OVERVIEW OF CASE LAW ON THE CISH’S INTERNATIONAL SPHERE OF APPLICATION AND ITS APPLICABILITY REQUIREMENTS (ARTICLES 1(1)(A) AND (B))

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I. INTRODUCTION

The CISG’s provisions contained in Chapter I of Part I (relating to the “Sphere of Application”) are without any doubt the Convention’s most important provisions. Indeed, unless it has been decided on the basis of those provisions that the CISG applies at all, the Convention’s substantive provisions cannot be used to solve any dispute. This is why it is no surprise that the Convention’s applicability has been dealt with in many state courts and arbitral tribunals. Despite the large number of court decisions and arbitral awards concerning the issue at hand, there are many issues regarding the CISG’s applicability that have not yet been touched upon in any decision. This short paper does not, however, want to deal with all the issues of applicability, as they have already been examined very often; rather, it wants to give an overview of the issues dealt with in case law.

Before looking more closely into the case law relating to the Convention’s applicability, it is, however, necessary to briefly focus on a problem – very important in practice – that has to be solved preliminarily, i.e. before even examining whether the CISG’s applicability requirements are met, the question of whether a court has to resort to its private international law rules in order to determine the applicable substantive law or whether it has to have recourse to the Convention. According to some courts, before resorting to the private international law rules (of the forum), courts of Contracting States have to look into whether the CISG applies1; in other words, recourse to the CISG, but this is true in respect of any substantive law convention, prevails over recourse to the forum’s private international law2. One court expressly stated this: it argued that the CISG’s prevalence over the conflicts of law approach is due to the principle “lex specialis derogat generalis” and to the CISG being more specific than any private international law rule: “This specificity is due not only to the narrower scope of the [CISG] (it applies only to sale contracts whose international character depends on the location of the buyer and seller in different countries, whereas – as is commonly recognized – [the private international law rules of the forum]}

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apply to all kinds of international sales contract) but also, and above all, to the fact that rules of uniform substantive law must always prevail over the rules of private international law (independent of their sources). Uniform substantive law is more specific per definitionem than the rules of private international law because the former settles "directly" the question of applicable substantive law. It thus avoids the two-step approach – consisting first in the identification of the applicable law and then in its application – necessarily required by resort to private international law."3.

II. THE INTERNATIONALITY OF SALES CONTRACTS UNDER CISG

1. Internationality under the 1964 Hague Conventions

In order for the CISG to apply, but this was true for its predecessor, the 1964 Hague Conventions, as well, the contract for the sale of goods has to be "international"; in other words, the CISG (and, prior to the CISG, the 1964 Hague Conventions) solely applies to sales contracts deemed to be "international", a choice which has been criticized on the grounds that currently "[the] differences which one time existed between transnational sales and sales of the same goods within one legal system have no reason [to exist]."4 Although both sets of rules (CISG and 1964 Hague Conventions) apply only to "international" sales, their international spheres of application are very different. This is due to the different criteria adopted by these Conventions in order to determine the internationality of a sales contract5. Indeed, the 1964 Hague Conventions (as opposed to the CISG) considered "international" only those sales which presented two elements of internationality: a subjective and an objective one6. As far as the first element is concerned, the 1964 Hague Conventions required the parties' place of business (or, absent a place of business, their residence)7 to be located in different States, independent from the parties' citizenship.8 As for the second element, the objective one, Article 1(1) Ulis9 required that "either [the] acts constituting offer and acceptance are effected in different States, or that the goods are sold during international transports or are to be transported internationally, or that the act of offer and acceptance are made in a State other than the State of the place of delivery."10

2. The Internationality of Contracts under the CISG

It is common knowledge that the 1964 Hague Conventions' international sphere of application was criticized. This criticism undoubtedly influenced the decision of the drafters of the CISG to decide against the adoption of the objective criterion of internationality and, thus, simplify the CISG's approach. Indeed, according to the CISG, the sole criterion on to determine the internationality of a sales contract corresponds to the subjective criterion of the 1964 Conventions. Thus, under the CISG the internationality of a contract depends merely on the parties having their places of business (or habitual residences)11 in different States, as stated by several courts12. One court also pointed out that in order to be relevant, the internationality must exist at the moment of conclusion of the contract13.

It must be noted, however, that since the CISG did not adopt the approach of the 1964 Hague Conventions according to which the criteria of internationality constituted, at the same time, the only criterion of applicability, the internationality of a sales contract does not suffice to make the CISG applicable, as recently pointed out in case law14. It is for this reason, that a court15 rightly stated that it is wrong to suggest, as some authors do16, that the different States in which the parties must have their places of business in order for a sales contract to be international under CISG must also be Contracting States.

