CISG and Arbitration Agreements

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I. Introduction

It is an oft-discussed and still controversial subject whether and if so to which extent the United Nations Convention on Contracts for the International Sale of Goods (CISG) of 1980[1] is applicable in connection with arbitration. Insofar, several questions seek an answer: Do the CISG-provisions on formation of contract also apply to arbitration clauses in CISG-contracts? Do CISG-standards of interpretation apply to arbitration clauses in CISG-contracts or even in Non-CISG-contracts? Must arbitrators apply the CISG, eventually when? Which are the consequences if the CISG is not or merely wrongly applied?

The following text examines the present state of opinions to these problems and discusses which solution to follow. It is dedicated in longstanding collegiality and friendship to THOMAS KOLLER whose working areas include the Vienna Sales Convention and international trade law as a whole. He has written extensively on the CISG[2] and has, last but not least, been the coach of

1 The CISG has been ratified by 89 States (2018). Among them there are almost all major trading nations.

2 See in particular THOMAS KOLLERS commentary (together with HERBERT SCHÖNLE) on Arts. 66-70 and 74-76 CISG, in: Heinrich Honsell (ed.), Kommentar zum UN-Kaufrecht (2nd ed. 2010); further: THOMAS KOLLER, AGB-Kontrolle und UN-Kaufrecht (CISG) – Probleme aus schweizerischer Sicht, in: Festschrift für Heinrich Honsell (2002) 223 et seq.; THOMAS KOLLER, Die Verjährung von Ansprüchen des Käufers aus der Lieferung nicht vertragskonformer Ware im Spannungsfeld zwischen UN-Kaufrecht (CISG) und nationalem Partikularrecht, recht 2003, 41 et seq.; THOMAS KOLLER, Aliud und peius: wirklich überholt? – oder: Was das CISG und das revidierte deutsche Recht dem OR (noch) voraus haben, in: Festschrift für Ernst A. Kramer (2004), 531 et seq.; THOMAS KOLLER (together with MICHAEL STALDER), Vertragsrecht und interantionaler Handel – Die Vertragswidrigkeit der Ware im UN-Kaufrecht (CISG) bei national unterschiedlichen öffentlichrechtlichen Beschaffenheitsvorschriften, in: Festschrift für Peter Gauch (2004) 477 et seq.; THOMAS KOLLER (together with MICHAEL STALDER), Verunreinigter Paprika – ein Prüfungsfall aus dem Bereich des UN-Kaufrechts (CISG) mit prozessualen Aspekten, recht 2004, 10 et seq.; THOMAS KOLLER, Das Regressrecht des CISG-Importeurs gegen den CISG-Verkäufer bei Produkthaftungsfällen mit Körperschäden, in: Festschrift für Wolfgang Wiegand (2005) 421 et seq.; THOMAS KOLLER, Der Übergang der Leistungsgefahr bei internationalen Kaufverträgen unter der CIF- und der FOB-Klausel – Überlegungen zur sachgerechten Risikoverteilung im grenzüberschreitenden Warenverkehr, in: Festschrift für Eugen Bucher (2009) 383 et seq.; THOMAS KOLLER (together with MARC ANDRÉ MAUERHOFER), Das Beweismass im UN-Kaufrecht (CISG), in: Festschrift für Ingeborg Schwenzer (2011) 963 et seq.; THOMAS KOLLER (together with DAVID JOST), Rinderlasagne mit Pferdefleisch, Salatgurken mit EHEC-Bakterien, dioxinverseuchtes Schweinefleisch – oft nur ein Verdacht und doch ein Mangel? Überlegungen zum Mangelverdacht bei Lebensmitteln als Vertragswidrigkeit der Ware nach UN-Kaufrecht (CISG), in: Festgabe der Rechtswissenschaftlichen Fakultät der Universität Bern für den Schweizerischen Juristentag 2014 (2014) 35 et seq.; THOMAS KOLLER, Querbezüge zwischen UN-Kaufrecht und COTIF-Eisenbahngüterbeförderungs-

numerous Vis Moot Court teams of the University of Berne. I hope THOMAS will forgive my writing in English (which he speaks well) but in the CISG-world English is the *lingua franca* whereas writings in German are read and taken into account only by a shrinking number of persons.

II. Some general considerations

There is ample evidence that arbitral tribunals in fact frequently apply the CISG when concerned with international sales cases.[3] However, since many arbitral awards remain unpublished, a precise overall assessment is impossible. The evidence can only be taken from published awards and from personal views of arbitrators. Both sources speak in favour of a considerable frequency of the application of the CISG in arbitration proceedings.

Arbitration has numerous legal facets. With respect to the CISG only specific aspects are relevant: namely, whether, and if so when, the CISG applies to the formation, incorporation and interpretation of an arbitration agreement/an arbitration clause that is coupled with a sales contract to which the CISG is applicable. Also, the question whether and when arbitrators have to apply the CISG to the merits of a case must be pursued.

