

Various Perspectives Regarding the Effects of the United Nations Convention on Contracts for the International Sale of Goods



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The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) was adopted in order to provide uniform rules governing the international sale of goods. As of November 2020, UNCITRAL and the UN report that 94 States have adopted the CISG, with Portugal being the latest State to have acceded to the CISG.¹ This is an impressive number of Contracting States. The CISG applies to contracts for the sale of goods between parties whose places of business are in different States, where the States are CISG Contracting States (Article 1(1)(a)). Moreover, it applies to contracts for the sale of goods when the contracting parties have their places of business in different

States and when the rules of private international law lead to the application of the law of a CISG Contracting State (Article 1(1)(b)). However, at the time of ratification, the prospective Contracting States are given the possibility of making additional reservations, including one set out in Article 95 CISG, which limits the application of Article 1(1)(b) of the Convention. Although there are some CISG Contracting States that initially applied the reservation but have since withdrawn it,² there are still a few Contracting States, including the United States, where reservations remain.³

² Examples are: Canada and the Czech Republic.

³ The remaining Article 95 CISG Reservation States are: Armenia, the Lao People's Democratic Republic, Saint Vincent and the Grenadines, Singapore, Slovakia and the United States of America. On 16th January 2013, the Government of the People's Republic of China notified the Secre-

¹ Portugal accepted the CISG on 23rd September 2020, coming into force on 1st October 2021. See: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=X-10&chapter=10&clang=_en (10.12.2020).

In addition, it appears there are still new Contracting States, such as the Lao People's Democratic Republic, which decided to make the reservation upon adopting the CISG.⁴ This paper presents various approaches regarding the interpretation of the effects of the reservation set out in Article 95 CISG, which, in fact, challenge the principle of the uniform interpretation and application of the Convention's provisions. The author argues that the Article 95 CISG reservation leads to increased confusion and problematic conflict of law issues that bring more chaos than benefits.

Introduction

The creation and successful ratification of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter: "CISG" or the "Convention"), was a 'uniform answer' to the diversity of the national legal systems and their respective trade laws. It was drafted with the aim of facilitating international transactions and providing a neutral and uniform set of rules that are specifically tailored to the needs of B2B international sales contracts.⁵ To protect the uniformity principle, the Convention contains its own autonomous methodology of interpreting its rules, placing an obligation upon the adjudicator to recognise the Convention's international character and the need to observe uniformity in its interpretation and application.⁶ Since the CISG came into force on 1st January 1988,⁷ the number of CISG Contracting

States has risen to an impressive 94 States,⁸ which includes major trading countries such as China and the United States.⁹ In this respect, the significant number of States that have ratified the Convention makes the CISG one of the most potentially-applicable instruments in international commercial contracts in B2B relations around the world. This is so because, once a State adopts and signs (ratifies) the Convention, the CISG provisions automatically become part of that Contracting State's national legal system, and therefore part of the domestic law of contracts of that State.¹⁰ Accordingly, when the prerequisites for applying the Convention are met,¹¹ the courts seated in CISG Contracting States have to apply the CISG directly,¹² as a special part of the substantive sales law.¹³

The Convention applies to sale of goods contracts with an international aspect. The "internationality"

tary-General of its decision to withdraw its declaration made upon approval, with respect to the Article 95 CISG. Information is based on the official website: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10 (26.10.2020).

- 4 The Lao People's Democratic Republic accepted and ratified the CISG on 24th September 2019.
- 5 I. Schwenzer & P. Hachem, in: I. Schwenzer (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford 2016, p. 23, para. 14.
- 6 In accordance with Article 7(1) CISG: "[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".
- 7 The CISG was signed at the diplomatic Conference in Vienna on 11th April 1980 and came into force as a multilateral treaty on 1st January 1988.

8 See: the official web page of the United Nations Commission on International Trade Law and the current status of the State's ratification of the CISG, available at: https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status (26.10.2020).

9 Within the European Community, 25 out of the 27 EU Member States have joined the CISG with the exception of Ireland and Malta.

10 Undisputed, see for example: P. Schlechtriem, in: P. Schlechtriem, I. Schwenzer (eds.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford University Press, Oxford 2005, p. 5; M.J. Bonell, in: C.M. Bianca & M.J. Bonell (eds.), *Commentary on the International Sales Law. The 1980 Vienna Convention*, Milan 1987, p. 56; A.E. Butler, *A Practical Guide to the CISG. Negotiations through Litigation*, New York 2007, para. 2.02.

11 The CISG applies solely to cross-border situations, when the territorial sphere of application (Article 1 CISG), substantive sphere of application (Articles 2–5), or its temporal sphere of application (Article 100 CISG) are fulfilled. The CISG is not to be applied when the parties decide to opt-out from its provisions by virtue of Article 6 CISG.

12 See: I. Schwenzer, in: I. Schwenzer (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford 2010, p. 20, 24.

13 T. Kadner Graziano, "The CISG Before the Courts of Non-Contracting States? Take Foreign Sales Law As You Find It", *Yearbook of Private International Law* 13, 2011, p. 166.

of a sale of goods contract is determined “geographically”,¹⁴ meaning that the decisive factor will be the parties’ place of business.¹⁵ In this respect, Article 1 of the CISG sets out two situations where it applies. With respect to the first situation, which is described in Article 1(1)(a) CISG, the Convention applies to contracts for the sale of goods between parties whose places of business, at the time of concluding the contract,¹⁶ are in different states, and where both those

As far as Article 1(1)(b) CISG is considered, it has been subject to criticism, or rather concern, due to the fact that its provision considerably expands the CISG’s sphere of application.¹⁸ More specifically, during the Vienna Diplomatic Conference when the CISG was being negotiated,¹⁹ the representatives of socialist countries expressed a concern that, for countries with such a system, an agreement to the rule expressed in the current Article 1(1)(b) CISG, would result in the



