

## WHY SINGAPORE SHOULD WITHDRAW ITS RESERVATION TO THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

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Singapore is a party to the CISG, while entering an “Article 95” reservation to Article 1(1)(b). For Singapore then, the CISG applies only when both parties have their places of business in CISG Contracting States. Following a survey of the legislative history of the CISG, the author argues that Singapore’s reservation leads to confusion, complicated conflict of laws problems, and forum shopping. He argues that for these and other policy reasons, Singapore should therefore withdraw its reservation.

### I. INTRODUCTION

Singapore is a party to the *United Nations Convention on Contracts for the International Sale of Goods* (CISG).<sup>1</sup> Singapore has adopted an implementing statute that makes the CISG part of Singapore law, the *Sale of Goods (United Nations Convention) Act*<sup>2</sup> (“the Implementing Act”). The Convention came into force with respect to Singapore on 1 March 1996.<sup>3</sup>

The ratification and implementation of the CISG by Singapore is no surprise considering the importance Singapore attaches to the work done by the United Nations Commission on International Trade Law (UNCITRAL).<sup>4</sup> Given the keen interest Singapore has in facilitating international trade, it makes sense that it would ratify a convention which states in its preamble that the parties are of the opinion “that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade”.<sup>5</sup>

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<sup>1</sup> *United Nations Convention on Contracts for the International Sale of Goods*, 11 April 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 and 696; A.T.S. 1988 No. 32 (in force internationally on 1 January 1988 in accordance with Article 99(1)) (CISG). The English version of the CISG is available at <<http://www.cisg.law.pace.edu/cisg/text/treaty.html>>. The Arabic, Chinese, English, French, Russian and Spanish version of the CISG are equally authentic; see penultimate paragraph of the CISG (the paragraph that follows Article 101).

<sup>2</sup> Subsection 3(1) of the *Sale of Goods (United Nations Convention) Act* (Cap 283A, Rev. Ed. Sing.) (“the Implementing Act”) states: “Subject to subsection (2), the provisions of the Convention shall have the force of law in Singapore.”

<sup>3</sup> See information on the internationally effective date for Singapore at *Pace Law School CISG Database* at <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Singapore.html>>. The Implementing Act came into force on the very same day.

<sup>4</sup> Singapore has always played a very active role at UNCITRAL meetings and in promoting UNCITRAL documents in Asia.

<sup>5</sup> See the preamble of the CISG. In this article I will quote the English version of the CISG. I have also personally checked the French version which I will however not quote.

However, at the time of ratification, Singapore made an important reservation that seriously limits the application of the CISG. In short, Article 1(1) makes the CISG applicable to two situations.<sup>6</sup> First, through Article 1(1)(a), the Convention applies when both parties to the contract of sale have their places of business in States that are Contracting States.<sup>7</sup> For example, if a company with its place of business in Singapore sells to one with its place of business in the People's Republic of China (PRC), the CISG applies because both Singapore and the PRC are Contracting States.<sup>8</sup>

Second, the CISG also applies "when the rules of private international law lead to the application of the law of a Contracting State".<sup>9</sup> For example, if a French company (France being a Contracting State) enters into a contract of sale with an Indonesian company and the law of the contract as determined by the relevant rules of private international law is French law, normally, through Article 1(1)(b), the CISG applies notwithstanding the fact that Indonesia is not yet a Contracting State. The Convention is part of French law and the parties by choosing French law are presumed to have chosen the CISG. The CISG is part of the national law of Contracting States and unless the parties to a contract of sale specifically excludes it,<sup>10</sup> the CISG applies and takes precedence over the normal domestic law of that State.<sup>11</sup>

However, Article 95 of the CISG states that:

"Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention."

Singapore has made such a reservation.<sup>12</sup> This means that in the case of a contract between a Singapore company and an Indonesian company, the CISG *will not* apply even if the law of the contract is Singapore law and the CISG is part of Singapore law.<sup>13</sup>

At first sight, the effect of such a reservation should be that the Convention will apply to contracts to which Singaporean companies are parties, only if the other party has its place of business in a Contracting State—a sort of reciprocity. For example, if the parties are from

<sup>6</sup> The rest of this discussion assumes that the other conditions for the application of the CISG are met such as, for example, the fact that the parties have their place of business (as determined by Article 10) in different states (Article 1(1)), that this fact was apparent (Article 1(2)) and that the contract concerns a sale to which the CISG is applicable (Articles 2 and 3).

<sup>7</sup> CISG, Article 1(1) states: "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".

<sup>8</sup> The CISG applies to the PRC as of 1 January 1988.

<sup>9</sup> See CISG, Article 1(1)(b), *supra* note 7.

<sup>10</sup> Parties may exclude the application of the CISG. See Article 6: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions".

<sup>11</sup> For cases that apply the CISG through Article 1(1)(b) and give it precedence over normal domestic law, see for example (amongst quite a few others): *IIC Court of Arbitration, case number 7197* of 1992, summarised at <<http://cisgw3.law.pace.edu/cases/927197i1.html>>, *Decision of 3 December 2002 (DT Ltd. v. B. AG)* H.G. (Commercial Court) St. Gallen, Switzerland, reported in translation at <<http://cisgw3.law.pace.edu/cases/021203s1.html>> and *Decision of 27 September 1991, OLG Koblenz* (Provincial Court of Appeal of Koblenz, Germany), summarised at <<http://www.cisg.law.pace.edu/cisg/text/treaty.html>>.

<sup>12</sup> The reservation is as follows: "In accordance with article 95... the Government of the Republic of Singapore will not be bound by sub-paragraph (1) (b) of article 1 of the Convention and will apply the Convention to the Contracts of Sale of Goods only between those parties whose places of business are in different States when the States are Contracting States". See <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Singapore.html>>. The reservation is also stated in the implementing legislation as follows at Section 3(2) of the Implementing Act: "Sub-paragraph (1)(b) of Article 1 of the Convention shall not have the force of law in Singapore and accordingly the Convention will apply to contracts of sale of goods only between those parties whose place of business are in different states when the States are Contracting States".

<sup>13</sup> This conclusion is certainly true as long as the forum is in Singapore, but as we will see below, it is not necessarily a forgone conclusion if the forum is in another Contracting State that has not made a reservation under Article 95 of the CISG.

Singapore and Canada (a Contracting State) and they choose Singapore law as the applicable law, because there is reciprocity, the CISG will apply through Article 1(1)(a) unless the parties exclude its application by contract.<sup>14</sup> On the other hand, if the contract is between a Singaporean and a Thai, there is no reciprocity as Thailand is not yet a contracting party. Therefore if the parties choose Singapore law as the law of the contract, notwithstanding the fact that “the rules of private international law [would] lead to the application of the law of a Contracting State”,<sup>15</sup> the Convention will not apply because Singapore has made a reservation excluding Article 1(1)(b) and Thailand is not yet a Contracting State. This means that in practice these parties will not be able to choose the CISG as the governing law by choosing Singapore law.<sup>16</sup> If the parties want the CISG to apply, they should avoid choosing Singapore law and choose, if possible, the law of a Contracting State which has not made a reservation under Article 95.<sup>17</sup>

In this paper I will argue that Singapore should withdraw its reservation.<sup>18</sup> I will first look at the reason why the option to make this reservation was introduced into the CISG (intention of the drafters) and why a few states have made such a reservation (Part II). I will then argue (Part III) that the reservation leads to a lot of confusion, to complicated conflicts of laws and to forum shopping, all of which might hinder Singapore’s competitiveness as an international trade centre and as an arbitration and dispute resolution centre. I will then argue (Part IV) that there are many other valid policy reasons why Singapore would be well advised to withdraw its reservation. In short, the withdrawal of the reservation (A) will show that Singapore adopts a business-friendly, liberal and progressive approach to choices of law, (B) will allow traders to use the CISG in their standard form contract, (C) will promote the CISG in the region and (D) will allow Singapore to build an increased expertise on the CISG with the hope of influencing its interpretation through court decisions and arbitral awards.