The CISG mentions arbitration directly on two occasions: Art. 45 (3) and Art. 61 (3) both provide: "No period of grace may be granted to the seller (resp. buyer) by a court or arbitral tribunal when the buyer (resp. the seller) resorts to a remedy for breach of contract." The Convention states here a rule that also arbitral tribunals have to observe when they apply the CISG. Wheth-

recht (CIM), AJP 2016, 415 et seq.; THOMAS KOLLER, Ist die Pflicht des Verkäufers zur fristgerechten Andienung korrekter Dokumente beim Akkreditivgeschäft eine wesentliche Vertragspflicht gemäss Art. 25 CISG? – Gleichzeitig mit Bemerkungen zum «chinesisch-italienisch-schweizerischen Walzdraht-Fall», IHR 2016, 89 et seq.; THOMAS KOLLER, Das Verhältnis von «frachtrechtlicher Rüge» und «kaufrechtlicher Rüge» im internationalen Warenhandel unter UN-Kaufrecht (CISG), Jusletter vom 3.7.2017.

3 A recent counting stated that in 2017 the comprehensive data-bank of the Pace University, New York (cisg.pace) listed over 1.600 arbitral awards applying the CISG, see LOUKAS A. MISTELIS, in: Stefan Kröll/Loukas A. Mistelis/Maria del Pilar Perales Viscasillas (eds.), UN Convention on Contracts for the International Sale of Goods. A Commentary (2nd ed. 2018) Art. 1 n. 18; for statistical material see also NILS SCHMIDT-AHRENDTS, CISG and Arbitration, Belgrade L. Rev. LIX (2011) 211 et seq. Further relevant studies are PETRA BUTLER, CISG and International Arbitration – A Fruitful Marriage?, International Trade and Business Law Review XVII (2014) 322 et seq. ; André JANSSEN/MATTHIAS SPILKER, The Application of the CISG in the World of International Commercial Arbitration, RabelsZ 77 (2013) 131 et seq.; SEBASTIAN KNETSCH, Das UN-Kaufrecht in der Praxis der Schiedsgerichtsbarkeit (2011) in particular 39 et seq.; LOUKAS A. MISTELIS, CISG and Arbitration, in: André Janssen/Olaf Meyer (eds.), CISG Methodology (2009) 375 et seq.

er this is a hint that tribunals are bound to apply the Convention (provided all conditions for its application are met) or whether the Convention merely reacts to the situation that the tribunal applies the CISG on the basis of its own rules is open (see thereto below). The CISG further mentions arbitration proceedings in an indirect way in Art. 19 (3) and in Art. 81 (1). In both cases the Convention addresses contract provisions relating to the "settlement of disputes". It is common opinion that the term includes arbitration agreements or arbitration clauses which are connected with a CISG-contract.[4] However, it is disputed – and has to be discussed below – how far such agreements or clauses are covered by the CISG.

The parties'agreement that disputes arising from a specific contract shall be arbitrated by a specific arbitration tribunal may be made either – rather rarely – by a separate agreement or – regularly – by a clause in the main contract. In the latter case an arbitration clause is often contained in the standard contract form of one or even both parties. Both kinds of agreeing on arbitration can relate to a CISG-contract and have to be dealt with here although the main focus will be on the practically only relevant arbitration clauses. When the term arbitration agreement is used here it includes both kinds – the separate and the incorporated agreement – unless stated otherwise.

The arbitral tribunal may be bound by rules of procedure as regulated by the arbitration institution under which the tribunal is established. These rules may prescribe the law applicable to the arbitration clause and to the arbitration proceedings. Yet, if they are silent in this respect or if an *ad hoc*-arbitral tribunal is composed the arbitrators have to determine the applicable law.

The relationship between the CISG and the international conventions on arbitration is relatively simple. Arbitration law is still primarily domestic law regulated by national laws which, however, often follow the UNCITRAL Model Law on International Commercial Arbitration of 1985 as amended in 2006. There are only two relevant multi-state conventions in the field of arbitration which take priority over national law: first, the famous and widely accepted[5] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 which unified the law that state courts have to apply with respect to the recognition and enforcement of awards. Secondly,

4 EDWARD ALLAN FARNSWORTH, in: Cesare Massimo Bianca/Michael Joachim Bonell (eds.), Commentary on the International Sales Law (1987) Art. 19 n. 2.8; JOHN O. HONNOLD/HARRY M. FLECHTNER, Uniform Law for International Sales under the 1980 United Nations Convention (4th ed. 2009) n. 169 and n. 442; ULRICH MAGNUS, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch – Wiener UN-Kaufrecht (CISG) (ed. 2018) Art. 19 n. 17 and Art. 81 n. 8; ULRICH G. SCHROETER, in: Peter Schlechtriem/Ingeborg Schwenzer (eds.), Kommentar zum Einheitlichen UN-Kaufrecht – CISG – (6th ed. 2013) Art. 19 n. 8a.