Where the "subjective international prerequisite" is missing, the CISG will not be applicable per se, even if the contract's execution involves different States,17 as has been confirmed by a German
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court decision: the court refused to apply the CISG to a case where a German buyer had acquired tickets from a German seller for the 1990 Soccer World Cup final to be handed over in Rome, on the grounds that the contract was not an international one.

On the other hand, the contract can be considered international even in those cases where the goods do not cross any border and where the parties have the same citizenship, since, as pointed out in case law, citizenship is – according to article 1(3) CISG – irrelevant in order to determine internationality, as is the civil or commercial nature of the contract or the parties, as long as the parties have their place of business in different States.

Internationality does not appear to create many problems in case law, unless an agent is involved in the conclusion of the contract. In this case it becomes necessary to identify who is party to the contract (the principal or the agent) in order to determine internationality. Since agency is, as often pointed out in case law, one of the issues that fall outside the CISG’s scope of application, it is on the basis of the law applicable by virtue of the rules of private international law of the forum that it must be decided who is party to the contract. Thus, where the agent discloses the principal and according to the applicable law this leads to the principal being the party to the contract, it is the principal’s place of business that is to be taken into account to determine whether the contract is international.

3. The “Place of Business” under CISG

Considering that by virtue of Article 1(1) CISG the internationality of a sales contract (and, thus, the applicability of the CISG) depends on the location of the parties’ places of business, the importance of the definition of “place of business” is evident. It is therefore surprising that the drafters of the CISG have not defined it, apparently due to the lack of a uniform concept acceptable to all the delegates to the Vienna Diplomatic Conference, who suggested the most disparate definitions.

Despite, however, the apparent differences in conceiving a definition of the “place of business”, there are some elements which allow for a better determination of its essence, even though one must keep in mind that there is no general abstract definition: the “place of business” has to be defined on a case-by-case basis. As a general rule it can be asserted that there is a place of business where there is a stable business organization or, as stated by the German Supreme Court (in relation, however, to the 1964 Hague Conventions), where “the center of the business activity directed to the participation in commerce” is located, which links the contracting party to the State where the business is conducted, as long as the party has autonomous power. A similar definition can be found in a much more recent court decision (this one relating to the CISG) which defined “place of business” as “the place from which a business activity is de facto carried out [...] this requires a certain duration and stability as well as a certain amount of autonomy”. That autonomous power is an element which characterizes the concept of place of business is evidenced by the fact that an arbitral award considered a contract concluded between a Chinese seller and an Austrian buyer as being international, despite the fact that the buyer had conducted the negotiations partially through its liaison office located in China: a liaison office, as pointed out by an even more recent French Supreme Court decision as well, which confirmed a decision of the Cour d’appel de Paris, must not be considered a “place of business”, since it has no distinct legal personality and, thus, no autonomy.

The other element characterizing the concept de quo, i.e., the stability requirement, has been referred to only once, without having been examined closely. Legal writers suggest, however, that from this requirement it follows that places of temporary sojourn cannot be considered “places of business”. This is why one cannot consider conference centers of exhibitions or hotels or rented offices at exhibitions as being places of business under CISG.
4. Multiple Places of Business

Although the concept of "place of business" will not cause too many problems, the exact determination of the relevant place of business does, at least in those cases where a party to the contract has more than one place of business.

The 1964 Hague Conventions did not answer the question of which among several places of business was to be considered the relevant one. This is why a dispute arose among legal scholars as to what criteria had to be used in order to solve the problem. While several legal scholars favored the view of the relevant place of business to be where the principal place of business was located, others suggested that the solution depended upon which place of business had the closest relationship with the contract.

The dispute was finally solved in 1982 by the German Supreme Court, which stated that the preferred solution was the second one and that "one must not share [...] the point of view according to which the decisive place of business is always the principal one."

Under the CISG, this dispute is unnecessary, since the Convention expressly provides for a solution of the foregoing problem. According to this solution, laid down in Article 10(a) CISG, the place of business relevant for the determination of the internationality of a sales contract is the one having the closest relationship with the contract, as recalled by a recent German court decision. The CISG has, in other words, expressly rejected the so-called "theory of the principal place of business".

