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Article

CISG Exclusion during Legal Proceedings

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Abstract

In the contracting States of the Convention on Contracts for the International Sale of Goods (CISG), where the CISG applies via its Article 1, the courts have a duty under public international law to apply its rules automatically, regardless of the parties' awareness in this respect. At the same time, the parties have a subsequent autonomy based on Article 6 of the CISG to exclude the application of the Convention, which may be done expressly or by implication. Such an exclusion may take place at various stages of the parties' legal relationship, including during legal proceedings. Due to the fact that the legal representatives are often not aware of the CISG's existence and its potential automatic application to the given case, when a dispute arises, they may fail to plead or base their arguments on the basis of its applicable rules. This article focuses on the adjudicator's duty to apply the CISG ex officio, *together with the possibility and requirements regarding its exclusions made during legal proceedings, given the example of two recent Chinese cases. In this contribution, it is advocated that the failure by the parties' representatives to plead and base their arguments during litigation over the applicable CISG rules is not a sufficient indication of their intention to exclude the Convention.*

Introduction

It has been more than 30 years since the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG)[1] entered into force.[2] As an international substantive law treaty, the CISG undoubtedly has a wide

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1 Convention on the Law Applicable to Contracts for the International Sale of Goods (1985, 24 ILM 1575) (CISG).

2 The CISG was signed at the diplomatic Conference in Vienna on 11 April 1980 and came into force as a multilateral treaty on 1 January 1988.

geographical potential application; it has already been adopted by 95 countries,[3] including 25 of 27 European Union Member States, with the exceptions of Ireland and Malta.The CISG was drafted to provide a neutral set of rules on contracts for the international sale of goods in business to business international relations.[4] After an effective adoption and/or implementation in a given State's jurisdiction,[5] its provisions become fully integrated into the national legal system of that State (domestic law of contracts).[6] As a result, when the prerequisites for its application are fulfilled, its provisions have priority over the non-unified domestic rules of that State; thus, the Convention is to be applied by the adjudicator automatically (*ex officio*),[7] regardless of the parties' awareness in this respect.

At the same time, the CISG has a dispositive nature, allowing the parties to exclude its application through the parties' mutual intention and agreement in this regard. As the parties' autonomy to exclude is one of the factors that influences the Convention's application when a dispute arises, the possible exclusion should be established by the adjudicator at the time of analysing the CISG's potential application. As stated before, this is so that the judges in the CISG contracting States have a duty to test the prerequisites for the Convention's application and, once fulfilled, are obliged by international public law[8] to apply its rules to the given case directly.[9]

With respect to the CISG's exclusion, there is no doubt that the parties may opt out from the CISG at various stages of their legal relationship. This includes at the time when they conclude a contract, called in the doctrine an *ex ante exclusion.*[10]

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3 There are 95 accessions, though in the case of Ghana and Venezuela, the CISG has not yet been brought into force. For information about the current CISG contracting States, see <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status> accessed 14 February 2023.

4 Ingeborg Schwenzer and Pascal Hachem, Intro to Arts 1-6 in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods* (OUP 2016) 23, para 14.

5 In States with a monist system, the act of ratifying an international treaty immediately incorporates that international law into national law of that State. In States with a dualist system, ratification is not sufficient for an effective adoption as an additional step is needed in the form of a national implementing legislation to give it force.

6 Peter Schlechtriem, Introduction in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods* (OUP 2005) 5; C Massimo Bianca and Michael Joachim Bonell, *Commentary on the International Sales Law: The 1980 Vienna Convention* (Giuffrè, Milan 1987) 56; AE Butler, *A Practical Guide to the CISG: Negotiations through Litigation* (Aspen 2007) para 2.02.

7 Ingeborg Schwenzer, Intro to Arts 1-6 in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods* (Oxford University Press 2010) 20.

8 In accordance with art 11 of the Vienna Convention on the Law of Treaties: '[t]he consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed'. Vienna Convention on the Law of Treaties (1969, 1155 UNTS 331) (VCLT).

9 John Michael Grant, 'The CISG Applies When It Says It Does, Even if Nobody Argues It: Why the CISG Should Be Applied *Ex Officio* in the United States and a Proposed Framework for Judges' (20 March 2015) 5 <https://ssrn.com/abstract=2619458> accessed 14 February 2023.

10 CISG Advisory Council Opinion no 16 (CISG-AC Op no 16), 'Exclusion of the CISG under Article 6' (30 May 2014) 4, para. 2.5 <http://cisgac.com/cisgac-opinion-no16/> accessed 14 February 2023; Lisa Spagnolo, *CISG Exclusion and Legal Efficiency* (Wolters Kluwer 2014) 273.

It may be made by modifying the original contract or at the time of the dispute—namely, by way of an agreement during legal proceedings (*ex post exclusion*).[11] There is also no doubt that the parties' intention to exclude may be explicit or implicit (including made through conduct).[12] Notwithstanding the above, many times the parties (or rather their legal representatives) are simply not aware of the Convention's existence and its potential automatic application to the given case, not to mention their right to exclude it.

With respect to possible *ex post* exclusions—that is, at the time when a dispute arises—this unawareness may simply lead to one or both of the parties failing to plead or base their arguments on the basis of applicable CISG rules. As a result, it might be doubtful whether the parties can exercise their autonomy with regard to an instrument of which they are simply not aware. As it will be argued, the mere failure to plead or argue the case based on the applicable provisions of the Convention should not be regarded as a sufficient indication of the parties' intent to exclude it. In practice, it seems that the search for an implied will of the parties in this respect may reach justifiable doubts: on the one hand, the courts in CISG contracting States have a duty to apply the Convention, regardless of the parties' awareness in this respect; on the other hand, it is true that the parties may exclude its provisions by implication, including when made by conduct.

With regard to the above, the question arises: is the failure by the parties' representatives to plead and base their arguments during litigation on the applicable CISG rules a sufficient indication of their will to exclude? Although this issue has been touched upon in the doctrine before,[13] regrettably, as the recent case law presents,[14] the courts in CISG contracting States seem to repeatedly commit the same mistake over again. Accordingly, as will be demonstrated, it appears that in some cases, the final conclusion on whether the Convention applies or is excluded may fall somewhere between the (potential) intention of the parties,

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[11] Spagnolo (n 10) 300.

[12] Schwenzer and Hachem (n 4) 111; Loukas Mistelis, Article 6 in Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods, A Commentary* (C.H.Beck 2018) 105; CISG-AC Op no 16 (n 10) 23, para 5.15; Franco Ferrari, 'Remarks on the UNCITRAL Digest's Comments on Article 6 CISG' (2006) 25(13) JL & Com 20.

