The Application of the CISG in the World of International Commercial Arbitration

By André Janssen and Matthias Spilker,
Münster and Frankfurt*

Contents

A. Introduction 132

B. Statistical outline 133

C. Application of the CISG by arbitral tribunals 134
- *I. Choice of law by contracting parties* 135
  - *1. Direct choice* 135
  - *2. Indirect choice and opting out* 136
- *II. Determination of the applicable law by the arbitral tribunal absent a choice of law by the parties* 136
  - *1. General legal obligation for arbitral tribunals to apply Art. 1(1)(a) CISG?* 137
    - *a) Arbitral tribunal situated in a contracting state* 137
    - *b) Arbitral tribunal situated in a non-contracting state* 138
    - *c) Interim result* 138
  - *2. Indirect method of application by arbitral tribunals* 139
    - *a) On the basis of Art. 1(1)(b) CISG* 139
    - *b) On the basis of Art. 1(1)(a) CISG as a rule of private international law* 141
  - *3. Direct method of application by arbitral tribunals* 143
    - *a) Arbitrator's autonomy* 143
    - *b) Limited arbitrator's autonomy* 145
  - *4. A closer look at application beyond the CISG's scope* 147
    - *a) Trade usage or part of the lex mercatoria* 147
    - *b) Generally accepted principles* 150
    - *c) Implication and analogy* 151
    - *d) Range of voie directe and interim result* 152
- *III. The CISG and arbitration agreements* 153

---

* Literature cited in *abbreviated form: Urs Peter Gruber*, The Convention on the International Sale of Goods (CISG) in Arbitration: Int. Bus. L.J. 1 (2009) 15–34; *Julian Lew/Loukas Mistelis/Stefan Kröll*, Comparative International Commercial Arbitration (2003); *Loukas Mistelis*, CISG and Arbitration, in: CISG Methodology, ed. by *Janssen/Meyer* (2009) 375–395.

RabelsZ 77, 131–157 – DOI: 10.1628/003372513X661094
ISSN 0033-7250 – © 2013 Mohr Siebeck

1. *The clash of formal requirements* 153
2. *How to unravel the formal requirement knot* 154

D. *Conclusion* 156

A. Introduction

More than 30 years have passed since the United Nations Convention on Contracts for the International Sale of Goods (1980)[1] (hereafter: "CISG" or "the Convention") was signed in Vienna. As of 2013, the CISG has been adopted by 78 contracting states which account for at least about 2/3 – probably even 3/4 – of world trade. Thus, it governs an uncountable number of international sales contracts all over the world.[2]

The national courts boast a growing body of case law which is subject to detailed discussions by legal experts throughout the world. This makes it all the more remarkable that until recently the application of the CISG by international arbitral tribunals "has not been really discovered as a subject of discussion".[3] Although the awards by arbitral tribunals often remain unpublished, the growing number of reported cases might indicate that parties to international sales contracts are increasingly resorting to arbitration as a "private" mechanism for resolving disputes.

This present contribution attempts to "discover" the application of the CISG by arbitral tribunals as a subject of academic discourse. It starts by briefly outlining statistical evidence that the CISG is frequently applied by arbitral tribunals and then focuses on the legal peculiarities associate with applying it in this area. Among the most important issues dealt with are the factors that arbitration tribunals have to take into account when determining whether to apply the CISG. On closer examination, one realises that several questions arise when tribunals apply the CISG in accordance with Art. 1(1) CISG. For example, it is questionable whether arbitral tribunals are directly bound by Art. 1(1)(a) CISG as they do not form part of a country's judicial system. Assuming that arbitration tribunals are not bound by Art. 1(1)(a) CISG, the question arises whether they can apply the Convention indirectly through Art. 1(1)(b) CISG. This would require the conflict rules applied by an arbitral tribunal to refer to the domestic law of a contracting state. In this regard, tribunals would then have to consider further factors depending on

---

[1] 1489 U.N.T.S. 3.

[2] See for the question of the CISG's acceptance in German legal practice *Justus Meyer*, UN-Kaufrecht in der deutschen Anwaltspraxis: RabelsZ 69 (2005) 457–486.

[3] *Gruber* 20. However, see recently also *Sebastian Knetsch*, Das UN-Kaufrecht in der Praxis der Schiedsgerichtsbarkeit (2011); *Pilar Perales Viscasillas/David Ramos Muñoz*, CISG & Arbitration: Spain Arbitr. Rev. 10 (2011) 63–84; *Nils Schmidt-Ahrendts*, CISG and Arbitration: Belgrade L. Rev. 59 (2011) 211–223.

whether the governing law was chosen by the tribunal or the parties themselves. When enquiring as to the reasons for applying the CISG in international arbitration, one could argue as arbitral tribunals have done in the past[4] that the CISG always has to be taken into consideration (despite the fact that its scope of application is open to debate) because it either represents a trade usage, forms part of the *lex mercatoria* or constitutes a generally accepted principle of international trade law, or that it can be applied by implication, or alternatively, analogy. This contribution assesses whether such assumptions of arbitral tribunals are correct. Finally, the article investigates the controversy surrounding the application of the Convention to arbitration agreements. This issue is of vital importance in practice because Art. 11 CISG abolishes the formal requirements of sales contracts which fall under the scope of the CISG. Thus, if this provision were to apply to arbitral agreements, parties would not necessarily have to comply with the formal requirements of arbitration laws which generally require written arbitration agreements.

B. Statistical outline

Before focussing on the legal peculiarities and problems concerning the application of the CISG in international commercial arbitration, it is worth mentioning a few statistics. In 2008, Loukas Mistelis[5] completed a survey based on the PACE database. This shows that, towards the end of 2008, over a quarter of the 2000 decisions contained in the database were made by an arbitral tribunal. As of May 2012, 914 of the 2,766 documented cases in the PACE database were arbitral awards.[6] According to Mistelis' survey the application of the CISG was determined in 57% of the cases by choice of the arbitral tribunal, in 22% of the cases on the basis of conflict-of-laws rules, in 11% of the cases by choice of the parties and in 2% of the cases by general principles of law. No reason was given as to why the CISG was applied in the remaining 8% of the cases.[7]

However, considering the arbitral institutions' confidentiality policy, it is very likely that the real number of arbitration cases involving the CISG is markedly higher. Mistelis estimates that only significantly less than 5% of

[4] See e. g. ICC Arbitration Case No. 5713 of 1989 available at <http://cisgw3.law.pace.edu/cases/ 895713i1.html>; ICC Arbitration Case No. 8502 of November 1996 *(Rice case)* available at <http://cisgw3.law.pace.edu/cases/968502i1.html>; ICC Arbitration Case No. 8908 of December 1998 *(Pipes case)* available at <http://cisgw3.law.pace.edu/cases/988908i1.html>.

[5] *Mistelis* 386 et seq.

[6] Compare <http://www.cisg.law.pace.edu/>; last accessed 15 May 2012.

[7] *Mistelis* 388 et seq.

the arbitration awards are published.[8] On that basis he comes to the result that the CISG was applied through the end of 2008 in 4,250–5,000 arbitration cases.[9] If he is correct, the figures relating to court decisions and arbitral awards based on the CISG would change dramatically with at least 70–80% of CISG-related cases having been settled by arbitral tribunals.[10] Contrary to the proportion suggested by the PACE database, almost four out of five CISG-related cases may therefore be arbitration cases. But even if one only wants to take the published CISG-related cases into consideration, these statistics show that a large number of arbitral awards can be identified in this field. Thus, there are several hundreds of published (and probably thousands of non-published) CISG cases in the field of international commercial arbitration which have applied or at least considered applying the Convention.

C. Application of the CISG by arbitral tribunals

The review of arbitral practice has shown that the CISG is frequently applied by arbitral tribunals. This chapter will now particularly focus on the peculiarities that arise when the Convention is applied by arbitral tribunals rather than national courts. The CISG itself clearly assumes that it can be applied by both. For example, Art. 61(3) CISG prohibits courts and arbitral tribunals from granting a period of grace to the buyer when the seller resorts to a remedy for breach of contract.[11] Furthermore, in its informative explanatory note to the Convention, the UNCITRAL Secretariat expressly addresses its recommendations on the interpretation of the CISG to domestic courts and arbitral tribunals.[12] As with international disputes before national courts, one has to distinguish between situations where the applicable law has been chosen by the parties and those where it is determined by the arbitral tribunal.

