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APPLICABLE LAW, THE CISG, AND THE FUTURE CONVENTION ON INTERNATIONAL COMMERCIAL CONTRACTS

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I. Introduction: A Convention on International Commercial Contracts

THERE is no question that the debate on international commercial contract law has grown following the adoption and subsequent success of the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG). The merits of the CISG can be measured not only in terms of the high number and the economic weight of the countries that have ratified the Convention, but also by the quality and novelty, of the worldwide solutions it achieved from a pure technical and legal perspective.[1] However, the CISG's status as an international treaty has some drawbacks. First of all, as an international treaty, it might be quite difficult to amend or modify it;[2] second, despite the wide substantive coverage of the CISG, there are important areas of sale of goods contracts left to domestic law; third, the CISG only covers international sale of goods contracts, and thus some other important international commercial contracts do not have an international uniform law regime.

After the success of the CISG, several different instruments, mostly with a material or a territorial scope different as to the CISG, have tried to contribute *soft law* that either can be applied in conjunction with the CISG, or as an alternative to it if specified by a contract. These contractual instruments are mostly based on or inspired by the CISG solutions because, despite the fact that the CISG is restricted to international sale of goods contracts, it governs those contracts by regulating areas that belong to general contract law. The most well-known instrument of this sort is the UNIDROIT Principles of International Commercial Contracts (UPICC, 1994, 2004, and 2010) that might be seen as a complementary tool to the

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1. *See* U.N. Comm'n on Int'l Trade Law, United Nations Convention on Contracts for the International Sale of Goods art. 35, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG], *available at* http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf. The list of contracting states is now seventy-eight. Brazil has to be added to the list since it recently adopted the CISG.

2. Notwithstanding the above, there are some indirect mechanisms to update an International Treaty. *See* UNCITRAL, Recommendation Regarding the Interpretation of Article II (2), and Article VII (1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc. A/6/17 (July 7, 2006); *see also* United Nations Convention on the Use of Electronic Communications in International Contracts, G.A. Res. 60/21, art. 20, U.N. GAOR, 60th Sess., Supp. No. 17 U.N. Doc. A/RES/60/21 (Nov. 23, 2005) [hereinafter Electronic Communications Convention].

CISG to the extent that it supplements, aids in its interpretation, and even covers certain areas excluded from the CISG.[3] The UNIDROIT Principles have a wider field of application as compared to the CISG because they cover international commercial contracts in general. One of the most recent instruments, is however, in more direct competition with the CISG because, as a regulation, it will be incorporated into the legislation of the EU member states, although for the contractual parties it will be an opting-in instrument: the European Union Proposal for a Regulation on a Common European Sales Law (CESL) of October 11, 2011[4] whose antecedents might be found in the Draft Common Frame of Reference (DCFR, 2009) and the European Principles in Contract Law (PECL, 1995, 1999, and 2003).[5] There are also several other regional initiatives such as in Africa (Organization for the Harmonization of Business Law in Africa, OHADA),[6] Asia (Principles of Asian Contract Law, PACL), or Latin America being the last two still under development.

These instruments have produced a worldwide, intense debate on general commercial contract law, more generally on private law, on regional versus universal harmonization of the law, as well as on the role of soft law instruments in regard to hard instruments. Furthermore, at the core of the discussion is the role of the CISG, its limits, and its drawbacks, in the framework of an international commercial contract law instrument.[7]

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3. In fact the 2004 and 2010 editions cover general contract law institutions that are not covered by the CISG: authority of agents, contracts for the benefit of third parties, set-off, limitation periods, assignment of rights and contracts, transfer of obligations, conditions, plurality of obligors and obligees, unwinding of contracts, and illegality.

4. *See* European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 Final (Oct. 11, 2011), *available at* http://ec.europa.eu/justice/contract/files/common_sales_law/regulation_sales_law_en.pdf.

5. *See* Pilar Perales Viscasillas & Rafael Illescas Ortiz, *The Scope of the Common European Sales Law: B2B, Goods, Digital Content and Services*, 11 J. INT'L TRADE L. & POL'Y 241 (2012) (offering critical view); *see also* Ingeborg Schwenzer, *The Proposed Common European Sales Law and The Convention on the International Sale of Goods*, 44 UCC L.J. 457 (2012).

6. *See* Organization for the Harmonization of Business Law in Africa, *The Uniform Act on General Commercial Law*, *available at* http://www.ohadalegis.com/anglais/tableaudrtcomgb.htm.

7. The idea of elaborating a "Global Commercial Code" was put forward by Gerold Herrmann. *See* Gerold Herrmann, *Law, International Commerce and the Formulating Agencies—The Future of Harmonisation and Formulating Agencies: The Role of UNCITRAL* (June 1, 2000) (unpublished paper presented at the Schmitthoff Symposium: Law and Trade in the 21st Century, Centre of Commercial Law Studies, London) (on file with author). Before that, it was suggested that UNCITRAL should embark on an international convention related to the general part of contract law. *See* Ole Lando, *Principles of European Contract Law and UNIDROIT Principles: Moving from Harmonisation to Unification?*, 8 UNIF. L. REV. 123 (2003) (arguing in favor of international convention by UNIDROIT); SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES, FESTSCHRIFT FOR ALBERT H. KRITZER ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY (Camilla B. Andersen &

It is not a surprise that on the occasion of the last Commission session of UNCITRAL in 2012[8] a proposal on possible future work by UNCITRAL in the area of international contract law was put forward by Switzerland.[9] The proposal tries to initiate a debate on two areas:[10]

> (i) whether UNCITRAL can undertake an assessment of the operation of the 1980 Convention on Contracts for the International Sale of Goods and related UNCITRAL instruments in light of practical needs of international business parties today and tomorrow, and
>
> (ii) To discuss whether further work both in these areas and in the broader context of general contract law is desirable and feasible on a global level to meet those needs.[11]

This proposal was well received by the Commission; however there were several words of caution,[12] and so the decision is still pending on the

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Ulrich G. Schroeter eds., 2008); Michael Joachim Bonell, *Towards a Legislative Codification of the UNIDROIT Principles?*, 12 UNIF. L. REV. 233 (2007). *But see* Michael Joachim Bonell, *Do We Need a Global Commercial Code?*, 106 DICK. L. REV. 87 (2001).

8. *See* U.N. Comm'n on Int'l Trade Law, Rep. on its 45th Sess., June 25–July 6, 2012.

9. *See* UNCITRAL, *Possible Future Work in the Area of International Contract Law: Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law*, U.N. Doc. A/CN.9/758 (May 8, 2012) [hereinafter *Swiss Proposal*].

10. *See id.* at 1.

11. The areas identified in the Swiss Proposal are in particular: general provisions (i.e., freedom of contract, freedom of form), formation of contract (i.e., offer, acceptance, modification, discharge by assent, standard terms, battle of forms, electronic contracting), agency (i.e., authority, disclosed/undisclosed agency, liability of the agent), validity (i.e., mistake, fraud, duress, gross disparity, unfair terms, illegality), construction of contract (i.e., interpretation, supplementation, practices and usages), conditions, third party rights, performance of contract (i.e., time, place, currency, costs), remedies for breach of contract (i.e., right to withhold performance, specific performance, avoidance, damages, exemptions), consequences of unwinding; set-off; assignment and delegation (i.e., assignment of rights, delegation of performance of duty, transfer of contracts), limitation, joint and several obligors and obligees. *See id.*

12. *See* Rep. of the U.N. Comm'n on Int'l Trade Law on its 45th Sess., U.N. GAOR, 67th Sess., Supp. No. 17, ¶ 130, U.N. Doc. A/67/17 (2012) [hereinafter Report of the 45th Session]. The Report stated:

> In reply, it was said that it was not evident that existing instruments were inadequate in actual practice, that the proposal seemed unclear and overly ambitious and that it could potentially overlap with existing texts, such as the Unidroit Principles of International Commercial Contracts. It was added that lacunae in existing texts, such as the United Nations Sales Convention, were a result of the impossibility of finding an agreed compromise solution and that there were significant doubts that that could be overcome in the near future. Concerns were also expressed about the implications of such a vast project on the human and financial resources available to the Commission and to States. For those reasons, it was urged that the proposed work should not be undertaken, at least not at the present time. It was added that the Commission might reconsider the matter at a future date in the light of possible developments.