[13] For an in-depth analysis see Spagnolo (n 10) 273−316; Lisa Spagnolo, 'Iura Novit Curia and the CISG: Resolution of the Faux Procedural Black Hole' in I Schwenzer and L Spagnolo (eds), *Towards Uniformity: The 2nd Annual MAA Schlechtriem CISG Conference* (Eleven International Publishing 2011) 181−221; CISG-AC Op no 16 (n 10) para 5-6.4; Schwenzer and Hachem (n 4) 113; Ferrari (n 12) 30−1.

[14] *PH 'Podlasiak' Andrzej Cylwik v Yiwu Entuo Import and Export Firm (PH 'PODLASIAK')*, China: Intermediate People's Court Jinhua, Zhejian Province (9 November 2018) <https://cisg-online.org/search-for-cases?caseId=10030> accessed 14 February 2023; *Ideal Rulo ve Firça Sanayi AS v Xinyang Hengda Pork Processing Co, Ltd (Ideal Rulo)*, China: Higher People's Court Henan Province (15 October 2018), abstract prepared by Shu Zhang/Peng Guo, (30 May 2022) <https://cisg-online.org/search-for-cases?caseId=10027> accessed 14 February 2023; *Chevrolet Trans Sport 3.4 F AWD*, Netherlands: Court of Appeal Arnhem-Leeuwarden (23 January 2018) <https://cisg-online.org/search-for-cases?caseId=8958> accessed 14 February 2023.

which could also be doubtfully expressed or implied, and the judge's obligation to apply the Convention, though this obligation is not always observed.

This contribution will focus on the potential exclusions made during legal proceedings, giving the example of two recent Chinese cases:[15] one heard by the Jinhua Intermediate People's Court in the case *PH* '*Podlasiak*' *Andrzej Cylwik v Yiwu Entuo Import and Export Firm*,[16] and one heard by the Henan Province Higher People's Court in the case *Ideal Rulo ve Firça Sanayi AS v Xinyang Hengda Pork Processing Co, Ltd.*[17] First, I will present the factual background for these two cases. Later, before analysing the case examples in regard to the issue at hand, it is vital to present the legal basis for the adjudicator's duty to apply the Convention *ex officio*. Subsequently, it is equally crucial to present the basic legal requirements for the Convention's possible exclusion. This background will help one to analyse and reach a conclusion in regard to the presented issue of the given case examples.

A presentation of the cases

The first case is *PH* '*Podlasiak*' *Andrzej Cylwik v Yiwu Entuo Import and Export Firm*, where the case was brought by the Polish buyer against the Chinese seller. The dispute arose under a contract for the sale of goods between two parties with their respective places of business in two different CISG contracting States.[18] Given the above facts, the prerequisites for the Convention's application via Article 1(1)(a) were undoubtedly fulfilled.[19] The parties did not make any choice of law clause in their contract as to the applicable law.

When the dispute was brought before the court, it seems that the parties' representatives did not plead and did not base their arguments on the clearly applicable CISG. In the end, the court of first instance[20] did not even consider the application of the CISG. Instead, it established that, in accordance with Article 41 of the Law of the People's Republic of China on the Choice of Law for Foreign-related Civil Relationships, absent any choice of law made by the parties, it should apply '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

[15] The topic is discussed using the example of two recent Chinese cases that have been translated into English at <https://cisg-online.org/home> accessed 14 February 2023. Both cases concern the same issue, namely the potential *ex post* exclusions versus the court's duty to apply the Vienna Sales Convention. See also an analysis of Chinese judicial practice over CISG: Qiao Liu and Xiang Ren, 'CISG in Chinese Courts' (2017) 65(4) American J Comparative L 906, where the authors present a different view and conclusion with regard to the *ex post* exclusion than the author of this article.

[16] *PH* '*Podlasiak*' (n 14).

[17] *Ideal Rulo* (n 14).

[18] China ratified the CISG on 11 December 1986, and it entered into force on 1 January 1988; Poland ratified the CISG on 9 May 1995 and it entered into force on 1 June 1996.

[19] CISG (n 1) art 1(1)(a) ('[t]his 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').

[20] *PH* '*Podlasiak*' (n 14).

connected with the contract'.[21] As the closest connection in this case was China, the court applied Chinese non-unified domestic law accordingly. Upon appeal,[22] no challenge as to the applicable law was made. Although the Jinhua Intermediate People's Court held that the court of first instance should have considered applying the CISG because the prerequisites under Article 1(1)(a) of the CISG were met, nevertheless, it did not apply the CISG due to the parties' failure to plead it.

At the same time, the court pointed out that, as both of the parties at first instance referred exclusively to Chinese non-uniform domestic law, and accordingly, made no objections as to the applicable law, such conduct (or omission) could be regarded as an implicit choice of law by the parties with respect to the foreign-related civil relationship. In the end, this failure on the side of the parties' representatives was regarded as an implicit exclusion of the CISG; thus, the court of appeal maintained the lower court's decision and applied Chinese non-unified domestic law.

In the second case, the dispute was heard by the Henan Province Higher People's Court in the case *Ideal Rulo ve Firça Sanayi AS v Xinyang Hengda Pork Processing Co, Ltd.*[23] The claim was brought by a Turkish company (the buyer) against a Chinese company, who was the seller in this case. As in the previous case, the dispute arose under a contract for the sale of goods between two parties with their respective places of business in two different CISG contracting States.[24] Likewise, the prerequisites for the application of the Convention via Article 1(1)(a) were fulfilled, where no agreement between the parties as to the applicable law was made. Just as in the previous case, when considering the applicable law, the court of first instance (the Luohe Intermediate People's Court)[25] held that in a foreign-related contractual relationship, the case should be decided in accordance with Article 41 of the Law of the People's Republic of China on the Choice of Law for Foreign-related Civil Relationships.[26] Here, the court also decided to apply Chinese non-unified domestic law.

At the appeal,[27] the application of Chinese law was not challenged. Although the Henan High People's Court pointed towards the applicability of the CISG as the prerequisites of Article 1(1)(a) were fulfilled, at the same time the court held that the parties could choose to exclude the application of the CISG under Article 6. Accordingly, although it concluded that the application of the *closest connection test* by the lower court was incorrect, eventually it decided that the application of the Chinese non-unified domestic law on the merits of this case was correct. It ruled that, as both of the parties in their pleadings had based their

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21 China: Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations, adopted at the 17th session of the Standing Committee of the 11th National People's Congress on 28 October 2010 (Law of the People's Republic of China).

22 *PH* '*Podlasiak*' (n 14).

23 *Ideal Rulo* (n 14).

24 Turkey ratified the CISG on 7 July 2010 and it entered into force on 1 August 2011.

25 *Ideal Rulo* (n 14).

26 Law of the People's Republic of China (n 21).

27 *Ideal Rulo* (n 14).

arguments exclusively on the rules of the Chinese non-unified domestic law (and not the CISG), it meant that they had expressly chosen that law, which in opinion of the court led to the CISG's exclusion under Article 6. This is why the court of appeal eventually maintained the ruling of the lower court with respect to the applicable law. The question is whether the parties' conduct during the legal proceedings was indeed enough to imply the parties' agreement as to the exclusion of the Convention.