---

[8] *Stefan Kröll/Loukas Mistelis/Pilar Perales Viscasillas (-Mistelis)*, UN Convention on Contracts for the International Sale of Goods (CISG) (2011) Art. 1 CISG para. 18 (cited: *Kröll/Mistelis/Perales Viscasillas [-commentator]*).

[9] *Mistelis* 387.

[10] *Kröll/Mistelis/Perales Viscasillas (-Mistelis)* (supra n. 8) Art. 1 CISG para. 18.

[11] See also the parallel provision in Art. 45(3) CISG.

[12] See UNCITRAL, Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods (2010) 36.

I. Choice of law by contracting parties

All essential arbitration laws and rules[13] concede party autonomy to the contracting parties for good reason.[14] This allows parties to draft contracts in a way that reflects their interests and prevents the application of inappropriate or unfavourable laws.[15] Where the CISG is concerned, provided that there is a choice of law, there are three possible situations that can arise in international arbitration. The parties can choose the CISG directly, choose the law of a contracting state which leads to the application of the Convention (indirect choice), or exclude the CISG (opting out).

1. Direct choice

With regard to national courts, it is debatable whether EU private international law in the form of the Rome I Regulation[16] also allows the parties to directly choose non-national law (e. g. a convention like the CISG) or only the law of a *state*.[17] Although this problem has been discussed in cases where the parties directly chose the CISG, it does not arise in relation to arbitration because Art. 1(2)(e) of the Rome I Regulation precludes application of the Regulation to arbitration procedures and because arbitration procedures are, in general, more flexible. Arbitration laws and rules give priority to the parties' agreements. As a result, these regulations offer a wider range of choice by expressly allowing the parties to choose the "rules of law" they consider appropriate to their agreements.[18] All in all, arbitration laws and rules attribute great importance to the parties' choice and will apply the CISG if the parties agree that their contract is to be governed by it.[19]

---

[13] See e. g. Art. 28(1) UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006), Art. 59(a) WIPO Arbitration Rules and Art. 21(1) and (2) ICC Arbitration and ADR Rules.

[14] See in more detail on the question of party autonomy in arbitration *Gary Born*, International Commercial Arbitration I (2009) 82 et seq.

[15] *Mistelis* 382.

[16] Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), O.J. 2008 L 177/6.

[17] See Art. 3(1) Rome I Regulation. For a good overview see *Rauscher (-von Hein)*, Europäisches Zivilprozess- und Kollisionsrecht – EuZRP/EuIPR (2011) Art. 3 Rom I-VO Rz. 62 et seq.; Münchener Kommentar zum BGB[5] *(-Martiny)* (2009) Art. 3 Rom I-VO Rz. 28 et seq., 31, both with further references (cited: Münch. Komm. BGB *[-commentator]* [year]).

[18] See also *Gruber* 26.

[19] The parties can also agree to apply the CISG in arbitration proceedings to contracts not covered by the CISG ("opt in"). However, they cannot opt out of mandatory national rules (e. g. consumer protection).

2. Indirect choice and opting out

Where indirect choice or an opt-out is concerned, there are no particular discrepancies between the application of the CISG by national courts and by arbitral tribunals. In arbitration proceedings, if the parties to an international sales contract were to choose the law of a contracting state to the CISG as the law governing the contract (and not the Convention directly), the arbitration tribunal would apply the CISG as an integral part of this state's law in the same way as a domestic court.[20] If the CISG is actually applicable but the parties decide in favour of a certain national law or other rules instead, they are free to exclude the CISG according to Art. 6 CISG, and the arbitration tribunal, as every national court, has to respect such exclusion. Thus, particular problems for arbitration tribunals do not arise as concerns an indirect choice or an opt-out of the CISG.[21]

II. Determination of the applicable law by the arbitral tribunal absent a choice of law by the parties

If there is no choice of law by the contracting parties, the arbitrator has to determine the applicable law. In this respect, the tribunal could apply the Convention in a number of ways, predominantly dependent on the discretion given by arbitration laws and arbitration rules:

Some arbitration laws and rules oblige the arbitral tribunals to apply conflict-of-laws rules when determining the applicable law. Thus, in such cases arbitral tribunals would apply the CISG indirectly (see 2. below). Other arbitration laws and rules provide arbitral tribunals with a wider discretion. Such provisions entitle the tribunals to determine the applicable law without recourse to conflicts-of-laws rules. Consequently, in this respect the CISG would be applied directly (see 3. below).

However, regardless of the provisions in the relevant arbitration rules and laws, the first question to be addressed here is whether an arbitral tribunal – particularly one situated in a CISG member state – is obliged to consider Art. 1(1)(a) CISG if applicable (see 1. below).

---

[20] This is illustrated by a dispute settled in 1993 by an ICC tribunal concerning an agreement between a German steel producer and a Syrian importer (buyer) for the sale of steel bars (ICC Arbitration Case No. 6653, 26 March 1993 *(Steel bars case)*, available at <http://cisgw3.law.pace.edu/cases/936653i1.html>).

[21] The parties have to make a statement to this effect (e. g. "the CISG shall not apply to this agreement"). Mere reference to the law of a CISG member state is not sufficient (e. g. "This contract shall be governed by German law.") because the CISG forms part of that state's law.

1. General legal obligation for arbitral tribunals to apply Art. 1(1)(a) CISG?

a) Arbitral tribunal situated in a contracting state

One could presume that an arbitrator, like a judge of a national court in a dispute involving two parties based in different CISG member states, is regardless of any arbitration laws and rules obliged to apply the CISG via Art. 1(1)(a) CISG if the arbitration takes place in a CISG member state. However, by their very nature arbitral tribunals are not per se bound by Art. 1(1)(a) CISG despite the fact that they may have their seat solely in a contracting state. Arbitral tribunals are private institutions based on a private agreement, whereas national courts are grounded on a state's constitution and are regulated by national procedural laws. Arbitration is a mechanism agreed between private individuals for settling their disputes and is not a state dispute settlement mechanism. Moreover, it is based on party autonomy, flexibility and free choice, whereas litigation is expressly governed by national procedural laws. By contrast, the CISG is an international treaty. Under Art. 26 of the Vienna Convention on the Law of Treaties (1969)[22], international treaties only bind contracting states as parties to these treaties. As a result, only contracting states and their organs are bound to apply international treaties.[23] Unlike national courts, arbitral tribunals do not form part of the national legal system and are therefore bound neither by a state's private international law nor by an international treaty which replaces it (like the CISG). Instead, when determining the applicable law for arbitration proceedings, arbitral tribunals are always bound by either national arbitration laws or arbitration rules that replace these arbitration laws. Significantly, by virtue of arbitration laws or rules, arbitral tribunals have the power to directly apply the CISG in accordance with Art. 1(1)(a) CISG. However, it is not their seat in a CISG member state but the provisions on the determination of the applicable law in arbitration laws or rules that determine whether and how to apply the CISG. To conclude, as arbitral tribunals are not bound by a state's legal system,[24] they are not *per se* bound by Art. 1(1)(a) CISG either.[25]

---

[22] Int. Leg. Mat. 8 (1969) 679 (entered into force Jan. 27, 1980).

[23] Concerning this point, see *Gruber* 23 et seq.; *Schmidt-Ahrendts* (supra n. 3) 214 et seq.

[24] See also *Peter Huber/Alastair Mullis*, The CISG, A new textbook for students and practitioners (2007) 67.