## II. WHY THE RESERVATION?

We should first try to determine why the CISG allows contracting states to make such a reservation. We will then see the reasons why other countries have made a similar reservation and then try to understand why Singapore might have decided to make the reservation.

<sup>14</sup> See, CISG, Article 6, *supra* note 10. Canada is a party to the CISG. Although at first, the CISG did not apply to all provinces and territories and British Columbia had made a reservation, it now applies to all provinces and territories without reservation—British Columbia withdrew its reservation. Further elaboration below.

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

<sup>16</sup> The CISG provides that in matters not governed by it or on which it is silent or has no general principles the parties should have recourse to the underlying national law. See Article 7(2) “Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law”.

<sup>17</sup> Whether such a choice of law will be recognised by the applicable rules of private international law will be a source of uncertainty—many jurisdictions will not recognise a choice of law that has no nexus with the transaction. In addition as we shall see below, if the forum is Singapore, the reservation will cause many difficulties.

<sup>18</sup> Articles 97 (4) and (5) of the Convention states:

“(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary. (5) A withdrawal of a declaration made under article 94 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article”.

A. *The Travaux Préparatoires—The Reservation was Meant to be Used by Socialist Countries*

The original draft of the CISG did not include what was to become Article 95 which allows the reservation Singapore has made. The provision was introduced by the delegation from Czechoslovakia, then a socialist country, rather late in the negotiations in April 1980 at the Vienna Diplomatic Conference. The argument in favour of its introduction was as follows:

79. Mr. KOPAC (Czechoslovakia), introducing his delegation's proposal for a new article C *bis* [which became article 95 CISG] (A/CONF.97/L.4), recalled that, under paragraph 1(b) of its article 1 [which became article 1(1)(b) CISG], the Convention applied to contracts for the sale of goods between parties having their places of business in different countries when rules of private international law "lead to the application of the law of a Contracting State".

That provision would not give rise to any problem for countries where the ordinary rules of law merchant applied to international transactions.

80. An entirely different situation arose, however, in countries like his own or the German Democratic Republic where special legislation had been enacted to govern transactions pertaining to international trade. Similar legislation was under preparation in Poland and Romania. For countries with such a system, the rule in paragraph 1(b) would mean the exclusion of whole areas of the special legislation enacted to govern international trade transactions.

81. The net result was that countries like Czechoslovakia would be unable to ratify the Convention because of the effect which article 1(1)(b) [which became article 1(1)(b) CISG] would have on the application of their special legislation on international trade.

82. The only solution for those countries was to limit the application of the Convention to contracts concluded between parties having their places of business in different Contracting States. In that manner, the rules of the special code on international trade would continue to apply to trade transactions involving parties of which one at least did not have its place of business in a Contracting State.<sup>19</sup>

The reservation was therefore meant to accommodate those socialist countries that had special legislation governing contracts with foreign parties.<sup>20</sup> This might therefore explain why Czechoslovakia<sup>21</sup> (which proposed Article 95) and China made such a reservation at the time.<sup>22</sup> It is however far less clear why some other countries have made such

<sup>19</sup> *Legislative History, 1980 Vienna Diplomatic Conference, Summary Records of the Plenary Meetings, 11th Plenary Meeting*, Thursday, 10 April 1980, at 3 p.m. as reproduced at <<http://www.cisg.law.pace.edu/cisg/plenarycommittee/summary11.html>>.

<sup>20</sup> For example, Evans states: "On the other hand certain delegations stressed that in their countries special legal rules governed international commercial transactions. The effect of sub-paragraph (1)(b) of Article 1 would be to exclude the application of those rules in favour of the Convention with the consequence that the States in question would be unable to ratify it, and it was primarily to meet this concern that the Czechoslovak proposal was made to permit any State to declare, at the time of the deposit of its instrument of ratification, acceptance, approval or accession, that it will not be bound by sub-paragraph 1(b) of Article 1 of the Convention (Official Records, II, 229-230)." in Cesare Massimo Bianca & Michael Joachim Bonell, eds., *Commentary on the International Sales Law* (Giuffrè: Milan, 1987) at 654, reproduced at <<http://www.cisg.law.pace.edu/cisg/biblio/evans-bb95.html>>.

<sup>21</sup> The present status of the reservation for the former Czechoslovakia is not entirely clear as the declarations of succession by the Czech Republic and Slovakia neither confirmed nor denounced the reservation. See Dr. Fritz Enderlein, "Vienna Convention and Eastern European Lawyers", *International Sales Quarterly* (June 1997) at 12-14 as reproduced at <<http://www.cisg.law.pace.edu/cisg/biblio/vienna.html>>.

<sup>22</sup> It is not entirely clear to me why China decided to make this reservation—I have not been able to find clear indications of the original intent (my inability to read Chinese obviously makes any research on the matter very

a reservation—the United States, Saint Vincent and the Grenadines<sup>23</sup> and Singapore.<sup>24</sup> To my knowledge, no other country has made such a reservation.<sup>25</sup>

B. *The Reasons for the Reservation by the USA: Clarity and the Promotion of Reciprocity?*

The reasons why the United States made a reservation under Article 95 of the CISG are well documented. They are found in Appendix B of the Letter of Submittal from then Secretary of State George P. Shultz:

[The Article 95 reservation], recommended by the American Bar Association, will promote maximum clarity in the rules governing the applicability of the Convention. The rules of private international law, on which applicability under subparagraph (1)(b) depends, are subject to uncertainty and international disharmony. On the other hand, applicability based on subparagraph (1)(a) is determined by a clear-cut test: whether the seller and buyer have their places of business in different Contracting States.

A further reason for excluding applicability based on subparagraph (1)(b) is that this provision would displace our own domestic law more frequently than foreign law. By its terms, subparagraph (1)(b) would be relevant only in sales between parties in the United States (a Contracting State) and a non-Contracting State. (Transactions that run between the United States and another Contracting State are subject to the Convention by virtue of subparagraph (1)(a).) Under subparagraph (1)(b), when private international law points to the law of a foreign non-Contracting State the Convention will not displace that foreign law, since subparagraph (1)(b) makes the Convention applicable only when “the rules of private international law lead to the application of the law of a Contracting State.” Consequently, when those rules point to United States law, subparagraph (1)(b) would normally operate to displace United States law (the Uniform Commercial Code) and would not displace the law of foreign non-Contracting States.<sup>26</sup>

It therefore seems that the United States were first concerned with clarity of the choice of law—in their view, the rules of private international law did not provide sufficient clarity. Second, they were concerned that US law would be displaced more often than foreign law—a kind a discomfort with applying international law rather than domestic law when the country of the other contracting party is not willing to do the same.

incomplete). One should note however that at the time China became a party to the CISG on 1 January 1988, it had a separate law of contract for foreign transactions. See *Foreign Economic Contract Law of the People's Republic of China* (adopted March 21, 1985, effective July 1, 1985). Therefore the rationale for the use of the reservation might have been the same as Czechoslovakia's reasons for the introduction of art. 95. Now that the new *Contract Law of the People's Republic of China* came into force on 1 October 1999 and that this law makes no distinction between domestic and foreign contracts, this presumed rationale for the reservation seems to have vanished, but China's reservation is still in force.

<sup>23</sup> I have been unable to find out why Saint Vincent and the Grenadines have chosen to make the reservation.

<sup>24</sup> The list of countries that has made a reservation is taken from the *Pace Law School CISG Website* at <<http://www.cisg.law.pace.edu/cisg/countries/cntries.html>>.