The court's duty to apply the CISG

Given these cases, it is evident that neither of the courts of first instance pointed to the automatic application of the CISG. Only upon appeals did the court point out the fact of the Convention's existence and application. It is vital to recall the legal basis that justifies not only the automatic application of the Convention but also its priority before the domestic non-unified sales law of the given contracting State and its priority over the respective rules of private international law[28] as well as its procedural rules.[29]

When looking at the provisions of the CISG and its Article 91, it is evident that, as an international treaty, it is subject to ratification, acceptance, or approval by the signatory States.[30] In accordance with international public law, after the ratification of the CISG, the given contracting State establishes on an international plane its consent to be bound by a treaty,[31] which is in line with Article 11 of the Vienna Convention on the Law of Treaties.[32] Therefore, once a State effectively adopts and incorporates the Convention into its legal system, under public international law, the provisions of the CISG automatically become part of that contracting State's national legal system.[33] This means it is part of

[28] Schwenzer (n 7) 20; Schlechtriem (n 6) 16; Schwenzer in Schwenzer (n 4) 19, para 5; James J Fawcett, Jonathan M Harris and Michael Bridge, *International Sale of Goods in the Conflict of Laws* (Oxford University Press 2005) 916, para 16.20. When analysing the CISG's priority over the private international law (PIL) rules in case of the Rome I Regulation and Rome I Convention, see Gralf-Peter Calliess and Hermann Hoffmann Article 25 in Gralf-Peter Callies (ed), *Rome Regulations: Commentary on the European Rules of the Conflict of Laws* (Wolters Kluwer 2015) 431–4; Gralf-Peter Calliess/ Hermann Hoffmann Article 25 in Calliess, *Rome Regulations: Commentary on the European Rules of the Conflict of Laws* (Wolters Kluwer 2011) 347–9, art 25; Ilaria Queirolo, Article 25 in Ulrich Magnus and Peter Mankowski, *ECPIL: Rome I Regulation: Commentary* (Sellier European Law Publishers 2017) 861; Schwenzer and Hachem (n 4) 1245–51, art 90; Sebastian Omlor Article 25 in Franco Ferrari, *Rome I Regulation Pocket Commentary* (Sellier European Law Publishers 2015) 505–8.

[29] For this opinion and an in-depth analysis, see Spagnolo (n 10) 290–2; Spagnolo, 'Iura Novit Curia' (n 13) 190, 197, para 4.

[30] CISG (n 1) Art 91(2).

[31] VCLT (n 8) Art 2(b).

[32] Ibid art 11 on the means of expressing consent to be bound by a treaty ('[t]he consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed').

[33] For the difference between *monist* and *dualist* systems with regard to the effective adoption of the CISG into a given legal system see footnote 5 above.

the domestic law of contracts of that State,[34] naturally within the Convention's subjective scope of application, as presented in its Articles 1–5 and temporal sphere of application (Article 100 of the CISG).

As a result, the State courts seated in a CISG contracting State are bound by the provisions of the Convention, which means that judges should apply its provisions not as a foreign or international law, but as their own unified State law, applicable *ipso iure* to situations set out in Chapter 1 of the Convention.[35] That is why this ratified instrument should not be treated by the courts in the CISG contracting States as a foreign law, as a result of which its application is not a question of fact but a question of law.[36]

Article 1(1)(a) of the CISG sets out that it applies to contracts for the sale of goods between parties whose places of business[37] at the time of concluding the contract[38] are in different States, where those States are CISG contracting States. Thus, where the Convention applies via Article 1(1)(a), its rules are dominant[39] and prevail over recourse to the rules of private international law.[40] This was the very purpose of the uniform law—to supersede the respective private international law rules (PIL rules).[41]

Moreover, the Convention may apply by virtue of Article 1(1)(b) to contracts for the sale of goods between parties whose places of business are in different States and where the PIL rules of the forum lead to the application of the law of a contracting State.[42] In this case, the CISG may apply via PIL rules, by virtue of

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[34] Schlechtriem (n 6) 5; Bianca and Bonell (n 6) 56; Butler (n 6) para 2.02; Fawcett, Harris and Bridge (n 28) 916, para 16.22.; Urlich G Schroeter, 'To Exclude, to Ignore, or to Use?: Empirical Evidence on Courts', Parties' and Counsels' Approach to the CISG (with some Remarks on Professional Liability)' in Larry A DiMatteo (ed), *The Global Challenge of International Sales Law* (Cambridge University Press 2014) 665.

[35] Schwenzer and Hachem (n 4) 18 and 19; Fawcett, Harris and Bridge (n 28) 916, para 16.22.

[36] This is why it is irrelevant how the CISG contracting State treats foreign law because the CISG constitutes an inherent part of its domestic legal system. It should be treated as a question of law, meaning that the parties do not have to plead the applicability of the Convention and prove its content. In this respect, see Spagnolo (n 10) 289–90; CISG-AC Op no 16 (n 10) 18, para. 5.5; Fawcett, Harris and Bridge (n 28) 916.

[37] In determining the place of business, in the circumstances when the party has more than one, the rule in art 10(a) indicates what is relevant for the purpose of the Convention. It points to the one having 'the closest relationship to the contract and its performance'. However, when the party has no place of business, according to art 1(b), its habitual residence will be considered appropriately. The burden of proof as to the contract's 'international character' is borne by the party that claims the CISG as applicable law.

[38] Schwenzer (n 7) 29.

[39] Fawcett, Harris and Bridge (n 28); Franco Ferrari, 'PIL and CISG: Friends or Foes?' (2012–13) 31 JL & Com 48.

[40] The PIL rules are used in order to determine the applicable substantive rules, while the CISG as a unified substantive law Convention gives a 'straightforward answer' with respect to the applicable substantive law. Thus, the PIL rules are to be applied only if the particular 'substantive answer' cannot be found within the rules of the Vienna Convention, provided its automatic application.

[41] Maksymilian Pazdan, *Konwencja wiedeńska o umowach międzynarodowej sprzedaży towarów. Komentarz* (Zakamycze 2001) 59, art 1.

[42] However, CISG (n 1) art 1(1)(b) does not apply in countries that made an art 95 CISG reservation. In accordance with art 95 ('[a]ny State may declare at the time of the deposit of its

either the objective connecting factor, such as the law of the seller's place of business,[43] or the law that has the closest connection to the particular contractual relationship.[44] Moreover, the CISG may apply via PIL rules through a subjective connecting factor,[45] here by means of the parties' choice of law clause selecting the law of the CISG contracting State.[46]

Therefore, contrary to Article 1(1)(a), when the PIL rules were irrelevant for the CISG to apply, conversely, in the case of Article 1(1)(b) situation, the rules of private international law are essential, since they are a precondition for the Convention's application. In other words, the CISG may apply either directly (automatically) in a situation presented in the Convention's Article 1(1)(a), or the Convention may also find its application through the 'gateways'[47] of the PIL rules when they lead to the application of the law of a CISG contracting State. It is vital to point out that the operation of Article 1(1)(b) CISG only differs in those States that made an Article 95 of the CISG reservation, though such an analysis requires different research in this respect.[48]

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instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention').