[25] *Schmidt-Ahrendts* 214 et seq. Opposing opinion however *Knetsch* 41 et seq. (both supra n. 3).

b) Arbitral tribunal situated in a non-contracting state

The same applies to arbitral tribunals situated in a non-contracting state to the CISG. Obviously, in such a case an arbitral tribunal is not per se obliged to apply Art. 1(1)(a) CISG if the parties have not chosen the applicable law themselves; this would be the case even if both parties had their place of business in different contracting states. In such a case not even a domestic court would be bound by Art. 1(1)(a) CISG as the forum state is not a signatory of the CISG, accordingly, neither should an arbitral tribunal be bound. Nevertheless, arbitral tribunals situated in a non-contracting state to the CISG might by virtue of arbitration laws or rules have the power to apply Art. 1(1)(a) CISG.

c) Interim result

Arbitral tribunals, regardless of whether they are situated in a contracting state of the CISG or not, are not obliged as an organ of the state to determine the applicable law in a dispute in accordance with Art. 1(1)(a) CISG. However, as will be discussed later, arbitration laws or rules may bind arbitral tribunals to make use of Art. 1(1)(a) CISG. This has two consequences: on the one hand arbitral tribunals display peculiarities and differences in comparison to the national courts of CISG member states. On the other hand, one could argue that, as a matter of fact, arbitral tribunals find themselves in a similar situation to national courts of states which are not signatories to the CISG.[26] Neither of them are under any direct obligation to apply Art. 1(1)(a) CISG although each can apply the CISG using the rules of private international law and Art. 1(1)(b) CISG.[27] The difference lies in the fact that a national court is obliged to apply the rules of private international law of the state in which it is situated and, possibly, the CISG on the basis of Art. 1(1)(b) CISG. On the other hand, an arbitral tribunal generally only has to obey arbitration laws or rules when determining the applicable law[28] and not necessarily the private international law of the state it is located in.[29]

---

[26] See also *Gruber* 24.

[27] Regarding the application of the CISG by arbitral tribunals pursuant to Art. 1(1)(b) CISG see the following paragraphs.

[28] Those rules sometimes provide an application of conflict-of-laws rules by the arbitral tribunal, see e.g. Art. 28(2) UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006).

[29] See e.g. Art. 21(1) sentence 2 ICC Arbitration and ADR Rules.

2. Indirect method of application by arbitral tribunals

a) On the basis of Art. 1(1)(b) CISG

From a national court's perspective, the CISG can also be applied indirectly through Art. 1(1)(b) CISG because rules of private international law lead to the application of the contracting state's law which incorporates the CISG. Accordingly, Art. 1(1)(b) CISG does not constitute a rule of private international law in itself but rather gives the CISG a domestic law status.

(1) Initial situation provided by arbitration rules. – The situation is basically the same with regard to an arbitral tribunal. In cases where the tribunal is, due to the applicable arbitration laws or rules, bound to apply certain rules of private international law and thereby a contracting state's law (the so-called "indirect method of application" or "voie indirecte"), it will – like a domestic court – *eo ipso* apply the CISG on the basis of Art. 1(1)(b) CISG. As an example for this indirect method of application, one can consider Art. 28(2) of the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006). This article provides that, in absence of a choice of law by the parties, an arbitral tribunal "shall apply the law determined by the conflict of laws rules which it considers applicable."

(2) Arbitral tribunals bound by reservation under Art. 95 CISG? – Arbitral tribunals could run into problems if these conflict-of-laws rules lead to the application of the law of a CISG member state which has declared a reservation to Art. 1(1)(b) CISG as permitted under Art. 95 CISG (e. g. the United States or China). In that case, a national court can apply the CISG only if the requirements of Art. 1(1)(a) CISG are satisfied.[30]

As already pointed out, arbitral tribunals are not bound to apply either the private international law of their seat nor the CISG itself, regardless of whether their seat has implemented the latter or not. However, these basic rules do not offer a sufficient argument in this particular case because the point of departure is slightly different. That is to say, the question is not where the tribunal is based but whether or not a tribunal, recognising that the application of the conflict-of-laws rules will lead to the application of a member state's law, has to respect a state's reservation from Art. 1(1)(b) CISG under Art. 95 CISG.

There are few published decisions regarding this problem. In an award decided by the China International Economic and Trade Arbitration Commission (CIETAC) in 2004,[31] the parties (a Japanese seller and a

[30] See the U.S. example: 22 November 2002 U.S. District Court, Southern District of Florida, Unilex No. 01–7541 available at <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356>.

[31] China 24 December 2004 CIETAC Arbitration proceeding *(Medical equipment case)* available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/041224c1.html>.

Chinese buyer) agreed on a sales contract which did not contain a choice-of-law clause. The contract was concluded in China and the place of performance had connections with China. China was a CISG member state at that time, Japan was not.[32] The parties referred to Chinese law in their statements of claim and defence. The tribunal viewed such references as evidence that the parties had chosen Chinese law to govern the contract. However, as China had entered a reservation under Art. 95 CISG, Art. 1(1)(b) CISG was not applicable and did not give the CISG the status of domestic Chinese law. Consequently, the tribunal held that the contract was governed by the Chinese domestic laws and not the CISG.

Although the reasoning of the award was insufficiently documented, it is easy to see how the tribunal reached its decision. Where an arbitral tribunal determines the law applicable to an international sales contract on the basis of the rules relating to conflict of laws and these rules lead to the application of a CISG member state's law, it must apply this law correctly and thus in its entirety. For example, suppose that a dispute arises between two parties to an international sales contract and one of them is based in the United States, a contracting state to the CISG which has entered a reservation under Art. 95 CISG, and the other one in a non-member state to the CISG. In this case, even if the rules of private international law stipulated the application of US law, the CISG would not be applicable because in that context it does not form part of its legal system.[33] This is because the United States has implemented the Convention without being bound by Art. 1(1)(b) CISG. To hold otherwise would contradict the pertinent arbitration laws and rules which oblige tribunals to apply conflict-of-laws rules correctly. Furthermore, if an arbitrator were to ignore the United States' specific rejection of being bound by Art. 1(1)(b) CISG, it would effectively incorporate the CISG into US law and therefore fail to apply US law correctly. Finally, this opinion is indirectly supported by arbitration practice. When arbitral tribunals apply the Convention pursuant to Art. 1(1)(b) CISG, it is normally the case that they expressly take into consideration whether or not the respective CISG member state has entered a reservation under Art. 95 CISG.[34] If these tribunals did not consider themselves bound by such a reservation and if they were entitled to apply the CISG on the basis of Art. 1(1)(b) CISG in any

[32] The CISG came into effect in Japan in August 2009.

[33] By contrast, if there is a sales contract between one party based in the US and another party based in another member state to the CISG (Art. 1(1)(a) CISG situation), the CISG can be considered as a member state's law.

[34] See e. g. the following awards: ICC Arbitration Case No. 7645 of March 1995 *(Crude metal case)* available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/957645i1.html#cx>; Serbia 28 January 2009 Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce *(Medicaments case)* available at <http://cisgw3.law.pace.edu/cases/090128sb.html>. The latter tribunal emphasised that the CISG can only be applied via Art. 1(1)(b) CISG, if there is no reservation under Art. 95 CISG.

event (i.e. despite the fact that a member state had entered a reservation), then arbitrators would not in the first instance have to examine whether such a reservation existed.

b) On the basis of Art. 1(1)(a) CISG as a rule of private international law

As argued above, regardless of whether being situated in a CISG member state or not, an arbitral tribunal is not per se obliged to apply the CISG via Art. 1(1)(a) CISG.[35] The UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006) and several arbitration rules, however, oblige arbitral tribunals to apply conflict-of-laws rules. Therefore, it is conceivable that an arbitral tribunal in such situation[36] will make use of Art. 1(1)(a) CISG, considering it a conflict-of-laws rule.[37] The following example illustrates this point: In an ICC case[38] decided in 1992, a legal dispute arose between an Austrian seller and a Yugoslavian buyer (both Austria and Yugoslavia were contracting parties to the CISG at that time) who had entered into a sales contract for the furnishing and assembly of materials for the construction of a hotel without specifying the applicable law. At that time, Art. 13.3 of the ICC Rules of Conciliation and Arbitration[39] provided that, in the absence of an indication of the law applicable to the main issue, the arbitrator could apply the law designated by the *conflict-of-laws rule* he deemed appropriate. Accordingly, the arbitral tribunal applied the CISG with recourse to Art. 1(1)(a) CISG. Admittedly, although the wording of Art. 13.3 of the ICC Rules of Conciliation and Arbitration implied that an ICC tribunal was bound to apply a conflict-of-laws rule first, it was generally agreed by commentators at the time that this provision also allowed a tribunal to choose the applicable law directly.[40]

[35] See C. II.1. a)–c).

[36] This situation differs from that in which a tribunal is granted complete freedom under its arbitration rules to choose the applicable substantive law directly and is not obliged to refer to conflict-of-laws rules first. This so-called direct application will be discussed in more detail below under C. II. 3. a), b).