Commission level.[13]

It seems that some part of the criticism derives from a misunderstanding on the scope of the Swiss Proposal that it might be perceived as an intention to create a new instrument that will modify the CISG. There is indeed no need to touch the CISG, or to modify it. A different issue is where a new instrument would be able to complement the CISG by either covering areas outside the scope of the CISG, or filling internal gaps in the CISG. At the same time, and because of the intended general nature of the future instrument, it will be applicable to other international commercial contracts as well.

It seems to us that this is the correct approach to assess the viability of a new instrument on the area of contract law as a project to be undertaken by UNCITRAL. One might say that UNIDROIT Principles already do so, since the Principles touch upon issues outside the scope of the CISG, and also implement the regulation of areas that are covered by the CISG. Yet, that is the case only if parties choose to have the UNIDROIT Principles govern their contract. There is no legitimacy behind the UNIDROIT Principles to be considered in all and any case as the general principles on which the CISG is based.[14] The Principles, although a very useful text, are not an international treaty accepted worldwide. This legitimacy issue is a very important one to consider in favor of a general contract law instrument in a form of a binding instrument. To this regard, the endorsement of UPICC by UNCITRAL is by no means a declaration of intention by UNCITRAL to consider UPICC in the same foot as the CISG or to consider that they are the general principles of which the CISG is based.[15]

The Swiss Proposal has been recently endorsed by the CISG Advisory Council (CISG-AC) Declaration No. 1: The CISG and Regional Harmonization,[16] where it considers some of the shortfalls of regional unification as opposed to global unification. The present author, who supported that declaration as a member of the CISG-AC, did recently consider the idea of UNCITRAL undertaking a leading role in the area of international commercial contracts.[17] If finally a working group within UNCITRAL were to

Id.

13. *See id.* ¶ 132. The Report stated:

> [I]t was determined that there was a prevailing view in support of requesting the Secretariat to organize symposiums and other meetings, including at the regional level and within available resources, maintaining close cooperation with Unidroit, with a view to compiling further information to assist the Commission in the assessment of the desirability and feasibility of future work in the field of general contract law at a future session.

Id.

14. *See* Pilar Perales Viscasillas, *The Role of the UNIDROIT Principles and the PECL in the interpretation and Gap-Filling of CISG*, *in* CISG METHODOLOGY 287–317 (André Janssen & Olaf Meyer eds., 2009).

15. *See* Report of the 45th Session, *supra* note 12, ¶¶ 141–44.

16. *See* CISG Advisory Council, *Welcome to International Sales Convention Advisory Council (CISG-AC)*, *available at* www.cisg-ac.org (last visited Apr. 7, 2013).

17. *See* Perales Viscasillas & Illescas Ortiz, *supra* note 5, at 243.

be established one of the most important questions would be the specific form the instrument will finally take, an issue which is usually related to the degree of compromise the states are willing to accept in regard to the substance of the instrument.

Although the unification through a model law could be as successful as an international treaty,[18] but with a less degree of uniformity since it is an indirect way of unification by which the states can depart as much as they wish from the rules of the model law, I am of the opinion that a model law would not be a good tool for a general contract law instrument mainly for two reasons. First, UPICC is already a "model law" available for the states.[19] Second, a General International Commercial Contract Model Law would not be enough to achieve a desired level of unification because there still would be a high degree of uncertainty in regard to the applicable law and its influence on domestic laws, particularly since there would not be a mechanism to ensure international and uniform interpretation.

In regard to a possible soft law instrument, i.e., an optional instrument for the parties, the same reservations as mentioned before applies: there is again an instrument that from my point of view offers the parties good solutions, i.e., UPICC.[20] In fact, the need for another optional instrument is unconvincing given the variety of options available to businesses. Also, an optional instrument might be problematic in regard to its effects, particularly if we think of some countries or even regions of the world where soft law instruments would not be considered a real choice of law.[21]

There is, however, no international treaty in the area of international commercial contracts, and thus there is no risk of competing instruments; furthermore, UNCITRAL, preferably in conjunction with UNIDROIT, would need to take the leading role as an international organization with enough legislative experience and legitimacy behind it, and with the capacity to create a universally accepted set of rules through a worldwide representation during the negotiation of the instrument.[22] Furthermore,

18. Indeed one of the most successful model laws is the 1985 UNCITRAL Model Law on International Commercial Arbitration, where nearly seventy jurisdictions all over the world have drafted domestic and/or international arbitration rules based upon the 1985 Model Law.

19. As considered by the Preamble, UPICC "may serve as a model for national and international legislators." INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS art. 1.6(2), pmbl. 1 (2010) [hereinafter UNIDROIT PRINCIPLES], *available at* http://www.unidroit.org/english/principles/contracts/main.htm.

20. UPICC Preamble states that: "They shall be applied when the parties have agreed that their contract be governed by them." *See id.*

21. *See* Rome I Regulation 593/2008, 2008 O.J. (L 177) 6 (EC) [hereinafter Rome I Regulation].

22. *See* UNITED NATIONS COMM'N ON INT'L TRADE LAW, THE UNCITRAL GUIDE: BASIC FACTS ABOUT THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 1 (2007), *available at* http://www.uncitral.org/pdf/english/texts/general/06-50941_Ebook.pdf. The UNCITRAL Guide states:

the fact that UNCITRAL works in the six official languages of the UN (Arabic, Chinese, English, French, Russian, and Spanish), and thus that its texts are equally official in those languages, also offers a tremendous advantage.

Therefore, from my point of view, if UNCITRAL were to be helpful in the efforts of harmonizing and unifying international commercial contract law, it is probably the time to undertake a more ambitious project that should take the form of an international convention.[23]

However, a final consideration—a plan B—if such a project finally fails: a less ambitious project is also possible. UNCITRAL might focus its work on specific contracts such as international distribution contracts. To a certain extent, international distribution contracts are covered by the CISG.[24] However several factors make them an ideal subject for an international convention: the CISG does not cover certain important aspects of these contracts, they are being used more and more in international trade, and finally, there is a need to adjust some of the Vienna rules in this context, particularly in regard to remedies, but also the formation of contract provisions.

> These instruments are negotiated through an international process involving a variety of participants, including member States of UNCITRAL, which represent different legal traditions and levels of economic development; non-member States; intergovernmental organizations; and non-governmental organizations. Thus, these texts are widely acceptable as offering solutions appropriate to different legal traditions and to countries at different stages of economic development. In the years since its establishment, UNCITRAL has been recognized as the core legal body of the United Nations system in the field of international trade law.

Id.

23. The international treaty reservations by states should be kept to the minimum possible since the effect of reservations is to diminish the degree of uniformity. One has to remember here the famous "British reservation" that was an "opt-in" mechanism chosen for ULF and ULIS (Convention relating to a Uniform Law on the International Sale of Goods and Convention relating to a Uniform Law for the Formation of the Contract (The Hague, July 1, 1964)) and that were adopted by the UK. The evolution of the CISG has shown that the reservations are being withdrawn by the states, and so very recently the four reservation states in regard to Article 92 CISG (Norway, Finland, Denmark, and Sweden) have withdrawn it, and China has done so in regard to the written declaration (Article 96 CISG) on the 16th of January 2013.

24. For a treatment of international distribution contracts under CISG, see Pilar Perales Viscasillas, *Los contratos de distribución internacional a la luz de la Convención de Viena de 1980 sobre compraventa internacional de mercaderías*, *in* HOMENAJE AL PROF. FRANCISCO VICENT CHULIÁ (Tirant lo blanch ed., 2013). *See also* Pilar Perales Viscasillas, *Contratos de distribución internacional y arbitraje*, *in* DISTRIBUCIÓN COMERCIAL Y DERECHO DE LA COMPETENCIA 44–102 (Arístides Jorge Viera González & Joseba Aitor Echevarría Sáenz eds., 2011).

In terms of the determination of the applicable law, note that even unified private international law instruments such as Rome I Regulation can be problematic since it provides for different criteria depending on whether the contract is characterized as a sale of goods (place of the habitual residence of the seller) or as a distribution contract (place of the habitual residence of the distributor). *See* Rome I Regulation, *supra* note 21, arts. 4.1(a), (f).

II. PRIVATE INTERNATIONAL LAW AND PARTY AUTONOMY WITHIN CISG

One of the most important features of the uniform international law instruments that take the form of a convention is that they provide the applicable law to the contract, and thus displace the otherwise applicable domestic law. Therefore, the majority of the international uniform law conventions contain a direct way of application, i.e., when both parties have their place of business in contracting states, the treaty is directly applicable to the contract.

