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WHAT'S CISG GOT TO DO WITH IT? – APPLICABILITY OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS TO ARBITRATION AGREEMENTS**

Arbitration agreements are among the most complex agreements in international law. They allow the parties to a certain contract to settle their potential dispute outside of national courts. However, although they are of a procedural nature, they are only contracts. In this paper, the question of whether the United Nations Convention on Contracts for the International Sale of Goods (CISG) applies to arbitration agreements will be analysed. We will discuss the scope of the CISG and the interpretation of the CISG regarding this issue. Following will be the examination of the recent developments in case law and scholarly writing which dealt with this matter. Finally, we will offer our view of how the CISG governs arbitration agreements and which aspects of arbitration agreements are impacted.

Key words: *CISG. – Arbitration agreements. – Formation. – Substantive validity. – Formal validity.*

1. INTRODUCTION

1.1. The CISG

The 1980 United Nations Convention on Contracts for the International Sale of Goods[1] (hereinafter: CISG, Convention) is an

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1 United Nations Convention on Contracts for the International Sale of Goods, *https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19–09951_e_ebook.pdf,* last visited 4 December 2023.

international treaty developed by the United Nations Commission on International Trade Law (hereinafter: UNCITRAL) and signed in 1980.[2] It now covers most of the world trade and is signed and adopted by the largest world economies such as the United States, China, Russia, Germany etc.[3] According to UNCITRAL – 97 states have signed the CISG.[4] Therefore, it is considered one of the most successful international conventions aimed at unifying international trade law.[5]

Although the CISG contains rules from many legal systems, both common law and continental legal traditions, the efforts to unify international sales law were not satisfied by introducing it. The consensus agreed upon on a verbal level is promoted through the uniform application, interpretation, and gap-filling – which is achieved through the observance of legal scholarship developed in regard to it and court (and arbitral) practice in different countries.[6]

The story of the CISG is, therefore, a story of success, but it is far from its last chapter, because the accomplishments it achieved can only be maintained through its application and development.

1.2. International commercial arbitration

International commercial arbitration is a means by which international business disputes can be definitively resolved, pursuant to the parties' agreement, by independent, non-governmental decision-makers, selected by or for the parties, applying neutral adjudicative procedures that provide the parties an opportunity to be heard.[7] As a means

2 Ingeborg Schwenzer, "Introduction", *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (ed. Ingeborg Schwenzer) Oxford University Press, Oxford 2022, 1–2; Nils Schmidt-Ahrendts, "CISG and Arbitration", *Annals of the Faculty of Law in Belgrade* 3/2011, 212.

3 Interestingly, some major economies like India, South Africa, Nigeria, and the United Kingdom have not yet ratified the CISG.

4 Status: United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980 (CISG). *https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status*, last visited 4 December 2023.

5 N. Schmidt-Ahrendts, *op. cit.,* fn. 2, 212.

6 I. Schwenzer (2022), *op. cit.,* fn. 2, 1–12.

7 Gary Born, *International Commercial Arbitration*, Kluwer Law International, The Hague 2021, 67.

of dispute resolution, international commercial arbitration may be appealing to parties in international trade because, unlike state courts, its rules are more elastic, it is a faster mode of dispute settlement, the expenses of the proceedings tend to be lower, it is characterised by neutrality, and the arbitral awards tend to be recognised more easily by national courts than foreign court decisions.[8]

Arbitration owes its existence to the consent of the parties in a particular business relationship. That consent is articulated in an arbitration clause or an arbitration agreement.[9]

According to the UNCITRAL Model Law on International Commercial Arbitration from 1985 (with amendments as adopted in 2006)[10] (hereinafter: UNCITRAL Model Law or Model Law), an "arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".

2. THE SCOPE OF THE CISG

The discussion regarding the scope of the CISG will firstly examine its objective scope[11] (2.1.). Following this, we will discuss the impact of Articles 19 and 81 which mention provisions for the settlement of disputes (2.2.). Finally, we will examine the possibilities of applying the CISG to arbitration agreements allowed by the objective scope and articles mentioning provisions for the settlement of disputes (2.3.).

8 Tibor Varadi *et al.*, *Međunarodno privatno pravo*, Pravni Fakultet Univerziteta u Beogradu, Beograd 2021, 574; Margaret Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, New York 2012, 1–2.

9 The terms "arbitration clause" and "arbitration agreement" are used interchangeably throughout this paper.

10 UNCITRAL Model Law on International Commercial Arbitration from 1985 (with amendments as adopted in 2006), *https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19–09955_e_ebook.pdf*, last visited 4 December 2023.

11 The discussion that follows assumes that the courts or arbitral tribunals can apply the CISG in a given case, and, additionally, that all the conditions for applicability *ratione personae* are already met.

2.1. Objective scope of the CISG

The CISG does not have any provisions that explicitly mention arbitration agreements. In order to ascertain if the CISG applies to arbitration agreements, we should first take a look at the provisions regarding its sphere of application.

The sphere of application of the CISG is defined in Articles 1 through 6.[12] Articles 1 through 3 and 6 determine whether the CISG applies "at all" to the contract concluded between the parties, while Articles 4 and 5 define the issues to which the CISG applies.[13] In particular, Article 4 CISG defines which contractual elements are governed by the Convention and which issues are excluded from the CISG's application.[14]

The CISG does not govern the entirety of an international sales contract, but rather, according to Article 4 sentence 1, limits itself ("governs only"), to the formation of the sales contract, as well as the rights and obligations of the seller and the buyer arising from such a contract.[15] However, although there are only two explicitly mentioned contractual aspects governed by the CISG, it is generally considered that this list is non-exhaustive[16] and that the phrase "governs only" should be read as "governs without a doubt".[17]

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12 Ingeborg Schwenzer, Pascal Hachem, "Introduction to Articles 1–6", *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG),* (ed. I. Schwenzer), Oxford University Press, Oxford 2016, 18.

13 Milena Đorđević, "Article 4", *UN Convention on Contracts for the International Sale of Goods (CISG)* (eds. S. Kröll, L. Mistelis, P. Perales Viscasillas), C. H. Beck Hart Nomos Publishers, Munich-Oxford 2018, 64.

14 Article 4 CISG reads:

"This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold."

15 Ingeborg Schwenzer, Pascal Hachem, "Article 4", *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (ed. I. Schwenzer) Oxford University Press, Oxford 2016, 74.

