21 Article 1 CISG – The Gateway to the CISG

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21.1 Introduction

The last decades have seen a steady growth of international instruments seeking to provide uniform substantive rules for international contracts.[1] The benefit for a unified approach to the law applicable to international sales transactions are threefold. Firstly, different domestic (sales) laws can lead to an increase in the parties' transaction costs. Complicated private international law rules and for example limitation of liability laws can make it difficult for a party to ascertain their legal position. Secondly, the divergence of domestic contract laws can lead to a distortion of competition between businesses in different states. Lastly, many domestic contract laws are not suitable for international transactions.[2] In light of these developments, it may be thought that choice of law rules play, at best, a residual role in the resolution of disputes concerning the international sale of goods. This is not correct.[3] Even in the case of the 1980 United Nations Convention on the International Sale of Goods (CISG), which is the most significant instrument in this area,[4] choice of law analysis is far from obsolete. It is only through the process of choice of law, after all, that the court or tribunal may determine the applicability of the CISG, or identify the governing law of those matters falling outside of the scope of the Convention.

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1 *See*, for example, UNIDROIT Principles 2010; OHADA Uniform Act on General Commercial Law, (Draft) Common European Sales Law; Principles of Asian Contract Law.

2 K.P. Berger, *The Creeping Codification of the Lex Mercatoria* (2nd edn., 2010) pp. 19-20, 21-26.

3 *See* generally F. Ferrari, 'PIL and CISG: Friends or Foes?' (2012) *3 IHR* p. 89; I. Schwenzer *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods* (3rd edn., OUP, 2010) pp. 21-22.

4 *See* generally S. Kröll, L. Mistelis & P.P. Viscasillas, *UN Convention on Contracts for the International Sale of Goods* (C.H. Beck, Munich, 2011) pp. 10-12.

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21.2 THE CISG IN LITIGATION

21.2.1 Introduction

Perhaps the most fundamental question that parties to an international sales contract face is whether their transaction will be governed by the CISG.[5] There are two principal questions that determine whether the CISG is applicable. The first is whether it is applicable as a matter of choice of law, pursuant to Article 1(1)(a) or (b), or pursuant to the choice of law rules of a non-contracting state. The second is whether the transaction or the dispute falls within the scope of the Convention as defined by Articles 2 to 5, or whether it raises an issue that is not regulated by the Convention.[6] It is the first issue, the question of choice of law, which will be examined here.

Article 1 of the CISG provides:

> (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.

21.2.2 Article 1(1): Internationality

Article 1(1) of the CISG requires, as a precondition to its application, that the parties must have their place of business in different states.[7] Although not a choice of law rule in the strict sense, Article 1(1) addresses a potentially difficult question that usually falls to be answered by the forum's private international law rules: whether the dispute is of an

5 *See* in regard to the application of the CISG by Brazilian courts before the CISG came into force and the CISG's possible treatment after coming into force in Brazil: Nathalie Gazzaneo, 'Accession of Brazil to the CISG: A First Analysis on the Application of the Convention by the Brazilian Judge' (2013) 17(2) VJ 209.

6 *See* Article 7(2).

7 On the meaning of this requirement, *see* Schwenzer, above n. 3, p. 37; Kröll, Mistelis and Perales Viscasillas, above n. 4, p. 33.

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international character and thus gives rise to a choice of law issue.[8] The provision acts as a filter to the application of the CISG, potentially excluding the Convention in circumstances that will still raise questions of choice of law pursuant to the forum's private international law rules.

The Convention does not define what constitutes a 'place of business'. Interpreted autonomously, a place of business is generally understood to require "a genuine and effective link of the business with a place with at least regular business activity".[9] Where the identity of the parties to the sales contract is in doubt – as may be the case, for example, where one of the parties is represented by an agent – this question must be determined pursuant to ordinary choice of law rules before the internationality of the contract can be established under Article 1(1).[10]

The internationality requirement is not satisfied unless it appears "either from the contract or from any dealings between, or from information disclosed by, the parties at any time before the conclusion of the contract".[11] However, it is not necessary for the parties to have had actual knowledge of the fact that their places of business are located in different states.[12]

It has to be noted that for the application of the CISG it is not determinative whether goods are transferred between countries or between borders or where the place of performance is.[13]

21.2.3 Article 1(1)(a): States Are Contracting States

Article 1(1)(a) provides that the CISG applies to contracts of sale of goods, between parties whose places of business are in different States, "when the States are Contracting States".[14] This provision can be understood as a unilateral choice of law rule which calls for the application of the CISG as part of the law of the forum.[15] Alternatively, when concentrating on its effect the CISG may be characterised as an overriding mandatory law of the forum[16]

8 *See* Ferrari, above n. 3, pt. IV.

9 Kröll *et al.*, above n. 4, Article 1, [43]; Schwenzer, above n. 3, Article 1, [23].

10 Kröll *et al.*, above n. 4, at Article 1, [45]; Schwenzer, above n. 3, at Article 1, [27].

11 Article 1(2).

12 Schwenzer, above n. 3, at Article 1, [3].

13 *See*, for example, ICC Arbitration case no 9781 (2000) Ybk Arb XXX 2005, 22, 36; Burkhard Piltz, *Internationales Kaufrecht* (2nd edn., Beck, Munich, 2008) pp. 2-75.

14 The relevance of Article 1(1) CISG is evidenced by Brazil's five top exporting countries and four of the five Brazil's top importing countries, Nigeria being the exception, are all CISG member states <http://atlas.media.mit.edu/en/profile/country/bra/> accessed 28 Oct 2015.

15 P. Schlechtriem, 'Requirements of Application and Sphere of Applicability of the CISG' (2005) 36 *VUWLR* pp. 781-784; *cf* Schwenzer, above n. 3, pp. 19-20; *cf.* J. Fawcett, J. Harris & M. Bridge, *International Sales in the Conflict of Laws* (Oxford University Press, Oxford, 2005) at [16.24]-[16.35], [16.104].

16 *Cf.* the House of Lords' treatment of the Hague Visby Rules in *The Hollandia* [1983] 1 AC p. 565.