As a result, an international treaty will be applied directly, avoiding recourse to the rules of private international law. However, the rules of private international law still play an indirect role in the application of international uniform law instruments by way of an indirect application, i.e., when only one of the parties has its place of business in a contracting state and the rules of private international law, i.e., the conflicts of law rules of the forum, lead to the application of the law of the contracting state. The indirect way of application when the conflict of laws points to the state that has ratified the treaty is a mechanism that extends its application, although it brings a certain degree of uncertainty for the parties as it depends upon the application of the rules of private international law.

Both ways of application, direct and indirect, have been uniformly adopted in international treaties, such as the CISG,[25] and so Article 1.1 states that:

> (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
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> *(a)* when the States are Contracting States; or
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> *(b)* when the rules of private international law lead to the application of the law of a Contracting State.[26]

International uniform legal instruments also clearly recognize the principle of freedom of contract which means that the parties might exclude the application of an international treaty as a whole or partially derogate or vary the effects of any of its provisions. CISG Article 6 states that: "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."[27]

Furthermore, the predominant view in legal literature, as well as in case law, is that choice of law analyses in CISG contracting states, or in provinces or territories of CISG contracting states, must apply the CISG,[28]

25. For an example of similar rules, see Convention on the Limitation Period in the International Sale of Goods art. 3, June 14, 1974, 13 I.L.M. 952 (1974) [hereinafter Limitation Convention].

26. CISG, *supra* note 1, art. 1.1.

27. *Id.* art. 6.

28. *See* Michael Bridge, *Choice of Law and the CISG: Opting in and Opting Out*, *in* DRAFTING CONTRACTS UNDER CISG 78 (Harry M. Flechtner et al. eds., 2008); Loukas Mistelis, *Article 6*, *in* COMMENTARY ON THE UN CONVENTION ON CONTRACTS FOR

and furthermore, that for a valid exclusion of the CISG there ought to be a clear indication of its exclusion.[29] This proposition derives from a systematic interpretation of the CISG, which applies *ex officio*, and it ought to be considered the default applicable law. Therefore an exclusion should be clearly expressed.

As is clear when analyzing Articles 1.1(b) and 6 of the CISG, the Convention fails to recognize party autonomy in regard to the choice of the law, as well as the role of arbitration in the determination of the applicable law.

A. *Party Autonomy in Regard to the Choice of the Law*

Article 6 of the CISG fails to recognize that the parties may opt into an international convention—a choice that might be more problematic if the treaty is not yet in force or that might have not yet been ratified by the states concerned. The lack of this kind of recognition by the CISG is due to the fact that for many uniform international instruments the issues regarding applicable law, validity of the choice, and effects of such election,

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THE INTERNATIONAL SALE OF GOODS (CISG) 18 (Ingeborg Schwenzer ed., 2011); Ingeborg Schwenzer & Pascal Hachem, *Article 6*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 14 (Ingeborg Schwenzer ed., 3d ed. 2010). *See also* Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Technical Fabrics Canada Ltd., 474 F. Supp. 2d 1075 (D. Minn. 2007); St. Paul Guardian Ins. Co. & Travelers Ins. Co. v. Neuromed Med. Sys. & Support, GmbH, No. 00 Civ. 9344(SHS), 2002 WL 465312 (S.D.N.Y. Mar. 26, 2002). *But see* Hanwha Corp. v. Cedar Petrochemicals, Inc., 760 F. Supp. 2d 426 (S.D.N.Y. 2011).

29. It is considered that only an express exclusion would be valid. *See* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION art. 6., 77 (2009); Schwenzer & Hachem, *supra* note 28, at 19. Note that Article 3.2 of the Limitation Convention provides that: "This Convention shall not apply when the parties have expressly excluded its application." Limitation Convention, *supra* note 25, art. 3.2.

Some authors advocate at least for a conscious decision that "the parties have knowingly consented to the exclusion of the Convention." *See* Filip De Ly, *Opting Out: Some Observations on the Occasion of the CISG's 25th Anniversary*, *in* QUO VADIS CISG?: CELEBRATING THE 25TH ANNIVERSARY OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 35–36 (Franco Ferrari ed., 2005); Franco Ferrari, *CISG Rules on Exclusion and Derogation*, *in* THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 122 (Franco Ferrari et al. eds., 2004) ("There must be clear indications that the parties really wanted such an exclusion, that is, there must be a real—as opposed to the rhetorical, fictitious or hypothetical—agreement on exclusion."); Mistelis, *supra* note 28, at 19; *see also* Jorge Oviedo Alban, *Autonomía conflictual en los Contratos de Compraventa Internacional de Mercaderías*, *in* COLECCIÓN DE ESTUDIOS DE DERECHO PRIVADO 23 (2012).

A few cases have also addressed this issue. *See* Cedar Petrochemicals Inc. v. Dongbu Hannong Chem. Co., 769 F. Supp. 2d 269 (S.D.N.Y. 2011); BP Int'l, Ltd. v. Empressa Estatal Petroleos de Ecuador, 332 F.3d 333 (5th Cir. 2003) ("Where parties seek to apply a signatory's domestic law in lieu of the CISG, they must affirmatively opt-out of the CISG.").

are left to the specific instruments of private international law and thus to domestic law.[30]

B. *The Role of Arbitration in the Determination of the Applicable Law*

Article 1.1(b) is directed to the judges, but not to arbitrators. It is true that the UNCITRAL Model Law on International Commercial Arbitration did not exist at that time, but it is interesting to note that the CISG did consider arbitration in some provisions,[31] and that the ICC Arbitration Rules applied at that time (1975) recognized that the arbitrators were not bound by any conflict of law system, not even the one of the place of arbitration:

> "The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply *the law designated as the proper law by the rule of conflict which he deems appropriate*."[32]

Furthermore, the concept of private international law within CISG is not an autonomous concept that ought to be interpreted within the boundaries of the CISG, but a concept that is to be found in domestic law.

Apart from this obvious drawback of the CISG,[33] it is important to mention that since the CISG's adoption, the developments in the area of the applicable law have been significant, and thus if a new instrument were to be created it would be time to reconsider the solutions typically provided in international instruments that follows the system articulated by Article 6 (*infra* III) and 1.1 CISG (*infra* IV). Common to both of them in our proposal is that this issue of party autonomy in regard to the applicable law as well as to the concept of private international law would be "transformed" into uniform concepts, i.e., autonomous concepts within the future instrument that will be exclusively covered by it to the maxi-

30. In fact, Rome Convention—the precedent to Rome I Regulation—on the law applicable to contractual obligations was also approved in 1980.

31. Pilar Perales Viscasillas & David Ramos Muños, *CISG & Arbitration*, *in* PRIVATE LAW: NATIONAL—GLOBAL—COMPARATIVE: FESTSCHRIFFT FOR INGEBORG SCHWENZER ON THE OCCASION OF HER 60TH BIRTHDAY 1355–74 (2011).

32. *See* INTL'L CHAMBER OF COMMERCE, RULES OF ARBITRATION (1975).

33. One might need also to mention art. 95 CISG, which contains a reservation limiting the indirect application of the CISG. In order not to limit the application of the future instrument, the recommendation should be not to include a provision similar to art. 95 CISG, which is a reservation that should be withdrawn. *See* Gary F. Bell, *Why Singapore Should Withdraw its Reservation to the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 2005 SINGAPORE Y.B. INT'L 55. For an example of the classical application of art. 95 CISG, see Princesse D'Isenbourg et CIE Ltd. v. Kinder Caviar, Inc., CIV.A. No. 3:09-29-DCR, 2011 WL 720194, at *4 n.3 (E.D. Ky. Feb. 22, 2011).

mum extent possible and thus with no interference from domestic concepts or laws.[34]

The proposal that we will put forward intends to expand the scope of application of an international convention in the area of general contract law with an aim to provide recognition to the freedom of choice of the parties, and also to provide more tools for judges and arbitrators in their finding of the applicable law. This is particularly important in light of the variety of contracts that might be covered under the new instrument.[35]

34. Having said so, one has to recognize the legal implications for UNCITRAL dealing with this area of the law that we cannot cover in this paper, but it will be pointed out. First, a political issue in terms of the relationship between UNCITRAL and The Hague Conference on Private International Law, and second, in regard to the implications upon domestic legal conflict of law rules or arbitration laws if the Convention were to depart from them. The first issue is an easy one to solve through intense cooperation and coordination. The second is a more difficult one. However, it is interesting to note that there are some uniform international conventions that deal, at least partly, with choice of law issues such as the UNIDROIT Convention on International Interests in Mobile Equipment. *See* UNIDROIT, Convention on International Interests in Mobile Equipment, art. 5 (Nov. 16, 2001), http://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf (providing interpretation and applicable law). Article 5 states that:

> 3. References to the applicable law are to the domestic rules of the law applicable by virtue of the rules of private international law of the forum State.
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> 4. Where a State comprises several territorial units, each of which has its own rules of law in respect of the matter to be decided, and where there is no indication of the relevant territorial unit, the law of that State decides which is the territorial unit whose rules shall govern. In the absence of any such rule, the law of the territorial unit with which the case is most closely connected shall apply.