16 M. Đorđević, *op. cit.,* fn. 13, 66.

17 I. Schwenzer, P. Hachem (2016b), *op. cit.,* fn. 15, 74.

Even though the CISG does not govern the jurisdiction of the courts and arbitral tribunals, it is established that the effective incorporation of an arbitration clause can be an issue contained within the scope of the CISG.[18]

All the previous reasoning is further aided by the provision of Article 7(2) CISG which identifies the concept of matters governed by the CISG which are not expressly settled in it. These matters are called "internal gaps"[19] and are governed by the CISG i.e., they are settled in conformity with the principles on which the CISG is based. Arbitration agreements present an internal gap within the system of the CISG.

The gap-filling method suggested in theory follows a hierarchy of solutions: firstly, once an internal gap is identified – specific provisions of the CISG should be directly applied by way of analogy; secondly, if the matter still cannot be filled, general principles on which the CISG is based should apply; finally, in the absence of those principles, applicable domestic law should govern the matter at hand.[20] Therefore, if specific articles within the CISG can govern arbitration agreements – they must apply directly.

2.2. Articles 19 and 81 CISG

A newer approach to the issue of applicability of the CISG to arbitration agreements does not rely on articles discussing its objective scope but rather on Articles 19 and 81 CISG.[21] Both of these provisions mention clauses for the settlement of disputes.

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18 M. Đorđević, *op. cit.,* fn. 13, 80; Loukas Mistelis, "CISG and Arbitration", *CISG Methodology* (eds. André Janssen, Olaf Meyer), Sellier European Law Publishers, Munich 2009, 394; Robert Koch, "The CISG as the Law Applicable to Arbitration Agreements", *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (eds. C. Andersen, U. Schroeter), Wildy, Simmonds & Hill Publishing, London 2008, 282.

19 Pilar Perales Viscasillas, "Article 7", *UN Convention on Contracts for the International Sale of Goods (CISG)* (eds. S. Kröll, L. Mistelis, P. Perales Viscasillas), C. H. Beck Hart Nomos Publishers, Munich-Oxford 2018, 136.

20 *Ibid*.

21 In case law most notably: District Court for the Southern District of New York, Filanto v. Chilewich, United States, 14.4.1992, para. 33–34, *https://cisg-online.org/search-for-cases?caseId=6025*, last visited 4 December 2023, CISG-online number: 45.

2.2.1. Article 19

Article 19 CISG deals with material and immaterial differences between the offer and the acceptance.[22] It provides that a reply to an offer that purports to be an acceptance, but contains additions, limitations or modifications is not an acceptance, but a counter-offer. These alterations (additions, limitations, and modifications) are non-exhaustively enumerated in Article 19(3) CISG, which among other things (e.g. price of the goods, quantity, quality), lists terms relating to the *settlement of disputes*.

Just like other CISG provisions discussed in this section, Article 19 CISG too bears a problem of interpretation.[23] Interpreted more broadly, it extends to the settlement of dispute clauses which form part of an international sales contract. However, if we were to interpret it more narrowly, Article 19 only lists contractual clauses that materially alter the offer, but which are not necessarily governed by the CISG (aside from clauses that are explicitly governed by the CISG).

Among the authors who argue that the CISG regulates arbitration clauses,[24] Schwenzer and Tebel point out that Article 19 CISG treats the addition of a dispute settlement clause as a material alteration of an offer, which would only be possible if dispute resolution clauses

22 Article 19 reads:

(1) A reply to an offer which purports to be an acceptance, but which contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

23 Aleksandrs Fillers, "Application of the CISG to Arbitration Agreements", *European Business Law Review* 30(4)/2019, 681.

24 Maria Pilar Perales Viscasillas, David Ramos Muñoz, "CISG & Arbitration", *Spain Arbitration Review* 10/2011, 73; Ingeborg Schwenzer, David Tebel, "The Word is not Enough: Arbitration, Choice of Forum and Choice of Law Clauses under the CISG", *The ASA Bulletin* 31(4)/2013, 745–746.

were considered a part of a contract of sale – and therefore governed by the CISG.

If this was not the case, the acceptance of an offer which adds a dispute resolution clause would not be considered an alteration of an offer and a contract for the sale of goods would be concluded with this additional dispute resolution clause.[25] This, in turn, would result in an absurd scenario where the accepter could sneak an arbitration clause into their acceptance and bar the offeror from state courts in case of a dispute, thus completely negating consent as a basis for arbitral dispute resolution.

Other authors are more cautious about extending the scope of the CISG to arbitration agreements based on Article 19. They point out that the fact that Article 19 (3) mentions dispute resolution clauses does not mean that arbitration agreements are covered by the CISG, but only reveal the effect that an arbitration clause has on the offer to conclude a sales agreement.[26]

2.2.2. Article 81

Article 81 CISG regulates the avoidance of an international sales contract.[27] In its first paragraph it, among other things, states that "Avoidance does not affect any provision of the contract for the *settlement of disputes* or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract".

25 I. Schwenzer, D. Tebel, *op. cit.,* fn. 24, 746.

26 Gustav Flecke-Giammarco, Alexander Grimm, "CISG and Arbitration Agreements: A Janus-Faced Practice and How to Cope with it", *Journal of Arbitration Studies* 25(3) /2015, 49; Peter Huber, Alistair Mullis, *The CISG: A new textbook for students and practitioners*, Sellier European Law Publishers, Mainz – Norwich 2007, 61; A. Fillers, *op. cit.,* fn. 23, 681–682.

27 Article 81 reads:

(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

This article does not enumerate the provisions which are unaffected by the avoidance of the contract and can therefore be interpreted as having an "unlimited scope" in the sense that it applies to all contractual provisions that are meant to be unaffected by avoidance.[28]

As was the case with Article 19, this article can also be interpreted in two ways.[29] According to a broader interpretation, if the CISG provides that avoidance of a sales contract does not affect provisions for the settlement of disputes, then it extends its scope of application to all those provisions as well.[30] This is not to say that the CISG could validate a previously invalid arbitration clause, but only that it would preserve that clause in case of avoidance.[31] The CISG will prevent national laws which require the termination of ancillary provisions following the termination of the main contract from applying.

However, if we adopt a narrower interpretation, Article 81 would only state that the avoidance of the sales contract would not "spill over" to arbitration agreements (among other ancillary provisions).[32] That narrower approach would allow for national laws to govern the provisions that survived the avoidance. This approach appears to be unacceptable because national laws governing international sale or arbitration could contain a provision that requires the termination of an arbitration agreement once the main contract is avoided.[33] This would lead to an illogical outcome: the arbitration clause would survive the avoidance of a sales contract only to be avoided because of a national law provision.