43 For example, in accordance with art 4(1) of Council Regulation (EC) 593/2008 on the Law Applicable to Contractual Obligations [2008] OJ L177 (Rome I Regulation)—applicable law in the absence of choice.

44 Eg, in accordance with ibid art 4(3) or art 4(4).

45 For example, in accordance with ibid art 3.

46 Given such a forum (and respective PIL rules) allow for such a choice to be made.

47 Petra Butler, 'Article 1 CISG: The Gateway to the CISG' in Ingebog Schwenzer, Cesar Pereira and LeandroTripodi (eds), *CISG and Latin America: Regional and Global Perspectives Eleven International Publishing* (Eleven International Publishing 2016) 379, Victoria University of Wellington Legal Research Paper no 8/2017 <https://ssrn.com/abstract=2779408> accessed 14 February 2023.

48 Most likely, when the PIL rules of a forum seated in a contracting reservation State point to the law of a CISG contracting State, that contracting reservation State would not apply the CISG, but the non-uniform domestic law of the indicated State, as not being bound to apply art 1(1)(b). On the other hand, a court seated in a CISG non-reservation State, when led by its PIL rules to the law of a CISG reservation State, would most probably apply the CISG as it would be bound to apply the CISG by virtue of art 1(1)(b), and not by the reservation. In practice, the effects of such a reservation may vary depending on where the forum is seated: in a State that has not made an art 95 reservation, in an art 95 reservation State, or in a non-contracting State. However, such an analysis would require separate research in this respect. On the matter regarding an art 95 of the CISG reservation, see Małgorzata Pohl-Michałek, 'Various Perspectives Regarding the Effects of the United Nations Convention on Contracts for the International Sale of Goods' (2020) 6 Forum Prawnicze 40; CISG-AC Op no 15, 'Reservations under Articles 95 and 96 CISG' (21–2 October 2013) <https://www.cisgac.com/cisgac-opinion-no15/> accessed 14 February 2023; Ulrich G Schroeter, 'Backbone or Backyard of the Convention? The CISG's Final Provisions' in Camilla B Andersen and Ulrich G Schroeter (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of his Eightieth* (Wildy, Simmonds & Hill 2008) 425; Gary F Bell, 'Why Singapore should Withdraw Its Reservation to the United Nations Convention on Contracts for the International Sale of Goods (CISG)' (2005) 9 Singapore YB Intl L 55-73; Harry M Flechtner and Ronald A Brand, 'Opting in to the CISG: Avoiding the Redline Products Problems' in Morten B Andersen and R Frederic Henschel (eds), *A Tribute to Joseph M Lookofsky* (Djøf Publishing 2015) 95-127; Thomas Kadner Graziano, 'The CISG Before the Courts of Non-Contracting States? Take Foreign Sales Law As You Find It' in

Although it is evident that the parties may exclude the application of the Convention by virtue of Article 6 of the CISG, nevertheless, where the Convention applies via Article 1(1)(a) or 1(1)(b), its initial application is not subordinated to the will of the parties—only its subsequent application may be altered by the will of the parties in their agreement, which also is exclusively governed by the rules of the Convention.[49] This is why, after testing the material and temporal prerequisites, the adjudicator should determine whether or not the parties made use of their autonomy in accordance with Article 6 of the CISG: thus, whether they have intended and agreed to the Convention's exclusion.

It is vital to stress that, when the court fails to apply the CISG as the applicable governing law when the prerequisites for its application were clearly fulfilled, such a failure may amount to a breach of international obligations.[50] This is so since, in accordance with Article 26 of the Vienna Convention on the Law of Treaties, '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith' and subsequently in Article 27: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'[51]

This is why the State courts seated in CISG contracting States, once the prerequisites for the Convention's application are fulfilled, have a duty to apply the Convention *ex officio*—regardless of the parties' awareness in this respect. Besides, as has been submitted in the doctrine, where the CISG applies *ex officio*, the local procedural rules would be displaced where those rules would 'interfere with the duty to apply the CISG';[52] thus, the CISG would likewise prevail over the domestic procedural rules of the respective CISG contracting State.[53] There should be no doubt that this conduct is the court's duty, as imposed by public international law.

Andrea Bonomi and Gian Paolo Romano (eds), *Yearbook of Private International Law, vol. 13* (Sellier European Law Publishings 2011) 165-182.

49 Discussed below in 'The basic requirements for the possible exclusion of the Convention'.

50 For this statement and analysis in this regard, see Spagnolo, 'Iura Novit Curia' (n 13) 185, para 3.1; Spagnolo (n 10) 286; see also CISG-AC Op no 16 (n 10) para. 6.1.

51 In accordance with art 26 of the VCLT (n 8) ('[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith') and art 27 ('[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'). For this statement, see Spagnolo, 'Iura Novit Curia' (n 13) 185, para 3.1; CISG-AC Op no 16 (n 10) para 6.1; Spagnolo (n 10) 286.

52 Spagnolo (n 10) 292.

53 Spagnolo, 'Iura Novit Curia' (n 13) 292; Schroeter (n 34) 649, 655. However, in the opinion of the CISG Advisory Council, the domestic procedural rules of waiver are not displaced by the CISG, as the CISG autonomously controls its own sphere of applicability. Accordingly, its rules determine the question of its exclusion, so such an exclusion can only be made through an agreement that satisfies CISG (n 1) arts 6, 11, 14–24, 29. In this respect, see CISG-AC Op no 16 (n 10) para. 6.3. The contrary opinion states that the substantive provisions of the CISG do not preclude the use of domestic procedural doctrines, see Clayton P Gillette and Steven D Walt, 'Judicial Refusal to Apply Treaty Law: Domestic Law Limitations on the CISG's Application' (2017) 22 ULR 452.

The basic requirements for the possible exclusion of the Convention

At this point, it is vital to establish what the legal conditions are for the Convention to be excluded by the parties. The matter of exclusion is governed by Article 6 of the CISG,[54] and, in this respect, there are two key factors to be established: whether the parties intended to exclude the Convention, and whether they reached and entered into an agreement in this regard. It is important to point out that the agreement to exclude is autonomously governed by the Convention's rules itself;[55] thus, when examining the exclusion of the Convention, the adjudicator should look at its rules on contract formation and modification, as presented in Articles 11, 14–24, and 29 of the CISG as well as its interpretative provisions (Articles 7, 8, and 9 of the CISG).[56]

As far as the exclusions made during legal proceedings are concerned, the parties to the international sales contract, where the Convention applies, may agree to exclude its application in the course of litigation, though two prerequisites must be fulfilled. First, the Convention may be excluded during litigation, on the condition that this is allowed under the particular procedural law of the *lex fori*.[57] Second, as stated before, the parties must both intend to and reach an agreement to exclude the Convention. Consequently, an exclusion must amount to a mutual and conforming agreement, or an agreement to modify the previous agreement in this respect: accordingly, an agreement to exclude the Convention, which would meet the requirements of Articles: 6, 11, 14–24, and 29 of the CISG.[58]

In this respect, there are at least two scenarios: the first is when the Convention applies *ex officio* on account of Article 1(1)(a) or 1(1)(b) and the parties did not make any choice of law clause, in which case an agreement to exclude must meet the requirements of a valid offer and corresponding acceptance—thus, the requirements of Articles 14–24 CISG respectively. In the

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[54] In accordance with CISG (n 1) art 6 ('[t]he parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions').

