REMARKS ON THE UNCITRAL DIGEST'S COMMENTS ON ARTICLE 6 CISG

Franco Ferrari[*]

I. INTRODUCTION

The text of the UNCITRAL Digest of Case Law on the United Nations Convention on the International Sales of Goods (Digest) relating to Article 6 CISG, not unlike the text relating to other provisions, evidences both the Digest's usefulness as well as its weaknesses.[1] As far as the former is concerned, it can easily be evinced from the number of court decisions cited in the Digest, the retrieval of which would otherwise be difficult.[2] Furthermore, the Digest is helpful as it organizes all decisions under different headings, thus making the research even easier. Also, the fact that the Digest is published in each of the six official languages of the United Nations allows it to reach more scholars and practitioners than any other instrument of interpretation. However, the use of all six official languages, albeit necessary for achieving a more global outreach, does bear some risk, namely that of certain statements drafted in one language being wrongly translated into another.

Although this appears to be a point too general to be made here, in the beginning of a number of comments on that part of the Digest that deals with Article 6 CISG, this is exactly the time and place where to make this comment, as an error in the translation from (at least) English to French did occur. Having drafted the Digest part to be discussed, I can vouch at least for what the drafter wanted to state in the English version of the relevant part of the Digest.

---

* Full Professor of International Law, Verona University School of Law; former Legal Officer, United Nations Office of Legal Affairs, International Trade Law Branch; the author is the drafter of the UNCITRAL draft Digest on Articles 1-13 and 78 on which the final version of the Digest is based.

1. For an overview of the advantages and disadvantages of the UNCITRAL Digest, see Heinz A. Friehe, *Review of The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention*, INTERNATIONALES HANDELSRECHT 175-76 (2004).

2. *See also* Joseph Lookofsky, *Digesting CISG Case Law: How Much Regard Should We Have?*, 8 VINDOBONA J. INT'L COM. L. & ARB. 181-82 (2004).

The error occurred in relation to that part of the Article 6 Digest (para. 5) that deals with those cases where the CISG's application is excluded with an indication of the applicable law. According to the English version of the Digest, the applicable law is determined by virtue of the rules of private international law of the forum, which in most countries makes applicable the law chosen by the parties, at least in those countries where the 1980 Convention on the law applicable to contractual obligations is to be applied. Unfortunately, the French version of the Digest refers to this solution when dealing with the cases where *l'application de la Convention est exclue sans indication du droit applicable*, a line of cases specifically dealt with at a later stage.

Apart from this weakness, there are other reasons why one should go beyond the Digest. These reasons can be summarized as follows: since the Digest cites many (albeit not all) decisions that deal with a specific provision, there will be cases where a contrast in case law will emerge. Pursuant to a decision taken by the United Nations Commission on International Trade Law when authorizing the drafting of the Digest,[3] the Digest itself does not criticize any decision,[4] neither does it point out those cases that are worth being followed. This means, however, that ultimately the Digest is not too helpful in guiding the interpreter through the labyrinth of case law which it makes readily available. If one were to look for a guide, one would have to look elsewhere, for instance to comments by legal writers such as those made on the occasion of this Conference.

Furthermore, the Digest does not deal with all the cases that have been decided by courts in relation to a given provision. This is of course a natural consequence of there having to be a deadline for comments to be drafted in order for the Digest to be published, but it poses a problem nonetheless, as important issues may have been dealt with after the deadline for the Digest's finalization.

In respect of the Digest comments on Article 6 CISG, this is an important issue, given a very recent Italian court decision[5] which dealt with a particular problem—namely the effect of the parties' choice to apply the CISG to

---

3. *See* Report of the United Nations Commission on International Trade Law on its Thirty-Fourth Session, U.N. GAOR, 56th Sess., Supp. No. 17, U.N. DOC. A/56/17 (2001).

4. *See* Jernej Sekolec, *Digest of case law on the UN Sales Convention: The combined wisdom of judges and arbitrators promoting uniform interpretation of the Convention*, *in* THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 1, 14 (Franco Ferrari et al. eds., 2004).

5. *See* Tribunale di Padova, Italy, 11 Jan. 2005, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText.

contracts to which it would otherwise not apply. Although this issue is referred to in the Article 6 Digest (para. 12), the Digest does not refer to any court decisions dealing with that issue, even though today there is case law on this issue.[6]

In the following pages, I will comment on the decisions referred to in (and missing from) the Article 6 Digest. In doing so, I will be a little more critical then when drafting those Digest comments.

II. EFFECTS OF ARTICLE 6 IN GENERAL

It is common knowledge, that even where all the CISG's requirements of applicability (international, substantive, temporal, and personal/territorial)[7] are met, the CISG does not necessarily apply,[8] since pursuant to Article 6,[9] the parties may exclude the CISG's application. Consequently, in order to decide whether the CISG is applicable, one must also look into whether it has been excluded by the parties,[10] as pointed out by several court decisions,[11] some of

6. For a more detailed analysis of this issue, see *infra* text accompanying note 118 ff.

7. For comments on these requirements, see, most recently, Franco Ferrari, *The CISG's Sphere of Application: Articles 1-3 and 10*, *in* THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 21 ff. (Franco Ferrari et al. eds., 2004).

8. *See* FRANCO FERRARI, THE SPHERE OF APPLICATION OF THE VIENNA SALES CONVENTION 20 (1995).

9. For a detailed overview of the history of Article 6 CISG, see Maureen T. Murphy, *United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity on International Sales Law*, 12 FORDHAM INT'L L.J. 727-29 (1989).

10. *See also* Kenneth C. Randall & John E. Norris, *A New Paradigm for International Business Transactions*, 71 WASH. U. L.Q. 616 f. (1993).

11. For decisions not referred to in the Digest that also refer to the lack of exclusion as an applicability requirement, see Tribunale di Padova, *supra* note 5; Tribunale di Padova, Italy, 31 Mar. 2004, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=966&step=FullText; Tribunale di Padova, Italy, 25 Feb. 2004, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=972&step=FullText.

which (albeit not all) are quoted in the Digest.[12] Thus, the lack of an exclusion can be regarded as a (negative) applicability requirement.[13]

By providing for this possibility, the draftsmen of the CISG reaffirmed one of the general principles already embodied in the 1964 Hague Conventions,[14] that is, the principle according to which the primary source of the rules governing international sales contracts is party autonomy,[15] which is why it is no surprise that some court decisions state that the CISG is based upon the general principle of "prevalence of party autonomy."[16] By stating

---

12. *See*, *e.g.*, Tribunale di Vigevano, Italy, 12 July 2000, *published in* GIURISPRUDENZA ITALIANA 281 ff. (2001), also *available at* http://cisgw3.law.pace.edu/cases/000712i3.html; Oberlandesgericht Hamm, Germany, 23 June 1998, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/434.htm; Cour d'appel Paris, France, 15 Oct. 1997, *available at* http://witz.jura.uni-sb.de/CISG/decisions/151097v.htm; Oberlandesgericht München, Germany, 9 July 1997, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/281.htm; Oberlandesgericht Karlsruhe, Germany, 25 June 1997, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/263.htm; Oberster Gerichtshof, Austria, 11 Feb. 1997, *available at* http://www.cisg.at/10_150694.htm; Landgericht Landshut, Germany, 5 Apr. 1995, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/193.htm; Landgericht Oldenburg, Germany, 15 Feb. 1995, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/197.htm; Oberster Gerichtshof, Austria, 10 Nov. 1994, *published in* ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG 79 f. (1995); Tribunal Cantonal Valais, Switzerland, 29 June 1994, *published in* ZEITSCHRIFT FÜR WALLISER RECHTSPRECHUNG 125 (1994); Amtsgericht Nordhorn, Germany, 14 June 1994, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/259.htm; Oberlandesgericht Karlsruhe, Germany, 20 Nov. 1992, *published in* NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNGS-REPORT 1316 (1993); Landgericht Düsseldorf, Germany, 9 July 1992, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/42.htm.

13. In this respect, see Landgericht Trier, Germany, 12 Oct. 1995, *published in* NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNGS-REPORT 564 ff. (1996) (expressly mentioning the parties' not excluding the CISG as a requirement for the CISG's applicability).

14. Despite some textual differences, Article 6 CISG is based upon Article 3 ULIS, as has often been pointed out; *see*, *e.g.*, M.J. Bonell, *Art. 6*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW 51 (C.M. Bianca & M.J. Bonell eds., 1987); FRANCO FERRARI, LA VENDITA INTERNAZIONALE. APPLICABILITÀ ED APPLICAZIONI DELLA CONVENZIONE DI VIENNA 157 (1997); Rolf Herber, *Art. 6*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT 83 (Peter Schlechtriem ed., 2d ed. 1995).

15. For a similar statement, see BERNARD AUDIT, LA VENTE INTERNATIONALE DE MARCHANDISES 37 (1990) (stating that "the Convention makes of the parties' will the primary source of the sales contract"); Fritz Enderlein, *Die Verpflichtung des Verkäufers zur Einhaltung des Lieferzeitraums und die Rechte des Käufers bei dessen Nichteinhaltung nach dem UN-Übereinkommen über Verträge über den Internationalen Warenkauf*, *in* PRAXIS DES INTERNATIONALEN PRIVAT-UND VERFAHRENSRECHTS 314 (1991); Hans Hoyer, *Der Anwendungsbereich des Einheitlichen Wiener Kaufrechts*, *in* DAS EINHEITLICHE WIENER KAUFRECHT 41 (Hans Hoyer & Willibald Posch eds., 1992) (stating the same); ULRICH MAGNUS, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN, WIENER UN-KAUFRECHT (CISG) 133 (13th revised ed., 1999) (making a similar statement).