<sup>25</sup> At the time of ratification, Canada had also made such a reservation for British Columbia but the reservation was later withdrawn on 31 July 1992, less than three months after the convention became effective for Canada on 1 May 1992. See <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Canada.html>> for details.

<sup>26</sup> The *Appendix B of the Letter of submittal from Secretary of State George P. Shultz* is attached to the *Message From the President of The United States Transmitting the United Nations Convention on Contracts for the International Sale Of Goods*, Senate Treaty Doc. No. 91, 98th Cong., 1st Sess. V, VI (1983), reproduced in full at <<http://www.cisg.law.pace.edu/cisg/biblio/reagan.html>>. See also E. Allan Farnsworth, “Review of Standard Forms or Terms Under the Vienna Convention” (1988) 21 *Cornell Int'l L.J.* 439, footnote 4 at 440.

I will show later why I do not think that making the reservation brings great clarity.<sup>27</sup> I wish to address here the US concern for reciprocity and explain why, in my view, this kind of reciprocal approach, though an understandable reflex in public international law, is not warranted in private international law when a treaty only provides an optional choice of law. It is not always true that Article 1(1)(b) “would normally operate to displace United States law”.<sup>28</sup> As we know, the parties may always exclude the application of the CISG<sup>29</sup> and therefore it might well be that the US *Uniform Commercial Code* (UCC) will in fact often be the applicable law. The explicit exclusion of the CISG is probably quite frequent in contracts involving US parties.<sup>30</sup>

More importantly, however, it should be noted that the CISG does not govern relations between States where treaty reciprocity is important; it only governs relations between traders. Traders are interested in using the law best-suited for their transactions. That law may sometimes be the law of the seller’s country, sometimes that of the buyer’s country and sometimes, as a compromise between the different systems of law and as a practical compromise between the parties to the contract, that law might be the CISG. Why not let the experienced traders and their lawyers choose their law without concern for treaty reciprocity between States. Allowing such a choice of law will facilitate trade and all countries involved will eventually benefit, whatever law is chosen.

The problem with the reciprocity rationale proposed by the US is that it effectively prevents the application of the CISG when one of the parties comes from a country which is not a party to the CISG—it effectively reduces the choice of the parties. Secretary Shultz stated that “parties who wish to apply the Convention to international sales contracts not covered by Article 1(1)(a) may provide by their contract that the Convention will apply”<sup>31</sup> but as we will see below, this option is full of difficulties.<sup>32</sup> As we will see, the best way to allow parties to choose the CISG is not to make a reservation under Article 95.

### C. No Strong Reason Why Singapore Made the Reservation

The Singapore rationale for the reservation is expressed in a recommendation to the Government of Singapore made in a report of the Sub-Committee on Commercial Law of the Law Reform Committee of the Singapore Academy of Law. It states:

58. If no Article 95 reservation is made, it will mean that the Convention will apply even though one of the parties does not have its place of business in a Convention State. Let us illustrate with the following example on the assumption that Singapore ratifies the Convention. A Singapore trader enters into a contract with a Malaysian trader. If the contract provides that it be governed by Singapore law, then, the Convention will apply instead of the Singapore Sale of Goods Act. This may not be the result intended by the traders. Hence, for a start it is recommended that a reservation be

<sup>27</sup> See discussion below in Part III at 7.

<sup>28</sup> *Appendix B of the Letter of submittal from Secretary of State George P. Shultz, supra* note 26.

<sup>29</sup> CISG, Article 6, *supra* note 10.

<sup>30</sup> The United States are probably the most active trading nation in the world and also one of the most litigious and yet in April 2005 there are only about 56 reported American cases out of more than 1400 reported cases at the *Pace Law School CISG Database* <<http://www.cisg.law.pace.edu/cisg/text/caselit.html#us>>. The vast majority of cases seem to come from Europe. This seems to indicate, although admittedly in a very imprecise way, that Europeans are much more enthusiastic about using the CISG than their American counterparts. The latter probably exclude the CISG more often than Europeans do. I recognise however that the basis for such extrapolation is not very strong and a proper statistical study would be useful.

<sup>31</sup> *Supra* note 26.

<sup>32</sup> See discussion below at Part IV(A).

entered as permitted by article 95. It can always be withdrawn later if it is not found to be useful.<sup>33</sup>

It is therefore clear that Singapore's rationale has nothing to do with the original reason for introducing Article 95 of the CISG (*i.e.*, to accommodate socialist countries that had a separate contract law for international trade). Singapore does not have a separate contract law for international trade. Singapore's rationale also has nothing to do with the reasons why the United States made their reservation. Singapore therefore had a unique reason to make the reservation.

Essentially, Singapore's concern was that the parties may unwittingly end up with the CISG as their law when they intended Singapore's domestic law to apply. This assumes that the parties are unaware of Article 1(1)(b) of the CISG and its potential application in Singapore and are also unaware of the fact that they may exclude the CISG entirely if they so wish<sup>34</sup> and that they would therefore be able to choose Singapore's domestic law without the CISG even if there were no reservation under Article 95 of the CISG.

The possibility of an incompetent and therefore unintended choice of law<sup>35</sup> might have been a real concern at the time when Singapore ratified the CISG—lawyers and traders at that time were little aware of the CISG—but by now, nine years later, Singapore lawyers have become experts at almost systematically excluding the CISG from almost all contracts of sale<sup>36</sup> and there is, in my view, little danger that parties will now be caught off guard if Singapore were to withdraw its reservation (provided sufficient notice of such withdrawal was given).

In any event, now that there are 65 Contracting States,<sup>37</sup> 59 of which have not made a reservation under Article 95 of the CISG, traders in Non-Contracting States are quite used to checking whether a given country is a Contracting State. Given the current awareness of the existence of the CISG and provided proper notice is given to the Singapore Bar and to the Bars and trade associations of our main trading partners of the eventual withdrawal of the reservation, I see no reason to continue to protect incompetent lawyers who choose Singapore law without knowing that Singapore is a party to the CISG. In my view, the original rationale, while it may indeed have been valid then, is no longer valid today. As the Sub-committee rightly stated, the reservation “can always be withdrawn later if it is not found to be useful”.

There are also many other reasons to withdraw the reservation besides the fact that the original rationale no longer makes sense. In short, the reservation leads to great confusion as to which law applies in many circumstances and may lead to forum shopping (Part III). In addition there are many good policy reasons for withdrawing the reservation (Part IV).

<sup>33</sup> Sub-Committee on Commercial Law of the Law Reform Committee of the Singapore Academy of Law, *The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)—Should Singapore Ratify?*, (Singapore: Singapore Academy of Law, 1995) at 27-28.

<sup>34</sup> CISG, Article 6, *supra* note 10.

<sup>35</sup> One should point out however that it would still be open to the parties to convince a court that they impliedly excluded the CISG through Article 6.

<sup>36</sup> A happy exception is now found in the standard procurement contract terms of the Government of Singapore which, in most cases, no longer excludes the CISG. The standard choice of law clause now reads: “This Contract shall be deemed to be made in Singapore and shall be subject to, governed by and interpreted in accordance with the Laws of the Republic of Singapore for every purpose”. See *Contract and Purchasing Procedures*, issued by the Government of Singapore, at 4 and available online at <[http://www.gebiz.gov.sg/scripts/doc/contract\\_purchasing.pdf](http://www.gebiz.gov.sg/scripts/doc/contract_purchasing.pdf)>.

<sup>37</sup> As of 7 March 2005 according to the *Pace Law School Website* at <<http://www.cisg.law.pace.edu/cisg/countries/cntries.html>>.

