

# CISG Advisory Council\* Opinion No 16

## Exclusion of the CISG under Article 6

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INGEBORG SCHWENZER, Chair

YESIM ATAMER, ERIC BERGSTEN, JOACHIM BONELL, MICHAEL BRIDGE, ALEJANDRO GARRO, ROY GOODE, JOHN GOTANDA, HAN SHIYUAN, SERGEI LEBEDEV, PILAR PERALES VISCASILLAS, JAN RAMBERG, ULRICH SCHROETER, HIROO SONO, CLAUDE WITZ, Members

SIEG EISELEN, Secretary

### OPINION [BLACK LETTER TEXT]

#### *Article 1 CISG*

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#### \* FOOTNOTES

\* The CISG-AC started as a private initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. The International Sales Convention Advisory Council (CISG-AC) is in place to support understanding of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the promotion and assistance in the uniform interpretation of the CISG.

At its formative meeting in Paris in June 2001, Prof. Peter Schlechtriem of Freiburg University, Germany, was elected Chair of the CISG-AC for a three-year term. Dr. Loukas A. Mistelis of the Centre for Commercial Law Studies, Queen Mary, University of London, was elected Secretary. The founding members of the CISG-AC were Prof. Emeritus Eric E. Bergsten, Pace University School of Law; Prof. Michael Joachim Bonell, University of Rome La Sapienza; Prof. E. Allan Farnsworth, Columbia University School of Law; Prof. Alejandro M. Garro, Columbia University School of Law; Prof. Sir Roy M. Goode, Oxford, Prof. Sergei N. Lebedev, Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation; Prof. Jan Ramberg, University of Stockholm, Faculty of Law; Prof. Peter Schlechtriem, Freiburg University; Prof. Hiroo Sono, Faculty of Law, Hokkaido University; Prof. Claude Witz, Universität des Saarlandes and Strasbourg University. Members of the Council are elected by the Council. At subsequent meetings, the CISG-AC elected as additional members Prof. Pilar Perales Viscasillas, Universidad Carlos III, Madrid; Professor Ingeborg Schwenger, University of Basel; Prof. John Y. Gotanda, Villanova University; Prof. Michael G. Bridge, London School of Economics; Prof. Han Shiyuan, Tsinghua University, Prof. Yesim Atamer, Istanbul Bilgi University, Turkey, and Prof. Ulrich G. Schroeter, University of Mannheim, Germany. Prof. Jan Ramberg served for a three-year term as the second Chair of the CISG-AC. At its 11th meeting in Wuhan, People's Republic of China, Prof. Eric E. Bergsten of Pace University School of Law was elected Chair of the CISG-AC and Prof. Sieg Eiselen of the Department of Private Law of the University of South Africa was elected Secretary. At its 14th meeting in Belgrade, Serbia, Prof. Ingeborg Schwenger of the University of Basel was elected Chair of the CISG-AC.

*(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:*

*(a) when the States are Contracting States; or*

*(b) when the rules of private international law lead to the application of the law of a Contracting State.*

#### **Article 6 CISG**

*The parties may exclude the application of this Convention [...].*

**1. Where the CISG is applicable according to Arts 1-3 CISG, the principle of party autonomy expressed in Art. 6 CISG permits parties to agree to exclude its application, at the time of or after the conclusion of the contract.**

**2. The CISG governs the manner of exclusion. An agreement to exclude the CISG is governed by the rules on contract formation and modification in Arts 11, 14-24, 29 CISG.**

**3. The intent of the parties to exclude must be determined in accordance with Art. 8 CISG. Such intent should be clearly manifested, whether at the time of conclusion of the contract or at any time thereafter. This standard also applies to exclusions during legal proceedings.**

**4. Generally, such a clear intent to exclude:**

**(a) should be inferred, for example, from:**

**(i) express exclusion of the CISG;**

**(ii) choice of the law of a non-Contracting State;**

**(iii) choice of an expressly specified domestic statute or code where that would otherwise be displaced by the CISG's application.**

**(b) should not be inferred merely from, for example:**

**(i) the choice of the law of a Contracting State;**

**(ii) choice of the law of a territorial unit of a Contracting State.**

**5. During legal proceedings an intent to exclude may not be inferred merely from failure of one or both parties to plead or present arguments based on the CISG. This applies irrespective of whether or not one or both parties are unaware of the CISG's applicability.**

**6. Domestic principles of waiver should not be used to determine the parties' intent to exclude the CISG.**

## COMMENTS

**1. Where the CISG is applicable according to Arts 1-3 CISG, the principle of party autonomy expressed in Art. 6 CISG permits parties to agree to exclude its application, at the time of or after the conclusion of the contract.**

**1.1** The general principle of party autonomy manifest in Art. 6 enables parties to exclude the applicability of the CISG in whole or part.

**2. The CISG governs the manner of exclusion. An agreement to exclude the CISG is governed by the rules on contract formation and modification in Arts 11, 14-24, 29 CISG.**

**2.1** The matter of exclusion is one which is governed by the CISG. In every case where parties purport to do so, exclusion of its application will only be effective if it complies with the CISG. Thus the ability of parties to choose to exclude the application of the CISG is dealt with by Arts 6, 11, 14-24, which control the manner of exclusion, whether parties seek to exclude the CISG within the original contract or sometime thereafter. Domestic validity laws in relation to matters not covered by the CISG remain applicable: Art. 4(a).<sup>1</sup>

**2.2** In relation to exclusions *at the time of concluding the contract*, there is a contrary minority opinion that advocates the testing of *ex ante* exclusion clauses by conflicts of laws rules.<sup>2</sup> However, the majority view is that any agreement to exclude the CISG's applicability must meet the formation provisions Arts 11, 14-24 CISG, and must satisfy Art. 6.<sup>3</sup> The CISG's initial applicability is not 'subordinated to the will of the parties' since the CISG

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<sup>1</sup> L. Mistelis, in S. Kröll, L. Mistelis & P. Perales Viscasillas (Eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* Art. 6, 99, at 104 para. 17 (2011)(private international law of the forum determines which laws apply in relation to validity).

<sup>2</sup> P. Schlechtriem, in P. Schlechtriem & I. Schwenzer (Eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Art. 6, at 85-89 & 91 paras 7-10, 12 & 14 ('Schlechtriem & Schwenzer 2<sup>nd</sup> edn')(stating that rules of private international law determine the issue). *Contra* Tribunale di Forli, Italy, CISG-online Case No 2336, 26 March 2009, §V (this avoids the 'two-step' process, the CISG prevailing over private international law as the special and more limited law) <<http://www.globalsaleslaw.org/content/api/cisg/urteile/2336.pdf>>.

<sup>3</sup> See, e.g., Oberlandesgericht [Appellate Court](OLG) Oldenburg, Germany, 20 December 2007 <<http://cisgw3.law.pace.edu/cases/071220g1.html>>; Golden Valley Grape Juice and Wine, LLC v. Centrisys Corp., 2010 U.S. Dist. LEXIS 11884 (E.D. Cal.), 22 January 2010 <<http://cisgw3.law.pace.edu/cases/100121u1.html>> ('Golden Valley case'); Easom Automation Systems, Inc. v. Thyssenkrupp Fabco, Corp., 2007 WL 2875256, U.S. District Court (E.D. Mich.), 28 September 2007, CISG-online Case No 1601 <<http://cisgw3.law.pace.edu/cases/070928u1.html>> ('Easom Automation case'); Handelsgericht des Kantons, [Cantonal Commercial Court](HG) St. Gallen, Switzerland, 15 June 2010, 2009/164, CISG-online Case No 2159 <<http://www.globalsaleslaw.org/content/api/cisg/urteile/2159.pdf>> (where parties chose Swiss law to the exclusion of the CISG, the court first applied CISG to determine if exclusion had been successful under Art. 6), see discussion by Phillip Landolt, *Summary of Swiss case law on the CISG from 2008 until March 2013*, Jusletter, 26 August 2013 <[www.jusletter.ch](http://www.jusletter.ch)>; L. Spagnolo, *The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers*, 10 Melbourne J. Int'l L. 141, at 205; (CISG should determine the matter, at least until the point at which exclusion is established under its formation provisions); I. Schwenzer & P. Hachem, in I. Schwenzer (Ed), Schlechtriem & Schwenzer: *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Art. 6, at 104 & 105 (2010)('Schwenzer 3<sup>rd</sup> edn') (formation and interpretation of exclusion clauses subject to CISG rules); M. Schmidt-Kessel, in Schwenzer 3<sup>rd</sup> edn, Art. 8, at 177 para. 61 (incorporation of choice of law clauses including exclusions of CISG within the sphere of CISG formation provisions). *But see* Schlechtriem, in Schlechtriem & Schwenzer 2<sup>nd</sup> edn, *supra* note 2, Art. 6, at 85-89 paras 7-10 (stating that rules of private international law determine the issue). For discussion suggesting the need for choice of law clauses to be treated as separable from the remainder of the contract for the purposes of Art. 6: see Jack Graves, *CISG Article 6 and Issues of Formation: The Problem of Circularity*, 15 Vindobona Journal of International Commercial Law & Arbitration 105 (2011). See also Mistelis, *supra* note 1, at 102 para. 10 (2011)(agreements to exclude should be treated as 'stand-alone' agreements).

already applies pursuant to Art. 1.<sup>4</sup> Its subsequent applicability can be altered by the will of the parties provided that will amounts to an agreement to exclude in accordance with the CISG. The question in every case of purported exclusion is whether parties have an agreed intent to exclude which satisfies the requirements of the CISG provisions.

**2.3** The better view is that once a contract is *prima facie* governed by the CISG by virtue of Art. 1, the adjudicator must look to its provisions alone to decide if there has been an exclusion, since until such time as Art. 6 is satisfied, the CISG remains the governing law of the contract. It is the CISG which controls the ‘choice of law rule’ when a contract to which the CISG is *prima facie* applicable exists.

**2.4** It follows that the question of incorporation of the clause purporting to exclude the CISG is to be determined initially in accordance with Arts 11, 14-24, not the contract law that would otherwise be applicable by virtue of conflict rules.<sup>5</sup> Courts in Contracting States have a duty to apply these provisions to determine formation of an agreement to exclude, including incorporation of any clause purporting to exclude the CISG’s application.<sup>6</sup>

**2.5** In relation to exclusions *after* the contract has been concluded, the position is unequivocal. CISG formation provisions incontrovertibly apply to *ex post* exclusions, has been acknowledged even by the minority of scholars who advocate conflict rules to test *ex ante* exclusion clauses.<sup>7</sup> Therefore the ability of parties to exclude the application of the CISG *after the contract is concluded* is also dealt with by Arts 6, 11, 14-24.<sup>8</sup> However, as a CISG contract already exists, any agreement to exclude *ex post* also constitutes a modification of the original contract. Thus Art. 29 CISG must also be satisfied before the CISG’s application is excluded at the stages of contractual performance or legal proceedings alike. The adjudicator must look to the CISG alone to decide if there has been an exclusion. Until Art. 6 is enlivened, the CISG remains the governing law of the contract.<sup>9</sup>

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<sup>4</sup> *Sté Ceramique Culinaire de France v. Sté Musgrave Ltd*, Cour de Cassation, France, 17 December 1996 <<http://cisgw3.law.pace.edu/cases/961217f1.html>> (the CISG ‘applies at the outset; its applicability is not subordinated to the will of the parties, express or tacit’). *See also*, Tribunale di Padova, Italy, 25 February 2004 <<http://cisgw3.law.pace.edu/cases/040225i3.html>> ([f]urther, the silence in the pleadings on the matter of the applicability of the law at issue is immaterial because, in the presence of all requisites mentioned above [the CISG] is applicable by operation of law’).

<sup>5</sup> CISG Advisory Council Opinion No 13 Inclusion of Standard Terms under the CISG, Rapporteur: Prof. Sieg Eiselen, §1. *Contra Venter v. Ilona MY Ltd.*, Supreme Court of New South Wales, Australia, 24 August 2012 at [26] <<http://cisgw3.law.pace.edu/cases/120824a2.html>> (incorporation of a choice of forum/choice of law clause was determined in accordance with Australian domestic law, despite the court correctly noting that an argument was available that the exclusion only operates if the terms containing the exclusion were incorporated ‘(the very question to be decided)’).

<sup>6</sup> A court’s failure to apply the CISG as the applicable governing law may amount to a breach of international obligations. As the Vienna Convention on the Law of Treaties at Art. 27 states ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’: Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, Vol. 1155 U.N.T.S. 331. *See* discussion, Spagnolo, *infra* note 9. *Venter v. Ilona MY Ltd.*, *supra* note 5 (court did not consider whether it had a duty to apply the CISG *ex officio*).

<sup>7</sup> Schlechtriem, *in* Schlechtriem & Schwenzer 2<sup>nd</sup> edn, *supra* note 2, at 89 & 91 paras 12 & 14.

<sup>8</sup> Alluding to disagreement about the relevance of Arts 8, 14-24 in relation to Art. 29: A. Björklund, *in* Mistelis, *supra* note 1, Art. 29, 382, at 383 para. 5 (2011). Suggesting reference to these provisions in the context of modifications is appropriate: P. Schlechtriem & P. Butler, UN Law on International Sales 87 para. 97 (2009); P. Perales Viscasillas, *Modification and Termination of the Contract (Art. 29 CISG)*, 25 J. L. & Com. 167, at 171 (2005-6); H. Gabriel, *Contracts for the Sale of Goods* 22 (2009)(provided to their full extent).

<sup>9</sup> L. Spagnolo, *Iura Novit Curia and the CISG: Resolution of the Faux Procedural Black Hole*, *in* I. Schwenzer & L. Spagnolo, *Towards Uniformity: 2<sup>nd</sup> Annual MAA Schlechtriem CISG Conference* 181, 191, 205 (2011), revised version published as L. Spagnolo, *CISG Exclusion and Legal Efficiency* (Kluwer, 2014) Ch. 10.

**2.6** While parties can agree to exclude the CISG during litigation,<sup>10</sup> the only way conduct of legal proceedings itself can potentially alter the prior applicability of the CISG is if it amounts to an agreement to modify the choice of law of the underlying contract. In other words, the CISG is excluded only if such conduct leads to formation of an agreement to modify the original contract in compliance with Arts 6, 11, 14-24 and 29 CISG.<sup>11</sup> Parties must therefore comply with the CISG's internal requirements before their autonomous choice can be effective.<sup>12</sup>

**3. The intent of the parties to exclude must be determined in accordance with Art. 8 CISG. Such intent should be clearly manifested, whether at the time of conclusion of the contract or at any time thereafter. This standard also applies to exclusions during legal proceedings.**

**3.1** It is undesirable to have extensive disparity between the requirement for intent to exclude at the *ex ante* and *ex post* stages. There is broad consensus in the scholarship and amongst cases decided on exclusions within the original contract that a clear intent to exclude is required pursuant to Art. 6. Generally, courts and commentators have taken a rather restrictive approach to *ex ante* exclusion of the CISG. Most scholars caution against swift conclusions of implicit exclusion within the contract.<sup>13</sup> Implicit exclusions have been upheld,<sup>14</sup> but most courts and tribunals have been slow to infer exclusion where the intent of a contractual clause is unclear.<sup>15</sup> Generally, a 'certain' or 'real' tangible intent rather than

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<sup>10</sup> Bridge, *Uniform and Harmonized Sales Law: Choice of Law Issues*, in J. Fawcett *et al* (Eds), *International Sale of Goods in the Conflict of Laws*, 905 at 922 (2005) at 917 & 922. Note that Bridge argues that where the forum would otherwise be obliged to apply the CISG, parties can post-contractually agree to apply non-CISG domestic law if, for example, Art 3(2) 1980 Rome Convention applies; J. S. Ziegel, *The Future of the International Sales Convention from a Common Law Perspective*, 6 *New Zealand Business L. Q.* 336, 342, note 30 (2000) at 342, note 30. See generally, I. Zajtay, Ch. 14, *The Application of Foreign Law*, in K. Lipstein (Ed.), *International Encyclopedia of Comparative Law*, Vol. III, *Private International Law*, at 8, §14-13 (1972). at 9, §14-13.

<sup>11</sup> Schlechtriem, in Schlechtriem & Schwenger 2<sup>nd</sup> edn, *supra* note 2, Art. 6, at 91 para. 14; Schwenger & Hachem, *supra* note 3, Art. 6, at 114 & 116 paras 24 & 28 (agreements to derogate by modification are 'only' subject to the CISG, not conflicts rules). Agreements modifying contracts governed by the CISG are also subject to CISG formation provisions: U. Schroeter, in Schwenger 3<sup>rd</sup> edn, *supra* note 3, Art. 29, at 472 & 473 paras. 2 & 4; P. Schlechtriem, *Uniform Sales Law* 63, §A5 (1986) ('Uniform Sales Law 1986'); F. Ferrari, *The CISG's Sphere of Application: Articles 1-3 and 10*, in F. Ferrari *et al* (Eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention*, 21, *passim* (2004) ('Digest & Beyond'), at 61 ('contracts modifying an international sales contract fall under the CISG as well, since they directly affect the [parties'] rights and obligations'); Peter Schlechtriem and Petra Butler, *UN Law on International Sales* 87 [97] (2009); Pilar Perales Viscasillas, *Modification and Termination of the Contract*, 25 *J. L. & Com.* 167, 171 (2005-6); Henry Gabriel, *Contracts for the Sale of Goods* 22 (2009) (provided not applied to their full extent). Alluding to disagreement about the relevance of Arts 8, 14-24 in relation to Art. 29: Andrea Björklund, in Kröll *et al* (eds), *supra* note 1, Art. 29, 382, at 383 [5].

