

# Application of CISG in Kuwait

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## Abstract

This article examines the impact of the United Nations Convention on Contracts for the International Sale of Goods (CISG) (signed 11 April 1980, entered into force 1 January 1988) on Kuwait as a non-Contracting State. By examining the potential application of CISG to countries around the world, it becomes clear that the applicability of this Convention is inevitable. This article identifies and examines the cases where CISG can be applied, according to its rules, and the process by which CISG, as a foreign law, would be applied in Kuwait. As this article shows, this can be achieved through the autonomy of the parties, Kuwaiti conflict-of-laws rules, or through customary law. This article also examines the cases where CISG cannot be applied in Kuwait and the implications of Kuwait's ratification of CISG.

## Keywords

United Nations Convention on Contracts for the International Sale of Goods (CISG) – conflict-of-laws rules – Kuwaiti courts – private international law

## 1 Introduction

The integration of world markets, fragmentation of barriers and technological revolution all facilitate the flow of goods<sup>1</sup> to reach the rest of the world faster

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<sup>1</sup> I really have to raise my hat to Sirko Harder for the insightful comments on an earlier version of this article and for being very supportive, which has made this research possible. All errors are my own. Joseph Stiglitz, *Globalization and its Discontents* (London: Penguin Books, 2002), p. 9.

than ever before.<sup>2</sup> The requirement for a comprehensive set of substantive rules as a result of this integration is necessary.<sup>3</sup> In 1980, the UN Commission on International Trade Law (UNCITRAL) created, with the collaboration of more than 62 countries,<sup>4</sup> the Convention on Contracts for the International Sale of Goods (CISG).<sup>5</sup> The Convention contains a set of rules governing the formation and obligations of international sale of goods contracts. This Convention was established as the means to displace international contracts from unpredictable national laws and to harmonise the field of international sale of goods.<sup>6</sup> Kuwait is not a party to CISG.

The law of Kuwait mainly derives from French law by way of Egyptian law, which admittedly has exerted great influence even after the re-formalisation of the latter. Despite this, Kuwaiti law has not pursued the legal development of these jurisdictions whereas, in 1999, Egypt in contrast to Kuwait codified a new commercial law reflecting the influence of CISG.<sup>7</sup> Furthermore, Egyptian Commercial Law No. 17 (1999) encourages international trade by stating that:

The international commercial sale shall be subject to the provisions of international conventions concerning these sales, as are enforced in Egypt. They shall also be subject to the prevalent practices in international trade and the explanation prepared by the international organizations for the terms of the trade if the contract refers to them.<sup>8</sup>

Moreover, the French Civil Code was recently amended to comply with many of the UNIDROIT Principles of International Commercial Contracts (UPICC principles),<sup>9</sup> which are compatible with CISG's general aim and purpose.

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- 2 Thomas Friedman, *The Lexus and the Olive Tree* (London: Harper Collins Publishers, 2000), p. 9.
  - 3 Paul Berman, 'From International Law to Law and Globalization', *Columbia Journal of Transnational Law* 43(2) (2005): 485, 490.
  - 4 Ray August, *International Business Law: Texts, Cases and Readings* (London: Prentice Hall, 2000), p. 535.
  - 5 It is also called the Vienna Convention or UN Convention on the International Sale of Goods, see: Jason Chuah, *Law of International Trade: Cross-Border Commercial Transactions* (London: Thomson Reuters, 2013), p. 175, available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html), accessed 27 April 2019.
  - 6 Herbert Kronke, 'The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond', *Journal of Law and Commerce* 25(1) (2005): 451, 460.
  - 7 Jacqueline McCormack 'Commercial Contracts in Muslim Countries of the Middle East: a Comparison with the United States', *International Journal of Legal Information* 37(1) (2009): 13.
  - 8 Egyptian Commercial Law No. 17 (1999), Art. 88(2).
  - 9 Mohamed Mattar, 'Integrating the Unidroit Principles of International Commercial Contracts as a Source of Contract Law in Arab Civil Codes', *Uniform Law Review* 22(1) (2017): 168, 168.

Despite the fact that Kuwait is a non-Contracting State to CISG, there is a great opportunity to apply CISG in Kuwait on the basis that: '[t]here is not a legal system in the world where international law is regarded as "foreign law". It is everywhere part of the law of the land'.<sup>10</sup> Accordingly, 'national courts [...] are called upon to consider and resolve issues turning on the correct understanding and application of international law, not on an occasional basis, now and then, but routinely, and often in cases of great importance'.<sup>11</sup> Consequently, there is a strong relationship and interaction between national law and international law, and this represents a great opportunity to examine the potential application of CISG in Kuwait.

## 2 Applicability of CISG According to its Own Rules

CISG was designed specifically to govern the international sale of goods contracts in order to provide a legal system characterised by neutrality, uniformity and harmony. Its aim is to promote worldwide trade through the removal of legal obstacles among international merchants<sup>12</sup> and to solve their disputes beyond the realms of domestic law, which may be neither compatible with global trading nor foreseeable. Noticeably, CISG will be applied only to international contracts. Pursuant to the meaning of CISG Article 1, internationality depends on the existence of the parties' places of business in different States:<sup>13</sup> namely, whether these States are signatory to CISG<sup>14</sup> or are non-Contracting States.<sup>15</sup> Then, CISG will be applied to two scenarios. The first scenario concerns parties whose places of business (or their habitual residence if there is no place of business), at the time of conclusion of the contract, are located in different Contracting States to CISG. The second scenario concerns the application of CISG when the applicable law, determined by the forum's conflict-of-laws

<sup>10</sup> Rosalyn Higgins, *Themes and Theories* (Oxford: Oxford Scholarship Online, 2009), pp. 926.

<sup>11</sup> Tom Bingham, 'Foreword', in: Shaheed Fatima (ed.), *Using International Law in Domestic Courts* (Oxford: Hart Publishing, 2005).

<sup>12</sup> Amin Dawwas & Yousef Shandi, 'The Applicability of CISG to the Arab World', *Uniform Law Review* 16/4 (2011): 813-814; Fatima Akaddaf, 'Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles', *Pace International Law Review* 13(1) (2001): 5.

<sup>13</sup> CISG, Art. 1; László Reczei, 'The Area of Operation of the International Sales Conventions', *The American Journal of Comparative Law* 29 (1981): 513, 517.

<sup>14</sup> CISG, Art. 1(1)(a).

<sup>15</sup> CISG, Art. 1(1)(b).

rules, is that of a Contracting State, even if the parties' places of business are not in Contracting States.

