

ARBITRATION AGREEMENTS UNDER THE CISG

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International sales contracts increasingly include arbitration agreements as the default dispute settlement mechanism. The interplay between the 1980 United Nations *Convention on Contracts for the International Sale of Goods* (CISG or Convention) and arbitration is the basis for the annual *Willem C. Vis Commercial Arbitration Moot* and a fertile source of academic discussion. In international sales contracts providing for arbitration, does the CISG apply to the arbitration agreement?

I. VALIDITY OF THE ARBITRATION AGREEMENT

International arbitration has a lot of moving parts. One of the most complex, and the one that relates directly to the law applicable to the arbitration agreement, is the matter of the arbitration agreement's validity. The validity of the arbitration agreement is composed of multiple elements: formal validity, substantive validity, arbitrability, capacity, authority. Each element can potentially be governed by a different law.¹ This article will focus on the substantive validity element, since Article 4 of the CISG excludes from the Convention questions of

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¹ Marc Blessing, *The Law Applicable to the Arbitration Clause*, in Albert van den Berg, *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series No. 9 (1999), p. 168.

capacity or authority;² and arbitrability and formal validity are generally not considered as being governed by the CISG.³

The substantive validity of the arbitration agreement normally includes questions of formation, interpretation, and its effects – matters governed by contract law generally. These questions play a crucial role in determining the amplitude of the arbitral tribunal's jurisdiction and powers. Generally, the parties are free to choose the law that governs the substantive validity of the arbitration agreement (*lex compromissi*).⁴ The problem arises when no choice has been made. Two main competing theories exist.

The first theory states that, in absence of a choice, the *lex compromissi* is the law applicable at the seat of arbitration (*lex loci arbitri*). This theory points out the closeness between the arbitral procedure and the seat – arguing that the arbitral seat is the ‘center of gravity’ of the arbitration.⁵ The second theory states that the proper law of the arbitration agreement is the law that the parties chose to govern the underlying contract (*lex contractus*). This theory argues that the selection of *lex contractus* is an indication of an implicit choice by the parties of

² Article 4(a) expressly excludes issues of validity. The problem of agency and authority is excluded from the CISG, see Louis F. Del Duca and Patrick Del Duca, *Practice under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders*, Uniform Commercial Code Law Journal, volume 29 (1996), p. 107, 357.

³ Ingeborg Schwenzer and Florence Jaeger, *The CISG in International Arbitration*, in Patricia Shaughnessy and Sherlin Tung, *The Powers and Duties of an Arbitrator, Liber Amicorum Perre A. Karrer*, Kluwer Law International (2017), pp. 320-322 for the issue of formal validity; for the law that determines issues of arbitrability, see Bernard Hanotiau, *What Law Governs the Issue of Arbitrability*, *Arbitration International*, Volume 12, Issue 4 (1996), pp. 391-404.

⁴ See, for example, the model arbitration clause suggested by the Hong Kong International Arbitration Centre (HKIAC), which expressly allows the parties to designate the *lex compromissi*: ‘The law of this arbitration clause shall be...’. HKIAC, *Administered Arbitration Rules 2018*, p. 2.

⁵ See Principle XIV.1(a) of the Translex Principles, comments 1-5.

the *lex compromissi*.⁶ Other (less accepted) theories exist, including a French theory stating that the arbitration agreement needs no ‘proper law’ and that the parties’ intentions are enough, but I digress.

In a way, the *lex compromissi* mirrors the *lex contractus* – just like the latter is the ‘proper law’ of the underlying contract, the former is the ‘proper law’ of the arbitration agreement. The division is justified (or necessary, depending on the theory adopted) due to the separability doctrine. The separability doctrine states that the invalidity of the contract does not affect the arbitration agreement. This doctrine generally seeks to preserve the jurisdiction of the arbitral tribunal when deciding on claims that the contract is null.⁷ The effect of the doctrine on the applicable law depends on how extensively one interprets it. If one interprets that the separability doctrine only applies when the contract’s validity is challenged, for all other purposes the arbitration agreement is nothing more than another clause, subject to the same law. If one interprets that the arbitration agreement’s validity is always independent, then the contract’s choice of law does not extend to the arbitration agreement. In the end, the separability doctrine merely causes that the choice of law in the contract may or may not be the same in the arbitration agreement. Concluding the same law applies would need evidence that the parties impliedly intended for the *lex contractus* to be also the *lex compromissi*.

The *Sulamérica* case decided by the England and Wales Court of Appeal has provided a three-step analysis to determine

⁶ For discussion on the *lex contractus* theory, see Gary Born, *The Law Governing International Arbitration Agreements: An International Perspective*, Singapore Academy of Law Journal (2014).