The mentioning of "provisions for the settlement of disputes" in Article 81(1) prompted several authors to argue that the CISG applies to arbitration agreements.[34]

28 A. Fillers, *op. cit.,* fn. 23, 683.

29 *Ibid.*

30 *Ibid.*

31 For validity see: M. P. Perales Viscasillas, D. Ramos Muñoz, *op. cit.,* fn. 24, 72.

32 G. Flecke-Giammarco, A. Grimm, *op. cit.* fn. 26, 49; A. Fillers, *op. cit.,* fn. 23, 683.

33 A. Fillers, *op. cit.,* fn. 23, 683.

34 Janet Walker, "Agreeing to Disagree: Can We Just Have Words? CISG Article 11 And the Model Law Writing Requirement", *Journal of Law and Commerce* 25(1)/2005, 163; M. P. Perales Viscasillas, D. Ramos Muñoz, *op. cit.,* fn. 24, 73; I. Schwenzer, D. Tebel, *op. cit.* fn. 24, 746; Martin Schmidt-Kessel, "Introduction to Articles 14–24", *Schlechtriem & Schwenzer Commentary on the UN*

2.3. Are arbitration agreements within the scope of the CISG?

Despite the CISG not mentioning arbitration clauses in any of its provisions, it seems natural that they should be contained within its system precisely due to its protean scope, which expands and shapeshifts with every new CISG-related case and scholarly paper; because of the gap-filling mechanism envisaged in Article 7 CISG; and because of the useful mentioning of dispute resolution clauses in Articles 19 and 81 CISG. Therefore, from the non-exhaustive nature of its scope, it follows that arbitration agreements are governed by the CISG.

Still, the CISG's applicability to arbitration clauses remains a debated matter. Therefore, in order to interpret the CISG and attempt to settle said debate, it is necessary to examine the case law and scholarly writing dealing with it in more detail (sections 4. and 5.).

3. THE ISSUE OF SEPARABILITY

In order not to apply the CISG to arbitration clauses, some authors rely on the doctrine of separability.[35] They argue that the doctrine of separability, "if taken seriously", demands that arbitration clauses must be classified separately from the rest of the contract.[36] The key point that these authors make is that arbitration clauses are conceptually different contracts with a different legal fate from the rest of the contract, and that they may be submitted to a different law than the main contract.[37]

Convention on the International Sale of Goods (CISG) (ed. I. Schwenzer), Oxford University Press, Oxford 2016, 232.

35 Stefan Kröll, "Selected Problems Concerning the CISG's Scope of Application", *Journal of Law and Commerce* 25/2005, 45; Stefan Kröll, "Arbitration and the CISG", *Current Issues in the CISG and Arbitration* (eds. Ingeborg Schwenzer, Yeşim M. Atamer, and Petra Butler), Eleven International Publishing, The Hague 2014, 82–82; Jeffrey Waincymer, "The CISG and International Commercial Arbitration: Promoting a Complementary Relationship Between Substance and Procedure", *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (eds. Cammilla Andersen, Ulrich Schroeter), Wildy, Simmonds & Hill Publishing, London 2008, 587.

36 S. Kröll (2014), *op. cit.,* fn. 35, 82.

37 *Ibid*., 77.

Separability principally means that the arbitration clause in a contract is considered to be separate from the main contract of which it forms part and, as such, survives the termination of that contract.[38] The essential point being that, in case of a breach or voidness of the contract, the arbitration clause survives to allow the appointment of an arbitral tribunal and, the resolution of disputes arising out of the contract.[39]

The doctrine of separability does not mean that the law governing the arbitration clause is necessarily different from the law that governs the contract. Instead, it means that different laws may apply to the contract and the arbitration clause.[40]

It is to be noted that the doctrine of separability cannot be used to prevent the application of the CISG to the arbitration clause, because the goal of this doctrine is not to create a fiction of two completely separate agreements, which request two different bodies of law to govern them. Instead, the goal is to preserve an arbitration clause in case of a breach of contract so that the dispute may nonetheless be arbitrated, and not brought before national courts. This means that the two agreements (the contract and the arbitration clause) are *separable* and not *separate*. The legal fate of the contract and the arbitration clause *can* be different, and they *can* be submitted to different laws – but this is not necessarily so. Separability is a mere possibility – not a determined route.

Finally, the doctrine of separability does not concern itself with the CISG's sphere of application. It is imaginable that different national laws may apply to the main contract and the arbitration clause; however, if both national laws have adopted the CISG it is difficult to see how the doctrine of separability would prevent the application of the CISG to contractual aspects of the arbitration clause. Therefore, the view taken by the mentioned authors is inaccurate.

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38 Nigel Blackaby *et al.*, *Redfern and Hunter on International Arbitration*, Oxford University Press, New York 2015, para. 2.101; M. Moses, *op. cit.* fn. 8, 19; Julian Lew, Loukas Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague 2003, 102.

39 N. Blackaby *et al.*, *op. cit.,* fn. 38, para. 2.103.

40 *Ibid.*

4. APPROACHES IN CASE LAW

In court practice which discusses the application of the CISG to settlement of dispute clauses (including arbitration agreements), the courts have taken different positions. As a result, there are different opinions as to whether the CISG applies at all; while among the courts which agree that it does, there are different opinions on which Articles of the CISG apply to arbitration agreements.

A number of courts reject the idea that the CISG should apply to the settlement of dispute clauses altogether.[41] These courts are of the opinion that the CISG only regulates substantive, and not procedural issues. With the most recent decision being the ruling of the Frankfurt Court of Appeals, which stated that Article 4 (1) of the CISG did not encompass arbitration clauses.[42]

Among the courts that do apply the CISG to arbitration agreements, there is a variety of CISG articles that the courts applied in their decisions. Some courts have applied Article 7 CISG. A German decision applied the good faith principle from Article 7 (1) CISG to ascertain the parties' duties regarding the incorporation of standard terms (which contained an arbitration clause).[43] On the other hand, a Dutch court applied the gap-filling principle from Article 7 (2) CISG to determine whether the arbitration clause had been agreed between the parties.[44]

41 Handelsgericht des Kantons Zürich (Commercial Court Canton Zurich), Switzerland, 26.4.1995, *https://cisg-online.org/search-for-cases?caseId=6222,* last visited 4 December 2024, CISG-online number: 248; Bundesgerichtshof Switzerland (Supreme Court), Switzerland, 11.7.2000, *https://cisg-online.org/search-for-cases?caseId=6582,* last visited 4 December 2023, CISG-online number: 627; Bundesgerichtshof (Supreme Court), Germany, 25.3.2015, *https://cisg-online.org/search-for-cases?caseId=8502* last visited 4 December 2023, CISG-online number: 2588; Oberlandesgericht Frankfurt am Main (Court of Appeal Frankfurt am Main), Germany, 7.9.2020, *https://cisg-online.org/search-for-cases?caseId=13355,* last visited 4 December 2023, CISG-online number: 5441.

