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# THE OPTING-OUT AND OPTING-IN SYSTEMS OF THE 1980 VIENNA CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) AND ITS APPLICATION IN BRAZIL

# *OS SISTEMAS DE OPTING-OUT E OPTING-IN DA CONVENÇÃO DE VIENA SOBRE COMPRA E VENDA INTERNACIONAL DE MERCADORIAS DE 1980 (CISG) E SUA APLICAÇÃO NO BRASIL*

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**ABSTRACT**

This article deals with the opting-out and opting-in system of the 1980 Vienna Convention on Contracts for the International Sale of Goods and its application in the Brazilian context. Article 6 of the CISG and the possibilities derived from the principle of the autonomy of the parties to the exclusion of the applicability of the Convention in certain cases, as well as the possibility of using the treaty in hypotheses not foreseen in the text. Subsequently, the autonomy of the parties in Brazilian private international law is reviewed and contextualized with Article 6.

**KEYWORDS:** CISG; Opting-out; Opting-in.

**RESUMO**

O presente artigo trata sobre o sistema de *opting-out* e *opting-in* da Convenção de Viena sobre Compra e Venda Internacional de Mercadorias de 1980 e sua aplicação no contexto brasileiro. É analisado o artigo 6º da CISG e as possibilidades que derivam do princípio da autonomia das partes para a exclusão da aplicabilidade da Convenção em certas hipóteses, assim como a possibilidade de utilizarem o tratado em hipóteses não previstas no texto. Em seguida, a autonomia das partes no direito internacional privado brasileiro é passada em revista e contextualizada com o artigo 6º.

**PALAVRAS-CHAVE:** CISG; Opting-Out; Opting-In.

## INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods of 1980 is the product of the convergence of contractual law aspects of various legal systems, the main ones being the common law and civil law systems. Its main objective is to promote the standardization of these contractual legal rules and their

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interpretation by the courts. The Convention entered into force internationally in 1988 with the ratification of 11 States Parties.

One of the bastions of the Convention is the principle of the party autonomy enshrined in Article 6. In Brazil, the autonomy of the parties in contractual private international law has long been debated by doctrine and jurisprudence, but without much progress. With the adhesion to CISG by Brazil, in March 2013, the subject comes back, and questions arise as the possibility of conformation of the opting-out and opting-in systems of the Convention to the Brazilian legal order. These systems, derived directly from the autonomy of the parties, are provided for in Article 6 of the CISG and authorize the parties to extend or restrict the scope of the treaty, derogating or modifying provisions, or expressly or implicitly excluding the CISG as the applicable law to transnational contractual relations.

In order to present the opting-out and opting-in systems of the CISG and its possibility of application in the Brazilian legal system, this article has been divided and will be presented in the following way, in three parts: in the first moment, the principle the autonomy of the parties and the outlines of Article 6 of the Vienna Convention; followed, in the second moment, of the opting-out and opting-in systems of the CISG and its hypotheses of incidence; in the third moment, analyze the party autonomy principle in the Brazilian International Contractual Law and its eventual antinomies in relation to the CISG.

## 2 ARTICLE 6 OF THE CISG AND THE PRINCIPLE OF PARTY AUTONOMY IN THE CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

### 2.1 THE AUTONOMY OF THE PARTIES

The principle of the autonomy of the parties is widely recognized in Article 6[1] of the Vienna Convention on the International Sale of Goods (CISG) and represents an important guarantee for the effective functioning of international trade, as well as

[1] Article 6. The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

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accommodating the principle of freedom of contract, which is an important bulwark of international trade relations (BORISOVA, 2007, p.39).

As can be seen, Article 6 authorizes the parties to exclude the application of the Vienna Convention, to modify or partially derogate from the applicable rules, as well as exclude its effects (MURPHY, 1989, p.727). From this, CISG authorises the parties to promote exclusions / modifications in the text of the law, not only explicit, but also implicit, e.g. on the basis of the designation of the applicable law by reference to a national codification, thus rendering the application of the Convention (ANYMONE, 2011, p.64) in some situations, as discussed below.

However, the text presented was only possible from the agreement between the States Parties to exclude certain sensitive matters from the scope of the Convention, including consumer relations (Article 2), liability for death or personal injury (Article 5) and the validity and right of third parties (Article 4) (HONNOLD, 1987, p.74), situations which are usually governed by local laws.