⁷ See Principle XIII.2.4(c) of the Translex Principles: ‘The invalidity of the main contract does not automatically extend to the arbitration clause contained therein unless it is proven that the arbitration agreement itself is vitiated by fraud, or initial lack of consent (Principle of Separability).’

the *lex compromissi*, which is useful in practice. The arbitrators should start by determining whether the parties made an express choice. Then, the arbitrators should determine whether the parties made an implied choice. Finally, if no express or implied choice was made, the arbitrators should select the law that has the ‘closest and most real connection’ to the arbitration agreement. The *lex contractus* selected by the parties could be an indication of an implied choice; if no implied choice exists, the law most closely connected to the arbitration agreement is generally regarded to be the law of the arbitral seat.⁸

II. GENERAL APPLICABILITY OF THE CISG

As with the arbitration agreement, the law governing a contract can be chosen by the parties. The parties can expressly opt into the CISG. In absence of a choice, one must determine the applicability of the CISG. According to Article 1(1), the CISG applies when the parties to the contract are based in different Contracting States (say, Germany and Switzerland) or when the rules of private international law lead to the laws of a Contracting State.

Since the CISG is an international treaty, public international law mandates Contracting States and its organs to obey it. Article 1(1) obligates the courts of Contracting States to apply the CISG whenever one of the alternatives is met. However, arbitral tribunals are not bound by such rules of public international law. Modern arbitration law tends to favor the arbitrators’ discretion in selecting the law that applies to the

⁸ For more detail on the *Sulamérica* case, see Harry Ormsby, *Governing Law of the Arbitration Agreement: Importance of Sulamérica case Reaffirmed where Choice of Seat was Agreed without Actual Authority*, Kluwer Arbitration Blog, 29 January 2014, available at: <http://arbitrationblog.kluwerarbitration.com/2014/01/29/governing-law-of-the-arbitration-agreement-importance-of-sulamerica-case-reaffirmed-where-choice-of-seat-was-agreed-without-actual-authority/>.

merits when none was selected by the parties.⁹ Frequently, in international sales contracts, arbitrators opt to apply the CISG.¹⁰

III. ARBITRATION AGREEMENTS UNDER THE CISG

The CISG, of course, was not designed to govern arbitration agreements. By its name and structure, it governs international sales contracts, and arbitration agreements are clearly not that. However, the CISG governs basic concepts of contract law that are relevant for substantive validity of arbitration agreements, such as formation (Articles 14-24), interpretation (Article 8) and remedies for breach. Moreover, as stated above on the theories of substantive validity, the *lex contractus* can govern the substantive validity of the arbitration agreement under specific circumstances.

The CISG thus becomes relevant when it governs a sales contract that itself has an arbitration clause. Majority opinion appears to accept the CISG's applicability as *lex compromissi* in those cases.¹¹ This is consistent with the CISG's provisions: Article 19(3) states that introduction of a dispute resolution clause is considered a 'material alteration'. Article 81(1) states that dispute resolution clauses survive the avoidance of the sales contract. This suggests that the CISG treats arbitration clauses

⁹ Modern arbitration law permits the arbitrators to select the law that appears more appropriate, in absence of party choice. See Article 28(2) of the UNCITRAL Model Law on International Commercial Arbitration (Model Law); Article 35(1) of the UNCITRAL Arbitration Rules; Article 21(1) of the ICC Rules of Arbitration; Article 36.1 of the HKIAC Arbitration Rules 2018; Article 27(2) of the Vienna International Arbitration Center Arbitration Rules; Rule 31.1 of the Singapore International Arbitration Center Arbitration Rules; etc.

¹⁰ See Schwenger and Jaeger *supra* at note 3, pp. 316, 317.

¹¹ The following cases have recognized this approach: CISG-online 45 (arbitration agreements); CISG-online 1476 (arbitration agreements); CISG-online 344 (choice of forum clauses); CISG-online 767 (choice of forum clauses); CISG-online 1232 (choice of forum clauses).

as it would any other contractual provision, regardless of its ‘procedural’ character.¹²

However, the same could apply if the *lex loci arbitri* theory is adopted and the arbitral seat is a Contracting State: the arbitrators retain discretion to determine whether to choose uniform or non-uniform law applicable at the seat.¹³ To avoid the problems of compatibility, parties are advised to agree expressly that their arbitration agreement will be governed by the CISG to the extent that it is applicable.

IV. WHY SHOULD THE CISG APPLY TO THE ARBITRATION AGREEMENT?

The CISG is one of the biggest triumphs for uniformity. It provides a middle ground between common law and civil law approaches and embodies a theory of contract that is unified and internationalized. It was the basis to develop later uniform instruments governing a broader group of commercial transactions, such as the UNIDROIT *Principles of International Commercial Contracts*.

As a matter of neutrality, the CISG is more likely to provide a contractual *lingua franca* for parties involved in international sales. Moreover, as the law that governs the contract, applying the CISG to the arbitration agreement safeguards the expectations of the parties, who rarely conceive of a part of their contract having a different applicable law from the rest. Most importantly, considering the transnational character of commercial arbitration in such cases, the CISG is better

¹² Pilar Perales Viscasillas and David Ramos Muñoz, *CISG and Arbitration* in Andrea Büchler and Markus Müller-Chen, *Private Law (national - global - comparative - Festschrift für Ingeborg Schwenzer zum 60. Geburtstag)*, Stämpfli Verlag AB (2011), pp. 1355, 1366.

¹³ See Schwenzer and Jaeger *supra* at note 3, p. 323.

equipped to address transnational problems of contract law, as it was designed to do so.