5 Presently (April 2018) there are 159 Contracting States to the New York Convention.

the European Convention on International Commercial Arbitration of 1961.[6] The relationship between the CISG and the two Conventions is governed by the principle of specialty. Both Arbitration Conventions are the more special regulations which prevail over the CISG as far as they contain competing rules.[7] This does not forbid the application of CISG provisions in order to fill gaps the two Conventions leave.[8]

III. CISG applicable to arbitration clauses?

There are several subquestions when one asks whether the CISG applies to arbitration clauses: First, have the parties to a CISG-contract validly agreed on arbitration? Which law applies to the formation of the arbitration agreement/clause? Secondly, when is an arbitration clause in standard contract terms been validly incorporated into the contract? Thirdly, connected with it, how is the problem of the battle of forms solved with respect to mutual arbitration clauses? Fourthly, which form is applicable to arbitration clauses?

When I use the expression "CISG-contract" I mean a sales contract to which the CISG applies via Art. 1 (1) (a) or (b) and Art. 100 CISG. This is the case if the parties have validly chosen the CISG[9] or if their seats of business are located in different CISG-States (Art. 1 (1) (a) CISG) or if the rules of private international law of the forum seized with the case lead to the law of a CISG-State (Art. 1 (1) (b) CISG). Further, the CISG's temporal applicability must be given (Art. 100); no exclusions must apply (Arts. 2-5) and the parties must not have opted out of the CISG (Art. 6).

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6 This Convention has been adopted by 30 States, among them 18 Member States of the EU (2018).

7 See NIKLAUS HUTZLI, in: Christoph Brunner, UN-Kaufrecht – CISG (2nd ed. 2014) Art. 90 n. 4; PETER HUBER, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch (7th ed. 2016) Art. 90 CISG n. 5; PETER MANKOWSKI, in: Franco Ferrari et al. (eds.), Internationales Vertragsrecht (2nd ed. 2012) Art. 90 CISG n. 6; INGO SAENGER, in: Beck'scher Online Kommentar zum Bürgerlichen Gesetzbuch (BeckOG BGB, 2017) Art. 90 CISG n. 2; STAUDINGER/MAGNUS (supra fn. 4) Art. 90 n. 11.

8 See German Bundesgerichtshof (BGH) Internationales Handelsrecht (IHR) 2014, 56 n. 9 et seq.; *Filanto SpA v. Chilewich International Corp*., 789 F.Suppl. 1229 (SDNY 1992) and the references in the preceding fn.

9 The parties can choose the CISG for their contract even if the conditions of the CISG's applicability are not met; see Hoge Raad, Nederlands Jurisprudentie (NJ) 1992, 105; Hoge Raad NJ 2001, 391; *FPM Financial Services, LLC v. Redline Products Ltd.*, (DCNJ) WestLaw 5288005; BIANCA/BONELL/BONELL (supra fn. 4) Art. 6 n. 3.5; BRUNNER/MANNER/SCHMITT (supra fn. 7) Art. 6 n. 10; HONNOLD/FLECHTNER (supra fn. 4) n. 78 et seq.; SCHLECHTRIEM/SCHWENZER/FERRARI (supra fn. 4) Art. 6 n. 39 et seq.; STAUDINGER/MAGNUS (supra fn. 4) Art. 6 n. 62 et seq.

A. The law governing the formation of an arbitration agreement

1. The doctrine of separability

Arbitration clauses in contracts are generally regarded as separate contracts though connected with the main (sales) contract.[10] This is expressed, for instance, in Art. 23 (1) of the UNCITRAL Arbitration Rules (in their 2013 version): "…an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause." In substance more or less identical is sec. 7 of the practically important English Arbitration Act 1996.[11] Furthermore, the same idea of principal independence of the arbitration clause from the rest of the contract underlies Art. 81 (1) sent. 2 CISG that "Avoidance does not affect any provision of the contract for the settlement of disputes…".

The principle of the autonomy – or separability – of the arbitration agreement can have repercussions on the law that applies to the formation of the main contract and to the arbitration agreement or arbitration clause. In practice, often the same law will be applied to both.[12] However, there is no automatism. Both – the main contract and the arbitration agreement – can follow different law. Therefore, where the CISG governs the main contract it is not self-understanding that the conclusion of an arbitration clause in this contract is also subject to the CISG-provisions on the formation of contracts (Arts. 14 et seq.).

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10 See the particularly relevant English jurisprudence: e.g., *Premium Nafta Product Ltd. (20th Defendant) & Ors. v. Fili Shipping Company Ltd. & Ors.* [2007] UKHL 20; *National Iranian Oil Company v. Crescent Petroleum Company International Ltd. & Anor.* [2016] EWHC 510 (Comm.); further, e.g., DIETMAR CZERNICH, The Law Applicable to the Arbitration Agreement, in: Gerold Zeiler/Irene Welser et al. (eds.), Austrian Yearbook on International Arbitration 2015, 73; RAINER HAUSMANN, in: Christoph Reithmann/Dieter Martiny (eds.), Internationales Vertragsrecht (8th ed. 2015) n. 8.182; DAVID ST JOHN SUTTON/JUDITH GILL/MATTHEW GEARING, Russell on Arbitration (24th ed. 2015) n. 2-010 et seq.; PIETER SANDERS (ed.), International Handbook on Commercial Arbitration (looseleaf, 2010) 59 et seq.; ROLF TRITTMANN/INKA HANEFELD, in: Karl-Heinz Böckstiegel/Stefan Kröll/Patricia Nacimiento (eds.), Arbitration in Germany (2007) § 1029 n. 9.