[55] CISG-AC Op no 16 (n 10) 382, para 42; Schwenzer and Hachem (n 4) 102, art 6, para 4; Lisa Spagnolo, 'The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers' (2009) 10 Melbourne J Intl L 205; Michael Joachim Bonell, Article 6 in Bianca and Bonell (n 6) 55, para. 2.3.1; Pazdan (n 41) 113, 118, art 6.

[56] Bonell (n 55) 58, art 6; CISG-AC Op no 16 (n 10) para 2; Schlechtriem (n 6) 91, art 6, para 14; Peter Schlechtriem and Pascal Hachem, Article 6 in Schwenzer (n 7) 113, para 21; CISG-AC Op no 16 (n 10) para 5.3; Spagnolo (n 10) 304–10; P Perales Viscasillas, 'Modification and Termination of the Contract' (2005–06) 25 JL & Com 167.

[57] Fawcett, Harris and Bridge (n 28) 917, 922; Ferrari (n 12) 32; G Beate Czerwenka, *Rechtsanwendungsprobleme im internationalen Kaufrecht. Das Kollisionsrecht bei grenzüberschreitenden Kaufverträgen und der Anwendungsbereich der internationalen Kaufrechtsübereinkommen* (Duncker & Humblot 1987) 169–70; Ingeborg Schwenzer and Pascal Hachem, Article 6 in Schwenzer (n 7) 113, para 21.

[58] Schlechtriem (n 6) 91, art 6, para 14; Schwenzer and Hachem Article 6 in Schwenzer (n 7) 113, para 21; CISG-AC Op no 16 (n 10) para 5.3; Spagnolo (n 10) 304–10; Viscasillas (n 56).

second scenario, if there is already an existing agreement as to the choice of law clause, as a result of which the CISG applies, if the parties want to exclude the Convention, they must meet the requirements of Article 29 of the CISG (agreement to modify the contract). Therefore, in order to modify any agreement under the CISG, there must be an offer to modify the original contract (Article 29(1) of the CISG in connection with Article 14(1) of the CISG), and, subsequently, a valid acceptance to an offer to modify (Article 18(1) CISG).[59]

As to the acceptance to an offer (including an offer to modify the contract), the Convention provides that a statement made by, or other conduct of, the offeree indicating assent to an offer constitutes an acceptance.[60] Thus, the above allows for an implied agreement, which can be derived from assent by conduct. However, it is important to note that silence or inactivity does not in itself amount to acceptance.[61] The above likewise applies if the parties are not modifying a previously agreed choice of law clause but are simply making an agreement to exclude the Convention. Accordingly, such an exclusion, in cases where the Convention applies *ipso iure*, by operation of law, can be made only by way of an agreement and existing will of the parties in this respect. For this reason, '[the] parties cannot oust the CISG from a contract to which it already applies, without actual agreement in accordance with the standard of intent'.[62]

With respect to the above, in establishing what the parties' intent was while acting in a certain manner, following the interpretative rules of Article 8 of the CISG, the adjudicator should take into account all the relevant circumstances of the case, including the negotiations, any practices the parties have established between themselves, usages and any subsequent conduct of the parties.[63] However, determining the relevant standard of intent with respect to the Convention's exclusion during the course of legal proceedings may be problematic.

With regard to the appropriate standard of intent applied by the adjudicators when examining the choice of law clauses from the perspective of the potential intention to exclude at the time of contracting (*ex ante* exclusions), the courts, considering the appropriate approach, have tended to demand a rather high evidentiary standard of the parties' intent.[64] Accordingly, when judges are

[59] On this matter, see eg Schlechtriem (n 6) 328–36; Samuel K Date-Bath Article 29 in Bianca and Bonell (n 6) 240–4; Jadwiga Pazdan Article 29 in Pazdan (n 41) 338–40.

[60] CISG (n 1) Art 18(1), first sentence.

[61] Ibid, second sentence.

[62] CISG-AC Op no 16 (n 10) para 6.3.

[63] CISG (n 1) Art 8(3).

[64] For this conclusion, see Spagnolo (n 10) 300; CISG-AC Op no 16 (n 10) paras 3.5, 5.11, 5.12. For cases, see eg *Gasoline and Gas Oil Case*, Austria Supreme Court, 1 Ob 77/01g (22 October 2001) <https://cisg-online.org/search-for-cases?caseId=6572> accessed 14 February 2023; *SA P v AWS*, Belgium District Court Namur (15 January 2002) <https://cisg-online.org/search-for-cases?caseId=6687> accessed 14 February 2023; *Tonnellerie Ludonnaise SA v Anthon GmbH & Co Maschinenfabrik*, France Supreme Court (3 November 2009) <https://cisg-online.org/search-for-cases?caseId=7921> accessed 14 February 2023; *Construction Materials Case*, Switzerland Appellate Court Jura (3 November 2004) <https://cisg-online.org/search-for-cases?caseId=6889> accessed 14 February 2023; *BP Oil International v Empresa Estatal Petroleos de Ecuador*,

examining the potential CISG exclusion, they should only decide in favour of an exclusion if the parties' intent in this regard is 'common',[65] 'clearly implied in fact',[66] or 'certain',[67] 'real—as opposed to theoretical or factious',[68] or 'tangible intent rather than hypothetical intent'[69] (thus, not a theoretical intent),[70] especially in cases where the parties argue implicit exclusion. In this respect, the aim of the adjudicator is rather to establish the parties' true intent.

Therefore, the interpretative approach of *ex ante* exclusions is characterized by a high evidentiary standard for intent to exclude the CISG. Consequently, it seems that the post-contractual stage of excluding the Convention (*ex post* exclusion), following the principle of uniform interpretation and application of Article 6 based on Article 7(1) of the CISG,[71] should likewise involve the same standard of intent in this respect.[72] With this in mind, it must be remembered that any offer under Article 14 of the CISG, including an offer to exclude the Convention, must be sufficiently definite and must demonstrate the offeror's intention to be bound in the event of an acceptance. Accordingly, the adjudicator would have to decide whether one party pleading on the basis of the wrong law—that is, a non-unified domestic law of the CISG contracting State (rather than the

USA Federal Appellate Court, 5th Circuit (11 June 2003) <https://cisg-online.org/search-for-cases?caseId=6666> accessed 14 February 2023.