Id. Other uniform substantive law conventions also deal with arbitration or jurisdiction issues, such as Chapters 14 and 15 of the 2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("Rotterdam Rules")—although in that case states have the ability to opt into the regulation. *See* United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Dec. 11, 2008, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html (last visited Apr. 7, 2013).

35. Compare the geographical field of application of the CISG with other international conventions such as the UNIDROIT Conventions on Factoring (art. 2) or Leasing (art. 3) where a formula similar to art. 1 CISG is used but further complicated because of the participation of a third party in the contractual scheme and the presence of an underlying contract. *See* Convention on International Factoring, art. 2, May 28, 1988, 27 I.L.M. 943 [hereinafter Factoring Convention]; Convention on International Financial Leasing art. 3, May 28, 1988, 27 I.L.M. 931 [hereinafter Leasing Convention]. Article 3 of the Leasing Convention states:

> This Convention applies when the lessor and the lessee have their places of business in different States and: (a) those States and the State in which the supplier has its place of business are Contracting States; or (b) both the supply agreement and the leasing agreement are governed by the law of a Contracting State.

Id. Article 2 of the Factoring Convention states:

> 1. This Convention applies whenever the receivables assigned pursuant to a factoring contract arise from a contract of sale of goods between a sup-

Although, one has to be aware that the issue of the applicability of the new instrument would greatly depend on its material scope of application. If, for example, the future instrument were to be only a complementary instrument to the CISG, then a similar technique to that used on the 2005 UNCITRAL Convention is a possibility.[36]

For the sake of clarity, we will assume that the future instrument is a convention in the area of general contract commercial law with only two contracting parties.

III. THE ROLE OF PARTY AUTONOMY IN A FUTURE INSTRUMENT ON INTERNATIONAL COMMERCIAL CONTRACTS

One of the most important developments in the area of party autonomy towards the choice of the applicable law is a progressive recognition of the freedom of the parties to choose as the governing law of the contract not only the "law" but also the "rules of law."[37] Although this possibility is fully recognized in arbitration laws and rules,[38] it is not yet so in some conflict of law systems. However, there are important developments in this area that invite wider recognition of party autonomy.

In our opinion, a wider approach towards the concept of law should be adopted so as to reflect the possibilities for the parties to choose not only the law but also the rules of law. For this reason, our proposal in regard to the field of application of the new instrument would be to specif-

> plier and a debtor whose places of business are in different States and: (a) those States and the State in which the factor has its place of business are Contracting States; or (b) both the contract of sale of goods and the factoring contract are governed by the law of a Contracting State.

Factoring Convention, *supra* note 35, art. 2. *See also* Convention on Independent Guarantees and Stand-by Letters of Credit art. 1, Dec. 11, 1995, 2169 U.N.T.S. 190, 35 I.L.M. 735. Article 1 states:

> This Convention applies to an international undertaking referred to in article 2: (a) If the place of business of the guarantor/issuer at which the undertaking is issued is in a Contracting State, or (b) If the rules of private international law lead to the application of the law of a Contracting State, unless the undertaking excludes the application of the Convention.

Id.

36. Article 1.1 of the United Nations Convention on the Use of Electronic Communications in International Contracts states that: "This Convention applies to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States." *See* Electronics Communications Convention, *supra* note 2, art. 1.1.

37. The concept of "rules of law" implies not only the law that is in force domestically or internationally in a state but also the so-called *soft law* instruments which are applicable to international commercial contracts, such as the UNIDROIT Principles on International Commercial Contracts (2010). *See* Catherine Kessedjian, *Determination and Application of Relevant National and International Law and Rules*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 74 (Loukas A. Mistelis & Julian D.M. Lew. eds., 2006).

38. *See* UNCITRAL, Model Law on International Commercial Arbitration, 40 U.N. GAOR Supp. No. 17, U.N. Doc. A/40/17, art. 28.1 (Dec. 11, 1985) [hereinafter Model Law].

ically recognize the principle of party autonomy in the selection of the applicable law which means also the future international convention as rules of law.[39]

To this regard, a good starting point for drafting the proposal is actually reflected in the current work of the Draft Hague Principles on the Choice of Law in International Contracts as approved by the November 2012 Special Commission meeting on choice of law in international contracts, November 12–16 2012.[40] Assuming that the new instrument were to take the form of a convention[41] and taking also into consideration the

39. Note that under Rome I Regulation, this kind of choice would not be considered as a choice of the applicable law but as an incorporation by reference. In fact Preamble 13 Rome I Regulation states that: "This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention." *See* Rome I Regulation, *supra* note 21, at pmbl. 13. For a contrary discussion, see *infra* note 40 and accompanying text.

40. *See Draft Hague Principles as Approved by the November 2012 Special Commission Meeting on Choice of Law in International Contracts and Recommendations for the Commentary* (Nov. 12–16, 2012) [hereinafter *The Hague Draft*], *available at* http://www.hcch.net/upload/wop/contracts2012principles_e.pdf. The Draft Principles intend to create a universal model of conflict of rules applicable to international commercial contracts on the basis of reinforcing the principle of party autonomy. The Preamble of the Draft Principles that uses a similar technique to that of UNIDROIT Principles states that:

> 1. This instrument sets forth general principles concerning choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions.
> 2. They may be used as a model for national, regional, supranational or international instruments.
> 3. They may be used to interpret, supplement and develop rules of private international law.
> 4. They may be applied by courts and by arbitral tribunals.

Id. at pmbl. 13.

41. *See id.* arts. 2–5. The Draft Hague Principles state that:

> *Article 2—Freedom of Choice*
> 1. A contract is governed by the law chosen by the parties.
> 2. The parties may choose (i) the law applicable to the whole contract or to only part of it and (ii) different laws for different parts of the contract.
> 3. The choice may be made or modified at any time. A choice or modification made after the contract has been concluded shall not prejudice its formal validity or the rights of third parties.
> 4. No connection is required between the law chosen and the parties or their transaction.
>
> *Article 3—Rules of law*
> In these Principles, a reference to law includes rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.
>
> *Article 4—Express and tacit choice*
> A choice of law, or any modification of a choice of law, must be made expressly or appear clearly from the provisions of the contract or the circumstances. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law.

state of affairs developed under the opting in/out of the CISG as the applicable law, our draft proposal would be as follows:

Freedom of Choice of Law

1. *A contract is governed by this convention if chosen by the parties as the law applicable to the contract either to the whole contract or only part of it.*
2. *The choice of law of a state (or one of its territorial units) that is part of this convention implies also its application if the rest of the conditions for its applicability are met.*
3. *A choice of law of this convention, any modification of a choice of law, or its exclusion, must be made expressly or appear clearly from the provisions of the contract or the circumstances.*
4. *A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties.*[42]
5. *A choice of law does not refer to rules of private international law of the law chosen by the parties unless the parties expressly provide otherwise.*[43]

As mentioned before, the proposal is to deal with applicable law issues within the uniform international convention as to make it an autonomous concept to the maximum extent possible. It would not be however a completely autonomous concept from domestic law and so it has to be recognized that in certain circumstances resort is to be had to the domestic concepts of private international law rules, particularly in case one of the offered models where a national judge whose state has not ratified the convention has to assess the validity of the choice by the parties. However, if the judge were to be in a contracting state but the convention were not to be yet in force, or where the parties choose the convention to relations not covered by it, this choice would be considered as a valid and real choice of the applicable law. The convention as part of the domestic law would be automatically binding upon the judge who will be bound by the choice of law by the parties as mandated by it.

Article 5—Formal validity of the choice of law

A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties.

Id.

42. This provision can be merged into a more general provision applicable to the contracts covered by the future convention in a similar fashion to art. 11 CISG. *See* CISG, *supra* note 1, art. 11.