<sup>12</sup> Spagnolo, *supra* note 9. at 204-205.

<sup>13</sup> Against implicit exclusion: F. Enderlein & D. Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods: Convention on the Limitation Period in the International Sale of Goods: Commentary*, Art. 6, at 48-49 paras 1.2 & 1.3 (1992) ('Enderlein & Maskow'); Schlechtriem, in Schlechtriem & Schwenger 2<sup>nd</sup> edn, *supra* note 2, Art. 6, at 88-89 para. 12 (noting reluctance of legal writers to infer exclusion). In support of implicit exclusion: M. Bridge, *Choice of Law and the CISG: Opting In and Opting Out*, in H. M. Flechtner *et al* (Eds), *Drafting Contracts Under the CISG*, 65 at 77 (2008), *but see id.*, at 78 (cautioning parties bear the burden of making their intent plain); H. M. Flechtner (Ed.), J. O. Honnold, *Uniform Law for International Sales*, Art. 6, at 108-110 & note 19 para. 77.1 (2009) ('Honnold 4th edn').

<sup>14</sup> See, e.g. *Olivaylle Pty Ltd v Flottweg GmbH & Co KGAA (No 4)* (2009) 255 ALR 632, Federal Court, Australia, 20 May 2009 <<http://cisgw3.law.pace.edu/cases/090520a2.html>>; District Court (LG) München, Germany, 29 May 1995 <<http://cisgw3.law.pace.edu/cases/950529g1.html>>; Bezirksgericht [Lower District Court] (BG) Weinfelden, Switzerland, 23 November 1998 <<http://cisgw3.law.pace.edu/cases/981123s1.html>>; Cour d'appel de Colmar, France, 26 September 1995 <<http://cisgw3.law.pace.edu/cases/950926f1.html>> (in a decision criticized in this respect on appeal by the Cour de Cassation, 17 December 1996, *supra* note 4).

<sup>15</sup> Schlechtriem, in Schlechtriem & Schwenger 2<sup>nd</sup> edn, *supra* note 2, Art. 6, at 88-89 para. 12 (noting the reluctance of courts to infer exclusion). See, e.g., *International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade*,

hypothetical intent has been required.<sup>16</sup> Above all, the cases strongly demonstrate that a ‘clear intent’ is required for *ex ante* exclusion.<sup>17</sup> By contrast, where parties have failed to plead or present argument based on the CISG during legal proceedings involving a contract for which the CISG is the applicable law, intent to exclude has frequently been tested by far less stringent standards, and in some cases, domestic law applied instead of the CISG.

**3.3** Rather than have different approaches to determining an intent to exclude at the *ex ante* and *ex post* stages, it is appropriate to discern a single uniform standard that can be applied consistently to determine intent to exclude at both contractual and post-contractual stages.

**3.4** Since court and tribunal decisions and most scholars overwhelmingly support the requirement of a high threshold for intent to exclude at the time of concluding a contract, it is appropriate that this existing strict standard of intent should be maintained as the single uniform standard for all exclusions at contractual and post-contractual stages, including during legal proceedings. A clear intent to exclude should be inferred before the court or tribunal is satisfied of an agreement to exclude, whether at the time the contract is formed, or post-contractually.

**3.5** It is true that this sets the threshold for intent to exclude at a higher level than is otherwise generally required for intent under the CISG. However, at the *ex ante* contractual stage, the evidentiary bar for inferences satisfying Art. 6 is already consistently applied in a stringent manner by courts and tribunals.<sup>18</sup> The strict uniform interpretive approach to the threshold for intent to exclude generally observed in the decisions on *ex ante* exclusions is desirable in terms of promoting efficiency and certainty.<sup>19</sup> It encourages greater and more predictable uniform application of the CISG. It also accords with the views of most scholars,<sup>20</sup> furthers the CISG’s ‘international character and to the need to promote uniformity in its application’ as directed by Art. 7(1), and develops the original aim of the CISG in ‘contribut[ing] to the removal of legal barriers in international trade and promot[ion of] the development of international trade’. It is consistent with the timbre of the Diplomatic Conference, where the concern was that uniform law would be rendered ineffective if courts were too quick to find exclusion,<sup>21</sup> a policy concern that has been expressly recognized in some cases.<sup>22</sup> In

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218y/2011, 23 January 2012, CLOUT Abstract No 1405 <<http://cisgw3.law.pace.edu/cases/120123u5.html>> (applying CISG as part of the law of Ukraine chosen in the contract, despite incorporation of GAFTA No 200 excluding CISG, on the basis that the intention to exclude must be express and clear).

<sup>16</sup> Cour de Cassation, 17 December 1996, *supra* note 4 (implied exclusion must be ‘certain’); Honnold 4<sup>th</sup> edn, *supra* note 13, Art. 6, at 107-108 para. 77 (requiring ‘real’ and not ‘theoretical’ intent, thus exclusions must be ‘express’ or ‘clearly implied in fact’). See also, Enderlein & Maskow, *supra* note 13, Art. 6, at 48; F. Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing*, 15 J. L. & Com. 1, at 88, note 614 (1996); F. Ferrari, *Applicability and Applications of the Vienna Sales Convention (CISG)*, 4 Int’l Legal Forum 138, at 220 (1998) (‘*International Legal Forum*’) at 220.

<sup>17</sup> Oberster Gerichtshof [Supreme Court], Austria, 22 October 2001 <<http://cisgw3.law.pace.edu/cases/011022a3.html>> (‘[A]n implicit exclusion may only be assumed if the corresponding intent of the parties is sufficiently clear. If it cannot be established with sufficient clarity that an exclusion of the Convention was intended (taking into account the criteria provided by Art. 8 CISG for the interpretation of a party’s statements and other conduct), then the CISG is to be applied’).

<sup>18</sup> Moreover, the uniformly strict approach can be observed irrespective of whether the applicable law (if exclusion of the CISG is upheld) is that of the forum or the domestic law of a foreign state: U.G. Schroeter, *To Exclude, to Ignore, or to Use?: Empirical Evidence on Courts’, Parties’ and Counsels’ Approach to the CISG (with some Remarks on Professional Liability)*, in L. DiMatteo (Ed.), *The Global Challenge of International Sales Law* (Cambridge University Press, 2014) 16 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1981742](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1981742)>.

<sup>19</sup> For discussion see L. Spagnolo, *CISG Exclusion and Legal Efficiency* (Kluwer, 2014) Ch. 10.

<sup>20</sup> For a critique of standard of proof in *ex ante* exclusions: Schroeter, *supra* note 18, at 8-9.

<sup>21</sup> The Diplomatic Conference declined special reference to the ability to impliedly exclude the CISG ‘lest the special reference [...] might encourage courts to conclude, on insufficient grounds, that the [CISG] had been wholly excluded’:

interpretation of potential agreements to exclude the CISG's application, a principle of *in dubio pro conventione* furthers these purposes.

**3.6** In considering whether an agreement to exclude has been formed pursuant to Arts 29 and/or 11, 14-24, Arts 6 and 8 CISG are of prime importance. The adjudicator will need to determine whether a clear inference arises from the words and/or conduct of the parties to the effect that they intended to exclude the CISG, in the sense that these would be reasonably understood as manifesting such an intent: Art. 8(2). The evidence may support divergent inferences regarding intent. In balancing competing inferences arising from such evidence, the adjudicator must determine the most likely intent from amongst competing hypotheses. When doing so, Art. 7 requires that the adjudicator bear in mind the need for uniform development of the law, and thus the uniform requirement of clear intent to exclude required by Art. 6, 11, 14-24 and 29 should be used to determine intent to exclude at both contractual and post-contractual stages.

**3.7** It follows that, while implicit exclusion is possible, intent to exclude is not to be readily inferred for the purposes of Art. 6. In accordance with the cases and commentary, the balance should generally tip in favour of non-exclusion where the facts do not support an inference of clear intent to exclude.<sup>23</sup> In other words, when balancing competing inferences pursuant to Art. 8 CISG, in the absence of a clear intent to exclude, parties should be reasonably understood as not evincing intent to opt out pursuant to Art. 8(2). The burden is on parties to make their choice of law plain enough that it would be reasonably understood as bearing the purpose of exclusion: Art. 8(2) CISG.<sup>24</sup> Thus the facts of a particular case are not to be ignored, but must be weighed appropriately against the requirement of a clear manifestation of intent.<sup>25</sup> The conduct of the parties both prior and subsequent to the choice should be taken into account pursuant to Art. 8(3).

**3.8** Naturally, the evidence of intent must be analysed on a case-by-case basis pursuant to Art. 8, but some general observations are possible as to what might be reasonably understood as an intent to exclude pursuant to Art. 8(2).

#### **4. Generally, such a clear intent to exclude:**

##### **(a) should be inferred, for example, from:**

- (i) express exclusion of the CISG;**
- (ii) choice of the law of a non-Contracting State;**

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*Official Records of the United Nations Conference on Contracts for the International Sale of Goods*, Vienna, 10 March-11 April 1980, UN Doc. A/CONF.97/19, at 17.

<sup>22</sup> *Travelers Property Casualty Company of America v. Saint-Gobain Technical Fabrics Canada Ltd*, 2007 WL 313591, U.S. District Court, Minnesota, 31 January 2007 <<http://cisgw3.law.pace.edu/cases/070131u1.html>> ('an affirmative opt-out requirement promotes uniformity and the observance of good faith in international trade, two principles that guide interpretation of the CISG'); *St Paul Guardian Insurance Company and Travelers Insurance Company v. Neuromed Medical Systems & Support, GmbH*, 2002 U.S. Dist. LEXIS 5096 (S.D. N.Y.), 26 March 2002 <<http://cisgw3.law.pace.edu/cases/020326u1.html>> (stating that choice of the law of a Contracting State did not exclude the CISG, and that '[t]o hold otherwise would undermine the objectives of the [CISG]').

<sup>23</sup> Spagnolo, *supra* note 9, at 208.

<sup>24</sup> Oberlandesgericht [Appellate Court] (OLG) Linz, Austria, 23 January 2006, [2.2] <<http://cisgw3.law.pace.edu/cases/060123a3.html>> (onus of proof of exclusion lies on party arguing in favour of it, citing *Schlechtriem/Ferrari*) but decision on exclusion ultimately overturned by Oberster Gerichtshof [Supreme Court], Austria, 4 July 2007 <<http://cisgw3.law.pace.edu/cases/070704a3.html>>; *Bridge*, *supra* note 13, at 78.

<sup>25</sup> *Schroeter*, *supra* note 18, at 8.

**(iii) choice of an expressly specified domestic statute or code where that would otherwise be displaced by the CISG's application.**

**(b) should not be inferred merely from, for example:**

**(i) the choice of the law of a Contracting State;**

**(ii) choice of the law of a territorial unit of a Contracting State.**

**4.1** Courts and tribunals already apply a strict standard for intent to exclude in relation to *ex ante* exclusions. Awareness of the CISG's applicability is not considered relevant in the context of *ex ante* choice of law clauses.<sup>26</sup>

**4.2** Where a choice of law clause indicates that the law of a Contracting State governs the contract, commentators, courts and tribunals have widely accepted that, without more, this will not exclude the CISG, since the CISG forms part of the law of the Contracting State,<sup>27</sup>

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<sup>26</sup> This has been the approach in the cases below. See also Schwenger & Hachem, *supra* note 3, Art. 6, at 108-109 para. 14.

<sup>27</sup> See, e.g., Cour de Cassation, 17 December 1996, *supra* note 4 ('[r]eferring only to the law of a Contracting State in a clause...is not sufficient'); Oberster Gerichtshof [Supreme Court], Austria, 26 January 2005 <<http://cisgw3.law.pace.edu/cases/050126a3.html>>; International Chamber of Commerce (ICC) Award No. 7565 of 1994 <<http://cisgw3.law.pace.edu/cases/947565i1.html>>; Bundesgerichtshof [Federal Supreme Court] (BGH), Germany, 25 November 1998 <<http://cisgw3.law.pace.edu/cases/981125g1.html>>; Federal Supreme Court (BGH), Germany, 23 July 1997 (Benetton I) <<http://cisgw3.law.pace.edu/cases/970723g1.html>> (translation A. Raab); Federal Supreme Court (BGH), Germany, 23 July 1997 (Benetton II), NJW 1997, 3309, 3310 at 3310 <<http://cisgw3.law.pace.edu/cases/970723g1.html>>; Supreme Court, Austria, 22 October 2001, *supra* note 17 ('choice of Austrian law principally includes the CISG, which is a part of the Austrian legal system... The choice of law without an explicit declaration that the [CISG] be excluded does not constitute an implicit exclusion, because the CISG is a part of the chosen law, it is therefore included in the referral, and takes precedence over the non-unified law which would otherwise be applicable'); Kantonsgericht [District Court] (KG) Zug, Switzerland, 11 December 2003, available at <<http://cisgw3.law.pace.edu/cases/031211s1.html>>; Oberlandesgericht (OLG)[Appellate Court] Frankfurt, Germany, 30 August 2000, CLOUT Case No. 429 <<http://cisgw3.law.pace.edu/cases/000830g1.html>> ('subject to Swiss law' would not lead to exclusion, instead a more specific reference to domestic Swiss code is necessary); Cour d'appel Paris, 6 November 2001 <<http://cisgw3.law.pace.edu/cases/011106f1.html>>; Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, 6 May 2010 <<http://cisgw3.law.pace.edu/cases/100506sb.html>>; *NV Van Heygen Staal v. GmbH Stahl- und Metalhandel Klockner*, Hof van Beroep [Appellate Court] Gent, Belgium, 20 October 2004 <<http://cisgw3.law.pace.edu/cases/041020b1.html>>; Supreme Court, Austria, 2 April 2009, CLOUT Case No. 1057 <<http://cisgw3.law.pace.edu/cases/090402a3.html>>; Supreme Court, Poland, 17 October 2008, M. Zachariasiewicz, *Abstract* <<http://cisgw3.law.pace.edu/cases/081017p1.html>>; Arbitration Court of Latvian Chamber of Commerce and Industry, 7 July 2011 <<http://www.cisgnordic.net/110707LV.shtml>>; District Court (LG) Kiel, Germany, 27 July 2004 <<http://cisgw3.law.pace.edu/cases/040727g1.html>>; Tribunal Supremo Popular (Sala de lo económico)[Economic Chamber of Peoples' Supreme Court], Cuba, 16 August 2008 <<http://www.cisgspanish.com/seccion/jurisprudencia/cuba/>>. Although not relevant on the facts, see Tribunale di Forli, Italy, 26 March 2009, *supra* note 2, at 17, §VI. See also, *UNCITRAL Digest of Case Law on the [CISG]* (2012) <<http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf>> Art. 6 para. [11]; Schlechtriem, in Schlechtriem & Schwenger 2<sup>nd</sup> edn, *supra* note 2, Art. 6, at 90 para. 14 ('prevailing opinion ... holds that a reference to the law of a Contracting State *in itself* does not amount to an exclusion'); Schwenger & Hachem, *supra* note 3, Art. 6, at 108-109 para. 14; Mistelis, *supra* note 1, at 101 para. 7 & 104 para. 18 & notes 31 & 32; Schroeter, *supra* note 18, at 8. For an example of the rare exceptions where courts had reached the opposite conclusion was held, where parties chose the 'exclusive' application of domestic law: Hof's-Hertogenbosch [Appellate Court], Netherlands, 13 November 2007 <<http://cisgw3.law.pace.edu/cases/071113n1.html>>; Tribunale Civile di Monza, Italy, 29 March 1993, CISG-online Case No 102 <<http://cisgw3.law.pace.edu/cases/930114i3.html>> (choice of a Italian law held to exclude CISG, in circumstances where, despite a choice of Italian law, the court felt neither Art. 1(1)(a) nor (b) was met); International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade, *supra* note 15 (applying CISG on the basis intention to exclude must be express and clear, where main contract chose Ukraine law without excluding CISG, and only incorporated GAFTA No 200 expressly 'unless in contradiction of the provisions of the underlying contract'). Only two recent decisions are to the contrary, see Tribunal Cantonal [Appellate Court] Vaud, Switzerland, 24 November 2004 <<http://cisgw3.law.pace.edu/cases/041124s1.html>> (while acknowledging generally choice of Contracting State law did not exclude, choice of Swiss law in the absence of any contractual/other association with Switzerland whatsoever was inferred as an intent that the contract to be governed by the Swiss Code of Obligations rather than the CISG); Appellate Court (OLG) München, Germany 2 October 2013, CISG-online Case No 2473 <<http://cisgw3.law.pace.edu/cases/131002g1.html>> (parties included a contractual choice of law clause selecting "German law". The Court held that the parties had "explicitly and unambiguously stipulated German law to apply" and consequently, the CISG was excluded)(translation F. Jaeger).