### 2.1 *CISG Applicability in Accordance with Article 1(1)(a)*

According to CISG Article 1(1)(a), application of CISG depends on the locations of the business.<sup>16</sup> Thus, CISG applies to disputes arising from sale of goods contracts when the parties' places of business: (1) occur in different countries and (2) these countries are Contracting States to CISG.<sup>17</sup> It is a self-sufficient requirement, which means this precondition dispenses with having to resort to the conflict-of-laws rules of the forum.<sup>18</sup>

### 2.2 *CISG Applicability in Accordance with Article 1(1)(b)*

According to CISG Article 1(1)(b), internationality depends merely on the existence of the parties' places of business in different States and whenever the domestic law of a CISG Contracting State being applicable, by virtue of the rules of private international law or conflict-of-laws rules of the forum, CISG will be applied.<sup>19</sup> Thus, the cause of this effectiveness of CISG is not attributed to the occurrence of the parties' places of business in different Contracting States or to the parties' choice of CISG as their governing law. Rather, CISG is applicable because the parties' places of business exist merely in different States and the private international law of the forum leads to the domestic law of a Contracting State. Thus, Article 1(1)(b) acknowledges conflict-of-laws rules of the forum,<sup>20</sup> regarding the Convention as a part of the domestic law in Contracting States.<sup>21</sup> In the case of *Downs Investments v. Perwaja Steel*,<sup>22</sup> the contract involved an Australian seller selling scrap metal to a Malaysian buyer.

16 Franco Ferrari, 'Specific Topics of CISG in the Light of Judicial Application and Scholarly Writing', *Journal of Law and Commerce* 15(1) (1995): 1, 25.

17 Clayton Gillette & Steven Walt, *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice* (Cambridge: Cambridge University Press, 2016), p. 25; *Plastic Granulate* case (1995) 7 U 3758/94 [Appellate Court München], available at: <https://cisgw3.law.pace.edu/cases/950208g2.html>, accessed 27 April 2019.

18 Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford: Oxford University Press, 2010), p. 39

19 CISG, Art. 1; August, *supra* note 5 at 536.

20 This is regardless of whether it is a Contracting State or non-Contracting State.

21 Stefan Kroll, Loukas Mistelis & Pilar Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)* (Oxford: Hart Publishing, 2018), p. 23; Peter Schlechtriem, 'Requirements of Application and Sphere of Applicability of the CISG', *Victoria University of Wellington Law Review* 36 (2005): 781, 787-790.

22 *Downs Investments v. Perwaja Steel* (2001) 11036/2000 SC 106 of 1996 [Supreme Court of Queensland], online at: <http://cisgw3.law.pace.edu/cases/01012a2.html>, accessed 19 December 2018.

Australia is a Contracting State, unlike Malaysia. The court concluded that Australian law was applicable and, according to Article 1(1)(b), CISG replaced it.<sup>23</sup> Davies and Snyder commented on this case, stating that there is no likelihood that the governing law of the contract would be the Australian domestic sales law.<sup>24</sup>

### 3 Applicability of the CISG under Kuwait Conflict-of-Law Rules: Key Rules

The function of conflict-of-laws rules or private international law is to determine the applicable law or the competent law that governs issues containing foreign element(s) for the purpose of achieving justice as seen by the Kuwaiti legislator. Thus, justice, equity and fairness are the driving force for adopting these rules in the Kuwaiti law when a dispute has at least one foreign element. Kuwaiti law has set the rules of conflict, which are not substantive rules, but rather assigns the solution of the question to a law that the legislator considers more equitable than Kuwaiti law.<sup>25</sup> The foreign element(s) can be introduced when the parties in a dispute are of different nationalities, and the subject or the reason for the relationship has been established in a foreign country.<sup>26</sup>

There is a great opportunity to apply CISG in relation to international sale of goods when the competent court is that of Kuwait even though Kuwait is not a signatory party to CISG. First, let us understand when the courts in Kuwait are competent in adjudicating an international issue or a dispute with a foreign element. According to Articles 23 and 24 of the Kuwaiti Code of Procedure (KCP), the Kuwaiti courts shall have jurisdiction over: (1) the claims brought against a person who is Kuwaiti; (2) the claims filed against a foreigner who has a domicile or residence in Kuwait; (3) claims against a foreigner who has chosen Kuwait as their address of service; or 4) when the case is related to an obligation that arises in Kuwait, or has been fulfilled or ought to have been fulfilled in Kuwait.<sup>27</sup> Additionally, the parties may choose Kuwait as a forum

23 See also: *Marques Roque Joachim v. La Sarl Holding Manin Rivière* (1995) 93/4879 [Court of Appeal of Grenoble], available at: <http://cisgw3.law.pace.edu/cases/950426f2.html>, accessed 27 April 2019.

24 Martin Davies & David Snyder, *International Transactions in Goods: Global Sales in Comparative Context* (Oxford: Oxford University Press, 2014), p. 47.

25 Ahmad al-Salman, *Private International Law* (Kuwait: Kuwait University Press, 2001), p. 11.

26 Al-Salman, *ibid.*, pp. 8-10.

27 Kuwaiti Code of Procedure (KCP), Arts. 23 and 24.

of litigation or as the place of their arbitration.<sup>28</sup> Now Kuwaiti conflict-of-laws rules will be elucidated in order to know the possibility of applying CISG in Kuwait.

### 3.1 *Choosing CISG under the Autonomy of the Parties Principle*

Under Kuwaiti law, the parties may simply choose CISG as their applicable law in their contract. Article 59 of the Kuwaiti Foreign Relations Act No. 5 of 1961 (FRA) states that:

The law applicable to the contract in terms of its substantive conditions and its effects is the law of the country in which both parties' residence is located. However, if the parties have their residence in different countries, the applicable law will be the law of the country in which the contract was concluded. This is unless the parties expressly agree on applying *another law* or the circumstances indicate that the parties implicitly intended to apply another law.<sup>29</sup>

Article 59 merely uses the phrase 'other law' when stating that the parties' choice has priority over (1) the law of the parties' common habitual residence and (2) over the law of the State in which the contract was concluded. Triggering the application of an international convention like CISG depends on the interpretation of this article, and in particular, whether it permits the choice of 'law' in the general sense, and whether the choice is not confined to a law of a State. The English courts' attitude towards the parties' obvious choice of CISG, is clear from the wording of Article 3(1) of Rome I Regulation indicating that the chosen law by the parties must be a law of a 'country';<sup>30</sup> any non-State law will probably not be taken into account. Nevertheless, Rome I Regulation states that the parties can 'incorporate' a non-State law or international convention as terms of their contract.<sup>31</sup> 'Incorporation' is the act of choosing specific rules for specific occasions, whereas 'choosing the law' means that the chosen law will govern the whole contractual dispute except those clauses with incorporated clauses.<sup>32</sup> Thus, a clause in a contract stating merely that 'the CISG will

28 Kuwaiti Civil and Commercial Procedural Law No. 38 (1980), Arts. 23 to 28.

29 Kuwaiti Foreign Relations Act No. 5 of 1961 (FRA), Art. 59.

30 Paul Torremans, *Cheshire, North & Fawcett: Private International Law* (New York: Oxford University Press, 2017), p. 715.

