THE APPLICATION OF CISG IN INTERNATIONAL ARBITRATION

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Abstract

International arbitration allows great flexibility of the parties to structure their whole relationship. One of the key factors is the choice of the law applicable to the substance of the relationship. CISG is intended for the regulation of such relations between international businessmen. This paper builds on the empirical evidence of the International Arbitration Surveys conducted among various groups of practitioners on their reasoning concerning choice of law applicable to the substance of the relationship and argues that although CISG is not chosen by them frequently (or arguably not chosen at all), this "omission" is not warranted.

Keywords

CISG; International Arbitration; Choice of Applicable Law.

1 Introduction

International commercial arbitration is dispute settlement mean sought by international businessmen as preferred way of judicial dispute settlement compared to national court systems. The declared qualities of the arbitration regularly quoted by the international businessmen include fairness, neutrality and flexibility of dispute settlement procedures provided by the

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arbitration. Outcome of such flexible procedures should be efficient solution to their disputes.[2]

The flexibility of the arbitration has manifold aspects. Parties to the dispute are in general free to choose persons who will be in charge of the settlement of their dispute, or at least choose arbitral institution which will administer process of the dispute settlement. Indeed, the possibility to choose persons of own choice as arbitrators is the internationally recognized characteristic of the arbitration.[3] Another example of flexibility of the arbitration relates to the choice of the (legal) seat of arbitration. Consequently, the parties are in the position to choose underlining procedural regulations, the safety-net of procedure law and also ultimate referee of the procedural aspects of the case.[4] However, contrary to the national court proceedings in which the seat of the court is also venue where the parties will meet in person with judges (except of specific circumstances in which national procedural laws allows court to hold hearing in place different from the court room due to specific grounds connected with procedural propriety of specific case), the international arbitration allows the parties to select also venue (or even venues) for individual hearings.[5]

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2 *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* [online]. White & Case; Queen Marry, University Of London, London, 2012, p. 2 [accessed on 2017-03-20]; BLACKABY, Nigel, PARTASIDES, Constantine. *Redfern and Hunter on International Arbitration*. 6th ed. Oxford: Oxford University Press, 2015, paras. 1.97, 1.104; BORN, Gary B. *International Commercial Arbitration*. 2nd edition. Alphen aan den Rijn: Kluwer Law International, 2014, pp. 69, 83.

3 See e.g. Arbitral Procedure: Draft Prepared by the Commission. In: *Yearbook of the United Nations*. 1953, p. 672; Report of the International Law Commission Covering the Work of its Fifth Session, 1 June–14 August 1953: A/2456. In: *Yearbook of the International Law Commission* [online]. 1953, Vol. II., p. 202 [accessed on 2017-03-20]; Advisory Opinion of the Permanent Court of International Justice of 21 November 1925, Interpretation of Article 3, paragraph 2, of the Treaty of Lausanne. *Publications of the Permanent Court of International Justice,* Series B., No. 12, p. 26; Judgment of the International Court of Justice of 16 March 2001 (Merits), Maritime Delimitation and Territorial Questions between Qatar and Bahrain, para. 113 [online]. *International Court of Justice* [accessed 2017-08-08]; BLACKABY, Nigel, PARTASIDES, Constantine. *Redfern and Hunter on International Arbitration*. 6th ed. Oxford: Oxford University Press, 2015, para. 1.71. BORN, Gary B. *International Commercial Arbitration*. 2nd. Alphen aan den Rijn: Kluwer Law International, 2014, p. 1540.

4 BLACKABY, Nigel, PARTASIDES, Constantine. *Redfern and Hunter on International Arbitration*. 6th ed. Oxford: Oxford University Press, 2015, para. 1.77; BORN, Gary B. *International Commercial Arbitration*. 2nd edition. Alphen aan den Rijn: Kluwer Law International, 2014, pp. 1595–1596.