43. The clause is derived from Article 8 of The Hague Draft, which states: "A choice of law does not refer to rules of private international law of the law chosen by the parties unless the parties expressly provide otherwise." *See The Hague Draft, supra* note 40, art. 8. The same solution is usually considered in arbitration laws and rules. *See* Model Law, *supra* note 38, art. 28.1 ("Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.").

IV. THE APPLICABLE LAW BY THE JUDGE OR THE ARBITRATOR IN THE FUTURE INSTRUMENT ON INTERNATIONAL COMMERCIAL CONTRACTS

The relationship between uniform law instruments and the conflict of law rules is more important at the beginning of the implementation of a new treaty. As it is well known the process of entries into force of a convention is usually a long one, and the same can be said until the convention gets enough state parties so as to make the conflict of law analysis less important for the application of the treaty. Therefore, from my point of view, it is worthwhile to consider mechanisms to improve and enhance the ways in which an international treaty might be applied in the light of the discussion on a future instrument of contract law. This is more so, since the approach adopted in Article 1.1(b) is a very traditional one.

When a state ratifies an international convention such as the CISG, it becomes part of the internal domestic legal system, that is, in contracting states, the CISG is not a foreign law, but a part of the law of the forum.[44] It is not, however, to be considered a purely domestic law since its origin, making-process, interpretation, and application is truly international.[45]

Taking into account the advantage of (re)examining this provision after more than thirty years of its approval and considering the developments in the determination of the applicable law, we believe that the provision can be improved in several ways. In order to do so, it is necessary to first consider the classical way in which international treaties such as CISG find their application by analyzing Article 1.1 of the CISG, which at a first glance is a provision that is problematic for several reasons: the determination of the conflict of law by the judge relies on the concept of private international law which is to be found in domestic law; the provision does not expressly recognize the possible application of the rules of law, i.e., a concept that includes the law but also soft law instruments or international conventions not applicable to the specific transaction; and the provision fails to recognize the more flexible way to determine the law/rules of law applicable to the contract in international commercial arbitration.

A. *Automatic Application of the CISG by Virtue of Art. 1.1(a)*

This provision is considered a uniform and unilateral conflict of laws rule,[46] and thus domestic conflict of law rules should be disregarded.

44. *See* Georgia Pacific Resins, Inc. v. Grupo Bajaplay, Cuarto Tribunal Colegiado del Decimoquinto Circuito [TCC] [Federal Court of Appeals], Amparo proceeding No. 225/2007, Aug. 9, 2007 (Mex.), *available at* http://cisgw3.law.pace.edu/cases/070809m1.html.

45. *See, e.g.*, CISG, *supra* note 1, art. 7.1 ("(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.").

46. *See* Mistelis, *supra* note 28, art. 1, 1.

Where both parties have their place of business in contracting states to the Convention, the CISG directly applies.

B. *Application of the CISG by Virtue of Article 1.1(b)*

According to this provision, the Convention will extend its application when only one of the states is a contracting state if the rules of private international law lead to the application of the law of the contracting state. On the contrary, if the judge or the arbitral tribunal were to find that the conflicts of law rules points out to the law of the "non-contracting state" then CISG will not be applicable. However, the method of finding the applicable law would be different depending on the organ entrusted with its application.

1. *The Application of the Rules of Private International Law by a Judge*

Article 1.1(b) of the CISG usually finds its normal application when a judge applies its private international law rules, since it is generally acknowledged that it is the conflicts of law rules of the forum.[47] This is a traditional analysis that would be made by a judge. For example, in the case of a judge in an EU country, Rome I Regulation on the Law Applicable to contractual obligations[48] would provide the judge with the legal framework to point out to the applicable law. Generally, it would be the law where the seller has his habitual residence because the seller is considered to affect the characteristic performance of the contract (Art. 4.1(a)) Rome I.

As a consequence it is clear that the concept of private international law is not an autonomous concept under CISG but a concept that will find its meaning under the domestic rules of the forum. As a consequence, the applicable law would depend upon the judge and its conflict of law system making the result quite unpredictable and unsatisfactory.

Take the following example based with some departures on a real case: a CISG dispute between a buyer in Mexico and a seller in Hong Kong (PRC China) through an independent agent in Mexico. Payment through letter of credit (UCP 600, ICC) with an issuing bank in Houston, Texas, but confirming bank in Hong Kong, China. Delivery of Goods from Venezuela, Mexico being the place of discharge of the goods. CFR INCOTERMS, ICC (2010) agreed by the parties. No agreement on the applicable law or the tribunal competent to hear the dispute. To shorten

47. *See id.* at 10, 51. *See* Peter Schlechtriem, *Article 1*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 10, 34 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2005); Schwenzer & Hachem, *supra* note 28, art. 1, 30; Franco Ferrari, *Homeward Trend: What, Why and Why Not*, *in* INTERNATIONALE HANDELSRECHT 13 (Herber et al. eds., 2009). It is to be noted that besides art. 1, art. 7.2 CISG refers to the rules of private international law and so it also has to be amended. Art. 7.2 is, however, outside the scope of this work.

48. *See* Rome I Regulation, *supra* note 21, art. 3.

the discussion, we assume that Hong Kong is not a contracting state in regard to CISG application.[49]

If a judge were to make a typical conflict of law analysis, it will tend to apply its own conflict of law rules, i.e., those of the forum. Usually, the domestic laws will use connecting factors to point out to the specific applicable rule. One of the most well-known "connecting factors" in the area of contract law is the "most significant relationship" or "real connection test," which is just an undetermined and flexible formula to lead the judge in its finding of the applicable law. Other similar formulas are used in conflict of law rules such as the "closest connection test"[50] or the "most closely connected,"[51] etc. In our example, it is logical to assume that for the seller the most relevant relationship in the transaction is Hong Kong while for the buyer it is Mexico.

It is undeniable that the transaction has in our example connecting factors with both places—Mexico and Hong Kong—apart from the fact of the parties' respective places of business. What is important to consider for the judge or an arbitral tribunal is the weight and relevance to be given to these connecting factors. Let's first approach the issue using the prevalent doctrine under conflicts of law rules, which is to be found in several domestic or international laws on applicable law.

For example, the Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations adopted on October 28, 2010 states in Article 41 that "Absent any choice by the parties, the law of the habitual residence of a party whose *performance of obligation is most characteristic of the contract or the law that most closely connected with the contract* shall be applied."[52] It does not state, however, which of the parties' performance obligations is to be considered the most characteristic one.

The Inter-American Convention on the Law Applicable to International Contracts, signed in Mexico, D.F. Mexico, on March 17, 1994, at the Fifth Inter-American Specialized Conference on Private International Law (CIDIP-V) is part of the Law of Mexico by virtue of its ratification and enactment on December 5, 1996. Article 9 of the CIDIP-V states that:

49. An issue which is frequently discussed by scholars and case law, although in our opinion it is to be considered as a CISG contracting State. *See, e.g.*, Ulrich Schroeter, *The Status of Hong Kong and Macao Under the United Nations Convention on Contracts for the International Sale of Goods*, 16 PACE INT'L L. REV. 307, 317–18 n.2 (2004); Fan Yang, *Barriers to the Application of the United Nations Convention on Contracts for the International Sale of Goods (1980), in* THE PEOPLE'S REPUBLIC OF CHINA (Jan. 2011) (unpublished Ph.D. dissertation, Center for Commercial Law Studies, Queen Mary Univ. of London), *available at* https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/2483/YANGBarriersTo2011.pdf?sequence=1.

50. Contract Law of the People's Republic of China art. 142 (promulgated by the Nat'l People's Cong. effective Mar. 15, 1999), *available at* http://www.novexcn.com/contract_law_99.html.

51. *See* Rome I Regulation, *supra* note 21, art. 3.1.

52. *Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations* art. 41 (promulgated by the Nat'l People's Cong. effective Oct. 28, 2010).

> If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by *the law of the state with which it has the closest ties.* The Court will take into account all objective and subjective elements of the contract to determine the law of the state with which it has the closest ties. It shall also take into account the general principles of international commercial law recognized by international organizations.[53]

As part of Mexican law, the Inter-American Convention states that the applicable law to the contract would be the law chosen by the parties and the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted (see Articles 7 and 10).