## 2.2 BRIEF LEGISLATIVE EVOLUTION OF ARTICLE 6 OF THE CISG

The provisions on implicit and explicit exclusions and their controversies have been present since the first attempts to standardize contractual law at the end of the 1920s. The organization of the uniform law of sale began in 1928, with the first proposal presented by the International Law Association at the Hague Conference on Private International Law of that year, followed by a project that was proposed by the International Institute for the Unification of Private Law (UNIDROIT) in 1935 to unify the contractual rules. This effort continued in the following years with the approval of two international conventions on international buying and selling: the Convention relating to a Uniform Law on International Sale of Goods (ULIS) (UNIDROIT, 1964a) and the Convention relationg to a Uniform Law on the Formation of Contracts for International Sale of Goods (ULFC) (UNIDROIT, 1964b), both from 1964 (VICENTE; 2004, p. 271-273; WALD; COSTA; VIEIRA, 2013, p. 18-22).

The Uniform Law on International Sale (ULIS), in Article 3 of the Annex, expressly provided for the possibility of exclusion from the application of the

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Convention[2]. At the same time, the Uniform Law on the Formation of International Contracts for International Sale of Goods (ULFC), also in 1964, established that its provisions are applicable unless the parties expressly or implicitly agree to apply other rules. Although ULIS and ULFC are still in force, they have been ratified by only nine States and have not achieved the penetration expected by the Hague Conference on Private International Law.

Article 6 of the CISG is a reaffirmation, albeit contained, of the 1964 Conventions, in particular Article 3 of the ULIS, which, with minor editorial changes, ensures that the primary source of the rules governing international sales contracts is the principle of the autonomy of the parties, as defended by the doctrine (FERRARI, 2012, p.153) and the courts. Thus, although the general rule of Article 1 of the Vienna Convention stipulates the scope of the CISG by means of material, space and time criteria[3], Article 6, by making it possible to exclude the application of the Convention by means of autonomy of the parties, completely relativizes the inaugural rule of the text[4].

## 2.3 THE NON-MANDATORY NATURE OF THE CISG AS A RESULT OF ARTICLE 6

Although the principle party autonomy is recognized as one of the main guarantors of the stability of the rules of international equality and competition, it can not be said that CISG has cogent and binding force. Both doctrine (BORISOVA, 2004, p.40; FERRARIA, 2012, p.154) and the courts recognize and affirm the non-mandatory nature of the CISG.

[2] Article 3. The parties to a contract of sale shall be free to exclude the application thereto of the present Law either entirely or partially. Such exclusion may be express or implied.

[3] Article 1. (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State. (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract. (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

[4] Regarding the material, spatial and temporal scoper of the CISG, see: VICENTE, 2004, p.273-284

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As an illustration, the company H2O Recreation Inc. (buyer) based on Canadá has filed suit against Dongui Synthetic Resin Inc. (seller), a company based in Shanghai, China, on the applicability of Article 1 (1) of the CISG. In appellate seat, the Appeals Court of Shanghai decided, in May 2007, corroborating with courts and tribunals of other States that the Vienna Convention has a dispositive nature and therefore not mandatory[5].

Article 6 establishes, therefore, the supplementary and not an imperative nature of the Convention, which will be automatically applied, once observed the conditions that it imposes, unless, by will of the Contracting Parties, the devices are excluded in whole or in part, as reinforced by Fernando KUYVEN and Francisco PIGNATTA (2015, p.100).

As it will be analyzed, through the opting-out system, parties may exclude, derogate or modify the effects of the standards contained in the Convention, and, on the other hand, apply the CISG, through the will of the parties, to contracts normally excluded from the field of the scope of application, what is meant by opting-in.

## 3 THE SYSTEM OF OPTING-OUT THE CISG: THE PERMISSION TO EXCLUDE, DEROGATE FROM OR MODIFY THE EFFECTS OF THE RULES

According to Article 6 of the CISG, the parties may exclude wholly or in part the application of the Convention or derogate from its rules. In this sense, several courts understand that in order to set up the opting-out, the Parties shall establish a clear[6], unequivocal[7] and affirmative[8] agreement[9] in order to avoid an undesirable binding linkage with the norms of the Vienna Convention. In this way, the opting-out

[5] The Convention is not mandatory and it is not necessary that the Convention is applicable to international sales contracts between parties with their places of business in different Contracting States. The Convention does not apply if the parties exclude the application of the Convention expressly or if there is objection to the application of the Convention. Then the rules of Chinese law on determining the law applicable to civil litigation should be resorted to. Thus, the Convention does not apply due to the objection of [Seller], despite the fact that both China and Canada are Contracting States to the Convention. (CHINA, 2007)

[6] See, FRANCE, 2009; AUSTRIA, 2006; SWITZERLAND, 2004; 2003, and others.

[7] See, UNITED STATES OF AMERICA, 2011; AUSTRIA, 2007, and others.

[8] See, UNITED STATES OF AMERICA, 2005.

[9] See, NETHERLANDS, 2007.