65 *Traction Levage SA v Drako Drahtseilerei Gustav Kocks GmbH*, France Appellate Court, Paris (6 November 2001) <https://cisg-online.org/search-for-cases?caseId=6619> accessed 14 February 2023.

66 CISG-AC Op no 16 (n 10) para 3.1.

67 *Ceramique Culinaire v Musgrave*, France Supreme Court (17 December 1996) <https://iicl.law.pace.edu/cisg/case/france-ca-aix-en-provence-ca-cour-dappel-appeal-court-societ%C3%A9-ceramique-culinaire-de> accessed 14 February 2023; Franco Ferrari, 'Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing' (1996) 15 JL & Com 88.

68 John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edn, Kluwer Law International 1999) 77 (where the author states that 'although an agreement to exclude the Convention need not be 'express' the agreement may only be implied from facts pointing to a real—as opposed to theoretical or fictitious—agreement'). For a similar statement see Ferrari (n 12) 23. In this respect, see also Franco Ferrari and Massimo Torsello, *International Sales Law: CISG in a Nutshell* (West Academic Publishing 2014) 33.

69 CISG-AC Op no 16 (n 10) para 3.1.

70 Honnold (n 68) 128, art 6, para 77.

71 CISG (n 1) Art 7(1) ('[i]n 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'). Within the understanding behind the notion 'promote uniformity of application', in the doctrine one can read that, in order to preserve common meaning in the interpretation of the CISG and uniformity of application of its provisions, the courts and arbitral tribunals should take into account foreign academic writings, foreign court decisions and arbitral awards. On this matter, see Schwenzer and Hachem (n 4) 123; Franco Ferrari, 'Applying the CISG in a Truly Uniform Manner: Tribunale di Vigevano (Italy)' (2001) 1 ULR 205; Franco Ferrari, 'The CISG's Interpretative Goals, Its Interpretative Method and its General Principles in Case Law (Part I)' (2013) 13(5) Internationales Handelsrecht 137; Pazdan (n 41) 133, art 7.

72 It seems a different view is presented by Liu and Ren (n 15) 911, where the authors agree to apply a different standard of intent for *ex ante* and *ex post* exclusions ('while a choice of Chinese law in the contract will not per se exclude the application of the CISG, the same choice made in court proceedings will be given such an exclusory effect, provided the parties so intend').

applicable CISG) would constitute such an offer that possibly demonstrates a clear, real, and true intent in this respect. The answer is rather negative.

As one author has rightly pointed out on this matter: 'a [f]ailure to mention the law sought to be excluded would arguably render most purported offers to modify hopelessly indefinite pursuant to Article 14 CISG'.[73] Similarly, with respect to the potential acceptance to such a 'doubtful offer', the sole fact of the other party's failure to object to such a pleading would not be equal to assent under Article 18 of the CISG in such circumstances. Accordingly, '[a] defence that answers only those arguments raised by the claimant is a long way from what is generally understood as acceptance of a unilateral attempt to modify'.[74]

Therefore, it is submitted here that the implied exclusion of the CISG does not occur without a more affirmative demonstration of the parties' intent than merely failing to plead it during the legal proceedings.[75] Accordingly, 'the interpretation of the conduct of the parties still needs to sufficiently indicate whether the parties knowingly departed from the otherwise applicable CISG or mistakenly assumed that the domestic provisions they rely on would be applicable'.[76] It is further submitted that only in the first situation can the Convention be effectively excluded during the legal proceedings; otherwise, the adjudicators should carefully contemplate alternative reasons for the parties' failure to plead or argue the Convention during proceedings, as generally the parties cannot intend to exclude the CISG unless they are aware of it.[77] This is so, because the parties' statements based on a mere ignorance cannot be considered as agreements, 'because they lack the necessary "intention to be bound"; therefore they cannot alter the content of the contract'.[78]

This is why such failure on the side of the parties' representatives during litigation should not be interpreted as a 'subsequent conduct' under Article 8(3) of the CISG, which, as a general rule, could potentially justify the parties implied intention; however, here it cannot serve to support an implied will to exclude the Convention.[79] The Convention requires a higher threshold of intent in this regard. Therefore, as far as the appropriate standard of intent as to the discussed subject matter is concerned, I agree with an opinion of the doctrine, that the mere fact that the parties base their argumentation during legal proceedings on the sole basis of a non-unified domestic law, without mentioning the CISG, does

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[73] Spagnolo (n 10) 305.

[74] Ibid.

[75] CISG-AC Op no 16 (n 10) para 5 (according to which, '[d]uring legal proceedings, an intent to exclude may not be inferred merely from a failure by one or both parties to plead or present arguments based on the CISG. This applies irrespective of whether or not one or both parties are unaware of the CISG's applicability').

[76] Schwenzer and Hachem (n 57). However, for a contrary opinion, see Liu and Ren (n 15) 908–10.

[77] Ferrari (n 12) 30–1. For a contrary view, see Liu and Ren (n 15) 908.

[78] For this statement, see Schlechtriem (n 6) 92, para 14. Similarly see Schwenzer and Hachem (n 57).

[79] See also Schroeter (n 34) 654.

not lead to an automatic conclusion that the Convention has been impliedly excluded.[80]

Accordingly, the parties must first be aware of the Convention's applicability in order to validly exclude it. For this reason, if the parties are not aware that the CISG applies to their case *ipso iure*, and when, during litigation, they build arguments on the sole basis of the non-unified domestic law (excluding the CISG), just because they believe that this is the applicable law for their case, the adjudicator should nevertheless apply the Convention, following its duty arising from the public international law to do so.[81] Therefore, any contrary judicial practice established in this regard by the courts in any of the CISG contracting States should not be followed as some sort of 'national interpretation'. Accordingly, it is submitted here that the practice would be clearly contrary to the principle of the uniform interpretation and application of Article 6 of the CISG based on Article 7(1) of the CISG.[82] Therefore, as far as the particular procedural law authorizes the court to do so, it is advised that the court could draw the parties' attention to the fact that the Convention applies,[83] in order to allow them to modify the legal basis for their submissions, or at least, so that they could reach a real agreement to exclude.

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[80] For similar statement see Ferrari (n 12) 30; CISG-AC Op no 16 (n 10) Rule 5; Spagnolo (n 10) 298–300; Schwenzer and Hachem (n 4) 113–14, para 24; Schlechtriem (n 6) 89, para 12. For case law in this respect, see *Industrial Tools Case* Germany Appellate Court Oldenburg (20 December 2007) <https://cisg-online.org/search-for-cases?caseId=7563> accessed 14 February 2023; *Golden Valley Grape Juice and Wine, LLC v Centrisys Corporation et al*, USA Federal District Court, California (21 January 2010) <https://cisg-online.org/search-for-cases?caseId=8005> accessed 14 February 2023; *Easom Automation Systems, Inc v Thyssenkrupp Fabco, Corp*, USA Federal District Court, Michigan (28 September 2007) <https://cisg-online.org/search-for-cases?caseId=7520> accessed 14 February 2023; *StencilMaster case*, Switzerland Kantonsgericht St. Gallen (15 June 2010) <https://cisg-online.org/search-for-cases?caseId=8075> accessed 14 February 2023. For a contrary view, see Liu and Ren (n 15) 908.