42 Oberlandesgericht Frankfurt am Main (Court of Appeal Frankfurt am Main), Germany, 7.9.2020, *https://cisg-online.org/search-for-cases?caseId=13355,* last visited 4 December 2023, CISG-online number: 5441, para. 27.

43 Oberlandesgericht Naumburg (Oberlandesgericht des Landes Sachsen-Anhalt) (Court of Appeal Naumburg), Germany, 13.2.2013, *https://cisg-online.org/search-for-cases?caseId=8369* last visited 4 December 2023, CISG-online number: 2455.

44 Rechtbank Arnhem (District Court Arnhem), The Netherlands, 17.1.2007, *https://cisg-online.org/search-for-cases?caseId=7375,* last visited 4 December 2023, CISG-online number: 1455.

Another German decision has used the rules of interpretation from Article 8 CISG (in conjunction with Article 1 (1) (b) and Article 4 CISG) to conclude that the parties have agreed on an arbitration clause.[45] One court used Art 9 to determine whether there were established practices between the parties regarding the incorporation of arbitration clauses.[46]

Probably the most controversial are the cases in which the courts applied the freedom of form principle from Article 11 CISG. The Spanish Supreme Court applied Article 11 CISG to an arbitration agreement. The court held that the freedom of form principle should extend to the arbitration clause contained in the sales contract, therefore the application of the CISG to the formal validity of the arbitration clause derogated the Spanish Arbitration Law which had a writing requirement.[47]

Although almost three decades apart, the most influential cases involving the application of the CISG to arbitration agreements are the *Filanto v. Chilewich* case and the Ground Mace case. Notably, to determine the applicability of the CISG, courts in these decisions applied Article 19(3) and/or Article 81(1) CISG.

In the *Filanto v. Chilewich case*[48], an American company, Chilewich agreed to supply shoes to a Russian company based on a master agreement which stipulated that all disputes between the parties to be settled before an arbitration in Moscow. In order to fulfill its obligations, Chilewich entered into a number of contracts with an Italian company, Filanto.

Based on one of the contracts between them, Filanto supplied shoes to Chilewich, but Chilewich only made a partial payment.

45 Oberlandesgericht Stuttgart (Court of Appeal Stuttgart), Germany, 15.5.2006, *https://cisg-online.org/search-for-cases?caseId=7336,* last visited 4 December 2023, CISG-online number: 1414.

46 Landgericht Hamburg (District Court Hamburg), Germany, 19.6.1997, *https://cisg-online.org/search-for-cases?caseId=6257,* last visited 4 December 2023, CISG-online number: 283.

47 Tribunal Supremo (Spanish Supreme Court), Spain, 17.2.1998, *https://cisg-online.org/search-for-cases?caseId=7256,* last visited 4 December 2023, CISG-online number: 1333; the previously mentioned decision of the District Court of Arnhem also applied Article 11 to the form of the arbitration clause.

48 District Court for the Southern District of New York, Filanto v. Chilewich, United States, 14.4.1992, *https://cisg-online.org/search-for-cases?caseId=6025,* last visited 4 December 2023, CISG-online number: 45.

Filanto brought a claim before a New York court to recover the suffered damages, but Chilewich sought a stay of proceedings because of an arbitration clause contained in the master agreement, which was incorporated by reference to the present contract. The court, applying Article 19 (3) CISG and Article 81 (1) CISG, decided that the arbitration clause was binding upon the parties and that they are required to arbitrate the dispute.[49]

The *Ground mace case*[50] which was finally decided before the German Supreme Court, involved a Dutch seller and a German buyer who agreed on a purchase of 1,500 kilograms of ground mace over three separate contracts. The seller's letters of confirmation contained references to the contract conditions of the Netherlands Spice Trade Association (which contained an *arbitration clause*) and the seller's general conditions of sale and delivery.

The dispute between the parties ensued after the buyer alleged that the mace had been contaminated. The buyer's insurance company reimbursed the buyer for the damages, and then brought a claim against the seller before the District Court of Bremen. After conflicting decisions of the District and the Appellate Court (the former held that it had no jurisdiction because of the arbitration clause, and the latter held that it had jurisdiction), the seller brought an appeal to the Supreme Court.

When deciding about the incorporation of the arbitration clause, the Supreme Court applied articles 14–24 CISG. The court elaborated that the applicability of the contract conclusion rules of the CISG follows from Article 19 (3) CISG and Article 81 (1) which mention dispute settlement clauses, adding that the references to these clauses would be superfluous if they were not considered a part of a contract of sale under the CISG.[51]

The application of the CISG to arbitration agreements is rather non-uniform. Although, there are some trends in applying CISG articles on interpretation and articles regarding contract formation, there is still no definitive mode of applying the CISG in practice. That is why

49 *Ibid.*, paras. 33–34, para. 49.

50 Bundesgerichtshof (Supreme Court), Germany, 26.11.2020, *https://cisg-online.org/search-for-cases?caseId=13402,* last visited 4 December 2023, CISG-online number: 5488.

51 *Ibid.*, para. 35.

we should look at the dogmatic views taken in legal theory in order to get some clarification.

5. OPINIONS IN LEGAL THEORY

Opinions in legal literature regarding the matter of application of the CISG to arbitration clauses are, not surprisingly, divided. While it is understood that the CISG does not apply to issues of jurisdiction of the forum, the debate regarding the CISG's applicability revolves around its application to contractual aspects of arbitration clauses (formation, substantive validity, formal validity etc.).

There have been, at least, three main streams of approaches regarding this issue. Authors that favor the *first* approach (5.1) argue that the CISG does not apply to arbitration clauses. The *second* approach (5.2) rejects the application of the CISG to the formal validity of arbitration clauses but applies the CISG to the formation and substantive validity of arbitration clauses. Finally, the *third* approach (5.3) extends the application of the CISG even to the formal validity of arbitration clauses.