11 "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.»

12 See, for instance, the German Federal Supreme Court, BGH RIW 1976, 449 (450); the Indian Supreme Court in *National Thermal Power Corp. v. Singer Co.*, 1992 SCR (3) 106; however, contrary, e.g., Austrian Supreme Court (OGH) JBl. 1974, 186.

2. *Choice of law*

Since in arbitration the autonomy of the parties is the all-embracing general principle[13] (as it is also the fundamental principle of the CISG)[14] the parties may choose the law applicable to a separate arbitration agreement or to an arbitration clause in their contract.[15] The choice may be explicit or even implicit. The law intended to be chosen then governs already the conclusion of the arbitration agreement or clause as well as any possible invalidity ground such as mistake, fraud, threat and the like.

In the case of an arbitration clause in the contract it is, however, completely unusual that the parties explicitly agree on a specific law applicable only to this clause though this may happen where a separate arbitration agreement has been concluded.[16]

In the absence of an explicit choice of law for the arbitration agreement the question arises whether the parties agreed implicitly on a specific law. The most common case is that the main contract contains both a choice of law-clause and an arbitration clause. Does then the choice of law-clause also extend to the arbitration clause? The answer depends on the intention of the parties unless international or national mandatory law that applies to arbitration provides otherwise (presently, there appear to exist nowhere statutory restrictions on the principle freedom of commercial parties in international sales transactions to choose the applicable law for their arbitration agreement). Yet, in the absence of any indication to the contrary the intention of the parties should be assumed that the chosen law shall also regulate the formation of the incorporated arbitration agreement. This seems to be the prevailing opinion in international case law and legal writing.[17] The influential

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13 See, e.g.,GARY BORN, International Commercial Arbitration I (2009) 82 et seq.; JANSSEN/SPILKER (supra fn. 3) RabelsZ 77 (2013) 135. Generally on the principle of party autonomy in private international law JÜRGEN BASEDOW, Theorie der Rechtswahl oder Parteiautonomie als Grundlage des Internationalen Privatrechts, RabelsZ 75 (2011) 32 et seq. who regards party autonomy as a general right of persons in any field of law which exists already before all stately power and which in principle the state has to respect. Any restriction of this right requires a reasonable justification.

14 See in particular Art. 6 CISG, but also the numerous provisions of the Convention which expressly give priority to the parties' agreement.

15 See Art. V (1) (a) New York Convention and Art. VI (2) (a) European Convention on International Commercial Arbitration; further ALBERT VENN DICEY/JOHN HUMPHREY CARLILE MORRIS/LAWRENCE COLLINS, The Conflict of Laws (15th ed. 2017) n. 16R-001; REITHMANN/MARTINY/HAUSMANN (supra fn. 10) n. 8.240 with many references.

16 See also *Sulamérica CIA Nacional de Segouros SA & Ors. v. Enesa Engenharia SA & Ors.* [2012] EWCA Civ 638 (n. 11 per MARTIN JAMES MOORE-BICK LJ.).

17 See, for instance, BGH RIW 1976, 449 (450); BGH NJW-RR 2010, 548 (n. 30); OLG Hamm SchiedsVZ 2014, 38 (42); OGH RdW 2009, 514 (528); *National Thermal Power Corp. v. Singer Co.*, 1992 SCR (3) 106; also, e.g., BORN (supra fn. 10) International

standard-work of DICEY/MORRIS/COLLINS is representative for this view: "*The law chosen by the parties*. If there is an express choice of law to govern the arbitration agreement, that choice will be effective, irrespective of the law applicable to contract as a whole. If there is an express choice of law to govern the contract as a whole, the arbitration agreement will also normally be governed by that law: this is so whether or not the seat of arbitration is stipulated, and irrespective of the place of the seat."[18]

Is the intended seat of arbitration nonetheless an indication of an intention to apply the law at this seat? Some courts[19] and legal writers[20] suggest to generally subject the arbitration agreement to the law at the seat of the arbitration and to disregard the law explicitly chosen for the main contract. It is in my view unlikely and unrealistic that this mirrors the probable intention of the parties because parties generally refer their choice of law to all clauses of their contract including the arbitration clause. If they intended another law for the formation of the arbitration clause they could have easily so said in their