Rome I Regulation also follows the *characteristic performance principle* to assess the choice of law considering that in the case of sale of goods the governing law is that of the country where the seller has his habitual residence (art. 3.1 Rome Regulation). The basis of this rule lies on the reasonable presumption that in a contract of sale when comparing the main obligations of the parties under the contract (the obligation to deliver the goods by the seller and the obligation to pay for them by the buyer), the obligation to deliver the goods is considered the characteristic performance and thus its connection with the place of business of the seller. However, this presumption and connection might be of no importance when the origin of the goods is in a third country, Venezuela in our example, which is also the place where the risk is passed from the seller to the buyer according to the CFR INCOTERMS, and thus there is no connecting point with Hong Kong.[54]

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53. Inter-American Convention on the Law Applicable to International Contracts art. 7, Mar. 17, 1994, O.A.S.T.S. no. 78, *available at* http://www.oas.org/juridico/english/treaties/b-56.html.

54. *See* Convention on the Law Applicable to Contracts for the International Sale of Goods art. 8 (Dec. 22, 1986) (stating place of business of seller is to be disregarded in certain circumstances). Article 8 states:

> (1) To the extent that the law applicable to a contract of sale has not been chosen by the parties in accordance with Article 7, the contract is governed by the law of the State where the seller has his place of business at the time of conclusion of the contract.
>
> (2) However, the contract is governed by the law of the State where the buyer has his place of business at the time of conclusion of the contract, if—
>
> *a)* negotiations were conducted, and the contract concluded by and in the presence of the parties, in that State; or
>
> *b)* the contract provides expressly that the seller must perform his obligation to deliver the goods in that State; or
>
> *c)* the contract was concluded on terms determined mainly by the buyer and in response to an invitation directed by the buyer to persons invited to bid (a call for tenders).
>
> (3) By way of exception, where, in the light of the circumstances as a whole, for instance any business relations between the parties, the con-

Furthermore, according to CFR term, it is not only the place of delivery which is important but also the place of taking delivery. This is so, because in C terms as opposed to F terms, the delivery and the taking of delivery are not performed in the same place.[55] As is clear from the case under consideration those places diverge: the place of delivery is Venezuela and the place of taking delivery is Mexico. It is also to be noted that the price of the contract is calculated including the transportation costs to the port of discharge of the goods in accordance with the CFR term where the seller is obliged to arrange the transportation of the goods to the place of discharge.

Therefore, in terms of the characteristic performance of the contract, the place of discharge of the goods, i.e., the place of taking delivery, might be considered to shift the presumption that the obligation to deliver the goods is connected with the place of business of the seller when, as it happens in the example under consideration, this place is situated in a third country, when the goods have no connection at all with the place of business of the seller, and when the seller undertakes obligations connected to the place of discharge: the seller has the obligation to contract the transportation of the goods from the place of delivery (Venezuela, Port of Origin) to the place of taking delivery by the buyer (Mexico, Port of Discharge). In fact, usually when using a C term, the place of delivery is not named, but the relevant destination of the main transport is.[56]

In regard to the place of payment for the goods, this is not a prevalent connecting factor under a conflict of law analysis. As mentioned earlier, the characteristic performance in a sales contract is considered to be tied to the delivery of the goods.[57] The fact that the parties might have agreed on a documentary credit does not change this fact. The payment by a letter of credit refers only to the payment obligation of the buyer and this does not change the nature of the contract as a sale of goods. Therefore, the characteristic performance of a contract of sale when a payment by letter of credit is also agreed upon is still related to the goods itself.

This is not to say that the place of payment is of no importance. On the contrary, it might be important in order to determine other issues, such as the currency of payment or the jurisdiction of state courts. However, as considered in this work, it is not the dominant factor to consider in a conflict of law analysis.

> tract is manifestly more closely connected with a law which is not the law which would otherwise be applicable to the contract under paragraphs 1 or 2 of this Article, the contract is governed by that other law.

Id.

55. *See* INT'L CHAMBER OF COMMERCE, ICC GUIDE TO INCOTERMS A5, B5 (2010).

56. *See* Burghard Piltz, *Article 31*, *in* COMMENTARY ON THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 65 (Stefan Kröll et al. eds., 2011).

57. *See* Ferrari, *supra* note 29, at 44–45 ("The monetary obligation is generally not the characteristic one.").

Even if the place of payment were to be considered under a conflict of law analysis, resort is to be had to the terms to which the parties agreed. In the example given, there are two relevant places to consider: Houston (Texas) and Hong Kong. According to UCP, the issuing bank is also the place for presentation of the documents, but the confirmation of the L/C is with a bank in Hong Kong.[58]

This means that the connecting factor is either Texas or Hong Kong depending on whether the seller requires confirmation, i.e., a definite undertaking of the confirming bank, in addition to that of the issuing bank, to honor or negotiate a complying presentation (art. 2 UCP 600). As is clearly stated by Article 8(a) UCP, the confirming bank may or may not exist: "*Provided that the stipulated documents are presented to the confirming bank* or to any other nominated bank and that they constitute a complying presentation, the confirming bank must . . . ."[59]

Finally, among the connecting factors mentioned in the example, the place where negotiations took place should also be mentioned. Probably the buyer will consider that Mexico is the real connection place because it was in Mexico where it was negotiating the contract with the agent. This is a connecting factor that might be of importance if the parties are discussing the conclusion of the contract and if the main obligations of the sale of goods contract by the parties were never performed.

The above analysis means that depending upon the circumstances of the case and the interpretation made by the judge several results are possible, including the selection of connecting factors that points to either the law of Mexico or the law of Hong Kong as the parties will probably allege in court or an arbitral proceedings.[60]

The conclusion to be derived is that judges are too constrained by the application of conflict of law rules that at the end might point artificially to a domestic law which might not be suitable for the parties and their transaction.[61] The use of connecting factors makes the choice of law still

58. *See* ICC Uniform Customs and Practice for Documentary Credits, 2007 revision (UCP 600), art. 6(d)(ii) (2006).

> The place of the bank with which the credit is available is the place for presentation. The place for presentation under a credit available with any bank is that of any bank. A place for presentation other than that of the issuing bank is in addition to the place of the issuing bank.

Id. Then, the connecting factor is Texas.

59. *Id.* art. 8(a).

60. But also as shown in the example the laws of Texas and Venezuela. Those laws should also be disregarded by the arbitral tribunal for a different reason: the choice made by the arbitral tribunal should not surprise the parties.

61. *See, e.g.*, Rome I Regulation, *supra* note 21, pmbl. Under Rome I Regulation although it provides a flexible way for the judge to determine the applicable law is an artificial method as shown by Preamble 21:

> In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorized as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of

unpredictable for the parties. We are aware that the same can be said in regard to the freedom of the judge and the arbitral tribunal in the application of the rules of law they consider to be most appropriate, but the final determination of the applicable law must be guided by the appropriateness of the law or rules of law and their content as we will consider below.

2. *The Determination of the Conflicts of Law Rules by the Arbitral Tribunal*

The arbitral tribunal's freedom under the arbitration system is wide enough to allow it to consider the determination of the conflict of law rule without being bound by the rules of the forum. The wide discretion of the arbitrators is derived from the fact that they are not organs of a given state and are not bound by any rules of private international law, for example Rome Regulation in the case of Europe.

The determination of the rules of private international law is not, however, a simple task when an international contract submitted to international arbitration is considered.

First, the arbitral tribunal does not have a "forum."[62] Although the place of arbitration determines the arbitration law applicable to the arbitration, this is not to be equivalent to the place of the forum in art. 1.1(b) CISG, and particularly the conflict rules of the place of arbitration should be disregarded.[63]

Second, as pointed out by several authors,[64] arbitration tribunals have applied various different conflicts of law systems including:

- Conflict rules of the place of arbitration.
- Conflict rules most closely connected with the subject matter of the proceedings.
- Conflict rules the tribunal considers appropriate.
- Converging conflicts of law rules.
- General principles of conflicts of laws.

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the contract, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts.

Id.

62. *See* ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 122 (2004).

63. It is generally considered in modern arbitration practice that the application of the conflicts of rules of the place of arbitration is illogical. *See* JULIAN D. M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 428 (2003). *See also* Arbitration Institute of the Stockholm Chambers of Commerce, UNILEX No. 117/1999 (2001), SCC nº117/1999, Arbitral Award 2000, *available at* http://www.unilex.info/case.cfm?id=793 (considering it inappropriate to resort to law of seat).

64. *See* LEW ET AL., *supra* note 63, at 428. *See also* REDFERN & HUNTER, *supra* note 62, at 47.