16. *See* Tribunale di Rimini, Italy, 26 Nov. 2002, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=823&step=FullText; Hof Beroep Gent, Belgium, 17 May 2002, *available at* http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-05-17.htm; Rechtbank Koophandel Ieper, Belgium, 29 Jan. 2001, *available at* http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-01-29.htm; Landgericht Stendal, 12 Oct. 2000, *published in* INTERNATIONALES HANDELSRECHT 32 (2001).

that the CISG can be excluded, the drafters clearly acknowledged the dispositive nature[17]—emphasized also in case law[18]—and the "central role which party autonomy plays in international commerce and, particularly, in international sales."[19]

As far as party autonomy is concerned,[20] it must be pointed out (as the Digest does in para. 3) that Article 6 CISG refers to two different lines of

---

17. For this statement, see Sergio M. Carbone, *L'ambito di applicazione ed i criteri interpretativi della convenzione di Vienna*, *in* LA VENDITA INTERNAZIONALE. LA CONVENZIONE DELL'11 APRILE 1980 78 (1981); Sergio M. Carbone & Riccardo Luzzatto, *I contratti del commercio internazionale*, *in* 11 TRATTATO DI DIRITTO PRIVATO 131 (Pietro Rescigno ed., 1984); Johan Erauw, *Waneer is het Weens koopverdrag van toepassing?*, *in* HET WEENS KOOPVERDRAG 47 (Hans van Houtte et al. eds., 1997); FRANCO FERRARI, VENDITA INTERNAZIONALE DI BENI MOBILI. ART. 1-13. AMBITO DI APPLICAZIONE. DISPOSIZIONI GENERALI 110 (1994); Herber, *supra* note 14, at 84; ALESSANDRA LANCIOTTI, NORME UNIFORMI DI CONFLITTO E MATERIALI NELLA DISCIPLINA CONVENZIONALE DELLA COMPRAVENDITA 146 (1992); BURGHARD PILTZ, INTERNATIONALES KAUFRECHT 64 (1993); GERT REINHART, UN-KAUFRECHT 26 (1991); Giorgio Sacerdoti, *I criteri di applicazione della convenzione di Vienna sulla vendita internazionale: diritto uniforme, diritto internazionale privato e autonomia dei contratti*, 44 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 744 (1990); Ingo Saenger, *Art. 6*, *in* 3 KOMMENTAR ZUM BURGERLICHEN GESETZBUCH §§ 1297-2385. EGBGB. CISG 2779 (Heinz G. Bamberger & Herbert Roth eds., 2003); Claude Witz, *L'exclusion de la Convention des Nations Unies sur les contrats de vente internationale de marchandises par la volonté des parties (Convention de Vienne du 11 avril 1980)*, RECEUIL DALLOZ CHRONIQUE 107 (1990).

Note, however, that even though the principle of party autonomy is widely accepted, there were some States which expressed reservations to it; "[t]heir concern was that, in practice, the principle could be abused by the economically stronger party imposing his own national law or contractual terms far less balanced than those contained in the Convention," Bonell, *supra* note 14, at 51; *see also* 1 UNCITRAL YEARBOOK 168 (1968-1970); 2 UNCITRAL YEARBOOK 43-44 (1971); 3 UNCITRAL YEARBOOK 73 (1973).

18. For an express reference to the Convention's non-mandatory nature, see Cassazione Civile, Italy, 19 June 2000, *published in* GIURISPRUDENZA ITALIANA 236 (2001); Oberster Gerichtshof, Austria, 21 Mar. 2000, *published in* INTERNATIONALES HANDELSRECHT 41 (2001); Oberster Gerichtshof, Austria, 15 Oct. 1998, *published in* ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG 63 (1999); Handelsgericht Wien, Austria, 4 Mar. 1997, *available at* http://www.cisg.at/1R4097x.htm; Kreisgericht Wallis, Austria, 29 June 1994, *published in* ZEITSCHRIFT FÜR WALLISER RECHTSPRECHUNG 126 (1994).

19. M.J. Bonell, *Commento all'art. 6*, NUOVE LEGGI CIVILI COMMENTATE 16 (1989); for similar affirmations in scholarly writing, see Samuel Date-Bah, *The United Nations Convention on Contracts for the International Sale of Goods: Overview and Selective Commentary*, *in* REVIEW OF GHANA LAW 54 (1979); Enderlein, *supra* note 15, at 316; Hoyer, *supra* note 15, at 41; PETER SCHLECHTRIEM, EINHEITLICHES UN-KAUFRECHT 21 (1981). For a reference in case law to the party autonomy's central role, see Landgericht Stendal, Germany, 12 Oct. 2000, *published in* INTERNATIONALES HANDELSRECHT 32 (2001).

20. Note, that Carbone, *supra* note 17, at 78, has compared the reaffirmation of party autonomy as a basic principle of the CISG to "the recognition of a necessity for the development of international commerce." *See also* Luigi Rovelli, *Conflitti tra norme della Convenzione e norme di diritto internazionale privato*, *in* LA VENDITA INTERNAZIONALE. LA CONVENZIONE DELL'11 APRILE 1980 102 (1981), stating that the introduction of Article 6 CISG and, therefore, the recognition of party autonomy was, a "political need."

cases.[21] One where the Convention's application is excluded, the other where the parties derogate from—or modify the effects of—the provisions of the CISG on a substantive level.[22] These two situations differ from each other in that the former does, according to the CISG, *per se* not encounter any restrictions,[23] as also pointed out in the Digest (para. 3), whereas the latter is limited, as there are provisions the parties are not allowed to derogate from. Where, for instance, at least one of the parties to the contract governed by the CISG has its place of business in a State that has made a reservation under Article 96, the parties may not derogate from or vary the effect of Article 12. In those cases, according to Article 12, any provision "that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply."

Although this matter has been referred to in the Digest as well (para. 3), the Digest does not conclusively deal with the effects of such a reservation, not even in its comments on Article 12. It states—correctly—that the effects of Article 12 lead to the principle of freedom from form requirements not being *per se* applicable where one party has its relevant place of business in a State that made an Article 96 declaration.[24] It then cites the contradictory views held in case law in respect of the effects of an Article 96 declaration, unfortunately without stating which view is the correct one: that according to which the sole fact that one party has its place of business in a State that made an Article 96 reservation does not necessarily mean that the form requirements of that State apply,[25] thus letting it (correctly) depend on the law to which the rules of private international of the forum lead whether any form requirements have to be met;[26] or that pursuant to which where one party has its relevant

---

21. For this statement, see also Bonell, *supra* note 14, at 53; ESPERANZA CASTELLANOS RUIZ, AUTONOMIA DE LA VOLUNTAD Y DERECHO UNIFORME EN LA COMPRAVENTA INTERNACIONAL 37 (1998); FRANCO FERRARI, LA COMPRAVENTA INTERNACIONAL 119 ff. (1999); TOMÁS VAZQUEZ LEPINETTE, COMPRAVENTA INTERNACIONAL DE MERCADERIAS. UNA VISION JURISPRUDENCIAL 86 (2000).

22. For this distinction, see also LANCIOTTI, *supra* note 17, at 148 f.; MAGNUS, *supra* note 15, at 105 ff.; Dieter Martiny, *Kommentar zum UN-Kaufrecht*, *in* 7 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH 1655 f. (Hans-Jürgen Sonnenberger ed., 1989); Sacerdoti, *supra* note 17, at 745-46.

23. For this statement, see Hoyer, *supra* note 15, at 41.

24. *See* Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, *available at* http://www.law.kuleuven.ac.be/int/tradelaw/WK/1995-05-02.htm.

25. Rechtbank Rotterdam, Netherlands, 12 July 2001, *published in* 278 NEDERLANDS INTERNATIONAAL PRIVAATRECHT (2001).

26. *Id.*; Hooge Raad, Netherlands, 7 Nov. 1997, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=333&step=FullText.

place of business in a State that made an Article 96 reservation, the contract must necessarily be concluded or evidenced or modified in writing.[27]

It should be noted that although the Convention does not expressly mention it, there are other provisions that the parties cannot derogate from, as also pointed out by the Digest (para. 4), namely the public international law provisions (i.e. Articles 89-101).[28] As the Digest correctly states, this is due to the fact that those provisions relate to issues relevant to Contracting States rather than private parties. Even though the Digest holds that there is no case law on this point yet, it should be noted that the Tribunale di Vigevano in its rather famous decision of 12 July 2000, expressly took the view referred to in the Digest and stated that Articles 89-101 cannot be derogated from.[29] In a 2005 decision, the Tribunale di Padova not only confirmed that the parties cannot exclude the CISG's final provisions, but it also stated that the parties cannot derogate from Article 28 either.[30] In my opinion, that view is correct, as Article 28 is not directed to the parties, but rather to the courts of

27. The High Arbitration Court of the Russian Federation, 16 Feb. 1998, *available at* http://cisgw3.law.pace.edu/cases/980216r2.html; Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, *available at* http://www.law.kuleuven.ac.be/int/tradelaw/WK/1995-05-02.htm.

28. For this conclusion, *see also* BEATE CZERWENKA, RECHTSANWENDUNGSPROBLEME IM INTERNATIONALEN KAUFRECHT 172 (1988); FERRARI, *supra* note 17, at 111.

29. *See* Tribunale di Vigevano, Italy, 12 July 2000, *available at* http://cisgw3.law.pace.edu/cases/000712i3.html.