Commercial Arbitration I 385; DIETMAR CZERNICH, Österreich: Das auf die Schiedsvereinbarung anwendbare Recht, SchiedsVZ 2015, 181 (184); LEONARDO GRAFFI, The law applicable to the arbitration agreement: A practitioner's view, in: Franco Ferrari/Stefan Kröll (eds.), Conflict of Laws in International Arbitration (2010) 19 et seq. (35); STEPHAN WILSKE/TODD J. FOX, IN: REINMAR WOLFF (ed.), New York Convention (2012) Art. II n. 233; confirming this principle also *Sulamérica CIA Nacional de Segouros SA & Ors. v. Enesa Engenharia SA & Ors.* [2012] EWCA Civ 638 (n. 11 per MARTIN JAMES MOORE-BICK LJ.: "It has long been recognised that in principle the proper law of an arbitration agreement which itself forms part of a substantive contract may differ from that of the contract as a whole, but it is probably fair to start from the assumption that, in the absence of any indication to the contrary, the parties intended the whole of their relationship to be governed by the same system of law. It is common for parties to make an express choice of law to govern their contract, but unusual for them to make an express choice of the law to govern any arbitration agreement contained within it; and where they have not done so, the natural inference is that they intended the proper law chosen to govern the substantive contract also to govern the agreement to arbitrate.»). The decision cites many further judgments supporting this principle. In the concrete case the Court reached however the result that English law applied to the arbitration clause in a main contract for which the parties had explicitly chosen Brazilian law. The main reason was that the closest and most real connection of the arbitration clause existed with English law where the seat of the arbitration was located because under an alleged rule of Brazilian law the arbitration agreement would be significantly undermined. The outcome of the decision is hardly convincing because the Court of Appeal ranked possible alleged rules of the chosen law higher than existing facts in the process of balancing all circumstances for and against a closer connection to English than to Brazilian law. Further, the result of this balancing process is unforeseeable.

18 DICEY/MORRIS/COLLINS (supra fn. 15) n. 16-017.

19 E.g., OGH JBl. 1974, 186.

20 E.g., MICHAEL MUSTILL/STEWART CRAFORD BOYD, Commercial Arbitration (2nd ed. 2001) 63 (rebuttable presumption that law of the intended seat of the arbitration governs the arbitration agreement); REITHMANN/MARTINY/HAUSMANN (supra fn. 10) n. 8.240 with further references.

contract. The doctrine of separability of the arbitration agreement alone is no reason to infer that the law at the seat of the arbitration should govern the agreement. For, separability as such has nothing to do with the intention of the parties and does therefore not imply a certain intention. In addition, the separability doctrine merely allows but does not oblige to apply different law to the main contract and to the arbitration clause. Indeed, it may be easier for arbitrators to apply the law at the seat of arbitration to all aspects of arbitration, even to the conclusion of the arbitration agreement. However, the yardstick is not to ease the burden of arbitrators but to follow the intention of the parties.

Moreover, in cases where the seat of the arbitration is still undetermined when the main contract with the arbitration clause is concluded the seat theory would not allow to determine the applicable law at that time. This causes considerable uncertainty on whether or not the arbitration clause is valid. Also under practical aspects it is preferable to apply the same law to the formation of the main contract as well as to the formation of the arbitration clause unless there are further relevant indications than merely the intended seat of the arbitration which point to the law of the seat. This solution avoids in many cases a double examination of the same question under different laws. Only, where the law applicable to the main contract leads to the invalidity of the contract[21] whereas the law of the – in advance definitely determined – seat does not, the latter law should prevail.[22]

If the parties have chosen an institutional arbitration which prescribes the application of a specific law this is generally also an implied choice of that law for the formation of the arbitration agreement. If the institution does not regulate the question of the applicable law, the seat of the institution as such does not justify the inferral of an implicit choice of the law at this seat.

Thus, where the parties have chosen the CISG as applicable law – or where the arbitral tribunal decided to apply the CISG – the Convention applies both to the main contract as well as to (the formation of) the connected arbitration clause. The choice of the law of a CISG-state (or arbitral decision to apply such a law) suffices as a choice of the CISG unless there are clear signs of a

21 Contrary to the English decision in *SulaAmérica CIA Nacional de Segouros SA & Ors. v. Enesa Engenharia SA & Ors.* [2012] EWCA Civ 638 the mere allegation that the chosen law would lead to the invalidity of the contract and also of the arbitration clause should however not suffice. Only if the invalidity is more or less certain (for instance, confirmed by an expert opinion) should it matter and point to the law of the arbitration's seat if this law regards the arbitration agreement as valid.

22 In this sense also CZERNICH (supra fn. 17) SchiedsVZ 2015, 181 (184); CHRISTIAN KOLLER, in: Christoph Liebscher/Paul Oberhammer/Walter H. Rechberger, Schiedsverfahrensrecht I (2011) 3/63.

deviating intention of the parties.[23] Without such signs, the formation provisions of the CISG (Arts. 14-24) regulate how and when an agreement has been concluded.