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may occur in a variety of ways, either through derogation, modification or exclusion, expressed or implicit.

## 3.1 DEROGATION (PARTIAL EXCLUSION) OF STANDARDS OR MODIFICATION OF THE EFFECTS OF CISG

Article 6 allows parties to depart in part from the Vienna Convention by excluding or modifying its provisions. Several are the hypotheses in which the courts have been positioning themselves on the possibility of derogation from the CISG provisions. By way of illustration of the above, a court has recognized that the parties may derogate from the expression *reasonable time* for the notice period pursuant to Article 39 (1) and stipulated that the notification should be confirmed *within five working days from delivery*[10]. An arbitral tribunal has set out that the parties may waive the period of 2 years on Article 39 (2)[11]. One further stated that the parties are authorized to derogate from the concept of *delivery* established in the CISG[12].

Nevertheless, the autonomy of the parties provided for in the CISG is not unlimited and Article 6 imposes certain restrictions on the freedom of choice of the contracting parties. However, there is no consensus in the doctrine regarding the extent of the limitations on the right of derogation and modification.

One of the rare cases of limitation that reflects a consensus surround is Article 12[13][14] subject to the reservation of Article 96[15]. Whereas at least one of the parties to the contract regulated by the CISG has its place of business in the State which may have declared a reservation on the basis of Article 96 of the Convention, the parties

[10] See, NETHERLANDS, 2009; GERMANY, 1994.
[11] See, ICC, 2002.
[12] See, SWITZERLAND, 2006.
[13] Article 12. Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.
[14] This article came to the fore in the hands of the former Soviet Union, which insisted on the requirement of written form for foreign trade contracts, in view of the provisions of its domestic law.
[15] Article 96. A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

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may not derogate from or modify the effects of Article 12 in respect of written applications.

Also, according to the understanding of most of the doctrine (BORISOVA, 2004, p.44; FERRARI, 2012, p.157; KUYVEN; PIGNATTA, 2015, p.107), besides Article 12, the provisions of Public International Law, contained in articles 89 to 101[16], may not be dismissed either, since such provisions are addressed to relevant issues of States parties. In this sense, it was the decision of the *Tribunal di Padova* in 2005[17]. In the same judgment, the *Tribunal di Padova* took the view that Article 28[18], in the same way, was not addressed to contractual parties, but to the States parties and, for that reason, it could not be derogated from, nor had their effects modified.

## 3.2 THE EXPRESS EXCLUSION OF THE APPLICATION OF THE CISG

The exclusion of the CISG may occur in a variety of ways, usually through express statements by parties[19] with the insertion of contractual terms or clauses that expressly excludes the applicability of the Convention[20]. For traditional doctrine, represented by Maureen MURPHY, since the main objective of the CISG is to unify the application of its devices, the best and only solution that emerges from the literality of Article 6 is explicit exclusion (MURPHY, 1989, p.743). However, currently, the majority doctrine, led in this by Franco FERRARI, advocates a complete possibility of the parties promote, along with explicit exclusions, the so-called implicit exclusions (FERRARI, 2012, p.159-176).

The explicit exclusions are twofold: the exclusion with and without the indication by the parties of a law applicable to the contract (FERRARI, 2012, p.176). It is also possible that these hypotheses are fragmented into full or partial exclusion.

[16] Articles 89 to 101 refer to Part IV which contains the final provisions of the CISG.
[17] See, ITALY, 2005.
[18] Article 28. If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.
[19] For cases where the application of the CISG has been expressly excluded through the manifestation of the parties, see: SERBIA, 2009; NETHERLANDS, 2009; RUSSIA, 2004.
[20] See, GERMANY, 2007; AUSTRIA, 2007. For a simple reference to the possibility of excluding CISG expressly by the use of standard contractual terms , see: SWITZERLAND, 2004.

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Contractors may, in the first case, exclude the application of the Vienna Convention and to supplement this absence of a governing rule with the indication of an applicable law which would result from the application of the rules of Private International Law of the *forum*[21] or, as in most States, would result in the application of the law chosen by the contracting parties themselves[22]. In this context, it is even possible that the applicable law is chosen by the contracting parties during the course of judicial proceeding, in the States where their conflicting rules permit, as, for example, Germany and Switzerland.

In the event that the contracting parties expressly only choose to exclude the CISG without, on the contrary, designating a law applicable to the conduct of the contract, the rules of Private International Law of the *forum* shall, by its own means, determine the applicable domestic law for to govern the legal business, according to the preferred view of doctrine (FERRARI, 2012, p.178)[23].