### III. THE CONFUSION CAUSED BY THE RESERVATION AND THE UNNECESSARY CONFLICTS OF LAW IT CREATES

As mentioned above, one of the reasons the Americans invoked to justify their Article 95 reservation was that rejecting sub-paragraph 1(1)(b) would bring clarity to the determination of which law is applicable—if both parties are from contracting states then the CISG applies but if not, then the CISG does not apply. How I wish it were that simple. Unfortunately, excluding the application of Article 1(1)(b) creates many uncertainties and great confusion with respect to which law applies and also encourages forum shopping. There has been much academic debate on the matter and the courts have shown some confusion.<sup>38</sup> Many more confusing fact patterns can be imagined which have not yet even been considered by any court or tribunal.

It is always a challenge to try to clearly expose confusion—if I speak with great clarity, am I not proving that the situation is not that confusing? I hope to clearly give a few examples of situations where, because of the reservation, there will be confusion or debate as to which law a court or arbitral tribunal should apply.

I will do so by giving examples that take the following countries as paradigms—Singapore as a Contracting State that has made a reservation under Article 95, Australia which is a Contracting State that has not made a reservation and Malaysia which is not a Contracting State. The main examples are intentionally those of common law countries which to a large extent share similar principles of conflicts of laws and of jurisdictions, not because I intend to go into the details of these principles of conflicts but rather because it allows me to assume most common law reflexes on conflicts without having to explain them.<sup>39</sup>

All the examples below have three identical features. First, in all cases at least one party has its place of business in a Non-Contracting State. If both were in Contracting States, Article 1(1)(a) CISG would apply and therefore the CISG would apply. Having one party that is not in a Contracting State means that article 1(1)(a) cannot apply and the CISG can apply only through article 1(1)(b). Second, in all cases the parties have chosen as the law governing their contract the law of a Contracting State, a choice of law which, were it not for a reservation under Article 95, would definitely lead to the application of the CISG through sub-paragraph 1(1)(b). Third, the parties did not exclude the application of the CISG through Article 6 of the CISG.

There are numerous possible permutations, but I will limit the discussion to only a few examples. In each scenario I will start by providing the following information in the heading:

- (1) the States in which the parties have their place of business (Parties: State A and State B);
- (2) the name of the State, the law of which was chosen by the parties (Law: State C); and

<sup>38</sup> See for example *Decision of 2 July 1993*, Docket number 17 U 73/93, OLG Düsseldorf (Provincial Court of Appeal, Germany) summarised at <<http://cisgw3.law.pace.edu/cases/930702g1.html>>. At the time of the contract, Germany was not a Contracting State. The court decided that the rules of private international law led to the application of a US law and erroneously applied the CISG notwithstanding the reservation the US had made. See the editorial remarks of Albert H. Kritzer also at <<http://cisgw3.law.pace.edu/cases/930702g1.html>>. A US Court of Appeals did get it right though: *Standard Bent Glass Corp. v. Glassrobots Oy* (2003) 333 F.3d 440 (3d Cir.) available at <<http://cisgw3.law.pace.edu/cases/030620u1.html>> as well as a US District Court: *Impuls I.D. Intern., S.L. v. Psion-Teklogix, Inc.* (2002) 234 F.Supp.2d 1267 (S.D.Fla.) available at <<http://cisgw3.law.pace.edu/cases/021122u1.html>>. A Japanese court also got it right in what a common lawyer would refer to as an obiter dictum, see *Nippon Systemware Kabushikigaisha v. O.*, (1998) Case number 1997-wa-19662 (Tokyo Chiho Saibansho [District Court]) as summarised at <<http://cisgw3.law.pace.edu/cases/980319j1.html>>.

<sup>39</sup> Had I chosen some civil law countries, I might have had to explain how the civil law characterises private international law differently and the effect of this difference on determining which law should be used to solve conflicts of law and which law can be chosen by the parties to govern their contracts.



- (3) the name of the State in which the forum is situated, whether it be a court in that State or an arbitral tribunal the seat of which is in that State (Forum: State D).

A. *Parties: Singapore-Malaysia; Law: Singapore; Forum: Singapore*

This is the easy case.<sup>40</sup> Singapore has made a reservation under Article 95 and therefore Singapore “is not bound by” Article 1(1)(b). That means that the courts in Singapore and presumably also arbitral tribunals seated in Singapore do not have to apply sub-paragraph 1(1)(b) since Singapore is not bound by it and therefore the law applicable is Singapore law without the CISG. This much is clear.

B. *Parties: Singapore-Malaysia; Law: Singapore; Forum: Australia*

In this case, to take the exact wording of sub-paragraph 1(1)(b), “the rules of private international law lead to the application of the law of a Contracting State”, namely Singapore. Singapore has made a reservation, but is this reservation binding on a court or tribunal in Australia?

The text of Article 95 of the CISG says that a State that makes the reservation “will not be bound by subparagraph (1)(b) of article 1 of this Convention”, *i.e.*, Singapore is not bound by Article 1(1)(b). Article 95, however, does not say that Australia is not bound by the CISG nor does it say that Singapore is to be considered a Non-Contracting State for the purpose of Article 1(1)(b). Therefore it would seem that an Australian court or tribunal may well decide that the CISG does apply—the court or tribunal is bound by Article 1(1)(b) (no reservation in Australia) and Singapore, notwithstanding its reservation, is a “Contracting State” under Article 1(1)(b).

This result would leave most conflicts specialists very uncomfortable—the same choice of law (Singapore law) might lead an Australian court to apply the CISG whereas a Singapore court would refuse to apply the CISG. This seems very unsatisfactory and would clearly encourage forum shopping.

Germany foresaw this problem and purported to make a remark (like one would make a reservation) at the time of ratification. The remark is reported as follows:

Germany has advised that it holds the view that parties to the CISG that have made a declaration under article 95 are not considered Contracting States within the meaning of subparagraph (1)(b) of article 1 of the CISG and that Germany assumes no obligation to apply this provision when the rules of private international law lead to the application of the law of a party that has made a declaration to the effect that it will not be bound by subparagraph (1)(b) of the CISG.<sup>41</sup>

If the CISG were interpreted this way, Australia would not consider Singapore to be a Contracting State for the purpose of applying 1(1)(b). How I wish that whoever drafted the remark by Germany had drafted Article 95 CISG! Had such wording been included in Article 95 CISG, there would be no problem. In fact such wording was used in Article 92 CISG (a different reservation allowed by the CISG).<sup>42</sup> It could therefore be argued, by

<sup>40</sup> “No difficulties would seem to exist with regard to this provision if a court in a State taking the reservation under Article 95 ... finds its own law to be applicable”. See Evans, *supra* note 20 at 655.

<sup>41</sup> *Pace Law School CISG Database* at <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Germany.html>>. The status of that remark is unclear. It is not one of the reservations authorised by the CISG and therefore has no effect internationally. As an official interpretation of the CISG by the German Government, I am not sure it would have a binding effect even on German courts. Besides, trying to bind one’s own courts into interpreting the CISG in a particular way seems to go against Article 7(1): “In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application ...”

<sup>42</sup> Article 92 states:

“(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession

contrasting Articles 92 and 95, that in Article 95 the drafters clearly rejected the suggestion made by Germany that a State that has made a reservation under article 95 should be considered a Non-Contracting State. It therefore seems difficult to argue that Singapore is not a Contracting State for the purposes of Article 1(1)(b) when it is a Contracting State. It is also not possible to argue that Australia is not bound by Article 1(1)(b), it clearly is.<sup>43</sup>

One possible argument that may allow us to reach the desired result would be to apply the wording of Article 1(1)(b) in a narrow, specific, almost distorted, literal sense when asking whether “the rules of private international law lead to the application of the law of a Contracting State”. As we know, the Australian rules of private international law would lead to the application of Singapore law and one could argue that according to these Australian rules, Singapore law is Singapore’s domestic law however defined by Singapore and in this case, Singapore has determined that the CISG does not apply, and in fact a Singapore Act specifically states so.<sup>44</sup> Therefore, the rules of private international law lead in fact to a law that is similar to the law of a Non-Contracting State—Singapore determines that the applicable law is the law as it would be were Singapore not a Contracting State—*i.e.*, effectively the law of a non-Contracting State. This is what Australian private international law leads to—whatever Singapore says its law is and if it says its law is similar to the law of a non-Contracting State, then it is. Singapore is a Contracting State, but the law the Australian rules of private international law lead to, the Singapore law as defined by Singapore, for all intents and purposes, does not look like “the law of a Contracting State”<sup>45</sup> and therefore, the CISG should not be applied by Australian courts. The argument can be enhanced by adding a dose of international comity to it—the courts in Australia should respect the sovereignty of the Singapore Parliament to determine the content of Singapore law.