3. Lacking choice of law by the parties

If there is neither an explicit nor an implicit choice of the applicable law (neither for the arbitration agreement nor for the main contract) but the main contract is a CISG-contract it is advocated here that the CISG-provisions on formation shall apply also to the formation of the arbitration agreement.[24] This solution is in line with the opinion that the law applicable to the main contract should generally apply to the arbitration clause as well.[25] The solution is, however, in contrast to the probably prevailing view which generally favours the law at the place where the arbitral award was made or is to be made as the law objectively applicable to the formation of an arbitration agreement.[26]

In CISG-cases, there are particular reasons for applying the formation provisions of the CISG to an arbitration agreement: First, due to the widespread dissemination of the CISG the arbitration will anyway often take place in a Contracting State of the CISG (for instance in Paris, in Switzerland, in Swe-

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23 See HONNOLD/FLECHTNER (supra fn. 4) n. 77.1; KRÖLL/MISTELIS/PERALES VISCASILLAS/MISTELIS (supra fn. 3) Art. 6 n. 18; SCHLECHTRIEM/SCHWENZER/FERRARI (supra fn. 4) Art. 6 CISG n. 22; STAUDINGER/MAGNUS (supra fn. 4) Art. 6 CISG n. 24; all with further references.

24 In this sense also, e.g., WOLFRAM BUCHWITZ, in: Beck'scher Online Grosskommentar zum Bürgerlichen Gesetzbuch (BeckOGK BGB, as on 1 June 2017) Art. 14 CISG n. 27.

25 In this sense, e.g., OGH JBl. 2006, 726; OGH RdW 2009, 514; CZERNICH (supra fn. 17) SchiedsVZ 2015, 181 (185).

26 For this view see Art. V (1) (a) New York Convention ("… the said agreement is not valid … under the law of the country where the award was made»); Art. VI (2) (b) European Convention on International Commercial Arbitration ("In taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement … under the law of the country in which the award is to be made»); BGHZ 77, 12; Italian Corte di Cassazione Foro it. 1983 I 2200; Swiss Bundesgericht (BG) YB Comm. Arb. XXII (1997) 800; BÖCKSTIEGEL/KRÖLL/NACIMIENTO/TRITTMANN/HANEFELD (supra fn. 10) § 1029 n. 11; DOMINIQUE HASCHER, European Convention on International Commercial Arbitration of 1961. Commentary, YB Comm. Arb. XXXVI (2011) 504 et seq. (529); REITHMANN/MARTINY/HAUSMANN (supra fn. 10) n. 8.242; for the law at the seat of arbitration (where the award is however regularly made) *Sulamérica CIA Nacional de Segouros SA & Ors. v. Enesa Engenharia SA & Ors.* [2012] EWCA Civ 638 (n. 26 et seq.); *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v. VSC Steel Company Ltd.* [2013] EWHC 4071 (Comm.) (n. 101); JULIAN D. M. LEW/LOUKAS A. MISTELIS/MICHAEL KRÖLL, Comparative International Commercial Arbitration (2003) n. 6-23.

den etc.). Then, there will be no differing outcome under the two contrary views. However, the here suggested solution clarifies the otherwise still open question whether or not the CISG-provisions apply instead of the domestic law of the respective state. Secondly, in a number of cases the country where the award was made or is to be made cannot be determined, in particular if the award was not yet rendered and the seat of arbitration has still to be determined by the arbitrators. Also, in cases of online arbitration it can be difficult to determine the country of the award. The applicability of the CISG avoids this loophole. Thirdly, since the Convention is a uniform and worldwide accepted regulation with abundant case law and legal writing in English the CISG is often easier to apply than national domestic law. The latter requires expert opinions on the domestic law where the arbitrators or state court judges are not familiar with it. This will not infrequently be the case because neither the arbitrators nor state court judges are necessarily trained in the law of the country where the arbitration proceedings take place. The application of the CISG then saves costs and time. Fourthly, in any event is the CISG particularly designed and apt for international transactions. Fifthly, like in the case of a choice of law by the parties as discussed supra, where the CISG applies to the main contract it should also apply to all of its single clauses. To systematically subject the arbitration clause in a CISG-contract to a law different from that of the main contract would be both impractical and unnatural. Sixthly, the suggested application of the CISG removes the necessity of two different rules – for cases where the place of the award can be determined and where this is not the case. Seventhly, a modest further argument derives from the fact that the wording of Art. V (1) (a) New York Convention and essentially also Art. VI (2) European Convention on International Commercial Arbitration addresses the law that regulates the "validity". This could be understood as referring only to the material validity (error, fraud, duress etc.) and not to the pure mechanism to establish consent (the formal validity is anyway separately regulated). Then, the question which law applies to that mechanism would remain open. In any way both instruments do not provide substantive provisions for this formation mechanism whereas the CISG does.