including a notable line of U.S. cases.<sup>28</sup> Choice of a Contracting State's law immediately following an express exclusion of the CISG has been held to exclude the CISG.<sup>29</sup> A reference to INCOTERMS has been held insufficient to demonstrate intent to exclude the CISG.<sup>30</sup> A choice of national law excluding ULIS was held not to exclude the CISG.<sup>31</sup> A few cases have denied even the possibility of implicit exclusion within the contract.<sup>32</sup> By contrast, a clause providing for 'exclusion of UNCITRAL law' was upheld as manifesting an intent to exclude the CISG.<sup>33</sup> Choice of law of a non-Contracting State has been upheld as an implicit exclusion.<sup>34</sup>

**4.3** A minority of cases and commentators view selection of the law of a territorial unit or province within a Contracting State as an exclusion.<sup>35</sup> However, most courts and tribunals

<sup>28</sup> Valero Marketing & Supply Co. v. Greeni Oy, 373 F.Supp.2d 475, U.S. District Court New Jersey, 15 June 2005 <<http://cisgw3.law.pace.edu/cases/050615u1.html>>; Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd., 2003 U.S. Dist. LEXIS 1306 (N.D. Ill.), 29 January 2003 <<http://cisgw3.law.pace.edu/cases/030129u1.html>>; American Mint LLC v. GOSoftware, Inc., 2006 U.S. Dist. LEXIS 1569 (M.D. Pa), 6 January 2006 <<http://cisgw3.law.pace.edu/cases/060106u1.html>>; Travelers Property Casualty Company of America v. Saint-Gobain Technical Fabrics Canada Ltd, *supra* note 22 ('absent an express statement that the CISG does not apply, merely referring to a particular state's law does not opt out of the CISG'); *Easom Automation case*, *supra* note 3; Asante Technologies, Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, U.S. District Court (N.D. Cal.), 27 July 2001 <<http://cisgw3.law.pace.edu/cases/010727u1.html>>; St Paul Guardian Insurance Company and Travelers Insurance Company v. Neuromed Medical Systems & Support, GmbH, *supra* note 22 ('Where parties ... designate a choice of law clause in their contract -- selecting the law of a Contracting State without expressly excluding application of the CISG' this results in application of the CISG 'as the law of the designated Contracting state'); BP International, Ltd. v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333, U.S. Court of Appeals (5th Cir.), 11 June 2003 <<http://cisgw3.law.pace.edu/cases/030611u1.html>> ('Where parties seek to apply a signatory's domestic law in lieu of the CISG, they must affirmatively opt-out of the CISG'); Foreign Trade Court of Arbitration Serbian Chamber of Commerce, 6 May 2010 §IV <<http://cisgw3.law.pace.edu/cases/100506sb.html>> ('[i]f the parties opted for a law of [Contracting] State ... without expressly delineating that they choose internal law of the State, the Vienna Convention will be applicable').

<sup>29</sup> Beechy Stock Farm Ltd v. Managro Harvestore Systems Ltd, Court of Queen's Bench Saskatchewan, Canada, 3 April 2002 <<http://cisgw3.law.pace.edu/cases/020403c4.html>> (clause stating 'The application of the Vienna Convention on Contracts for the International Sale of Goods (CISG) is excluded. Instead, German law is agreed upon to be the basis of this contract as far as not these General Conditions of Sale stipulate anything different' was taken as an exclusion of the CISG).

<sup>30</sup> Oberster Gerichtshof [Supreme Court], Austria, 22 October 2001, *supra* note 17.

<sup>31</sup> District Court (LG) Düsseldorf, Germany, 11 October 1995 <<http://cisgw3.law.pace.edu/cases/951011g1.html>>.

<sup>32</sup> See Landgericht [District Court](LG) Landshut, Germany, 5 April 1995, §II.1.a <<http://cisgw3.law.pace.edu/cases/950405g1.html>> (stating '[t]he parties can only exclude the application of the CISG by explicit agreement'); *Orbisphere Corp. v. United States*, 726 F. Supp. 1344, Federal Court of International Trade, U.S.A., 24 October 1989, note 7 <<http://cisgw3.law.pace.edu/cases/891024u1.html>>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Award 54/1999, 24 January 2000, para. 1 <<http://cisgw3.law.pace.edu/cases/000124r1.html>>. Criticizing such cases: Schroeter, *supra* note 18, at 9.

<sup>33</sup> Olivaylle Pty Ltd v Flottweg GmbH & Co KGAA (No 4), 20 May 2009, *supra* note 14.

<sup>34</sup> P. Perales Viscasillas, *Abstract*, BSC Footwear Supplies Ltd v. Brumby St., Audiencia Provincial de Alicante, Spain, 16 November 2000 <<http://cisgw3.law.pace.edu/cases/001116s4.html>> (one basis for the conclusion of tacit exclusion was that English law governed the contract); Mistelis, *supra* note 1, at 103 para. 12 & 104 para. 17.

<sup>35</sup> For the minority view, see American Biophysics v. Dubois Marine Specialties, 411 F.Supp.2d 61, U.S. District Court Rhode Island, 30 January 2006 <<http://cisgw3.law.pace.edu/cases/060130u1.html>> (upholding exclusion by choice of law of the state of Rhode Island), and (albeit in the course of litigation by express reliance in pleadings on 'State Law'); Ho Myung Moolsan, Co. Ltd. v. Manitou Mineral Water, Inc., U.S. District Court (SDNY), 2 December 2010 <<http://cisgw3.law.pace.edu/cases/101202u1.html>> (concluding that by referring expressly to 'State Law' the claimant had in pleadings consented to the application of New York UCC rather than the CISG); Rienzi & Sons, Inc., v. Puglisi, U.S. District Court (EDNY), 27 March 2014 <<http://cisgw3.law.pace.edu/cases/140327u1.html>> (approving of Ho Myung Moolsan); Mistelis, *supra* note 1, at 105 para. 18 & 107 para. 23 (selection of the law of a province in a Contracting State may be seen as exclusion of CISG). *Contra*, upholding the majority view that selection of the law of a territorial unit or province is insufficient, see e.g., Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd., *supra* note 28; Asante Technologies v. PMC-Sierra, *supra* note 28; American Mint LLC v. GOSoftware, Inc., *supra* note 28; Travelers Property Casualty Company of America v. Saint-Gobain Technical Fabrics Canada Ltd, *supra* note 22 (choice of Minnesota law not an exclusion); Valero Marketing & Supply Co. v. Greeni Oy, *supra* note 28 (choice of New Jersey/New York law would not exclude CISG); Beltappo Inc. v. Rich Xiberta, SA, 7 February 2006 <<http://cisgw3.law.pace.edu/cases/060207u2.html>>; Schwenzler & Hachem, *supra* note 3, Art. 6, at 108-109 para. 14; William P. Johnson, *Understanding Exclusion of the CISG*, 59 Buffalo Law Rev. 213, at 228 (2011)(concluding it 'is appropriate under the Supremacy Clause of the US Constitution [that]...a choice-of-law clause choosing the laws of a jurisdiction within the United States in fact chooses the CISG'). See

recognize that as part of the law of the Contracting State, the CISG is, by extension, the law of its territorial units. For example, choices of the law of ‘California’, the ‘Province of British Columbia’ and ‘the state of Pennsylvania’ were considered insufficient to exclude in US cases typical of the majority of decisions.<sup>36</sup>

**4.4** A clear choice of non-CISG domestic law would evince an intent to exclude the CISG, but whether this is achieved by reference to a particular domestic statute or code in a choice of law clause has been controversial. Reference in a choice of law clause to an entire non-uniform code or statute has sometimes been held by courts as sufficient indication of intent to exclude, but not consistently.<sup>37</sup> Academic commentary generally favours the notion that reference to an entire non-uniform code or statute within a choice of law clause evinces an intent to exclude,<sup>38</sup> although some take a more restrictive view, arguing that reference to a code such as a Civil Code is insufficient, and that instead, specific reference to the Sales Law within the Code is required.<sup>39</sup> Cases have been mixed in their approach. In regard to selection of entire domestic codes or statutes. Some German courts have suggested that a choice of ‘the BGB’ or ‘HGB’ could amount to an effective opt-out,<sup>40</sup> as has a Chinese tribunal in the case of selection of a Chinese statute, likewise an Austrian court upheld implied exclusion on the basis of reference to Austrian Consumer Protection Act or Austrian Commercial Code,<sup>41</sup> and American courts have held selection of the ‘Uniform Commercial Code’ or ‘California Commercial Code’ may be implied exclusions.<sup>42</sup> On the other hand, the Hungarian Supreme Court concluded selection of the Hungarian Civil Code was not an exclusion of the CISG,<sup>43</sup> in a decision which has attracted criticism from Hungarian commentators.<sup>44</sup>

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also Johnson, *id.*, at 242 (arguing the American Biophysics case, *id.*, relied on cases which were not relevant to the issue of exclusion).

<sup>36</sup> *Asante Technologies v. PMC-Sierra*, *supra* note 28, at 1150 (as these did not evince a ‘clear intent to opt out’); *It’s Intoxicating, Inc. v. Maritim Hotelgesellschaft mbH* Federal District Court [Pennsylvania] United States, 31 July 2013 <<http://cisgw3.law.pace.edu/cases/130731u1.html>>.

<sup>37</sup> On choice of specific domestic code or law, Oberlandesgericht [Appellate Court] (OLG) Stuttgart, Germany, 31 March 2008 <<http://cisgw3.law.pace.edu/cases/080331g1.html>> (commenting that were German law to apply, it should not be assumed the BGB or HGB rather than CISG applied, since ‘the CISG is incorporated into German law’. Words such as ‘the provisions of the BGB are applicable’ would be required to denote domestic non-uniform law). *Contra* Appellate Court (OLG) Linz, 23 January 2006, *supra* note 24, [2.3] (mention of HGB (Austrian Commercial Code) in standard terms dealing with warranties was not sufficient), but overturned in Supreme Court, Austria, 4 July 2007, *supra* note 24.

<sup>38</sup> Schwenger & Hachem, *supra* note 3, Art. 6 para. [25].

<sup>39</sup> Apparently suggesting this as the safest course: Joseph Lookofsky, *Understanding the CISG* 27 (Kluwer 2008); *Contra* Schwenger & Hachem, *supra* note 3, Art. 6 para. [26].

<sup>40</sup> Appellate Court (OLG) Stuttgart, 31 March 2008, *supra* note 37; Appellate Court (OLG) Oldenburg 20 December 2007, *supra* note 3; CIETAC Award, 24 March 1998, CISG-online Case No 930 (selection of the PRC Law on Economic Contracts Involving Foreign Interest).

<sup>41</sup> Supreme Court, Austria, 4 July 2007, *supra* note 24 (reference to a particular law such as the Austrian Consumer Protection Act and the Austrian Commercial Code was an implied exclusion of the CISG, overturning Appellate Court (OLG) Linz, 23 January 2006, *supra* note 24).

<sup>42</sup> *Asante Technologies v. PMC-Sierra*, *supra* note 28, at 1150 (*dicta*); *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1027 n. 1 <<http://cisgw3.law.pace.edu/cases/951206u1.html>>; *Doolim Corp. v. R Doll, LLC*, U.S. District Court (SDNY), 29 May 2009 [34] <<http://cisgw3.law.pace.edu/cases/090529u1.html>> (*dicta*)(approving *Delchi* statement that choice of UCC would exclude CISG).

<sup>43</sup> Supreme Court, Hungary, 2007, Gfv.IX.30.372/2007/5 (‘The fact that in the choice of law clause the parties referred to the Hungarian Civil Code instead of the Hungarian law does not mean - according to the phrasing as well - the exclusion of the application of the Convention. It is evident that in case of civil law relations the parties are referring to the specific law which governs their relation and not to the Hungarian law in general, especially when their contract contains provisions which are not covered by the Convention. [...] Therefore it can not be verified that the parties excluded the application of the Convention by mutual consent’)(reported in translation by Gusztáv Bacher, *Application of the CISG in Hungary and the effect of the CISG on Hungarian Law*, 30 October 2008, §1.2 <[http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CDAQFjAB&url=http%3A%2F%2Fwww.szecskay.hu%2Fdynamic%2FBacher\\_Application\\_of\\_CISG\\_in\\_HUNGARY.doc&ei=QqtgU4-fHMLoIAWLroGgDA&usq=AFQjCNEcae1REvspVHWO5PscAVIPTy2pXg&bvm=bv.65636070,d.dGI](http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CDAQFjAB&url=http%3A%2F%2Fwww.szecskay.hu%2Fdynamic%2FBacher_Application_of_CISG_in_HUNGARY.doc&ei=QqtgU4-fHMLoIAWLroGgDA&usq=AFQjCNEcae1REvspVHWO5PscAVIPTy2pXg&bvm=bv.65636070,d.dGI)>). Similarly, some German and Italian courts have dismissed the notion that reference by both parties during proceedings to BGB or other

**4.5** The majority approach that a choice law clause indicating a domestic code or statute is sufficiently clear is arguably consistent with legislative history in that ‘referring to the title of [a municipal law]’ was seen as potential evidence of parties’ intent to exclude.<sup>45</sup> However, the view must still be treated with caution. It should be recalled that some domestic statutes may indeed be the instrument within which the CISG is enacted into law in that Contracting State *e.g.*, *Goods Act 1958* (Vic.)(Australia). In such circumstances, the reference is far from clear, and a more specific expression of intent would be necessary before exclusion could be reasonably understood as sufficient intent. Notably, this reasoning was not relied upon in the Hungarian decision above.<sup>46</sup> Likewise, reference to a non-uniform domestic code or statute will not be a clear indication of intent to exclude in a choice of law clause where the transaction in question does not fall within the scope of that code or statute.<sup>47</sup> It is not necessary for the purposes of exclusion of CISG for the choice of law clause to refer to the specific non-uniform Sales Law within a Code. A reference to a Code containing the purely domestic sales law should be sufficient, provided the Code does not also enact the CISG. A reference only to particular provisions may evince only an intent to derogate from parts of the CISG, rather than to exclude it entirely, as discussed below [§4.11].

**4.6** It has been speculated whether certain expressions might indicate an intention for non-CISG domestic law to be applied. Courts have not resolved the effect of selection of ‘civil code and corresponding community regulation’.<sup>48</sup> While one Italian court has speculated that choice of ‘purely domestic law’, or more controversially, ‘the Italian domestic law’ could amount to an exclusion,<sup>49</sup> cases actually decided on the basis of choices of ‘Swiss internal law’ and ‘the law applicable to residents within the Federal Republic of Germany’<sup>50</sup> have held that these expressions do not exclude the CISG’s application. A contractual choice of law for ‘the law of a Contracting State insofar as it differs/derogates from the national law of another Contracting State’ has been also suggested as wording that might convey an intent to exclude.<sup>51</sup> On the other hand, exclusions were upheld by a Swiss court for a choice of Swiss

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domestic provisions could amount to an implied exclusion, discussed below: *see* District Court (LG) Landshut, 5 April 1995, *supra* note 32, §II.1.a; Appellate Court (OLG) Linz, 23 January 2006, *supra* note 24; Tribunale di Padova, 25 February 2004, *supra* note 100; Oberlandesgericht [Appellate Court](OLG) Zweibrücken, Germany, 2 February 2004, §3 <<http://cisgw3.law.pace.edu/cases/040202g1.html>>; Oberlandesgericht [Appellate Court](OLG) Hamm, Germany, 9 June 1995 <<http://cisgw3.law.pace.edu/cases/950609g1.html>>.

<sup>44</sup> Bacher, *supra* note 43, at §1.2 (citing also Sándor, Tamás - Vékás, Lajos, *Nemzetközi Adásvétel* [International Sale of Goods], Budapest, 2005, at 65).

<sup>45</sup> *See* Summary Records of the First Committee, 4<sup>th</sup> Meeting, 13 March 1980, UN Doc. A/CONF.97/C.1/SR.4, reprinted in Official Records UN Doc. A/CONF.97/19, at 251 para. [38]-[40] (Comments by Mr Rognlien for Norway and Mr Plantard for France). *See also*, Johnson, *supra* note 35, at 254-55.

<sup>46</sup> Supreme Court, Hungary, *supra* note 43 (translation by Bacher, *supra* note 43, at §1.2).

<sup>47</sup> *See* Appellate Court (OLG) Linz, 23 January 2006, *supra* note 24, [2.3] (reference to HGB insufficient as transaction fell outside scope of HGB), but overturned in Supreme Court, Austria, 4 July 2007, *supra* note 24.