In this context, the CISG's proposed exclusions occur *in totum*, although, as Franco FERRARI puts it, there is a debate among the commentators of the Vienna Convention regarding exclusions being partial (FERRARI, 2012, p.178). According to the author, a first stream of writers favoring the partial exclusion of the CISG provisions argue that the controversial issues raised from the exclusion of the parties should be settled in accordance with Article 7 (2)[24], together with the general principles of the Convention. Thus, although the parties express their wish to depart from the wording of a particular provision, the CISG remains applicable through its principles, as provided for in Article 7 (2). On the other hand, Franco FERRARI maintains the need to protect the partial exclusion[25], without any reference to the general principles of the CISG, reasoning more logical, according to the author (FERRARI, 2012, p.178).

[21] See, GERMANY, 1997.
[22] See, SERBIA, 2009.
[23] The author explains in footnote that in the past this express exclusion without the determination of an applicable substitute law was not admissible.
[24] Article 7 (…) (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.
[25] Case reference on the possibility of partial exclusion of CISG , see: GERMANY, 2002.

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## 3.3 THE IMPLICIT EXCLUSIONS OF THE CISG

Although there is some doctrinal divergence about the possibility of implicit exclusion from the contracting parties of the CISG provisions, the majority share defends the application and utility of the exclusion (BORISOVA, 2004), provided that it is manifested by a real and clear intention of the parties, of a systemic interpretation of the legal relationship and in the conduct of the parties. This is also the construct found in jurisprudence.

The implied exclusion had already been provided for in Article 3 of the ULIS 1964, which, although later criticized and therefore not included in the current CISG text, stated that "the parties to a contract of sale are free to exclude application of this Convention in whole or in part. Such exclusion shall be express or implied. " However, the current absence in the text of the Vienna Convention concerning the possibility of implied exclusion should not be interpreted restrictively. According to Franco Ferrari, the silence of the CISG should only be analyzed as a discouraging factor directed at the courts so that they do not easily declare the impossibility of excluding the provisions of the Convention in the contractual relations between the contracting parties (FERRARI, 2012, p.161). This understanding was stated in several judgments.

The parties may exclude the application of the CISG in their contractual relations (a) by indicating, by the parties, the law applicable to the contract; (b) because of the use of standardized contracts and the choice of jurisdiction by the parties; as well as the effect of the Convention.

## 3.4 IMPLICIT EXCLUSION AND INDICATION BY THE CONTRACTING PARTIES OF THE LAW APPLICABLE UNDER THE GENERAL CONDITIONS

A form commonly used by contracting parties to remove the incidence of CISG provisions, implicitly, is by choosing an applicable law to govern the contractual relationship. This choice should be effective, especially in the case of a law of a State Party which is not a member of the Convention, as the courts have already ruled on several occasions.

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Parties may designate a specific law of one of the Contracting States of the CISG, for example, the Civil Code of France or the Commercial Code of Germany, at which point the effect of the Vienna Convention is removed by reference to another law. In the same sense, the application of the CISG would be disregarded if the parties designate a law of a State not contracting the Convention. Priscila AYMONE (2011, p.64) emphasises that, in the event of doubts as to the designation of the applicable law by the parties, Article 1 should be reinstated with all its limitations[26].

It is imperative to emphasize that the aim of the Vienna Convention, as well as any other related instrument, is to promote the standardization, *in casu*, of the rules applicable to international contracts and their interpretation. In this sense, because the CISG is a systemic whole, the interpretation of its provisions, in particular Article 6, must comply with the content of Article 7, that is, respect the international character of the Convention and the need to promote uniformity of and to ensure respect for good faith in international trade. It should be noted, however, that the pure and simple indication of a national law as the applicable law in the conduct of an international contract does not exclude *per se* the impact of the CISG, which can be applied as a substantive law of the legal order whose right has appointed by the parties themselves. However, there being, in parallel with the designation of the applicable law, an express reference to the exclusion of the Convention, as will be done, as discussed in item 3.2.

## 3.5 IMPLICIT EXCLUSION DUE TO THE USE OF STANDARDIZED CONTRACTS AND THE CHOICE OF JURISDICTION BY THE PARTIES

The exclusion of CISG also occurs implicitly through the use of standardized contracts. The exclusion is evident from the moment these contracts become an integral part of the main contract, observing the following requirements evidenced by Franco FERRARI: (a) its content is deeply influenced by the rules and concepts of a

[26] According to Article 1 of the CISG: Article 1. (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State. (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract. (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

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specific legal system, concluding the incompatibility of the application with the CISG, as well as the intention of the parties regarding the exclusion; and (b) its use is biased to the exclusion of the Convention (FERRARI, 2012, p.172). Similarly, the use of the international trade terms, INCOTERMS, considered as widely recognized and accepted standards in international trade, does not induce, *per se*, a removal of the CISG. The same occurs as the UNIDROIT Principles. Both complement the contractual system, as authorized by Article 7 of the Vienna Convention itself. In the same sense, the case-law is pronounced[27].