[81] Spagnolo (n 10) 288; Schlechtriem and Schwenzer (n 6) 5; Schwenzer and Hachem (n 4) 18, para 3; Bianca and Bonell (n 6) 56; Butler (n 6) para 2.02; Fawcett, Harris and Bridge (n 28) 917, para 16.23.

[82] See Liu and Ren (n 15) 908, where the authors support the argument whereby 'a choice by the parties of the law of the PRC as the proper law of their contract effectively excluded the application of the CISG'.

[83] Spagnolo (n 10) 308; Schwenzer and Hachem (n 57) 113–14, para 21; *Motorcycle Clothing and Accessories Case* Germany Appellate Court Köln (28 May 2001) <https://cisg-online.org/search-for-cases?caseId=6622> accessed 14 February 2023; MKAC, Russia Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry Arbitration Proceeding no 62/2002 (11 October 2002) <https://cisg-online.org/search-for-cases?caseId=6818> accessed 14 February 2023 ('[w]here in the contract for the international sale of goods there was a provision on the application of Russian law to the relationships of the parties located in CISG Contracting States, the Tribunal asked the parties representatives whether or not, when drafting such a provision in the contract, the parties meant to exclude the application of the CISG. Since the [Buyer]'s representative objected to the application of the CISG and since the CISG allows the parties to exclude its application (Article 6 CISG), the Tribunal came to the conclusion that the parties' relationships should be governed by the provisions of the Russian Federation Civil Code') (translation by Yelena Kalika). Grant (n 9) 39.

Above and beyond, it may be contentious on how to qualify the submissions of the parties' legal representatives during legal proceedings. In the doctrine, it has been observed that one may argue that the legal representatives act as the parties' agents. Consequently, they may have the power not only to litigate the dispute but also to modify the contract; thus, 'their conduct of proceedings should be sufficient for tacit exclusion, or that if counsel agree to exclude, as agents they thereby form a post-contractual exclusion agreement under Art. 6'.[84] On the other hand, however, the conduct of the legal representatives during the legal proceedings in some jurisdictions may be regarded by the courts as irrelevant. For example, in a case decided by the Supreme Court of Poland,[85] the CISG was applicable on account of Article 1(1)(a) of the CISG, where the legal representative based its arguments upon non-unified Polish law (ignoring the applicable CISG). Accordingly, the court decided to apply the Convention, emphasizing that:

> filing a suit before a Polish court, invoking Polish law in the pleadings, and not contesting the other party's reliance on a given law, are not a sufficient proof of a tacit choice of Polish law. Circumstances of that kind do not indicate an intention to submit the contract to a particular governing law. They rather constitute an expression of the parties' legal representatives, who, however, had no authority to choose the applicable law on behalf of the parties.[86]

Irrespective of whether or not the legal representatives are regarded as the parties' agents, it must still be proven that the parties were aware of the application of the Convention and consciously decided and agreed to exclude it. Otherwise, a mere failure by the parties' representatives to plead and base their arguments during litigation on the applicable CISG rules when it applies *ex officio* is 'simply a mistake on the part of the attorney'[87] or, as stated by other authors,

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[84] For this statement, see CISG-AC Op no 16 (n 10) para 6.4. The parties' intent to exclude, under most procedural laws, would mean the intent of their legal representatives; in this respect, see also Schroeter (n 34) 655. For case law, see *Boiler Case*, Austria Supreme Court (2 April 2009) <https://iicl.law.pace.edu/cisg/case/austria-ogh-oberster-gerichtshof-supreme-court-austrian-case-citations-do-not-generally-53> accessed 14 February 2023; *Rienzi & Sons, Inc v N Puglisi & F Industria Paste Alimentari SPA*, USA District Court for the Eastern District Court of New York (27 March 2014) <https://iicl.law.pace.edu/cisg/case/united-states-state-minnesota-county-hennepin-district-court-fourth-judicial-district-89> accessed 14 February 2023.

[85] *Fabric Case*, Poland Supreme Court (17 October 2008) <https://cisg-online.org/search-for-cases?caseId=8454> accessed 14 February 2023.

[86] CLOUT, Poland Supreme Court, (17 October 2008) Case law on UNCITRAL texts (A/CN.9/SER.C/ABSTRACTS/137) <https://www.uncitral.org/clout/clout/data/pol/clout_case_1307_leg-3073.html> accessed 14 February 2023.

[87] Schwenzer and Hachem (n 57) 113, para 21; *Citroen Type C 5 Case*, Austria Oberlandesgericht [Appellate Court] Linz (23 January 2006) <https://cisg-online.org/search-for-cases?caseId=7299> accessed 14 February 2023; *SO.M.AGRI sas v Erzeugerorganisation Marchfeldgemüse GmbH & Co KG*, Italy District Court Padova (25 February 2004) <https://cisg-online.org/search-for-cases?caseId=6745> accessed 14 February 2023; *Milling Equipment Case*, Germany Court of Appeal Zweibrücken (2 February 2004) <https://cisg-online.org/search-for-cases?caseId=6802> accessed 14 February 2023; *Furniture Case*, Switzerland District Court Nidwalden (3 December 1997) <https://cisg-online.org/search-for-cases?caseId=6303> accessed 14 February 2023; MKAC Russia (n 83).

a 'professional malpractice'[88] by the legal representative who has violated his client's interest.[89] This is especially true when the Convention would have been favourable to the otherwise erroneously pleaded domestic non-unified law of the CISG contracting State.[90]

Did the parties validly exclude the CISG in the cases of '*Podlasiak*' *v Yiwu Entuo* and *Ideal Rulo ve Firça Sanayi A.S. v Xinyang Hengda*?

After analysing the factual background of the cases of *PH* '*Podlasiak*' *Andrzej Cylwik v Yiwu Entuo Import and Export Firm*[91] and *Ideal Rulo ve Firça Sanayi AS v Xinyang Hengda Pork Processing Co, Ltd*,[92] together with the rules based on which the Convention should be applied *ex officio* by the courts in the CISG contracting States, it is rather evident that the courts of first instance in both of the cases clearly omitted their duty to consider the automatic application of the Convention.

Additionally, with regard to the legal requirements arising from the Convention in order to exclude its application, the parties' agreement, and the sufficient standard of intent, it is also clear that the decision made by the court of appeal in both cases was likewise incorrect. Accordingly, although the court's duty to apply the CISG at the first instance based on Article 1(1)(a) of the CISG was pointed out by the court of appeal in both cases, still, both of the courts maintained the incorrect decision to exclude the Convention, grounded on the mere failure of the counsel to plead and base their argumentation over the applicable CISG.