<sup>48</sup> *See* Vrhovno sodišče v Celju [Celje High Court], Slovenia, 8 June 2011 <<http://cisgw3.law.pace.edu/cases/110608sv.html>> (the contractual choice of law was for ‘civil code and corresponding community regulations’, and was remanded to the first instance court which had applied CISG without considering whether parties had excluded the CISG pursuant to Art. 6). Although not relevant on the facts, *see* Tribunale di Forli, Italy, 26 March 2009, *supra* note 2, at 17, §VI (speculating that selection of ‘the Italian Civil Code’ might amount to exclusion).

<sup>49</sup> Although not relevant on the facts, *see* Tribunale di Forli, Italy, 26 March 2009, *supra* note 2, at 17, §VI.

<sup>50</sup> ICC Award No. 12365/2004 <<http://cisgw3.law.pace.edu/cases/0412365i1.html>>; Hof van Beroep [Appellate Court] Gent, Belgium, 20 October 2004, *supra* note 27; Schroeter, *supra* note 18, at 9.

<sup>51</sup> Appellate Court (OLG), Linz, 23 January 2006, *supra* note 24, [2.3] (suggesting this could amount to an implied exclusion (utilizing the term ‘derogates’); UNCITRAL Digest, *supra* note 27, Art. 6 at para. [12](citing OLG Linz, using the term ‘differs’).

law ‘as if domestic parties had been concerned’, and a Dutch court for a choice of ‘exclusively’ domestic law.<sup>52</sup>

**4.7** A choice of a contractual term associated with a particular jurisdiction was held not to constitute a choice of that jurisdiction’s law, nor to be an implicit exclusion of the CISG.<sup>53</sup> An attempt to exclude the application of local sales laws, even if unsuccessful, was considered in a Canadian case to evince an intent to exclude the CISG.<sup>54</sup> A misplaced comma in one exclusion clause which stated ‘All our disputes are exclusively subject to Austrian law, excluding private international law, and the CISG’ led to an ‘extensive weighing of arguments’ before the court eventually upheld the exclusion.<sup>55</sup>

**4.8** It is to be doubted that a clear intent could be evinced from selection of the law of a territorial unit or province of a CISG Contracting State,<sup>56</sup> but a choice of law clause referring to a specific domestic statute or code may more readily be seen as evincing a clear intent.<sup>57</sup> Choice of the ‘domestic law’ of a Contracting State is no different to a choice of the Contracting State law, and so, without more, should not generally be viewed as evincing a clear intent to exclude, although selection of the ‘purely domestic law’ of such as State are more likely to meet the evidentiary standard, since there can be little other explanation for inclusion of the word ‘purely’. Attempts to exclude or limit the application of specific domestic statutes or codes do not generally evince a sufficiently clear intent to exclude the CISG.

**4.9** Further, it is likely that a reasonable person would understand a clause excluding UNCITRAL law to evince an intent to exclude something, and it is difficult to envisage an alternative hypothesis as to what was intended other than exclusion of the CISG.<sup>58</sup> In the absence of evidence of conduct which might point in the either direction, the intent behind the clause ‘All our disputes are exclusively subject to Austrian law, excluding private international law, and the CISG’ is less clear. Similarly, a choice of ‘the national law of [a Contracting State] as set out in the statutes of [that Contracting State] and developed by its courts’ is also unclear, since the CISG may indeed be implemented by domestic legislation and will naturally be the subject of domestic court cases.<sup>59</sup> In these cases where what would

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<sup>52</sup> Federal Supreme Court, Switzerland, 16 December 2012, 4A\_240/2009, CISG-online Case No 2047 (‘dass Schweizer Recht zur Anwendung gelange, und zwar so, wie wenn inländische Parteien betroffen wären’)(translation by Landolt, *supra* note 3; Hof’s-Hertogenbosch [Appellate Court], Netherlands, 13 November 2007, *supra* note 27 (although the court also took into account the fact the party arguing for application of CISG did not raise it until rejoinder)(translation by S. Kruisinga).

<sup>53</sup> *Accord Nidera SA v. General Oil Trading BV*, District Court Rotterdam, Netherlands, 2 March 2011 [2.5] <<http://cisgw3.law.pace.edu/cases/110302n1.html>> (rejecting argument inclusion of ‘cash against documents’ term implied choice of English law).

<sup>54</sup> Although this was not expressly stated as the reasoning for the court’s conclusion, see *Houweling Nurseries Oxnard, Inc. v. Saskatoon Boiler Mfg. Co. Ltd.*, Queen’s Bench for Saskatchewan, Canada, 14 March 2011 [90]-[93] <<http://cisgw3.law.pace.edu/cases/110314c4.html>> (where the court applied local sales law after deciding an attempt to exclude terms implied terms by those laws had been unsuccessful, but did not explain why it omitted to apply the CISG, despite its potential applicability being drawn to the court’s attention in the pleadings).

<sup>55</sup> *Oberster Gerichtshof* [Supreme Court], 2 April 2009, *supra* note 27 (the clause read ‘Gerichtsstand. Gerichtsstand für alle Streitigkeiten ist Steyr. Für alle unsere Streitigkeiten gilt ausschliesslich österreichisches Recht, ausgenommen IPR, und UN-Kaufrecht’; Schroeter, *supra* note 18, at 22, note 122).

<sup>56</sup> *Accord Schwenzer & Hachem*, *supra* note 3, Art. 6, at 108-109 para. 14; *Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd.*, *supra* note 28; *American Mint LLC v. GOSoftware, Inc.*, *supra* note 28; *Travelers Property Casualty Company of America v. Saint-Gobain Technical Fabrics Canada Ltd.*, *supra* note 22. *Contra* *American Biophysics v. Dubois Marine Specialties*, *supra* note 35; *Mistelis*, *supra* note 1, at 105 para. 18 & 107 para. 23.

<sup>57</sup> *Accord Appellate Court (OLG) Stuttgart*, 31 March 2008, *supra* note 37.

<sup>58</sup> *Accord Olivaylle Pty Ltd v Flottweg GmbH & Co KGAA (No 4)*, 20 May 2009, *supra* note 14.

<sup>59</sup> This was the choice of law indicated in the 21<sup>st</sup> Annual Willem C. Vis International Commercial Arbitration Moot Problem, 2014, with the Contracting State in question being the fictitious Medditeraneo.

be reasonably understood as the intent is unclear, a generally strict approach would favour application of the CISG unless other evidence existed that exclusion was intended by the parties. On the other hand, choice of the law of a non-Contracting State would generally indicate a sufficiently clear intention not to be bound by the CISG.

**4.10** Without more, a jurisdiction clause will not imply exclusion of the CISG where the forum selected is located in a Contracting State. This was upheld in some court decisions. In one German case, it was correctly reasoned that whilst a choice of forum might otherwise ‘hint’ as to the law intended, this ‘hint’ is based on the underlying assumption that parties would not normally choose a forum intending it to apply foreign law. This assumption, however, bears no relevance to the CISG, which is not foreign law in Contracting States.<sup>60</sup> However, the assumption might have relevance for choice of a non-Contracting State court, which could accordingly indicate an intent to exclude.

**4.11** It can be contemplated that parties might sometimes refer, especially in relation to matters not governed by the CISG, to a non-CISG domestic law or provisions of a domestic law. This might be the case, for example: in a retention of title clause, whereby parties refer to a domestic law that deals with property or title issues which are excluded by Art. 4(b) CISG;<sup>61</sup> or, in a franchise or distribution agreements where domestic laws dealing with agency or validity are chosen (see Art. 4(a)), or other situations in which a law concerning assignment is chosen. In such situations, much will turn on the wording of the clause. However, in the absence of other evidence, the application of a high threshold for intent would generally result in the following:

- (a) If the wording makes it clear that the choice of a purely non-CISG domestic law is in relation only to matters not governed by the CISG, then the choice operates only to fill external gaps in the CISG for the nominated issues that extend beyond its scope. This recognizes parties, cognizant of the CISG’s limits, may have made provision for matters with which it does not deal;<sup>62</sup>
  
- (b) If the choice is only in relation to a limited issue (*e.g.*, risk, anticipatory breach, payment of price)<sup>63</sup> which is covered by the CISG, then the choice may amount to a

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<sup>60</sup> Appellate Court (OLG) Stuttgart, Germany, 31 March 2008, *supra* note 37; Handelsgericht [Commercial Court](HG) Aargau, Switzerland, 10 March 2010, CISG-online No 2176 <<http://cisgw3.law.pace.edu/cases/100310s1.html>> (the Court held that a choice of forum clause selecting a court in a CISG Contracting State would not suffice for exclusion of the CISG under Art. 6, because such a court must apply the CISG as part of its own law)(translation by U. Schroeter). *See also* Appellate Court (OLG) Linz, 23 January 2006, *supra* note 24, at [2.2] (overturned on appeal by Supreme Court, Austria, 4 July 2007, *supra* note 24). *Contra* Obergericht [Appellate Court] Aargau, Switzerland, 3 March 2009 <<http://cisgw3.law.pace.edu/cases/090303s1.html>> (*inter alia*, considering that a jurisdiction clause was relevant, although ultimately exclusion was not upheld)(translation by Landolt, *supra* note 3 & A. Raab).

<sup>61</sup> In *Roder Zelt- und Hallenkonstruktionen GmbH v. Rosedown Park Pty Ltd* (1995) 57 FCR 216 <<http://cisgw3.law.pace.edu/cases/950428a2.html>> the CISG was governing law, but the main issue was property in goods where an administrator had been appointed. The court rightly held the Romalpa/retention of title clause to involve matters outside the CISG, but still correctly determined whether the ROT clause had been incorporated by reference to CISG formation provisions. A building lien was registered under the Swiss Civil Code by a subcontractor in Appellate Court, Aargau, Switzerland, 3 March 2009, *supra* note 60 (raising without deciding the question as to which law applied to the potential actions: CISG Art. 41, Austrian or Swiss law) (translation by Landolt, *supra* note 3 & A. Raab).

<sup>62</sup> This approach was followed by the Geneva Cour de justice [Appellate Court], Switzerland, 12 March 2010, C/13279/2006, CISG-online Case No 2426 (pleading Belgian law was not considered as a tacit exclusion since areas of law concerned were outside scope of CISG) (translation by P. Landolt, *supra* note 3). *See also*, Federal Supreme Court (BGH), Germany, 23 July 1997 (Benetton II), *supra* note 27.

<sup>63</sup> *See* Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 12 November 2004 <<http://cisgw3.law.pace.edu/cases/041112r1.html>> (derogation relating to risk, anticipatory breach); Cour de justice [Appellate Court] de Genève, Switzerland, 22 October 2010, CISG-online Case No 2430

derogation from the CISG in relation to those matters, but not a full exclusion, consistent with the approach to nomination of INCOTERMS below [§4.12];

- (c) If the choice is not limited to specific matters, but appears to be more general in nature, then the general approach endorsed in this Opinion should be applied.<sup>64</sup>

**4.12** A choice of law indicating parties have selected a body of rules as opposed to national law will be subject to the applicable rules on the validity of the choice of law. Whether such a choice is a sufficiently clear indication of intent to exclude the CISG depends on the scope of the rules of law validly chosen. If such rules have much the same scope or a wider scope than the CISG, an intention to exclude would normally be sufficiently clear. For example, if parties select the UNIDROIT Principles of International Commercial Contracts,<sup>65</sup> in most cases they would be reasonably understood to be to have intended that the UNIDROIT Principles apply rather than the CISG, provided the choice is valid.<sup>66</sup> Where such a choice is not allowed under applicable law, intent to exclude the CISG in the absence of positive choices of rules of law will not be sufficiently clear. Selection of INCOTERMS concerns a narrow range of issues, therefore cannot of itself objectively manifest a clear intent to exclude the entire CISG rather than mere derogation from some of its provisions, such as risk, documentation, and payment terms.<sup>67</sup>

**4.13** The now withdrawn proposed EU Regulation for a European Sales Law (Draft CESL) provided for application on an ‘opt-in’ basis.<sup>68</sup> There was some controversy over how the application of the CISG and application of the Draft CESL would interface.<sup>69</sup> It had been

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<<http://globalsaleslaw.com/content/api/cisg/urteile/2430.pdf>> (derogation from Art. 58 by valid settlement on price, CISG otherwise applicable)(translation by C. Baasch Andersen).

<sup>64</sup> For example, for choice of Contracting State law simpliciter without exclusion, discussed above at §42. As to the general approach to the gap filling function of residual national law in such situations to those matters not governed by the CISG, see comments of Economic Chamber of Peoples’ Supreme Court, Cuba, 16 August 2008, *supra* note 27 (translated in Addendum Table of Cases below, translation by P. Perales Viscasillas).

<sup>65</sup> International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts 2010 (Rome: UNIDROIT)(UNIDROIT Principles).

<sup>66</sup> The same would be true of a choice of the Principles of European Contract Law. See Commission on European Contract Law, Principles of European Contract Law, Parts I & II (1999) & Part III (2003), available at <http://www.cisg.law.pace.edu/cisg/text/textef.html> (PECL/‘Lando Principles’).

<sup>67</sup> *Accord* Oberster Gerichtshof [Supreme Court], Austria, 22 October 2001, *supra* note 17; Mistelis, *supra* note 1, at 106 para. 20 (stating this view is ‘indisputably correct’). Similarly, if the terms of the contract do not provide for consequences of proposals to continue the contract, then Art. 71(3) may step in to provide the solution: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 12 November 2004, *supra* note 63.

<sup>68</sup> The proposal was withdrawn 16 December 2014 in the EU Commission Work Program for 2015 Item 60. See *Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, art. 3, COM (2011) 635 final (10 November 2011) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF>>, adopted by EU Parliament: *European Parliament legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law* (COM(2011)0635 – C7-0329/2011 – 2011/0284(COD))(Ordinary legislative procedure: first reading), Art. 3 (as amended)

<<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0159>>.

<sup>69</sup> CESL Regulation, *id.*, at para. [25](a choice to opt into CESL should imply intent to exclude CISG). See also Franco Ferrari, *CISG and OHADA Sales Law*, in U. Magnus (ed.), *CISG vs Regional Sales Law Unification* 79, 88 (Sellier 2012)(in relation to OHADA and Art. 90). *Contra* P. Schlechtriem & P. Butler, *UN Law on International Sales* 239 (Springer (stating that while other international agreements prevail over the CISG pursuant to Art. 90, that ‘does not apply to [EU] legislation, regulations and directives’ and that for such instruments to prevail the relevant State ‘has to make a declaration under Articles 94(1) or (2) CISG’); I. Schwenzer, *The Proposed Common European Sales Law and the Convention on the International Sale of Goods* 44 *UCC Law Journal* 457, at 459 (2012)(noting whilst CESL drafters consider choice of CESL to be implied exclusion of the CISG, that ‘Whether such a disposition can be ordered by the European authorities seems at least very doubtful, as the question whether the parties validly opted out from the CISG is entirely to be decided autonomously under the CISG itself’); see also I. Schwenzer & D. Tebel, *The World is Not Enough*, 31 *ASA Bulletin* 740, 762 (2013); U. Schroeter, *Global Uniform Sales Law -- With a European Twist? CISG Interaction with EU Law*, 13

argued that the CISG should prevail over the Draft CESL where both instruments applied, such as where a CESL opt-in did not amount to a valid exclusion of the CISG, since ‘the CISG remains applicable if not validly excluded, and CESL respects the principal prevalence of the CISG’.<sup>70</sup> This approach would be consistent with the requirement of a clear intent for exclusion of the CISG.

**4.14** Terms exchanged by the parties may differ in that one party has attempted to exclude the CISG and the other has not. In this situation the question of intention to exclude is problematic. The approach that best accords with the position that clear intent is necessary under Art. 6 would require both parties to positively assent to the exclusion before exclusion is effective. If both choose Contracting States, but only one excludes the CISG, there can be no clear agreement to exclude for the purposes of Art. 6.<sup>71</sup> Yet even if parties exchange standard terms both purporting to exclude the CISG, their intent may still be unclear. For example, one party may indicate a choice of Danish law excluding the CISG, and the other might indicate Spanish law excluding the CISG. Neither Danish nor Spanish law will be applicable pursuant to the knock out method of dealing with conflicting standard terms expressed in CISG Advisory Council Opinion No 13, Rule 10.<sup>72</sup> However, the common exclusion of the CISG should not usually be allowed to stand independent of the connected positive indications of choice of law, since it might well be that, absent their respective positive choices of law, and in the absence of any remaining positive choice, parties would rather that the CISG apply than resort to the uncertainty of default conflicts rules. In any event, the intention of parties in relation to exclusion is unlikely to be sufficiently clear.