5 BLACKABY, Nigel, PARTASIDES, Constantine. *Redfern and Hunter on International Arbitration*. 6th ed. Oxford: Oxford University Press, 2015, para. 4.171; see e.g. Article 17(2) of the 2017 ICC Rules of Arbitration: "*The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties.*"

This paper will deal with the third aspect of the international arbitration flexibility – the possibility to choose also the law governing the substance of the dispute. Although it is not only the speciality of the arbitration,[6] international arbitration is the prime forum where such flexibility is utilized. Moreover, the choice of the substantive regulation is intertwined with the choice of the seat.[7]

2 Requirements on Law Governing Substance of the Dispute

In general, international businessmen are free to choose from minimally 200 different legal systems round the world.[8] The choice of national legal system is broaden by various initiatives proposing unified or harmonized codes of legal regulation more suitable for international transactions.[9] The most formalized attempts to provide unified legal regulation for international transactions are international agreements provided for direct regulation of international business transactions with direct application taking precedence before invocation of national legal system. A prime example of the unification tendencies in the form of direct regulation is the CISG.

The selection of proper law governing the substance of the dispute is based on a range of considerations. International businessmen who participated

6 See e.g. BLACKABY, Nigel, PARTASIDES, Constantine. *Redfern and Hunter on International Arbitration*. 6th ed. Oxford: Oxford University Press, 2015, para 3.97; Article 3(1) of the Rome I Regulation: "*A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.*"

7 *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* [online]. White & Case; Queen Marry, University of London, London, 2015, p. 13 [accessed on 2017-03-20].

8 Currently, there are 193 member states to the United Nations. Several entities which could be deemed to achieve characteristics of statehood are not members, e.g. Palestine or the Republic of China (Taiwan). Additionally, there are several entities claiming to be states but not recognized as such (or recognized only by small minority of states, e.g. one or two). Moreover, several states are organized as federal states with separate legal systems for each individual constituent party (e.g. United States of America, Canada, United Kingdom, Australia). See *Status. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)* [online]. UNCITRAL [accessed on 2017-03-20].

9 E.g. UNIDROIT Principles of International Commercial Contracts, INCOTERMS (in various versions), Uniform Customs and Practice for Documentary Credits (either UCP 500 or UCP 600) etc.

in the 2010 International Arbitration Survey[10] listed these influences (listed in relative order of importance as indicated in the Survey):

- Neutrality and impartiality of the legal system
- Appropriateness for type of contract
- Familiarity with and experience of the particular law
- Choice of law imposed by other party
- Corporate policy, standard terms and conditions
- Place of performance of the contract
- Location of company headquarters
- Location of the arbitration institution chosen for the arbitration
- Seat chosen for the arbitration
- Location of legal team
- Recommendation of external counsel
- Location of other party

The most important influences or the top three characteristics relevant for the choice of the law governing the substance of a contract are perceived neutrality and impartiality of the legal system with regard to the parties and their contract, the appropriateness of the law for the type of contract and the party's familiarity with the law.

Several of these influences have some common denominator and could be summarized under one heading. For example, location of company headquarters can be deemed as just specification or reason for greater familiarity and experience with particular law. Similar reasoning can be employed in relation to ground of location of legal team and also reasoning related to corporate policy or standard terms and conditions employed. Selected method of dispute settlement and especially its seat are common to reasons of location of the arbitration institution chosen for the arbitration and seat chosen for the arbitration. These characteristics aim at the familiarity with the selected law by the arbitrators.

10 *2010 International Arbitration Survey: Choices in International Arbitration* [online]. White & Case; Queen Marry, University Of London, London, 2015, p. 11 [accessed on 2017-03-20].

The same survey as above quoted also tried to find out which legal systems are selected (and consequently arguably do fulfil the listed characteristics).[11]

It is not much of a surprise that parties mostly chose their own law, law of their home jurisdiction, if they were free to choose, and even imposed their own law in case they were in such position. What is more interesting, however, is that English law was the second most frequently chosen law in case parties were free to choose (and consequently also in cases when such law is imposed by other party).[12] Other national legal systems are selected rather rarely when compared to English law.

3 CISG and the Requirements on Law Governing Substance of the Dispute

Previous section introduced most important characteristics that are sought by the users of international commercial arbitration –international businessmen, when selecting the legal system applicable to the substance of their business relations. As was indicated, the most popularly selected legal system was the national legal system of England. On the other hand, the international agreement with the aim of unification of substantive law – the CISG was selected rather rarely. This section employs the abovementioned criteria on the CISG with the aim do determine whether the position of the CISG as a rather unused (and even unwanted) legal regulation is justified.