In '*Podlasiak*' *v Yiwu Entuo*, due to the absence of a choice of law clause in the contract, the fact that the parties' representatives at the first instance referred exclusively to the Chinese non-uniform domestic law, and that no objections were raised about the applicable law at the appeal, the court of appeal decided

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88 Schroeter (n 34) 665–6.

89 Ronald A Brand, 'Professional Responsibility in a Transnational Transactions Practice' (1997–8) 17 JL & Com 336–7; William S Dodge, 'Teaching the CISG in Contracts' (2000) 50 J Legal Education 72-94, n 5; Peter L Fitzgerald, 'The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States' (2008) 27(1) JL & Com 32; Lisa Spagnolo, 'A Glimpse through the Kaleidoscope: Choices of Law and the CISG (Kaleidoscopt Part 1)' (2009) 13 Vindobona J Intl Commercial L & Arbitration 139 (where the author states that: '[f]or lawyers, opting out as a means of avoiding an unfamiliar law is arguably an abdication of professional responsibility'). Additionally, see Spagnolo (n 55) 141.

90 See also Richard Garnett, *Substance and Procedure in Private International Law* (Oxford University Press 2012) 66 (where the author states: '[o]ften foreign law will not be pleaded out of ignorance as to its potential application or because neither party sees any tactical advantage in doing so'). However, it must be stressed that the CISG in CISG contracting States does not constitute a 'foreign law' but, rather, an inherent part of the contracting State's legal system.

91 *PH* '*Podlasiak*' (n 14).

92 *Ideal Rulo* (n 14).

that the parties had made an implicit exclusion of the CISG. On the other hand, in *Ideal Rulo ve Firça Sanayi AS v Xinyang Hengda*, although the situation was similar—the parties made no choice of law clause, and upon the first instance based their arguments exclusively upon the rules of the Chinese non-unified domestic law—this was understood by the court of appeal as an express choice of Chinese non-unified domestic law, and thus was equal to the CISG's exclusion under its Article 6. It must be stressed that this conduct (or rather omission) on the part of the parties' counsels in these cases was neither an implicit exclusion of the CISG nor an express choice of the Chinese non-unified domestic law.

Taking into consideration all the previously discussed rules on this matter, the correct approach of the judges in these cases should have been to apply the Convention, or at least to point the counsels towards the fact of its automatic application for possible further consideration. As established above, the mere fact that the parties base their argumentation during the proceedings on the sole basis of the non-unified domestic law, without mentioning the CISG, should not have led to the conclusion of the Convention's valid exclusion. Accordingly, '[s]tatements based on ignorance are not agreements, because they lack the necessary 'intention to be bound'; therefore, they cannot alter the content of the contract'.[93]

Consequently, the court should have first tested whether the parties were aware of the Convention's applicability in order to validly exclude it. With this in mind, 'under no circumstances can the fact that the parties based their arguments on a domestic sale of goods law be regarded in itself as an exclusion of the CISG where its application requirements are otherwise met. The judge is not bound by the parties' wrong interpretation of the law'.[94] Therefore, unless the parties consciously and intentionally express their autonomy to exclude the application of the CISG upon proceedings, the court should apply its rules regardless of the parties' ignorance in this respect.[95]

In conclusion, where the CISG rules are to apply automatically, the approach described above regarding the exclusion of the Convention as to the agreement and the adequate standard of intent is acceptable. This is so, even if the domestic PIL rules[96] or procedural rules[97] regarding the possible implicit choice of law accept a lower evidentiary standard of intent in this respect. The rules of the Convention must be interpreted and applied uniformly—thus, in the spirit of

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[93] For this statement, see Schlechtriem (n 6) 92, para 14. Similarly, see Schwenzer and Hachem (n 57) 113, para 21.

[94] Peter Schlechtriem and Petra Butler, *UN Law on International Sales, the UN Convention on the International Sale of Goods* (Springer 2009) 20, para 21.

[95] For a similar opinion and statement see: Schlechtriem (n 6) 92, art 6, para 14; Schwenzer and Schlechtriem (n 7) 113, art 6, para 20(d); CISG-AC Op no 16 (n 10) Rule 5; Spagnolo, 'Iura Novit Curia' (n 13) para 3.1.

[96] Schroeter (n 34) 10 (where the author states: 'CISG's exclusion under Article 6 CISG is therefore subjected to stricter requirements than an implicit choice of law governed by private international law rules, where reliance by both attorneys on the same domestic law is often considered a valid choice of law').

[97] Spagnolo (n 10) 290–2; Spagnolo, 'Iura Novit Curia' (n 13) 190, 197, para 4.

Article 7(1) of the CISG—where no domestic rules should replace such reasoning. This is why I am of the opinion that any contrary judicial practice established in this regard violates the principle of uniform interpretation and application of Article 6 of the CISG in connection with Article 7(1) of the CISG.[98]

Conclusion

It is evident that in both cases—'*Podlasiak*' *v Yiwu Entuo* and *Ideal Rulo ve Firça Sanayi AS v Xinyang Hengda*—the court of first instance and the court of appeal wrongly omitted the application of the Convention. There should be no doubt that courts seated in CISG contracting States are obliged under public international law to apply the Convention directly (*ex officio*) once the prerequisites for its application have been fulfilled. Although it is true that the parties may exclude the application of the CISG at the time of the proceedings, the failure of the parties to base their argumentation entirely on the non-unified domestic law, without mentioning the applicable rules of the Convention, does not automatically lead to a conclusion that the CISG has been validly excluded. In order to meet the requirements of Article 6 of the CISG in this respect, the adjudicators in the CISG contracting States should observe whether the parties have reached an agreement in this respect (or an agreement to modify the already existing agreement).

Moreover, they should observe whether the contracting parties present a sufficient level of intent to exclude—namely, that they consciously and intentionally express their autonomy to exclude the CISG upon proceedings. Otherwise, the court should rather apply the CISG rules regardless of the parties' ignorance in this respect. This is so even if the domestic PIL rules or procedural rules regarding the possible implicit choice of law accept a lower evidentiary standard of intent in this respect.

Alternatively, where the parties plead based on the non-unified domestic law of the CISG contracting State, as far as the particular procedural law authorizes the court to do so, the court should draw the parties' attention to the fact of the Convention's application. Accordingly, it would be advisable for the adjudicators to ask the parties, in the early stage of the proceedings, if they are aware that the Convention applies and whether they have agreed to exclude its application. If the parties, in their early pleadings, fail to plead based on the applicable CISG, the court should, either way, decide the case based on the rules of the Convention or request the modification of the legal basis of their argumentation.[99]

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[98] See note 82 above.

[99] For such a recommendation, see Spagnolo, 'Iura Novit Curia' (n 13) 221.