Among these systems, the application of the conflict rules the tribunal considers appropriate is the most followed today in arbitration practice.[65]

What is considered to be the most appropriate conflict of law rule is of course an issue to be decided on a case-by-case basis. The arbitral tribunal has discretion to point to the conflict of law rules of a given state in order to further determine the applicable law, or to apply the connecting factor it considers more appropriate, for example the one derived from international conventions, academic writings, or even a rule which the arbitrators consider otherwise appropriate.[66]

However, this kind of analysis, even when considering a more simplified analysis under the most appropriated conflict of law rules, and even if one were to consider that arbitrators will follow a pragmatic approach to make the determination of the choice of law, and thus they will be able to choose the conflict of law rules which they prefer,[67] is not the one to be followed by an arbitral tribunal under modern arbitration rules or laws. Take the example of Article 21 ICC Rules (2012) (Applicable Rules of Law),[68] which states that:

> 1. The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.
>
> 2. The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.

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65. *See* Georgios C. Petrochilos, *Arbitration Conflict of Laws Rules and the 1980 International Sales Convention*, 52 REVUE HELLENIQUE DE DROIT INTERNATIONAL 191–218 (1999); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 530 (2002). *See also* ICC Court of Arbitration—Paris, UNILEX, No. 7375/1995, June 5, 1996, *available at* http://www.unilex.info/case.cfm?id=625 ("The conflict rule which, beyond doubt, has received on a worldwide basis, the strongest support, is the so-called 'closest connection rule,' which leads to the application of the law where the most characteristic performance of the contract is performed.").

66. *See* LEW ET AL., *supra* note 63, at 431.

67. *See id.* at 426.

68. A rule very similar to the old International Chamber of Commerce Rules art. 17:

> 1. The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.
>
> 2. In all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages.
>
> 3. The Arbitral Tribunal shall assume the powers of an *amiable compositeur* or decide *ex aequo et bono* only if the parties have agreed to give it such powers.

INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION (1998).

> 3. The arbitral tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such powers.[69]

In order for the arbitral tribunal to consider the application of art. 1.1(b) CISG, it has to be clear that it is not subject to any conflict of law system, as it is evident from art. 21.1 ICC Rules which directs the arbitral tribunal for a direct application of the law (*voie directe*), as opposed to the conflict of law system which is an indirect application of the law (*voie indirecte*). In fact, Article 21.1 ICC Rules offers the arbitral tribunal the possibility to apply directly the rules of law that it considers appropriate.

Therefore, the arbitral tribunal is neither obliged to find the conflicts of law rules, and certainly it is not convenient for it to do so when the effort in making this analysis is dispensed by the arbitration rules agreed upon by the parties and those rules ought to be followed by the arbitral tribunal. In fact, the traditional analysis of the conflict of law rule, that derived from the judicial system, when used in old arbitration was more a way to justify the decision-making process in choosing the applicable law and to preserve a conservative method than an appropriate, reasonable, or convenient way to decide on this issue.[70] Precisely the dissatisfaction with this kind of analysis and the desire to free the arbitrators of the restraints with a conflict of law analysis was the reason behind the ICC abandoning the conflict view approach in the 1998 Arbitration Rules; a decision that has been ratified in the 2012 ICC Rules.

From what we have just explained it is clear that in our opinion a conflict of law analysis by the arbitral tribunal is not only unnecessary but probably inconvenient in so far that it does not respond to the agreement of the parties when choosing arbitration as a method of solving disputes and in fact it is to a certain extent going back to the past.[71]

However, there are still arbitration laws and rules that rely on a more traditional approach towards the application of the law by the arbitral tribunal as shown by art. 28.2 UNCITRAL Model Law on International Commercial Arbitration: "Failing any designation by the parties, the arbitral tribunal shall apply *the law* determined by the *conflict of law rules which it considers applicable.*"[72]

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69. *See* INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION (2012).

70. *See* LEW ET AL., *supra* note 63, at 426.

71. *Compare with* INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION, art. 13.3 (1988).

> The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply *the law designated as the proper law by the rule of conflict which he deems appropriate.*

Id. (emphasis added). It was also the provision under ICC Rules of 1975, 15.2 INT'L LEGAL MATERIALS 395, 395–406 (Mar. 1975).

72. *See also* UNCITRAL, Arbitration Rules, art. 25 (as revised in 2010).

Under both systems (ICC Rules and UNCITRAL Model Law) it is important to note that usages of trade should be taken into account by the arbitral tribunal, and so an important lesson might be derived from the way in which the CISG was applied before it entered into force or whether only one of the parties was in a state that was a contracting state. The almost universal recognition of the CISG as a suitable set of rules to govern international sale of goods contracts between traders with different legal systems has led some arbitral tribunals to consider the application of the CISG as trade usages under art. 17.2 ICC Arbitration Rules (1998) particularly when the conditions for the CISG applicability were not met. We consider that this kind of consideration is useful particularly for arbitral tribunals as an aid into its finding of the future international convention as the most appropriate rules of law. Examples of this kind of application might be found in several cases: ICC 5713/1989;[73] and ICC 8502/1996.[74]

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73. *See* ICC Court of Arbitration—Paris, UNILEX, No. 5713/1989 (1989), ttp://www.unilex.info/case.cfm?id=16. The ICC stated:

> The Arbitrators, in accordance with the last paragraph of Art. 13 of the ICC rules [1988, now ICC Rules 1998], will also take into account the 'relevant trade usages' [. . .]. The Tribunal finds that there is no better source to determine the prevailing trade usages than the terms of the United Nations Convention on the International Sale of Goods of 11 April 1980, usually called 'the Vienna Convention. This is so even though neither [Buyer's country] nor [Seller's country] are parties to that Convention. If they were, the Convention might be applicable to this case as a matter of law and not only as reflecting the trade usages. The Vienna Convention, which has been given effect to in 17 countries, may be fairly taken to reflect the generally recognized usages regarding the matter of the non-conformity of goods in international sales.

Id.

74. *See id.* The relevant part of the decision is:

> The application of the relevant trade usages is consistent with Article 13(5) of the ICC Rules (now article 17.5) and with the arbitral practice [. . .]. For the foregoing reasons, the Arbitral Tribunal finds that it shall decide the present case by applying to the Contract entered into between the parties trade usages and generally accepted principles of international trade. In particular, the Arbitral Tribunal shall refer, when required by the circumstances, to the provisions of the 1980 Vienna Convention on Contracts for the International Sale of Goods (Vienna Sales Convention) or to the Principles of International Commercial Contracts enacted by Unidroit, as evidencing admitted practices under international trade law [. . .]. The Arbitral Tribunal is of the opinion that the principles embodied in the Vienna Convention reflect widely accepted trade usages and commercial rules. Although the Vienna Sales Convention is not as such directly applicable to the Contract (Vietnam has not ratified this Convention), the Arbitral Tribunal finds that it may refer to its provisions as the expression of usages in the world of international commerce.

Id. See also ICC Court of Arbitration—Paris, UNILEX No. 7331 (1994), http://www.unilex.info/case.cfm?id=140; ICC Court of Arbitration—Paris, UNILEX No. 8502 (1996), http://www.unilex.info/case.cfm?id=395; ICC Court of Arbitration—Paris, UNILEX No. 9333 (1998), http://www.unilex.info/case.cfm?id=400.

As a conclusion: the application of art. 1.1(b) CISG by the arbitral tribunal bound by a provision similar to art. 21.1 ICC Rules means that the tribunal might be able to get around the conflict of law analysis and *directly* apply the CISG as the rules of law it considers appropriate. Therefore, by choosing ICC Rules the parties have empowered the tribunal to determine the applicable rules of law without the need to resort to a conflict of law analysis and applying a liberal and flexible approach toward its determination.[75] This makes the analysis under art. 1.1(b) CISG redundant since a direct application of the law the arbitral tribunal can directly apply the CISG.[76]

3. *The Determination of the Rules of Private International Law in the Future Convention on General Contract Law*

Turning to the design of a specific provision for the scope of application of the future international convention, our proposal will recognize both the traditional as well as the more modern way for arbitrators to determine the applicable law to the contract. Furthermore, it will consider the feasibility of judges and arbitrators to apply the future instrument as the appropriate applicable law.

The rule that we propose is as follows:

Article 2 Scope of Application

Absent a choice of law by the parties, this Convention applies to contracts 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 of the forum lead to the application of the law of a contracting state; or

(c) when the rules of private international law considered to be applicable by the arbitrators lead to the application of the law of a contracting state; or

(d) when the judge or the arbitral tribunal consider this Convention to be the appropriate applicable law.