3.1 Neutrality and Impartiality

CISG is an international agreement concluded by the states as primary subjects of public international law. It emerged after many years of negotiations and discussions brokered by the UNCITRAL in which representatives from all Member States of the United Nations had the possibility to participate

11 Ibid., pp. 13–14.

12 It has been also argued, that English law serves in some areas purpose of the unified international regulation, especially in case of trade with commodities. See ZELLER, Bruno. *CISG and the Unification of International Trade Law*. New York: Routledge-Cavendish, 2007, pp. 5–6. For further comparison between English law and CISG also discussing overall advantages of English law over CISG see ZHOU, Qi. The CISG and English Sales Law. In: DIMATTEO, Larry A. *International Sales Law: A Global Challenge*. Cambridge: Cambridge University Press, 2014.

and indeed had participated. Therefore, *prima facie* it is not an outcome of particular legal system, legal system of a particular country or even an imposition of the so-called developed countries on the developing ones.

The inherently anticipated bias of a national legal order in favour of the domestic businessmen is eliminated in the case of CISG. As an international agreement concluded and adhered to by 85 states[13] it is hard to say that it contains rules specific to one state and thus favouring its nationals.

As was indicated above, national law is strongly favoured. However, its selection as the chosen one is limited either by the willingness of the counterparty to accept it or by the negotiation power of the party to impose its wish on the counterparty. Selection of the CISG eliminates potential risks to the created relationship as it cannot be deemed as advancing only one side of the transaction. Moreover, the exercise of the negotiation power and advantage position could seed at least caution if not distrust between the parties. Such risks are avoided by selection as compromise rules that are not home-coming for either of the parties.[14]

Also, as an internationally negotiated instrument trying to accommodate needs and opinions of countries from various corners of the world with different economic policies and interests, the CISG is a compromise between the interests of export oriented states (naturally advancing rather interests of their exporters, i.e. sellers) and import oriented/depended states (naturally advancing interests of their importers, i.e. buyers). Consequently, CISG is deemed to be a balanced document respecting the interests of both parties to the transaction – seller and buyer.[15]

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13 *Status. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)* [online]. UNCITRAL [accessed on 2017-03-20].

14 It has been reported that CISG is viewed as such neutral law and compromise among lawyers in German speaking countries. See SCHROETER, Ulrich G. Empirical Evidence of Courts' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability). In: DIMATTEO, Larry A. *International Sales Law: A Global Challenge*. Cambridge: Cambridge University Press, 2014, p. 660.

15 Note on the UNCITRAL web page provides following characterisation: "*The resulting text provides a careful balance between the interests of the buyer and of the seller.*" See United Nations Convention for Contract on the International Sale of Goods (Vienna, 1980) [online]. *UNCITRAL* [accessed on 2017-03-20].

Neutrality and impartiality of the CISG could be attractive in international commerce. The visible advantages could indicate that CISG should be selected more compared to national legal systems.

3.2 Appropriateness for Type of Contract

The second most important characteristic listed by the international businessmen in connection with their choice of substantive law to govern their business relationship is the appropriateness of the selected law for the type of contract.

CISG is designed to provide substantive law for "*contracts of sale of goods*".[16] The covered sale of goods is further specified by elimination of certain sales either by type of goods involved (sale of goods for personal, family or household use; sale of stocks, shares, investment securities, negotiable instruments or money; sale of ships, vessels, hovercraft or aircraft; sale of electricity) or by method of conclusion of contract (sale by auction; sale on execution or otherwise by authority of law).[17]

On the one hand, this specification provides high level of legal certainty for the parties of the limits concerning application of the CISG. On the other hand, the specificity of the scope of application limits the potential selections. Although clear cut sales contracts have been cornerstones of international trade, they are often only part of the overall transaction. In that case it would establish more legal conflicts instead of bringing more legal certainty to the transaction if only portion of the transaction (the sales part) is regulated by the CISG and the rest of the contract would be governed by other law. The *dépeçage* is in general allowed but not promoted as there are rather more risks than advantages connected with it.[18] It is also true that parties could decide to adopt CISG also to other parts of the transactions (incorporate CISG into the transaction regulation provided by the

16 Article 1(1) of the CISG.
17 Article 2 of the CISG.
18 E.g. see Article 3(1) of the Rome I Regulation; ROGERSON, Pippa, COLLIER, John G. *Collier's Conflict of Laws*. 4th edition. Cambridge: Cambridge University Press, 2013, p. 306.

contract).[19] However, as CISG is designed for the sales of goods, it does not contain regulation required for other types of transactions, e.g. agency, royalties etc.[20] Contrary to limitations of the CISG, national legal orders offer in general comprehensive regulation for whole business transaction.[21]

3.3 Familiarity and Experience with the CISG

On first sight, CISG will lose points on familiarity as it is not a national law of any potential party of the transaction.