UN Convention on Contracts for the International Sale of Goods (CISG) was a ‘uniform answer’ to the diversity of the national legal systems and their respective trade laws.

states are CISG Contracting States. With respect to the second situation, Article 1(1)(b) CISG allows the Convention’s sphere of application to be extended to parties from the CISG non-Contracting States in situations when the rules of private international law lead to the application of the law of a Contracting State. The reference to a “Contracting State”, in the language of the Convention, signifies a State that has ratified, accepted and approved the CISG.¹⁷

exclusion of their special legislation that was enacted to govern international trade transactions in such countries.²⁰ Accordingly, it would mean that those countries would most probably not have ratified the Convention at the time in the 1980s, due to the effect that Article 1(1)(b) would have had on their special legislation.²¹ As a result of the above, the drafters of the Convention decided to create the possibility of an additional State reservation, which is reflected in Article 95 CISG. Under that reservation: “[a]ny State may

14 E.g.: I. Schwenzer & P. Hachem, in: I. Schwenzer (ed.), *Commentary on the UN Convention...*, 2016, p. 18, para. 2.

15 Where the parties have more than one place of business, see Article 10 CISG.

16 I. Schwenzer & P. Hachem, in: I. Schwenzer (ed.), *Commentary on the UN Convention...*, 2016, p. 29.

17 See: Article 91 CISG. However, a Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II (the rules on the formation of the contract), or that it will not be bound by Part III of the Convention, thus such a State is not to be considered a Contracting State within paragraph (1) of Article 1 of this Convention in respect of matters governed by the Party that the declaration applies to (Article 92 CISG).

18 F. Ferrari, *Contracts for the International Sale of Goods. Applicability and Applications of the 1980 United Nations Convention*, Leiden 2012, p. 84; P. Huber, in: P. Huber & A. Mullis (eds.), *The CISG. A New Textbook for Students and Practitioners*, Munich 2007, p. 54.

19 United Nations Conference on Contracts for the International Sale of Goods took place in Vienna, from 10th March to 11th April 1980.

20 See: United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10th March – 11th April 1980 – Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee – United Nations Document A/CONF.97/19, 1981, p. 229, para. 80.

21 *Ibidem*, p. 229, para. 81.

declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by sub-paragraph (1)(b) of article 1 of this Convention.” Thus the principal purpose of the reservation under Article 95 was to exclude the reserving State’s obligation under public international law to apply the Convention by operation of Article 1(1)(b).²²

The reason set out above as to why the Article 95 reservation was added to the final version of the Convention makes it clear that, at the time when the Convention was drafted, some countries might have had justified reasons for making such a reservation²³ – at least back then in the 1980s. In the case of China, it appears that no official reason for applying the reservation has ever been expressed,²⁴ although some authors state it was also due to a special enactment that China made in the 1980s. According to them, the enactment and subsequent reservation was done to protect “immature traders” from the rapid economic changes from a planned to a market-based economy.²⁵ However, given the years that have passed

since that argument held water, and considering the great experience of Chinese courts and arbitral tribunals to resolve disputes where the CISG applies,²⁶ it has led many authors to discuss China’s possible withdrawal from the Article 95 CISG reservation,²⁷ as it effectively did in the case of the Article 96 CISG reservation.²⁸ It seems that, on 16th January 2013, the Government of the People’s Republic of China notified the Secretary-General of its decision to withdraw its declaration made upon approval, with respect to Article 95 CISG.²⁹ In the case of other countries that

that: “[t]he fact that the United States had made the Art. 95 reservation may also be a factor that influenced the [People’s Republic of China] to follow suit and make such a reservation as well).”

22 See: CISG-AC Opinion No. 15, Reservations under Articles 95 and 96 CISG, Rapporteur: Professor Doctor Ulrich G. Schroeter, University of Mannheim, Germany. Adopted by the CISG Advisory Council following its 18th meeting, in Beijing, China on 21st and 22nd October 2013; U.G. Schroeter, “Backbone or Backyard of the Convention? The CISG’s Final Provisions”, in: C.B. Andersen & U.G. Schroeter (eds.), *Sharing International Commercial Law across National Boundaries. Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, London 2008, p. 440.

23 The Socialist countries at that times such as Czechoslovakia, German Democratic Republic. See also: M. Evans, in: C.M. Bianca & M.J. Bonell (eds.), *Commentary on the International Sales Law. The 1980 Vienna Convention*, Milan 1987, p. 655.

24 Pan Zhen, “China’s Withdrawal of Article 96 of the CISG. A Roadmap for the United States and China to Reconsider Withdrawing the Article 95 Reservation”, *U. Miami Bus. L. Rev.* 141, 2016, p. 155.

25 Ibidem. See also: Xiao Yongping & Long Weidi, “Selected Topics on the Application of the CISG in China”, *Pace International Law Review* 20, 2008, p. 66. However, see: F.G. Mazzotta, “Reconsidering the CISG Article 95 Reservation Made by the United States of America”, *International Trade and Business Law Review* 17(1), 2014, p. 443, fn. 7, which states

26 See: an official database of CISG cases resolved by Chinese courts: <http://www.cisg.law.pace.edu/cisg/text/casecit.html#china> (26.10.2020).

27 See for example: Pan Zhen, “China’s Withdrawal of Article 96 of the CISG...”; Xiao Yongping & Long Weidi, “Selected Topics...”; Li Wei, “On China’s Withdrawal of Its Reservation to CISG Article 1(b)”, *Renmin Chinese Law Review* 300(2), 2014.

28 On 16th January 2013, China deposited an instrument with the Secretary-General of the United Nations withdrawing its “written form” declaration, which took effect on 1st August 2013. See: <https://www.cisg.law.pace.edu/cisg/countries/entries-China.html> (26.10.2020).