30. Tribunale di Padova, Italy, 11 Jan. 2005, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText.

Contracting States.[31] However, the aforementioned exceptions are the only ones. All other provisions can be derogated from.[32]

III. IMPLIED EXCLUSION OF THE CISG AND CHOICE OF THE APPLICABLE LAW

Party autonomy also played a very important role under the ULIS.[33] A comparison of Article 6 CISG and its "direct predecessor,"[34] Article 3 ULIS, could even lead to the conclusion that under ULIS party autonomy was more widely recognized,[35] since the ULIS expressly stated that its exclusion could also be made implicitly.[36] However, this provision was later criticized,[37] which is why the express reference to the possibility of an implicit exclusion

---

31. For this conclusion, see also AUDIT, *supra* note 15, at 123 f.; Franco Ferrari, *Art. 6*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT (CISG) 125-26 (Peter Schlechtriem & Ingeborg Schwenzer eds., 4th ed. 2004); Martin Karollus, *Art. 28*, *in* KOMMENTAR ZUM UN-KAUFRECHT 298, 309 (Heinrich Honsell ed., 1997); *contra* Amy H. Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 WASH. L. REV. 607, 641-42 (1988), stating that:

> Arguably, however, article 28 differs from most of the Convention's provisions because it deals directly with a court's power and discretion to grant injunctive relief. In this way, article 28 is more like article 12, regarding domestic statutes of frauds. Article 12 is expressly exempted from the contractual waiver power in article 6. The parties cannot agree to be bound by an oral modification if any party has its principal place of business in a Contracting State that has preserved its own statute of frauds under article 96. Similarly, one may argue, the parties cannot require specific performance when the court would not otherwise grant it under article 28. On balance, however, article 6 should be interpreted to permit waiver of article 28. First, only article 12, not article 28, is expressly exempted from article 6. Furthermore, the Convention's drafters reasonably might have concluded that the domestic policies supporting a statute of frauds are more significant than those protecting a court's discretion to deny specific performance.

Id. (citations omitted).

32. Thus, it cannot surprise that a court has recently stated that Article 55, relating to open-price contracts, is only applicable where the parties have not agreed to the contrary. *See* Cour d'appel Grenoble, France, 26 Apr. 1995, *available at* http://witz.jura.uni-sb.de/CISG/decisions/2604952v.htm. Neither is a court decision surprising which expressly states that Article 39, relating to the notice requirement, is not mandatory and can be derogated from. *See* Landgericht Giessen, Germany, 5 July 1994, *published in* NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNGS-REPORT 438 (1995). To make another example, according to the Austrian Supreme Court, Article 57 also can be derogated from. *See* Oberster Gerichtshof, Austria, 10 Nov. 1994, *published in* ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG 79 ff. (1995).

33. For a similar statement, see Rolf Herber, *Art. 3*, *in* KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT 19 (Hans Dölle ed., 1976); Hoyer, *supra* note 15, at 41; LANCIOTTI, *supra* note 17, at 145-46.

34. Bonell, *supra* note 19, at 17.

35. This has already been pointed out by Carbone & Luzzatto, *supra* note 17, at 132.

36. Article 3 ULIS reads as follows: "The parties to a contract of sale shall be free to exclude the application thereto of the present Law either entirely or partially. Such exclusion may be express or implied." Uniform Law on the International Sale of Goods (ULIS) ch. 1, art. 3 (1964).

37. *See* 1 UNCITRAL YEARBOOK 168 (1968-1970).

was not retained by the drafters of the CISG,[38] even though at the Vienna Diplomatic Conference proposals to reintroduce that express reference were made.[39] In my opinion, this does not mean that under the CISG the exclusion always has to be made expressly,[40] as, however, stated in several court decisions cited—once again, without any comment—in the Digest,[41] as well

---

38. *See* Claude Samson, *La Convention des Nations Unies sur les contrats de vente internationale de marchandises: Etude comparative des dispositions de la Convention et des règles de droit québécois en la matière*, CAHIERS DE DROIT 931 (1982).

39. Both the representatives of England and Belgium made proposals to reintroduce a reference to the possibility of implicitly excluding the CISG's application; for a reference to these attempts, see FERRARI, *supra* note 14, at 162; Herber, *supra* note 14, at 83-84; MAGNUS, *supra* note 15, at 134; United Nations Conference on Contracts for the International Sale of Goods, Vienna, Mar. 10, 1980-Apr. 11, 1980, *Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees* 85-86, 249-50, U.N. DOC. A/CONF.97/19 (1981) [hereinafter *Records*]; SCHLECHTRIEM, *supra* note 19, at 22 n.98.

40. This conclusion, possibility of an implicit exclusion, is favored by most legal scholars; *see*, *e.g.*, WILHELM-ALBRECHT ACHILLES, KOMMENTAR ZUM UN-KAUFRECHTSÜBEREINKOMMEN (CISG) 25 (2000); AUDIT, *supra* note 15, at 38; Kevin Bell, *The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods*, 8 PACE INT'L L. REV. 237, 255 (1996); CHRISTOPH BRUNNER, UN-KAUFRECHT—CISG: KOMMENTAR ZUM ÜBEREINKOMMEN DER VEREINTEN NATIONEN ÜBER DEN INTERNATIONALEN WARENKAUF VON 1980, at 68 (2004); Jacopo Cappuccio, *La deroga implicita nella Convenzione di Vienna del 1980*, 8 DIRITTO DEL COMMERCIO INTERNAZIONALE 867, 868 (1994); Carbone & Luzzatto, *supra* note 17, at 132; CZERWENKA, *supra* note 28, at 170; Date-Bah, *supra* note 19, at 54; FERRARI, *supra* note 17, at 113; Ferrari, *supra* note 31, at 128; ALEJANDRO M. GARRO & ALBERTO LUIS ZUPPI, COMPRAVENTA INTERNACIONAL DE MERCADERÍAS 98 (1990); ROLF HERBER & BEATE CZERWENKA, INTERNATIONALES KAUFRECHT 42 (1992); Rudiger Holthausen, *Vertraglicher Ausschluß des UN-Übereinkommens über internationale Warenkaufverträge*, RECHT DER INTERNATIONALEN WIRTSCHAFT 515 (1989); Hoyer, *supra* note 15, at 41; MARTIN KAROLLUS, UN-KAUFRECHT 38 (1991); Nicole Lacasse, *Le champ d'application de la Convention des Nations Unies sur les contrats de vente internationale de marchandises*, *in* ACTES DU COLLOQUE SUR LA VENTE INTERNATIONALE 23, 37 (Nicole Lacasse & Louis Perret eds., 1989); Fabio Liguori, *La Convenzione di Vienna sulla vendita internazionale di beni mobili nella pratica: un'analisi critica delle prime cento decisioni*, FORO ITALIANO 145, 158 (1996); JOCHEN LINDBACH, RECHTSWAHL IM EINHEITSRECHT AM BEISPIEL DES WIENER UN-KAUFRECHTS 253 (1996); Ulrich Magnus, *Das UN-Kaufrecht tritt in Kraft*, 51 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 123, 126 (1987); Martiny, *supra* note 22, at 1655 f.; Barry Nicholas, *The Vienna Convention on International Sales Law*, 105 L.Q. REV. 201, 208 (1989); REINHART, *supra* note 17, at 27; Bradley J. Richards, *Contracts for the International Sale of Goods: Applicability of the United Nations Convention*, 69 IOWA L. REV. 209, 237 (1983); Saegner, *supra* note 17, at 2779; SCHLECHTRIEM, *supra* note 19, at 21; Peter Winship, *The Scope of the Vienna Convention on International Sale Contracts*, *in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1.35 (Nina M. Galston & Hans Smit eds., 1984); Witz, *supra* note 17, at 108.

See also Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 281 (1984), where the author criticizes the draftsmen who, although they could have foreseen the problems which the lack of an express reference to the possibility of implicitly excluding the Convention would cause, "chose to provide little guidance."

41. *See* Helen Kaminski Pty. Ltd. v. Mktg. Australian Products, Inc., No. 96B46519, 1997 U.S. Dist. LEXIS 10630 (S.D.N.Y. July 27, 1997); Landgericht Landshut, Germany, 5 Apr. 1995; Orbisphere Corp. v. United States, 13 Ct. Int'l Trade 866, 726 F. Supp. 1344 (Ct. Int'l Trade 1990).

as in some other court decisions not cited at all.[42] This is evidenced, *inter alia*, by the fact that "the majority of delegations was . . . opposed to the proposal according to which a total or partial exclusion of the Convention could only be made 'expressly.'"[43] Consequently, the lack of express reference to the possibility of an implicit exclusion must not be regarded as precluding such possibility.[44] Rather it has a different meaning, to discourage courts from too easily inferring an 'implied' exclusion or derogation.[45] Therefore, an implicit exclusion must be regarded as possible, a view which has already been confirmed by many court decisions.[46] Some of these

---

42. *See* BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador, 323 F. 3d 333 (5th Cir. 2003), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/030611u1.html; Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd., No. 01 C 5938, 2003 U.S. Dist. LEXIS 1306 (N.D. Ill. Jan. 29, 2003), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/030129u1.html; St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, No. 00 Civ. 9344(SHS), 2002 WL 465312, at *2 (S.D.N.Y. Mar. 26, 2002).

43. Bonell, *supra* note 14, at 52; *see also* AUDIT, *supra* note 15, at 38; PILTZ, *supra* note 17, at 48. For the proposal mentioned in the text, see *Records*, *supra* note 39, at 86, 249-50.

44. However, several authors have argued that in order to be effective, the exclusion of the Convention's application must be explicit; *see*, *e.g.*, Isaak I. Dore & James E. DeFranco, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23 HARV. INT'L L.J. 49, 53-54 (1982), stating that "[u]nlike the U.C.C. . . . the Convention does not seem to recognize implied agreements which exclude the application of the Convention. The Convention may therefore govern contracts which the parties by their implied agreement might have assumed to be governed by domestic law."