The lack of experience is caused by its lack of application and in turn creates vicious cycle. Such consequence could not occur in the case of a national law which is imposed and enforced by the power of the state (formally sole holder of power to compel through monopoly of violence) and the subject of the law cannot avoid its application.

However, at least in cases of the Czech (and also Slovak) businessmen the familiarity and even experience with the CISG is inherent to their familiarity and experience with their national law. The former Czechoslovak Commercial Code (which is still applied in modified, amended, form in Slovakia) was modelled in chapters concerning formation of contract, issues of contract breach (issues of fundamental breach) and specifically regulation of the sales contract on the CISG. The tradition of this regulation has been retained also

19 HUBER, Peter, MULLIS, Alastair. *The CISG: A New Textbook for Students and Practitioners*. München: Sellier, 2007, p. 66; SCHLECHTRIEM, Peter, BUTLER, Petra. *UN Law on International Sales: The UN Convention on the International Sale of Goods*. New York: Springer, 2008, p. 21. (However, the main point the authors made concerns domestic circumstances and not comparison to other types of international transactions than sales of goods. Although the authors also discuss the application of CISG to framework or preliminary contracts like distribution agreements.).

20 See e.g MAURIC, Jan. Právní jistota použití Úmluvy OSN o smlouvách o mezinárodní koupi zboží na atypické smlouvy, smíšené smlouvy a různé smluvní typy dle českého právního řádu. In: ROZEHNALOVÁ, Naděžda, DRLIČKOVÁ, Klára et al. *Úmluva OSN o smlouvách a mezinárodní koupi zboží - ano či ne?* Brno: Masarykova univerzita, 2012.

21 ZHOU, Qi. The CISG and English Sales Law. In: DIMATTEO, Larry A. *International Sales Law: A Global Challenge*. Cambridge: Cambridge University Press, 2014, p. 673.

in the recent recodification of the private law in the Czech Republic and the new Civil Code follows same heritage.[22]

Thus, businessmen versed in the Czech (and also Slovak) law have already advantage in familiarity and experience with the CISG. Such advantage could be used in their contract negotiations in cases where they either are not in the position to impose their national law or would rather not to press this issue, and as compromise or concession see as a better negotiating tactic an offer of adoption of international rules in the CISG. By choosing the CISG they would not select an unknown law but rather their home law in disguise.

Similar conclusions are applicable also to Czech (and Slovak) lawyers who would be involved in such international commercial transactions either as counsels or as arbitrators.

3.4 Place of Performance of the Contract

It is understandable that the place of performance of the contract has significant place among the criteria for the selection of applicable substantive law. The factual place of the performance of the contract (place where the goods are actually delivered) could be relevant e.g. for availability of evidence.

The CISG fulfils this criterion very well.

Although CISG is not the most successful international agreement in the field of international transactions, the list of contracting parties contains 85 state parties which represents nearly one half of the current number of states. When considering landmass, these countries occupy nearly the whole of Europe (except for the United Kingdom and Portugal), most of Asia (with the exception of the portion of the Middle East and south and south-east Asia), both Americas (with few exceptions) and Australia.

Besides, what is more important, the contracting parties represent significant portion of international trade - countries with highest rates of both

22 ROZEHNALOVÁ, Naděžda. Czech Republic. In: FERRARI, Franco. *The CISG and Its Impact on National Legal Systems*. Munich: Sellier, 2008, pp. 108–111. For more complex analysis of the relations between Czech Civil Code and CISG and other regulations designed for the international transactions see e.g. ROZEHNALOVÁ, Naděžda, DRLIČKOVÁ, Klára, VALDHANS, Jiří et al. *Nový občanský zákoník pohledem mezinárodních obchodních transakcí*. Brno: Masarykova univerzita, 2014.

exports and imports are state parties to the CISG as indicated in the following tables (the state parties to the CISG are highlighted):

World biggest exporters in 2015[23] (share in world exports by their value)	
China	14.1 %
United States of America	9.3 %
Germany	8.2 %
Japan	3.8 %
Republic of Korea	3.2 %
Hong Kong, China[25]	3.1 %
France	3 %
Netherlands	2.9 %
United Kingdom	2.9 %
Italy	2.8 %
Canada	2.5%
Belgium	2.4 %
Mexico	2.3 %