29 The China’s withdrawal from the Article 95 CISG reservation is not entirely clear to the author for several reasons: firstly, due to the wording used on the official UN webpage on this matter: “The Government of the People’s Republic of China notified the Secretary-General on 16th January 2013 of its decision to withdraw the following declaration made upon approval with respect to Article 11 as well as the provisions in the Convention relating to the content of Article 11: The People’s Republic of China does not consider itself to be bound by sub-paragraph (b) of paragraph 1 of article 1 and article 11 as well as the provisions in the Convention relating to the content of article 11.” This is rather unclear, as Article 11 CISG relates to issues regarding Article 96 CISG reservation and freedom of form requirement, thus does not relate to issues regarding Article 1(1)(b) CISG. Secondly, since 16th January 2013, following the literature on this matter, there are several articles where the authors gave China as an example of a country that retains its Article 95 CISG reservation. Thirdly, such a potential withdrawal is

still apply the Article 95 CISG reservation, the motives are vague.³⁰

The other important trading country that, as a CISG Contracting State, decided to make an Article 95 CISG reservation is the USA. The recommendation for the reservation was given by the American Bar Association and is somewhat surprising to the author. Apparently the reservation was made in order to "...promote maximum clarity in the rules governing the applicability of the Convention"³¹, as it was alleged that the rules of private international law, on which applicability under sub-paragraph (1)(b) depends, are subject to uncertainty and international disharmony.³² In practice, however, the effects of the Article 95 CISG reservation have turned out to make things far from being clear, certain or even uniform in its interpretation or application. There is a dispute in the doctrine and case law as to the extent to which the discussed res-

ervation narrows the Convention's application. This is due to the fact that the effects of such a reservation may vary depending on where the forum is situated: in a Contracting State that has not made such a reservation, in an Article 95 Reservation State, or in a non-Contracting State. As will be presented below, the reservation causes more confusion and disharmony in its uniform interpretation and application than any advantages it can possibly bring. The author will firstly present the mechanisms of the direct and indirect application of the Convention, and then will present various views with respect to the Article 95 CISG reservation, depending on where the forum is seated, following the concluding remarks.³³

1. Article 1 CISG – direct and indirect application

An adjudicator seated in a CISG Contracting State, when hearing an international commercial case, has to determine the Convention's potential application while examining its personal,³⁴ territorial,³⁵ material,³⁶ and temporal³⁷ prerequisites. Moreover, the court should determine whether the parties' have used their right (autonomy) to exclude the Convention from its application under Article 6 CISG.³⁸ With respect to the territorial scope of application, two possible paths of application, direct and indirect, are presented in Article 1 CISG.

As far as the direct path of application is concerned, it is presented in Article 1(1)(a) and it reads: "[t]his Convention applies to contracts of the sale of goods between parties whose places of business are in different States:(a) when the States are Contracting States." In accordance with the above provision, the state

not indicated on the UNCITRAL's official webpage, thus in fact, presenting China as an Article 95 Reservatory State: https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status. On the other hand, following the wording of the official UN webpage, mentioning "sub-paragraph (b) of paragraph 1 of article 1" as withdrawn, the interpretation leads to a conclusion that the Article 95 reservation indeed lost its effect with respect to China on 1st August 2013 (by virtue of Article 97(4) CISG). See: China, fn 12 on: <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&msgid=X-10&chapter=10&clang=en#12>.

30 E.g. the reservation made by Saint Vincent and the Grenadines and Singapore, as one author stated: "[i]t is, however, far less clear why some other countries have made such a reservation – the United States, Saint Vincent and the Grenadines and Singapore." G.F. Bell, "Why Singapore Should Withdraw Its Reservation To The United Nations Convention On Contracts For The International Sale Of Goods (CISG)", *Singapore Yearbook of International Law and Contributors* 55(9), 2005, p. 58–59.

31 The public statement of the reasons for the Article 95 declaration is found in Appendix B to the legal analysis accompanying President Ronald Reagan's 1983 message to the Senate: U.S. State Department's 1983 Letter of Submittal (S. Treaty Doc. No. 98–99, 98th Cong., 1st Sess. Appendix B, available at <http://www.cisg.law.pace.edu/cisg/biblio/reagan.html>, 26.10.2020).

32 Ibidem.

33 Some issues presented in this paper were partially discussed by this author at the "4th Sino-Polish Seminar on Comparative Law – The Theory and Practice of Contract Law" which was held between 25–26th April 2019 at the Chinese Academy of Social Sciences Law Institute in Beijing.

34 Article 1(1)(a) CISG.

35 Ibidem.

36 Articles 2–5 CISG.

37 Article 100 CISG.

38 In accordance with Article 6 CISG: "[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."

courts seated in a CISG Contracting State³⁹ are to apply the CISG not as a foreign or international law, but as a unified part of its state law, applicable directly and autonomously.⁴⁰ Therefore, if a dispute arises and the prerequisites of the Convention's application are met, the state court of the CISG Contracting State should not give recourse to its domestic rules of private international law (conflict of laws rules), but should apply the Convention directly,⁴¹ which is also supported by the official records⁴² of the 1980 United Nations Conference. This is a result of the fact that courts seated in CISG Contracting States are bound by the rules of public international law⁴³ to apply the provisions of the Convention where the prerequisites of its application are met, in accordance with the principle of *iura novit curia*, i.e. even when the parties themselves are not aware of it⁴⁴ or fail to plead it.⁴⁵

With respect to the second, indirect path of application, it is presented in Article 1(1)(b) CISG, which

states that: “this Convention applies to contracts of sale of goods between parties whose places of business are in different States: (b) when the rules of private international law lead to the application of the law of a Contracting State.” With respect to the understanding behind the notion “private international law” which is used in Article 1(1)(b), when the Convention refers to the PIL rules, it refers rather to the forum's domestic concept of PIL rules.⁴⁶ Accordingly, the PIL rules of the forum may be either merely the domestic PIL rules or uniform PIL rules⁴⁷ embodied in an international agreement (convention) or any other international act of a regional nature.⁴⁸

Therefore, in the event of the indirect application of the Convention, it may also apply through the “gateways”⁴⁹ of PIL rules, namely by virtue of Article 1(1)(b), so when the PIL rules lead to the application of the law of a CISG Contracting State. For that reason, the PIL rules are essential, since they are a precondition for applying the Convention. As a result, Article 1(1)(b) CISG allows the Convention's sphere of application to be extended to parties from the CISG non-Contracting States, in situations when the PIL rules of a respective forum lead to the application of the law

39 A CISG Contracting State is a state that has ratified the Convention.

40 I. Schwenzer, in: I. Schwenzer (ed.), *Commentary on the UN Convention...*, 2010, p. 18; M. Bridge, “Uniform and Harmonized Sales Law. Choice of Law Issues”, in: J.J. Fawcett, J.M. Harris & M. Bridge (eds.), *International Sale of Goods in the Conflict of Laws*, New York 2005, p. 916, para. 16.22.