31 Rome I Regulation, Recital (13).

32 Jonathan Hill & Máire Ní Shúilleabháin, *Clarkson & Hill's Conflict of Laws* (Oxford: Oxford University Press, 2011), p. 223.

be the applicable law for any contractual disputes' will likely be ineffective as the chosen legal instrument is a non-State law.

This is not the case in Kuwait; the parties are probably allowed to choose CISG.<sup>33</sup> This is confirmed by a jurisprudential rule in Kuwait, which provides that: 'generality in law should be taken according to its general sense unless there is an evidence of its restriction'.<sup>34</sup> Thus, the word 'law' mentioned in the Article should not be restricted to a 'State's law'. Additionally, CISG can be applicable in accordance to the choice of the parties because of its binding nature once a State signs it.<sup>35</sup> Furthermore, as it will be mentioned below, CISG can be regarded as international customary law, which the parties can choose, given that Kuwaiti law establishes customs as one of the main sources of law. Therefore, the parties can rely on CISG instead of national law according to *lex mercatoria* and the autonomy of the parties,<sup>36</sup> even if the contract is national and has been concluded in Kuwait. Article 196 of the Kuwaiti Civil Code provides that the contract is the law of the parties<sup>37</sup> and this provision facilitates the autonomy of the party principle. Therefore, if the contract contains a provision for the adoption of a particular law, in our case CISG, this will be the required applicable law.<sup>38</sup>

### 3.2 *Possibility of Applying CISG by Kuwaiti Courts through Kuwaiti Conflict-of-Laws Rules*

Assume, for instance, that a contract was signed in England between a German seller and a Kuwaiti buyer to sell a shipment of cars to be exported to Kuwait. If a dispute should arise between the seller and buyer before the Kuwaiti courts, which law would be applicable? Would it be (a) English law, for the country where the contract was concluded; or (b) German law, for the country where the sold goods were located when the contract was concluded and which corresponds to the seller's nationality; or (c) Kuwaiti law, which is consistent with the nationality of the buyer, with the country of implementation and with the

33 M. Wethmar-Lemmar, 'When Could a South African Court be Expected to Apply the United Nations Convention on Contracts for the International Sale of Goods (CISG)', *De Jure* 41(2) (2008): 419, 425.

34 See: the study of Kuwaiti National Assembly, Article 2 of the Kuwaiti Nationality Law between reality and law, available at: <http://www.kna.kw/clt-html5/run.asp?id=654>, accessed 3 June 2018.

35 Mattar, *supra* note 9 at 171.

36 Kuwait Civil Code, Art. 175(1) that states that: 'the contract may include *any* condition satisfactory to the contractors unless it is legally prohibited or contrary to public order and good manners'.

37 Kuwait Civil Code, Art. 196.

38 Kuwait Civil Code, Arts. 175, 195, 197.

law of the presiding judge?<sup>39</sup> Application of a specialised international legal instrument, like CISG, may also be possible. This dilemma can occur even if the contract was concluded between two Kuwaitis in Germany to buy such a shipment of cars. This article will answer this question in the following sub-sections.

### 3.2.1 Article 59 of Kuwaiti Conflict-of-Laws Rules

CISG can be applied in Kuwait if Kuwaiti conflict-of-laws rules, by virtue of Article 59, leads to a CISG Contracting State. The law that is applicable to the contract will mostly be subject to the country where it was concluded, according to the *locus regit actum* principle. This means that the formation, obligations and subject matter of the contract are subject to the requirements of the law of the country in which it was concluded. Batiffol has argued that the latter country was chosen because it reflects the implicit consent of the parties.<sup>40</sup>

If the contract was concluded in a State party to CISG, according to FRA Article 59, there is a strong presumption that there is an implicit agreement between the parties that CISG is applicable, unless otherwise stated. Thus, several steps should be followed in a hierarchical order. Firstly, the contract will be regulated in accordance with the law of the country of the parties' residence if both parties' habitual residences are located in the same country. If such a country is a Contracting State to CISG, it will probably be applied. CISG will not be applied according to Article 1(1)(b) especially when the parties' places of business are not in different countries. Alternatively, the applicability of CISG is based on implicit agreement between the parties. Secondly, if the parties' habitual residences are not located in the same country, the applicable law will be the law of the State in which the contract was concluded. Again, CISG could be applied if this country is a Contracting State. It is necessary to clarify that these two steps are complementary applied only when the contract is not articulated in the parties' agreement on their preferable law, either explicitly or implicitly. Thus, the choice of the parties is regarded as the main rule.

### 3.2.2 Applicability of CISG in Kuwait according to Article 1(1)(a)

It is unlikely that Article 1(1)(a) would be applied by Kuwaiti courts, *i.e.*, when the places of business of the parties at the time of conclusion of the contract are located in different Contracting States to CISG, given that the State is not a party to CISG. This is unless the parties clarify and convince the judge that

39 Al-Salman, *supra* note 25 at 10.

40 Henri Batiffol, *Aspects philosophiques du droit international privé* (Paris: Dalloz, 1956), p. 53.



their places of business reflect their implicit agreement to the agreed applicable law, which is CISG.

### 3.2.3 Applicability of CISG in Kuwait according to Article 1(1)(b)

There is great potential for CISG to be applied before Kuwaiti courts through Kuwaiti conflict-of-laws rules and according to Article 1(1)(b) of CISG, despite the fact that Kuwait is not a signatory State to CISG. Bridge finds that, in order to apply Article 1(1)(b), the forum State (which is Kuwait in our case) should be a Contracting State.<sup>41</sup> However, Kroll and Ferrari find that CISG will be applied through Article 1(1)(b), even if the forum State is a non-Contracting State<sup>42</sup> as CISG is considered to be the specialised law of the area of international sale of goods and becomes a part of the domestic law of the State that has ratified it.<sup>43</sup> This article follows the approach of Kroll and Ferrari on the basis that a Contracting State may declare reservation under CISG Article 95 that it is not bound by Article 1(1)(b). China, Singapore, St. Vincent & Grenadines, the Czech Republic and the United States have resorted to this reservation and thus they are not bound by Article 1(1)(b).<sup>44</sup> To explain this reservation, let us assume this example: a contract is between a Californian seller (whose place of business is California) and a Kuwaiti buyer (whose place of business is Malaysia), and the applicable law is the Californian domestic sales law (UCC). If the litigation takes place in Kuwait, CISG would neither apply according to Article 1(1) (a), because Malaysia is a non-Contracting State, nor according to Article 1(1) (b), because the United States resorts to Article 95.<sup>45</sup> However, in normal cases, CISG applies in lieu of the applicable domestic law, regardless of whether the State of the forum is or is not a Contracting State. That is what happened, for instance, in the *Propane Case*, as the conflict-of-laws rules of the forum pointed to application of Austrian law (Contracting State not declared Article 95 reservation), the CISG applied according to Article 1(1)(b).<sup>46</sup> Therefore, when the Contracting State does not resort to reservation of Article 95, this means this State agrees to replace its domestic law with CISG whenever Article 1(1)(b) applies, regardless of the State of the forum. Therefore, once the Kuwaiti conflict-