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or as a self-executing treaty. Paragraph (a) thus cuts across the choice of law rules that would ordinarily be applicable to international contracts by providing for the application of the CISG to all those cases that fall within its scope. To the extent that the dispute is covered by the Convention, there is no need, therefore, to determine the law that would otherwise be applicable.

An important exception to the operation of this unilateral forum rule is the principle of party autonomy. Where the parties have their places of business in different contracting states but have chosen the law of a non-contracting state or have explicitly exclude the CISG, this choice will generally be given effect in accordance with the forum's rules on party autonomy.[17]

21.2.4 Article 1(1)(b): Rules of Private International Law Lead to the Application of the Law of a Contracting State

Article 1(1)(b) provides that the Convention applies "when the rules of private international law lead to the application of the law of a Contracting State". There is some debate whether, where the forum is a contracting state, paragraph (b) leads to a direct application of the CISG, or whether it designates the CISG as part of the applicable foreign law. *Schlechtriem & Schwenzer* states that "if the forum state is a CISG Contracting State, the Convention is not applied as foreign law, but as law created by an international convention and enacted by the forum State as its own law."[18] Pursuant to this view, paragraph (b) does not require the forum state to give effect to its rules of private international law at all.

The alternative – and, it is submitted, correct – interpretation of paragraph (b) is as a simple reference to the choice of law rules of the forum. Thus, the forum is required to apply the CISG where its choice of law rules designate the law of a contracting state, and it will do so in the same manner as the foreign court would apply it. This interpretation accords with the wording of paragraph (b), which calls for the 'application' of the law of the contracting state, suggesting that the forum's choice of law rules are to be given effect.

The distinction between the two aforementioned interpretations of Article 1(1)(b) may be relevant where party autonomy to choose the applicable domestic law can be limited insofar as a given country's conflict of law rules are deemed mandatory.

17 *See infra*.
18 Schwenzer, above n. 3, p. 42.

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In Brazil, the conflict of law rules under Article 9 of the Introductory Law to Provisions under Brazilian Law (Introductory Law)[19] are generally regarded as capable of overriding the choice of the applicable law by the parties in a non-arbitration context.[20]

According to Article 9 of the Introductory Law, a judge shall apply (i) the law of the place where the parties entered into the contract (*lex loci contractus*) when the parties are in the presence of each other, or (ii) the law of the jurisdiction in which the offer was made (*i.e.* where the offeror was physically located) when the parties are not in each other's presence (contract *inter absentes* – for example, by e-mail).[21]

The interpretation of Article (1)(1)(b) advanced in this Article could lead to a reduced application of the CISG by Brazilian courts in comparison to other the courts of other member states. In accordance with Brazilian conflict of laws rules, which do not have party autonomy at its core, the law of a non-contracting state rather than the CISG will be applicable where the *contract* has been *performed in* or the *offer* has been *made in* a non-contracting state. On the other hand, a Brazilian court would tend to apply the CISG in those scenarios if it interprets Article 1(1)(b) in accordance with *Schlechtriem & Schwenzer*'s view as described above (that means, internal rules on conflict of laws should be disregarded under Article 1(1)(b)). Even though the view advanced in this Article might lead to a reduced application of the CISG due to determining the applicable contract law through extrinsic criteria rather than through the principle of party autonomy, this should not

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19 Decree-Law No. 4657, which encompasses conflict of laws rules. Compare to Article 2 of the Brazilian Arbitration Act (Law No. 9307/1996): At the parties' discretion, arbitration may be conducted under the rules of law or in equity. (1) The parties may freely choose the rules of law applicable in the arbitration provided that their choice does not violate good morals and public policy.
(2) The parties may also agree that the arbitration shall be conducted under the general principles of law, customs, usages and international rules of trade.

20 *See* N. de Araújo & L. Gama Jr., 'A Escolha da Lei Aplicável aos Contratos do Comércio Internacional: Os Futuros Princípios da Haia e Perspectivas para o Brasil Escritório Permanente da Conferência de Haia de Direito Internacional Privado' (2012) 34 *Revista de Arbitragem e Mediação* 11. Available at: http://nadiadearaujo.com/wp-content/uploads/2015/03/A-ESCOLHA-DA-LEI-APLIC%C3%81VEL-AOS-<CONTRATOS-DO-COM%C3%89RCIO-INTERNACIONAL-OS-FUTUROS-DA-PRINC%C3%8DPIOS-DA-HAIA-E-PERSPECTIVAS-PARA-O-BRASIL.pdf> accessed 12 Nov 2015, p. 14: "…case law has made clear that, although allowed in case of arbitration, the choice of law by the parties is not authorized by Article 9 of the Introductory Law" and "More recent cases have not solved the problem either, and the situation is of legal uncertainty regarding the parties autonomy application as to the choice of law in international contracts from which disputes are judged by the Brazilian Judiciary".

21 It is worth noting other aspects may also be considered, such as the law of the place of performance of the contract. *See* N. de Araújo & D.C. Jacques, 'Contratos Internacionais no Brasil: Posição Atual da Jurisprudência no Brasil' (2008) 34 *Revista Trimestral de Direito Civil* p. 267 available at: <http://nadiadearaujo.com/wp-content/uploads/2015/03/CONTRATOS-INTERNACIONAIS-NO-BRASIL-POSI%C3%87%C3%83O-ATUAL-DA- JURISPRUD%C3%8ANCIA-NO-BRASIL.pdf> accessed 12 Nov 2015, p. 3: "Although the Brazilian rule refers to the *lex loci contractus*, the law of performance trumps many times, as the prevailing interpretation is that those requirements of the performance rules of law are added to the law of the place of perfection of the contract."

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determine the correct interpretation of Article 1(1)(b). Jurisdictions that do not have party autonomy at the core the determination of the applicable contract law are an anachronism.