41 See: I. Schwenzer, in: I. Schwenzer (ed.), *Commentary on the UN Convention...*, 2010, pp. 20, 24.

42 See: Official Records – Document A/CONF.97/C.2/L.7, p. 15.

43 The courts in the CISG Contracting States are “treaty-bound” to apply the Convention directly, See: M. Bridge, “Uniform and Harmonized Sales Law...”, p. 917, para. 16.23.

44 With regard to Article 1(2) CISG: “[t]he fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract”.

45 See also: M. Bridge, “Uniform and Harmonized Sales Law...”, p. 917, para. 16.22; L. Spagnolo, “Iura Novit Curia and the CISG. Resolution of the Faux Procedural Black Hole”, in: I. Schwenzer & L. Spagnolo (eds.), *Towards Uniformity. The 2nd Annual MAA Schlechtriem CISG Conference*, The Hague 2011, para. 3.1. See also: Germany 31st March 2008 Appellate Court Stuttgart (Automobile case), available at: <http://cisgw3.law.pace.edu/cases/080331g1.html> (26.10.2020).

46 F. Ferrari & M. Torsello, *International Sales Law – CISG in a nutshell*, Minnesota 2014, p. 79; F. Ferrari, *Contracts for the International...*, p. 72–75; See also: Italy 12th July 2000 District Court Vigevano (Rheinland Versicherungen v. Atlarex), available at: <http://cisgw3.law.pace.edu/cases/000712i3.html>; Italy 25th February 2004 District Court Padova (Agricultural products case), available at: <http://cisgw3.law.pace.edu/cases/040225i3.html>; Italy 26th November 2002 District Court Rimini (Al Palazzo S.r.l. v. Bernardaud di Limoges S.A.), available at: <http://cisgw3.law.pace.edu/cases/021126i3.html> (all 26.10.2020).

47 P. Huber, in: P. Huber & A. Mullis (eds.), *The CISG...*, p. 52; I. Schwenzer, in: I. Schwenzer (ed.), *Commentary on the UN Convention...*, 2010, p. 41, art. 1, para. 32.

48 E.g.: The 1955 Hague Convention on the Law Applicable to International Sales of Goods, the 1980 Rome Convention on the Law Applicable to the Contractual Obligations, or the Rome I Regulation on the Law Applicable to Contractual Obligations.

49 P. Butler, “Article 1 CISG – The Gateway to The CISG”, *Victoria University of Wellington Legal Research Papers* 8, 2017, p. 379–395.

of a CISG Contracting State. Accordingly, it is feasible that the CISG would apply when just one or neither party has its place of business in a CISG Contracting State, but where the PIL rules of the forum lead to the law of a CISG Contracting State.⁵⁰ Naturally, this only applies as long as the other prerequisites of Article 1(1) CISG are fulfilled (sale of goods contract, parties with places of business in different states).

a choice to be made. At this point, it must be noted that, when the court hears an international case, irrespective of whether it will be the court seated in a CISG Contracting State or a CISG non-Contracting State, it will apply its own PIL rules.⁵⁵ If this is the case, as long as the other requirements of Article 1 CISG are met, and the PIL rules were to lead to the law of a CISG Contracting State applying, then the rules of



The principal purpose of the reservation under Article 95 was to exclude the reserving State's obligation under public international law to apply the Convention by operation of Article 1(1)(b).

The Convention may apply under PIL rules⁵¹ either by virtue of an objective connecting factor, such as the law of the seller's place of business,⁵² or the law that has the closest connection to the particular contractual relationship.⁵³ Furthermore, the CISG may apply via PIL rules by virtue of a subjective connecting factor,⁵⁴ i.e. through the parties choosing the law of the contract as the law of a CISG Contracting State, if the forum (and respective PIL rules) allow for such

the CISG would apply. The only difference to the above is that the court seated in a CISG Contracting State is bound by the provisions of the Convention. Therefore, such a court is bound to apply the provisions of Article 1(1)(b) CISG directly (provided that the State did not make a reservation under Article 95 CISG).⁵⁶ Conversely, a court in a CISG non-Contracting State is not bound by the rules of the Convention, and so is not bound to apply Article 1(1)(b) CISG directly. It would rather apply its own PIL rules, and if those lead to the application of the law of a CISG Contracting State, then that court should apply the Convention as a foreign law,⁵⁷ thus indirectly.

50 See: Official Records – Document A/CONF.97/C.2/L.7, p. 15, art. 1, para. 7; P. Schlechtriem, *Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods*, Vienna 1986, p. 24.

51 Within the EU Community: Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17th June 2008 on the law applicable to contractual obligations (Rome I). Rome I has been governing law in almost all of the EU Member States since 2009, with the exception of Denmark – where Rome Convention on the Law Applicable to Contractual Obligations applies.

52 E.g.: in accordance with Article 4(1) Rome I Regulation – Applicable law in the absence of choice.

53 E.g.: in accordance with Article 4(3) or 4(4) Rome I Regulation.

54 E.g.: in accordance with Article 3 Rome I Regulation (freedom of choice).

55 F. Ferrari, "PIL and CISG. Friends or Foes?", *Journal of Law and Commerce* 31, 2012–2013, p. 58.

56 Under Article 95 CISG: "[a]ny State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by sub-paragraph (1)(b) of article 1 of this Convention", which will be looked at in more detail below.