[37] Concerning this problem, see also *Gruber* 27.

[38] ICC Arbitration Case No. 7153 of 1992 *(Hotel materials case)* available at <http://cisgw3.law.pace.edu/cases/927153i1.html>.

[39] The ICC Rules of Conciliation and Arbitration 1975 were replaced as of 1 January 1998 by the ICC Rules of Arbitration. The latest version are the ICC Arbitration and ADR Rules which were brought into effect on 1 January 2012.

[40] See *Dominique Hascher*, Commentary on ICC Case 7153 of 1992: J.L. Comm. 14 (1995) 220, 221. This assumption is at least questionable. In addition to the literal meaning of Art. 13.3, in a later decision an ICC tribunal itself stated that the mere entry into force of the ICC Arbitration Rules in 1998 meant that the court was no longer bound to make use of conflict-of-laws rules. See ICC Arbitration Case No. 9887 of August 1999 *(Chemicals case)* abstract available at <http://cisgw3.law.pace.edu/cases/999887i1.html>.

However, by expressly referring to Art. 1(1)(a) CISG rather than the Convention as a whole, it may be the case that the tribunal applied this provision as conflict-of-laws rule – although, ultimately, it does remain unclear with regard to this point. In a comparable case from 1997 (Romanian seller, Italian buyer, no choice-of-law clause, CISG in force in both states), the ICC tribunal reached a similar decision. Based on the wording of the abstract,[41] it is (again) not wholly clear whether the arbitrator applied the CISG directly and merely referred to Art. 1(1)(a) CISG to support its reasoning or whether he applied this provision as a rule of private international law.

In order to be considered as a rule of private international law, a legal provision must offer solutions to a conflict of laws in the abstract (i. e. by determining the applicable law in the light of several options). Article 1(1)(a) CISG, however, is specific. It determines the Convention's scope of application in definite terms. Technically speaking, it is not a rule of private international law.[42]

Nevertheless, we submit that Art. 1(1)(a) CISG should be regarded as expressing a conflict rule:[43] Firstly, this provision offers a solution for a conflict of laws. If there is, for example, a sales contract between a US seller and a French buyer, it basically determines that the contract is to be governed by the CISG itself rather than the national sales law of France or the United States; in this respect, the CISG settles a conflict of laws. Secondly (and more importantly), a different view could, under certain circumstances, prevent an arbitral tribunal from applying the CISG in a "typical" CISG case. This is because the indirect method of application requires the tribunal to apply conflict-of-laws rules in determining the applicable law. Where both parties have their places of business in different CISG member states, it is very likely that conflict-of-laws rules will lead to the domestic law of one of the host states being applied. In such a case it would normally be easy to apply the CISG on the basis of Art. 1(1)(b) CISG (i. e. as part of one of the member states' laws). However, the situation will be different if one or even both of the states, in which the parties have their principal place of business, have entered a reservation from Art. 1(1)(b) CISG under Art. 95 CISG. If the conflict-of-laws rules were to result in the application of the domestic law of a reservation state (a foregone conclusion if both parties have made a reservation), the tribunal would not be able to apply the Convention since a tribunal, unlike a national court, is not per se bound by Art. 1(1)(a) CISG.

---

41 ICC Arbitration Case No. 8962 of September 1997 *(Glass commodities case)* available at <http://cisgw3.law.pace.edu/cases/978962i1.html>.

42 As to the legal status of Art. 1(1)(a) CISG see *Gruber* 27, Münch. Komm. BGB[6] *(-Westermann)* (2012) (supra n. 17) Art. 1 CISG Rz. 3, with further references.

43 Supporting this assumption: *Hascher* (supra n. 40) 221, who gives no reasons but cites further sources. See furthermore *Gruber* 27.

Some additional points must be made in this respect: Firstly, the tribunal cannot apply the CISG directly because the indirect method of application provides that the conflict-of-laws rules must be applied first. Secondly, our assumption in the above example is that Art. 1(1)(a) CISG does not have to be considered a conflict-of-laws rule. Thirdly, all relevant conflict-of-laws rules in this case point to the laws of the states that have declared a reservation under Art. 95 CISG (e. g. in the case of a Chinese seller and American buyer). As mentioned earlier, an arbitral tribunal has to respect such a reservation which basically means it simply cannot apply the CISG either by means of Art. 1(1)(b) CISG or any other method.

However, such a result would be unsatisfactory for three reasons. First, every national court of these two states would be under an obligation to apply the CISG by means of Art. 1(1)(a) CISG since both are CISG member states. Secondly, the CISG would be the appropriate law in terms of its substance and status. Finally, this result would negate the benefits of arbitral tribunals over national courts (i. e. in the sense that they offer more remedies, options and greater flexibility). In order to ensure that the CISG is applied in those cases where tribunals are bound to use rules of private international law in determining the applicable law and the CISG appears the most appropriate, Art. 1(1)(a) CISG would have to be deemed a rule of private international law.

3. Direct method of application by arbitral tribunals

Unlike the aforementioned indirect method of application, modern arbitration rules more often provide for a free choice of rules and standards without the need to apply conflict-of-laws rules first. This subjective method of directly determining the substantive law by arbitrators is called "voie directe" or "direct method of application".[44]

a) Arbitrator's autonomy

An example of a direct method of application is provided in the Rules of Arbitration of the London Court of International Arbitration. Article 22.3 stipulates that absent a choice of law by the parties "[…] the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate." By virtue of this provision the arbitral tribunal is endowed with the widest possible discretion to act. The ICC Arbitration and ADR Rules take a

---

[44] See *Benjamin Hayward*, New Dog, Old Tricks: Solving a Conflict of Laws Problem in CISG Arbitrations: J. Int. Arbitr. 26 (2009) 405, 412 et seq.; *Lew/Mistelis/Kröll* 434 et seq.; *Mistelis* 385 et seq.; *Ingeborg Schwenzer/Simon Manner*, The Claim is Time-Barred, The proper Limitation Regime for International Sales Contracts in International Commercial Arbitration: Arbitr. Int. 23 (2007) 293 (306 et seq.).

similar approach. According to its Art. 21(1) sentence 2 the "[…] arbitral tribunal shall apply the rules of law which it determines to be appropriate".[45] Other arbitration rules contain comparable regulations.[46]

Applying the rules of law that the tribunal deems appropriate "gives the tribunal broad discretion for its decision".[47] At the same time, even a tribunal capable of applying the CISG *voie directe* should substantiate its choice to a certain extent,[48] although, regrettably, this is not always the case in practice. However, tribunals[49] and commentators[50] agree that even if the tribunal is entitled to decide by unlimited *voie directe*, it will not be released from the obligation to decide upon the subject of dispute in accordance with a system of law. The reason lies in the arbitration laws and rules. Arbitrators are usually bound to take account of the provisions of the contract and relevant trade usages.[51] A decision as *amiable compositeur* or *ex aequo et bono* is only possible if the arbitral tribunal has been expressly authorised by the parties.[52]

If tribunals are entitled to choose the substantive law directly, they tend to proceed in one of two ways: In the majority of cases they apply the CISG because it is convenient in terms of substantive scope. In such cases they explicitly verify (like a national court) whether the requirements for the applicability of the CISG have been satisfied, despite the fact that they are not bound by the CISG.[53] On the other hand, in a considerable number of cases where the scope was apparently granted under Art. 1(1)(a) CISG, tribunals did not expressly refer to any of the rules on the CISG's sphere of application. Instead, they either stated that the CISG was applicable because

---

[45] The same wording is, for example, used in Art. 59(a) WIPO-Rules and in Art. 35(1)(2) UNCITRAL Arbitration Rules (as revised in 2010).

[46] See e. g. Art. 34.1 of the Arbitration Rules of the Australian Centre for International Commercial Arbitration.

[47] As the ICC stated in a case worth reading: ICC Arbitration Case No. 10274 of 1999 *(Poultry feed case)* available at <http://cisgw3.law.pace.edu/cases/990274i1.html>.

[48] *Hayward* (supra n. 44) 412 et seq.; *Beda Wortmann*, Choice of Law by Arbitrators, The Applicable Conflict of Laws Systems: Arbitr. Int. 14 (1998) 97 (101).