**5. During legal proceedings an intent to exclude may not be inferred merely from failure of one or both parties to plead or present arguments based on the CISG. This applies irrespective of whether or not one or both parties are unaware of the CISG’s applicability.**

**5.1** Court decisions on purported exclusion of the CISG’s application during the course of legal proceedings by reason of failure to plead or argue the CISG during legal proceedings do not exhibit similar levels of uniformity to that displayed by *ex ante* exclusion decisions. A number of anomalies seem evident. There is an unsatisfactory variety of outcomes amongst cases involving similar circumstances. The uniformly strict approach to intent to exclude at the *ex ante* stage is not evident, despite the fact that both involve interpretation of Art. 6.

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Vindobona Journal of International Commercial Law & Arbitration 179, at 190-191 (discussing complications in the interface with an EU instrument).

<sup>70</sup> Ulrich Magnus, *The Roots and Traces of the CISG in the Draft of a Common European Sales Law* in I. Schwenzer & L. Spagnolo (eds), *Boundaries and Intersections* 1, 4 (Eleven, 2014).

<sup>71</sup> While the Draft Hague Principles on Choice of Law acknowledges that if CISG Art. 1 conditions are met, the CISG is applicable in the absence of an exclusion agreement under Art. 6 [6.25], they understandably do not consider the preliminary threshold requirements under Art. 6 before such exclusion should become effective in removing the CISG’s application. Nonetheless, the Draft Principles suggest a solution on a conflicts approach [6.27], stating that where in a battle of standard terms A chooses a Contracting State X’s law, and B chooses a different Contracting State Y’s law but purports to opt out of the CISG, then one should compare the battle of the forms rules under the CISG (either last shot or knock out) with the rule under Y’s law (excluding the CISG). If Y operates under a knock out rule, then both choices of law are knocked out, leaving no choice of law, and thus CISG applies: Revised Draft Hague Principles on Choice of Law in International Commercial Contracts, Prel. Doc. No 6, July 2014 <[http://www.hcch.net/index\\_en.php?act=text.display&tid=49](http://www.hcch.net/index_en.php?act=text.display&tid=49)>.

<sup>72</sup> *Supra* note 5. Notably, in one case where there were differing choices of law (albeit not involving exclusion of the CISG) it was held that no contract was formed at all, however, the court mistakenly applied domestic knock out principles rather than within the framework of formation under the CISG: *Hanwha Corporation v. Cedar Petrochemicals, Inc.*, U.S. District Court, New York, 18 January 2011 <<http://cisgw3.law.pace.edu/cases/110118u1.html>>.

Moreover, courts and tribunals have relied on an unsatisfactorily wide range of rationale for decisions in such circumstances.

**5.2** There are a number of cases where parties did not refer to the CISG in pleadings or argument, or only did so upon appeal, despite the fact it was the applicable law. The applicability of the CISG has been overlooked in first instance hearings due to failure by parties to plead or argue the CISG, leading to decisions based on domestic law.<sup>73</sup> In some decisions, reference to domestic law without mention of CISG during proceedings led to the conclusion that the CISG was ‘inapplicable’.<sup>74</sup> In some cases, non-application of the CISG has been upheld upon appeal,<sup>75</sup> sometimes on the basis that the manner in which proceedings were conducted precludes application of the CISG.<sup>76</sup> Alternatively, the CISG has sometimes been applied upon appeal for the first time,<sup>77</sup> or the matter remitted to lower courts with a direction to determine the case pursuant to the CISG.<sup>78</sup> Conversely, in other cases, the CISG was applied by the court regardless of the fact that counsel did not present CISG based

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<sup>73</sup> See, e.g., Oberlandesgericht [Appellate Court](OLG) Naumburg, Germany, 13 February 2013 <<http://cisgw3.law.pace.edu/cases/120213g1.html>>; Ho Myung Moolsan, Co. Ltd. v. Manitou Mineral Water, Inc., *supra* note 35; Rienzi & Sons, Inc., v. Puglisi, *supra* note 35 (relying on Ho Myung Moolsan case in applying NY UCC where parties failed to plead the CISG other than in one incidental paragraph and did not mention it in preliminary conference) Italian Imported Foods Pty Ltd v. Pucci Srl, New South Wales Supreme Court, Australia, 13 October 2006 <<http://cisgw3.law.pace.edu/cases/061013a2.html>>; Gammatex International Srl v. Shanghai Eastern Crocodile Apparels Co. Ltd., Shanghai First Intermediate People’s Court, China, 21 August 2002 <<http://cisgw3.law.pace.edu/cases/020821c1.html>>(translation W. Long). See Spagnolo, *supra* note 3, at 197-199; Y. Xiao & W. Long, *Selected Topics on the Application of the CISG in China*, 20 Pace Int’l L.Rev. 61, at 71 (2008) <<http://www.cisg.law.pace.edu/cisg/biblio/xiao-long.html>> (*‘Application of the CISG in China’*).

<sup>74</sup> Amanda Waters, *Digest*, ICC Award No. 8453/1995, October 1995, *ICC Court of Arbitration Bulletin*, 2000, 55 <<http://cisgw3.law.pace.edu/cases/958453i1.html>> (stating that as ‘[b]oth parties agree that the contract is subject to French law and neither party referred to CISG’ that the CISG ‘was considered inapplicable’). Similarly, see Shanghai First Intermediate People’s Court, China, 22 March 2011 <<http://cisgw3.law.pace.edu/cases/110322c1.html>> in which the parties’ arguments at first instance were based only on Chinese domestic law. On appeal the court upheld this as a choice of Chinese domestic law, concluding that this meant ‘the parties agreed on the application of [Chinese domestic law] during the proceedings at 1st instance, thereby excluding the application of the CISG’ (translation W. Long).

<sup>75</sup> Industrias Magromer Cueros y Pielas SA v. Sociedad Agrícola Sacor Limitada, Corte Suprema [Supreme Court], Chile, 22 September 2008 <<http://cisgw3.law.pace.edu/cases/080922ch.html>> (*sub-nom* Jorge Plaza Oviedo v. Sociedad Agrícola Sacor Limitada); J. Oviedo-Albán, *Exclusión tácita de la ley aplicable e indemnización de perjuicios por incumplimiento de un contrato de compraventa internacional (a propósito de reciente jurisprudencia chilena)*, 14 Int’l Law, *Revista Colombiana de Derecho Internacional* 191, at 203, note 22 & 214 (2009) at 194, 195, 198, 199 & note 7. The CISG was only argued in the Court of Appeal and Supreme Court: Oviedo-Albán, *id.*, at 194 & 195 (stating the decision was incorrect).

<sup>76</sup> GPL Treatment v. Louisiana-Pacific Corp., 894 P. 2d 470 (Or. Ct App., 1995), 12 April 1995; aff’d 914 P. 2d 682 (Or, 1996), Oregon Court of Appeals, U.S.A. <<http://cisgw3.law.pace.edu/cases/950412u1.html>>; (domestic ‘in writing’ requirement was displaced by the CISG, but counsel for plaintiff failed to raise this until late in the trial, and case was decided on basis of UCC). See also, W. S. Dodge, *Teaching the CISG in Contracts*, 50 *Journal of Legal Education* 72, at 74 (2000); H. M. Flechtner, *Another CISG Case in the US Courts: Pitfalls for the Practitioner and Potential for Regionalized Interpretations*, 15 *J. L. & Com.* 127, at 131 (1995); Ferrari, *International Legal Forum*, *supra* note 16, at 220, n. 742.

<sup>77</sup> Appellate Court (OLG) Naumberg, 13 February 2013, *supra* note 73; Oberlandesgericht [Appellate Court](OLG) Linz, Austria, 25 July 2008, GZ 3 R 46/08t-49 (applying CISG despite lower court and parties overlooking the CISG in Landesgericht [District Court](LG) Steyr, Austria, GZ 4 Cg 146/05m-45, 29 January 2008. At first instance, both parties and the court referred to domestic law including Art. 922 Allgemeines Bürgerliches Gesetzbuch 1811 [Austrian General Civil Code](ABGB). On further appeal to the Supreme Court, exclusion of CISG upheld on basis of original choice of law, conduct of the case at first instance, and held there had been an infringement of § 182a ZPO by OLG in rendering surprise judgment): see Oberster Gerichtshof [Supreme Court], Austria, 2 April 2009, *supra* note 27, see also Petra Peer, *Abstract* <<http://cisgw3.law.pace.edu/cases/090402a3.html>>).

<sup>78</sup> Regional Court, Nitra, Slovak Republic, 15 October 2008 <<http://www.cisg.sk/en/15cob-140-2008.html>>; Supreme Court, Slovak Republic, 26 October 2006, <<http://www.cisg.sk/en/3obob-247-2005.html>>; Supreme Court, Slovak Republic, 28 February 2001 <<http://www.cisg.sk/en/2cdo-114-2000.html>>. However, one Slovak court interpreted such conduct as a choice of law, but pursuant to domestic law: Regional Court, Bratislava, Slovak Republic, 10 October 2007 <<http://www.cisg.sk/en/3cob-102-2007.html>> (interpreting failure to plead or argue the CISG as an exclusion of CISG and tacit choice of Slovakian domestic law pursuant to §9(1) of act no. 97/1963 Coll., on International Private and Procedural Law as amended)(translation by J. Kotrusz).



arguments, or inadequately argued the CISG.<sup>79</sup> In one Dutch case, the CISG was applied due to a choice of Dutch law during proceedings.<sup>80</sup>

**5.3** Amongst such cases, courts have often ignored Art. 6 in their decision as to whether to apply the CISG or domestic sales law. The domestic procedural principle of *iura novit curia* has been invoked to apply the CISG, but in other cases, the decision to apply non-CISG domestic law has been based on domestic waiver principles, discussed below [§6]. Yet the CISG governs exclusion during proceedings where it is prima facie applicable pursuant to Art. 1, just as much as during performance or at the time the contract is concluded.

**5.4** There has been a view that the *lex fori* controls which law is to be applied where both sides have not presented argument on the applicable law. The domestic procedural principle of *iura novit curia* (the court knows the law)<sup>81</sup> defines the respective roles of the court and parties in relation to the task of establishing which substantive law applies, and ascertaining the content of that law.<sup>82</sup> A court is said to be obliged to apply the applicable law irrespective of whether parties have invoked it in a forum that follows the principle.<sup>83</sup>

**5.5 Contracting States:** In Contracting States, courts must apply the CISG to an existing contract to which the CISG is applicable *ipso jure* from the nature of the CISG as

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<sup>79</sup> Tribunale di Vigevano, Italy, 12 July 2000 <<http://cisgw3.law.pace.edu/cases/000712i3.html>>; Appellate Court (OLG) Hamm, 9 June 1995, *supra* note 43, §§ I & II; Landgericht [District Court](LG) Landshut, Germany, 5 April 1995, *supra* note 32. *See also*, M. Torsello, *Italy*, in F. Ferrari (Ed.), *The CISG and Its Impact on National Legal Systems* 187, at 191–195, notes 20 & 22 & 209 (2008); Oviedo-Albán, *supra* note 75, at 204; Ferrari, *Digest & Beyond*, *supra* note 11 at 114 at 131 (2004). *See also* Landgericht [District Court] Saarbrücken (LG), Germany, 1 June 2004, CLOUT Case No 590 <<http://cisgw3.law.pace.edu/cases/040601g1.html>> at [I] (application of CISG not contradicted by the fact that the parties argued in their pleadings referring to provisions of their respective domestic laws, as that action, in itself, does not lead to an implicit exclusion of the CISG). Asserting a lack of cases on CISG applicability in light of conduct during legal proceedings, *see* Rienzi & Sons, Inc., v. Puglisi, *supra* note 35 (in dismissing a summary motion, there was “little case law interpreting the CISG” and no “controlling case considering application of the CISG that addresses post-contract actions, particularly, the parties’ actions during the course of litigation”).

<sup>80</sup> *See* Eyroflam SA v. PCC Rotterdam BV, Rechtbank [District Court](Rb) Rotterdam, Netherlands, 15 October 2008 <<http://cisgw3.law.pace.edu/cases/081015n2.html>> (holding that a choice of Dutch law during proceedings led to applicability of CISG). Notably, seller had argued the CISG applied and the buyer left the applicability open: *id.*, para. 7.2.

<sup>81</sup> Ferrari *International Legal Forum*, at 220, *supra* note 16 (1998); Peter Huber, *Scope of Application*, in Peter Huber & Alastair Mullis, *The CISG: A New Textbook for Students and Practitioners* 41, 65 (Sellier 2007); J. Oviedo-Albán, *supra* note 75 at 203, note 22 & 214 (2009)(denying applicability of the CISG unless the parties invoke it or [*i*] *iura novit curia* applies and criticising the Chilean *Industrias Magromer case*, *infra* note 75, for non-application of the CISG on the basis that the court failed to observe the procedural law of the forum which was subject to *iura novit curia*); M. Reimann, *The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care*, 71 *RebelsZ* 115, at note 48 & accompanying text (2007); Bridge, *supra* note 10, at 917; M. Torsello, *Italy*, in F. Ferrari (Ed.), *The CISG and Its Impact on National Legal Systems* 187, at 191–192 & note 20 (2008); F. Ferrari, *Remarks on the UNICITRAL Digest’s Comments on Article 6 CISG*, 25 *J. L. & Com.* 13, at 30–31 (2005); P. Schlechtriem & P. Perales Viscasillas, *Case note on decision of Court of First Instance of Tudela (Spain) 29 March 2005*, at note 10 (2005) <<http://www.cisg.law.pace.edu/cisg/biblio/perales4.html>> (“Whether counsel pleading for the parties properly introduced the applicable provisions of the CISG is not known to these annotators, but would be irrelevant, since *iura novit curia*”); A. Pribetic, *An “Unconventional Truth”: Conflict of Laws Issues Arising under the CISG*, at 27, presented at the Continuing Legal Education Program, Toronto, 10 March 2009, at 27; F. Mazzotta, *The International Character of the UN Convention on Contracts for the International Sale of Goods: An Italian Case Example*, 15 *Pace Int’l L. Rev.* 437, at 443 (2003); F. Ferrari, *Applying the CISG in a Truly Uniform Manner: Tribunale di Vigevano (Italy), 12 July 2000*, 1 *Uniform L. Rev.* 203, at 211 (2001); *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sales of Goods* (2008) Art. 6 para. [10] <[http://www.uncitral.org/pdf/english/clout/08-51939\\_Ebook](http://www.uncitral.org/pdf/english/clout/08-51939_Ebook)>. The 2012 version omits these comments: *UNCITRAL Digest of Case Law on the [CISG]* (2012), *supra* note 27, Art. 6 [14].

<sup>82</sup> T. Isele, *The Principle of Iura Novit Curia in International Commercial Arbitration*, 13(1) *Int’l Arbitration L. Rev.* 14, at 14 (2010); M. S. Kurkela, *‘Iura Novit Curia’ and the Burden of Education in International Arbitration – A Nordic Perspective*, 21(3) *ASA Bulletin* 486, at 490 (2003); S. L. Sass, *Foreign Law in Civil Litigation – A Comparative Survey*, 16 *Am. J. Comp. L.* 332, at 332 (1968).

<sup>83</sup> *See also*, Sass, S. L. Sass, *Foreign Law in Civil Litigation – A Comparative Survey*, 16 *Am. J. Comp. L.* 332, at 334-5 (1968).

international law, or as international law incorporated into domestic law. Courts in Contracting States are bound to apply the CISG whenever it is applicable pursuant to Art. 1. The duty is not derived from the forum's principle of *iura novit curia*. The conduct of counsel during proceedings does not unilaterally relieve the court of its duty. In Contracting States, the CISG is not a foreign law, but a part of the law of the forum.<sup>84</sup> Its applicability and content are therefore always questions of law, not fact, and default rules regarding substitution of domestic for unascertainable foreign law are irrelevant.<sup>85</sup>

**5.6 Non-Contracting States:** As courts in non-Contracting States are not bound by an obligation to apply the CISG, in such courts the procedural law of the forum remains determinative, thus domestic principles of *iura novit curia* are relevant. If such a court's own conflict rules point to the law of a Contracting State, application of the CISG will amount to application of a foreign law,<sup>86</sup> thus the extent to which a court considers itself either obliged or empowered to apply the CISG will be influenced by whether its procedural rules classify foreign law as a question of fact or law.<sup>87</sup>

**5.7 Arbitral tribunals:** The CISG itself does not impose any obligation upon arbitral tribunals to apply the Convention,<sup>88</sup> thus in principle no duty arises to apply the CISG *ex officio* where parties have remained silent on the issue. The respective roles of tribunals and parties in relation to identification and application of substantive law is derived from the procedural law of the arbitration, including mandatory due process rules,<sup>89</sup> the arbitration agreement and any arbitration rules agreed by the parties.<sup>90</sup> Some arbitral rules and laws

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<sup>84</sup> Bridge, *supra* note 10, at 916; Schwenger & Hachem, *supra* note 3, Introduction to Arts 1-6, at 19 para. 3; Spagnolo, *supra* note 9, 195-196; L. Sevón, *Method of Unification of Law for the International Sale of Goods*, in K. Buure-Hägglund (Ed.), *The Finnish National Reports to the Twelfth Congress of the International Academy of Comparative Law*, 11 at 14 (1986); *Georgia Pacific Resins, Inc. v. Grupo Bajaplay, S.A. de C.V., Baja California*, Fourth Panel of the Fifteenth Circuit Court [Federal Court of Appeals], Mexico, 9 August 2007 <<http://cisgw3.law.pace.edu/cases/070809m1.html>>.