The distinction may also assume importance where the CISG is not yet in force in the foreign contracting state, application of the forum's choice of law rules would mean that the CISG should not be given effect as part of the foreign governing law. Of particular significance are those cases where the contracting state has entered a reservation to paragraph (b) pursuant to Article 95, which provides that a state may declare that "it will not be bound" by paragraph (b).[22] A number of countries, including the United States and China, have made such a declaration.[23] The application of Article 1(1)(b) in regard to Article 95 reservation states is not straightforward and is worth examining more closely. It should be noted that an Article 95 reservation does not mean that the courts of a reservation country cannot apply Article 1(1)(b). The reservation merely does not compel the courts of a reservation state to apply Article 1(1(b). Courts in reservation states that were faced with parties where at least one party had their business in a non-member state but where the parties had agreed on the CISG directly[24] or on the law of a CISG contracting state have given full effect to party autonomy.[25]

It is controversial whether the CISG is regarded as part of the law of an Article 95 reservation state if the rules of private international law of a member state, which is forum of a dispute, lead to the application of the law of an Article 95 reservation State. The CISG Advisory Council contends that "the Convention applies in accordance with Article 1(1)(b) even when the rules of private international law lead to the application of the law of a Contracting State that has made an Article 95 declaration, because such declaration does

22 *See* for a brief summary of the history of Article 95 CISG-AC Opinion No. 15, Reservations under Articles 95 and 96 CISG, Rapporteur: Professor Doctor Ulrich G. Schroeter (Beijing, 2013) paras, 2.1-2.3.

23 Armenia, Singapore, St Vincent and the Grenadines also declared a declaration to Article 95: <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html> accessed 18 March 2015. Singapore's Singapore Sale of Goods (United Nations Convention) Act s. 3(2) explicitly states "Sub-paragraph (1)(b) of Article 1 of the Convention shall not have the force of law in Singapore and accordingly the Convention will apply to contracts of sale of goods only between those parties whose places of business are in different States when the States are Contracting States." Some US courts decided in the same way: *Impuls v. Psion-Teklogix*, U.S. District Court [S.D. Florida], 22 November 2002, 234 F.Supp.2d 1267, 1272, available at: <http://cisgw3.law.pace.edu/cases/021122u1.html>; *Prime Start v. Maher Forest Products*, U.S. District Court [W.D. Washington], 17 July 2006, *Internationales Handelsrecht* (2006) pp. 259-260, available at: <http://cisgw3.law.pace.edu/cases/060717u1.html>; *Princess d'Isenbourg et Cie Ltd. v. Kinder Caviar, Inc.*, U.S. District Court [E.D. Kentucky], 22 February 2011, available at: <http://cisgw3.law.pace.edu/cases/110222u1.html>.

24 *See infra* in which circumstances parties can choose directly.

25 *Japan Taiping v. Jiangsu Shuntian*, Jiangsu Higher People's Court, 2001, Case No. Su Jing Zhong Zi (2001) No. 011; *Japan Xingsheng v. Ningxia Capital Steel*, Ningxia Huizu Higher People's Court, 2002, Case No. Ning Min Shang Zhong No. 36 cited in CISG-AC Opinion No. 15, Reservations under Articles 95 and 96 CISG, Rapporteur: Professor Doctor Ulrich G. Schroeter (Beijing 2013) fn. 29.

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not affect the declaring State's status as a 'Contracting State'."[26] A noteworthy number of authors on the other hand reason that, when the private international law rules of the forum, which is located in a member state, as applied under Article 1(1)(b) CISG lead to the application of the law of an Article 95 CISG reservation state, a court has to apply the domestic law of the reservation State without the CISG. They argue that the law of the state which the rules of private international law refer to should be applied in the same way as a judge in that state would apply his or her domestic law. In the case of a judge in a reservation state that means that he or she would not apply the CISG.[27] In the author's view the CISG Advisory Council's reasoning is compelling. Article 1(1)(b) reads: "*This Convention*[28] applies to contracts of sale of goods between parties whose places of business are in different States […] when the rules of private international law lead to the application of the law of a Contracting State." As the CISG Advisory Council correctly points out: "It is therefore 'this Convention' which the judge in a Contracting State has to apply when its forum's rules of private international law lead to the application of the law of a Contracting State, and not 'the law of a Contracting State' (that may or may not have made a declaration under Article 95 CISG)."[29]

21.2.5 Non-Contracting States

Since the CISG as an international treaty only has effect between contracting state parties, a non-state party court does not have to take notice of an Article 95 reservation. Whether a non-contracting state will apply the CISG where its choice of law rules designate the law of a contracting state depends on the status of the CISG within the applicable law. Thus,

26 CISG-AC Opinion No. 15, Reservations under Articles 95 and 96 CISG, Rapporteur: Professor Doctor Ulrich G. Schroeter (Beijing 2013) paras. 3.14, 3.15 with fn. 39 in regard to a list of authors that support the CISG Advisory Council's opinion.

27 C. Benicke, *in Münchener Kommentar zum Handelsgesetzbuch* (2nd edn., 2007) Art. 1, para. 39; M. Evans, in Bianca & Bonell (eds.), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987) Art. 95, note 3.1 *et seq*; V. Heuzé, *La vente internationale de marchandises:* Droit uniforme (2000) note 116; J.O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (4th edn., 2009) para. 47.5; F. Maultzsch, 'Die Rechtsnatur des Artikel. 1 Abs. 1 lit. b CISG zwischen internationaler Abgrenzungsnorm und interner Verteilungsnorm', in Büchler & Müller-Chen (eds.), *Private Law*: national – global – comparative, Festschrift für I. Schwenzer zum 60. Geburtstag (2011), p. 1225; K.H. Neumayer & C. Ming, *Convention de Vienne sur les Contrats de Vente internationale de Marchandises* (1993) Art. 1, note 8; I. Saenger, in Bamberger & Roth (eds.), Bürgerliches Gesetzbuch (2nd edn., 2007), Art. 1 para. 19; P. Schlechtriem, Uniform Sales Law (1986) pp. 26-27; P. Winship, 'The Scope of the Vienna Convention on International Sales Contracts', in Galston & Smit (eds.), *International Sales*: The United Nations Convention on Contracts for the International Sale of Goods (1984) pp. 1-27; C. Witz, 'Droit uniforme de la vente internationale de marchandises – juillet 2006-décembre 2007', (2008) *Recueil Dalloz* pp. 2620-2621.

28 *Emphasis added.*

29 CISG-AC Opinion No. 15, Reservations under Articles 95 and 96 CISG, Rapporteur: Professor Doctor Ulrich G. Schroeter (Beijing 2013) para. 3.16.