However, although Article 10(a) prevents a dispute among legal scholars as to which thesis should apply ("principal place of business theory" or "closest relationship theory"), it does not solve all of the problems. Indeed, quid iuris where the contract is concluded at one place of business and has to be executed at another one? Of course, where the parties have agreed upon which place of business must be considered relevant, the problem will not arise, since that agreement is to be taken into account in determining the relevant place of business. But where there is no agreement concerning the relevant place of business, Article 10(a) CISG creates a new problem, that of how to determine the "closest relationship with the contract and its execution". In order to facilitate this task, Article 10(a) provides for some elements to be used, which, however, have not yet been employed by courts, although at least one court might have had reason to do so. According to Article 10(a) CISG, one must take into account all the circumstances known to or contemplated by the parties at any time before (or contemporaneous to) the conclusion of the contract. Consequently, one is not allowed to take into consideration the circumstances which become apparent only after the contract is concluded. Thus, it does not matter whether the places of business change after the conclusion of the contract, as pointed by the Secretariat Commentary to the Draft Convention.

Sometimes, however, the circumstances are insufficient to unequivocally determine the relevant place of business. In this line of cases it is here suggested, as no guidance can be found in case law, that the international character of a sales contract be determined by resorting to the places of business involved in the conclusion of the contract, since these places of business will always be known to both parties. However, where the parties know that the contract is performed at a place of business different than the one involved in the conclusion of the contract, the text of Article 10(a) suggests that the relevant place of business be the one where the performance takes place.

In those rare cases where the parties do not have a place of business, Article 10(b) CISG provides that in such cases one must resort to the parties' habitual residence in order to determine whether a sales contract is international, that is, one has to look at a situation of fact, i.e., the real place of sojourn for a long period of time.

5. The Knowledge of the Location of the Place of Business

As recently stated by an Italian court, for the CISG to apply it is not sufficient that parties have their places of business in different States, i.e.,

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that the sales contract be an international one. Even though it is not required that the parties be conscious of the applicability – or existence – of the CISG, Article 1(2) requires, as emphasized in a recent court decision,\(^5\) that the internationality be apparent to both parties, i.e., that the contract does not appear to be a merely domestic one. In order to determine whether this prerequisite – apparent internationality of the contract – exists, the following objective elements – exhaustively listed in Article 1(2) CISG – must be taken into account: the contract itself, the dealings between, or the information disclosed by, the parties before or at the conclusion of the contract. Thus, the Convention is not applicable "[...]

As far as the burden of proof is concerned, in a recent decision an Italian court correctly stated that the party invoking the impossibility of recognizing the international character of the sales contract (and, thus, the inapplicability of the CISG), carries it.\(^6\)

III. THE CRITERIA OF APPLICABILITY OF THE VIENNA SALES CONVENTION

1. The CISG’s “Direct” Application ex Article 1(1)(a)

As recently pointed out in case law, in order for the CISG to apply, it is not per se sufficient that the sales contract be an international one, the internationality of which has to be apparent. Article 1(1) CISG also lists two alternative requirements of applicability, at least one of which has to be met in order to lead to the applicability of the Convention.

According to the criterion set forth in Article 1(1)(a), the CISG is “directly”\(^5\) or “autonomously”\(^5\) applicable, i.e. – as stated by one court, "without the need to resort to the rules of private international law"\(^5\), when the parties have their places of business in different Contracting States, and this is true even where the parties are unaware that the States where their places of business are located are Contracting States. Thus, whenever this requirement is met (and the contract is an international one) and the parties have not excluded the CISG,\(^5\) it will be applicable.

Although this criterion did initially not lead too often to the CISG’s applicability, given the number of Contracting States to the CISG\(^6\) – sixty-two\(^6\) – it now is the prevalent basis for its application.\(^6\)

This criterion of applicability generally causes no problems. Problems may, however, arise in respect of whether a State must be considered a Contracting State or not. As stated in article 99 CISG, a State becomes a Contracting State once it has either ratified, approved or accepted or acceded to the Convention and once a twelve months period of time – fixed by the CISG itself – has elapsed. However, as far as the applicability of Part II (Formation of Contracts) of the Convention is concerned, the applicability presupposes, according to Article 100, that a State be a Contracting one before the offer is made; it is, in other words, not sufficient that a sales contract be concluded after the Convention enters into force for the Contracting States concerned, as pointed out, among others, by the Italian Supreme Court.\(^6\) The court had to decide a dispute which had arisen between an Italian seller and a German buyer in relation to a contract for the sale of fruit concluded prior to the CISG’s entry into force in Italy in 1988. According to Article 100(2), for the applicability of Part III (Rights and Obligations of Buyer and Seller), it is sufficient that either the Contracting States referred to in Article 1(1)(a) or the Contracting State referred to in Article 1(1)(b) entered the CISG into force at a date not later than that of the conclusion of the contract.