5.1. Denying the application of the CISG

The first group of authors deny that the CISG applies to arbitration clauses altogether. They rely on two main arguments: the first is that arbitration clauses fall outside the scope of the CISG[52] (*5.1.1*), while the second is that the doctrine of separability bars the CISG's application because the arbitration clause should be treated differently than the sales contract that contains it (*5.1.2*).

5.1.1. Arbitration clauses are outside the scope of the CISG

The first argument claims that arbitration clauses fall outside of the CISG's scope of application as defined in Articles 1–3 CISG. These articles limit the CISG's sphere of application to contracts of sale. Therefore, it is argued that "no one would apply the CISG to an arbitration agreement concluded as a separate agreement after a dispute has arisen or after the main contract has been concluded".[53]

52 S. Kröll (2005), *op. cit.,* fn. 35, 45; S. Kröll (2014), *op. cit.* fn. 35, 81; J. Waincymer, *op. cit.* fn. 35, 587.

53 S. Kröll (2005), *op. cit.,* fn. 35, 45.

The view that arbitration clauses are outside of the purview of the CISG is further buttressed by the fact that during the 1980 United Nations Conference on Contracts for the International Sale of Goods, the delegations of Mexico, Panama, and Peru proposed an addition of a "new article on dispute settlement" which was intended to be placed at the end of the substantive portion of the convention.[54] This motion was rejected and the current text of the CISG does not contain any article explicitly regulating the settlement of disputes arising out of a sales contract.

5.1.2. The doctrine of separability

The second argument used to claim that arbitration clauses are distinct contracts that deserve a separate consideration invokes the doctrine of separability.[55] The fact that arbitration clauses are concerned with procedural questions render them conceptually and legally independent from the rest of the contract. Therefore, they should not be equated to other non-sale clauses within a sales contract.[56] These authors draw attention to the fact that even in cases where there was an explicit choice of law to govern the main contract, that choice did not always extend to the arbitration clause.[57]

Finally, an unusually extreme interpretation of the doctrine of separability is used as a reason not to apply Article 19 (3) and Article 81 (1) CISG in this context. Regarding Article 19(3) CISG, it is argued that "[i]f the doctrine of separability is taken to the extreme, not only

54 1980 United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980, Official Records, *https://cisg-online.org/Travaux-preparatoires/1980-vienna-diplomatic-conference*, last visited 10 January 2024, 174. The proposed wording of this article read as follows: "The parties to a contract of sale under this Convention may submit any dispute arising out of the interpretation or application of this Convention to ordinary or arbitration courts established in territories of any of the States being Parties to the present Convention: parties may agree on their own rules to resolve disputes, including provisions on the appointment of arbitrators."

55 J. Waincymer, *op. cit.,* fn. 35, 586.

56 S. Kröll (2014), *op. cit.,* fn. 35, 82.

57 S. Kröll (2005), *op. cit.,* fn. 35, 45. For this view, see among others: England and Wales Court of Appeal (Civil Division), [2012] EWCA Civ 638, Sulamérica CIA Nacional de Seguros S.A. and others v. Enesa Engenharia S.A. and others, 16.5.2012, *http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2012/638.html&query=(sulamerica),* last visited 10 January 2024.

do the two contracts have to be treated separately but their declaration of intent must be split into two: one being acceptance of the offer to conclude a sales contract and one being acceptance of the offer to conclude an arbitration agreement".[58] Thus, Article 19 (3) CISG will only regulate the influence of the new offer.[59] On the other hand, Article 81 (1) CISG is interpreted merely as an endorsement of the doctrine of separability.[60]

Although compelling at first glance, the views that favor this approach tend to be dated and isolated; and they have attracted opposition in legal scholarship.

5.2. Partial application of the CISG

Among the three identified approaches, this one has the most supporters in legal theory. However, the views that the supporters of this approach have are rather heterogenous.

One of the first opinions to support the view that the CISG applies to arbitration agreements argued that Article 19 (3) CISG, by referencing dispute resolution clauses, allows not only for the application of the rules on contract formation (Articles 14–24), but also the general provisions of the CISG (Articles 7–13).[61] However, this author's understanding is that the provisions of Part III are not applicable to arbitration clauses because the rights and obligations arising from the arbitration clause cannot be subsumed under Article 4 CISG.[62]

Some authors agree that the conclusion of an arbitration agreement may be one of the disputed questions arising from a contract governed by the CISG. They are of the opinion that the CISG may possibly apply to the formation, but that it is very unlikely for it to apply

58 S. Kröll (2014), *op. cit.* fn. 35, 85. In my view, this understanding of the doctrine of separability is inaccurate. The doctrine of separability is "a convenient and pragmatic fiction" (N. Blackaby *et al.*, *op. cit.* fn. 38, para. 5. 102) meaning that the factual background is exactly the opposite of what the fiction claims to have happened. Therefore, there would never actually be two declarations of intent, but only one.

59 S. Kröll (2014), *op. cit.,* fn. 35, 85.

60 *Ibid.*

61 R. Koch, *op. cit.,* fn. 18, 282.

62 *Ibid.*, 285.

to the substantive validity, and that it will never apply to the formal validity of an arbitration agreement.[63]

Relying on Article 19(3) CISG, Schwenzer and Tebel argue that the CISG applies to the formation of the arbitration agreement. Furthermore, they argue that the CISG should also apply to questions of substantive validity, interpretation, and breach of the arbitration clause.[64]

A number of authors have detailed their opposition toward the application of Article 11 CISG in a different manner. According to them, Article 90 CISG[65] prevents the application of Article 11 CISG and instead gives precedence to Article II of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958[66] (hereinafter: the New York Convention).[67]

5.3. Applying the CISG to the formal validity of the arbitration clause

The last of the three approaches is the one which suggests that the CISG's freedom of form principle enshrined in its Article 11 CISG should, in addition to applying to all other terms of a sales contract, extend to arbitration clauses.

This notion was first articulated by Janet Walker, who, like the supporters of the partial application of the CISG, considered references to dispute settlement provisions in Articles 19 (3) and 81 (1) CISG to be sufficient indicators that the CISG applies to arbitration clauses

63 L. Mistelis, *op. cit.,* fn. 18, 394; M. Đorđević, *op. cit.,* fn. 13, 80–81.

64 Dmytro Vorobey, "CISG and Arbitration Clauses: Issues of Intent and Validity", *Journal of Law and Commerce* 31/2012–2013, 746–748.

65 Article 90 reads as follows:

"This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties, to such agreement."