[49] Compare e. g. ICC Arbitration Case No. 10274 (supra n. 47).

[50] See e. g. *W. Michael Reisman/W. Laurence Craig/William Park/Jan Paulsson*, International Commercial Arbitration (1997) 708.

[51] See e. g. Art. 21(2) ICC Arbitration and ADR Rules.

[52] See Art. 22.4 LCIA Arbitration Rules, Art. 21(3) ICC Arbitration and ADR Rules and Art. 35(2) UNCITRAL Arbitration Rules (as revised in 2010). For more details see *Mauro Rubino-Sammartano*, International Arbitration² – Law and Practice (2001) 457 et seq.

[53] Many ICC cases serve as examples: ICC Arbitration Case No. 9448 of July 1999 *(Roller bearing case)*, abstract available at <http://cisg3.law.pace.edu/cases/999448i1.html>; ICC Arbitration Case No. 9978 of March 1999 *(Penalty clause case)*, available at <http://cisgw3.law.pace.edu/cases/999978i1.html>; ICC Arbitration Case No. 10274 (supra n. 47).

both parties were based in contracting states[54] or did not explicitly address the question of which law was applicable and simply applied the CISG.[55]

The following decision by an ICC tribunal in 1999 offers valuable insights into how arbitrators determine the applicable law by unlimited *voie directe* and reason their decision. The dispute in question arose between a Romanian seller and a German buyer.[56] With respect to the applicable law, the tribunal explained that the entry into force of the new ICC Arbitration Rules in 1998 meant that it was no longer obliged to apply conflict-of-laws rules and could apply recognised international standards instead. The tribunal then applied the CISG for three reasons. First, the CISG was widely recognised in arbitration practice "as a set of rules reflecting the evolution of international law in the field of international sale of goods".[57] Second, the tribunal stressed the applicability of Art. 1(1)(a) CISG since both Romania and Germany were contracting states. Finally, it pointed out that Art. 1(1)(b) CISG would also lead to the application of the Convention because the rules of private international law provided that German law, which incorporated the CISG, was applicable.

Overall, these examples and remarks clearly show the pronounced autonomy of the arbitrator when determining the applicable law by means of (unlimited) *voie directe*. The tribunal is entitled to choose the CISG as rules of law whenever it considers the Convention to be the appropriate law. Accordingly, the Convention can be applied even if the facts of the case are not covered by its substantive scope. This would be the case, for example, if one of the exemptions contained in Arts. 2 and 3 CISG applies.[58] As far as unlimited *voie directe* is concerned, the tribunal can choose to apply the CISG in whole or in part and regardless of an Art. 95 reservation. The latter point is explained by the fact that the CISG can itself be used as "rules of law" in arbitration proceedings.

b) Limited arbitrator's autonomy

Some national arbitration laws provide for only a "limited *voie directe*". They typically oblige the tribunals to decide the case first and foremost

---

[54] See e.g. China 26 July 2002 CIETAC Arbitration proceeding *(Green beans case)*, available at <http://cisgw3.law.pace.edu/cases/020726c1.html>. See further ICC Award 7531/1994, available at CISG-online Case No. 565 <http://www.globalsaleslaw.org/index.cfm?pageID=29&action=search>.

[55] Iran/U.S. Claims Tribunal 28 July 1989 *(Watkins-Johnson* v. *Islamic Republic of Iran)* available at <http://cisgw3.law.pace.edu/cases/890728i2.html>.

[56] ICC Arbitration Case No. 9887 of August 1999 (supra n. 40).

[57] ICC Arbitration Case No. 9887 of August 1999 (supra n. 40).

[58] See e.g. ICC Case 8817/1997 which concerned an agreement for the exclusive distribution of food (and not a sales contract). Here the tribunal applied the CISG in resolving the dispute; available at <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356>.

according to the rules of law chosen by the parties. In cases where the parties have not made a choice, the provisions can have different levels of limitation. The most liberal provision in this instance allows the arbitrator to apply the rules of law with the closest connection to the case at hand; for example, the Swiss Art. 187(1) *Bundesgesetz über das Internationale Privatrecht* (IPR, Federal Statute on International Private Law): "[…] bei Fehlen einer Rechtswahl, nach dem Recht, mit dem die Streitsache am engsten zusammenhängt."[59] The word "Recht" can be interpreted in a broader sense here. An arbitrator could choose an international convention like the CISG as a non-national rule directly or the law of a state which has incorporated the CISG into its national law.[60] Although the arbitrator might have to satisfy particular requirements arising under this provision in his reasoning, there is, *de facto*, practically no difference from unlimited *voie directe*.[61]

Article 834(1) sentence 2 of the Italian *Codice di Procedura Civile* (CPC, Civil Procedure Law), as a stricter example, stipulates that "[s]e le parti non provvedono, si applica la legge con la quale il rapporto è più strettamente collegato."[62] Within the context of this article the word "legge" must be understood as national "substantive law".[63] Being an international treaty, the Convention cannot be regarded as "legge" and cannot be chosen directly. However, the arbitrator could apply the national law of a CISG member state[64] with the result that the CISG remains applicable in this context if there is no Art. 95 CISG reservation. A similar provision can be found in the German *Zivilprozessordnung* (ZPO, Code of Civil Procedure), § 1051(2), which says that "[…] das Schiedsgericht das Recht des Staates anzuwenden [hat], mit dem der Gegenstand des Verfahrens die engsten Verbindungen aufweist."[65] Thus, the provision requires the arbitral tribunal to apply national substantive law.[66] Nevertheless, as in the previous example, the CISG remains applicable in principle as part of a member state's national law.

---

[59] "[…] in the absence of [the parties'] choice of law [the tribunal is entitled to decide the case] according to the rules of law with which the case has the closest connection." (Translated by the authors.)

[60] *Lew/Mistelis/Kröll* 436.

[61] *Lew/Mistelis/Kröll* 436.

[62] "If the parties do not provide [a choice of law], the law shall be applied which has the closest connection [to the dispute]." (Translated by the authors.)

[63] See *Valerio Sangiovanni*, Das internationale Schiedsverfahren nach italienischem Recht: JbItalR 15/16 (2002/2003) 275 (280) with further references.

[64] This state must not have declared a reservation under Art. 95 CISG.

[65] "If the parties have not determined the applicable rules of law, the arbitral tribunal shall apply the law of the state, with which the subject matter of the proceedings has the closest connection." (Translated by the authors.)

[66] *Lew/Mistelis/Kröll* 436.

4. A closer look at application beyond the CISG's scope

Arbitration practice shows that sometimes the CISG is applied by arbitral tribunals using (unlimited) *voie directe* even when Arts. 1 to 3 CISG would normally make it difficult for national courts to apply the Convention. These decisions deserve closer examination considering the differences in the methods of application and, in particular, the reasoning of arbitral tribunals. Concerning the latter point, it is possible to divide their reasoning into three different categories.

a) Trade usage or part of the *lex mercatoria*

When arbitral tribunals determine the applicable law they are often required by arbitration laws and rules to take account of relevant trade usages.[67] Unsurprisingly, in disputes arising under international sales contracts some arbitral tribunals applied rules of the CISG, viewing it as a trade usage or part of the *lex mercatoria*,[68] despite the fact that its scope of application was far from settled.[69]

A widely criticised example concerns an ICC award made in 1989[70] where the tribunal applied the CISG to a contract concluded in 1979, several years before it came into force in any form.[71] The justification for the application was that "there [was] no better source to determine prevailing trade usages […] [because due to its ratification by many states, it] may be fairly taken to reflect the generally recognised usages regarding the matter of the nonconformity of goods in international sales". However, due to the particular circumstances of the case, it is only of limited assistance in determining whether the CISG can be considered a trade usage. The

[67] See Art. 28(4) UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006) and Art. 21(2) ICC Arbitration and ADR Rules.

[68] The *lex mercatoria* is the basis upon which trade usages are identified and held to be applicable, see *Roy Goode*, The 1997 Alexander Lecture: dispute resolution in the twenty first century: Arbitration 64 (1998) 9 (15).

[69] See e. g. ICC Arbitration Case No. 5713 of 1989; ICC Arbitration Case No. 8502 of November 1996; ICC Arbitration Case No. 8908 of December 1998 (all supra n. 4).