41 Michael Bridge, *The International Sale of Goods: Law and Practice* (Oxford: Oxford University Press, 1999), p. 43.

42 Kroll *et al.*, *supra* note 21 at 24; Ferrari, *supra* note 16 at 34.

43 Dawwas & Shandi, *supra* note 12 at 826.

44 See online at: <https://www.cisg.law.pace.edu/cisg/countries/cntries.html>, accessed 20 March 2018.

45 Davies & Snyder, *supra* note 24 at 46.

46 *Propane case* (1996) 10 Ob 518/95 [Supreme Court of Oberster Gerichtshof], available at: <http://cisgw3.law.pace.edu/cases/960206a3.html>, accessed 27 April 2019.

of-laws rule leads to CISG Contracting State, CISG should be applied despite the fact that Kuwait is not a Contracting State to CISG.

However, even if the opinion of Bridge, who maintains that the forum State should be a Contracting State to apply Article 1(1)(b), is followed in Kuwait, practically and pragmatically, it is probable that the Kuwaiti judge may find that it is impossible to determine the content and the true meaning of the referred foreign law. The judge may also find that resorting to this law may require translation, costs, time and effort, and this may exceed the time limit for the determination of the case.<sup>47</sup> In this dilemma, the court is likely to apply a different law,<sup>48</sup> one that would be suitable for the sale of goods contracts involving association with foreign factor(s). This is especially the case when the national applicable law belongs to a CISG Contracting State.

### 3.2.4 Customary Law

Customary law is of great importance under Kuwaiti law, which makes the application of CISG in Kuwait acceptable. This is because CISG can be regarded as a customary law between merchants and this potentially can lead to the application of CISG in Kuwait. The importance of customary law in both Shari'ah<sup>49</sup> and Kuwaiti law<sup>50</sup> indicates that the Kuwaiti perspective encourages the application of international customs, which could be embodied in a convention like CISG, even for national contracts, as CISG's provisions manifest the globally accepted standard and are considered to be a codification of customary duties among merchants. Evidence of this acceptance are the traditional principles in Kuwait of the Ottoman codification of Islamic juridical decisions (*majalla*),<sup>51</sup> which state that 'appointment by custom such as appointment by text',<sup>52</sup> 'the popular usage among people should be followed'<sup>53</sup> and 'customs should be known as conditions'.<sup>54</sup> Generally speaking, the Kuwaiti rules associated with sale are not mandated unless the law mentions otherwise. Thus, the legislator

47 Dawwas & Shandi, *supra* note 12 at 833-835.

48 *Ibid.*

49 Custom is considered an influential criterion among all Islamic sects; see: Suleiman Ayob, *The Concept of Fault in Contractual Liability* (Beirut: Lebanese University, 1996), p. 221.

50 See, *e.g.*, Kuwaiti Civil Code No. 67 (1980), Arts. 51, 52, 193(2) and 477; Kuwaiti Commercial Code No. 68 (1980), Art. 126(1).

51 Nicholas Kourides, 'The Influence of Islamic Law on Contemporary Middle Eastern Legal Systems: The Formation and Binding Force of Contracts', *Columbia Journal of Transnational Law* 9(2) (1970): 384, 385; W. Ballantyne, *Commercial Law in the Arab Middle East: The Gulf States* (London: Springer, 1986), p. 50.

52 *Majallah*, the Ottoman codification of Islamic juridical decisions, Art. 45.

53 *Ibid.*, Art. 37.

54 *Ibid.*, Art. 43.

has left significant room for what is considered as customary. This especially international custom plays a distinct role in international sales.<sup>55</sup>

CISG is regarded as a significant source of *lex mercatoria*.<sup>56</sup> As evidence of this, the Spanish Court determined the sale price objectively, according to CISG and UPICC, since the domestic contract had no provision specifying such a price.<sup>57</sup> Thus, UPICC and CISG are mentioned as supportive authorities<sup>58</sup> in order to demonstrate that the conclusion adopted by the court is compatible with internationally-acknowledged guidelines and customs,<sup>59</sup> even if the country is a non-Contracting State. Similarly, the Swiss Bundesgericht Court resorted to CISG Article 25 and UPICC Article 7.3.1 for the purpose of interpretation of the material breach in a contract of the sale of goods, which was concluded between a South African company and a US company. This is despite the fact that the parties chose Swiss domestic law to be the applicable law in their contract. It was decided that the interpretation should be according to a reasonable person of international commercial contracts pursuant to operative international instruments, which are CISG and UPICC.<sup>60</sup> These demonstrations indicate that these two legal instruments represent internationally established customs.

As stated in UPICC's preamble: 'these Principles ... shall be applied when the parties have agreed that their contract be governed by them ... [t]hey may [also] be applied when the parties have not chosen any law to govern their contract'<sup>61</sup> in cases of the international sale of goods contracts.<sup>62</sup> It adds that:

55 Abdulfadeel Ahmed, *Commercial Contracts and Banking Operations in Kuwaiti Law* (Kuwait: Dār al-Kutub, 2015), p. 15.

56 Mattar, *supra* note 9 at 171.

57 Mattar, *ibid.*, p. 173.

58 See, e.g., Spain: *Deutsche Seereederei Rostock GmbH v. Martico* (2006) SL RJ2006/6080 [Supreme Court of Spain], available at: <http://www.unilex.info/principles/case/1158>, accessed 27 April 2019; Canada: *Enerchem Transport Inc. et al. v. Nicolas R. Gravino et al.* (2005) 500-05-031756-974 [Superior Court of Montreal]; available at: <http://www.unilex.info/principles/case/1546>, accessed 27 April 2019; Australia: *United Group Rail Services v. Rail Corporation of New South Wales* (2009) NSWCA 177-2009 [Supreme Court of New South Wales Court of Appeal], available at: <http://www.unilex.info/principles/case/1517>, accessed 27 April 2019.