With reference to the concept of "Contracting State", it must also be pointed out that where a State declares itself not to be bound by Part II or Part III of the CISG, a possibility given under Article 92,\(^6\) it cannot be considered a Contracting
State in respect of the Part which it has excluded. Consequently, it is possible that a sales contract concluded between two parties that have their places of business in two Contracting States one of which has made a declaration according to Article 92 is either governed by the CISG as a whole or partly by the rules of the CISG and partly by the rules of domestic law, even in respect to issues normally all governed by the CISG, a situation which certainly does not favor uniformity.

The effects of the Article 92 reservation has been dealt with in several court decisions. In one case, a German court had to decide whether the CISG was applicable to a contract for the sale of 3,000 tons of nickel-copper electrolyte cathodes between a German buyer and a Finnish seller. The court held that the CISG was applicable to the rights and obligations of the parties by virtue of Article 1(1)(a), but that the issue of the contract's formation could not be governed by Part II (Formation of Contracts) of the CISG, at least not by virtue of Article 1(1)(a), since Finland had made an Article 92 reservation and therefore could not be considered a Contracting State in respect to that Part. Nevertheless, the court held that by virtue of Article 1(1)(b), to be examined more closely in the next chapter, relating to the CISG's indirect applicability, the CISG had to govern the formation as well, since the German conflict of laws rules made German law (i.e. the law of a contracting State) applicable to that issue. Similarly, a court, even though located in a State that made an article 92 reservation in respect of Part II, applied the CISG as whole, in part on the basis of article 1(1)(a) (Part III), in part by virtue of its rules of private international law leading to the law of a Contracting State (Part II).

In another case, a court had to decide whether a dispute between a Danish seller and a German buyer were to be solved by resorting to the rules of the CISG. The court held that since both Germany and Denmark were Contracting States at the moment of the conclusion of the contract, the CISG applied by virtue of Article 1(1)(a), but the the rules on formation of contract. Since Denmark had made an Article 92 reservation by virtue of which it is not bound by Part II, it cannot "be considered a Contracting State within paragraph (1) or article 1 of [the] Convention." The German court therefore resorted to its private international law rules and applied Danish domestic non uniform law to the formation of the contract. More recently, a Hungarian court as well as an arbitral tribunal took the same view.

2. The CISG's "Indirect" Application by Virtue of Article 1(1)(b) and the 1980 Rome Convention

The applicability of the CISG is not necessarily excluded where the parties do not have their places of business in different Contracting States. By virtue of Article 1(1)(b) CISG, on of the provisions that has led to major discussions, the CISG can be applicable even where one or both parties do not have their places of business in Contracting States, provided that the rules of private international law (of the forum, as pointed out by a recent Italian court decision) lead to the application of the law of a Contracting State. Consequently, where the lex fori is the law of a Contracting State in which the relevant rules of private international law of sales contracts are based upon the 1980 EEC Convention on the Law Applicable to Contractual Obligations, hereinafter: Rome Convention, as in many European countries, the CISG will generally be applicable when the law either chosen by the parties or, absent choice of law, that having the closest connection with the contract, is the law of a Contracting State.

As far as the Rome Convention's recognition of party autonomy (in the sense of choice of law) is concerned, its employment did not raise any problems, it being a concept widely acknowledged throughout European private international law codifications long before the Rome Convention's coming into force. This is why its application to international sales contracts does not cause too many difficulties, as evidenced by the fact that several courts as well as arbitral tribunals have already relied upon the parties' choice of law to make the CISG applicable by virtue of Article 1(1)(b).
Absent choice of law, the Rome Convention makes applicable the law of the country with which the contract is most closely connected,76 as pointed out by several court decisions.77 And since it is presumed that the contract is most closely connected with the country where the party who is to effect the contract's characteristic performance has its place of business78 and since the monetary obligation is generally not the characteristic one, as expressly states by a German court,79 the law applicable to international sales contracts is generally, i.e. where the presumption is not rebutted80, the law of the seller, as often pointed out in case law81, since it is the seller who has to execute the characteristic performance consisting of the transfer of ownership and the delivery of the goods, as by various courts82 and arbitral tribunals83.