57 I. Schwenzer & P. Hachem, in: I. Schwenzer (ed.), *Commentary on the UN Convention...*, 2016, p. 19, para. 4; P. Huber, in: P. Huber & A. Mullis (eds.), *The CISG...*, p. 53; L. Spagnolo, *CISG exclusion and legal efficiency...*, p. 292–293.

2. A Forum Located in a Contracting State that is not a Reservation State

As a general rule, a court seated in a CISG Contracting State that has not made a reservation under Article 95 CISG, is bound to apply Article 1(1)(b) by virtue of the public international law. It can be imagined, however, that a court located in such non-Reservation State hears the case between the parties: one being from a CISG Non-Contracting State and the other from a Reservation State. Such scenario could potentially raise interpretational problems regarding the application and operation of Article 95 CISG, when the PIL rules of the forum (which is a Contracting State) would lead to the law of the Reservation State. In such situations, the court being bound with Article 1 CISG must examine whether the prerequisites for applying the Convention have been fulfilled. As in the given example, where neither party is from a CISG Contracting State, so the prerequisites to apply Article 1(1)(a) are not met, and consequently the court has to apply Article 1(1)(b) CISG. The scenario described above may potentially lead to two possible outcomes: first, to the domestic law of the Reservation State applying rather than the Convention, or second, to the rules of the Convention applying.

With respect to the first scenario, there are some voices in the doctrine stating that, when PIL rules of the non-Reservation State lead to the law of the Article 95 Reservation State applying, then the court, out of respect for the declaration made by the State whose law applies, should apply the domestic law of that State rather than the CISG.⁵⁸ This argumentation is supported by the view that the court directed to the 'foreign law' should apply it in a way in which the court of that other jurisdiction would apply it.⁵⁹ Some

authors maintain that such an interpretation is favourable, as it prevents the parties from forum shopping.⁶⁰

In line with the above interpretation, Germany, despite being a CISG Contracting State that did not make a declaration concerning the reservation in question, made a special interpretative remark instead,⁶¹ leading to a similar conclusion as presented above. Accordingly, Germany holds the view that "parties to the CISG that have made a declaration under Article 95 are not considered Contracting States within the meaning of sub-paragraph (1)(b) of Article 1 of the CISG."⁶² In addition, Germany "assumes no obligation to apply this provision when the rules of private international law lead to the application of the law of a party that has made a declaration to the effect that it will not be bound by sub-paragraph (1)(b) of Article 1 of the CISG."⁶³ Therefore, in line with the mentioned interpretative instruction, German courts hearing a case between a party seated in a CISG non-Contracting State and a party from an Article 95 Reservation State, when directed with its PIL rules to the second State's legal system – would not apply the Convention, but rather the domestic law of the Reservation State.⁶⁴ Although such an official interpretative declaration

60 E.g.: P. Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in: N.M. Galston & H. Smit (eds.), *International Sale*, Bender 1984, p. 1–27; Pan Zhen, "China's Withdrawal of Article 96 of the CISG...", p. 163; G.F. Bell, *Why Singapore Should Withdraw...*, p. 64.

61 Article 2 of the German statute introducing the CISG, 5th July 1989, Bundesgesetzblatt 586 (1989/II).

62 Germany, Electronic Library on CISG Database – Table of Contracting States, available at: <http://www.cisg.law.pace.edu/cisg/countries/cntries-Germany.html> (26.10.2020).

63 Ibidem.

64 Notwithstanding the interpretative instruction made by Germany, in a case heard before the German Appellate Court Düsseldorf, at the time when Germany was not yet a CISG Contracting State, the court applied the CISG to a contract between German buyer and an American seller, see: Germany 2nd July 1993 Appellate Court Düsseldorf (Veneer cutting machine case), available at: <http://cisgw3.law.pace.edu/cases/930702g1.html> (26.10.2020). In this respect see also F. Ferrari, *Contracts for the International...*, p. 90; F. Enderlein & D. Maskow, *International Sales Law. United Nations Convention on Contracts for the International Sale*

58 P. Schlechtriem, in: P. Schlechtriem & I. Schwenzer (eds.), *Commentary on the UN Convention...*, 2005, p. 37, 933; J.O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, Boston 1991, p. 93; J. Ziegel, "The Scope of the Convention. Reaching out to Article One and Beyond", *Journal of Law and Commerce* 25, 2005, p. 66.

59 L. Spagnolo, *CISG exclusion and legal efficiency*, Alphen aan den Rijn 2014, p. 15; M. Bridge, "Uniform and Harmonized Sales Law...", p. 922–923, para. 16.31.–16.32.

made by Germany appears to be a step towards avoiding interpretative confusion regarding the effects of the Article 95 reservation, nonetheless, such a declaration is incompatible with Article 7(1) CISG, and so should not be followed by the courts outside Germany.⁶⁵

However, this approach towards the interpretation of the effects of the Article 95 CISG reservation seems to have been overtaken by the contrary opinion in this respect.⁶⁶ Accordingly, when the PIL rules of the court seated in a CISG Non-Reservation State would lead to the state law of the Reservation State, the court should apply the Convention.⁶⁷ The above reasoning is a consequence of two arguments. First, by the fact that a Contracting State is bound by the PIL rules to apply Article 1(1)(b) CISG. Second, the reservation made by one State has no *erga omnes* effect,⁶⁸ which means that a reservation made by one country cannot reasonably bind another non-Reservation State.⁶⁹ The same reasoning may apply to arbitral tribunals, which

are not bound by the reservation.⁷⁰ The above argumentation is also supported by the CISG Advisory Council in their opinion, which states: “the Convention applies in accordance with Article 1(1)(b) even when the rules of private international law lead to the application of the law of a Contracting State that has made an Article 95 declaration, because such a declaration does not affect the declaring State’s status as a ‘Contracting State’.”⁷¹