59 Mattar, *supra* note 9 at 174-175.

60 *Chemical Products case* (2009) 4A 240/2009 [Supreme Court of Bundesgerichtshof], available at: <http://www.unilex.info/case.cfm?id=1513>, accessed 13 February 2018; <http://cisgw3.law.pace.edu/cases/091216s1.html>, accessed 27 April 2019.

61 The UNIDROIT Principles of International Commercial Contracts 2016 (UPICC), Preamble.

62 In addition, the preamble of UPICC's Principles states that it: 'may be used to interpret or supplement international uniform law instruments. They may be used to interpret

[n]otwithstanding the fact that the Principles are conceived for international commercial contracts, there is nothing to prevent private persons from agreeing to apply the Principles to a purely domestic contract. Any such agreement would, however, be subject to the mandatory rules of the domestic law governing the contract.<sup>63</sup>

This is the case with UPICC, a non-binding instrument. Accordingly, it is more appropriate to follow these instructions in relation to CISG, which has a binding character.

Therefore, even if the country of the applicable law is not a Contracting State, a Kuwaiti court ideally could apply international law specialised in the area of the dispute. The Kuwaiti judge may find that CISG is an ideal legal instrument for the international sale of goods, especially when Kuwaiti law does not have a strong connection with the case. Furthermore, in other cases the referred applicable law could clash with the public order of Kuwait. Other examples include cases in which Kuwaiti law is not applicable to the dispute at hand, or its application will be contrary to the interests of justice because the dispute has foreign elements and Kuwaiti law is designed to only regulate internal issues. In this case, the judge might determine that CISG is the panacea in relation to the dispute in international sale of goods.<sup>64</sup> This is especially the case as a customary rule has the force of binding legal rule in Kuwait.<sup>65</sup> However, given that the judge may not be familiar with it, they are the parties who must initiate engagement with CISG.

#### 4 Applicability of CISG under Kuwait Conflict-of-Laws Rules: Further Matters

First, one must understand the process for applying a foreign law in Kuwait. In this section, we examine classification of the dispute and whether a Kuwaiti judge should automatically specify the foreign law directly after classifying the

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or supplement domestic law. They may serve as a model for national and international legislators'. UNIDROIT Principles of International Commercial Contracts 2016, Preamble (UPICC), available at: <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/418-preamble/862-preamble-purpose-of-the-principles>, accessed 13 February 2018.

63 *Ibid.*, UPICC, Preamble.

64 Dawwas & Shandi, *supra* note 12 at 836.

65 Abdulasool Abdulreda & Jamal al-Nakas, *Sources of Commitment and Proof* (Kuwait: Dār al-Kutub, 2015) 356.

relationship between the parties, or whether the parties should ask the judge to do so. Here we also explain that, although Kuwaiti law supports the parties' freedom to choose their applicable law regulating the contract and its substantive aspects, there are some limitations to this flexibility, such as in any other country in our global community.

#### 4.1 *Classification of the Dispute before Kuwaiti Courts*

To identify the applicable law for any issue with a foreign element(s), the first step should be to classify the dispute. Classification is the process for determining the nature of the legal relationship, the subject matter of the dispute and a legal description in order to be able to categorise the dispute into a specific type in which the legislator has a specific rule of attribution that defines the applicable law to such a type.<sup>66</sup> Thus, the judge must know whether the relationship between the parties is contractual from the outset. This is in order to apply the conflict-of-laws rule designated especially for contracts. Thus, the classification is an elementary exercise which facilitates the identification of the specific rule of attribution and the applicable law. Practically, at the process of classification, there is no law to classify the dispute but the law of the judge, and the applicable law is not yet known. Generally, the law that classifies the relationship before Kuwaiti courts is the law of the judge, *lex fori*, i.e., the Kuwaiti law. FRA Article 31 states that 'the Kuwaiti law is applicable for classifying the legal relation in a law-contested matter'. Thus, Kuwaiti law does not take the view of referring the classification to the comparative law to extract the global content to classify the relationship.<sup>67</sup> Moreover, it does not refer to the applicable law for the purpose of re-classifying the initial classification.<sup>68</sup>

#### 4.2 *Reference of the Foreign Applicable Law 'Renvoi'*

After classifying the parties' relationship as a sale of goods contract, the subsequent step is identifying the conflict-of-laws rule associated with these kinds of contracts. However, the application of the foreign law referred to by the conflict-of-laws rules is not inevitable in all cases. Its application may be problematic because the applicable foreign law may adopt different rules for resolving conflicts of law, and may not acknowledge its own jurisdiction that would regulate the dispute, and may attribute this regulation to the law of the

66 Majed al-Halawany, *Private International Law and its Provisions in Kuwaiti Law* (Kuwait: Kuwait University Press, 1974), pp. 295-299; Batiffol, *supra* note 41 at 143; Yvon Loussouarn, *Droit international privé* (Paris: Dalloz, 1993), p. 282.

67 Hesham Sadeq, *The Outline of Private International Law* (Cairo: Dār al-Jāmi', 1987), p. 75.

68 Sadeq, *ibid.*, pp. 55-56.

judge or any other law.<sup>69</sup> The Kuwaiti legislator has explicitly refused to adopt the private international law of the applicable foreign law. Thus, Kuwaiti law has not applied any 'second-reference' or 'double-reference' of the applicable foreign law to any other law. Instead, Kuwaiti law has required the implementation of the substantive rules of the applicable foreign law. This means that Kuwaiti law neglects the conflict-of-laws rules of the referred foreign law as FRA Article 72 states that 'if it is decided that a foreign law is applicable, only its internal provisions shall be applied, without regard to private international law of such a country'.<sup>70</sup> Thus, if, for instance, the conflict-of-laws rules of Kuwaiti law refer to the law of a non-Contracting State and the latter refers to the law of a Contracting State, CISG does not apply but the internal substantive rules of the foreign law itself. Otherwise, it is regarded a double-reference. However, when, for example, the judge determines that German law is the applicable law and German law refers to CISG, it is mostly not considered as a second-reference in Kuwait. This is because CISG should be regarded as an internal law of Germany designed specifically for international sale of goods contracts, given that it is a Contracting State.