4. Scope of the CISG-provisions on formation

However, with respect to the formation, the CISG merely regulates the so-called 'outer consent' as provided for in Arts. 14-24 CISG. This means the mechanism that forms the consent, generally through offer and acceptance. The CISG's formation provisions neither cover the material validity[27] nor the form of arbitration agreements (for the form see below at III.C.). There is a

[27] See Art. 4 (a) CISG.

decision of the German Federal Supreme Court giving the impression that the CISG as a whole cannot be applied to agreements on settlement of litigation (which include choice of court and arbitration agreements).[28] In regard of a choice of court agreement the Court stated that the formation of such clauses does not fall within the scope of the CISG but has to be dealt with in accordance with the law designated by the rules of private international law of the court seized.[29] The context makes it, however, clear that the formulation is too wide and that the Court merely excludes the material validity and the form aspect from the matters that are covered by the formation provisions of the CISG.[30]

Outside the scope of the CISG (for questions of material validity) either the chosen national law or, in the absence of such choice, the law of the country applies where the award was made or was to be made. Where this country cannot be determined the rules of private international law designate the insofar applicable law.[31]

The limits of the scope of the CISG can lead to the additional application of another law and it could be argued that it then would be simpler to apply from the outset the other law to the whole of the contract. However, the practice material shows that matters of material validity are rather rarely raised in international sales contracts. It would thus be a pity and a too quick consequence to abandon the advantages of the application of the CISG merely in order to care for certain rare cases.

5. Termination of the main contract and the fate of the arbitration agreement

If the main contract terminates this does generally not affect the fate of the accompanying arbitration agreement. Art. 81 (1) sent. 2 CISG provides expressly: "Avoidance *(sc. of the main contract)* does not affect any provision of the contract for the settlement of disputes …". Thus, an arbitration agreement regularly survives the end of the CISG-contract.

28 BGH IHR 2015, 157.

29 BGH ibid.

30 See thereto ULRICH MAGNUS, UN-Kaufrecht – Aktuelles zum CISG, Zeitschrift für Europäisches Privatrecht (ZEuP) 2017, 140 et seq. (155 et seq.).

31 See for this ultimate solution Art. VI (2) (c) European Convention on International Commercial Arbitration; also BGH SchiedsVZ 2011, 46 (n.32); REITHMANN/MARTINY/HAUSMANN (supra fn. 10) n. 8242. The UN Convention leaves the question open.

B. The incorporation of an arbitration clause into a CISG-contract

Where the incorporation of an arbitration clause into a CISG-contract is at stake and the CISG is applicable via the parties' explicit or implicit choice or via the tribunal's decision, the solution has to be sought within the CISG even though the CISG does not contain a special provision regulating the incorporation of standard terms. Since the New York Convention and the European Convention on International Commercial Arbitration do not provide a substantive solution for this situation they do not displace the CISG here. Both Conventions require an "agreement" on arbitration but are lacking detailed provisions how the agreement is reached. Insofar the CISG steps in.

Under the CISG it is necessary that the sender must give a clear hint that the arbitration clause – or in practice that the own standard terms – shall become part of the contract. Where the communication is in writing, even via the internet, the hint must be regularly placed on the frontpage of the offer or acceptance. Further, the receiving party must have had the possibility to read the standard terms including the arbitration clause.[32] This will regularly require that the clause, if not individually negotiated, must be made available to the other party either by giving or sending it, respectively the whole set of standard terms containing the clause, or by making it available on the internet by a direct link so that the addressee can immediately download the terms and is not forced to search the applicable terms. The receiving party must have had the opportunity to take knowledge of the standard terms before the conclusion of the contract. A mere reference to the own standard terms without making them easily available to the addressee does not suffice to incorporate them.[33]

C. Battle of forms

Often both parties will send their standard forms containing arbitration clauses which seldom refer to the same arbitration. This famous "battle of the forms" has also to be solved within the framework of the CISG although again no specific CISG-provision addresses the problem; and again the New York Convention and the European Convention on International Commercial Arbitration provide no rule for the situation. The solution that is gaining in-

[32] See, e.g., BGH IHR 2002, 14; Cour d'appel de Paris JCP 1997 II 22772; Hof's Hertogenbosch NIPR 2003 no. 192; OGH IHR 2018, 19 (20).

[33] See further FERRARI ET AL./MANKOWSKI (supra fn. 7) Vor Art. 14 n. 33 et seq.; KRÖLL/MISTELIS/PERALES VISCASILLAS/FERRARI (supra fn. 3) Art. 14 n. 40; STAUDINGER/MAGNUS (supra fn. 4) Art. 14 n. 41a.

creasing acclaim and should be adopted under the CISG is the "knock-out rule":[34] If the parties show that they wish to perform the contract despite the contradicting terms (for instance, by part-performance or preparations of performance etc.), those terms neutralise each other and no arbitration agreement has been reached; the competent state courts have jurisdiction.

D. The interpretation of arbitration agreements in CISG-contracts

It is not entirely clear which law applies to the interpretation of arbitration agreements or clauses. Where the parties have explicitly chosen the law applicable to the arbitration agreement, it should go undisputed that this law applies.[35] This case is however extremely rare. Where the parties have, as usual, merely chosen the law applicable to the main contract this should be dealt with in the same way as discussed in connection with the formation of arbitration agreements. Therefore, the choice of law for the main contract should also here regularly constitute an implicit choice for the arbitration clause in the contract unless there are clear indications to the contrary.