World biggest importers in 2015[24] (share in world imports by their value)	
United States of America	14 %
China	10.2 %
Germany	6.4 %
United Kingdom	3.8 %
Japan	3.8 %
France	3.4 %
Hong Kong, China[25]	3.4 %
Republic of Korea	2.7 %
Netherlands	2.5 %
Canada	2.5 %
Italy	2.5 %
Mexico	2.4 %
India	2.4 %

It may be noted that also the white gap in the map of contracting parties in Africa is not so to say "CISG-free". Similarly to the CISG influence on the Czech national contract law, the CISG served similar role in Africa where Organisation for the Harmonisation of Business Law in Africa representing 17 African states adopted common sales law based on the CISG.[26]

23 *List of Exporters for the All Products in 2015* [online]. International Trade Centre (ITC) [accessed on 2017-03-20].

24 *List of Importers for the All Products in 2015* [online]. International Trade Centre (ITC) [accessed on 2017-03-20].

25 The status of Hong Kong (and similarly to Macao) Special Administrative Region of the PRC as (part of) contracting state to the CISG is not entirely clear. For more discussion see e.g. SCHROETER, Ulrich. The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the International Sale of Goods. *Pace International Law Review* [online]. 2004, Vol. XVI, No. II, pp. 307–332 [accessed on 2017-03-21].

26 ZELLER, Bruno. *CISG and the Unification of International Trade Law*. New York: Routledge-Cavendish, 2007, p. 8; FERRARI, Franco. CISG and OHADA Sales Law. In: MAGNUS, Ulrich. *CISG vs. Regional Sales Law Unification: With a Focus on the New Common European Sales Law*. Munich: Sellier, 2012.

Adding the local perspective, the member states of the CISG are also most important trade partners for the Czech Republic itself (state parties to the CISG are highlighted):

Czech exports in 2015[27]	
Germany	32.2 %
Slovakia	9 %
Poland	5.9 %
United Kingdom	5.3 %
France	5.1 %
Austria	4.1 %
Italy	3.7 %
Hungary	3

Czech imports in 2015[28]	
Germany	26 %
China	13.5 %
Poland	7.9 %
Slovakia	5.1 %
Italy	4.1 %
France	3 %
Russian Federation	3 %
Netherlands	3 %

The abovementioned statistics indicate that vast majority of the world export is placed (and performed) in the CISG Contracting States. Consequently, CISG is frequently part of the law applicable at the place of contract performance.

The significant share of the state parties to the CISG in world exports is also telling from the point of view of the applicable law. The seat / residence of the seller is usually the sole criterion for the determination of the applicable law for the substantive regulation. And the CISG already anticipates this situation when prescribes its own application in situation when the rules of private international law lead to the application of the law of a contracting state, i.e. the exporter's home state.

4 Conclusion

Previous analysis showed that CISG fulfils several important considerations for the selection of substantive law – CISG is inherently neutral and was also drafted taking into consideration both parties of the transaction, it has been specifically designed for the contract of sales of goods, when imposed by other party it should not bring any special discomfort and

27 *List of exporters for the all products in 2015 for the Czech Republic* [online]. International Trade Centre (ITC). [accessed on 2017-03-20].

28 *List of importers for the all products in 2015 for the Czech Republic* [online]. International Trade Centre (ITC). [accessed on 2017-03-20].

it is also applicable when taking into consideration the place of the contract performance. For the businessmen from the Czech Republic (and Slovakia as well as other countries round the world) CISG also provides additional advantage of familiarity and experience with it even without special need to study CISG. CISG's negative is its specialization – it is appropriate for the clear-cut contract of sale but is not prepared to provide regulation for more complex international business transactions. Also, from the point of view of businessmen in general, as it is not used widely, there is an element of lack of familiarity and experience with it.

However, CISG is not a dead document. *Mistelis* estimated that by 2007 there could have been 4,250 to 5,000 awards rendered in CISG-governed international business transactions, based on number of cases listed in the public databases of decisions based on CISG (i.e. Pace, UNILEX, CLOUT and ICC collections of abstracted awards) (in total 512 awards published between 1988 and 2007 which should have been multiplied by the ratio of 5 % representing the rate of award publication). It is true that such number is only a small portion of the awards rendered worldwide. However, it is still a considerable number. We may hope that the number will rise further.

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