Notably, the second reference may be taken into account, as a rule, in exceptional circumstances, such as through special law or under an international convention that is in force in Kuwait.<sup>71</sup> Thus, if Kuwait becomes a Contracting State to CISG, the referred applicable law, by Kuwaiti conflict-of-laws rules, may point to principles of *lex mercatoria* in relation to the international sale of goods, and CISG and UPICC should probably be applied. This conclusion can be reached on the basis that the preamble of UPICC emphasises that the Principles can be applied 'when the parties have agreed that their contract be governed by ... the *lex mercatoria*'.<sup>72</sup> Through juristic reasoning by analogy, when a law of a State refers to the international principles or *lex mercatoria*, the judge should not ignore the will of the State and should not regard such a reference as *renvoi*, especially when the judge belongs to a Contracting State, for several reasons. Firstly, promoting uniformity and appreciating the international character of the contract is one of the main principles of CISG, which any Contracting State should take due account of.<sup>73</sup> This can be achieved by extending CISG's scope of application to attain these aims.<sup>74</sup> Secondly, this

69 Hassan al-Hadawy, *The Conflict of Laws* (Kuwait: Kuwait University Press, 1974), pp. 87-79; Torremans, *supra* note 30 at 57.

70 FRA, Art. 72.

71 Al-Hadawy, *supra* note 70 at 85.

72 UPICC, Preamble.

73 CISG, Art. 7(1)

74 It could be said that these aims are confined to interpretation of CISG.

reference is an acknowledgment of the State that its law is not applicable to an international dispute, or the State intends to follow the international law as the specialised legal instrument. Thirdly, CISG and UPICC are regarded as a codification of *lex mercatoria*, international practice and customs, as mentioned above. Finally, the reference to *lex mercatoria* by the referred foreign law in relation to sale of goods contracts could identify the State as a Contracting State and could activate CISG Article 1(1)(b).

Thus, when Kuwait becomes a Contracting State and its conflict-of-laws rule leads to Egyptian law, CISG will be applied. This is because Article 88(2) of Egyptian Commercial Law No. 17 (1999) refers to international sale usages and international conventions when the dispute in question concerns international sale of goods.<sup>75</sup> It is certain that CISG will be applied anyway in this case because Egypt is a Contracting State to CISG and CISG is applicable by virtue of its Article 1(1)(b). However, Kuwaiti conflict-of-laws rules may lead to a law of a non-Contracting State that adopts the same notion of the *lex mercatoria*. Before 1 January 2019, Palestine was a non-Contracting State and Palestinian commercial law refers to the international usages.<sup>76</sup> Thus, the Kuwaiti court could apply CISG when Palestinian commercial law is the applicable law, even in relation to contracts concluded before Palestine became a Contracting State<sup>77</sup> for the aforementioned reasons, bearing in mind that this outcome is only possible when Kuwait becomes a Contracting State. Otherwise, CISG will not be applied when the applicable foreign law is a non-Contracting State referring to *lex mercatoria*, simply because Kuwaiti law does not recognise the notion of *renvoi* as indicated above. Accordingly, it is likely that CISG will be applied when the referred foreign law belongs to the Contracting State.

#### 4.3 *Is the Foreign Law a Question of Fact or Law?*

It can be argued that the reference to foreign law as a principle is merely a 'matter of fact'. This means that the litigants themselves are supposed to adhere to its application and prove its provisions as the judge is not expected to be aware of any law except their own law.<sup>78</sup> This is because the national judge cannot be familiar with all the laws of the world. When CISG is applicable, the judge is not expected to be aware, as Kuwait is not a party to this Convention.

<sup>75</sup> Egyptian Commercial Law No. 17 (1999), Art. 88(2).

<sup>76</sup> Palestinian Commercial Law No. 2 (2014), Art. 88(2).

<sup>77</sup> Dawwas & Shandi, *supra* note 12 at 836-837. Palestine has become a Contracting State to CISG very recently, (1 January 2019), available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html), accessed 27 April 2019.

<sup>78</sup> John Westlake, *Private International Law* (Littleton, CO: Fred Rothman, 1986), p. 242; Torremans, *supra* note 30 at 105-107.

The relevance and potential application of CISG should be proved by those who want CISG to be applied to their case before the national courts.<sup>79</sup> Anyone who adheres to CISG must submit a copy of it, otherwise Kuwaiti law will be applied,<sup>80</sup> bearing in mind that the interpretation of CISG might be influenced by national perspectives.

The exception to this principle is that the court has the right to raise the issue of foreign law on its own motion and apply it to the case even if this is not requested by the litigants.<sup>81</sup> Has been stated that the general principle applies only to cases where the judge is not aware of the provisions of the applicable foreign law.<sup>82</sup> In Kuwaiti Case No. 369/80 dated 3 January 1982, the Pakistani law was applied before Kuwaiti courts according to the request of the litigants who brought an official copy of this law translated into Arabic.<sup>83</sup> However, when a judge is aware of the provisions of the foreign law, they shall, on their own initiative, raise the issue of conflict-of-laws and determine the applicable law and its provisions relating to the dispute without the recourse to the litigants and whether they wish to apply it.<sup>84</sup>

Nevertheless, there are some cases where the judge has relied on the litigants to raise the issue of the application of foreign law, even though the referred foreign law was a civil law written in Arabic. For example, in Kuwaiti Case No. 80/3, dated 14 January 1981, the Court of Appeal stated that 'since the applicable law is Jordanian law, it is intended that adherence to foreign legislation is no more than a mere fact so that evidence must be provided to the court of the matter'.<sup>85</sup> Accordingly, because the litigant, who had an interest in applying the law at issue, did not provide the Court with formal provisions of the Jordanian law, the Court applied the Kuwaiti law as if the dispute had a purely national character.<sup>86</sup>

Additionally, the litigant should raise the issue of the application of foreign law at the initial stages of the case. In Kuwaiti Case No. 333/964, dated 1 December 1964, the Court of Appeal stated that 'the two parties knew

79 Case No. 13/87 (18 January 1988) [Court of Appeal of Kuwait], cited in Abdulreda & Al-Nakas, *supra* note 66 at 356.

80 Case No. 139/2001 (10 March 2002) [Court of Appeal of Kuwait], cited in Abdulreda & Al-Nakas, *ibid.*, p. 357.

81 Al-Salman, *supra* note 25 at 172-173.

82 Al-Salman, *ibid.*, p. 681.

83 Case No. 369/80 (3 January 1982) [Court of Appeal of Kuwait], reproduced in Al-Salman, *ibid.*, p. 187.

84 Al-Salman, *ibid.*, at 188.

85 Case No. 80/3 (14 January 1981) [Court of Appeal of Kuwait] reproduced in Al-Salman, *ibid.*, p. 173.

86 *Ibid.*



throughout the initial stage that Kuwaiti law was applied'.<sup>87</sup> The convicted person had asked for English law to be applied when he appealed the ruling. The Court refused to apply such a law on the basis that the parties had an implicit agreement to resort to Kuwaiti law. KCP Article 26 provides jurisdiction for the Kuwaiti courts in any case that is not within its jurisdiction if the *plaintiff* accepts it. This indicates that the legislator wanted to rely on the position of the plaintiff, even in a case of jurisdiction, which is regarded as an issue of public order. This means that there is a priority to rely on the plaintiff's position in relation to the conflict-of-laws rules.<sup>88</sup> Thus, those who adhere to CISG should seek it and prove its content officially and from the beginning. On the other hand, in Kuwaiti Case No. 536/1974, dated 6 May 1975, the Court applied the foreign law through the conflict-of-laws rules on its own motion, without the request of the litigants, nor did it ask the litigants to prove its content.<sup>89</sup>