66 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), *https://www.newyorkconvention.org/english,* last visited 10 January 2024.

67 André Janssen, Matthias Spilker, "The Application of the CISG in the World of International Commercial Arbitration", *The Rabel Journal of Comparative and International Private Law* 77/2013, 156; J. Waincymer, *op. cit.,* fn. 35, 588.

– however, she also suggested that Article 11 CISG should apply.[68] Furthermore, faced with the problem arising from Article 90 CISG, she acknowledges that the New York Convention has precedence, pointing out that its Article II only mandates the recognition of arbitration agreements in writing, but it does not prevent the recognition of arbitration agreements in other forms.[69] Ultimately, she argues that Article VII(1) of the New York Convention allows for the application of Article 11 CISG.[70]

6. FINDINGS ON THE APPLICABILITY OF THE CISG TO ARBITRATION AGREEMENTS

From the discussion about the scope of the CISG (see section 2), it is obvious that the CISG does not pertain to all aspects of an arbitration agreement, but only to those which can be considered as contractual. These aspects are formation (6.1), substantive validity (6.2), and formal validity (6.3) of an arbitration agreement.

6.1. Contract Formation

As indicated before, among the authors that argue for the application of the CISG to arbitration agreements (who form an overwhelming majority), the question of whether the CISG applies to the *formation* of an arbitration agreement is fairly undisputed – the CISG does apply.

Formation entails the process of meeting of minds, i.e., exchange of offer and acceptance as the necessary declarations of will to conclude a contract, be it a contract of sale or an arbitration agreement.[71]

If an arbitration agreement is incorporated into an international sales contract, it is governed by the CISG's provisions on contract formation (Articles 14–24).[72] This is because of a broad interpretation of Articles 19 (3) and 81 (1) CISG (see parts 2.2.1. and 2.2.2) which is more favorable as opposed to their narrow reading.

68 J. Walker, *op. cit.,* fn. 34, 163.

69 *Ibid*., 163–164.

70 *Ibid*., 164; D. Vorobey, *op. cit.,* fn. 64, 161.

71 M. P. Perales Viscasillas, D. Ramos Muñoz, *op. cit.,* fn. 24, 72.

72 M. Schmidt-Kessel, *op. cit.,* fn. 34, 231–232.

If the parties elect a certain law to govern their contract, it is logical that their law of choice governs all clauses within that contract. This (broad) interpretation would, therefore, allow for a simpler and more predictable framework for concluding sales contracts which contain arbitration agreements.

There would make no sense for the CISG not to regulate the provisions for the settlement of disputes because Article 19 (3) CISG elevates them to the same level of importance as all the other listed terms which it undoubtedly regulates.

6.2. Substantive validity

As shown above, some courts and authors contend that the CISG applies to the substantive validity of an arbitration agreement. This view does not seem convincing.

Substantive validity is an elusive concept, but certain authors have identified its key aspects such as: the prohibition of a general clause; an odd number of arbitrators; arbitrability; lack of coercion, threat, fraud, delusion.[73] Moses formulates the aspects of substantive validity slightly differently. According to her, a substantively valid arbitration agreement relates to a defined legal relationship; regulates an issue which is capable of being settled by arbitration; and is not null and void, inoperable, or incapable of being performed.[74]

Article 4 CISG explicitly provides that the CISG is not concerned with the validity of the contract or any of its provisions. If the CISG does not govern the validity of the main contract, it would be hard to conceive how it can govern the validity of an arbitration agreement.

Furthermore, it is obvious that the CISG does not have any provisions that can adequately regulate the issue of substantive validity. Therefore, in order to determine the law applicable to the substantive validity, one cannot rely on the CISG.

73 Gašo Knežević, Vladimir Pavić, *Arbitraža i ADR*, Faculty of Law University of Belgrade, Belgrade 2013, 50–52.

74 M. Moses, *op. cit.,* fn. 8, 31–34.

6.3. Formal validity

Formal validity consists of the means by which declarations of consent ought to be exteriorized to conclude a valid contract.[75] As previously mentioned, whether the CISG governs the formal validity of the arbitration agreement incorporated in a sales contract is highly debated, with some authors ardently supporting its application to formal validity,[76] and others decidedly opposing it.[77] Article 11 CISG allows for the freedom of form.[78] However, it is unclear whether it extends to arbitration agreements.

The primary reason for this is the fact that arbitration agreements are generally subjected to more rigorous formal requirements than other provisions of a sales contract.

Furthermore, when discussing the matter of form of the arbitration agreement, one must take into account other relevant sources of law because of Article 90 CISG which states that the CISG "*does not prevail* over any international agreement which has already been or may be entered into and *which contains provisions concerning the matters governed by [the CISG]* provided that the parties have their places of business in States parties, to such agreement".

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75 M. P. Perales Viscasillas, D. Ramos Muñoz, *op. cit.,* fn. 24, 72.

76 Pilar Perales Viscasillas, "Article 11", *UN Convention on Contracts for the International Sale of Goods (CISG)* (eds. S. Kröll, L. Mistelis, P. Perales Viscasillas), C. H. Beck Hart Nomos Publishers, Munich-Oxford 2018, 195–196; M. P. Perales Viscasillas, D. Ramos Muñoz, *op. cit.* fn. 24, 73; J. Walker, *op. cit.,* fn. 34, 163.

77 André Janssen, Matthias Spilker, "The CISG and International Arbitration", *International Sales Law: A Global Challenge* (ed. L. DiMatteo), Cambridge University Press, New York 2014, 149; Larry DiMatteo *et al.*, *International Sales Law: A Critical Analysis of CISG Jurisprudence*, Cambridge University Press, New York 2005, 39; Christina Fountoulakis, "Article 11 CISG", *International Sales Law* (eds. I. Schwenzer, C. Fountulakis), Routledge Cavendish, London-New York 2007, 109; A. Janssen, M. Spilker (2013), *op. cit.,* fn. 67, 156; J. Waincymer, *op. cit.* fn. 35, 588; I. Schwenzer, D. Tebel, *op. cit.* fn. 24, 750; L. Mistelis, *op. cit.,* fn. 18, 394; M. Đorđević, *op. cit.,* fn. 13, 80–81.

78 Article 11 CISG reads:

"A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses."