For a similar conclusion, see also Isaak I. Dore, *Choice of Law under the International Sales Convention: A U.S. Perspective*, 77 AM. J. INT'L L. 521, 532 (1981); Caroline D. Klepper, *The Convention for the International Sale of Goods: A Practical Guide for the State of Maryland and Its Trade Community*, 15 MD. J. INT'L L. & TRADE 235, 238 (1991); Murphy, *supra* note 9, at 728; Robert S. Rendell, *The New U.N. Convention on International Sales Contracts: An Overview*, 15 BROOK. J. INT'L L. 23, 25 (1989).

45. For a similar justification of the lack of reference to the possibility of implicitly excluding the CISG's application, *see also Records*, *supra* note 39, at 17 (stating that "[t]he second sentence of ULIS, article 3, providing that 'such exclusion may be express or implied' has been eliminated lest the special reference to 'implied' exclusion might encourage courts to conclude, on insufficient grounds, that the Convention had been wholly excluded"); PETER SCHLECHTRIEM, UNIFORM SALES LAW. THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 35 (1986) (stating that "[i]n contrast to Article 3 sentence 2 of ULIS, the Convention does not mention the possibility of an 'implied' exclusion, but this does not mean that a tacit exclusion is impossible. The intent of deleting the word 'implied' was to prevent the courts from being too quick to impute exclusion or the Convention"); *see also* Bell, *supra* note 40, at 255; Cappuccio, *supra* note 40, at 868; Thomas C. Ebenroth, *Internationale Vertragsgestaltung im Spannungsverhältnis zwischen ABGB, IPR-Gesetz und UN-Kaufrecht*, *in* JURISTISCHE BLÄTTER 681, 684 (1986); Ferrari, *supra* note 31, at 128; MAGNUS, *supra* note 15, at 104; PILTZ, *supra* note 17, at 48; Reifner, *infra* note 49, at 55.

46. *See* Tribunale di Padova, Italy, 11 Jan. 2005, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText; Tribunale di Padova, Italy, 31 Mar. 2004, *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040331i3.html; Tribunale di Padova, Italy, 25 Feb. 2004, *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040225i3.html; Tribunale di Rimini, Italy,

decisions the Digest cites (para. 6 ff.) without commenting on, not unlike the cases holding the opposite view. Of course, there must be clear indications that the parties really wanted such an exclusion,[47] that is, there must be a real—as opposed to theoretical, fictitious or hypothetical[48]—agreement of exclusion.[49]

This is not a merely theoretical problem, as evidenced by the variety of ways to implicitly exclude the CISG. A typical[50] way of implicitly excluding the CISG is through the parties' choice of the applicable law.[51] There is no doubt that such a choice must be considered as being an effective exclusion

---

26 Nov. 2002, *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021126i3.html; Oberster Gerichtshof, Austria, 22 Oct. 2001, *available at* http://www.cisg.at/1_7701g.htm; Cour de Cassation, France, 26 June 2001, *available at* http://witz.jura.uni-sb.de/CISG/decisions/260612v.htm; Tribunale di Vigevano, Italy, 12 July 2000, *published in* GIURISPRUDENZA ITALIANA 281 (2001); Oberlandesgericht Dresden, Germany, 27 Dec. 1999, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/511.htm; Oberlandesgericht München, Germany, 9 July 1997, *available at* http://www.cisg-online.ch/cisg/urteile/282.htm; Landgericht München, Germany, 29 May 1995, *published in* NEUE JURISTISCHE WOCHENSCHRIFT 401 (1996); Oberlandesgericht Celle, Germany, 24 May 1995, *available at* http://www.cisg-online.ch/cisg/urteile/152.htm.

47. For a similar affirmation, see Michael J. Bonell, *La nouvelle Convention des Nations-Unies sur les contracts de vente internationale de marchandises*, DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL 7, 13 (1981) (stating that a "tacit exception may only be admitted if there are valid elements of indications showing the parties' 'true' intention"); FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW 48 (1992) (suggesting that there must be clear indications that an implicit exclusion is wanted); Erauw, *supra* note 17, at 47 (stating the same); Rovelli, *supra* note 20, at 105 (stating that "of course, the determination of the applicable law can result from an implicit choice of the parties, but is must be 'certain': this means that the intention of implicitly excluding the Convention must be real, not hypothetical").

48. *See also* Kammergericht Berlin, Germany, 24 Jan. 1994, *published in* RECHT DER INTERNATIONALEN WIRTSCHAFT 683 (1994) (expressly stating that the CISG's applicability cannot be excluded by a hypothetical choice of law).

49. For a similar statement, see JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 80 (3d ed. 1999) (stating that "although an agreement to exclude the Convention need not be 'express' the agreement may only be implied from facts pointing to *real*—as opposed to theoretical or fictitious—agreement"); for similar statements, see Christina Reifner, *Stillschweigender Ausschluss des UN-Kaufrechts im Prozess?*, *in* INTERNATIONALES HANDELSRECHT 55 (2002).

Note, however, that according to Murphy, *supra* note 9, at 749, the possibility of implicitly excluding the CISG contrasts with the need for certainty of law.

50. For this evaluation, see also Ferrari, *supra* note 31, at 129; Herber, *supra* note 14, at 81; MAGNUS, *supra* note 15, at 138.

51. As far as the validity of the choice of law is concerned, it must be evaluated on the grounds of the law applicable to this issue. According to Article 2 of the 1955 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, the *electio iuris* is governed by the law chosen by the parties; the same is true according to Article 3(4) and 8 of the 1980 EEC Convention on the Law Applicable to Contractual Obligations. For further reference to this problem, see Bonell, *supra* note 19, at 19; FERRARI, *supra* note 17, at 115-16; HERBER & CZERWENKA, *supra* note 40, at 43.

of the CISG, at least where the applicable law chosen by the parties is the law of a non-Contracting State.[52] This was true under the ULIS as well[53] and has been confirmed by a German court decision[54] cited in the Digest.

The choice of the law of a Contracting State as the law governing the contract poses more difficult problems.[55] One of these problems relates to the question of whether the CISG is applicable when the parties agree upon a national law, such as French, U.S. or Italian law, as the law applicable to their contract. As the Digest clearly shows (para. 8), the case law is contradictory on this issue as well. Since the Digest, however, simply lists the contradictory cases, once again without commenting on them, the interpreter has to look elsewhere to determine which cases should be followed.

In respect to the issue at hand, several courts,[56] as well as several legal writers,[57] suggest that the indication of the law of a Contracting State ought

---

52. For a similar statement, *see*, *e.g.*, Bonell, *supra* note 14, at 56 (stating that there is an "[implicit] indication of the parties' intention to exclude the application of the Convention, either entirely or partially, whenever they have chosen as the proper law of their contract the law of a non-Contracting State . . ."); *see also* AUDIT, *supra* note 15, at 39; Carbone & Luzzatto, *supra* note 17, at 132; FRITZ ENDERLEIN ET AL., INTERNATIONALES KAUFRECHT: KAUFRECHTSKONVENTION. VERJÄHRUNGSKONVENTION. VERTRETUNGSKONVENTION. RECHTSANWENDUNGSKONVENTION 58 (1991); FERRARI, *supra* note 14, at 166; Ferrari, *supra* note 31, at 129; GARRO & ZUPPI, *supra* note 40, at 95; Holthausen, *supra* note 40, at 515; Ole Lando, *The 1985 Hague Convention on the Law Applicable to Sales*, *in* RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 84 (1987); Liguori, *supra* note 40, at 158; LINDBACH, *supra* note 40, at 308; MAGNUS, *supra* note 15, at 138; Martiny, *supra* note 22, at 1656; PILTZ, *supra* note 17, at 48; Reifner, *supra* note 49, at 55; Sacerdoti, *supra* note 17, at 746; Christian Thiele, *Das UN-Kaufrecht vor US-amerikanischen Gerichten—zugleich Anmerkung zu Viva Vino Import Corp. v. Franese Vini S.r.l. (E.D.Pa. 2000)*, *in* INTERNATIONALES HANDELSRECHT 9 (2002); Winship, *supra* note 40, at 1.35.

53. *See* Herber, *supra* note 33, at 20.

See, however, Rechtbank Koophandel Tongeren, Belgium, 18 Mar. 1976, *in* INTERNATIONALE RECHTSPRECHUNG ZU EKG UND EAG 136 f. (Peter Schlechtriem & Ulrich Magnus eds., 1987); Rechtbank Koophandel Tongeren, Belgium, 9 June 1977, *in* INTERNATIONALE RECHTSPRECHUNG ZU EKG UND EAG 138.

54. *See*, *e.g.*, Oberlandesgericht Düsseldorf, Germany, 2 July 1993, *published in* RECHT DER INTERNATIONALEN WIRTSCHAFT 845 (1993).

55. For an overview of this issue, see Franco Ferrari, *Zum vertraglichen Ausschluss des UN-Kaufrecht*, *in* ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 743 (2002); MAGNUS, *supra* note 15, at 138-39.

56. *See* Cour d'Appel Colmar, France, 26 Sept. 1995, *available at* http://witz.jura.uni-sb.de/cisg/decisions/260995.htm; Kammergericht Zug, Germany, 16 Mar. 1995, *published in* INTERNATIONALES HANDELSRECHT 44 (2000); Ad Hoc Arbitral Tribunal Florence, 19 Apr. 1994, *published in* DIRITTO DEL COMMERCIO INTERNAZIONALE 861 (1994); Tribunale di Monza, Italy, 14 Jan. 1993, *published in* FORO ITALIANO 916 (1994).