Further, FERRARI states that the choice of jurisdiction may also lead to the removal of the CISG, as the choice of an arbitral tribunal (FERRARI, 2012, p.173). Requires, however, the author, two requirements to do so: (a) the possibility of inferring that the intention of the parties when choosing the *forum* represents an unequivocal choice of domestic law as applicable to the detriment of the CISG; (b) the *forum* shall not be located in the territory of any of the Contracting Parties to the CISG. In contrast, it is interpreted by the application of CISG[28].

## 4 THE QUESTION OF OPTING-IN: THE NON-PROHIBITION OF APPLICATION OF THE CISG RULES IN SITUATIONS EXCLUDED BY THE CONVENTION ITSELF AND ITS EFFECTS

Furthermore, the contracting parties may, by means of the party autonomy, choose the CISG as the law applicable to the contract in cases not covered by its scope, that is, when the prerequisites for the application of the Convention are not fulfilled. It is the so-called opting-in, a system which, although foreseen since 1964 in article 4 of ULIS[29], has never been raised by the parties (FERRARI, 2012, p.180).

[27] See, AUSTRIA, 2001. The ageement to apply Incoterms (...) does not necessarily indicate an agrément to exclude the CISG, because they provide only for singular aspects of the sales contract and do not requeire the basis of a certain sales law tha diSeeges from the CISG.
[28] See, GERMANY, 1998.
[29] Article 4. The present Law shall also apply where it has been chosen as the law of the contract by the parties, whether or not their places of business or their habitual residences are in different States and whether or not such States are Parties to the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods, to the extent that it does not affect the application of any mandatory provisions of law which would have been applicable if the parties had not chosen the Uniform Law.

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The mere fact that the Vienna Convention does not provide for the express possibility of using its provisions in situations other than those covered does not necessarily mean that the parties are prohibited from opting-in by extending the scope of the uniform rule. Thus, in the absence of the requirements imposed by the CISG, the parties may express their interest in matters relating to: (a) transactions or issues specifically excluded from the scope of the Convention, such as consumer[30] relations, liability for death or bodily injury[31], and the validity and right of others[32]; (b) contracting parties established in the same CISG Member State; and (c) transnational transactions which lack adequate contact with a Contracting State to the Convention (HONNOLD, 1987, p.83).

Thus, the uniform law can be applied in the contractual relationship of the parties, integrating the contractual content, limiting its provisions to the mandatory rules of the material law applicable to the controversy of public order.

## 5 THE PRINCIPLE OF PARTY AUTONOMY BRAZILIAN PRIVATE INTERNATIONAL CONTRACTUAL LAW AND THE APPARENT ANTINOMY WITH CISG RULES: LAW AS A UNITARY SYSTEM OF NORMS

### 5.1 PARTY AUTONOMY IN BRAZILIAN PRIVATE INTERNATIONAL CONTRACTUAL LAW

As will be examined, Brazil adopts a narrower conception of freedom of contract in the context of international agreements (KUYVEN; PIGNATTA, 2015, p.100). The issue of party autonomy in international contracts and rules of Brazilian Private International Law has been in place since the mid-nineteenth century, when

[30] Article 2. This Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; (...)

[31] Article 5. This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

[32] Article 4. This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold.

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Pimenta BUENO brought up the first lessons of the discipline in the country[33]. To determine whether Brazil is a partisan or not of the principle of party autonomy to establish the law that will eventually govern a cross-border contract has not proved to be the most conciliatory task in the last hundred and fifty years.

The first systematic codification of Brazilian Private International Law was the Law of Introduction of the Civil Code of 1916, which came into force in 1917 along with the Civil Code. In the codified text of the Brazilian Conflit of Laws rules, Article 13[34] established that, unless otherwise stipulated, the law of the place where they were contracted would regulate those obligations. The expression unless stipulated otherwise would determine the existence of the acceptance of the autonomy of the parties by the Brazilian legal system. However, the sole paragraph of this same instrument drastically reduced the scope of incidence, apparently denying the possibility of the autonomy inserted in the *caput*, providing that but always will be governed by Brazilian law, contracts feasible in Brazil; the obligations contracted between Brazilians abroad; and the acts related to the Brazilian mortgage regime. Therefore, a dichotomy of treatment between the autonomy of the will was established, in principle, due to a literal interpretation of the device, the rule, and the Brazilian law, when the obligations in Brazil were executed, *prima facie*, the exception.