The argument is admittedly very technical, convoluted, stretches the limits and is not very convincing, but it might be worth adopting if only to avoid encouraging forum shopping. The best way to get us out of this confusion however remains for Singapore to withdraw its reservation.

The fact that the choice of Singapore law may lead to uncertainty as to whether the CISG applies will lead parties to avoid choosing Singapore law. At a time when Singapore wants to become a regional centre for legal services, this situation should be remedied—the reservation should be withdrawn.

that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention. (2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention *is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.*” (my emphasis).

<sup>43</sup> Honnold also proposes that the CISG should not apply in this situation but does so based (in my view) on weak policy reasons. He reasons that because his country, the United States, made their reservation “to protect its traders from being deprived of their familiar domestic law without the countervailing gain of supplanting the foreign law ...” it would be unacceptable to apply the CISG to the situation described above. Not all countries however have the same reason for making this reservation and I fail to see why the intent of the United States in making the reservation should determine the interpretation of CISG provisions for all other countries. I agree with his instinct that the application of the CISG to Singapore for example, notwithstanding its reservation, should be wrong but I am seeking the right solution through another argument, though I must concede also a very weak one, but one based on private international law principles. See John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3<sup>rd</sup> ed. (Boston: Kluwer, 1991) at 41 and following.

<sup>44</sup> See Sub-section 3(2) of the *Implementing Act*, *supra* note 2: “Sub-paragraph (1) (b) of Article 1 of the Convention shall not have the force of law in Singapore and accordingly the Convention will apply to contracts of sale of goods only between those parties whose places of business are in different states when the States are Contracting States”.

<sup>45</sup> CISG, Article 1(1)(b), *supra* note 7.

C. *Parties: Singapore-Malaysia; Law: Australia; Forum: Singapore*

The reservation should be withdrawn not only because the confusion it causes encourages the parties to avoid Singapore law but also because in some cases it encourages the parties to avoid choosing Singapore as a forum.<sup>46</sup> Let me explain.

In this new example, the Singaporean and Malaysian parties have chosen the law of a Contracting State that has not made a reservation, namely Australia (assuming that this choice of law is valid).<sup>47</sup> The forum, however, is Singapore which has made a reservation that is binding on Singapore courts. As we know, the effect of the reservation is that the Singapore Courts or tribunals in Singapore “will not be bound by subparagraph (1)(b) of article 1 of this Convention”.<sup>48</sup>

The unfortunate result might be that a Singapore court might refuse to apply the CISG even though an Australian court would consider the CISG as part of Australian law. A Singapore Court might “adopt the line of reasoning that since its own legislature has deprived it of the possibility of applying the Convention pursuant to Article 1(1)(b), then it should only apply it when the requirements of Article 1(1)(a) are met.”<sup>49</sup> Or to put it maybe more precisely and mildly, using the words of Article 95, the Singapore court “would not be bound” to apply the CISG through Article 1(1)(b).

Could the Singapore court nonetheless choose to apply the CISG? I think that indeed, without being bound by Article 1(1)(b), it should nonetheless apply the CISG. I agree with Schlechtriem who suggests that although the CISG “can never lead to an *obligation* on a court of a reservation state to apply the CISG ...”,<sup>50</sup> the court could through the application of its own rules of private international law decide that the CISG should apply. It would decide, by applying the rules of private international law rather than Article 1(1)(b) of the CISG, that Australian law applies and that in Australian law, the CISG applies.<sup>51</sup>

I think this is the appropriate solution, but I stress again that this is far from clear when one first reads Article 95 of the CISG. I must also point out that we do not have any court decision in Singapore that adopts this solution and therefore it could still be argued that the reservation prevents a Singapore court from applying the CISG in the above example. This uncertainty will again encourage parties who find themselves in this situation not to choose Singapore as their forum—a forum that has made no such reservation should be preferred.

There are many other examples of parties which might normally consider Singapore as a good venue to resolve their dispute but which might decide to avoid Singapore in cases of contracts of sale because of the reservations made by Singapore. Maybe I should illustrate with two more examples where the parties are from civil law jurisdictions.

Let us say, for example, that the parties are from Indonesia (a Non-Contracting State) and the Netherlands (a Contracting State) and they choose Dutch law as the law governing the contract. One would think that Singapore would be an appropriate venue to settle any dispute, but regrettably, the parties may decide to avoid Singapore for the reasons mentioned above—the uncertainty as to whether a forum in Singapore would fully respect their choice of law, *i.e.*, the CISG.

<sup>46</sup> “... delicate problems could arise if such a court [in a State that made the reservation under Article 95 (State A)] were to find the law of another Contracting State (State B) to be applicable to the contract of sale or its formation in a case involving parties with their places of business in State B and in a non-Contracting State (State C)” See Evans, *supra* note 20 at 655.

<sup>47</sup> To the extent that the private international law rules require that the chosen law have a connection to the contract, we could assume for example that the goods are produced or delivered in Australia.

<sup>48</sup> CISG, Article 95.

<sup>49</sup> See Evans, *supra* note 20 at 655.

<sup>50</sup> Peter Schlechtriem ed., *Commentary on the UN Convention on the International Sale of Goods (CISG)*, trans. by Geoffrey Thomas, (Oxford; New York: Clarendon Press, 1998) on Article 95.

<sup>51</sup> Evans also agrees with this position. See Evans, *supra* note 20 at 656.

The same would be true with respect to a party from Vietnam (a Non-Contracting State) and a party from France (a Contracting State) who chose French law. It would even be true if parties from two Non-Contracting States chose the law of the Netherlands as their law. In all these cases there is uncertainty as to whether a Singapore forum would apply the CISG.

At a time when Singapore is positioning itself as a dispute resolution centre particularly an arbitration centre, this situation is no longer tenable. Singapore should therefore withdraw the reservation.

#### IV. OTHER POLICY REASONS FOR WITHDRAWING THE RESERVATION

As mentioned above, at the time of making its reservation, Singapore left open the possibility of reconsidering the issue.<sup>52</sup> There are many policy reasons why Singapore should reconsider its reservation.

##### A. *A More Liberal Approach to Choices of Law (Freer Trade)*

Although some jurisdictions still put limitations on the parties' choice of law, the parties' autonomy—in this case their freedom to choose the law governing their contract with as little hindrance from any State law as possible—is a valued principle and is perceived as a progressive trend in international trade circles. Parties will often shop for laws and jurisdictions that will most likely respect their choice of law, their autonomy. The CISG itself gives almost full autonomy to the parties who choose not to be governed by the CISG—Article 6 ensures that the parties are free to exclude the CISG in whole or in part.<sup>53</sup>

Singapore goes against this trend when it effectively prohibits the parties from choosing the CISG through the application of Article 1(1)(b). Parties from Non-Contracting States who want the CISG to govern their contract and its formation would be well advised to avoid Singapore law and Singapore as a forum, because Singapore does not give the parties the option to choose the CISG as their law (otherwise than by avoiding Singapore law and Singapore as a jurisdiction). This attempt to limit the choice of the parties, even if it did not lead to any confusion, does reduce the parties' autonomy, a principle valued by international traders, and is therefore inconsistent with our desire to see Singapore law being increasingly used and Singapore becoming a dispute resolution centre.