Another, independent argument that pleads for the last interpretation might be the wording of the Convention itself. The other, somehow related provision to Article 95 CISG, is the reservation under Article 92 CISG, which relates to the effect of a reservation with respect to Part II or Part III of the Convention. In accordance with Article 92 CISG, a Contracting State that “makes a reservation... of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of Article I of this Convention in respect of matters governed by the Part to which the declaration applies.” The wording of the two reservations (under Article 95 and Article 92 CISG), differs in relation to the Contracting States. Accordingly, in line with Article 92, the declaring State is not regarded as a Contracting State, while similar wording cannot be found in the Article 95 reservation. From the above, it can be concluded that an Article 95 Reservation State is still to be treated as a CISG Contracting State.⁷²

Last but not least, at this point the case of the Netherlands should be given. The Netherlands did not make a reservation under Article 95 when becoming a CISG Contracting State. Instead, however, it made a specific interpretative remark in its domestic law as to its effects. Accordingly, the Dutch Implementing

of Goods, Convention on the Limitation Period in the International Sale of Goods, Commentary, New York 1992, p. 381.

65 Similarly: F. Ferrari, *Contracts for the International...*, p. 90, who in this line rightly criticises the decision rendered by the German Provincial Court of Appeal, applying CISG where the domestic law (not the unified one) should have been applied. See: Germany 2nd July 1993 Appellate Court Düsseldorf (Veneer cutting machine case), available at: <http://cisgw3.law.pace.edu/cases/930702g1.html>; CISG-AC Opinion No. 15..., para. 3.17 (26.10.2020).

66 E.g.: F. Ferrari, *Contracts for the International...*, p. 89; G.F. Bell, *Why Singapore Should Withdraw...*, p. 63–64; I. Schwenzer & P. Hachem, in: I. Schwenzer (ed.), *Commentary on the UN Convention...*, 2016, p. 1263, art. 95, para. 3; M. Bridge, “Uniform and Harmonized Sales Law...”, p. 979, para. 16; U.G. Schroeter, “Backbone or Backyard of the Convention?...”, p. 446; F. Ferrari, “CISG and the Law Applicable in International Commercial Arbitration: Remarks Focusing on Three Common Hypotheticals”, in: M.B. Andersen & R.F. Henschel (eds.), *A tribute to Joseph M. Lookofsky*, Copenhagen 2015, p. 58.

67 See also: F. Ferrari, *Contracts for the International...*, p. 90.

68 U.G. Schroeter, “Backbone or Backyard of the Convention?...”, p. 446.

69 F. Ferrari, *Contracts for the International...*, p. 90; G.F. Bell, *Why Singapore Should Withdraw...*, p. 63–64; I. Schwenzer & P. Hachem, in: I. Schwenzer (ed.), *Commentary on the UN*

Convention..., 2016, p. 1263, art. 95, para. 3; U.G. Schroeter, “Backbone or Backyard of the Convention?...”, p. 446.

70 F. Ferrari, *PIL and CISG...*, p. 59.

71 CISG-AC Op. No. 15..., para. 3.14.

72 Some authors assume that, since the proposal of the Article 95 CISG reservation was made at the last minute, it was too complex and might have caused an omission in this respect. However, a proposal whereby Article 95 CISG reservation States would be considered as non-contracting States for the purpose of Article 1(1)(b) CISG was in fact rejected, See: L. Spagnolo, *CISG exclusion and legal efficiency...*, p. 16.

CISG Act⁷³ includes an explicit instructive provision whereby foreign courts situated in an Article 95 Reservation State who are directed to apply Dutch law by their own PIL rules, are requested to apply the CISG rather than the Dutch Civil Code.⁷⁴ Just as with the German interpretative instruction, the Dutch remark also has no binding effect upon foreign courts. Nevertheless, by making such an interpretative remark, the Dutch legislator made it clear that its legal system prefers the uniform solution over local Dutch law.⁷⁵ Therefore, if a court seated in an Article 95 Reservation State is directed by its PIL rules to apply Dutch law, and at the same time wishes to apply Dutch law in the way that the court in the Netherlands would, then that court should apply the Convention.

3. A Forum Located in an Article 95 CISG Reservation State

In a second possible scenario, the forum may be located in a Reservation State where interpretative problems may arise when one of the parties has its place of business in a CISG Contracting State and the other has not. It must be remembered, however, that where the prerequisites to the Convention's application are met via Article 1(1)(a), the possible issues arising from Article 95 CISG will not appear, thus will have no effect.⁷⁶ As mentioned before, the principal purpose of the Article 95 reservation was to exclude the reserving State's obligation under public international law to apply the Convention by the operation of Article 1(1)(b).⁷⁷ At the same time, however, the doctrine under-

lines that, "the courts of such a State [should not be prevented] from applying the Convention when their rules of private international law lead to the application of the law of a Contracting State".⁷⁸ As a result of the above, it is submitted in the doctrine that, although the courts in the Reservation States are not bound to apply the CISG by virtue of Article 1(1)(b), they should still apply the CISG when their own PIL rules lead to the law of a different (than the forum's) CISG Contracting State. This is the case because, in such situations the application of the Convention will not be led 'through the gates' of Article 1(1)(b), but by means of the forum's own PIL rules. Accordingly, when the PIL rules of the forum will be directed to a different CISG Contracting State – the court should apply the CISG as a part of that State's own law.⁷⁹ Consequently, the result of applying the CISG is reached exclusively by means of the forum's own PIL rules, thus without involvement of Article 1(1)(b) CISG.⁸⁰

Conversely, a different situation appears when the PIL rules of the forum, i.e. a Reservation State, lead to that State's own law, thus the law of the forum. In that case, the court would most probably apply its own domestic law, and not the CISG.⁸¹ It appears that this would be the only justifiable situation when the court should apply the Reservation State's domestic law instead of the CISG. This conclusion is substantiated by the reasoning presented in the Convention's *travaux préparatoires*, when presenting the reason behind the Article 95 reservation.⁸² This line has been applied by state courts seated in the Reservation States.⁸³

73 Article 2 of the Dutch Implementing CISG Act of 18th December 1991.

74 Although no case law in this respect can be found on the CISG database, nonetheless, this does not mean there is no case law that could present the Dutch line of reasoning where the PIL rules of other courts (seated in Article 95 Reservation States) would be directed to apply Dutch law.