In 1928, the Bustamante Code, an exercise in the standardization of private international law in the Latin American context, dealt with relative autonomy of the will. Receiving criticism because of imprecision, the treaty provided in articles 164 to 186 regarding the subject of obligations and contracts, however, he indicated the terms territorial law and personal law without, in fact, indicating a criterion for determination (ARAÚJO, 2009, p.173). Thus, it lacked applicability among Brazilian lawyers and courts.

Since 1942, the Brazilian Private International Law Code - Law of Introduction to the Norms of Brazilian Law (BRAZIL, 1942), in article 9, regarding the adoption of a territorial and nationalist criterion:

[33] See, PIMENTA BUENO, 1863.

[34] Article. 13. It will regulate, unless stipulated otherwise, as to the substance and effects of the obligations, the law of the place, where they are contracted. Sole paragraph. But always will govern by Brazilian law: I. Contracts set in foreign countries, when enforceable in Brazil. II. Obligations among Brazilians in foreign country. III. Acts relating to real estate located in Brazil. IV. The acts relating to the mortgage scheme.

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> Article 9 In order to qualify and govern the obligations, shall apply the law of the country in which they are constituted. Paragraph 1. Aiming at the obligation to be executed in Brazil and depending on the essencial form, Brazilian law will be observed, acknowledging the peculiarities of foreign law regarding the extrinsic requirements of the act. Paragraph 2. The obligation resulting from the contract is deemed to be constituted in the place where the tenderer resides. [emphasis added]

From the nineteenth century onwards, analyzing the brazilian doctrinal evolution on Private International Contracts Law party autonomy, it is possible to identify three distinct currents of thought: (a) those contrary to the adoption of party autonomy, among which stand out José Antônio Pimenta Bueno, in the nineteenth century, Pontes de Miranda (1935, p.156-160, 185-195), followed by Amílcar de Castro (2005, p.363-378); (b) those favorable to the autonomy of the parties, but limited to the supplementary rules, removing its applicability on completeness of contract, a position traditionally defended by Clóvis Beviláqua (1944, p.357-359), Álvaro da Costa Machado Villela (1921, p.320), Eduardo Espínola (1925, p.655-659), João Grandino Rodas (2002, p.44), Maristela Basso (1994, p.43-66). Endorsing the second chain, Paulo Borba Casella (2006, p.743), in analyzing article 9 of LINDB / 1942, states that there is no express provision authorizing the use of the autonomy of the parties' will in the Brazilian DIP, however, states that the impossibility of using the choice of the law applicable by the parties is not absolute, provided that indirectly; and (c) those who are widely in favor of recognizing and adopting party autonomy in the Brazilian DIP, with the largest representatives being Irineu Strenger (1998, p.215-220), Haroldo Valladão (1971, p.363-375) and Jacob Dolinger (2007, p.421-481). More recently, embrancing an understanding open to international sources of Private Internacional Law and in the light of Human Rights[35], André de Carvalho Ramos is totally in favour of the party autonomy and the *lex contractus*, since linked to public order at the time of execution of the contract (CARVALHO RAMOS; GRAMASTRUP, 2016, p.189-194).

Nevertheless, we are still faced with the absence of legal provision for the autonomy of the parties in negotiating relations with a cross-border reach, it is possible to identify concrete signs of change in Brazilian legal system that leads us to believe that the party autonomy is present and applicable in the Brazilian Private International

[35] On this subject see: CARVALHO RAMOS, 2015, p. 14-33

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Contracts Law. The first sign deals with the possibility for the parties to choose the law governing the arbitration proceedings, including in this list, the *lex mercatoria*, in accordance with Article 2 of the legal instrument (BRAZIL, 1996), and the freedom to exercise in the case in question is ample (CASELLA, 2006, p.745), as is clear from the article, below:

> Article 2. The arbitration may be of right or of equity, at the discretion of the parties. Paragraph 1. **The parties may freely choose** the **rules of law** that will be applied in arbitration, provided there is no violation of good customs and public order. Paragraph 2. The parties **may also agree that arbitration be conducted on the basis of the general principles of law, customs and international trade rules**. [emphasis added]

Furthermore, at the Inter-American level, the Inter-American Convention on the Law Applicable to International Contracts was drafted during during the fifth Inter-American Conference on Private International Law, in 1994 (Mexico Convention). In this context, Brazil participated, negotiated, and included the principle of party autonomy by way of applicable law, practically under the same terms of the Rome Convention, as well as adopted the rule of closer ties by which judges shall observe all the elements involving the concrete case, subjective and objective (ARAÚJO, 2009, p.197-198). In Article 7 *et seq*. is provided for the autonomy of the parties to determine the applicable law:

> The contract **shall be governed by the law chosen by the parties**. The agreement of the parties on this choice must be expressed or, if there is no express agreement, **be clearly apparent from the conduct of the parties** and the **contractual terms taken as a whole**. That choice may relate to the whole of the contract or a part thereof. The choice of a forum by the parties does not necessarily imply the choice of the applicable law. [emphasis added]

However, to date, Brazil has not ratified the Mexico Convention, largely because of its national private international law (OAS, 1994).