3. The CISG's "Indirect" Application by Virtue of Article 1(1)(b) and the 1955 Hague Convention

It must be noted that despite the coming into force of the 1980 EEC Convention on the Law Applicable to Contractual Obligations in all EU countries, it does not mean that the issue of what law is to be applied to an international sales contract must always be solved by resorting to that Convention. Indeed, since Article 21 states that the Rome Convention "shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party", other rules might govern the foregoing issue, despite the Rome Convention being in force. Thus, in those States that entered into force the Rome Convention where the 1955 Hague Convention on the Law Applicable to International Sales of Goods is still in force, such as in France and Italy, one must resort to the rules of this Convention rather than those of the Rome Convention, as several courts have done84.

As far as party autonomy is concerned, the application of the 1955 Hague Convention rather that of the Rome Convention does not lead to diverging results, as article 285 of 1955 Hague Convention also obliges judges to acknowledge the choice of law made by the parties86. Absent choice of law, under the 1955 Hague Convention courts have to apply the law of the seller87, except in cases where the seller receives the order in the buyer's country, in which case the law of the buyer governs88.

From what has been said thus far, one general rule can be set forth: provided that the parties have not excluded the CISG and that no electio iuris occurred, the CISG should be applied in the courts of Contracting States - which did not limit the scope of Article 1(1)(b) by means of an Article 95 reservation - at least to most international sales contracts involving a seller who has its place of business in a Contracting (non reservatory) State.

4. The Impact of the Article 95 Reservation on the CISG's Applicability

The CISG's "indirect" application has been criticized,89 mainly by so-called socialist countries, which "wanted to avoid the excessive restriction of the applicability of their domestic statutes governing the relationships with foreign parties",90 but also by the United States. As a consequence of such criticism, the drafters of the CISG provided for a reservation clause, Article 95 CISG, which gives the Contracting States the option not to be bound by Article 1(1)(b).

Although the reservation has a big impact on trade relations with States that declared an article 95 reservation, in case law the reservation's effects have not been dealt with often, nor have they been dealt with in depth.

The only cases that deal with the reservation at hand merely point out that the reservation does not impact on the CISG's applicability by virtue of article 1(1)(a). Therefore, it is no surprise that courts of Contracting States that declared an Article 95 reservation applied the CISG as a whole by virtue of Article 1(1)(a) where the parties to the sales contract had their relevant places of business in different Contracting States91.
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5. The Application of the CISG by Arbitral Tribunals

In order for the CISG to be applicable in the courts of Contracting States, either the requirements set forth in its Articles 1(1)(a) or those laid down in Article 1(1)(b) must be met. There appears to be little doubt as to the applicability of these rules to arbitral tribunals. Indeed, there are several arbitral awards which apply the CISG on the grounds that both parties have their places of business in different Contracting States. There are also many arbitral awards which make the CISG applicable because the rules of private international law resorted to by the arbitrators lead to the law of a Contracting State. From this it follows that arbitration tribunals do generally apply the CISG as if they were courts located in Contracting States.

At this point, however, it is worth mentioning that some arbitral tribunals have applied the CISG even where the contract was outside the Convention's stated territorial or personal sphere of application. In one case, an arbitral tribunal applied the CISG to a series of contracts concluded in 1979, on the grounds that “[t]here is no better source to determine the prevailing trade usages than the terms of the United Nations Convention on the International Sale of Goods of 11 April 1980 [...]. This is so even though neither the [country of the Buyer] nor the [country of the Seller] are parties to that Convention.” In another case, the Iran-United States Claims Tribunal applied the CISG as part of the so-called “lex mercatoria” or as relevant trade usages to a contract concluded, again, before the drafting of the CISG. This line of cases, which opens the door to the applicability of the CISG even to cases not falling under its scope, has been rightly criticized for several reasons. It has been said, for instance, that the CISG's provisions do not necessarily reflect uniform commercial practices, but are rather the result of a careful political compromise. Most importantly, however, the application of the CISG to contracts concluded before its coming into force violates a principle which appears to be recognized by most developed legal systems according to which, absent an agreement among the parties, the law in force at the moment a contract is concluded governs the contract even if that law is modified. Therefore, one can only hope that the arbitral tribunals, not unlike State courts, hold, as a few recent arbitral awards have actually done, that the CISG be inapplicable to operative facts that occurred before the CISG's coming into force in the countries involved.

IV. CONCLUSION

This paper wanted to give an overview of existing case law on the CISG's international sphere of application and its applicability requirements, i.e. Articles 1(1)(a) and (b). On the one hand, this means that other issues relating to the CISG's sphere of application, such as its sphere of application ratione materiae and the parties' possibility to exclude the Convention's application, which has already been discussed in this law review, have not been dealt with; on the other hand, this means that only those issues relating to the CISG's international sphere of application and its applicability requirements have been touched upon that were the subject of court decisions and arbitral awards. Consequently, as far all the other issues are concerned, such as the impact of an article 95 reservation, guidance has to be sought in legal writing rather than in case law.