57. *See*, *e.g.*, Franz Bydlinski, *Diskussionsbeitrag*, *in* DAS UNCITRAL-KAUFRECHT IM VERGLEICH ZUM ÖSTERREICHISCHEN RECHT 48 (Peter Doralt ed., 1985); Martin Karollus, *Der Anwendungsbereich des UN-Kaufrechts im Überblick*, JURISTISCHE SCHULUNG 381 (1993).

to amount to an (implicit) exclusion of the CISG, because otherwise the indication of the parties would have no practical meaning.[58] In my opinion,[59] however, this solution is not tenable under the CISG,[60] not unlike under the ULIS.[61] The indication of the law of a Contracting State, if made without particular reference to the domestic law of that State,[62] as in two of the cases cited by the Digest,[63] does not *per se* exclude the Convention's application,[64]

---

58. *See*, apart from the authors cited in the preceding note, KAROLLUS, *supra* note 40, at 38-39; Francis A. Mann, *Anmerkung zu BGH, Urteil vom 4.12.1985*, JURISTENZEITUNG 647 (1986); Walter A. Stoffel, *Ein neues Recht des internationalen Warenkaufs in der Schweiz*, SCHWEIZERISCHE JURISTENZEITUNG 173 (1990); Lajos Vekas, *Zum persönlichen und räumlichen Anwendungsbereich des UN-Einheitskaufrechts*, RECHT DER INTERNATIONALEN WIRTSCHAFT 346 (1987).

59. *See* Franco Ferrari, *Exclusion et inclusion de la CVIM*, REVUE DE DROIT DES AFFAIRES INTERNATIONALES 401, 403 (2001).

60. This view was also expressed on the occasion of the Vienna Diplomatic Conference, when a large number of delegations rejected proposals by Canada and Belgium (for these proposals, see *Records*, *supra* note 39, at 250) according to which the domestic sales law, and not the CISG, would have to be applied whenever the parties indicated the law of a Contracting State as the proper law for their contract.

For a reference to the rejection of the foregoing proposals as argument in favor of the view expressed in the text, see also Bonell, *supra* note 14, at 56; MAGNUS, *supra* note 15, at 106.

61. This view was predominant under the 1964 Hague Conventions; for a reference to this view in legal writing, see, e.g., ENDERLEIN & MASKOW, *supra* note 47, at 49; Herber, *supra* note 33, at 21; Gert Reinhart, *Dix ans de jurisprudence de la République Fédérale d'Allemagne à propos de la loi uniforme sur la vente internationale d'objets mobiliers corporels*, UNIFORM LAW REVIEW 424 (1984); Witz, *supra* note 17, at 110; Konrad Zweigert & Ulrich Drobnig, *Einheitliches Kaufrecht und internationales Privatrecht*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 162-63 (1965).

62. There is no doubt that the CISG's application is excluded where the parties merely refer to the domestic law of a Contracting State; for a similar conclusion, see Bonell, *supra* note 19, at 18; BRUNNER, *supra* note 40, at 70; Cappuccio, *supra* note 40, at 873; Erauw, *supra* note 17, at 49; FERRARI, *supra* note 17, at 117; SCHLECHTRIEM, *supra* note 45, at 35. Consequently, where the parties state, for instance, that "the contract be governed by American law as laid down in the U.C.C.," the CISG's application should be considered as being excluded.

For further examples of clauses that successfully exclude the Convention's application, see B. Blair Crawford, *Drafting Considerations under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 193 (1988); E. Allen Farnsworth, *Review of Standard Forms or Terms under the Vienna Convention*, 21 CORNELL INT'L L.J. 442 (1988); Herber, *supra* note 14, at 87; Holthausen, *supra* note 40, at 515; David L. Perrott, *The Vienna Convention 1980 on Contracts for the International Sale of Goods*, INTERNATIONAL CONTRACT LAW AND FINANCE REVIEW 580 (1980); PILTZ, *supra* note 17, at 48; Winship, *supra* note 40, at 1.35.

63. Oberlandesgericht Frankfurt, Germany, 30 Aug. 2000, *available at* http://cisgw3.law.pace.edu/cases/000830g1.html; Oberlandesgericht Frankfurt, Germany, 15 Mar. 1996, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/284.htm.

64. This view is shared by the majority of commentators; *see*, *e.g.*, AUDIT, *supra* note 15, at 39; Bonell, *supra* note 14, at 56; Erauw, *supra* note 17, at 21, 25, 48; Farnsworth, *supra* note 62, at 442; FERRARI, *supra* note 17, at 117; Rolf Herber, *Anwendungsvoraussetzungen und Anwendungsbereich des Einheitlichen Kaufrechts*, *in* EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT 104 (Peter Schlechtriem ed., 1987); HERBER & CZERWENKA, *supra* note 40, at 44; ALBERT H. KRITZER, GUIDE TO

as confirmed by many court decisions[65] and arbitral awards[66] cited in the

---

PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 100-01 (1989); Jean-Pierre Plantard, *Un nouveau droit uniforme de la vente internationale: La Convention des Nations Unies du 11-4-1980*, JOURNAL DU DROIT INTERNATIONAL 321 (1988); SCHLECHTRIEM, *supra* note 19, at 22; Pierre Thieffry, *Les Nouvelles Règles de la Vente Internationale*, 15 DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL 373 (1989); Peter Winship, *International Sales Contracts under the 1980 Vienna Convention*, 17 UCC L.J. 55, 65 (1984).

65. Hof van Beroep Gent, Belgium, 17 May 2002, *available at* http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-05-17.htm; Oberlandesgericht Frankfurt, Germany, 30 Aug. 2000, *available at* http://cisgw3.law.pace.edu/cases/000830g1.html; Bundesgerichtshof, Germany, 25 Nov. 1998, *published in* TRANSPORTRECHT-INTERNATIONALES HANDELSRECHT 18 (1999); Oberlandesgericht Hamburg, Germany, 5 Oct. 1998, *available at* http://www.cisg-online.ch/cisg/urteile/473.htm; Kantongericht Nidwalden, Switzerland, 3 Dec. 1997, *published in* TRANSPORTRECHT-INTERNATIONALES HANDELSRECHT 10 (1999); Bundesgerichtshof, Germany, 25 June 1997, *available at* http://www.cisg-online.ch/cisg/urteile/277.htm; Oberlandesgericht München, Germany, 9 July 1997, *available at* http://www.cisg-online.ch/cisg/urteile/281.htm; Oberlandesgericht Karlsruhe, Germany, 25 June 1997, *available at* http://www.cisg-online.ch/cisg/urteile/263.htm; Handelsgericht Kanton Zürich, Switzerland, 5 Feb. 1997, *available at* http://www.cisg-online.ch/cisg/urteile/327.htm; Cour de Cassation, France, 17 Dec. 1996, *available at* http://www.cisg-online.ch/cisg/urteile/220.htm; Landgericht Kassel, Germany, 15 Feb. 1996, *published in* NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNGS-REPORT 1146 (1996); Oberlandesgericht Hamm, Germany, 9 June 1995, *published in* RECHT DER INTERNATIONALEN WIRTSCHAFT 689 (1996); Arrondissementsrechtbank Gravenhage, Netherlands, 7 June 1995, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=154&step=FullText; Oberlandesgericht München, Germany, 8 Feb. 1995, *available at* http://www.cisg-online.ch/cisg/urteile/142.htm; Oberlandesgericht Köln, Germany, 22 Feb. 1995, *published in* PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 393 ff. (1995); Oberlandesgericht Koblenz, Germany, 17 Sept. 1993, *published in* RECHT DER INTERNATIONALEN WIRTSCHAFT 934 (1993); Oberlandesgericht Düsseldorf, Germany, 8 Jan. 1993, *published in* RECHT DER INTERNATIONALEN WIRTSCHAFT 325 (1993).

66. *See* Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 9187, June 1999, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=466&step=FullText (CISG applicable pursuant to the choice of French law, i.e., the law of a Contracting State); Schiedsgericht der Handelskammer Hamburg, Germany, 21 Mar. 1996, *published in* MONATSSCHRIFT FÜR DEUTSCHES RECHT 781 (1996) (applying the CISG on the grounds that the choice of the Hamburg arbitral tribunal was to be analogized to the choice of German law, *i.e.*, that of a Contracting State); Court of Arbitration of the Hungarian Chamber of Commerce and Industry, 17 Nov. 1995, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=217&step=FullText (stating that the CISG was applicable, among others, because the parties had chosen the law of two (!) Contracting States as the law governing the contract); Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 8324, 1995, *published in* JOURNAL DU DROIT INTERNATIONAL 1019 (1996) (applying the CISG to a contract which the parties had subjected to French law, *i.e.*, the law of a Contracting State); Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 7844, 1994, *published in* ICC COURT OF ARBITRATION BULLETIN 72 (1995) (stating that the CISG is applicable where the parties have chosen the law of a Contracting State to govern their international sales contract); Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 7660, 23 Aug. 1994, *published in* ICC COURT OF ARBITRATION BULLETIN 68 (1995) (holding that the CISG was applicable on the grounds that the parties had agreed upon the law of a Contracting State (Austria) as the law governing their contract and that the choice of the law of a Contracting State included the CISG); Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 7565, *published in* ICC COURT OF ARBITRATION BULLETIN 64 (1995) (applying the CISG to a contract to which the parties had made applicable "the Laws of Switzerland" based upon the

Digest. This is true even where the law chosen is that of a Contracting State that made an Article 95 reservation.[67]

The application of the Convention does not make the national law irrelevant, as suggested.[68] The indication of the law of a Contracting State must be interpreted as both making the CISG applicable (as part of the chosen law)[69] and as determining the law applicable to the issues not governed by the CISG (to the extent to which the parties are allowed to make a choice in respect of those issues),[70] such as the issues relating to the validity, thus avoiding to have to resort to the complex rules of private international law in order to determine the law applicable to the issues not governed by the CISG.[71]

Quid iuris if under the 1964 Hague Conventions the parties have established practices between themselves according to which the reference to the law of a Contracting State had to be interpreted as an exclusion of the uniform sales law and the parties continue to refer to the law of that State even

---

argument that "Swiss law, when applicable, consists of the Convention itself as of the date of its incorporation into Swiss law"); Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 6653, *published in* JOURNAL DU DROIT INTERNATIONAL 1040 (1993) (applying the CISG to a contract which the parties had agreed upon to subject to French law, the law of a Contracting State to the CISG); Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, Arbitral Award No. SCH-4366, 15 June 1994, *published in* RECHT DER INTERNATIONALEN WIRTSCHAFT 590 (1995) (expressly stating that "the parties' choice of the law of a Contracting State is understood as a reference to the corresponding national law, including the CISG as the international sales law of that State and not merely to the—non-unified—domestic sales law").