But could not the parties choose the CISG notwithstanding Singapore's reservation by explicitly saying so in their choice of law clause? Could they not, for example, exclude Singapore law to the extent that a matter could be governed by the CISG, but fall back on Singapore law for matters not governed by the CISG?

The US Secretary of State at the time of ratification did suggest that this would be possible.<sup>54</sup> I am afraid however that such a choice of law would face many difficulties and would therefore be very risky (it might not be enforced everywhere let alone in Singapore) and is therefore not a choice of law that I would recommend to the parties.

What would be the status of the CISG in this scenario? The CISG is meant to be applied as an international convention which becomes part of the law of a State. Unlike the *International Institute for the Unification of Private Law* (UNIDROIT) Principles, which in and of

<sup>52</sup> See *supra* note 33 and accompanying text.

<sup>53</sup> The only exception is provided in Article 12—where a state has made a reservation requiring the contract of sale and its modifications to be in writing, the parties may not exclude that particular requirement—the requirement of writing thus becomes of *ordre public*.

<sup>54</sup> After recommending that the US exclude the application of Article 1(1)(b), the Secretary of State wrote: "Moreover, parties who wish to apply the Convention to international sales contracts not covered by Article 1(1)(a) may provide by their contract that the Convention will apply." See *Appendix B of the Letter of submittal from Secretary of State George P. Shultz, supra* note 26. If that is so, one wonders what the point of making the reservation is in the first place.

themselves do not have the force of law and which envisage the parties choosing them as the principles governing the contract,<sup>55</sup> the CISG is meant to have the force of law in Contracting States and is binding both as State law and as international law. The CISG itself states that it is applicable through either Article 1(1)(a) or (b), period. It is only meant to apply when it is adopted by a State and does not envisage, let alone encourage, a scenario where the parties would choose to be governed by the CISG notwithstanding that the CISG does not apply through Article 1(1)(a) or (b). Its intended status is that of a convention implemented through State law and not that of a free standing set of contract rules incorporated to the contract by reference like one incorporates the UNIDROIT Principles or the International Commercial Terms (INCOTERMS).<sup>56</sup> The CISG is intended to supersede State law only when the State so agrees by ratifying the convention (Article 1(1)(a) applies) and by not making a reservation under Article 95 (Article 1(1)(b) applies).

Of course, those of us who favour the protection of parties' autonomy would wish that parties could choose the CISG notwithstanding Singapore's reservation, that they could incorporate the CISG into their contract the way one incorporates the INCOTERMS, for example. There are however two serious difficulties that would lead me to recommend against such a choice of law even though I wish it could be possible. One difficulty is technical—would choosing the CISG work well given the fact that it is not meant to apply by incorporation into the contract? The other has to do with whether that choice of law would be uniformly recognised by courts and tribunals.

Simply stating in a choice of law clause that the contract is governed by the CISG notwithstanding Singapore's reservation would not work well and may lead to uncertainties. The first and most obvious difficulty is that a wholesale incorporation of the CISG to the contract would incorporate Articles 1 and 95 as well! A judge could therefore validate Singapore's exclusion of Article 1(1)(b) under the now incorporated Article 95 and the judge could also state that the incorporated Article 1(1)(a) does not apply and therefore the CISG does not apply. This interpretation would be technical to the extreme but is possible.

One could of course argue that a choice of law clause that incorporates the CISG into the contract with words such as "notwithstanding Singapore's reservation" implicitly excludes Articles 1 and 95. Better yet, the choice of law clause could be drafted in a manner that explicitly excludes Articles 1 and 95. There would however be other difficulties. There may be other provisions of the CISG which may lead to strange results when the convention is applied as incorporated rules rather than domestic law or treaty law—for example it might be prudent to exclude the final provisions (Articles 89 to 101) which deal with reservations, time of coming into force *etc.* since the CISG is not to be applied as a convention or as domestic law.

Another technical difficulty is that the CISG is a very incomplete law<sup>57</sup> and is intended to be supplemented by a national domestic law.<sup>58</sup> The parties will need to choose a national

<sup>55</sup> The Preamble of the UNIDROIT Principles states that "[The UNIDROIT Principles] shall be applied when the parties have agreed that their contract be governed by them". See: Institut International pour l'Unification du Droit Privé (UNIDROIT), *UNIDROIT Principles of International Commercial Contracts 2004* (Rome: Unidroit, 2004). The text of the Principles, without the helpful commentaries, is reproduced in full online at <<http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf>>.

<sup>56</sup> For example, the latest version, the INCOTERMS 2000, the International Commercial Terms issued by the International Chamber of Commerce and which are incorporated to contracts for the sale of goods by very simple references such as "FOB Singapore, INCOTERMS 2000".

<sup>57</sup> See CISG, Article 4: "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

- (a) the validity of the contract or of any of its provisions or of any usage;
- (b) the effect which the contract may have on the property in the goods sold."

<sup>58</sup> See CISG, Article 7(2): "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law".

law. What will be the relationship between that national law and the CISG rules contractually incorporated by the parties? When it has the status of an international convention that is made part of the law of a State, the CISG takes precedence over domestic law.<sup>59</sup> But would it be the same if the status of the CISG is not that of an international convention or a superseding part of national law, but is rather a series of contractual terms incorporated to the contract by reference? To state the problem in civil law terms, the parties may, by their contract, exclude provisions of the applicable national law that supplement intention (the parties may choose the place of delivery determined by the CISG rather than by the national law) but they may not exclude those provisions of the national law that are of *ordre public* or of public order (*e.g.*, a compulsory provision of a national law that requires a writing for the validity of modifications to the contract). The CISG as a convention and as a superseding part of domestic law does override public order provisions of domestic law. For example Article 29 of the CISG stating that a contract may be modified without the modification being in writing will override any provision of domestic law to the contrary.<sup>60</sup> However, the same Article 29 if it is not part of an international convention and is not part of national law but is merely a contractual term chosen by the parties may not override a compulsory provision of national law that requires modifications to be in writing. Therefore the CISG when incorporated to the contract as contractual terms may not have the same effect as the CISG applied as a treaty or as part of national law. This therefore brings a certain measure of uncertainty.

All this to say that there are real “technical” legal risks associated with an alteration of the status of the CISG—applying the CISG as incorporated contractual terms, rather than as treaty law (Article 1(1)(a)) or as domestic law (Article 1(1)(b)) as originally intended by the CISG itself.

Even if the choice of the CISG notwithstanding Singapore’s reservation was not marred by technical legal risks, would such a choice of law be recognised by a court of law in Singapore or elsewhere? Could not the courts in Singapore consider Singapore’s reservation as an expression of public policy and therefore hold the choice of the CISG by the parties invalid as against public policy? Conflicts rules in some jurisdictions may also hold that the parties must choose a national law (including the CISG as part of the national law), and cannot choose a non-national law (the text of the CISG incorporated as contractual terms).

There are so many risks and uncertainties associated with choosing the CISG as the governing law notwithstanding Singapore’s reservation that I would certainly not recommend such a choice to parties. Therefore, by not withdrawing its reservation, Singapore effectively reduces the parties’ autonomy—they cannot effectively and safely choose the CISG as their law and therefore they have one fewer choice. If they want their contract to be governed by the CISG they should avoid Singapore law and Singapore as a jurisdiction. This cannot be good for Singapore.