Endnotes

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7. See Article 1 (2) Uiss: "Where a party to the contract does not have a place of business, reference is to be made to his habitual residence." For a court decision applying the aforementioned provision, see German Supreme Court, October 22, 1980, Neue Juristische Wochenschrift 158 (1981).
8. See Article 1 (3) Uiss: "The application of the present Law shall not depend on the nationality of the parties."
9. See Article 1 (1) Uiss: "The present Law shall apply to contracts of sales of goods entered into by the parties whose places of business are in the territories of different States, in each of the following cases:
   (a) where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another;
   (b) where the acts constituting the offer and the acceptance have been effected in the territories of different States;
   (c) where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected."
11. See Article 10(b): "... if a party does not have a place of business, reference is to be made to his habitual residence."
15. See also LG Hamburg, September 26, 1990, Praxis des internationalen Privat- und Verfahrensrechts 401 (1991), where it is expressly stated that in order for a sales contract to be international under the CISG, the parties do not have to have their places of business in different Contracting States.
24. Id.
25. According to Kaczurowska, supra note 18, at 228, the definition of "place of business" is "the center of the CISG."
26. For an overview of the various definitions proposed in 1980 on the occasion of the Vienna Diplomatic Conference, see Carbene and Lopez de Gonzalo, supra note 6, at 5.
27. For this conclusion, see also G.A. Ferretti, Commento all'art. 10 della convenzione di Vienna sui contratti di vendita internazionale di beni mobili, Nuove Leggi civ. commentato 43 (1989).
28. For this requirement of stability, see, e.g., Belt, supra note 1, at 245; Carbene and Lopez de Gonzalo, supra note 6, at 5; Czerwenka, supra note 1, at 131 ff.
30. See also Carbene & Lopez de Gonzalo, supra note 6, at 5, arguing that even though it is necessary that there be autonomous power, it is doubtful whether the power must relate to the possibility of concluding the contract or whether it is sufficient that it relates to the possibility of concluding the bargaining.
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CISG's applicability to a contract concluded in

between an Italian seller and a Swiss buyer); Camera Nacional de Apelaciones
Nederlands Internationaal Privarrecht 25, 1993, OLG Oldenburg, September 22, 1993, OLG Celle, September 2, 1993, published on the Internet at <http://www.jura.uni-freiburg.de/iprl/cisgurteiletext/296.htm> (not applying the CISG since its entry into force had been delayed in that country); Reichbank Arnhem, April 15, 1993, Niederländisch Internationaals Privaatrecht 692 f. (1993) (the court held that the CISG was not applicable to a contract concluded in 1990 between a Dutch seller, since the CISG had not entered into force in the country); Reichbank Arnhem, November 12, 1992, referred to on the Internet at <http://www.cisg.law.pace.edu/cisgwa/cases/2/91121121.html> (excluding the CISG's applicability to a contract concluded between an American buyer and a Dutch seller); Rechtbank Arnhem, October 22, 1992, Nederlands Internationaal Privaatrecht 196 f. (1993) (justifying the decision not to apply the CISG to an international sales contract concluded in 1991 between an English seller and a Dutch buyer by quoting Art. 100(1)); Dutch Supreme Court, September 25, 1992, Nederlands Internationaal Privaatrecht 126 f. (1993) (the court heard that the CISG was not applicable to a contract concluded in 1986 between a French seller and a Dutch buyer); Reichbank Arnhem, September 3, 1992, Nederlands Internationaal Privaatrecht 183 (1993) (not applying the CISG to a contract concluded in 1988 in the case of a German seller and a Dutch buyer); Reichbank Arnhem, May 7, 1992, Nederlands Internationaal Privaatrecht 659 f. (1992) (not applying the CISG to a contract concluded in 1989, i.e., before the CISG's entry into force in the country, which the court had held did not apply); Hof d'Hertogenbosch, November 27, 1991, Nederlands Internationaal Privaatrecht 336 (1992) (excluding Art. 100(1); Dutch Supreme Court, May 15, 1994, published on the Internet at <http://www.cisg.law.pace.edu/cisgwa/cases/2/91121121.html> (excluding the CISG's applicability to a contract concluded in 1990 between a Dutch seller and a Swiss buyer); Camera Nacional de Apelaciones en Comercial, March 15, 1991, El derecho 307 f. (1993) (finding that the contract could not be governed by the CISG since it had not been concluded prior to its entry into force); Italian Supreme Court, October 24, 1998, Foro italiano 2879 f. (1998) (the court held that the CISG could not govern the contract between an Italian seller and a German buyer that had entered into force before the CISG's coming into force and, thus, the requirements laid down in Art. 100 (1) were not met).
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73. See, however, the decision of the Tribunal de Monza, March 29, 1993, Foro italiano 916 ff. (1994), which expressly states that the rules of private international law to which Article 1(1)(b) refers cannot be applied when the parties have expressly chosen the law applicable to their contractual relationship; for strong criticism, see F. Ferrari, Uniform Law of International Sales: Issues of Applicability and Private International Law, 15 Journal of Law and Commerce 135 ff (1995).