75 F. De Ly, "Sources of International Sales Law. An Eclectic Model", *Journal of Law and Commerce* 25, 2005–2006, p. 11.

76 See for example: United States 15 June 2005 Federal District Court [New Jersey] (*Valero Marketing v. Greeni Oy*), available at: <http://cisgw3.law.pace.edu/cases/050615u1.html> (26.10.2020).

77 CISG-AC Opinion No. 15..., para. 1; U.G. Schroeter, "Backbone or Backyard of the Convention?...", p. 440.

78 *Ibidem*.

79 F. Ferrari, *Contracts for the International...*, p. 88–89; G.F. Bell, *Why Singapore Should Withdraw...*, p. 656.

80 U.G. Schroeter, "Backbone or Backyard of the Convention?...", p. 441.

81 F. Ferrari, *Contracts for the International...*, p. 88–89.

82 Accordingly, the signatory States that suggested the Article 95 CISG reservation during the Diplomatic Conference in Vienna, intended to be exempted from the duty to apply the CISG when the PIL rules lead the road to their own (reservation) domestic law. See: Official Records – Document A/CONF.97/C.2/L.7, p. 229, para. 82.

83 China, 20th July 1999, the Supreme Court of the People's Republic of China (*Zheng Hong Li Ltd. Hong Kong v. Jill Bert Ltd. Swiss*), available at: <http://cisgw3.law.pace.edu/>

In this respect, another individual approach is taken by Singapore, which is also an Article 95 CISG Reservation State. Singapore, in addition to the reservation itself, made an interpretative specification in its domestic law whereby, “the Government of the Republic of Singapore will not be bound by sub-paragraph (1)(b) of Article 1 of the Convention, and will apply the Convention to the Contracts of Sale of Goods only between those parties whose places of business are in different States when the States are Contracting

also applied a similar line of reasoning (only applying the CISG in Article 1(1)(a) situations), although this conclusion cannot be derived from the wording of the Article 95 reservation.⁸⁶

4. A Forum Located in a CISG non-Contracting State

With regard to the discussed reservation, the last possible scenario is when the forum is located in a CISG non-Contracting State and its PIL rules lead to the



The Article 95 CISG reservation leads to increased confusion and problematic conflict of law issues that bring more chaos than benefits.

States.⁸⁴ In accordance with the above, it appears that Singapore excludes the application of the Convention unless Article 1(1)(a) is met. A few US courts⁸⁵ have

cases/990720c1.html; China, 24th December 2004 CIETAC Arbitration proceeding (Medical equipment case), available at: <http://cisgw3.law.pace.edu/cases/041224c1.html>; United States, 22nd November 2002 Federal District Court [Florida] (Impuls v. Psion-Teklogix), available at: <http://cisgw3.law.pace.edu/cases/021122u1.html>; United States, 17th July 2006 Federal District Court [Washington State] (Prime Start Ltd. v. Maher Forest Products Ltd. et al.), available at: <http://cisgw3.law.pace.edu/cases/060717u1.html> (all 26.10.2020).

84 Sub-section 3(2) of the Singapore Sale of Goods (United Nations Convention) Act: “[s]ub-paragraph (1)(b) of Article 1 of the Convention shall not have the force of law in Singapore and accordingly the Convention will apply to contracts of sale of goods only between those parties whose places of business are in different States when the States are Contracting States.” See: <https://www.cisg.law.pace.edu/cisg/countries/cntries-Singapore.html> (26.10.2020).

85 United States, 22nd November 2002 Federal District Court [Florida] (Impuls v. Psion-Teklogix), available at: <http://cisgw3.law.pace.edu/cases/021122u1.html>; United States, 17th July 2006 Federal District Court [Washington State] (Prime Start Ltd. v. Maher Forest Products Ltd. et al.), available at: <http://cisgw3.law.pace.edu/cases/060717u1.html>; United

law of an Article 95 Reservation State. In such circumstances, it must be highlighted that courts in the CISG non-Contracting States are not treaty-bound to apply the Convention.⁸⁷ As a result, the adjudicator is not bound with the provisions of the Convention, thus neither with Article 95 nor with Article 1(1)(b) CISG. The same applies to arbitrators seated in arbitral tribunals.⁸⁸ Nonetheless, when the PIL rules of the non-Contracting State would lead the court to the laws of a CISG Contracting State that has made the reservation, the question is whether that court would apply the CISG or the domestic – non-unified – state law of the Reservation State. In the spirit of this

States, 22nd February 2011 Federal District Court [Kentucky] (Princesse D’Isenbourg et CIE Ltd. v. Kinder Caviar, Inc. and Kinder Caviar, Inc. v. United Airlines, Inc.), available at: <http://cisgw3.law.pace.edu/cases/110222u1.html> (all 26.10.2020).

86 Such an interpretation was subject to right criticism in the doctrine. See: F. Ferrari, “Short notes on the impact of Article 95 reservation on the occasion of Prime Start Ltd. v. Maher Forest Products Ltd. et al.”, *Internationales Handelsrecht*, 2006, p. 250.