[70] ICC Arbitration Case No. 5713 of 1989 (supra n. 4).

[71] See *Ronald Brand/Harry Flechtner*, Arbitration and Contract Formation in International Trade: First Interpretations of the U. N. Sales Convention: J. L. Comm. 12 (1993) 239 (258 et seq.); *Larry DiMatteo/Lucien Dhooge/Stephanie Greene/Virginia Maurer/Marisa Pagnattaro*, The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence: Nw. J. Int. L. Bus. 34 (2004) 299 (399 et seq.); *Franco Ferrari*, The CISG's sphere of application: Articles 1–3 and 10, in: The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unsolved Issues in the U. N. Sales Convention, ed. by *Ferrari/Flechtner/Brand* (2004) 21–95 (57 et seq.); *Gruber* 28 et seq.; *Michael Will*, UN-Kaufrecht und Internationale Schiedsgerichtsbarkeit, in: Rudolf Meyer zum Abschied, ed. by *Will* (1999) 145 (151 et seq.); all with further references.

contractual agreement had first been entered into by the parties in 1979.[72] Therefore, according to arbitration rules, the tribunal had to take this year as the reference point when discussing and determining the applicable law. Considering that the Convention did not exist as such in 1979, the tribunal should not have considered and discussed the question of whether or not the Convention was a trade usage.

Although this decision was subjected to some criticism upon its publication, it is interesting to note a similar decision reached by an ICC tribunal in 1996.[73] Again, a choice of law was not expressed in the contract nor could one be deduced from the parties' business relationship and correspondence. However, the fact that the parties had stipulated the application of UCP 500[74] and Incoterms 1990[75] in the sales contract persuaded the tribunal to subject their agreement to international trade usages and customs.[76] In that case, the tribunal regarded both the CISG and the UNIDROIT Principles of International Commercial Contracts "as evidencing admitted practices under international trade law" and applied the former accordingly.

However, despite this award and earlier decisions, the CISG does not in itself constitute a trade usage. Although it is not possible to discuss such a controversial subject in detail here,[77] the following should be noted: a trade usage can be aptly described as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question".[78] Trade usages are not rigidly codified but are flexible to accommodate changes over the long term; eventually, they may even cease to exist. By contrast, the CISG is codified, inflexible (apart from an agreement of the contracting parties in accordance with Art. 6 CISG) and, as an international convention, not prone to change either over the short or long term. In theory, it can only cease to exist as a result of its renunciation by the signatory states. From a legal perspective, the CISG is therefore not a trade usage.

---

[72] Neither the time when the dispute arose nor the date of the decision is crucial.

[73] ICC Arbitration Case No. 8502 of November 1996 (supra n. 4).

[74] The latest version of the Uniform Customs and Practice for Documentary Credits (UCP) is "UCP 600", which came into effect on 1 July 2007.

[75] The new Incoterms 2010 came into effect on 1 January 2011.

[76] Notably, the court again referred to Art. 13.5 ICC Rules of Conciliation and Arbitration 1975 by arguing that applying relevant trade usages was consistent with this provision and arbitration practice. Unlike the ICC Case No. 5713 decided in 1989 (supra n. 69), in which there was no choice of any law or rules governing the contract, the ICC tribunal in the present case acknowledged a choice of law by the parties, namely a choice of trade usages.

[77] See *Ferrari* (supra n. 71) 57 et seq.

[78] As the term "trade usage" is broad and rather vague, there are various definitions. The definition used and preferred here can be found in the American Uniform Commercial Code (Art. 1 § 1–205 UCC).

Of course, the question then arises whether it is possible to consider the Convention a trade usage in at least some respects. Yet there are several arguments against such a view. First, it would broaden the CISG's scope of application far too much; after all, the creators of the CISG expressly defined the boundaries of its application in Arts. 1–6 CISG, which is atypical for a trade usage. Rather, they considered the CISG to be a collection of general rules, to be applied whenever appropriate. Second, the CISG itself opposes such a view. According to Art. 9(2) CISG, the parties are assumed, in principle, to have made their contract subject to a trade usage of which they knew or ought to have known and which in international trade is widely known to parties to contracts of the type involved in the particular trade concerned. Owing to its express reference to common trade usages, the provision serves to distinguish the CISG from such usages. Finally, as an aside, the argumentation of the ICC tribunal in the 1996 case is not entirely accurate. The tribunal found that the parties had agreed to apply trade usages since they stipulated the application of the Incoterms 1990 and UCP 500. However, neither the Incoterms nor the UCP are trade usages (or part of the *lex mercatoria*).[79] This is clear from the fact that the parties have to expressly *agree* to these rules before they can take effect.[80] By contrast, a trade usage can also apply in the absence of an express agreement by the parties to this effect. Understood in their strict sense, the Incoterms and the UCP are not trade usages themselves but are merely derived from them.

The CISG does not form part of the *lex mercatoria* either.[81] The latter dates back to the 16th and 17th centuries[82] and is the basis upon which trade usages are identified and held to be applicable.[83] The CISG is to be distinguished from this body of law for the same reasons that it is to be distinguished from trade usages. The *lex mercatoria* can be defined in different ways and its terminology, range, content and legal character are debatable. However, from an international perspective, it can be described as "a set of general principles, and customary rules spontaneously referred to or elaborated in

[79] However, this is disputed. For more details see *Camilla Baasch Andersen*, Macro-Systematic Interpretation of Uniform Commercial Law, The Interrelation of the CISG and Other Uniform Sources, in: CISG Methodology (supra n.*) 207 (250 et seq.) (with further references); *John Erauw*, Observations on passing of risk, in: The Draft UNICTRAL Digest (supra n. 71) 292 (302 et seq.).

[80] Concerning the Incoterms even the ICC recommends a *specific* reference to the Incoterms whenever the terms are used (see <http://www.iccwbo.org/incoterms/id3040/index.html>).

[81] However, this is also disputed (see *Ferrari* [supra n. 71] 57 et seq.; *Monica Kilian*, CISG and the Problem with Common Law Jurisdictions: J. Transnat. L. Pol. 10 [2001] 217 [224 et seq.]).

[82] See *Peter Schlechtriem/Petra Butler*, UN Law on International Sales, The UN Convention on the International Sale of Goods (2009) 7.

[83] *Goode* (supra n. 68) 15.

the framework of international trade, without reference to a particular national system of law."[84] On the other hand, the *lex mercatoria* is by its very nature "uncodified, non-statutory and non-conventional."[85] That said, the CISG is an international convention and the rules contained in the CISG relate to the law of international conventions. The latter is based on negotiations between states which later become contracting states. Accordingly, the law of international conventions stems from the will of states and their representatives, not of merchants. It follows from this that the law of the CISG is not a rule of international customary law nor does it form a part of it; rather, it is codified, statutory and, of course, forms part of the law of international conventions. Although the creators of the CISG might have considered customary rules like those described as the *lex mercatoria* when drafting it, ultimately the Convention is a mixture of and a compromise between different laws (i. e. from civilian and common law traditions).[86]

b) Generally accepted principles

When interpreting contracts which are not actually governed by the CISG, arbitral tribunals occasionally apply specific rules of the CISG due to the general acceptance it has attained in international trade. For instance, in a commercial dispute between parties based in Liechtenstein and Italy,[87] an ICC tribunal made several references to the Convention, even though domestic Italian Law was applicable and not the CISG. For example, it referred to Art. 19(1) and (2) CISG regarding the formation of contracts, describing the provisions as a "normative text [...] that can be considered in the interpretation of all contracts of international nature".[88]

---

[84] *Berthold Goldman*, The Applicable Law: General Principles of Law, The Lex Mercatoria, in: Contemporary Problems in International Arbitration, ed. by *Lew* (1986) 113 (116). Further definitions are given by *Norbert Horn*, Uniformity and Diversity in the Law of International Commercial Contracts, in: The Transnational Law of International Commercial Transactions, ed. by *Horn/Schmitthoff* (1982) 3 (15 et seq.). For a good overview see *Abul Maniruzzaman*, The Lex Mercatoria and International Contracts, A Challenge for International Commercial Arbitration: Am. U. Int. L. Rev. 14 (1998–1999) 657 (660 et seq.). Very instructive also *Ole Lando*, The lex mercatoria in International Commercial Arbitration: Int. Comp. L.Q. 34 (1985) 747–768 and generally *Klaus Peter Berger*, The Creeping Codification of the New Lex Mercatoria[2] (2010).