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if the applicable law treats the CISG as forming part of it, the non-contracting forum should usually give effect to it pursuant to its own choice of law rules.[30] Such an approach is not contrary to the rejection of *renvoi* in contract, because the question of whether the CISG forms part of the applicable law is answered by reference to substantive law, rather than the foreign forum's choice of law rules.[31] The Brazilian Superior Court of Justice *Atecs v Rodrimar* held in that vein, albeit in an enforcement proceeding in regard to an arbitral award[32]

> The inclusion of a convention incorporated by Swiss law in this concept does not constitute a violation to *the limits of the arbitration clause* nor to the *Brazilian public policy*, for recognition purposes. At least in principle, analyzing the issue in light of Brazilian law, it is clear that a treaty or a convention, when ratified by a contracting State, receives the same status of a national law of that country. There is no reason to think that it would be different in Switzerland […].

For the avoidance of doubt, parties who wish to have the CISG applied to their dispute may be wise to select a forum that is a contracting state.[33]

21.2.6 Direct Choice of the CISG

A related question is the effect of a direct choice by the parties of the CISG, where Article 1(1)(a) is not satisfied and the otherwise applicable law is not the law of a contracting state. Because, in most legal systems, courts are required to identify and apply the law of a state,[34] and the CISG is merely a set of rules of law unless it forms part of the applicable law, a direct choice of the CISG would not usually be an effective choice of law in these circumstances. However, this does not mean that the choice may be disregarded: rather, the CISG should be incorporated into the parties' contract to the extent permitted by the otherwise applicable law. This 'incorporation' takes place entirely within the bounds of the applicable

30 *See* Schwenzer, above n. 3, p. 20; Fawcett, Harris & Bridge, *supra* n. 15, at [13.75].

31 *See* Fawcett, Harris & Bridge, *supra* n. 15, at [13.79].

32 (19 Aug 2009) as found at <http://cisgw3.law.pace.edu/cases/090819b5.html> accessed 5 Nov 2015.

33 *See* generally T.K. Graziano, 'The CISG before the Courts of Non-Contracting States? Take Foreign Sales Law as You Find It' (2011) *13 YB PIL* p. 165.

34 Recital 13 and Article 3, Rome I; *Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain* [2004] EWCA Civ 19, [2004] 1 WLR 1784 at [40]; *see* Lawrence Collins (ed.), *Dicey, Morris and Collins on the Conflict of Laws*, (15th edn., Sweet & Maxwell, London, 2012), at [32-049]; Hague Conference on Private International Law *Draft Commentary on the Draft Hague Principles on Choice of Law in International Contracts* (November 2013) at [3.13]. But *cf infra* (arbitration).

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law's law of contract.[35] For example, in a dispute governed by the law of England, an English court would give effect to a direct choice of the CISG to the extent that its rules do not conflict with simple mandatory rules of English law (*i.e.* rules that the parties are unable to contract out of). The pro-CISG choice approach does not only recognise party autonomy but also implements the thinking of the delegates of the diplomatic conference which had found that the principle of party autonomy was sufficient to allow parties to opt in to the CISG.[36]

For parties who wish to ensure that their dealings are submitted to the CISG, the safest option is to choose the law of a contracting state, possibly complemented by a direct choice of the CISG to clarify that the parties do not wish to contract out of it (particularly where the forum is not a contracting state).

21.2.7 Article 6: Contracting Out

Article 6 provides that the parties may exclude the application of the Convention or, subject to some limitations, derogate from any of its provisions. This provision operates on two levels:[37] first, on the level of choice of law, enabling parties to exclude the application of the CISG by choosing the law of a non-contracting state pursuant to the forum's party autonomy principle; and second, on a substantive level, allowing parties to exclude the CISG from the operation of the applicable law.[38]

To the extent that Article 6 raises an issue of choice of law, its primary purpose seems to be to give precedence to the forum's rules on party autonomy. It does not itself confer a power on the parties to choose the applicable law: the unilateral choice of law rule in Article 1(1)(a) simply does not come into play where the parties have chosen the law of a non-contracting state in accordance with the forum's choice of law rules. It has been suggested that the *exclusion* of the CISG must still be determined by Articles 14-24 of the Convention.[39] But it is doubtful whether the CISG is even applicable to choice of law agreements, which are generally considered to be independent from the underlying sales contract;[40] and whether Article 6 was ever intended to 'split' the law applicable to the choice

35 Recital 13, Rome I; Fawcett, Harris & Bridge, *supra* n. 15, at [13.89].

36 *See* Official Records of the United Nations Conference on Contracts for the International Sale of Goods (Vienna, 10 March-11 April 1980) United Nations publication, Sales No E.81IV.3, 86, 252, 253.

37 *See* Kröll *et al.*, *supra* n. 4, p 103; *cf.* Schwenzer, *supra* n. 3, p. 104.

38 This, in effect, is the opposite of 'incorporation', referred to *supra*.

39 Schwenzer, *supra* n. 6, at 104-105; I. Schwenzer, Pascal Hachem, Christoper Kee, *Global Sales and Contract Law* (Oxford University Press, Oxford, 2012) at 4.39.

40 Huber & Mullis, *The CISG: A New Textbook for Students and Practitioners* (Sellier, 2007) p. 61. On the independence of choice of law agreements generally, *see* Christoph Reithmann and Dieter Marticleiny, *Internationales Vertragsrecht*, (7th edn., Dr Otto Schmidt, Cologne, 2010), [88]; *see also Fiona Trust Holding Corp v Privalov* [2007] UKHL 40, [2008] 1 Lloyd's Rep 254 at [17] in relation to arbitration agreements.

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of law agreement in this way, by cutting across the forum's choice of law rules. The better view is that the indirect exclusion of the CISG, through choice of law of a non-contracting state, is not governed by the rules of contract contained in the CISG.

It is on the second, the substantive, level that Article 6 is of principal significance. In particular, problems may arise where the parties have not expressed their intention to exclude the CISG with sufficient clarity.[41] It is still an open question, for example, whether an express choice of the law of a contracting state may be understood as an implied exclusion of the CISG.[42] Another question that has concerned courts and arbitral tribunals has been whether the CISG's application is excluded if the parties litigate a dispute solely on the basis of domestic law even though the CISG is applicable to the dispute.[43] It is not clear whether it is the CISG or the applicable national law that should be used to determine this question.[44] By far the best course of action for parties is to reach an express agreement on whether to include or exclude the CISG.