67. For this solution, *see also* Gerold Herrmann, *Anwendungsbereich des Wiener Kaufrechts—Kollisionsrechtliche Probleme*, *in* WIENER KAUFRECHT. DER SCHWEIZERISCHE AUSSENHANDEL UNTER DEM ÜBEREINKOMMEN ÜBER DEN INTERNATIONALEN WARENKAUF 95 (Eugen Bucher ed., 1991); MAGNUS, *supra* note 15, at 139.

Contra, in the sense that in this line of cases the CISG should not apply, AUDIT, *supra* note 15, at 39 n.3.

68. For this affirmation, *see also* FERRARI, *supra* note 14, at 170.

69. *See* SCHLECHTRIEM, *supra* note 19, at 13.

70. *Compare* Franco Ferrari, *Diritto Uniforme della Vendita Internazionale: Questioni di Applicabilità e di Diritto Internazionale Privato*, RIVISTA DI DIRITTO CIVILE 669, 685 (1995); Liguori, *supra* note 40, at 158.

71. For a similar conclusion in respect of the consequences of the parties' choice of the law of a Contracting State as the proper law for their contract, see ENDERLEIN & MASKOW, *supra* note 47, at 49, stating that:

> When a state participates in the Convention the latter can be assumed to be part of his domestic law so that additional reference to it could be considered as superfluous at first, and/or for the reference to make sense, as an exclusion of the CISG. But the application of the Convention does in no way make the application of the other parts of the national law irrelevant . . . . Therefore, it must be recommended to the parties to determine the national law that is applicable in addition to the Convention . . . so that they can avoid the uncertainties involved in determining that law, using the conflict-of-law norms.

after that State becomes a Contracting one to the CISG? Does the continuing reference to the law of that State have to be considered as an exclusion of the CISG? Even though several authors have argued in favor of an affirmative answer to this question,[72] most recently the opposite view was adopted by a German court.[73]

IV. EXCLUSION OF THE CISG BY VIRTUE OF STANDARD CONTRACT FORMS AND CHOICE OF FORUM

The choice of the law of a State—whether Contracting or not—does not constitute the sole kind of implicit exclusion which can be used to bar the Convention's application.[74] Indeed, in certain situations, and this was also true under the 1964 Hague Conventions,[75] the use of standard contract forms can lead to the exclusion of the CISG's application.[76] This is true provided that these forms become part of the contract[77] and that (a) their contents are so profoundly influenced by the rules and the concepts of a specific legal system that their use is incompatible with the CISG and implicitly manifests the parties' intention to have the contract governed by that legal system[78] and

---

72. *See*, *e.g.*, FERRARI, *supra* note 17, at 118; Holthausen, *supra* note 40, at 516.

73. *Compare* Landgericht Düsseldorf, Germany, 11 Oct. 1995, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/180.htm (stating that the express exclusion of the 1964 Uniform Sales Law did not amount per se to an implied exclusion of the CISG and therefore applied the CISG to an international sales contract which the parties had agreed upon subjecting to the sole law of Germany, i.e., the law of a Contracting State to the CISG).

74. *See also* ACHILLES, *supra* note 40, at 26; FERRARI, *supra* note 14, at 172 ff.; MAGNUS, *supra* note 15, at 140 ff.

75. For a very detailed discussion of the possibility of implicitly excluding the application of both the ULIS and ULF, among others by adopting standard contract forms, see, e.g., Friedrich Graf von Westphalen, *Allgemeine Geschäftsbedingungen und Einheitliches Kaufgesetz (EKG)*, *in* EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT, *supra* note 64, at 49 ff.; Rainer Hausmann, *Stillschweigender Ausschluß der Einheitlichen Kaufgesetze durch allgemeine Geschäftsbedingungen*, RECHT DER INTERNATIONALEN WIRTSCHAFT 186 (1977); Gert Reinhart, *Erschwerter Ausschluß der Anwendung des Einheitlichen Kaufgesetzes*, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 288 (1986).

76. For a similar statement, see Erauw, *supra* note 17, at 49; Herrmann, *supra* note 67, at 95-96; Martiny, *supra* note 22, at 1656.

77. *See* SCHLECHTRIEM, *supra* note 19, at 14.

78. The possibility of an implicit exclusion of the CISG by means of standard contract forms has also been favored by Bonell, *supra* note 14, at 56-57, stating that:

> [T]he use of general conditions or of standard form contracts whose content is influenced by principles and rules typical of the domestic law of a particular State, is certainly an element from which one could infer the intention of the parties to have that domestic law rather than the Convention govern their contract. Before reaching such a conclusion, however, due consideration should be given to other circumstances of the case.

(b) their use tends at the same time to exclude the application of the CISG as a whole.[79] Where, on the contrary, standard contract forms are intended to merely regulate specific issues in contrast with the CISG, one must presume that only a derogation of some of the CISG provisions is desired.[80]

Furthermore, as pointed out also by the Digest (para. 9), the choice of forum can lead to the exclusion of the CISG's application,[81] and the same is true with reference to the choice of an arbitral tribunal,[82] provided that two requirements are met: (a) one must be able to infer from the parties' choice their clear intention to have the domestic law of the State where the forum or arbitral tribunal is located govern their contract,[83] and (b) the forum must not be located in a Contracting State,[84] otherwise the CISG would be applicable,[85] as confirmed by two arbitral rewards referred to in the Digest.[86]

This view is shared by other authors as well; *see*, *e.g.*, AUDIT, *supra* note 15, at 39; Ulrich Huber, *Der UNCITRAL-Entwurf eines Übereinkommens über internationale Warenkaufverträge*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 426 (1979); SCHLECHTRIEM, *supra* note 19, at 21.

79. *See also* MAGNUS, *supra* note 15, at 141 (stating that standard contract forms which contrast with specific provisions of the CISG should not *per se* be looked upon as excluding the CISG as a whole). This was true under the Hague Conventions as well; see, for instance, Oberlandesgericht Hamm, Germany, 7 May 1979, *in* INTERNATIONALE RECHTSPRECHUNG ZU EAG UND EKG, *supra* note 53, at 141 f.

80. For a similar solution, see ENDERLEIN & MASKOW, *supra* note 47, at 49 (stating that "[o]n no account can the exclusion of the Convention be deduced merely from agreement of such terms of contract which contradict specific provisions because deviating individual exclusions are indeed compatible with the CISG"). This view is also held by FERRARI, *supra* note 17, at 119; Witz, *supra* note 17, at 111.

81. Note to this regard, that it has been asserted that "[i]f the parties have not provided otherwise, but have included a choice of forum clause, courts are inclined to rule that the choice of forum indicates a choice of that jurisdiction's substantive law," Ronald A. Brand, *Nonconvention Issues in the Preparation of Transnational Sales Contracts*, 8 J.L. & COM. 145, 167 (1988).

For practical applications of the aforementioned tendency, see *Tzotrzis v. Monard Line A/B*, [1968] W.L.R. 406, 411-12 (C.A.); *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 14 n.15 (1972).

82. For this conclusion, see Holthausen, *supra* note 40, at 517-18; MAGNUS, *supra* note 15, at 140-41.

83. Several authors have pointed out that, even though the choice of a forum or of an arbitral tribunal may indicate the parties' intention to exclude the CISG, that choice by itself is not sufficient to bar the Convention's application; for similar affirmations, see HERBER & CZERWENKA, *supra* note 40, at 43 (stating that an arbitration clause or the choice of a forum might indicate the parties' intention to exclude the Convention); Huber, *supra* note 78, at 426 (stating that the choice of an arbitral tribunal by itself does not lead to the exclusion of the Convention); SCHLECHTRIEM, *supra* note 45, at 35 (stating that the choice of an arbitral tribunal does not by itself imply that the parties wish to exclude the Convention's application).

84. For similar, albeit not identical conclusions, see Erauw, *supra* note 17, at 49; Herber, *supra* note 14, at 87; Holthausen, *supra* note 40, at 519; Reifner, *supra* note 49, at 55.

85. For this solution, see Gerhard Walter, *Kaufrecht*, HANDBUCH DES SCHULDRECHTS 632 (1987) (stating that whenever the arbitral tribunal chosen by the parties is located in a Contracting State, the CISG is applied).

86. *See* Schiedsgericht der Hamburger freundlichen Arbitrage, Germany, 29 Dec. 1998, *published in* INTERNATIONALES HANDELSRECHT 36-37 (2001) (applying the CISG on the grounds that the choice of

Finally, although this possibility is nowhere referred to in the Digest, parties can exclude the CISG by agreeing that specific issues of their contract be subject to specific provisions of a law different than the CISG, provided, however, that those issues are fundamental ones[87] and that from the subjection of those issues to a domestic sales law one can infer the parties' clear intention to have the contract governed by a law different from the uniform one, as pointed out by various court decisions rendered in respect of the 1964 Hague Conventions.[88] As correctly stated in a decision referred to in the Digest (para. 11), the inclusion of Incoterms by the parties does not amount to an implicit exclusion of the CISG.[89]

V. IMPLICIT EXCLUSION AND PLEADINGS ON THE SOLE BASIS OF DOMESTIC LAW

Quid iuris where the parties argue a case on the sole basis of a domestic law despite the fact that all of the CISG's criteria of applicability are met? Although this issue is referred to in the Digest (para. 10), as there is case law on it, the Digest itself does not help to answer the question. The cases it cites are contradictory and the Digest once again does not help to solve the contradiction.