Subparagraph (d) is the one that deserves further consideration. The application of the future convention as the most appropriate rule of law by the arbitrators or judges would be in itself justified under a test of legiti-

75. *See* Kessedjian, *supra* note 37, at 26 ("Indeed, it may be said that by choosing an ICC Arbitration, the parties have chosen Article 17 of the ICC Rules and have taken the risk that the arbitral tribunal interpret that text in the most liberal way.").

76. *See* Jeffrey Waincymer, *The CISG and International Commercial Arbitration: Promoting a Complimentary Relationship Between Substance and Procedure, in* SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: FESTSCHRIFT FOR ALBER H. KRITZER ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY 596 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008) ("It has been suggested that it is easier for an arbitrator with a discretion to get to the CISG via direct approach than via a conflict approach, so it is preferable to pick a direct procedural model.").

macy derived from the negotiation process undertaken under UNCITRAL.

Furthermore, the arbitrator and the judge might take further criteria into consideration in order to justify the application of the (future) convention despite the fact that a more conservative method would point out to a domestic law. The factors that might lead the arbitral tribunal to decide on the appropriateness of the convention would be those derived from the particular circumstances of each case. Examples of such kind of circumstances are the following:

First. The possibility that none of the connecting factors pointed out by a traditional conflict of law analysis, is decisive or prevalent, might lead the judge or the arbitrator to disregard the method of finding the law applicable by virtue of the rules of private international law in favor of a direct application of the rules of law considered to be most appropriate. Therefore, the judge or the arbitral tribunal should also consider the result when pointing out to the applicable law by operation of a conflict of law analysis,[77] particularly when none of the connecting factors is found to be decisive or fully prevalent.

Second. In this situation to apply a domestic law would probably make an unjust imbalance between the parties and will defeat the parties' expectations in international contracts when neither of them is ready to accept the application of the domestic regime or a close domestic regime of the other party, particularly if there are other factors that point out to the application of international rules.

Third. The silence of the parties in regard to the lack of a choice of law clause might be indicative of their intention of not to be bound by a pure domestic law particularly that of the counterparty.[78] An *implied negative choice of law* by the parties is to be found when the absence in the contract of a choice of law clause is considered to be intentional, i.e., where the parties were not able to agree on any law or rules of law to be applied.[79] This is a rather frequent situation in international commercial

77. The same can be said in order to decide the law applicable by operation of the direct application of the rules of law.

78. As pointed out by Petrochilos in regard to CISG but the same might be said for a future international Convention:

> The Convention is a set of tailored-made rules for international sales, acceptable to and applicable as between a significant part of the international community of trading nations. Thus, when in doubt, the Convention is reasonably the most appropriate and neutral substantive law—in any event, clearly more appropriate than any domestic law.

Georgios C. Petrochilos, *Arbitration Conflict of Laws Rules and the 1980 International Sales Convention*, 52 REVUE HELLENIQUE DE DROIT INTERNATIONAL 191, 191–218 (1999), *available at* http://cisgw3.law.pace.edu/cisg/biblio/petrochilos.html.

79. As pointed out in ICC 7375/1996, the silence of the contract in regard to the applicable law:

> [T]his must be viewed as a "shouting silence," at least an "alarming silence," "un silence inquiétant;" thus, a silence which must ring a bell and requires the Tribunal to look "behind" so as to understand why the Par-

contracts when neither of the parties is ready to accept the law proposed by the other, usually its own domestic law. This kind of intention can be presumed from the mere silence of the parties in the contract or it might be ascertained through an analysis of the negotiation process of the contract where the parties clearly rejected the legal systems that were the own legal system or a familiar system to its counterparty.

In some circumstances this negative choice of law has been considered by some arbitral tribunals and courts as to imply an *agreement* of the parties towards the application of an international system of law and obviously the exclusion of any domestic law. At a minimum, the intention of the parties is a valid criterion to be considered in order to analyze whether a negative agreement might be found so as to exclude any domestic law. To this point, the intention of the parties in regard to the applicable law might be ascertained taking into consideration a variety of factors such as the negotiations between the parties, usages, or the conduct of the parties.[80]

Furthermore, the intention of the parties to exclude purely domestic law might be supported by other factors, for example, if the parties were able to accept other international rules to be applied to their contract, and thus making very clear the desire to have neutral and suitable rules for an international contract,[81] such as the agreement on INCOTERMS, ICC,

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> ties have failed to include "the obvious." In the case at hand the arbitral tribunal considered that the parties were not ready to accept the other party's own law, and thus "[t]he Contract should not, according to the implied negative choice of the Parties, be governed by any of the Parties" national laws.

ICC International Court of Arbitration—Paris, UNILEX No. 7375 (June 5, 1996), http://www.unilex.info/case.cfm?id=625. *See also* ICC International Court of Arbitration (First Partial Award), UNILEX No. 7110 (June 1995), http://www.unilex.info/case.cfm?id=713; ICC Court of Arbitration—Paris, UNILEX No. 8502 (Nov. 1996), http://www.unilex.info/case.cfm?id=395; ICC International Court of Arbitration, UNILEX No. 9875 (Jan. 1999), http://www.unilex.info/case.cfm?id=675; ICC 10422/2001; ICC International Court of Arbitration, UNILEX No. 10422 (2001), http://www.unilex.info/case.cfm?id=957; International Centre for Settlement of Investment Disputes (ICSID) UNILEX No. ARB?06/18, ILC 424 (Jan. 2010), http://www.unilex.info/case.cfm?id=1533. *See also* Marc Blessing, *Choice of Substantive Law in International Arbitration*, 14 J. INT'L ARB. 19 (1997).

80. *See* UNIDROIT PRINCIPLES, *supra* note 19; CISG, *supra* note 1, art. 8.3, 4.3. Of course one has to avoid the circular argument that the intention of the parties is a matter to be decided in accordance with the applicable law. There is no need to complicate the matter further, and so general principles of interpretation might be used without first finding the applicable law to the interpretation of the contract, or as with the case here, the statements of the parties during negotiation. *See* Kessedjian, *supra* note 37, at 26.

81. In fact arbitral tribunals have sometimes concluded that the absence of a choice of law clause in the contract coupled with a choice of other international trade terms such as INCOTERMS meant the parties intended to have general international rules to be applied as to the substantive law. *See, e.g.*, ICC Court of Arbitration—Paris, UNILEX No. 8502 (Nov. 1996), http://www.unilex.info/case.cfm?id=395.

or an agreement to submit the dispute to international commercial arbitration.

Fourth. The arbitrators and the judges might consider other criteria in order to find the future convention as the most appropriate rule of law to be applicable. For example, the parties' expectations under the contract, or their particular situation, i.e., where they are sophisticated business players or not, where they belong to different systems of law, so the convention would be the most appropriate set of rules drafted for international contracts that takes into account the interest of both parties, that provides a fair balance between civil and common law systems to which both parties might belong to, and that enjoys wide international consensus.

All these factors, in our view, might lead reasonably to assume that the parties expectations would be that the eventual law chosen by the judge or the arbitral tribunal would be one that protects their interests in the way that any reasonable business person doing international business with partners from a different legal background would consider adequate, fair, and reasonable, and without any surprise that could result from the application of domestic laws that are purely local, unknown to the other party or whose application is purely accidental. This would necessarily conduct the arbitral tribunal and the judge to the application of the rules of law of the future instrument as such rules that have found their way into an international codification under the auspices of UNCITRAL, and that enjoy worldwide consensus and recognition among countries that approved it.[82]

82. The basic reasoning is to be found in some arbitral awards such as Arbitration Institute of the Stockholm Chamber of Commerce, UNILEX No. 117/1999 (2001) in regard to the CISG. The arbitral award also considered the wide recognition of the CISG among scholars and other legal systems that have found the CISG as a legal model to other contract codifications due to its high quality, fairness, appropriateness, neutrality, capacity to be adapted to different transactions, and the fact that it reflects the basic principles of commercial relations in most if not all developed countries. *See* Stefan Kröll et al., *Introduction to the CISG*, *in* UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) (Stefan Kröll et al. eds., 2011); Franco Ferrari, *CISG and Private International Law*, *in* THE 1980 UNIFORM SALES LAW: OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES: VERONA CONFERENCE 2003 19–55 (2003).