#### B. *Singapore Traders Should Not Have to Exclude the CISG in Their Standard Form Contract*

Traders like to use standard form contracts. A trader from Canada, assuming he can impose his standard form contract on the other party and would like the CISG to apply, may write the following choice of law clause: “this contract is governed by the laws applicable in Ontario, Canada”. The effect of this clause will be that the CISG will apply and will be complemented by Ontario law. This will be the case either through Article 1(1)(a) (both parties are in Contracting States) or through Article 1(1)(b) (the rules of private international

<sup>59</sup> Section 4 of the *Implementing Act*, *supra* note 2, correctly states this principle: “The provisions of the Convention shall prevail over any other law in force in Singapore to the extent of any inconsistency”.

<sup>60</sup> Except if a country has made a reservation under Article 96 of the CISG.

law lead to the application of the law of a Contracting State—Canada) if the other party has its place of business in a non-Contracting State. The trader can therefore use the same standard form contract for all its international sales. It can draft the standard form contracts taking into account the law laid down in the CISG.

Such is not the case, however, for a trader based in Singapore. A choice of law clause worded in a similar fashion (“this contract is governed by the laws of Singapore”) will have a completely different effect depending on whether or not the other party has its place of business in a Contracting State. If the other party is in a Contracting State, then the law will be the CISG complemented by Singapore domestic law. However, if the other party has its place of business in a Non-Contracting State, because of Singapore’s reservation, the applicable law will be Singapore domestic law without the CISG.

This will make the drafting of a standard form contract almost impossible—a contract is normally drafted taking into account the governing law, but in this case which law applies depends not on the wording of the choice of law clause but on where the other party has its place of business. A trader who likes the CISG would have to draft a standard form contract based on the CISG for contracts with parties who have their place of business in Contracting States and a separate standard form contract based on Singapore law for contracts with parties who have their place of business in a non-Contracting State. Ironically, the choice of law clause can be worded identically in both contracts (“this contract is governed by the laws of Singapore”), but will have a different effect in each standard form contracts.

For efficiency, however, most traders will want to have the same standard form contract and the same governing law for all their international transactions. The only sure way to do this<sup>61</sup> is to exclude the application of the CISG in their standard form contract as authorised by Article 6 of the CISG— that way Singapore domestic law will apply whether the other party resides in a Contracting State or not. Therefore, Singapore traders who want one standard form contract for all their international sales have no choice but to exclude the application of the CISG.

It is regrettable that Singapore’s reservation has the unintended effect of discouraging the use of the CISG in standard form contracts. Withdrawing the reservation would put an end to this anomaly.

### C. Promoting the CISG in the Region

At the time of writing this article, Singapore is the only country in the Association of South East Asian Nations (ASEAN) to be a Contracting State to the CISG. The fact that Singapore has made the above-mentioned reservation means that the CISG cannot be used within ASEAN—it cannot be used by choosing Singapore law between two non-contracting states (*e.g.*, Thailand and Indonesia) or between Singapore and other ASEAN members.<sup>62</sup> This means that if other ASEAN countries and their judges and lawyers are getting exposure to

<sup>61</sup> I have shown above why I do not recommend that parties choose the CISG as their law notwithstanding the reservation.

<sup>62</sup> One should note however that a court in Vietnam seems to have applied the CISG in a case involving a seller in Vietnam (not a Contracting State) and a buyer in Singapore. Although the summary of the case available in English does not explain why, one may speculate that it might have been because the parties chose Singapore law and the court was unaware of Singapore’s reservation. That Singapore is a party to the CISG is better known than the fact Singapore has made a reservation. See *Ng Nam Bee Pte Ltd. v. Tay Ninh Trade Co.* (1996, People’s Supreme Court, Appeal Division in Ho Chi Minh City, Vietnam) described at <<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960405v1.html>> and summarised at <<http://www.unilex.info/case.cfm?pid=1&do=case&cid=350&step=FullText>>.

the CISG it will be through their choice of the law of a European country, for example, rather than their choice of Singapore law.<sup>63</sup>

Singapore sees the need for uniform laws within ASEAN to facilitate trade. It would seem, however, that prohibiting the use of a compromise uniform law between Singapore and its neighbours is inconsistent with the desire to promote uniform laws within ASEAN. Singapore should provide the opportunity for parties in ASEAN to use the CISG by choosing Singapore law. This does not impose the CISG as parties may always exclude the convention,<sup>64</sup> but it allows them to use and experience the CISG within the ASEAN context.

In fact the CISG would be an excellent start for promoting uniform laws within the region. The CISG is a compromise between the common law tradition (both the English and American models) and the civil law tradition (both the French and German models).<sup>65</sup> Within ASEAN, as far as the law relating to the sale of goods is concerned, both traditions are represented—Singapore, Malaysia, Myanmar and Brunei are part of the common law tradition, whilst Indonesia and Thailand are part of the civil law tradition. Cambodia, Vietnam and Laos have been influenced by socialist law and civil law. The Philippines are a mixed jurisdiction of civil and common law due to Spanish and American influences, the former being the main influence on the law of sale.

It is, of course, for the Singapore government to decide whether it wants to promote the CISG within ASEAN, but it would seem to me that letting the convention be used by private parties from the region willing to choose Singapore law as the law of their contract would be a first step in that direction. It has the advantage of promoting the convention by allowing it to be used but without imposing it on anyone—a very “diplomatic” approach. It might even encourage the parties to choose Singapore as an arbitration venue.

#### *D. Increasing the Expertise of Singapore-Based Judges and Arbitrators and Influencing the Interpretation of the CISG*

At the time of writing this article, I know of no Singapore cases involving the interpretation of the CISG. There are, however, hundreds of cases reported around the world.<sup>66</sup> The Convention itself states that in interpreting the CISG “regard is to be had to its international character and to the need to promote uniformity in its application”.<sup>67</sup> This provision invites judges and arbitrators to look at decisions on the CISG from other jurisdictions in order to insure some uniformity in the interpretation of the CISG.

It is therefore safe to say that published decisions on the CISG are in fact presently shaping the meaning of different provisions of the CISG. Sadly, however, ASEAN countries are not actively taking part in this interpretation exercise. The withdrawal of the reservation would encourage the use of the CISG within ASEAN, particularly through the choice of Singapore law and might eventually lead to some cases on the CISG in this region which would allow our judges and arbitrators to develop an expertise and to influence the interpretation of the CISG.

<sup>63</sup> Most European countries outside the United Kingdom and Ireland are contracting States. For a complete updated list see <<http://www.cisg.law.pace.edu/cisg/countries/cntries.html>> or <<http://www.uncitral.org/english/status/index.htm>>.

<sup>64</sup> See CISG, Article 6.

<sup>65</sup> At the time of the negotiation of the CISG, the socialist legal tradition or family was still very relevant. I will leave it to others to discuss whether it remains a relevant family. It seems that the main socialist countries are returning to the civil law tradition, of which arguably, socialist law was a sub-tradition. In ASEAN, Vietnam is the most important country that still describes itself as socialist, though most would say it is a civil law country where socialism still influences the law, at least in theory. For the purpose of this article I will focus only of the civil and common law traditions.

<sup>66</sup> See <<http://www.cisg.law.pace.edu/cisg/text/caseschedule.html>> which reports more than 1400 cases that deal with the CISG. This of course does not include probably hundreds of confidential arbitral decisions.

<sup>67</sup> See CISG, Article 7(1).



A large proportion of cases on the CISG are decided through arbitration. To the extent that Singapore wants to promote itself as an arbitration centre, the development of an expertise on the CISG would be a very useful asset.

#### V. HOW TO WITHDRAW THE RESERVATION

I hope to have shown that there are many good reasons to withdraw the reservation and frankly no good reason to keep it. If the Government of Singapore agrees with my analysis, or if for whatever other reason it would want to withdraw the reservation, how should it go about it?