In my opinion,[90] the mere fact that the parties argue on the sole basis of a domestic law does *not per se* lead to the exclusion of the CISG,[91] a view recently confirmed by several courts,[92] unless the parties are aware of the CISG's applicability or the intent to exclude the CISG can otherwise be

---

the Hamburg arbitral tribunal was to be analogized to the choice of German law, *i.e.*, that of the Contracting State in which the arbitral tribunal was located); Schiedsgericht der Handelskammer Hamburg, Germany, 21 Mar. 1996, *published in* MONATSSCHRIFT FÜR DEUTSCHES RECHT 781 (1996) (applying the CISG on the same grounds).

87. For this prerequisite, see Herber, *supra* note 14, at 87.

88. *See*, *e.g.*, Landgericht Bamberg, Germany, 12 Oct. 1983, *published in* PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 266 (1984); Bundesgerichtshof, 26 Nov. 1980, *published in* NEUE JURISTISCHE WOCHENSCHRIFT 1156 f. (1981).

89. Oberster Gerichtshof, Austria, 22 Oct. 2001, *available at* http://www.cisg.at/1_7701g.htm.

90. *See* Ferrari, *supra* note 55, at 744 ff.

91. For this conclusion, see SCHLECHTRIEM, *supra* note 19, at 14.

92. *See* Tribunale di Padova, Italy, 25 Feb. 2004, *available at* http://cisgw3.law.pace.edu/cases/040225i3.html; Landgericht Saarbrücken, Germany, 2 July 2002, *available at* http://cisgw3.law.pace.edu/cases/020702g1.html; Oberlandesgericht Rostock, Germany, 10 Oct. 2001, *available at* http://cisgw3.law.pace.edu/cisg/cases/011010g1.html; Tribunale di Vigevano, Italy, 12 July 2000, *published in* GIURISPRUDENZA ITALIANA 281 (2001); Oberlandesgericht Hamm, Germany, 9 June 1995, *published in* PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 269 (1996); Landgericht Landshut, Germany, 5 Apr. 1995, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/193.htm.

inferred with certainty. If the parties are not aware of the CISG's applicability and argue on the basis of a domestic law merely because they believe that this law is applicable, the judges will nevertheless have to apply the CISG on the grounds of the principle *iura novit curia*, provided that this principle is part of the *lex fori*.

One of the courts stated this very clearly:

> The fact that during the preliminary legal proceedings in this case the parties based their arguments exclusively on Italian domestic law without any references to the [CISG] cannot be considered an implicit manifestation of an intent to exclude application of the Convention . . . . [R]eference in a party's brief to the non-uniform national law of a Contracting State—even though it is theoretically some evidence of an intent to choose the national law of that State—does not imply the automatic exclusion of the [CISG]. We will assume that the parties wanted to exclude the application of the Convention only if it appears in an unequivocal way that they recognized its applicability and they nevertheless insisted on referring only to national, non-uniform law. In the present case, it does not appear from the parties' arguments that they realized that the [CISG] was the applicable law . . .; we cannot, therefore, conclude that they implicitly wanted to exclude the application of the Convention by choosing to refer exclusively to national Italian law. Thus according to the principle *iura novit curia*, it is up to the judge to determine which Italian rules should be applied; for the reasons mentioned above, the applicable rules are those in the Vienna Convention.[93]

In light of what has been said thus far, one has to reject the opposite view held by two tribunals (a state court[94] and an arbitral tribunal[95]) according to which pleadings on the sole grounds of domestic law automatically leads to the exclusion of the CISG.

VI. EXPRESS EXCLUSION OF THE CISG

In addition to problems concerning the CISG's implicit exclusion, problems can also arise with respect to its explicit exclusion.[96] In this respect, two lines of cases have to be distinguished: the exclusion with and the

---

93. Tribunale di Vigevano, Italy, 12 July 2000, English translation quoted from 20 J.L. & COM. 213-14 (2001).

94. Cour de Cassation, France, 26 June 2001, *available at* http://witz.jura.uni-sb.de/CISG/decisions/2606012v.htm.

95. Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 8453, Oct. 1995, *published in* ICC COURT OF ARBITRATION BULLETIN 56 (2000).

96. For a suggestion of various clauses by means of which the CISG can be expressly excluded, see Peter Winship, *Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners*, 29 INT'L LAWYER 538 (1995).

exclusion without indication of the law applicable to the contract between the parties.[97]

Nulla quaestio in the case in which the CISG is excluded with the indication of the applicable law, indication which under the CISG can, not unlike under the Hague Conventions,[98] also be made in the course of a legal proceeding,[99] at least where this is admissible according to the *lex fori*,[100] as in Germany[101] and Switzerland for instance,[102] even though the parties will normally make their choice before the conclusion of the contract.[103] In this case, the judge has to apply the law chosen by the parties,[104] and it is this law on the basis of which he has to decide upon the validity of the choice of law, at least where the applicable rules of private international law correspond to those laid down in the 1980 Convention on the law applicable to contractual obligations.[105] Where the parties' choice of law is invalid, the contract should

---

97. For this distinction, see FERRARI, *supra* note 17, at 121.

98. Under the 1964 Hague Conventions, the indication of the applicable law could be made during the legal proceeding. For a reference to this rule in respect of ULIS and ULF, see Volker Stötter, *Stillschweigender Ausschluß der Anwendbarkeit des internationalen Kaufabschlußübereinkommens und des Einheitlichen Kaufgesetzes*, RECHT DER INTERNATIONALEN WIRTSCHAFT 38 (1980); Christoph von der Seipen, *Zum Ausschluß des Einheitlichen Kaufrechts im deutsch-englischen Rechtsverkehr*, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 246 (1984).

For judicial applications of this principle, see Bundesgerichtshof, Germany, 26 Nov. 1980, *published in* NEUE JURISTISCHE WOCHENSCHRIFT 1156 (1981); Bundesgerichtshof, Germany, 26 Oct. 1983, *published in* RECHT DER INTERNATIONALEN WIRTSCHAFT 151 (1984).

99. *See* Erauw, *supra* note 17, at 47; KAROLLUS, *supra* note 40, at 38; SCHLECHTRIEM, *supra* note 19, at 14.

100. *See* ACHILLES, *supra* note 40, at 27; CZERWENKA, *supra* note 28, at 169-70; Holthausen, *supra* note 40, at 515; Ulrich Magnus, *Zum räumlich-internationalen Anwendungsbereich des UN-Kaufrechts und zur Mängelrüge*, PRAXIS DES INTERNATIONALEN PRVAT- UND VERFAHRENSRECHTS 391 (1993).

101. Oberlandesgericht Köln, Germany, 26 Aug. 1994, *available at* http://www.cisg-online.ch/cisg/urteile/132.htm; Oberlandesgericht Saarbrücken, Germany, 13 Jan. 1993, *available at* http://www.cisg-online.ch/cisg/urteile/83.htm.

102. Handelsgericht Kanton Zürich, Switzerland, 10 Feb. 1999, *published in* SCHWEIZERISCHE ZEITSCHRIFT FÜR INTERNATIONALES UND EUROPÄISCHES RECHT 111 (2000).

103. In this respect, it has been stated that:

> One might expect that, in practice, the parties would normally indicate their intention at the beginning of their negotiations, or at least before the contract is concluded. Nonetheless, there is nothing to prevent them from deciding at a later stage, even after the initiation of a legal proceeding relating to their contract. . . . It should, however, be borne in mind that any exclusion of or derogation from the Convention agreed upon after the conclusion of the contract amounts to a modification of the contract, which in some cases may require a particular form.

Bonell, *supra* note 14, at 58.

104. For this solution see also Sacerdoti, *supra* note 17, at 746.

105. Although it is common knowledge that the question of whether the parties' choice of law is valid falls outside the sphere of application of the Convention, there is uncertainty about the law on the basis of which to decide whether the parties have validly excluded the Convention, as has been pointed out, for

be governed by the law to be determined on the basis of the rules of private international law of the forum.[106] If this law turns out to be that of a Contracting State to the CISG, its domestic law rather than the CISG will have to be applied.[107]

Quid iuris, however, in the case of an express exclusion without indication of the applicable law, an issue also referred to in the Digest, although there is no case law on it yet?[108] In this case, the preferable view, held by most legal scholars,[109] is the one according to which "if the parties merely agree that the Convention does not apply, rules of private international law would determine the applicable domestic law."[110] And whenever these rules refer to the law of a Contracting State, its domestic sales law, not the uniform one, should apply.[111]

Undoubtedly, this rule applies in cases in which the CISG is excluded *in toto*.[112] However, its application to cases in which it is excluded only partially created disagreement among legal scholars.[113] Some authors favor the view according to which the issues dealt with in the excluded provisions must be

---

instance, by Bonell, *supra* note 14, at 60-61 (stating that "given the special nature of a choice-of-laws clause, it is uncertain whether the validity of the parties' consent is to be decided according to the proper law as objectively determined, the law chosen by the parties, or the substantive rules of the forum." In this respect, "see Article 10 of the 1985 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, according to which whenever the parties' agreement as to the applicable law is either express or clearly demonstrated by the terms of the contract and the conduct of the parties, the existence and validity of that agreement shall be determined by the law chosen.").

106. This solution is shared by Bonell, *supra* note 14, at 61; FERRARI, *supra* note 17, at 121; HONNOLD, *supra* note 49, at 126.

107. However, see HERBER & CZERWENKA, *supra* note 40, at 44 (favoring the view according to which the invalidity of the parties' choice of law leads to the application of the CISG).