74. See Hof Beroep Gent, May 17, 2002, published on the Internet at <http://www.law.kuleuven.ac.be/int/tradetlaw/WK/2002-05-17.htm> (applying the CISG due to the choice of French law as the applicable law); French Supreme Court, December 17, 1996, Revue critique de droit international privé 721 f. (1997) (annulling the appellate's court decision not to apply the CISG to a contract concluded between a Dutch seller and an Irish buyer which contained a choice of law clause leading to the law of a Contracting State); Rechtbank s'Gravenhage, June 7, 1995, Nederlands Internationaal Privaatrecht 687 (1995) (applying the CISG due to the choice of Dutch law as the applicable contract); OLG Köln, February 22, 1994, Recht der internationalen Wirtschaft 972 f. (1994) (applying the CISG to a contract concluded between a Dutch seller and a German buyer by virtue of the parties' choice of German law as the applicable law and, thus, the law of a Contracting State); OLG Düsseldorf, January 8, 1993, Neue Juristische Wochenschrift Rechtsprechungs-Report 1146 ff. (1993) (applying the CISG -- by virtue of the choice of German law -- to a contract concluded between a Turkish seller and a German buyer at a date at which Germany was a Contracting State but not Turkey).

75. See, e.g., Schiedsgericht der Handelskammer Hamburg, March 21, 1996, Monatschrift für deutscher Recht 781 ff. (1996) (erroneously applying the CISG to a contract concluded between a German buyer and a Chinese seller by virtue of the [hypothetical] choice of German law as the applicable law to the contract; since the parties had their place of business in different Contracting States, the CISG should have been held applicable by virtue of Article 1(1)(a) and 1(1)(b)); ICC Court of Arbitration, arbitral award n° 8324, Journal du droit international 1019 ff. (1996) (applying the CISG to a sales contract by virtue of the choice of French law, the law of a Contracting State, as the applicable law).

76. See Article 4(1) EEC Convention: "To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another part of that country may be, by way of exception, governed by the law of that other country."


78. See Article 4(2) EEC Convention.

79. For this statement in case law, see OLG Koblenz, January 16, 1992, Recht der internationalen Wirtschaft 1024 (1992), expressly stating that "the payment of money does never constitute the characteristic performance".

80. For a case in which the presumption contained in article 4(2) of the Rome Convention was rebutted and the law of the buyer was applied rather than the law of the seller, see LG Kassel, June 22, 1995, published on the Internet at <http://www.jura.uni-freiburg.de/iprlcisg/urteile/text370.htm>.


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84. In this respect see, e.g., Trib. Pavia, December 29, 1999, Corriere giuridico 932 f. (2000), (stating that in Italy "the conflict of law rules relating to international sales are not those provided by the Rome Convention; instead, one must look to the Hague Convention of 15 June 1955 (ratified by Law of 4 February 1958 n° 50, entered into force in Italy on 1 September 1964), since by virtue of Article 21 of the Rome Convention, the Hague Convention takes precedence over the conflict rules of the Rome Convention".

85. See article 2 of the Hague Convention: "A sale shall be governed by the domestic law of the country designated by the Contracting Parties. Such designation must be contained in an express clause, or unambiguously result from the provisions of the contract. Conditions affecting the consent of the parties to the law declared applicable shall be determined by such law."