<sup>85</sup> Spagnolo, *supra* note 9, at 195-96.

<sup>86</sup> Noting classification of the CISG as foreign law in such circumstances: I. Schwenger & P. Hachem, in I. Schwenger (Ed), Schlechtriem & Schwenger: *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Art. 1, at 40 para. 31(2010)('Schwenger 3<sup>rd</sup> edn'); Spagnolo, *supra* note 9, at 198-99.

<sup>87</sup> English courts cannot take judicial notice of foreign law: S. Geeroms, *Foreign Law in Civil Litigation: A Comparative and Functional Analysis* 114 (2004); M. Cappelletti & B. G. Garth, *Introduction – Policies, Trends and Ideas in Civil Procedure*, in M. Cappelletti (Ed.), *International Encyclopedia of Comparative Law*, Ch. 1, Vol. XVI, *Civil Procedure*, at 29, notes 176-177, §1-26 (1987). In the US, foreign law is now treated as a question of law, and federal courts and certain state courts are empowered (but not obliged) to take judicial notice of it: Rule 44.1 Federal Rules of Civil Procedure, U.S.A.. See *Frummer v. Hilton Hotels International, Inc.*, 60 Misc. 2d 840, 304 N.Y.S. 2d 335, Supreme Court, New York, U.S.A., 18 August 1969 (courts can take judicial notice of foreign law, but are not obliged to raise it *sua sponte*, unlike domestic law) <[http://www.leagle.com/decision/196990060Misc2d840\\_1654](http://www.leagle.com/decision/196990060Misc2d840_1654)>. By contrast, a duty to establish foreign law *ex officio* if necessary exists in some jurisdictions: see, e.g., F. Galgano, *The New Lex Mercatoria*, 2 Ann. Surv. Int'l & Comp. L. 99, at 105 & note 11 (1995)(Italian judges must ascertain and apply foreign law *ex officio*); S. L. Sass, *Foreign Law in Civil Litigation – A Comparative Survey*, 16 Am. J. Comp. L. 332, at 357 & note 85 (1968) (Italy); B. Bastuck & B. Gopfert, *Admission & Presentation of Evidence in Germany*, 16 Loy. L.A. Int'l & Comp. L. J. 609, at 622-623 (1994)(Germany); G. Dannemann, *Establishing Foreign Law in a German Court, Joint Workshops on Comparative Litigation Practice*, presented at British Institute of Int'l & Comparative Law & British-German Jurists Association, 30 June 1994, at text accompanying notes 4-7.

<sup>88</sup> CISG Advisory Council Opinion No 15: Reservations under Articles 95 and 96 CISG, Rapporteur Prof. Dr. Ulrich G. Schroeter, *Commentary* [3.19].

<sup>89</sup> G. Born, *International Commercial Arbitration* 1528 *et seq.* (2014, Kluwer); J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* 524 para. 21-17 (2003). Generally, see G. Cordero Moss, *Can an Arbitral Tribunal Disregard the Choice of Law made by the Parties?*, 1 Stockholm Int'l Arbitration Rev. 1, at 4 (2005).

<sup>90</sup> R. Goode, *Litigation or Arbitration? The Influence of the Dispute Resolution Procedure on Substantive Rights*, 19 Pace Int'l L. Rev. 53, at 56 (2007); Lew *et al*, *supra* note 89, at 427, para. 17-51; Schwenger & Hachem, *supra* note 3, Introduction to Arts 1-6, at 23 para. 13; G. Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 Vand. J. Transnat'l L. 1313, *passim* (2003).

contemplate the *iura novit arbiter* issue,<sup>91</sup> and empower arbitrators to look beyond party submissions (unless parties have agreed to the contrary), but do not oblige the tribunal to do so.<sup>92</sup>

**5.8 Appeals:** Appeal courts present additional considerations due to the diversity in rules regarding grounds for appeal and the options open to appellate courts where the lower court has applied the incorrect law.<sup>93</sup> Accordingly, a range of approaches is evident in cases which have proceeded to appeal where the CISG was not pleaded or argued at first instance. Some were remitted back to the lower court for re-determination under the correct law.<sup>94</sup> However, in other cases, appeal courts have declined application of the CISG on the basis of rules restricting the jurisdiction of the appellate court to matters raised at trial.<sup>95</sup> Where grounds of appeal are within judicial discretion,<sup>96</sup> the matter may turn on whether new arguments would be ‘futile.’ In such instances, allowing preliminary CISG argument would enable appellate courts to gauge the extent of potential futility.<sup>97</sup> Where rules of appeal allow for judicial discretion regarding new grounds, in Contracting States it is suggested that the duty of the court to apply the CISG should be taken into account in the exercise of that discretion. In other circumstances, appeal courts may choose to remit matters to lower courts for determination under the correct law, where such a course is open to the court under its own procedural rules.<sup>98</sup> Alternatively, where open to courts, leave to amend pleadings and an adjournment to enable presentation of argument upon the CISG may prevent infringement of any duty not to render ‘surprise’ judgments.<sup>99</sup>

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<sup>91</sup> For example, Rule 22(1) LCIA Rules gives the tribunal the power to ascertain and apply the law *sua sponte*, provided the parties have not agreed otherwise. See e.g., London Court of International Arbitration Rules 1998 (LCIA Rules) Rule 22(1). See also, less emphatically, Art. 21(1) ICC Rules of Arbitration (effective 1 Jan. 2012) (‘ICC Rules’). Similarly, the U.K. Arbitration Act s. 34(1) & (2)(g) specifically deals with this aspect of procedure: U.K. Arbitration Act 1996 s. 34(1) & (2)(g) states that unless parties agree otherwise, the arbitral tribunal may decide ‘whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law’. See also, M. S. Kurkela, ‘*Jura Novit Curia*’ and the Burden of Education in International Arbitration – A Nordic Perspective, 21(3) ASA Bulletin 486, at 493 (2003).

<sup>92</sup> *Supra* note 91. Indeed, some rules require tribunals to take account of contractual terms and usages ‘in all cases’, which by implication includes those where parties have not invoked them: Art. 21(2) ICC Rules; Art. 35(3) UNCITRAL Arbitration Rules 2010.

<sup>93</sup> For discussion, see Spagnolo, *supra* note 9, at 203-204.

<sup>94</sup> See, e.g., Regional Court, Nitra, Slovak Republic, 15 October 2008 <<http://www.cisg.sk/en/15cob-140-2008.html>>; Supreme Court, Slovak Republic, 26 October 2006 <<http://www.cisg.sk/en/3obo-247-2005.html>>; Supreme Court, Slovak Republic, 28 February 2001 <<http://www.cisg.sk/en/2cdo-114-2000.html>>.

<sup>95</sup> See e.g., GPL Treatment v. Louisiana-Pacific Corp., *supra* note 76, where the appeal court refused to hear CISG arguments. Counsel was not allowed to alter the pleadings and was held to have waived the CISG argument since it was not raised until late in the trial: Leeson J (dissenting, at note 8); H. M. Flechtner, *Another CISG Case in the US Courts: Pitfalls for the Practitioner and Potential for Regionalized Interpretations*, 15 J. L. & Com. 127, at 129 & note 11 (1995). Similarly, in accordance with rules of appeal and pleading, counsel was refused permission to amend pleadings to incorporate CISG argument for the first time at the appeal stage in the Australian case of Italian Imported Foods Pty Ltd v. Pucci Srl, New South Wales Supreme Court, Australia, 13 October *supra* note 73; see Spagnolo, *supra* note 3, at 197-199.

<sup>96</sup> GPL Treatment v. Louisiana-Pacific Corp., *supra* note 76; Italian Imported Foods Pty Ltd v. Pucci Srl, New South Wales Supreme Court, Australia, 13 October 2006, *supra* note 73; Summit Chemicals Pty Ltd v. Vetrotex Espana SA, Court of Appeal, Western Australia, 27 May 2004 <<http://cisgw3.law.pace.edu/cases/040527a2.html>>.

<sup>97</sup> For discussion see Spagnolo, *supra* note 3, at 193-199.

<sup>98</sup> Conversely, see Vrhovno sodišče v Celju [Celje High Court], Slovenia, 8 June 2011, *supra* note 48. In that case, the decision was remanded to the first instance court where the CISG had been applied by virtue of Art. 1(1)(a). The contractual choice of law was for ‘civil code and corresponding community regulations, but the court had failed to consider whether parties had excluded the CISG pursuant to Art. 6. <<http://cisgw3.law.pace.edu/cases/110608sv.html>>

<sup>99</sup> See also, discussing Austrian § 182a ZPO, Oberster Gerichtshof [Supreme Court], Austria, 2 April 2009, *supra* note 27 (and discussion *supra* note 77).

**5.9** The procedural principle of *iura novit curia* has been explicitly relied upon to justify application of the CISG in cases where counsel did not plead it.<sup>100</sup> Courts in some cases view conduct during proceedings as “waiver” without application of Art. 6 CISG. Indeed, within a single jurisdiction, conflicting decisions have been reached on this point.<sup>101</sup>

**5.10** On the other hand, in cases where Art. 6 has been relied upon as the basis for decisions on whether conduct of proceedings amounts to an agreement to exclude the CISG, the standards applied in relation to intent to exclude, and consequently the outcomes reached, have been widely inconsistent.<sup>102</sup> A number of court decisions uphold the notion that failure to mention the CISG during proceedings is not sufficient agreement to exclude.<sup>103</sup> By contrast, in other cases, the same conduct has been construed as demonstrating intent to exclude pursuant to the CISG, for example, in a Chilean case,<sup>104</sup> where failure to plead the CISG until the appellate stages was characterized as a tacit exclusion pursuant to Art. 6.<sup>105</sup> Spanish courts have also determined the CISG was tacitly excluded pursuant to Art. 6 due to the failure of parties to raise it until the appeal stage.<sup>106</sup> In China, Serbia and France, courts

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<sup>100</sup> Tribunale di Vigevano, Italy, 12 July 2000 <<http://cisgw3.law.pace.edu/cases/000712i3.html>> para 5 (‘[t]hus according to the principle *iura novit curia*, it is up to the judge to determine which Italian rules should be applied’); Tribunale Civile di Cuneo, Italy, 31 January 1996 <<http://cisgw3.law.pace.edu/cases/960131i3.html>> (‘[a]lthough the parties did not refer to the CISG, its rules must be followed by this Court from the principle *iura novit curia*’); Georgia Pacific Resins, Inc. v. Grupo Bajaplay, S.A. de C.V., Baja California, *supra* note 84 (where the court found it was irrelevant whether or not the parties had mentioned the CISG because of the principle of law ‘da mihi factur, dabo tibi ius’ and principle of ‘*iura novit curia*’); Tribunale di Padova, Italy, 25 February 2004 <<http://cisgw3.law.pace.edu/cases/040225i3.html>> (‘by virtue of the principle of *iura novit curia*, it is for the judge to determine the applicable Italian rules’).

<sup>101</sup> For example, compare Regional Court, Bratislava, Slovak Republic, 10 October 2007 <<http://www.cisg.sk/en/3cob-102-2007.html>>; Regional Court, Nitra, Slovak Republic, 15 October 2008, *supra* note 94; Supreme Court, Slovak Republic, 26 October 2006, *supra* note 94 (translation by J. Kotrusz).

<sup>102</sup> *Contra* Schroeter, *supra* note 18, at 9-10 (concluding that most courts are ‘sceptical’ in relation to whether conduct of proceedings demonstrates sufficiently clear intent to exclude).

<sup>103</sup> Tribunale Civile di Cuneo, Italy, 31 January 1996, *supra* note 100; Tribunale di Vigevano, Italy, 12 July 2000, *supra* note 100, paras 5 & 6; C. Sant’Elia, *Editorial Remarks* <<http://cisgw3.law.pace.edu/cases/000712i3.html>>; Tribunale di Forli, Italy, 16 February 2009, §4.3.3 <<http://cisgw3.law.pace.edu/cases/090216i3.html>>; Appellate Court (OLG) Stuttgart, Germany, 31 March 2008, *supra* note 37; Appellate Court (OLG) Hamm, 9 June 1995, *supra* note 43; District Court (LG) Landshut, 5 April 1995, *supra* note 32, §II.1.a (the fact that both parties based their case on the BGB ‘does not change anything’); Appellate Court (OLG) Linz, 23 January 2006, *supra* note 24; Tribunale di Padova, 25 February 2004, *supra* note 100; Oberlandesgericht [Appellate Court](OLG) Zweibrücken, Germany, 2 February 2004, §3 (‘the mere fact that the parties were not aware of the applicability of the CISG and therefore cited the provisions of national German Law ... is not to be considered as sufficient’) <<http://cisgw3.law.pace.edu/cases/040202g1.html>>; Oberlandesgericht [Appellate Court](OLG) Rostock, Germany, 10 October 2001 <<http://cisgw3.law.pace.edu/cases/011010g1.html>>; Oberlandesgericht [Appellate Court](OLG) Dresden, Germany, 27 December 1999 §A.II.1.b <<http://cisgw3.law.pace.edu/cases/991227g1.html>> (noting applicability of Art. 6, absence of conclusive exclusion, and stating ‘[t]he fact that the parties at first instance based their dispute on national German law does not lead to a different result’); Landgericht [District Court](LG) Bamberg, Germany, 23 October 2006 §II.1 (application of CISG ‘does not conflict with the fact that the parties have argued merely with reference to provisions of German law in their memoranda, since such practice does not in itself lead to an implied waiver of the CISG under Art. 6 CISG’); District Court (LG) Saarbrücken, Germany, 2 July 2002, CLOUT case No. 378 <<http://cisgw3.law.pace.edu/cases/020702g1.html>>. *See also*, ICC Award No. 7565/1994, *supra* note 27; UNCITRAL Digest, *supra* note 27, Art. 6, para. [14]. *But see* Bundesgerichtshof [Federal Supreme Court], Germany, 23 July 1997, *supra* note 27, at 3310 (court considering it relevant that ‘the defendant had expressly adhered to application of the CISG during the oral court hearing in the second instance of the proceedings’)(translation by Schlechtriem/Todd, *supra* note 27; Oberster Gerichtshof [Supreme Court], Austria, 2 April 2009, *supra* note 27 (exclusion of CISG upheld on basis of original choice of law, but also taken into account was the conduct of the case at first instance, and infringement of § 182a ZPO by OLG in rendering surprise judgment based on the CISG, which had been overlooked at first instance by both parties and the bench).

<sup>104</sup> *Industrias Magromer Cueros y Pielés SA v. Sociedad Agrícola Sacor Limitada*, *supra* note 75.

<sup>105</sup> *Industrias Magromer Cueros y Pielés SA v. Sociedad Agrícola Sacor Limitada*, *supra* note 75; Oviedo-Albán, *supra* note 75, at 194, 195, 198, 199 & note 7.

<sup>106</sup> Supreme Court, Spain, 24 February 2006 <<http://cisgw3.law.pace.edu/cases/060224s4.html>>, Pilar Perales Viscasillas, *Abstract* (not raised until third level of appeal, held tacit consent to domestic law, CISG inapplicable, court citing Art. 1); *BSC Footwear Supplies Ltd v. Brumby St.*, Audiencia Provincial de Alicante, Spain, 16 November 2000 <<http://cisgw3.law.pace.edu/cases/001116s4.html>> (deciding the CISG was tacitly excluded for three reasons, including

and tribunals appear to have applied the domestic law on the basis that failure of parties to invoke the CISG is tacit exclusion under Art. 6,<sup>107</sup> and it has been considered a relevant factor in determining exclusion in Dutch and Austrian cases.<sup>108</sup> In two cases, the French Cour de Cassation initially applied the domestic law on the basis of tacit exclusion due to failure by parties to invoke the CISG, although tacit exclusion was later limited by the Cour de Cassation to situations where parties fail to both plead and argue the CISG only.<sup>109</sup> While each case turns on its own facts, such differences in the interpretation of Art. 6 undermine uniformity, and should be resolved in favour of a more consistent approach.

**5.11** Cases applying Art. 6 CISG in regard to conduct of proceedings frequently set a far lower evidentiary standard for intent than at the time of contractual conclusion,<sup>110</sup> and in some cases courts appear quick to conclude exclusion without careful consideration. It is unsatisfactory that different evidentiary standards be employed in the interpretation of Art. 6 CISG. As concluded above, the better view is that the evidentiary standard for intent to exclude the CISG should be the same at all stages, although it may manifest in different ways depending on whether exclusion is *ex ante* or *ex post*. Further, as there is a high level of consistency amongst the decisions of courts and tribunals about the high level of clarity required for exclusion at the contractual stage, this is the appropriate degree of intent for a single uniform standard. Therefore at the post-contractual stage an equally high threshold for the standard of intent is required, and thus there must also be a clear agreement between parties to modify the contract so as to exclude the CISG.