108. Note, that while at one point an exclusion without indication of the applicable law was considered inadmissible, this view is no longer tenable. *See* Michael J. Bonell, *UN-Kaufrecht und das Kaufrecht des Uniform Commercial Code im Vergleich*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALS PRIVATRECHT 28 (1994); HONNOLD, *supra* note 49, at 78.

109. This solution has been favored, for instance, by FERRARI, *supra* note 14, at 179; HERBER & CZERWENKA, *supra* note 40, at 41-42; KAROLLUS, *supra* note 40, at 38; Martiny, *supra* note 22, at 1655; Sacerdoti, *supra* note 17, at 746; SCHLECHTRIEM, *supra* note 19, at 21.

110. HONNOLD, *supra* note 49, at 78; *see* Bonell, *supra* note 19, at 19; FERRARI, *supra* note 17, at 122; Jolanta K. Kostkiewicz & Ivo Schwander, *Zum Anwendungsbereich des UN-Kaufrechtsübereinkommens*, *in* FESTSCHRIFT NEUMAYER 48 (Ferenc Majoros ed., 1997); MAGNUS, *supra* note 15, at 137.

111. For this solution, see also Herber, *supra* note 14, at 85; KAROLLUS, *supra* note 40, at 38; MAGNUS, *supra* note 15, at 104; Martiny, *supra* note 22, at 1656; Kurt Siehr, *Der internationale Anwendungsbereich des UN-Kaufrecht*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATECHT 600 (1988).

112. For this affirmation, see Bonell, *supra* note 14, at 59.

113. For a recent overview of the discussion on this issue, see MAGNUS, *supra* note 15, at 142-43.

settled, according to Article 7(2) CISG, in conformity with the CISG's general principles.[114] In my opinion,[115] the better view seems to be the opposite one: the rules to substitute the excluded CISG provisions are to be determined, not unlike in the case of an exclusion *in toto* of the Convention, by applying the rules of private international law (of the forum State)[116]—without resorting to the general principles of the CISG—otherwise the exclusion would have no practical meaning. Indeed, it would make little sense to substitute specific solutions provided for by the Convention and which, therefore, are necessarily in conformity with its general principles, with solutions that are "in conformity with the general principles on which [the Convention] is based."[117]

VII. APPLICABILITY OF THE CISG AND OPTING-IN

As stated, the CISG provides for the parties' possibility of excluding (totally or partially) its application. To contrast, the Convention does not address the issue of whether the party may make the Convention applicable when it would otherwise not apply,[118] that is, where the prerequisites for application are not met.[119]

---

114. For this view, see Bonell, *supra* note 14, at 59; Herber, *supra* note 14, at 88-89; HERBER & CZERWENKA, *supra* note 40, at 42.

115. *See* FERRARI, *supra* note 17, at 122.

116. *Compare also* FERRARI, *supra* note 14, at 180.

117. CISG art. 7(2).

118. For a discussion of this problem, see AUDIT, *supra* note 15, at 40; FERRARI, *supra* note 17, at 124-26.

119. Note, that according to Bonell, *supra* note 14, at 63-64, the issue of the possibility of "opting-in" arises only where State courts are involved, since generally the parties are not allowed to select by virtue of a choice of law an international convention, instead of a particular domestic law.

> The situations may be different if the parties agree to submit the disputes arising from their contract to arbitration. Arbitrators are not necessarily bound by a particular domestic law. This is self-evident, if they are authorized by the parties to decide *ex aequo et bono*. . . . But even in the absence of such an authorization there is a growing tendency to permit arbitrators to base their decisions on principles and rules different from those adopted by State courts. This tendency has recently received a significant confirmation by the Uncitral Model Law on International Commercial Arbitration, where it is expressly stated that '[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute' (Article 28(1)). . . . Following this approach the parties to an international contract would be free to indicate in the Convention the 'rules of law' according to which the arbitrators shall decide any dispute, with the result that the Convention would directly apply regardless of whether or not the positive and negative conditions for this application are fulfilled in the single case.

Id.

As also pointed out in the Digest (para. 12), this issue did not arise at all under the ULIS which embodied a provision, Article 4,[120] that expressly provided for the parties' possibility of "opting-in."[121] The fact that the drafters did not retain that express reference to the parties' possibility of opting-in should, however, not be interpreted as preventing the parties from being entitled to do so.[122] This view can be justified on the grounds that the proposal (made by the former German Democratic Republic),[123] according to which the CISG should apply even where the preconditions for its application are not met, as long as the parties wanted it to be applicable, was rejected on the sole ground that an express provision to allow such possibility was not necessary,[124] because of the already existing principle of party autonomy.[125] Most recently, this view was confirmed by a Chinese court decision which applied the CISG by virtue of the parties' opting-in to a contract for the sale

---

120. *See* Article 4 ULIS.

> The present law shall also apply where it has been chosen as the law of the contract by the parties, whether or not their places of business or their habitual residences are in different States and whether or not such States are Parties to the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods, to the extent that it does not affect the application of any mandatory provisions of the law which would have been applicable if the parties had not chosen the Uniform Law.

Id.

121. For a reference to Article 4 ULIS in scholarly writing relating to Article 6 CISG, see FERRARI, *supra* note 14, at 182-83; HERBER & CZERWENKA, *supra* note 40, at 45.

122. For the possibility of "opting-in," see ENDERLEIN & MASKOW, *supra* note 47, at 51 (stating that "[t]he Convention can be interpreted in such a way that its application . . . can be agreed. In this case the substantive and territorial, and hence personnel and time *scope of application*, can be *extended*"); SCHLECHTRIEM, *supra* note 45, at 36 (stating that "[n]ot only can the parties agree to reject the application of the Convention, but they can also agree to apply the Convention when the preconditions for application have not been met"); Winship, *supra* note 40, at 1.34, stating that:

> Although the conference rejected an amendment which would have expressly permitted parties to derogate from Articles 2 and 3 the debate suggests that delegations could not agree on how to express the limitations on party autonomy required by 'mandatory' national laws. Parties should not be foreclosed, therefore, from agreeing to have the convention apply to a transaction otherwise excluded as long as the policy behind the specific exclusion is not contravened.

Id.

123. For this proposal, see *Records*, *supra* note 39, at 86 (reporting the proposal according to which Article 6 should be amended as follows: "Even if this Convention is not applicable in accordance with articles 2 . . . or . . . 3, it shall apply if it has been validly chosen by the parties. . . .").

124. For a similar reasoning, see FERRARI, *supra* note 17, at 125; HONNOLD, *supra* note 49, at 83; MAGNUS, *supra* note 15, at 145.

125. For this argument, see the considerations of the delegate of the Republic of Korea at the Vienna Conference, *reported in Records*, *supra* note 39, at 252 (stating that "the provision proposed by the [former] German Democratic Republic was not necessary because of the principle of the autonomy of the will of the parties. It [is] thus always permissible for the parties to decide to apply the Convention, even in the cases covered by articles 2 and 3").

of fish powder which otherwise would have fallen outside the CISG's scope of application or its substantive scope,[126] a decision not referred to in the Digest.

As far as the significance of the parties' "opting-in" is concerned, it must be emphasized that by virtue of the "opting-in," the CISG becomes part of the contract not unlike any other contractual clause.[127] In other words, the choice of the CISG in contracts to which it would otherwise not apply does not constitute a "choice of law," as there are no private international law rules that allow such a "choice" to have a different value. Consequently, it can be presumed, that "[t]he mandatory rules of the applicable law are . . . not affected by this [opting-in]."[128] Very recently, this view has been confirmed by the Tribunale di Padova in a decision of 11 January 2005,[129] a decision which the Digest does (obviously) not refer to. Referring to both the 1980 Convention on the law applicable to contractual obligations as well as the 1955 Hague Convention on the law applicable to contracts for the international sale of goods, the Italian court correctly decided that the choice of the CISG as the "law" applicable to a contract in cases where the CISG would otherwise not apply cannot amount to a "choice of law," since the aforementioned conventions do not allow for a choice of law different from State law.

---

126. *See* Xiamen Intermediate People's Court, People's Republic of China, 5 Sept. 1994, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=211&step=Abstract.

127. For a similar statement, see AUDIT, *supra* note 15, at 40.

128. ENDERLEIN & MASKOW, *supra* note 47, at 51.

For a similar conclusion, see Bonell, *supra* note 19, at 19 (stating that the result of the parties' "opting-in" "will be that the individual provisions of the Convention like any other contractual term may bind the parties only to the extent that they are not contrary to mandatory rules of the proper law of contract, i.e., the domestic law which by virtue of the rules of private international law of the forum governs the transaction in question"); Horacio Grigera Naon, *The UN Convention on Contracts for the International Sale of Goods*, *in* 2 THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 101 (Norbert Horn & Clive M. Schmitthoff eds., 1982) (stating the same); HERBER & CZERWENKA, *supra* note 40, at 45 (stating the same); HONNOLD, *supra* note 49, at 87 (stating that "[r]ules of domestic law that are 'mandatory' are not disturbed when the Convention becomes applicable by virtue of an agreement by the parties"); MAGNUS, *supra* note 15, at 111; Sacerdoti, *supra* note 17, at 746 (stating the same).

Note, however, that a similar statement had already been made at the Vienna Conference; see *Records*, *supra* note 39, at 252, reporting the Egyptian delegate's statement:

> [T]he draft amendment was an attractive one but was unnecessary because of the principle of the autonomy of the will of the parties. If the latter agreed to apply the Convention, even in cases where it would normally not apply, their wish should be respected. Naturally, if the applicable law did not admit certain provisions of the Convention, that law would prevail. But it was not for the Convention to settle that question.

129. *See* Tribunale di Padova, Italy, 11 Jan. 2005, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText.

Although it is not surprising that the aforementioned Italian decision is not included in the Digest, it poses the problem of how to deal with new case law, of which there is a lot. This is for sure one of the challenges UNCITRAL will face in the future.