The withdrawal of reservations is governed by Article 97(4) of the CISG:

97(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

The depositary is the Secretary General of the UN.<sup>68</sup> Therefore if for example the Singapore government gave notice of the withdrawal of its reservation to the Secretary General on 15 December 2005 it would become effective on 1 July 2006 (the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary).

Although the Singapore government would not be under any obligation to otherwise publicise this withdrawal, I would suggest that the government might wish to publicise this not only in Singapore but also with the Bars of our main trading partners—one could consider for example a short advertisement in a publication of the Bar Council of Malaysia. There is of course no need to publicise this move in States that are already parties to the CISG since the CISG already applies by default to transactions between Singapore and these states through Article 1(1)(a). There is therefore no need to give notice to many of our important trade partners (USA, China, most of continental Europe, Australia *etc.*). We should probably try to give notice to the other countries in ASEAN which have not ratified the CISG and to other important partners such as India and the United Kingdom which are also not parties.

What transitional measures would be needed? For example would the CISG rules on the formation of contract apply to offers made before the withdrawal? Would the CISG apply to contracts formed before the withdrawal? I suggest that the transitional rules are determined by analogy to Article 100:

100 (1) This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.

(2) This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.

Article 100 does not settle specifically the case of a withdrawal of a reservation but settles only the entering into force of the CISG in a Contracting State. Nonetheless Article 7(2) states that “questions concerning matters governed by this Convention which are not

<sup>68</sup> Article 89 of the CISG states that “The Secretary-General of the United Nations is hereby designated as the depositary for this Convention”.

expressly settled in it are to be settled in conformity with the general principles on which it [the convention] is based ...". In my view the principles on which article 100 is based should, *mutatis mutandis*, settle the matter as follow:

- (1) When, under Article 1(1)(b), the rules of private international law lead to the application of Singapore law, the CISG applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when Singapore's withdrawal is to take effect.
- (2) When, under Article 1(1)(b), the rules of private international law lead to the application of Singapore law, the CISG applies only to contracts concluded on or after the date when Singapore's withdrawal is to take effect.

This formulation of the transitional measures in fact corresponds exactly to the interpretation of the CISG given by Singapore's own legislation. In my view the Singapore Parliament stated perfectly well in its internal law what the effect of the withdrawal of a reservation would be in international law.<sup>69</sup>

There is only one precedent for the withdrawal of a reservation under Article 95 of the CISG—Canada withdrew its reservation under Article 95, a reservation that was applicable only to the province of British Columbia. I have enquired with colleagues at the Canadian Federal Ministry of Justice to see how they did it and whether there were any pitfalls. Ms Kathryn Sabo and Ms Mounia Allouch of the Canadian Ministry of Justice were most helpful in explaining how Canada and British Columbia followed closely Article 97 of the CISG and how they made sure that Canadian domestic law corresponded exactly to its international obligation. First, in June 1992, British Columbia (Canadian provinces have jurisdiction on the sale of goods<sup>70</sup>) amended its legislation implementing the CISG in order to make Article 1(1)(b) applicable in British Columbia but made sure that this amendment would not come into force immediately. On 31 July 1992, following the procedure provided for in Article 97 of the CISG, the Canadian federal government (in charge of foreign affairs) deposited a notice of withdrawal of the reservation with the Secretary-General of the UN. This meant that the withdrawal would take effect internationally on 1 February 1993 and the federal government advised British Columbia to ensure that its internal legislation (*i.e.*, the amendment to its implementing law) came into force on the same day.<sup>71</sup>

I note that Singapore's implementing legislation already provides a mean to amend the internal law in case of a withdrawal of its reservation. Sub-sections 3(2) and 3(3) of the Implementing Act state:

3(2) Sub-paragraph (1) (b) of Article 1 of the Convention shall not have the force of law in Singapore and accordingly the Convention will apply to contracts of sale of goods only between those parties whose places of business are in different states when the States are Contracting States.

3(3) The Minister may by order delete subsection (2) if the reservation made pursuant to Article 95 of the Convention is withdrawn except that sub-paragraph (1) (b) of Article 1 of the Convention shall not apply to and shall not have the force of law in relation to any proposal for concluding the contract made or any contract concluded

<sup>69</sup> See Sub-section 3(3) of the *Implementing Act*, *supra* note 2, which states: "The Minister may by order delete subsection (2) if the reservation made pursuant to Article 95 of the Convention is withdrawn except that *sub-paragraph (1) (b) of Article 1 of the Convention shall not apply to and shall not have the force of law in relation to any proposal for concluding the contract made or any contract concluded before the date on which the withdrawal of the reservation takes effect under Article 97 (4) of the Convention.*" [Italics added].

<sup>70</sup> Canada has made the federal state reservation authorised by Article 93 of the CISG which allows some federal states to have the CISG applied almost as if each state of the federation was, for the purpose of the CISG, a different Contracting State.

<sup>71</sup> Copy of e-mail correspondence (in French) with Ms Kathryn Sabo and Ms Mounia Allouch on file with the author.

before the date on which the withdrawal of the reservation takes effect under Article 97 (4) of the Convention.

There is therefore a very efficient and fast way to amend the Implementing Act without even having to go before Parliament. It will make it very easy to ensure that Singapore's internal law correspond to its international obligation; that the withdrawal of its reservation will take effect on the very same day internationally and internally. Singapore is therefore well prepared to withdraw its reservation if it so wishes. It is as if the Singapore legislator suspected that it might be well advised to withdraw its reservation someday.

## VI. CONCLUSION

Singapore, more out of prudence than strong conviction, decided that it should make a reservation under Article 95 and thus excluded the application of Article 1(1)(b) of the CISG. Out of prudence, because such reservations cannot be made after ratification, so if one is not entirely sure, one should make the reservation—one can always withdraw it later. In fact, when it adopted its legislation very prudently and very competently, Singapore put in place the process by which the reservation could be easily withdrawn in its internal law without having to go back to Parliament. This shows that Singapore, as usual, took a very pragmatic and flexible approach and has shown a willingness to reconsider the matter.

The apparent original rationale for the reservation—that parties from non-Contracting States may be taken by surprise if the CISG is applied through Article 1(1)(b)—is much less convincing today. Nine years after the CISG came into force in Singapore, most of our partners know that Singapore is a Contracting State. In any event, the CISG now has 65 Contracting States, 59 of which have not made a reservation under Article 95, and therefore traders in Non-Contracting States know they must check whether a given country is a Contracting States and whether it has made a reservation. They also know by now that they can exclude the CISG if they so choose and in fact many probably, “just in case”, already explicitly exclude the CISG even when it does not apply because of Singapore's reservation. There is therefore no reason to keep the reservation.

There are, however, many reasons to withdraw the reservation and it would be, in my view, in our best interests to withdraw it as soon as possible. First and foremost, Singapore law and Singapore as a forum might be chosen more often, particularly by those who wish their contract to be governed by the CISG. This is because a withdrawal of the reservation would reduce the many legal risks presently associated with the choice of Singapore law or of a Singapore forum for a sale of goods contract when one of the parties has its place of business in a Non-Contracting State—the legal effect of such choices would become much more predictable. This can only be good for Singapore's economy, with the generation of more work for Singapore lawyers and Singapore courts and tribunals.

The withdrawal will also demonstrate that Singapore is committed to respecting the autonomy of parties when it comes to choice of law, will allow Singapore traders to use standard form contracts that do not exclude the CISG, will promote the CISG in ASEAN and will increase our expertise on the CISG (by hopefully bringing more cases to Singapore) and thus allow our courts and tribunals to influence the interpretation of the CISG through their published decisions.

I therefore see only advantages to such a withdrawal and humbly submit that the Singapore Government should consider such a course of action. Hopefully, after Singapore has joined Canada in withdrawing the reservation, the other countries that have made such reservations will consider doing the same.