Under the jurisprudence of the Brazilian courts, there are few manifestations of the former Article 13 and the current Article 9. In these few opportunities for application of the provisions in Brazilian courts, according to Nádia de ARAÚJO, there has always been a literal interpretation of them, especially Article 9, removing party autonomy of the regency of transnational contracts (ARAÚJO, 2009, p.272).

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Thus, the Brazilian system of Private International Law, regarding the use of autonomy of the parties in contractual relations, is very particular. While there is an initial intention of the legislator to internalize the principle of the party autonomy for the Private International Law, there is also strong resistance, leading to legislation that completely removes the literal possibility of applying the autonomy of the parties. And, even in the present day, when there is a proliferation of international contracts to enhancing trade between the States, the question still awaits a solution.

## 5.2 THE APPARENT ANTINOMY OF BRAZILIAN RULES WITH CISG RULES: LAW AS A UNITARY SYSTEM OF NORMS

In this context, on March 4, 2013, Brazil deposited the instrument of adhesion to the CISG and it entered into force for the country, in the international juridical plane, on April 1, 2014, finally integrating Brazilian law. Faced with this fact and the normative and doctrinal pendulum regarding the autonomy of the parties in international contracts verified in the evolution of Brazilian Private International Law, the question is posed: How to apply Article 6 of the CISG in accordance with the panorama of Brazilian Law outlined above?

It is well known that each legal instrument, as an integral part of a unitary legal system, has its own characteristics, especially according to the temporal, spatial, personal and material validity. Norms conform to the whole, and in it they interact and dialogue with others, sometimes overlapping, sometimes moving away, but always contributing to the development of social regulation. Regarding the legal system, Norberto BOBBIO, in his Theory of Legal Order, presented the fundamental criteria for the solution of legal antinomies, which are: chronological, hierarchical and specialty. For the author, in the chronological context *lex posterior derogat priori*; in the sphere of hierarchy, the higher law removes the lower law; in the field of specialty lex speciali derogat generali (BOBBIO, 1994).

Using these criteria, it is possible to show that CISG, as part of the Brazilian legal system, will adapt, as well as all other system norms, to a unitary whole, maintaining the order's coherence and avoiding eventual antinomies. Noting the adage *lex posterior derogat priori*, the Vienna Convention became integrated into the Brazilian

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legal system after the promulgation and publication of Presidential Decree n. 8.327 of October 13, 2014, therefore, subsequent to the other norms and positions that do not accept the principle of the party autonomy in the scope of international contractual relations.

As for the hierarchy, most of the international treaties ratified and internalized in the Brazilian order are still equivalent to ordinary law. However, there is a clear and progressive development of jurisprudence in the sense of recognizing the normative status of treaties in Brazil as a supralegal norm, hierarchically below only the Constitution of the Republic, as is already the case with international human rights treaties that are not endorsed by a qualified quorum of constitutional amendment[36], as well as a recent understanding, still under construction, regarding treaties on double taxation[37]. In addition, in 2009, Brazil ratified the Vienna Convention on the Law of Treaties of 1969[38], which contained provisions on the impossibility of removing provisions of international treaties on grounds of violation of domestic law. In this sense, there is an accelerated process of elevating the treaties to a level higher than that currently reigning.

Lastly, regarding the specialty, it is observed that the CISG is, without a doubt, an instrument that regulates a special matter, that is, international contracts of international purchase of goods. Thus, in the case of transnational contractual relations, or in the hypotheses set forth in this article, lex speciali derogate generali, with the effect of domestic law being departed from, according to the will expressed by the contracting parties.

Thus, in the case of the application of the CISG to arbitration in Brazil, there appears to be no doubt as to its possibility. Article 2 of Law n. 9.307 of 1997 as follows:

[36] Constitution of the Republic. Article 5 (…) Paragraph 3. The international treaties and conventions on human rights that are approved in each House of the National Congress in two rounds, for three fifths of the votes of the respective members, shall be equivalent to the constitutional amendments. See also the following decisions of the Brazilian Federal Supreme Court: STF. Tribunal Pleno. RHC 79.785/RJ. Rel. Min. Sepúlveda Pertence, date of judgement 29/03/2000, publication DJ 22/11/2002; STF. 2ª Turma HC 90172/SP. Rel. Min. Gilmar Mendes, date of judgement 05/06/2007, publication DJ 17/08/2007; STF. Tribunal Pleno. RE 466.343. Rel. Min. Cezar Peluso, date of judgement 03/08/2008.