87 See: T. Kadner Graziano, *The CISG Before the Courts...*, p. 174.

88 CISG-AC Opinion No. 15..., para. 3.19.

question, there are some authors that have recommended the application of the Convention, arguing that the application of the Convention in those cases is based not on Article 1(1)(b) CISG, but on the fact that the Convention is part of the domestic legal system of the applicable (foreign) law that was pointed to by the PIL of the forum.⁸⁹ There is at least one case that supports that reasoning, heard by the Appellate Court in Düsseldorf at the time when Germany was not yet a CISG Contracting State, though the outcome has come under some criticism.⁹⁰ The case was heard between a party from Germany and a party from the United States. The PIL rules of the forum led to the law of the USA, which at that time was already a CISG Contracting State and an Article 95 CISG Reservation State. Notwithstanding the reservation made by the USA, the court decided to apply the Convention. The above decision made by the Appellate Court in Düsseldorf is probably not to be repeated by any other German court, due to the interpretative remark made by Germany at the time of ratifying the Convention, as explained above.

On the other hand, however, there is a strong argument not to apply the CISG in the above described circumstances. This is due to the fact that, firstly, the court seated in the Non-Contracting State is not bound by the provision of Article 1(1)(b) CISG, and secondly, out of respect for the Reservation State's decision to make the reservation – will not apply the CISG.⁹¹ As a case example, the Tokyo District Court held that the CISG, “should not be applied in circumstances where the forum is in a non-Contracting State, the forum has determined that the applicable law is that of a Contracting State that has made an Article 95 declaration, and the parties are from a non-Contracting and a Contracting State that has made an Article 95

declaration.”⁹² In the spirit of the above argumentation, some authors suggest not applying the CISG,⁹³ to which the present author is inclined to agree.

Conclusion

Taking into consideration the various approaches regarding the interpretative effects of the reservation under Article 95 CISG, it is clear that no agreement exists as to its uniform interpretation and application. The various perspectives presented in the doctrine and case law prove that the Article 95 CISG Reservation leads to problematic conflict of law issues that bring a lot of confusion in interpreting its effects. Such interpretations may not only depend on the particular forum where the case is heard, but may also depend on the particular court's interpretation in this regard, as even the state court decisions are not consistent in this respect. It appears that the initial motives for keeping the Article 95 Reservation have either lost their original grounds, or have no practical meaning, in particular in light of such a wide international acceptance of the Convention.

Given the diverse range of approaches to the interpretation of the Article 95 CISG effects, it is evident that uniformity in international law in this respect is infringed. It would be advisable for the remaining Article 95 Reservation States to withdraw their declaration of the reservation, which is possible under Article 97(4) CISG.⁹⁴ In addition, it is advisable for any potentially new CISG Contracting State that decides to

89 F. Ferrari, *Contracts for the International...*, p. 91.

90 G.F. Bell, *Why Singapore Should Withdraw...*, p. 62, fn. 38, where the author states: “[t]he court decided that the rules of private international law led to the application of a US law and erroneously applied the CISG notwithstanding the reservation the US had made.” See the editorial remarks of Albert H. Kritzer available at: <http://cisgw3.law.pace.edu/cases/930702g1.html> (26.10.2020).

91 See: CISG-AC Op. No. 15, para. 3.18.

92 See: 2012 UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, Digest of Article 95 case law, para 5. For the decision see: Japan, 19 March 1998 Tokyo District Court (Nippon Systemware Kabushikigaisha v. O.), available at: <http://cisgw3.law.pace.edu/cases/980319j1.html> (26.10.2020).

93 See: T. Kadner Graziano, *The CISG Before the Courts...*, p. 174; P. Schlechtriem, in: P. Schlechtriem & I. Schwenzer (eds.), *Commentary on the UN Convention...*, 2005, p. 932, art. 95, para. 4; P. Huber, in: P. Huber & A. Mullis (eds.), *The CISG...*, p. 56; P. Winship, *The Scope of the Vienna Convention...*, p. 1–53.

94 In accordance with Article 97(4) CISG: “Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first

join the “CISG family” in the future, to abstain from making an Article 95 CISG reservation when ratifying the Convention, though this, unfortunately, did not happen in the case of very recent Member State – Lao People’s Democratic Republic.

Last but not least, it is apparent that, due to the reservation in question, the operation of Article 1(1)(b) may depend on where either party is seated, or may depend on where the forum is situated. In this respect, it would be prudent for the contracting parties (or the advising lawyers) to pre-analyse the possible existence and effects of the reservation in a particular case. This is potentially an important but complicated issue, as it may not always be immediately obvious whether or not the Convention applies. Accordingly, if the parties intend to have their contract governed by the Convention, it is advisable to express that intention by virtue of a particular contractual clause opting for the CISG,⁹⁵ thus choosing the CISG on a (substantive) material law level.⁹⁶ If such a clause were to be validly incorporated into the contract, then regardless of the particular forum’s interpretation regarding the reservation, it would still either way have to recognise that choice as having been made on a substantive law level. Conversely, if the parties agree not to have the Convention applied to their legal relationship, then it is

advisable to make that intention explicit by introducing a relevant contractual clause expressly excluding the Convention.⁹⁷

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day of the month following the expiration of six months after the date of the receipt of the notification by the depositary”.

95 For example: ‘this contract is governed by the law of State X, interpreted and supplemented by the United Nations Convention on Contracts for the International Sale of Goods (CISG)’ or ‘the rules of the United Nations Convention on Contracts for the International Sale of Goods (CISG) are incorporated in this contract to the extent that they are not inconsistent with the other terms of the contract and the laws of State Y’.

96 “Choice of law on a substantive law level” is nothing more than the expression of the parties’ contractual autonomy. See e.g.: F. Ferrari, *Contracts for the International Sale of Goods*, p. 180–181; F. Ferrari, *The Sphere of Application of the Vienna...*, p. 38; P. Huber, in: P. Huber & A. Mullis (eds.), *The CISG...*, p. 65–66; E. Rott-Pietrzyk, “Swoboda stron w zakresie materialnoprawnego wyboru prawa modelowego (soft law)”, in: *Rozprawy z prawa prywatnego oraz notarialnego. Księga pamiątkowa dedykowana Profesorowi Maksymilianowi Pazdanowi*, Warszawa 2014, p. 324.

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