21.3 The CISG in Arbitration

21.3.1 Introduction

For parties who consider the domestic legal system to be too restrictive, and who wish to ensure that their choice of non-national rules of law is given effect,[45] arbitration may offer a valuable alternative to litigation in domestic courts. Arbitration is in some jurisdictions the standard means by which commercial disputes are resolved. It is increasingly chosen

41 *See* Schwenzer, *supra* n. 3, at pp. 103-104. According to the overwhelming opinion opting-out requires a clear, unequivocal and affirmative agreement between the parties: CLOUT case No 1025 (Cour de Cassation (3 Nov 2009)); Oberlandesgericht Linz (23 Jan 2006) <http://cisgw3.law.pace.edu/cases/060123a.html>; CLOUT case No 575 (US Court of Appeals 5th Circ (11 June 2003, corrected on 7 July 2003)); US District Court, Middle District of Pennsylvania (16 Aug 2005) <http://cisgw3.law.pace.edu/cases/050816u1.html>.

42 *See* Fawcett, Harris & Bridge, *supra* n. 15, pp. 683-684; Kröll *et al.*, *supra* n. 4, pp. 104-105; the majority of courts and arbitral tribunals demands an explicit exclusion of the CISG: BGH (11 May 2010) <www.globalsaleslaw.com/content/api/cisg/urteile/2125.pdf>, CLOUT case No 1057 (OGH, 2 April 2009), Polimeles Protodikio Athinion (2009) <http://cisgw3.law.pace.edu/cases/094505gr.html#ii2>, ICC award no 11333 (2002) <http://cisgw3.law.pace.edu/cases/021333il.html>; especially the tribunals constituted under the Russian Federation Chamber of Commerce and Industry rules and some courts have suggested that that exclusion is possible by merely choosing the law of a contracting state: for example, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry (16 March 2005) <http://cisgw3.law.pace.edu/cases050316r1.html>; Cour d'appel de Colmar (26 Sept 1995) Unilex; CLOUT case 904 (Tribunal Cantonal du Jura (3 Nov 2004).

43 *See* for an overview of the different views: UNCITRAL, Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (United Nations, New York, 2012) Art. 6, para. 14.

44 *Cf.* Hubert & Mullis, *supra* n. 40, at p. 63.

45 *See* for a discussion G. Born, *International Commercial Arbitration Vol II* (2nd edn., Kluwer International, Netherlands, 2014) p. 2661 *et seq.*

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as a means of resolving disputes even in those countries, such as the United Kingdom and Germany, in which civil litigation in commercial disputes has been common. Even areas, which traditionally have preferred litigation, such as the finance sector, have discovered arbitration to resolve disputes.[46]

Because international arbitration sits apart from domestic legal systems, the choice of law rules that apply to the merits in arbitral disputes are not (necessarily) the same as those applied by courts.[47]

Most importantly, parties who submit their dispute to arbitration generally enjoy a greater degree of party autonomy and flexibility than those parties who resolve it in court.[48] This is because international arbitration is founded on the very idea of contract. Arbitral tribunals, unlike courts, do not have a *lex fori*. That means that an arbitral tribunal does not have to apply automatically the substantive law of the seat of arbitration.[49] The seat of arbitration, however, determines the *lex arbitri*. The *lex arbitri* in turn governs the procedural facets of international arbitration.[50] Those aspects include the rules regarding the determination of the law applicable to the substance of the dispute. The greater degree of party autonomy can be seen, for example, in s. 46 of the Arbitration Act 1996 (UK) which provides that the parties may agree to submit their dispute to 'considerations' other than the law of a country.[51] Likewise Article 21(1) first sentence of the ICC Rules states that "[t]he parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute." Parties who choose arbitration as their preferred mode of

46 Richard Fentiman, Conflict of Laws.net, 11 May 2010, <http://conflictoflaws.net/2010/guest-editorial-fentiman- on-private-international-law-and-the-downturn/>.

47 *See* for a comprehensive discussion on the choice of law in international arbitration outlining the different approaches that have been taken by arbitral tribunals and outlining a neutral approach that takes account of the nature of international arbitration: Gary Born, *International Commercial Arbitration Vol II* (2nd edn., Kluwer International, Netherlands, 2014) § 19.03.

48 *See* E. Gaillard, 'The Role of the Arbitrator in Determining the Applicable Law', *in* L.W. Newman & R D Hill (eds.), *The Leading Arbitrators' Guide to International Arbitration* (3th edn, Juris Publishing, 2014) pp. 437, 442-443; O. Lando, 'The Law Applicable to the Merits of the Dispute', in Sarcevic (ed,), *Essays on International Commercial Arbitration* (Boston, London, 1991) pp. 129-131.

49 Sapphire International Petroleums Limited v National Iranian Oil Company, Award, (1967) 35 ILR 136, 15th March 1963, Arbitration Goldman "La *lex mercatoria* dans les contrats et l'arbitrage internationaux: réalité et perspectives" [1979] J du Droit Intl 475, 491; N. Blackaby, C. Partiesicleasides, A. Redfern & M. Hunter, *Redfern and Hunter on International Arbitration* (5th edn., Oxford University Press, Oxford, 2009) paras. 3.217, 3.218.

50 N. Blackaby *et al.*, *Redfern and Hunter on International Arbitration* (5th edn., Oxford University Press, Oxford, 2009), para. 3.223 *et seq.*

51 *See also*, for example, Code de Procédure Civile (France), Article 1496(1); Zivilprozessordnung (Germany), s. 1051; Arbitration Act 1996 (NZ), Sched. 1, Article 28; International Arbitration Act 1974 (Austria), Sched. 2, Article 28.

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dispute resolution are, therefore, free to choose the CISG directly[52] or soft-law like the UNIDROIT Principles, as the law applicable to their contract.[53]

In case that parties do not stipulate an applicable legal regime governing their contract, arbitrators, unlike judges, have a greater degree of freedom to determine the applicable substantive law. Again the ICC Rules are a good example of the arbitrators' scope. They state in Article 21(1) second sentence: "In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate."