Notwithstanding, the foreign law, according to conflict-of-laws rules, is definitely 'law' under the Kuwaiti legislation and not a 'matter of fact' that must be held by the litigants, for several reasons. Firstly, the Kuwaiti legislator enacted a special law to deal with conflict-of-laws issues. Article 7 of Kuwaiti Civil Code No. 67 (1980) states that 'matters involving foreign elements are dealt with in a special law designed specially to them'.<sup>90</sup> This strongly indicates that such a law is mandatory.<sup>91</sup> Secondly, the method of drafting conflict-of-laws rules by using terms like 'applies' and 'becoming effective' signifies that such rules are binding and their application does not depend on the will of the litigants or the will of the judge.<sup>92</sup> Thirdly, equality and justice are the driving force for enacting a specific law regulating legal relationships with at least one foreign element and such moral aims constitute an important part of the public order of Kuwait.<sup>93</sup> Lastly, KCP Article 74 states that 'in the case of application of a foreign law, the court may ask the litigants to submit the texts with a translation from the Ministry of Justice or a translation from the body designated by the

87 Case No. 333/964 (1 December 1964) [Court of Appeal of Kuwait] reproduced in Al-Salman, *ibid.*, p. 177.

88 Al-Salman, *supra* note 25 at 177.

89 *Ibid.*, Case No. 536/1974 (6 May 1975) [Court of Appeal of Kuwait], cited on p. 181. In this case, the Court indicated on its own motion that the Egyptian law is applicable in terms of substantive conditions of the contract and its effects. In the Case Nos. 373 & 368/71 (26 March 1972) [Court of Appeal of Kuwait] cited on p. 182, the Court stated that the law of the Government of Dubai is applicable.

90 Kuwaiti Civil Code, Art. 7.

91 Al-Salman, *supra* note 25 at 199.

92 *Ibid.*

93 Constitution of Kuwait No. 1 (1962), Arts. 7, 8, 162.

Court'.<sup>94</sup> It is clear in this text that the one charged with searching for foreign law is originally the court.<sup>95</sup> The judge may rely on oral and written evidence drawn by legal experts or foreign lawyers, or it can be assisted by political or consular representatives or use the official website of CISG without the need to assign the litigants.<sup>96</sup> However, due to the difficulties it may face in finding the law, the legislator can, in exceptional cases, ask the litigants to submit the text.<sup>97</sup>

Procedurally, it is likely that the foreign law might not be treated in accordance with Kuwaiti law, given that they are the litigants who might invoke it. Accordingly, because of the inconsistent attitude of Kuwaiti courts regarding the applicable foreign law, it is advisable to raise the subject of applying CISG, according to the Kuwaiti conflict-of-laws rules, at the initial stage of the legal proceedings, especially if the applicable law is the law of a CISG Contracting State. It is also important to inform the judge that the Convention is a part of the Contracting State and will replace the domestic law.

#### 4.4 *Exclusion of the Application of CISG as a Foreign Law in Kuwait*

In certain circumstances, CISG, like any other foreign law, will not be applicable in Kuwait. This section will examine those circumstances. They include, firstly, when CISG infringes Kuwaiti public policy, and, secondly, when the choice of CISG is a means of circumvention of the mandatory provisions of the applicable law.

##### 4.4.1 CISG Infringes upon Public Policy

When the provisions of CISG, which was referred by the rules, infringe public policy of Kuwait, Kuwaiti law (the law of the judge) will be applied.<sup>98</sup> FRA Article 73 provides that 'it is not permissible to apply the provisions of a foreign law specified by the Kuwaiti conflict-of-laws rules, if these provisions are contrary to the public order of Kuwait'.<sup>99</sup> This rule aims at preventing any violations to significant interests of the State.<sup>100</sup> The jurists have defined public order as a set of basic principles relating to the social, economic

94 KCP, Art. 74.

95 Al-Salman, *supra* note 25 at 200.

96 Similar meaning in: *ibid.*, p. 204.

97 *Ibid.*, p. 200.

98 Loussouarn, *supra* note 67 at 398. See also: *Kuwait Airways Corp. v. Iraqi Airways Co.* (2002) UKHL 19 [House of Lords]; and relevant commentary by: Janeen Carruthers & Elizabeth Crawford, 'Kuwait Airways Corporation v. Iraqi Airways Company', *International and Comparative Law Quarterly* 52(3) (2003): 761, 769.

99 FRA, Art. 73.

100 Al-Halawany, *supra* note 67 at 303.

or political entity of a State at a specific time. Any derogation from these principles constitutes a fundamental prejudice to that entity.<sup>101</sup> In Kuwait, the judge has discretion in determining whether a violation of public order has occurred.<sup>102</sup> This applies when, for example, Kuwaiti parties agreed to apply CISG to a consumer contract which had been concluded in China and concerned selling a machine manufactured in Japan. This machine was intended for personal use and the seller was aware of that at the time of the conclusion of the contract. This type of contract has mandatory provisions which cannot be subject to CISG under the autonomy of the parties' principle. CISG itself excludes these types of contracts.<sup>103</sup> Protecting the consumer constitutes one of the principles of public policy in Kuwait.

4.4.2       Circumvention of the Mandatory Provisions of the Applicable Law  
CISG or any other foreign law would not be applicable if they circumvent the mandatory rules of the applicable law, which would be applied if the parties did not choose CISG. This is the so-called *la fraude à la loi* principle. In this case, the conflict-of-laws rule depends on the establishment in the will of individuals by changing their nationality, domicile, location of the movable goods, the place of concluding the legal action, the place of implementation or the choice of the law by the parties. A change to the above elements could hide bad intentions on the part of the parties, which evades the mandatory provisions of the law originally competent, and apply CISG instead. This occurs when the applicable law collides with the parties' interests.<sup>104</sup> Although there is no provision in Kuwaiti law to explicitly state this, it can be inferred from the following considerations. Firstly, Kuwaiti law requires good faith in dealing as a general legal principle according to Article 30 of the Kuwaiti Civil Code. Violation of the provisions of the law for the purpose of achieving an illegal goal is considered as bad faith. Thus, this restriction is based on morality.<sup>105</sup> Secondly, FRA Article 69 provides that 'in case of absence of a provision for a specific case in relation to conflict-of-laws rules, regard shall be given to the consensus on the principles of international law'.<sup>106</sup> The exclusion of the application of foreign law on the ground of circumvention of the law is one of the principles advocated by the majority of jurists in private international law.<sup>107</sup> This evasion can