6.3.1. Interplay with the New York Convention

In this matter the CISG gives precedence to the New York Convention since it, *inter alia*, deals with the form of arbitration agreements. Article II of the New York Convention sets the formal requirements for arbitration agreements.[79]

Although the New York Convention provides that states parties to the New York Convention "shall recognize an agreement in writing", it is widely accepted that Article II (1) the New York Convention only defines the "maximum form requirement".[80]

Furthermore, UNCITRAL issued a recommendation[81] pursuant to which Article II (2), which lists what an agreement in writing shall include, should be read non-exhaustively. Indeed, the non-exhaustive reading of Article II (2) follows the general aim of the New York Convention, which is to facilitate the recognition and enforcement of arbitral awards and recognition of arbitration agreements.[82] This is especially necessary because technology has progressed, and business practices have significantly changed since the New York Convention was adopted. It is important to note that the 2006 UNCITRAL recommendation does not endorse the abolishment of the writing requirement, but only calls for the non-exhaustive and more inclusive interpretation of Article II (2). This is to include agreements concluded electronically within the ambit of Article II (2) of the New York Convention.

79 Article II (2) of the New York Convention reads:

"2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

80 I. Schwenzer, D. Tebel, *op. cit.,* fn. 24, 742–743; Reinmar Wolff, "Article II (1)-(2)", *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 Article-by-Article Commentary* (ed. R. Wolff), C. H. Beck Hart Nomos Publishers, Munich-Oxford 2019, 115. Although widely accepted, the opinion that the New York Convention only sets a maximum standard is not undisputed – some argue that it sets a minimum standard (R. Wolff, *op. cit.,* fn. 80, 115–116).

81 Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006), *https://uncitral.un.org/en/texts/arbitration/explanatorytexts/recommendations/foreign_arbitral_awards*, last visited 10 January 2024.

82 R. Wolff, *op. cit.,* fn. 80, 128.

The second prong of the 2006 UNCITRAL recommendation is the application of Article VII (1).[83] Article VII (1) enshrines what has become known as the "Most Favorable Law Approach".[84]

In this particular matter, it would be the law of a country which imposes less stringent formal requirements for arbitration agreements. This provision is viewed as an "escape clause"[85] for circumventing the formal requirements imposed by Article II.

The key question here is: Can the CISG be regarded as the most favorable law in the sense of Article VII (1) of the New York Convention?

Schwenzer and Tebel argue that the Most Favorable Law Approach stemming from Article VII (1) of the New York Convention only applies to treaties or laws specifically relating to recognition and enforcement of arbitral awards.[86] Therefore, Article VII (1) does not allow for the application of sales law or general contract law.

Even if we were to neglect the previous argument, the application of Article VII (1) of the New York Convention bears further problems. Namely, as Wolff puts it, Article VII (1) does not allow for "cherry-picking", meaning that arbitration agreements can either be recognized under the New York Convention or under other recognition regimes. He concludes that less demanding form requirements from different national laws cannot be implemented under the framework of the New York Convention's enforcement regime.[87]

To conclude, the CISG, as an international sales law convention would not be suitable to apply by virtue of article VII (1), and even if we were to consider its possible application, we would risk stepping outside of the enforcement regime of the New York Convention.

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83 Article VII (1) of the New York Convention reads:

"The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

84 I. Schwenzer, D. Tebel, *op. cit.,* fn. 24, 752.

85 D. Vorobey, *op. cit.,* fn. 64, 151.

86 I. Schwenzer, D. Tebel, *op. cit.,* fn. 24, 752.

87 R. Wolff, *op. cit.,* fn. 80, 155.

6.3.2. Interplay with the Model Law

The UNCITRAL Model Law is not an international agreement in the sense of Article 90 CISG. Therefore, we cannot use that provision to establish primacy of the Model Law. However, since it is adopted by 88 States in a total of 121 jurisdictions (among which are the United States, the United Kingdom, China, Russia, India, etc.).[88] Given that its provisions are a part of national arbitration laws of much of the world's largest economies, its provisions regulating the formal validity of arbitration agreements cannot be overlooked in this discussion.

The Model Law regulates the form of the arbitration agreement in its Article 7. The 2006 amendments to the Model Law introduced two options regarding this article. Model law jurisdictions can adopt either of the two options. Option I, among other things, provides that "[a]n arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means."[89] Option II, on the other hand, does not envisage any formal requirements for arbitration agreements.[90]

Obviously, the aim of the 2006 amendments was to relax the formal requirements for arbitration clauses envisaged in the New York Convention. The intended application of Article 11 CISG has the same goal. Therefore, we have to address the question: Which one of them has primacy when an arbitration agreement is incorporated into a sales contract?

The most persuasive view seems to be that Article 11 CISG is not applicable in this matter because it is preempted by the more specific provisions of national arbitration laws dealing with the form of

88 Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, *https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status*, last visited 10 January 2024.

89 Article 7 Option I, para. 3 reads:

"(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means."

90 Article 7 Option II reads:

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not."

arbitration agreements.[91] Even though the outcome might be similar, or virtually the same – it would be so not because of Article 11, but because of the rather permissive provisions of the amended Model Law.

This reasoning would be applicable even outside of the framework of the CISG, the New York Convention, and the Model law. This is because the principle of freedom of form of general contract law is superseded by the formal requirements of the national arbitration laws.[92]

7. CONCLUSION

We have discussed the aspects of arbitration agreements which are seen as contractual, and we have come to certain conclusions.

The formation of an arbitration agreement is the least controversial, not only because a majority of authorities agree that it is covered by the CISG, but because Articles 14–24 CISG which regulate the formation of a sales contract are apt to govern the formation on an arbitration agreement without any paradoxical outcome.

The issue of substantive validity is not regulated by the CISG. This is on account of the fact that the CISG simply does not have any articles which would be able to regulate the issues which fall under the notion of substantive validity.

The formal validity of an arbitration agreement cannot be regulated by Article 11 CISG because the CISG, through Article 90, gives precedence to the New York Convention. Furthermore, the Model Law has precedence over the CISG in this matter because it has specific provisions regulating the formal validity of arbitration agreements, whereas the CISG only regulates the formal validity of international sales contracts as a whole.

The CISG is a complex and ever-evolving legal instrument which unifies international commercial law like no other. In that vein, it should not be surprising that the scope of the CISG encompasses arbitration agreements. Although the CISG has its express limitations (not

91 I. Schwenzer, D. Tebel, op. cit. fn. 24, 750; R. Wolff, *op. cit.*, fn. 80, 155.

92 For various examples see: I. Schwenzer, D. Tebel, *op. cit.,* fn. 24, 753.

governing substantive nor formal validity of arbitration agreements) it serves the purpose of foreseeably regulating the majority of contractual aspects of arbitration agreements. The relationship between the CISG and international arbitration is thus formalized in this unique intersection.