89. R. Luzzatto, Vendita (dir. internaz. priv.), in 46 Enciclopedia del diritto 510 (Milan, 1993).


92. For an arbitral tribunal applying the CISG to international sales contracts both parties to which had their place of business in Contracting States, see ICC Court of Arbitration, arbitral award n° 9897, ICC Bulletin 109 f. (2000) (location of the parties' places of business not indicated); Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, arbitral award n° Vb/97/142, Transportrecht-Internationales Handelsrecht 16 (2000) (applying the CISG to a contract between a Hungarian seller and an Austrian buyer); Hungarian Chamber of Commerce Court of Arbitration, December 5, 1995, published on the Internet at <http://www.unilex.info/case.cfm?pid=1&docasea1id=1811&step=FullText> (applying the CISG to a contract between a Hungarian seller and an Austrian buyer); ICC Court of Arbitration, arbitral award n° 7531, published on the Internet at <http://www.unilex.info/case.cfm?pid=1&docasea1id=1399&step=FullText> (applying the CISG to a contract concluded between an Austrian buyer and a Chinese seller on the grounds that the parties had their place of business in two Contracting States); ICC Court of Arbitration, arbitral award n° 7251, published on the Internet at <http://www.unilex.info/case.cfm?pid=1&docasea1id=1405&step=FullText> (applying the CISG by virtue of Article 1(1)[b] CISG, since the parties had their place of business in different Contracting States, namely Yugoslavia and Italy); ICC Court of Arbitration, arbitral award n° 7153, 14 Journal of Law and Commerce 217 f. (1995).

93. See Schiedsgericht der Handelskammer Hamburg, March 21, 1996, Recht der internationalen Wirtschaft 766 f. (1996) (applying the CISG by virtue of Article 1(1)[b] to a contract, concluded between a German buyer and a Hong Kong seller, which contained a choice of law clause making applicable the law of Germany, a Contracting State to the CISG); ICC Court of Arbitration, arbitral award n° 8324, Journal du droit international 1019 f. (1996) (applying the CISG by virtue of Article 1(1)[b]); ICC Court of Arbitration, arbitral award n° 7660, ICC Bulletin 69 f. (November 1995) (applying the CISG on the grounds that the parties chose the law of a Contracting State as the applicable law and, thus, the requirements set forth in Article 1(1)[b] were met); ICC Court of Arbitration, arbitral award n° 7565, Unilex (applying the CISG to an international sales contract by virtue of the choice of law of the parties leading to the law of a Contracting State); Internationales Schiedsgericht des Bundeswirtschaftskammer der gewerblichen Wirtschaft Wien, June 15, 1994, Recht der internationalen Wirtschaft 591 f. (1995) (applying the CISG by virtue of a choice of law which led to the law of a Contracting State); ICC Court of Arbitration, arbitral award n° 7197, Journal du droit international 1028 f. (1993) (applying the CISG by virtue of Article 1(1)[b] to a contract concluded between an Austrian seller and a Bulgarian buyer); ICC Court of Arbitration, arbitral award n° 6653, Journal du droit international 1040 f. (1993) (applying the CISG to a German-Syrian contract by virtue of the parties' choice of French law).
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95. Id.


97. For another award where the CISG were referred to as a reflection of "general principles of international commercial practice and usages", see ICC Court of Arbitration, arbitral award no 7331, ICC Bulletin 73 ff. (1995).

98. See, e.g., J.C.Reitz, A History of Cutoff Rules as a Form of Caveat Emptor: Part I -- The 1980 U.N. Convention on the International Sale of Goods, 36 American Journal of Comparative Law 471 note 127 (1988), stating that "[m]erchants' custom does not appear to have played as significant a role in the drafting of the CISG. Proponents of the notice rule, for example, do not appear to have based their arguments to any significant extent on custom."

99. See R.Hyland, Commentary on ICC award 5713/1989, in ICM-Guide to Practical Applications of the UN Convention on Contracts for the International Sale of Goods, Deventer Suppl. 9 (April 1994). Case Commentaries, at 11, stating, with reference to the provisions of the CISG applied by the ICC Court of Arbitration in arbitral award in no 5713, that "the source of the CISG's conformity provisions was not a uniform commercial practice, as found, for example, in standard terms frequently employed in international commercial contracts. Rather, those provisions represent a careful political compromise between those states that demanded shorter periods of inspection and notice of defects and those states that had hoped that the CISG would permit even longer periods. In other words, there is no reason to believe that the CISG rules on this question rest on the generalized trade practice."

100. See Hyland, preceding note, at 12-13, stating that "[d]eveloped legal systems generally apply to a contract the law that was in force at the time the contract was concluded [...]. The notion of freedom of contract is thought to mandate that, absent very good reasons, the law in force at the time the contract is concluded will continue to govern that contract despite modifications in the applicable law. Thus, the CISG could not be applied, even by analogy, to the contract."

101. See, for instance, ICC Court of Arbitration, arbitral award no 6281, Journal du droit international 1054 ff. (1991) (holding that the CISG was not applicable to a contract concluded in 1987 between an Egyptian seller and a Yugoslav buyer).