101 Al-Hadawy, *supra* note 70 at 95; Al-Salman, *supra* note 25 at 25.

102 Al-Hadawy, *ibid.*, p. 97.

103 CISG, Art. 2(a).

104 Al-Salman, *supra* note 25 at 152-153.

105 Al-Hadawy, *supra* note 70 at 41; Loussouarn, *supra* note 67 at 428.

106 FRA, Art. 69.

107 Al-Salman, *supra* note 25 at 162.

be committed either in relation to the mandatory provisions of the law of the judge, if it is the applicable law, or the relevant foreign law. The effect of this exclusion is the application of the originally relevant law or Kuwaiti law.<sup>108</sup> For example, it was clear from the circumstances that the parties chose CISG or chose to conclude their contract particularly in France, as a Contracting State, in order to activate CISG, intending to evade the duties required by the original applicable law. In this case, CISG would not be applicable but the original applicable law. In short, in order to apply CISG as the law agreed by the parties, it should not violate public order in Kuwait<sup>109</sup> or circumvent the binding provisions of the applicable national law.<sup>110</sup>

## 5 Position after Kuwait's Potential Ratification of CISG

If Kuwait ratifies CISG, the question will arise whether Kuwaiti conflict-of-laws rules would still be applicable or the provisions of CISG on its applicability would be influential. In other words, if the parties have their places of business in different States, the question that arises is which legal rules, namely CISG's rules on its applicability or the Kuwaiti choice-of-law rules, would be applicable when a dispute arises before the Kuwaiti courts. The answer to this question is that CISG's provisions would prevail over the Kuwaiti conflict-of-laws rules, not only because CISG would be binding law, but also because FRA Article 68 states that 'the provisions in this section shall be applied only where there is no provision to the contrary in a special law or in an international treaty in force in Kuwait'.<sup>111</sup> Consequently, if a sale of goods contract is concluded in South Africa (a non-Contracting State) between a Kuwaiti whose place of business is in Kuwait (presumed a Contracting State) and an Egyptian whose place of business is in Egypt (Contracting State), and the dispute is brought before Kuwaiti courts, CISG will be applied, not the South African law (*i.e.*, the place of the conclusion of the contract). Moreover, CISG will be applied even if the contract is regarded as 'national' from a Kuwaiti perspective. For instance, if two Kuwaiti traders conclude a sale of cars contract in Kuwait, CISG will be applied when the parties' places of business are in different Contracting States.<sup>112</sup> However, the question of which law will classify the relationship between the parties and the nature of their dispute also arises. The classification of the legal

108 *Ibid.*

109 Kuwait Civil Code, Arts. 172, 175 & 177.

110 Al-Hadawy, *supra* note 70 at 89.

111 FRA, Art. 68.

112 CISG, Art. 1(1)(a)

relationship between the parties will mostly be determined according to the common interests of the Contracting States<sup>113</sup> to CISG, and not through resorting to Kuwaiti law.

## 6 Conclusion

CISG has attempted to bridge the gap between civil law and common law in order to come up with international commercial law in relation to contracts.<sup>114</sup> However, some civil law countries, in this case Kuwait, are still reluctant to become involved in such an initiative. CISG has become one of the most important conventions in our era and the most widespread treaty in the field of commercial law. To date, 89 States have ratified CISG.<sup>115</sup> With this worldwide and widespread acceptance, the applicability of the Convention has become very frequent nowadays.<sup>116</sup> It is important to elucidate and clarify the possibilities of applying CISG in Kuwait. This discussion allows us to examine the potential of this instrument in Kuwait, and reveals the relationship between them, even if Kuwait is not yet a party. This study may convince policymakers and the Kuwaiti Government to ratify CISG, given its potential positive effects in the domestic legal order. This is especially pertinent as in some cases the applicability of CISG is unavoidable in Kuwait. Ratifying CISG would familiarise judges, lawyers and practitioners with its provisions and its proper application. Applying CISG in every international contract with Kuwait would make lawyers familiar with the legal content meaning, traders could obtain legal advice within Kuwait, their legal rights and duties would be clear, and the trader would more likely sign international contracts with confidence that CISG will apply. This will strengthen the economy of Kuwait because applying CISG would obviate the choice of unfamiliar law when contracting with Kuwaiti companies.<sup>117</sup> The ratification would not place Kuwaiti companies at a disadvantage. To the contrary, it would facilitate a better understanding

113 Mansour Mostafa, *Notes on Kuwaiti Private International Law* (Kuwait: Kuwait University, 1985), p. 35.

114 Gary Bell, 'New Challenges for the Uniformisation of Laws: How CISG is Challenged by "Asian Values" and Islamic Law', in: Ingeborg Schwenzer & Lisa Spagnolo (eds.), *Towards Uniformity: The 2<sup>nd</sup> Annual MaaSchlechtriem CISG Conference* (The Hague: Eleven International Publishing, 2010), pp. 11-12.

115 Schwenzer, *supra* note 18 at 30, available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html), accessed 27 April 2019.

116 Schwenzer, *supra* note 18 at 30.

117 Kuwait is in the same position of South Africa. See: Wethmar-Lemmar, *supra* note 33 at 425; Gbeng Bamodu, 'Transnational Law, Unification and Harmonization of International Commercial Law in Africa', *Journal of African Law* 38(2) (1994): 125, 129.

of their rights and duties, given that foreign legal rules are unknown to them and difficult to identify.<sup>118</sup> Luca G. Castellani, Legal Officer of UNCITRAL, has rightly pointed out that:

As small and medium sized enterprises, especially in developing countries, have limited access to expert legal advice when drafting their contracts and little influence on the choice of the law applicable to the contract, they would take advantage correspondingly from the application of CISG. Small and medium sized enterprises constitute the backbone of a modern and balanced economy. They support economic diversification and may therefore significantly contribute to achieving sustainable growth. In conclusion, they may play an important role in addressing those structural problems affecting developing countries. CISG may be instrumental in making this role effective.<sup>119</sup>

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118 The same problem exists in South Africa; see: Wethmar-Lemmar, *supra* note 33 at 427.

119 Luca Castellani, 'Promoting the Adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG)', *Vindobona Journal of International Commercial Law & Arbitration* 13 (2009): 241, 241-248, available at: <http://www.cisg.law.pace.edu/cisg/biblio/castellani.html>, accessed 13 February 2018.