[85] *Roy Goode*, Usage and its reception in transnational commercial law: Int. Comp. L.Q. 46 (1997) 1 (2).

[86] See recently *Ulrich Magnus*, The Vienna Sales Convention (CISG) between Civil and Common Law – Best of all Worlds?: J. Civ. Stud. 3 (2010) 67–98.

[87] ICC Arbitration Case No. 8908 of December 1998 (supra n. 4).

[88] The case is abridged here; in reality it is slightly more complicated. The dispute originally arose from a large number of international sales contracts all of which were governed by Italian law (choice of parties) and thus the CISG via Art. 1(1)(b) CISG. The dispute was settled by the parties but then resumed in relation to the obligations arising from the settlement

In another case,[89] the U.S. producer of electronic communications equipment (the seller) manufactured several such products pursuant to a contract with the state of Iran (the buyer). The buyer did not pay and, in order to set-off the proceeds against its outstanding claim for performance costs, the seller sold the equipment in mitigation of its damages. The Iran-United States Claims Tribunal, after approving the seller's right to proceed in this way under the applicable law, stated further: "Moreover [the seller's] right to sell undelivered equipment in mitigation of its damages is consistent with recognized international law of commercial contracts. The conditions of Article 88 of the [CISG] are all satisfied in this case: there was unreasonable delay by the buyer in paying the price and the seller gave reasonable notice of its intention to sell." In this dispute, therefore, the Convention was applied in the sense of a recognised international law of commercial contracts.

These decisions by ICC tribunals and the way they treat the Convention in cases where it is neither directly nor indirectly applicable can be applauded. It is appropriate to view the rules contained in the CISG as generally accepted principles in international sales law. As already mentioned, the CISG is derived from many of the world's legal traditions in the field of (international) sales law and thus can offer useful guidance and support in terms of argumentation and interpretation if an arbitral tribunal cannot solve a case on the sole basis of the actual applicable law. Considering that contracts are becoming increasingly complex and globalisation is bringing ever more actors to the world market, the CISG might therefore prove helpful in this regard.

c) Implication and analogy

Finally, arbitral tribunals sometimes decide cases by drawing an analogy between the case at hand and the CISG rather than applying the latter expressly as a trade usage or generally accepted principle. For example, in the above-mentioned ICC Case 8817/1997,[90] the arbitral tribunal dealt with a contract for the exclusive distribution and sale of food products between parties based in Spain and Denmark. As the parties had not agreed on a law governing the contract, the tribunal determined the applicable law by the *voie directe* method. It held that the CISG was applicable despite the fact that the contract governing the exclusive distribution of the products was not one of sale. It supported its finding by referring to Art. 3(2) CISG which

agreement. The settlement agreement was indisputably governed by Italian national law, not by the CISG. When interpreting the settlement agreement, the court primarily based its argumentation on Italian law; however, it also resorted to the CISG and the UNIDROIT Principles as described.

[89] Iran/U.S. Claims Tribunal 28 July 1989 (supra n. 55).

[90] ICC Case 8817/1997 (supra n. 58).

excludes the application of the Convention as to cases where the obligations of the party who furnished the goods relate predominantly to the supply of labour and other services: "[This legal rule] calls for it to be applied in situations where, as in the present case, there is both a provision of service and sale, and the preponderant part of the obligations arise from the sale." It also argued that the CISG's legal rules and underlying principles, which were also incorporated into the UNIDROIT Principles of International Commercial Contracts, were "perfectly suited to resolving the dispute".

From the perspective of a national court, the applicability of the Convention might appear surprising in this context. The majority view is that distribution agreements are not covered by the CISG because this kind of agreement is directed more towards organising distribution than transferring ownership of the goods.[91] However, the reasoning in this case is convincing. An arbitral tribunal determining the law applicable to a dispute using the direct method is not bound by the strict requirements that bind national courts.

d) Range of *voie directe* and interim result

Particularly (but not only) in relation to the case just mentioned, one must also bear in mind that all these awards which applied the CISG beyond its actual scope were decided by arbitral tribunals on the basis of (unlimited) *voie directe*. With respect to the three categories of application, it follows from these facts that in all categories and underlying cases the arbitral tribunals were entitled to apply the CISG on the basis of arbitration rules. As explained, the reasoning underlying the first category, whereby the CISG was a trade usage or part of the *lex mercatoria*, was wrong. That does not necessarily mean the decision applying the CISG as the most appropriate law was wrong. In litigation proceedings, a court of appeal in this instance would remit the case to a lower court for further proceedings. In both the second and the third categories, the provision that the arbitrator should apply the rules he deems appropriate determines the tribunal's room for manoeuvre (which appears to be wide). According to arbitration rules, it would therefore be sufficient for a tribunal to argue that the CISG applies because the facts in a given case are comparable to those cases which fall within the CISG's scope. It would also be sufficient for a tribunal to resort to the CISG as an appropriate law in the event that the applicable national law did not cover all aspects of the dispute. Finally, a (unlimited) *voie directe* therefore grants arbitrators broad discretion to apply the CISG. Provided that the reasoning for the application of the CISG beyond its actual scope is understandable and correct, then the requirements of arbitration rules will be satisfied.

---

[91] See e. g. *Ferrari* (supra n. 71) 62 et seq. with further references.

III. The CISG and arbitration agreements

Before an arbitral tribunal can address an international commercial dispute and determine the applicable law, it must first have jurisdiction to do so. The arbitration agreement constitutes an essential condition for jurisdiction and also forms the basis for all arbitration proceedings and the later award. In terms of its legal status, it is a private agreement between the parties to commence arbitration in relation to any present or future disputes or differences between them, whether related to the contract or not.[92]

1. The clash of formal requirements

The UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006)[93] along with many arbitration laws and rules that are orientated upon it[94] and also the New York Convention[95] require that an arbitration agreement must be made in *writing*. This formal requirement applies regardless of whether the arbitration agreement or contract has been concluded orally, by conduct or by other means.[96] In principle, the parties' signature is not required and it is not necessary that the arbitration agreement be contained in the same document as the sales contract itself.

The CISG follows a different approach. As a rule, the CISG does not require a sales contract under the Convention to be concluded or evidenced in writing, nor does it stipulate any other formal requirements (see Art. 11 CISG). Subject to a reservation under Arts. 12 and 96 CISG, an oral agreement is generally valid under the CISG. The situation is now as follows: On the one hand, there is a large number of sales contracts governed by the CISG and exempt from any formal requirements under Art. 11 CISG. On the other hand, arbitration rules require arbitration agreements to be made in writing. For that reason, arbitral tribunals have to cope with divergent

---

[92] See e. g. option 1 Art. 7(1) UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006) and s. 6(1) U. K. Arbitration Act 1996.

[93] See option 1 Art. 7(2)–(6) UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006), which have been followed by many national legislators. Option 2 of Art. 7, which was introduced in 2006, now assumes, in contrast, the possibility of an informal arbitration agreement.

[94] See e. g. s. 5 U. K. Arbitration Act 1996 or § 1031(1) and (2) German Code of Civil Procedure (ZPO).

[95] See Art. II(2) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), 330 U. N. T. S. 38. See generally on the New York Convention *Born* (supra n. 14) 92 et seq.; *Rubino-Sammartano* (supra n. 52) 943 et seq.

[96] See option 1 Art. 7(3) UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006).

rules. Arbitration clauses are often contained in sales contracts and, if the latter are governed by the CISG, then it could be assumed that the CISG encompasses also the arbitration agreements. A necessary consequence thereof would be that the Convention suspends formal requirements for arbitration agreements. To give an example: A French seller and German buyer communicate by telephone and enter into a contract for the purchase of red wine. During this conversation they agree that disputes will be settled by arbitration. Assuming that the applicable arbitration rules require a written arbitration agreement (e. g. § 1031(1) German Code of Civil Procedure) and the CISG is applicable, would this agreement to arbitrate be valid and enforceable even if it does not satisfy the requirement of a written form? For those who believe that this is only a theoretical problem and that informal arbitration agreements are not concluded in practice, one should recall the explanatory note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration 1985 (as amended in 2006) to the newly introduced option 2 of Art. 7, according to which also informal arbitration agreements are effective. The justification for this option expresses that "[i]t was pointed out by practitioners that, in a number of situations, the drafting of a written document was impossible or impractical."[97]

2. How to unravel the formal requirement knot

There are three different opinions regarding the problem of the applicability of Art. 11 CISG to arbitration agreements:[98] The first group of authors supports the view that the CISG in general (and here especially the rules on the formation of contracts) and Art. 11 CISG in particular should govern an arbitration agreement.[99] In their opinion, the express reference to the "settlements of disputes" in Arts. 19(3) and 81(1) CISG means that agreements to arbitrate fall within the scope of the Convention as a whole. Consequently, according to this opinion Art. 11 CISG should apply to dispute resolution clauses as arbitration agreements with the consequence that a valid agreement to arbitrate under the mentioned example exists.