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failure to raise the CISG in pleadings and failure to argue the CISG until appeal); *see also*, Perales Viscasillas, *Abstract*, *supra* note 34.

<sup>107</sup> *Gammatex International Srl v. Shanghai Eastern Crocodile Apparels Co. Ltd.*, *supra* note 73; Xiao & Long, *Application of the CISG in China*, *supra* note 73, at 71 (the court ignored the CISG's applicability despite fulfilment of the requirements of Art. 1(1)(a) and no apparent intent to exclude)(translation W. Long); High Commercial Court, Serbia, 9 July 2004 <<http://cisgw3.law.pace.edu/cases/040709sb.html>> (where there was no choice of law but both parties were from Contracting States, the court applied domestic Law on Contract and Torts based on connections of the contract to that State and the conduct of the case at first instance whereby parties argued on the basis of that law); CIETAC Arbitral Award No CISG/2006/17 <<http://cisgw3.law.pace.edu/cases/060500c3.html>> (tribunal ruled that the CISG governed the contract but applied domestic law because the parties pleaded only Contract Law of China); ICC Award No. 8453/1995, *supra* note 74.

<sup>108</sup> Hof's-Hertogenbosch [Appellate Court], Netherlands, 13 November 2007, *supra* note 27 (decision based partly on choice of law clause, and partly on the fact the CISG was not raised until rejoinder and had previously based argument on Dutch Civil Code)(translation by S. Kruisinga); Appellate Court, Aargau, Switzerland, 3 March 2009, *supra* note 60 (*inter alia*, it was considered relevant that one side had argued on the basis of non-uniform Swiss law and the other had not objected, although ultimately exclusion was not upheld)(translation by Landolt, *supra* note 3 & A. Raab).

<sup>109</sup> *Société Muller Ecole et Bureau v. Société Federal Trait*, Cour de Cassation, France, 26 June 2001 <<http://www.cisg-france.org/decisions/2606012v.htm>> & <<http://cisgw3.law.pace.edu/cases/010626f1.html>> (stating that while French judges must apply the CISG as the substantive law of French international sales, the parties had tacitly excluded under Art. 6 by 'failing to invoke the [CISG] before the French court'); Cour de Cassation, France, 25 October 2005, CISG-online Case No 1098 <<http://cisgw3.law.pace.edu/cases/051025f1.html>> ('that by invoking and discussing, without any reservation, the [French Civil Code] all of the parties ... voluntarily placed the resolution of their dispute under French domestic law' by exclusion under Art. 6). Thus it appears absence of reference during oral arguments is no longer conclusive in the current approach of the French Supreme Court, although absence in both pleadings and oral argument is still relevant. *See also* *Société Anthon GmbH & Co. v. SA Tonnellerie Ludonnais*, Cour de Cassation, France, 3 November 2009 <<http://cisgw3.law.pace.edu/cases/091103f1.html>> (overturning lower court's determination that 'the parties to the dispute thus recognized that the applicable provisions are those of the French Civil Code' based on the fact that while the seller had pleaded CISG provisions 'it had not requested the application of the [CISG] before the court'); C. Witz & E. d'Almeida *Abstract* <<http://cisgw3.law.pace.edu/cases/091103f1.html>>(commenting on the abandonment of the Cour de Cassation approach in the 26 June 2001 decision, *id.*, in favour of the approach in the 25 October 2005 decision, *id.*, and concluding that in the *Société Anthon* case, *id.*, the Supreme Court was correct in stating the lower court 'could not infer the wish of the parties to exclude the application of the [CISG]').

<sup>110</sup> *Contra* Schroeter, *supra* note 18, at 9-10 (stating most courts are 'skeptical' and require 'strict' standards of proof in relation to intent to exclude during proceedings).

**5.12** Moreover, more coherent and uniform results will flow from realignment of the *ex ante* and *ex post* interpretations of Art. 6, promoting uniformity: Art. 7(1).<sup>111</sup> Application of a high threshold for intent to exclude, the standard that is already applied by courts in relation to exclusion at the time of concluding a contract, enhances the purpose of the CISG in reducing barriers to trade. While a general principle of party autonomy underlies the CISG, and Art. 6 undoubtedly permits exclusion during proceedings, the divergence observed above demonstrates the need to develop a balanced and consistent approach as to how party autonomy may be legitimately exercised. Finally, it is anomalous that a lower evidentiary standard apply in relation to *ex post* exclusions than for *ex ante* exclusions,<sup>112</sup> since not only do the same provisions apply to both,<sup>113</sup> but in the case of *ex post* exclusion, because a CISG contract already exists, it follows that Art. 29 must also be satisfied.<sup>114</sup> Scholarly opinion suggests any type of modification under Art. 29 CISG requires clear intent, simply by virtue of the fact that an agreed bargain already exists.<sup>115</sup> This suggests that rather than a lower standard of intent, *ex post* exclusions should involve a high degree of evidentiary certainty. In view of the fact that exclusion by modification during proceedings involves *both* Arts 6 and 29, the appropriate measure of intent for *ex post* modifications should be no less stringent. The general requirement of restraint before *any* type of modification is upheld under Art. 29 CISG accords with the requirement of clear intent for *ex ante* exclusion pursuant to Art. 6. Combining both requirements in relation to the appropriate standard for exclusions during legal proceedings will realign evidentiary standards for exclusion at all contractual stages and ensure greater consistency and uniformity.

**5.13** This means that inferences of an intent to exclude by the way that proceedings are conducted should not be drawn lightly. Courts and tribunals must find parties have formed an agreement to exclude, and should not simply accept the mere conduct of proceedings without mention of the CISG in pleadings or argument as sufficient. Arts 6 and 29 require a clear indication of intent to modify the contract by agreement between parties. In interpreting conduct during proceedings under Art. 8, consistently with Art. 7(1) and the purpose underlying the CISG, courts and tribunals should be slow to find intent to exclude without clear indications of an agreement to that effect between parties.

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<sup>111</sup> Promotion of uniformity in the CISG's interpretation is described by Schlechtriem as a 'maxim': Uniform Sales Law 1986, *supra* note 11, at 38, §IVA.

<sup>112</sup> As Schroeter points out, the requirement of 'clear intent' pursuant to Art. 6 results in a stricter standard in relation to implicit choice of law than would otherwise apply under most private international law, where 'reliance by both counsel on the same domestic laws is often considered a valid choice of the law relied upon': Schroeter, *supra* note 18, at 10.

<sup>113</sup> Schlechtriem, in Schlechtriem & Schwenger 2<sup>nd</sup> edn, *supra* note 2, Art. 6, at 89 & 91 paras 12 & 14.

<sup>114</sup> Spagnolo, *supra* note 9, at 209-10 ('[w]hy then do courts consistently show great restraint regarding *ex ante* exclusion, yet frequently are ready to quickly accept *implicit* or *tacit* waiver as sufficient where a CISG contract already exists?').

<sup>115</sup> U. Magnus, *Incorporation of Standard Contract Terms under the CISG*, in C. B. Andersen & U. Schroeter (Eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, 303 at 324 (2008) ('Kritzer Festschrift'); Schroeter, *supra* note 10, Art. 29, at 476 para. 11; Perales Viscasillas, *supra* note 34, at 172; Schmidt-Kessel, *supra* note 3, Art. 8, at 172 para. 53; *Macromex Srl v. Globex International Inc.*, American Arbitration Association Award, 23 October 2007 <<http://cisgw3.law.pace.edu/cases/071023a5.html>> (aff'd 2008 WL 1752530 (S.D.N.Y.); aff'd 330 Fed Appx. 241, U.S. Court of Appeal (2<sup>nd</sup> Cir.) 26 May 2009) ('failure to object to a unilateral attempt to modify a contract is not an agreement to modify a contract') <<http://cisgw3.law.pace.edu/cases/090526u1.html>>; *Solae, LLC v. Hershey Canada, Inc.*, 557 F.Supp.2d 452, U.S. District Court Delaware, 9 May 2008 <<http://cisgw3.law.pace.edu/cases/080509u1.html>> ('Nothing in the [CISG] suggests that the failure to object to a party's unilateral attempt to alter materially the terms of an otherwise valid agreement is an 'agreement' within the terms of Article 29'). Björklund, *supra* note 8, at 384 para. 5 & 383 para. 4 (stating failure to protest as a form of acceptance 'has not been decided uniformly').

**5.14** Adjudicators should be careful to balance alternative inferences arising from the conduct of proceedings. Absent other evidence, the following examples provide some general indications of the appropriate level of caution, for reasons discussed below in [§§5.15-22]:

- (a) Mere failure by both parties to plead the CISG and one party to argue the CISG cannot generally be reasonably understood as offers to modify with sufficient intent to be bound, and cannot manifest a clear intent to exclude the CISG pursuant to an agreement to modify the contract under Art. 29;
- (b) Mere failure by both parties to argue the CISG where one or both have pleaded it would similarly be insufficient to manifest clear intent to exclude by modification. In accordance with the observation in (a) above that failure to plead the CISG in claims will not constitute an offer to modify, failures to raise the CISG in defence in response cannot be reasonably understood as acceptances of purported offers to modify pursuant to Art. 8(2) CISG;
- (c) Failure by both parties to plead the CISG, and of one to argue the CISG would similarly be insufficient to manifest clear intent to exclude by modification;
- (d) Mere failure by both parties to plead and failure by both to argue the CISG would also be insufficient to manifest clear intent to exclude by modification;<sup>116</sup>
- (e) Mutual lack of awareness of the CISG's applicability cannot amount to a clear intention to exclude, since there cannot be an agreement upon something of which parties are unaware;
- (f) Where one party pleads the CISG but then later withdraws their pleading, this may indicate of awareness of the CISG's applicability, but will not, without more evidence, be sufficient clear intention of the parties to exclude the CISG by agreement to modify the contract.

**5.15** Failure to invoke the CISG in argument can only constitute an implied agreement to exclude if it actually modifies the pre-existing CISG contract. Thus, in addition to Art. 6, the conduct would need to satisfy Art. 29 and Arts 11, 14-24.<sup>117</sup> Pursuant to Art. 14 CISG, *ex post* offers to exclude should exhibit an 'intent to be bound.' It is improbable that absence of argument on applicable law in litigation constitutes such binding intent. On the contrary, failure to mention the law sought to be excluded renders purported offers to modify insufficiently definite pursuant to Art. 14 CISG, as is true under the prevailing approach to *ex ante* exclusions.<sup>118</sup> In keeping with Art. 29 CISG, silence or inaction rarely constitutes an agreement to modify, and failure to object to modification offers amounts to assent only in 'very exceptional cases'<sup>119</sup> since there is already a contractual balance of rights and

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<sup>116</sup> *Contra* Société Anthon GmbH & Co. v. SA Tonnellerie Ludonnais, Cour de Cassation, France, 3 November 2009, *supra* note 109. *See* Supreme Court, Poland, 17 October 2008, M. Zachariasiewicz, *Abstract*, *supra* note 27 (both parties 'at certain stages of the proceedings...[put] forward arguments under Polish law [so] a question arose whether such concerted behaviour should be treated as a choice of Polish domestic law and an exclusion of the CISG'. The court ultimately held that counsel were not authorized to make a choice of law on behalf of parties, and their conduct of proceedings was simply 'an expression of the parties' legal representatives' which was insufficient for exclusion).

<sup>117</sup> *Supra* note 11.

<sup>118</sup> Spagnolo, *supra* note 9, at 211.

<sup>119</sup> *Supra* note 115.

obligations on foot.<sup>120</sup> Additionally, as Art. 29 is ‘highly fact-specific’,<sup>121</sup> the context of legal proceedings must be taken into account. Thus mere failure to object could only rarely amount to assent in the context of legal proceedings. A defence which answers only those arguments raised by the claimant cannot be reasonably understood as acceptance of a unilateral attempt to modify.

**5.16** Where the original contract contains a ‘no oral modification’ clause, the potential for tacit waiver by conduct of the case is further reduced, unless there has been reliance on the conduct: Art. 29(2) CISG. However, the ‘mere fact that a party has not pursued his remedies against the other party should ... not constitute a sufficient reliance’ for the purposes of Art. 29(2).<sup>122</sup> The manner in which a respondent formulates its response to claims should not be considered sufficient reliance in such situations.

**5.17** A purported offer to modify must be understood as such by a reasonable person to be effective.<sup>123</sup> The intention to be bound must be tested objectively under Art. 8(2), and not ‘rashly’ assumed.<sup>124</sup> This accords with the approach to attempts to modify during the contractual performance stage, where caution has been urged in interpreting conduct as acceptance of offers to modify.<sup>125</sup> Mere performance of the contract is normally not enough,<sup>126</sup> and clear assent is required. At the stage of legal proceedings, parties are frequently unaware of the ‘right’<sup>127</sup> they supposedly relinquish in forgoing CISG arguments, therefore there will often be an objective absence of agreement to modify where the CISG is not raised in argument.<sup>128</sup> As stated by one court: ‘[where the CISG] is applicable by operation of law ... [it cannot be sustained] that the silence of the parties constitutes an implied manifestation of the intent to exclude.’<sup>129</sup>

**5.18** Some Italian and German courts have adopted this approach, correctly denying that mere failure to argue the CISG amounts to an implicit agreement to exclude it.<sup>130</sup> As stated in one decision, the fact that ‘the parties based their arguments exclusively on ... domestic law ... cannot be considered an implicit manifestation of an intent to exclude application of the

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<sup>120</sup> Magnus, *supra* note 115, at 324; Schroeter, *supra* note 10, Art. 29, at 476 para. 11. *Contra* Ho Myung Moolsan, Co. Ltd. v. Manitou Mineral Water, Inc., *supra* note 35 (concluding that failure to plead or argue the CISG until just before trial began constituted ‘consent’ to application of the NY UCC rather than the CISG in light of a pleading by the claimant that relied only on ‘State Law’).

<sup>121</sup> Björklund, *supra* note 8, Art. 29, at 384 para. 7.

<sup>122</sup> Schroeter, *supra* note 10, Art. 29, at 486 para. 37.

<sup>123</sup> Art. 8(2) CISG. Thus courts have rejected supposed offers to modify consisting of standard terms on the reverse of invoices sent after conclusion of the contract: *Solae v. Hershey*, *supra* note 115; *Chateau des Charmes Wines Ltd v. Sabaté USA Inc.*, 328 F.3d 528, U.S. Court of Appeals (9<sup>th</sup> Cir.), 5 May 2003 <<http://www.unilex.info/case.cfm?pid=1&do=case&id=899&step=FullText>>. *See also*, Schroeter, *supra* note 10, Art. 29, at 475 & 476 paras 10 & 11; *Schmidt-Kessel*, *supra* note 3, Art. 8, at 173-174 para. 58.

<sup>124</sup> *Schwenzer & Hachem*, *supra* note 3, Art. 6, at 113 & 115 paras. 21 & 26.

<sup>125</sup> Schroeter, *supra* note 10, Art. 29, at 476 para. 11 (urging ‘particularly careful assessment’ as to whether acceptance of an offer to modify has occurred); Schroeter, *id.*, at 480 para. 19, (arguing in the context of agreements to terminate that ‘courts and arbitrators are well advised to exercise appropriate restraint in finding an agreement between the parties’).

<sup>126</sup> Acts of performance are not acts of assent: CIETAC Arbitration Award, China, 23 May 2000 <<http://cisgw3.law.pace.edu/cases/000523c1.html>> (‘Partial performance of the Contract should not be deemed as a modification of the quantity of the goods under the Contract’); *Chateau des Charmes Wines v. Sabaté*, *supra* note 123 (payment of invoice containing new choice of forum clause); *Solae v. Hershey*, *supra* note 115.

<sup>127</sup> Schroeter, *supra* note 10, Art. 29, at 485, note 119 para. 33; *Schmidt-Kessel*, *supra* note 3, Art. 8, at 164 para. 38.

<sup>128</sup> Spagnolo, *supra* note 9, at 212-13.

<sup>129</sup> Tribunale di Padova, 25 February 2004, *supra* note 100.

<sup>130</sup> *Supra* note 102.