[37] See the following decisions of the Brazilian Federal Supreme Court: STF. Tribunal Pleno. RE 229.096. Rel. Min. Ilmar Galvão. Relatora para acórdão: Min. Cármen Lúcia, date of judgement 16/08/2007; STF. RE 460.320/PR

[38] Brazil has internalized the Convention on the Law of Treaties by means of Decree no. 7030 of 2009

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> Article 2. The arbitration may be of right or of equity, at the discretion of the parties. Paragraph 1. **The parties may freely choose** the **rules of law** that will be applied in arbitration, provided there is no violation of good customs and public order. Paragraph 2. The parties **may also agree that arbitration be conducted on the basis of the general principles of law, customs and international trade rules**. [emphasis added]

Reading the above provision, it is possible to understand the possibility of the parties choosing the law applicable to arbitration, which may be based on general principles of law, customs and international trade rules, including CISG. The principle of autonomy of the will is expressly stated in article 2 of the Brazilian Arbitration Law, and is applied, also, to international arbitrations. Such a provision is applicable to the merits of arbitration, with the effect of article 9 of the Law of Introduction to the Rules of the Brazilian Law of 1942 (DOLINGER; TIBURCIO, 2003, p.282) being excluded. In the same sense, the Brazilian jurisprudence[39].

On the other side is the application of CISG by state jurisdiction. As Priscila AYMONE affirms, once submitted to the Judiciary, this clause [choice of law] will be dismissed, because the judges, bound to the rigidity of the country's DIP rules, will not abide by the principle of autonomy of the will (AYMONE, 2011, p.84). Notwithstanding such a view, the CISG is now part of the Brazilian Law and with it must dialogue based on the hermeneutic criteria of conformation and interpretation. The legal system is unitary, and the rules should not provide fragmentation of the system. In this sense, the criteria provided by Bobbio demonstrate that the CISG is a later standard, special and of the same or higher hierarchy as understood. Not understanding in this way would be to go beyond the main criteria used to conform all other rules in the legal system. Is this the wish of the Legislator who endorsed the Vienna Convention, to give it special criteria of interpretation before all other Brazilian norms? As for the appellate judges, is the CISG a sufficient argument to exclude once and for all the fear of the literal character of Article 9 of LINDB of 1942 as regards transnational contracts?

In theory, these answers must be affirmative, however, their application will still be tested by the Judiciary and Article 6 of the CISG analyzed by the practice of the Brazilian courts.

[39] See, for exemple, the following decision: 1º TASP. ApCiv. 1111650-0/SP. 7ª Cam. Rel. Des. Waldir de Souza José, j. 24/09/2002

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## CONCLUSION

The CISG as a process of standardization of transnational contractual law is governed by the principle of party autonomy of the contracting parties, as provided for in Article 6 of the Convention. This provision, which originated from the similar conventions elaborated from the first ideas on the unification of contractual law in the first decades of the twentieth century, authorizes the parties to promote opting-out and opting-in, restricting and extending respectively the sphere of application established in the text of the Convention.

As a unifying instrument for international trade, CISG, in providing for opting-out and opting-in, reflects the dynamism of international trade practices, as well as the flexibility required by the contracting parties to better regulate their legal relationship, whether by simply accepting the limited scope of the Vienna Convention, either by derogating or modifying the effects of its provisions or by expressly or tacitly excluding the CISG as an instrument applicable to its contractual relations.

Although Brazil has recently acceded to the Convention, incorporating the treaty into the Brazilian legal system, there are still doubts regarding its adaptation and conformation before the Brazilian history of the departure from the principle of the autonomy of the parties in the scope of international or transnational contracts, in especially in the case law. Nevertheless, it is possible to conclude that, with regard to arbitration, supported by Article 2 of the Brazilian Arbitration Law, the CISG is applicable, as well as its Article 6, in the broad exercise of autonomy of the parties, since 1997.

However, the same can not be said about the transnational contracts that will be submitted to the Judiciary. At this point, despite the conservative understanding of the Brazilian judiciary, there will be no other way out except for the broad recognition of the applicability of the CISG and the principle of the autonomy of the parties by the criteria of removal of the antinomies taught by Bobbio, hierarchy, specialty and temporal. of Brazilian judges, under penalty of using different criteria to interpret norms that make up the same legal system. Lastly, recognizing the CISG, it recognizes the possibility of using the opting-out and opting-in system, a greater expression of the autonomy of the parties under the Vienna Convention.

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