Contrastingly, a different opinion advocates that the CISG should not be applicable to arbitration agreements, i. e. neither with regard to the question

[97] *UNCITRAL*, Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, 28.

[98] See fundamentally on the question of the formal validity of arbitration agreements *Born* (supra n. 14) 580 et seq.

[99] See e. g. *Kröll/Mistelis/Perales Viscasillas (-Perales Viscasillas)* (supra n. 8) Art. 11 para. 13; *Perales Viscasillas/Ramos Muñoz* (supra n. 3) 70 et seq.; *Burghard Piltz*, Internationales Kaufrecht[2] (2008) 69 et seq.; *Janet Walker*, Agreeing to Disagree: Can we just have words?, CISG Article 11 and the Model Law Writing Requirement: J.L. Comm. 25 (2005/2006) 153 (163).

of its formation nor as to its form.[100] Following this view, the sales contract would be subject to the CISG, yet the Convention would not be applicable to arbitration agreements. As a result, one would have to assume invalidity of the arbitration agreement due to the failure to adhere to formal requirements. Where this opinion is concerned, one has to note the principle of the separability of the arbitration agreement from the main (sales) contract. This perception is, for example, derived from Art. 16(1) UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006) and is reflected in the arbitration laws of many jurisdictions.[101] According to the principle of separability, an arbitration agreement is a separate contract[102] that is strictly distinct from the main contract despite the fact that it generally forms part of the main agreement. Furthermore, it is argued that the CISG governs only the substance of a contract and not the procedure, particularly in the event of a dispute. Thus, according to this opinion, the Convention does not intend to govern arbitration agreements at all.[103]

A further approach, which has recently seen increasing support, can be said to be found in-between the two aforementioned views: While according to this approach the formation of the arbitration agreement is subject to the CISG, the application of Art. 11 CISG to arbitration agreements is rejected.[104] As for the first opinion, reference is also made here to the "settlements of disputes" in Arts. 19(3) and 81(1) CISG in order for arbitration agreements in international sales contracts to be subject to the Convention. However, the supporters of this opinion argue that – in short – due to the drafting history as well as the wording and systematic structure of Art. 11 CISG, this provision cannot be applied to arbitration agreements.[105]

Ultimately, the first opinion, under which Art. 11 CISG is applicable to arbitration agreement cannot, however, be considered to be convincing. In particular, it does not sufficiently acknowledge the separability of the international sales contract from the arbitration agreement. Furthermore,

---

[100] See e. g. *Stefan Kröll*, Selected Problems concerning the CISG's Scope of Application: J.L. Comm. 25 (2005–2006) 39 (43 et seq.); *Schlechtriem/Schwenzer (-Schlechtriem/Schmidt-Kessel)*, Commentary on the UN Convention on the International Sale of Goods (CISG)³, ed. by *Schwenzer* (2010) Art. 11 Rz. 8; Germany, *Landgericht Duisburg* 17. 4. 1996 *(Textiles case)*, CISG-Online 186, available at <http://www.globalsaleslaw.org/index.cfm?pageID=29&action=search>; Switzerland, *Bundesgericht* 11. 7. 2000 *(Construction materials case)*, CISG-Online 627, available at <http://www.globalsaleslaw.org/index.cfm?pageID=29&action=search>.

[101] See for example § 1040(1) of the German ZPO (Code of Civil Procedure).

[102] *Kröll* (supra n. 100) 44; *Lew/Mistelis/Kröll* 102.

[103] *Kröll* (supra n. 100) 44; *Schlechtriem/Butler* (supra n. 82) 42 et seq.

[104] See e. g. *Robert Koch*, The CISG as the Law Applicable to Arbitration Agreements?, in: Sharing International Commercial Law Across National Boundaries, FS Albert H. Kritzler (2008) 267 (282 et seq.); *Mistelis* 393 et seq.; *Schlechtriem/Schwenzer (-Schlechtriem/Schmidt-Kessel)* (supra n. 100) Art. 11 § 7. Opposing opinion *Piltz* (supra n. 99) 70 et seq.

[105] See especially *Koch* (previous note) 270 et seq.

according to Art. 90 CISG this view would actually have to give precedence to the formal requirement of Art. II of the New York Convention. Consequently, a written arbitration agreement nevertheless would have to exist at the latest when the award is enforced. In practice, this view would not involve a specific relaxation of the formal requirement. In cases involving CISG sales contracts with oral arbitration agreements, the consequence would rather arise that tribunal decisions could not be enforced due to a failure to adhere to the formal requirement under Art. II of the New York Convention.[106] Thus, in accordance with the other mentioned approaches, the application of Art. 11 CISG to arbitration agreements should be rejected. These agreements must fulfill the formal requirements of the arbitration laws and rules and are not released from such obligation on the basis of the CISG.

D. Conclusion

The CISG and international commercial arbitration represent a fruitful symbiosis in the world of international trade as both are based on the same methodological principles of transnationality, party autonomy, consensus and neutrality. In general, the CISG appears to be tailor-made for international commercial disputes settled by arbitration. This impression is confirmed by arbitration practice as evidenced by statistical analysis.

One of the "hot topics" of this symbiosis and the main subject of this article is the applicability of the CISG. The contribution has shown possible avenues for application of the CISG in international commercial arbitration and the peculiarities that have to be observed. Relatively few specific problems arise when parties to an international sales contract make a choice of law. They can either choose the law of a CISG member state (which leads to the application of the Convention) or opt out from the CISG. Furthermore, it is acknowledged that the Convention can be chosen directly by the parties – despite the controversy regarding this question in litigation.

If there is no choice of law by the parties, then, unlike national courts, arbitral tribunals are not bound by Art. 1(1)(a) CISG irrespective of whether they are situated in a contracting state or not. However, if arbitration rules oblige arbitral tribunals to apply conflict-of-laws rules (the indirect method) that lead to application of CISG member state's law, tribunals have to apply the CISG using Art. 1(1)(b) CISG. In this instance, if the member state has declared a reservation under Art. 95 CISG, a tribunal must respect such

---

[106] However, some authors view Art. 11 CISG as a "more favourable provision" with the consequence that Art. II New York Convention is not applicable, see *Perales Viscasillas/Ramos Muñoz* (supra n. 3) 70 et seq.; *Walker* (supra n. 99) 163 et seq.

reservation. Whenever an arbitral tribunal makes use of the indirect method of application, it is entitled to apply Art. 1(1)(a) CISG since it has to be regarded as a conflict-of-laws rule in this case.

Arbitrators determining the applicable law autonomously without having recourse to conflict-of-laws rules (the direct method) can choose the CISG even beyond its actual scope and independently of an Art. 95 CISG reservation. Arbitration laws sometimes contain limitations on *voie directe* that have to be observed by arbitral tribunals, and to some extent these may hinder the (direct) application of the CISG. The wide autonomy provided by (unlimited) *voie directe* also gives arbitral tribunals the opportunity to apply the Convention by analogy, implication or as a generally accepted principle. In this respect, it must be noted that the CISG cannot be considered either a trade usage or a part of the *lex mercatoria*.

Finally, the CISG (Art. 11 CISG) cannot release the parties to an international sales contract from formal requirements relating to the arbitration agreement stipulated by arbitration laws and rules. The formal status and substantive nature of the arbitration agreement clearly distinguish it from the CISG's scope. As long as arbitration laws and rules require an arbitration agreement in writing, the parties must obey such a provision even though the main contract is governed by the CISG.