21.3.2 CISG

The CISG provides a neutral set of rules that were drafted with international business in mind. Article 1 CISG, as discussed above, sets out when the CISG is applicable between parties of a sales contract. In regard to the application of the CISG by an arbitral tribunal, three scenarios have to be distinguished. Firstly and uncontroversially, commercial parties will benefit from the CISG's neutrality by choosing the CISG as the governing law of their sale of goods contract. An arbitral tribunal will generally respect that choice.[54] Unlike the Rome I Regulation or most national laws, an arbitral tribunal can apply the CISG as the choice of the parties directly if it is either acting as *amiable compositeurs* or if the *lex arbitri* permits or even requires the application of rules of law instead of (or in addition to) a particular domestic law.[55]

Secondly, the application of the CISG by an arbitral tribunal in an international sale of goods transaction is a valid choice, when the parties have not agreed on an applicable law governing their relationship.[56] However, it is controversial in what circumstances an

52 Note that the Rome I Regulation is not applicable to arbitration (Rome I Regulation, Article 1(2)(e).

53 Compare ICC case no 7319 (1992) 120 (1993) Journal du Droit International 1018 where the arbitral tribunal was asked to apply "general principles of law applicable in Western Europe"; ICC case no 3131 (26 Oct 1979) *Pabalk Ticret Limited Sirketi v Norsolor SA* IX (1984) YBCom Arb 109, 110 where the tribunal applied international *lex mercatoria* in circumstance where the parties made no choice in regard to the applicable law to the merits of the case; E. Gaillard, 'The Role of the Arbitrator in Determining the Applicable Law', in L.W. Newman & R.D. Hill (eds.), *The Leading Arbitrators' Guide to International Arbitration* (3rd edn., Juris Publishing, 2014) pp. 437, 452.

54 Note that issues of the application of mandatory rules or order public in regard to the application of the CISG should only arise in exceptional circumstances (potentially in regard to interest if the seat of the arbitration is in an Islamic state) since the CISG was drafted with the aim to amalgamate the world's legal regimes.

55 *See* for a full discussion in regard to the UNIDROIT principles in international arbitration: M. Scherer, 'Use of PICC in Arbitration', in St. Vogenauer (ed.), *Commentary on the UNIDROIT Principles* (2nd edn., Oxford University Press, Oxford, 2015) p. 110 *et seq*.

56 *See* S. Kröll, 'Arbitration and the CISG', in I. Schwenzer, Y. Atamer & P. Butler (eds.), *Current Issue in CISG and Arbitration* (Eleven Publishing, 2013) p. 59; J. Waincymer, 'The CISG and International Commercial Arbitration: Promoting a Complimentary Relationship between Substance and Procedure', in C.B. Andersen & U.G. Schroeter (eds.), *Sharing International Commercial Law across National Boundaries: Festschrift für Albert H Kritzer* (Wildy, Simmonds & Hill, London, 2008) p. 582; *see* in regard to a quantitative analysis of the use of the CISG by arbitral tribunals: L. Mistelis, 'CISG and Arbitration', in A. Janssen & O. Meyer (eds.),

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arbitral tribunal can apply the CISG. When an arbitral tribunal can and should apply the CISG, void of a parties' agreement, will be discussed under (a). Lastly, the question arises what impact the parties' choice of an applicable domestic law has on the application of the CISG by an arbitral tribunal.

21.3.2.1 Parties Made No Choice in Regard to the Applicable Law

Some arbitration rules provide arbitrators with a wide discretion when the parties have not agreed to a domestic law applicable to their contract.[57] Article 28(2) of the UNCITRAL Model Law narrows the arbitral tribunal's discretion slightly by stating that "the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."

Article 1(1)(a) CISG

Article 1(1)(a), which states that the CISG is applicable if parties have their businesses in different member states, can be understood as a unilateral choice of law rule which calls for the application of the CISG as part of the law of the forum.[58] Alternatively, when concentrating on its effect the CISG may be characterised as an overriding mandatory law of the forum[59] or as a self-executing treaty.

The prevailing view is that Article 1(1)(a) of the CISG does not apply in the context of arbitration.[60] This view is based on the understanding that Article 1(1)(a) is an international treaty and as such binds the states and its organs but only those. In other words Article 1(1)(a) is a direction to the courts alone and not international arbitral tribunals.[61]

In the author's view, the fact that the CISG is an international treaty does not preclude an arbitral tribunal to apply Article 1(1)(a). In fact, in the author's view the argument can be made that the application of Article 1(1)(a) is wider in international arbitration than in litigation. In litigation, Article 1(1)(a) can only be applied if the forum state is a CISG

CISG Methodology (Sellier, Munich, 2009) p. 375 *et seq*; N. Schmidt-Ahrendts, 'CISG and Arbitration' 59 (2011) *Belgrade Law Review* p. 211.

57 *See*, for example, SIAC Rules, Article 27.1, second sentence, LCIA Rules, Article 22.3, or ICC Rules Article 21(1) second sentence: "In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate."

58 P. Schlechtriem, 'Requirements of Application and Sphere of Applicability of the CISG' (2005) 36 *VUWLR* at p. 784; *cf.* Schwenzer, *supra* n. 3, pp. 19-20; *cf* Fawcett, Harris & Bridge, *supra* n. 15, at [16.24]-[16.35], [16.104].

59 *Cf.* the House of Lords' treatment of the Hague Visby Rules in *The Hollandia* [1983] 1 AC 565.

60 *See* Schwenzer, *supra* n. 6, p. 22; *cf.* Petrochilos, 'Arbitration Conflict of Laws Rules and the 1980 International Sales Convention' (1999) 52 *Revue Hellenique de Droit International* p. 191; S. Kröll, 'Arbitration and the CISG', in I. Schwenzer, Y. Atamer & P. Butler (eds.), *Current Issue in CISG and Arbitration* (Eleven Publishing, 2013) p. 59.

61 S. Kröll, 'Arbitration and the CISG', *in* I. Schwenzer, Y. Atamer & P. Butler (eds.), *Current Issue in CISG and Arbitration* (Eleven Publishing, 2013) pp. 59, 65; A. Janssen & M. Spilker, 'CISG in the World of International Commercial Arbitration' (2013) 77 *RabelsZ* pp. 131, 137.