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ŠTA CISG IMA S TIM? – PRIMENA KONVENCIJE UJEDINJENIH NACIJA O UGOVORIMA O MEĐUNARODNOJ PRODAJI ROBE NA ARBITRAŽNE SPORAZUME

Rezime

Arbitražni sporazumi spadaju među najsloženije sporazume u međunarodnom pravu. Oni dopuštaju ugovornim stranama da reše svoj potencijalni spor izvan nacionalnih sudova. Međutim, iako su procesne prirode, oni su, ipak, samo ugovori. U ovom radu biće analizirano pitanje da li se Konvencija Ujedinjenih nacija o ugovorima o međunarodnoj prodaji robe (CISG) primenjuje na arbitražne sporazume. Razmotrićemo delokrug CISG-a i tumačenje CISG-a u vezi sa ovim pitanjem. Slediće ispitivanje novije sudske prakse i naučnih radova koji se bave ovim pitanjem. Na kraju, ponudićemo naše viđenje o tome kako se CISG primenjuje na arbitražne sporazume i na koje aspekte arbitražnih sporazuma utiče.

Ključne reči: *CISG. – Arbitražni sporazumi. – Zaključenje. – Materijalna punovažnost. – Formalna punovažnost.*

LITERATURA

Blackaby N., Partasides C., Redfern A., Hunter M., *Redfern and Hunter on International Arbitration*, Oxford University Press, New York 2015.

Born G., *International Commercial Arbitration*, Kluwer Law International, The Hague 2021

DiMatteo L. A., Dhooge L. J., Greene S., Maurer V. G., Pagnattaro M. A., *International Sales Law: A Critical Analysis of CISG Jurisprudence*, Cambridge University Press, New York 2005.

Đorđević M., "Article 4", *UN Convention on Contracts for the International Sale of Goods (CISG)* (eds. S. Kröll, L. Mistelis, P. Perales Viscasillas), C. H. Beck Hart Nomos Publishers, Munich-Oxford 2018.

Fillers A., "Application of the CISG to Arbitration Agreements", *European Business Law Review* 30 (4)/2019 .

Flecke-Giammarco G., Grimm A., "CISG and Arbitration Agreements: A Janus-Faced Practice and How to Cope with it", *Journal of Arbitration Studies* 25(3)/2015.

Fountoulakis C., "Article 11 CISG", *International Sales Law* (eds. I. Schwenzer, C. Fountulakis), Routledge Cavendish, London-New York 2007.

Huber P., Mullis A., *The CISG: A new textbook for students and practitioners*, Sellier European Law Publishers, Mainz – Norwich 2007.

Janssen A., Spilker M., "The Application of the CISG in the World of International Commercial Arbitration", *The Rabel Journal of Comparative and International Private Law* 77/2013

Janssen A., Spilker M., "The CISG and International Arbitration", *International Sales Law: A Global Challenge* (ed. Larry DiMatteo), Cambridge University Press, New York 2014.

Knežević G., Pavić V., *Arbitraža i ADR*, Faculty of Law University of Belgrade, Belgrade 2013

Koch R., "The CISG as the Law Applicable to Arbitration Agreements", *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (eds. Cammilla Andersen, Ulrich Schroeter), Wildy, Simmonds & Hill Publishing, London 2008.

Kröll S., "Selected Problems Concerning the CISG's Scope of Application", *Journal of Law and Commerce* 25/2005.

Kröll S., "Arbitration and the CISG", *Current Issues in the CISG and Arbitration* (eds. Ingeborg Schwenzer, Yeşim M. Atamer, and Petra Butler), Eleven International Publishing, The Hague 2014.

Lew J. D.M., Mistelis L. A., Kröll S., *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague 2003.

Mistelis L., "CISG and Arbitration", *CISG Methodology* (eds. A. Janssen, O. Meyer), Sellier European Law Publishers, Munich 2009.

Moses M. L., *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, New York 2012.

Perales Viscasillas M. P., Ramos Muñoz D., "CISG & Arbitration", *Spain Arbitration Review* 10/2011.

Perales Viscasillas P., "Article 7", UN Convention on Contracts for the International Sale of Goods (CISG) (eds. S. Kröll, Ls Mistelis, P. Perales Viscasillas), C. H. Beck Hart Nomos Publishers, Munich-Oxford 2018.

Perales Viscasillas P., "Article 11", *UN Convention on Contracts for the International Sale of Goods (CISG)* (eds. S. Kröll, L. Mistelis, P. Perales Viscasillas), C. H. Beck Hart Nomos Publishers, Munich-Oxford 2018.

Schmidt-Ahrendts N., "CISG and Arbitration", *Annals of the Faculty of Law in Belgrde* 3/2011.

Schmidt-Kessel M., "Introduction to Articles 14–24", *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (ed. I. Schwenzer), Oxford University Press, Oxford 2016.

Schwenzer I., Tebel D., "The Word is not Enough: Arbitration, Choice of Forum and Choice of Law Clauses under the CISG", *The ASA Bulletin* 31(4)/2013.

Schwenzer I., Hachem P., "Article 4", *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (ed. I. Schwenzer) Oxford University Press, Oxford 2016.

Schwenzer I., Hachem P., "Introduction to Articles 1–6", *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (ed. I. Schwenzer) Oxford University Press, Oxford 2016.

Schwenzer I., "Introduction", *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (ed. I. Schwenzer) Oxford University Press, Oxford 2022.

Varadi T., Bordaš B., Knežević G., Pavić V., *Međunarodno privatno pravo*, Pravni Fakultet Univerziteta u Beogradu, Beograd 2021.

Vorobey D. V., "CISG and Arbitration Clauses: Issues of Intent and Validity", *Journal of Law and Commerce* 31/2012–2013.

Waincymer J., "The CISG and International Commercial Arbitration: Promoting a Complementary Relationship Between Substance and Procedure", *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (eds. C. Andersen, U. Schroeter), Wildy, Simmonds & Hill Publishing, London 2008.

Walker J., "Agreeing to Disagree: Can We Just Have Words? CISG Article 11 And the Model Law Writing Requirement", *Jouranl of Law and Commerce* 25(1)/2005.

Wolff R., "Article II (1)-(2)", *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 Article-by-Article Commentary* (ed. R. Wolff), C. H. Beck Hart Nomos Publishers, Munich-Oxford 2019.

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