[CISG].<sup>131</sup> Similarly, other decisions have correctly held that a failure to argue due to a misapprehension that domestic law was applicable or because parties were simply unaware of the CISG does not support an imputation of intent to exclude it.<sup>132</sup> The fact that argument was based on domestic law has been upheld as an agreement to apply the domestic law, but not to exclude the CISG.<sup>133</sup>

**5.19** Several commentators also agree that the ‘mere fact that the parties argue on the sole basis of a domestic law’<sup>134</sup> is not sufficient to indicate a clear intent to exclude. Notably, this differs from awareness of the CISG’s applicability in the context of a simple *ex ante* choice of law clause. In relation to exclusion during proceedings it has been forcefully argued that parties cannot intend to exclude the relevant law unless they are aware of its applicability.<sup>135</sup> Only then can parties ‘knowingly’ depart from the CISG by agreement.<sup>136</sup> since “[s]tatements based on ignorance are not agreements, because they lack the necessary ‘intention to be bound’; therefore they cannot alter the contents of a contract”.<sup>137</sup>

**5.20** Therefore, contrary to the approach taken in some cases,<sup>138</sup> pursuant to Art. 8 and in light of the need to find a clear agreement to exclude, courts and tribunals should be cautious and careful to consider *alternative explanations for the failure to plead or argue* the CISG during proceedings in which it is the applicable law.<sup>139</sup> How counsel conducts the case will rarely support a clear inference that satisfies both Arts 6 and 29. Rather than demonstrative of tacit agreement by the parties, counsels’ conduct may be a product of counsels’ own lack of awareness, misapprehension or simply convenience. Ignorance should not be equated with

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<sup>131</sup> Tribunale di Vigevano, Italy, 12 July 2000, *supra* note 100, para. 5 (‘The fact that [parties] based their arguments exclusively on Italian domestic law without any references to the [CISG] cannot be considered an implicit manifestation of an intent to exclude’).

<sup>132</sup> Tribunale di Vigevano, Italy, 12 July 2000, *supra* note 100 (stating it was to be assumed ‘the parties wanted to exclude the application of the [CISG] only if it appears in an unequivocal way that they recognized its applicability and they nevertheless insisted on referring only to national, non-uniform law’); Appellate Court (OLG) Hamm, 9 June 1995, *supra* note 43; District Court (LG) Landshut, 5 April 1995, *supra* note 32, §II.1.a; District Court (LG) Bamberg, Germany, 23 October 2006 <<http://cisgw3.law.pace.edu/cases/061023g1.html>>. See also Appellate Court (OLG) Linz, 23 January 2006, *supra* note 24, at [2.2] (overturned on appeal by Supreme Court, Austria, 4 July 2007, *supra* note 24); UNCITRAL Digest, *supra* note 27, Art. 6 at para. [14].

<sup>133</sup> Appellate Court (OLG) Hamm, 9 June 1995, *supra* note 43. The OLG Hamm decision stated that litigation exclusively based on BGB provisions implied a choice of German law, and hence the CISG applied; *id.*, I. See also, District Court Saarbrücken (LG), Germany, 1 June 2004, *supra* note 79; Ho Myung Moolsan, Co. Ltd. v. Manitou Mineral Water, Inc., *supra* note 35 (concluding that by referring to domestic law parties consented to application of New York UCC rather than the CISG); Rienzi & Sons, Inc., v. Puglisi, *supra* note 35.

<sup>134</sup> Ferrari, *International Legal Forum*, *supra* note 16, at 220 (arguing that this cannot ‘per se lead to the exclusion of the CISG’); Schlechtriem, in Schlechtriem & Schwenger 2<sup>nd</sup> edn, *supra* note 2, Art. 6, at 91 para 14.

<sup>135</sup> Ferrari, *International Legal Forum*, *supra* note 16, at 220; Appellate Court (OLG) Rostock, 10 October 2001, *supra* note 103; Tribunale di Vigevano, Italy, 12 July 2000, *supra* note 100.

<sup>136</sup> Schwenger & Hachem, *supra* note 3, Art. 6, at 113 para. 21 (stating that ‘conduct of the parties still needs to sufficiently indicate ... whether the parties knowingly departed from the otherwise applicable CISG’); Schmidt-Kessel, *supra* note 3, Art. 8, at 164 para. 38.

<sup>137</sup> Schlechtriem, in Schlechtriem & Schwenger 2<sup>nd</sup> edn, *supra* note 2, Art. 6, at 91 para. 14 (emphasis added).

<sup>138</sup> ICC Award No. 8453/1995, *supra* note 74; Shanghai First Intermediate People’s Court, 22 March 2011, *supra* note 74; Industrias Magromer Cueros y Pieles SA v. Sociedad Agrícola Sacor Limitada, *supra* note 75; BSC Footwear Supplies Ltd v. Brumby St., Audiencia Provincial de Alicante, 16 November 2000, *supra* note 106; Société Muller Ecole et Bureau v. Société Federal Trait, Cour de Cassation, 26 June 2001, *supra* note 109; Cour de Cassation, 25 October 2005, *supra* note 109; Gammatex International Srl v. Shanghai Eastern Crocodile Apparels Co. Ltd., *supra* note 73; Xiao & Long, *Application of the CISG in China*, *supra* note 73, at 71 (the court ignored the CISG’s applicability despite fulfilment of the requirements of Art. 1(1)(a) and no apparent intent to exclude)(translation W. Long). In addition, decisions relying on domestic waiver principles discussed below, see e.g., GPL Treatment v. Louisiana-Pacific Corp., *supra* note 76; Playcorp Pty Ltd v. Taiyo Kogyo Ltd, Victorian Supreme Court, Australia, 24 April 2003, at [235] & [245] <<http://cisgw3.law.pace.edu/cases/030424a2.html>>; Attorney-General of Botswana v. Aussie Diamond Products Pty Ltd [2010] WASC 141, Supreme Court of Western Australia, 23 June 2010 <<http://cisgw3.law.pace.edu/cases/100623a2.html>>.

<sup>139</sup> Spagnolo, *supra* note 9, at 214.

intent. A belief that domestic law applies is not *per se* evidence of an agreement to exclude the CISG,<sup>140</sup> as stated in better decisions on point.<sup>141</sup> Notably, unlike contractual exclusion clauses, reference to domestic laws alone during proceedings is not *per se* indicative of agreement to exclude the CISG. Misapprehension of counsel or even refusal to argue the applicable law should not be accepted as manifesting an informed intent by the parties to exclude the CISG by modification.<sup>142</sup> Adjudicators should be slow in accepting inferences that conduct of litigation amounts to an offer to modify and acceptance of that offer. Such inferences should only be accepted when they are the *most* plausible explanation for counsels' conduct, but rejected when other more plausible reasons exist.<sup>143</sup>

**5.21** Notably, in relation to legal proceedings, there is a pragmatic consideration that, by contrast with the contractual stage, the evidentiary record is not static. At any time during proceedings, greater levels of proof are attainable upon enquiry by the adjudicator, simply by raising the matter with counsel<sup>144</sup> before, during or after the hearings. Thus the balancing of inferences need not be hypothetical at all. If counsel present an express agreement by informed parties to exclude during proceedings, the requirement of clear intent to modify by agreement is satisfied.<sup>145</sup>

**5.22** The requirement of a clear intent to exclude during legal proceedings does not rule out the possibility of implicit intent, but means the relevant provisions of the CISG will rarely be satisfied when applied correctly.<sup>146</sup> Importantly, this does not interfere with party autonomy. On the contrary, it mirrors the requirement for free choice to be 'clearly demonstrated' in other private international law contexts.<sup>147</sup> Adjudicators must be confident an agreement to

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<sup>140</sup> Ferrari, *International Legal Forum*, *supra* note 16, at 220; Schwenger & Hachem, *supra* note 3, Art. 6, at 113 para. 21 (arguing that 'basing arguments on provisions of domestic sales law is simply a mistake on the part of the attorneys' rather than evidence of an intent to exclude); Schlechtriem, in Schlechtriem & Schwenger 2<sup>nd</sup> edn, *supra* note 2, Art. 6, at 90-91 para. 14.

<sup>141</sup> Appellate Court (OLG) Stuttgart, 31 March 2008, *supra* note 37 (failure by parties to base allegations on the CISG does not imply post-contractual exclusion, since '[t]here is no mutual agreement of intent ... as this requires an express declaration of intent ... The application of the wrong provisions due to a legal misapprehension does not meet this requirement'); Tribunale di Padova, 25 February 2004, *supra* note 100 (pleadings referring only to non-uniform domestic law cannot of themselves amount to an exclusion of the CISG, as an intent to exclude the CISG, 'it must clearly show that [the parties] were aware of its applicability, and that they nonetheless insisted on referring only to the domestic rule'); Appellate Court (OLG) Rostock, 10 October 2001, *supra* note 103 ('Merely referring to [the domestic provisions] is insufficient, because such reference might also be made because the parties think that that law was applicable anyway'); Appellate Court (OLG) Linz, 23 January 2006, *supra* note 24; Appellate Court (OLG) Hamm, 9 June 1995, *supra* note 43; Tribunale di Forlì, 16 February 2009, *supra* note 103, at §4.3.3; District Court (LG) Landshut, 5 April 1995, *supra* note 32, §II.1.a (argument solely on the BGB 'does not change anything'); District Court (LG) Bamberg, Germany, 23 October 2006 <<http://cisgw3.law.pace.edu/cases/061023g1.html>>. See also, ICC Award No. 7565/1994, *supra* note 27; Tribunale di Vigevano, Italy, 12 July 2000, *supra* note 100, paras 5 & 6; Tribunale di Cuneo, 31 January 1996, *supra* note 100 (although the latter two were based on the domestic procedural rule).

<sup>142</sup> Spagnolo, *supra* note 9, at 214-15 (arguing moreover that counsels' 'ignorance, misapprehension or simply convenience' is insufficient).

<sup>143</sup> *Id.*, at 215.

<sup>144</sup> *Id.*, at 214. See also Xiao & Long, *Application of the CISG in China*, *supra* note 73, at 77 & 81-82.

<sup>145</sup> See Schroeter, *supra* note 18, at 16 (discussing Bundesgerichtshof (BGH), 11 May 2010, *Internationales Handelsrecht* 216 (2010) in which counsel had expressly agreed to apply 'German law' during proceedings, and the case was presented and decided on the basis of the German Civil Code (BGB) and German Commercial Code (HGB) by lower courts, but 'remarkably' the BGH nonetheless remanded the case and 'directed [the court below] to investigate whether the parties (acting through counsel) had really intended to choose the BGB and HGB'). Advocating such an approach: Spagnolo, *supra* note 9, at 217.

<sup>146</sup> *Id.*, at 215. See Schroeter, *supra* note 18, at 9-10 (stating most courts are already 'skeptical' due to concern that failure to argue the CISG results from counsel being unaware of its applicability).

<sup>147</sup> Art. 7(1) Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, 39 October 1986, 24 I.L.M. 1573, 1575 (1985) ('[t]he parties' agreement on this choice must be express or be clearly demonstrated') & Art. 3(1) Rome Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (L 266), 19 June 1980, 19 I.L.M. 1492 (1980) ('[t]he choice must be expressed or demonstrated with reasonable certainty'); Art. 3(1) Rome I Regulation (EC) No

exclude can clearly be inferred from conduct, and that such an inference is far more plausible than any other. This standard fosters clarification during proceedings.<sup>148</sup> It accords with the general principle of party autonomy, particularly given parties can reach agreement during proceedings.<sup>149</sup>

## **6. Domestic principles of waiver should not be used to determine the parties' intent to exclude the CISG.**

**6.1** A court's failure to apply the CISG as the applicable governing law may amount to a breach of international obligations. An absence of argument from counsel on the CISG cannot alter the court's fundamental obligation to apply the CISG.<sup>150</sup>

**6.2** The application of domestic principles of waiver during proceedings has played a key role in some decisions not to apply the CISG. For example, in the U.S. case of *GPL Treatment*, counsel's failure to argue the CISG was held to amount to a waiver, which permitted the court to apply the pleaded but inapplicable domestic law.<sup>151</sup> The Court of Appeal did not decide whether there had been an exclusion pursuant to the CISG, but a dissenting judgement footnote concluded that because the 'attempt to raise the CISG was untimely ... that they had waived reliance on that theory.'<sup>152</sup> In another US case, the fact that the CISG was not pleaded and only first raised in argument just after the preliminary stage of proceedings when the trial was about to commence, was considered to amount to 'consent' to apply local law rather than the applicable CISG.<sup>153</sup> Similarly, in a number of Australian cases, it was concluded application of the CISG was 'unnecessary' due to the manner in which cases were conducted by counsel, including absence of any suggestion by counsel that the CISG was 'inconsistent' with domestic sales law, thereby justifying the latter's application.<sup>154</sup>

**6.3** Domestic procedural rules of waiver are not displaced by the CISG.<sup>155</sup> However, the CISG itself determines the question of its exclusion, and autonomously controls its own sphere of applicability.<sup>156</sup> Accordingly, for contracts to which it already applies *ipso jure*, the

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593/2008 on the Law Applicable to Contractual Obligations, 2008 O.J. (L. 177/6), 4 July 2008 ('[t]he choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case'). *But see* Schroeter, *supra* note 18, at 10 (concluding Art. 6 imposes a stricter requirement than most private international law for expression of intent regarding choice of law).

<sup>148</sup> Spagnolo, *supra* note 9, at 215.

<sup>149</sup> *Id.*, at 215. *See, eg.*, the approach taken by the Supreme Court (BGH), Germany, 11 May 2010, *supra* note 145; Foreign Trade Court attached to the Serbian Chamber of Commerce, 27 December 2010 <<http://cisgw3.law.pace.edu/cases/101227sb.html>> (during the oral hearing parties reached agreement to explicitly exclude the application of the CISG).

<sup>150</sup> Stating the applicability of the CISG is not dependant on a claim by the parties, but is to be examined *ex officio* by the court: I. Schwenzer & P. Hachem, *in* Schwenzer 3<sup>rd</sup> edn, *supra* note 3, Introduction to Arts 1-6, at 19-20 para. 3.

<sup>151</sup> The CISG was raised in argument only very late in the trial: *GPL Treatment v. Louisiana-Pacific Corp.*, *supra* note 76, *See also* *Italian Imported Foods Pty Ltd v. Pucci Srl*, *supra* note 73.

<sup>152</sup> *GPL Treatment v. Louisiana-Pacific Corp.*, *supra* note 76, Leeson J (dissenting, at note 8).

<sup>153</sup> *Ho Myung Moolsan, Co. Ltd. v. Manitou Mineral Water, Inc.*, *supra* note 35 (the court did not consider whether Art. 6 CISG was satisfied).

<sup>154</sup> The implementing legislation stated the CISG was to prevail to the extent of any inconsistency: ss. 5 & 6 Sale of Goods (Vienna Convention) Act 1987 (Victoria); *Playcorp Pty Ltd v. Taiyo Kogyo Ltd*, 24 April 2003, *supra* note 138, at [235] & [245]; Spagnolo, *supra* note 3, (criticising this decision as ignoring the fact that application of the CISG involves an entirely different methodology). Relying upon the conclusion in the *Playcorp* case to interpret similar enacting provisions, *see* *Attorney-General of Botswana v. Aussie Diamond Products Pty Ltd*, 23 June 2010, *supra* note 138, para. 210 (in which court was aware of the applicability of the CISG, but declined to apply it because it was 'unnecessary' given the 'way the case was run' and the lack of suggestion from either party that the CISG was inconsistent with domestic sales law).

<sup>155</sup> *Contra* Spagnolo, *supra* note 9, at 196.

<sup>156</sup> Schwenzer & Hachem, Art. 1, *supra* note 3, at 104 para. [4].

CISG can only be excluded by means of an agreement which satisfies Arts 6, 11, 14-24 and 29 CISG. The exercise of party autonomy to exclude during proceedings involving a contract to which the CISG already applies requires modification by agreement. Parties cannot oust the CISG from a contract to which it already applies, without actual agreement in accordance with the standard of intent outlined above [§5].

**6.4** It might be argued that counsel are agents of the parties, thus their conduct of proceedings should be sufficient for tacit exclusion, or that if counsel agree to exclude, as agents they thereby form a post-contractual exclusion agreement under Art. 6. The CISG does not deal with matters of agency. However, the comments above apply equally irrespective of the existence of an agency relationship; *i.e.*, conduct of proceedings alone is not sufficient to support a strong inference of intent to exclude. If parties have authorized counsel acting as their agents, not only to litigate the dispute, but also to modify their original business dealings with the counterparty by amendment of the contract without further instructions, then express agreement by counsel to modify the choice of law may be sufficient. Such consent would be rare in practice. As the Polish Supreme Court recently noted, the behaviour of counsel was irrelevant to the issue of agreement to exclude – a matter that is governed by the CISG - since the parties' legal representatives 'had no authority to choose the applicable law on behalf of the parties'.<sup>157</sup> Further, even if specifically authorized to modify contractual dealings, in order to exclude at the post-contractual stage counsel would need to be aware of the CISG's application before entering such an agreement.<sup>158</sup>

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<sup>157</sup> Supreme Court, Poland, 17 October 2008, M. Zachariasiewicz, *Abstract, supra* note 27.

<sup>158</sup> Schroeter, *supra* note 18, at 24 & 29 (pointing out the latter is unlikely once a dispute is on foot, since by then, it will often be to one party's advantage to apply the CISG rather than an alternative law).