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member state. Arbitral tribunals, as indicated above, are generally not bound by the law of the forum state.[62]

Article 1 CISG, including Article 1(1)(a), as indicated above, acts, according to one view, as a unilateral conflict of laws rule. Born states the use of international conflict of law rules to determine the applicable law in arbitration would "escape the peculiarities of national legal systems" and would lead to "principally neutrality, efficiency, predictability and effective international enforcement".[63] The CISG, like international arbitration, provides uniform, neutral international principles for international sale of goods transactions that the business world desires. The CISG circumvents the issues that the choice of a national law transports into a contractual relationship since a national law reflects the social, economic, and, above all, the political environment of that particular country. The advantage that the application of the CISG to a contractual relationship brings is evidenced by the fact that eighty-three states, including most of the world largest economies, have ratified the CISG.[64] For an international arbitral tribunal to apply Article 1(1)(a) is coherent with the idea of applying an international conflict of laws rule.

> In addition, if one takes the view that the CISG is a self-executing international treaty, an international arbitral tribunal as part of the international legal order is bound by the CISG. As Born reminds,[65] "law is the basis for international arbitration, without which the arbitral process loses both its legitimacy and efficacy.[…]."

The CISG, as part of the international legal order, is part of the law an international arbitral tribunal cannot ignore if the parties to a sale of goods transactions have their places of businesses in different CISG member states. It should be remembered that parties can opt out of the CISG if they do not want the CISG to apply to their sale of goods transaction. The analysis does not ignore that under Article 26 of the Vienna Convention on the Law of Treaties (1969), international treaties only bind contracting states as parties to these treaties.[66] Businesses in CISG member states are part of the legal order of the member state and per se part of the international legal order. International human rights treaties, like

62 *See* especially in regard to the CISG; A. Janssen & M. Spilker, "CISG in the World of International Commercial Arbitration" (2013) 77 *RabelsZ* pp. 131, 138, 139.

63 G. Born, *International Commercial Arbitration Vol II* (2nd edn., Kluwer International, Netherlands, 2014) p. 2651.

64 <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html> accessed 5 April 2015.

65 G. Born, *International Commercial Arbitration Vol II* (2nd edn., Kluwer International, Netherlands, 2014) p. 2657.

66 *See* in regard to the Article 26 Vienna Convention (1969) argument which underpins the general view that arbitral tribunals are not bound to apply Article 1(1)(a): A. Janssen & M. Spilker, 'CISG in the World of International Commercial Arbitration' (2013) 77 *RabelsZ*, pp. 131, 137.

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the International Covenant on Civil and Political Rights ('ICCPR'), are in accordance with Article 26 of the Vienna Convention (1969) also only applicable in the member states to the Convention. However, it is accepted that the rights enshrined in the ICCPR are applicable irrespective of having been ratified by a state and that they are a bench mark in the international setting.[67] The CISG has been ratified by eighty-three states[68] and many states have amended their domestic contract law incorporating the provisions of the CISG or part of it.[69] Even though the CISG has not reached the same level of acceptance as the ICCPR, *i.e.* can be said to be customary law,[70] the CISG represents the most unified approach to the regulation of sale of goods transactions. It was conceptualised and drafted by representatives of all legal orders and from all parts of the world. Its Article 1, including Article 1(1)(a), therefore, represents what one would expect from an international conflict of laws rule.

The author's view that Article 1(1)(a) can and should be applied by an international arbitral tribunal if the parties have not made an explicit choice of the applicable law governing their contract is corroborated by two empirical studies. The studies found that international arbitral tribunals in actual fact already do apply Article 1(1)(a).[71] The reason that arbitral tribunals probably ignore the prevailing view in the literature lies in the fact that Article 1(1)(a) allows a tribunal to give effect to an implied consent by business parties which have their businesses in different CISG member states that the CISG will govern their sale of goods contract.[72] The CISG, as already stated earlier, provides for uniform,

67 Compare Beth Simmons, "Civil rights in international law: Compliance with aspects of the 'International Bill of Rights'" (2009) 16 *Indiana Journal of Global Legal Studies* p. 437.

68 <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html> accessed 5 April 2015.

69 *See* in general in regard to the influence of the CISG in respect of the reform of sales law: I. Schwenzer & P. Hachem, 'The CISG – Successes and Pitfalls' (2009) 57 *American Journal of Comparative Law*, pp. 457, 461-462. *See* C.S. Han, 'The CISG and Modernisation of Chinese Contract Law' *Victoria University Law Review* p. 67; for Germany, P. Schlechtriem & U. Schroeter, *Internationales UN-Kaufrecht* (5th edn., Mohr Siebeck, Tuebingen, 2013) para. 19; Eastern Europe & F. Zoll, 'The Impact of CISG on Polish Law' (2007) 71 *RabelsZ*, p. 81 *et seq*. In addition, in Africa, the sixteen member states of the Organisation for the Harmonisation of Business Law in Africa (*l'Organisation pour l'harmonisation en Afrique du Droit des Affaires*, OHADA) have adopted the *Acte uniforme sur le droit commercial général* (AUDCG) which is primarily based on the CISG.

70 For a law or practice to meet the requirements of customary law there must be duration, consistency and generality of practice, as well as *opinio juris*, *see* ICJ Statute Article 38(1)(b); J. Crawford, *Brownlie's Principles of International Law* (Oxford University Press, Oxford, 2012) pp. 24-25.

71 L. Mistelis, 'CISG and Arbitration', in A. Janssen & O. Meyer (eds.), *CISG Methodology* (Sellier, 2009) p. 375. In a study that surveyed 240 arbitral awards and 800 judgments in regard to their analysis of the CISG Article 1(1)(a) of the CISG was a point of discussion in nearly all awards. However, the study found, unlike the Mistelis study, that even though Article 1(1)(a) was a discussion in nearly all awards, often the arbitral tribunal applied the a domestic law the arbitral tribunal thought had a closer connection to the contract, often the forum law: P. Butler, 'CISG and Arbitration – A Fruitful Marriage' (2014) 16 *International Trade and Business Law*, Special Volume for Professor Zeller's 70th Birthday, pp. 322, 330 *et seq*.

72 In the empirical study conducted by the author the parties in only five awards (out of the 240 awards analyzed) explicitly excluded the CISG: P. Butler, 'CISG and Arbitration – A Fruitful Marriage' (2014) 16 International Trade and Business Law, Special Volume for Professor Zeller's 70th Birthday pp. 322, 331. In fact, in 41%

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neutral international principles for international sale of goods transactions which aligns with the intention of parties using international arbitration as their preferred mode of dispute resolution.

Article 1(1)(b)

It is uncontroversial that Article 1(1)(b) can be applied by an international arbitral tribunal.[73] Article 1(1)(b) directs the application of the CISG when the rules of the private international law of the forum lead to the application of the law of a CISG member state which incorporates the CISG. Article 1(1)(b) is not a choice of law rule. It gives the CISG domestic law status and prevents any possible *renvoi*. The direction incorporated in Article 1(1)(b) to an arbitral tribunal is therefore the same as for any court: if the rules of private international law applied by the arbitral tribunal lead to the law of a CISG member state the CISG will be applicable.[74] Importantly though it is acknowledge in the context of Brazilian law that arbitral tribunals are not bound by the mandatory nature of the Brazilian conflict of law rules.[75]

CISG as Rules of Law

In addition to the analysis of Articles 1(1)(a) and 1(1)(b) as indicated earlier, many arbitration rules give the arbitral tribunal a mandate to choose the applicable law by allowing the direct choice of 'rules of law' as the applicable law the tribunal considers 'appropriate'.[76] Therefore, even if one does not follow the analysis under *aa*. for the reasons set out under *aa*., a tribunal given that mandate should apply the CISG directly.[77]

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of cases the parties had made no stipulation of the applicable law (P. Butler, 'The Use of Foreign Judgments in New Zealand Courts' *Private Law, national-global-comparative*, Festschrift fuer I. Schwenzer zum 60. Geburtstag, A Buechler/M Mueller-Chen (eds.), (Staempfli, Bern, 2011)). *See also* N. Blackaby *et al.*, *Redfern and Hunter on International Arbitration* (5th edn., Oxford University Press, Oxford, 2009) para. 3.206 in regard to tribunals practice to determine the implied choice of the parties in the absence of an express choice.

73 G. Petrochilos, 'Arbitration Conflict of Laws Rules and the 1980 International Sales Convention' (1999) 52 *Revue Hellenique de Droit International* p. 191; S. Kröll, 'Arbitration and the CISG', in I. Schwenzer *et al.* (eds.), *Current Issue in CISG and Arbitration* (Eleven Publishing, 2013) p. 59.

74 *See* in regard to the application of Article 1(1)(b) *supra* D.II.1.c. and A. Janssen & M. Spilker, 'CISG in the World of International Commercial Arbitration' (2013) 77 *RabelsZ* pp. 131, 139 who also discusses whether Article 95 CISG binds the arbitral tribunal.

75 Article 2 of the Brazilian Arbitration Act (Law No. 9307/1996) *see* in regard to the text fn. 19.

76 Note that in regard to Article 28(2) Model Law and the derived §1051 Zivilprozessordnung (German Code of Civil Procedure) it is controversial whether the arbitral tribunal apply rules of law only if the parties explicitly or impliedly agreed to them – *see* for a discussion: Giudetta Cordero Moss, 'Can an Arbitral Tribunal Disregard the Choice of Law Made by the Parties' (2005) 1 *Stockholm Int'l Arbitration Review* pp. 1, 20; M. Scherer, 'Use of PICC in Arbitration', in S. Vogenauer (ed.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd edn., Oxford University Press, Oxford, 2015) para. 4, p. 114, who cites in fn. 10 ICC case no 13450 (2014) 141 Clunet 193 (experts) where the arbitral tribunal applied the CISG together with the UNIDROIT Principles based on Article 28(2) UNCITRAL Model Law.

77 *See* A. Janssen & M. Spilker, 'CISG in the World of International Commercial Arbitration' (2013) 77 *RabelsZ*, pp. 131, 141.

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21.3.2.2 Parties Have Chosen an Applicable Domestic Law

Due to the wide mandate, some arbitration laws and rules grant the arbitral tribunals the question arises whether the arbitral tribunal is free to apply the CISG despite an explicit choice of a domestic law. If the parties have chosen a domestic law of a CISG member state, the CISG is applicable as part of the domestic law of the country (Article 1(1)(b)) unless the parties have explicitly excluded it.[78] If the parties have chosen the domestic law of a CISG non-member state, the choice generally means that the parties have excluded the applicability of the CISG.[79] An arbitral tribunal can apply the CISG despite the parties have chosen the domestic law of a non-member state if the tribunal either has the mandate to act *ex aequo et bono*. To apply the CISG despite the parties' choice of the domestic law of a non-member state, a tribunal would need to find that a gap in the applicable domestic law which could not be closed from within the domestic law.

21.3.3 Summary

The CISG does not (yet) meet the requirements of customary international law. However, the CISG has been ratified by nearly half of all states and is one of the most successful international commercial conventions. Arbitral tribunals should apply the CISG if the parties have not chosen an applicable domestic law unless there is a clear indication that the parties would not apply the CISG or the *lex arbitri* requires a choice of a national law. The CISG provides a neutral set of rules that were drafted with international business in mind the presumption therefore has to be that, unless there is an indication to the contrary, the CISG will adequately regulate the contractual relationship between the parties.

21.4 Conclusion

Article 1 CISG provides the gateway to the CISG. Parties who engage in cross border trade should be especially aware of its requirement. If parties have their businesses in different member states the CISG will apply unless the parties have explicitly excluded its application. Unfortunately, parties and their lawyers are often not aware of the CISG's automatic application in that situation and anecdotal evidence suggests that in some regions a domestic contract law is more often than not applied even though the CISG would be applicable. The parties' choice of arbitration as their dispute resolution mechanism will allow for an application of the CISG to a wider range of contracts.

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78 *See* in regard to the degree of explicitness required P. Schlechtriem & P. Butler, *UN International Sale of Goods*, (Springer, Heidelberg, 2009), 1.6.

79 P. Schlechtriem & P. Butler, *UN International Sale of Goods* (Springer, Heidelberg, 2009) 1.6.1.

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