Where there is no choice of the applicable law by the parties it is again advocated here that if the main contract is governed by the CISG also the interpretation of the arbitration agreement should be subject to the respective CISG-provisions, in particular to Art. 8 CISG. In the first line this provision refers to the recognisable intent of the party making a statement, and in the second line "to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances."[36] According to the probably prevailing view, however, the law at the place of arbitration shall be applicable if that place can be ascertained.[37] If the place is indeterminable the law applicable to the main contract shall apply.[38] The reasons advanced for the application of the CISG – as the law objectively governing the main con-

34 See, e.g., BGH IHR 2002, 16 (18); French Cour de cassation CISG-online no. 344; BRUNNER/MURMANN/STUCKI (supra fn. 7) Art. 4 n. 44; DORNIS, in: Heinrich Honsell (supra fn. 2) Art. 19 n. 41; HONNOLD/FLECHTNER (supra fn. 4) n. 170.4; SCHLECHTRIEM/SCHWENZER/SCHROETER (supra fn. 4) Art. 19 n. 25 et seq.; STAUDINGER/MAGNUS (supra fn. 4) Art. 19 n. 24 et seq.

35 See, e.g., OLG München IHR 2018, 12 (14).

36 Art. 8 (2) CISG.

37 See, for instance, OLG München IHR 2018, 12 (14); JULIUS VON STAUDINGER/RAINER HAUSMANN, Internationales Vertragsrecht 2 (ed. 2016) IntVertrVerfR n. 455 (differently – law of the place where the arbitral award shall be rendered – REITHMANN/MARTINY/HAUSMANN (supra fn. 10) n. 8.242).

38 In this sense STAUDINGER/HAUSMANN (preceding fn. 37) n. 456.

tract – with respect to the formation of the arbitration agreement (supra III.A.3.) are in essence relevant also here and can be referred to.

E. The form problem

It is still disputed whether or not the CISG applies to the form of arbitration agreements which are contained in, or closely connected with, a CISG-contract. The CISG follows the principle of freedom from form (Art. 11) unless a Contracting State declared a reservation against this provision (see Arts. 12 and 96). Would the CISG be applicable, even oral arbitration agreements would regularly be valid. On the contrary, Art. II (1) New York Convention and Art. I (2) (a) European Convention on International Commercial Arbitration all require the arbitration agreement to be in writing unless the applicable national law allows a more lenient form.[39] Also Art. 7 (2) UNCITRAL Model Law on International Commercial Arbitration in its Option I version provides: "The arbitration agreement shall be in writing." The Option II version, however, waives any form requirement.

The court practice is divided on whether the CISG or the Conventions prevail although the more authoritative court decisions (of central supreme courts) reject the applicability of the CISG with respect to the form of arbitration agreements.[40] In legal literature some authors favour the applicability of the CISG,[41] whereas the majority denies it as far as international, European or national law provides for form requirements for arbitration agreements. [42] As

39 See Art. VII (1) New York Convention, Art. I (2) (a) European Convention on International Commercial Arbitration.

40 Against the applicability of the CISG and the freedom from form for arbitration agreements, e.g., BGH IHR 2015, 157; Swiss BG CISG-online no. 627; Cantonal Court Zug (Switzerland) IHR 2005, 119 (120); for the applicability of the CISG, e.g., *Filanto SpA v. Chilewich International Corp*., 789 F.Suppl. 1229 (SDNY 1992); evidently also Chateau des Charmes Wines Ltd. v. Sabaté USA, Sabaté S.A., 328 f. 3d 528 (US Court of Appeals, 9th Cir., 2003) = IHR 2003, 295; applying the CISG but accepting a valid arbitration agreement only if made in writing and respectively proved: Spanish Supreme Court (Tribunal Supremo) no. 3587/1996 and no. 2977/1996 (for both there are abstracts in English at the Pace database).

41 See in particular KRÖLL/MISTELIS/PERALES VISCASILLAS/PERALES VISCASILLAS (supra fn. 3) Art. 11 n. 13; BURGHARD PILTZ, Internationales Kaufrecht n. 3-132; JEFF WAINCYMER, The CISG and International Commercial Arbitration: Promoting a Complementary Relationship between Substance and Procedure, in: Festschrift for Albert A. Kritzer (2008) 582 et seq. (588); JANET WALKER, Agreeing to Disagree: Can we just have Words? *CISG Article 11 and the Model law Writing Requirement*, Journal of Law & Commerce 25 (2005/06) 153 et seq.

42 See among others BeckOGK BGB/BODENHEIMER (supra fn. 24) Art. 11 n. 8; BeckOK BGB/SAENGER (supra fn. 7) Art. 11 n. 6; ROBERT KOCH, The CISG as the Law Applicable to Arbitration Agreements?, in: Festschrift for Albert A. Kritzer (2008) 267 et seq. (286);

mentioned, this is also the standpoint of the relevant international instruments, the New York Convention, the European Convention and of the primary option of the UNCITRAL Model Law. The Conventions thus regulate the form of arbitration agreements and therefore prevail over the CISG as the more special regulations. The CISG's principle of freedom of form does not apply as far as the two Conventions are applicable. If the Conventions are not applicable, domestic law steps in which very often requires writing as well – as, too, suggested by the Option I of the UNCITRAL Model Law.[43] Despite all sympathy for informality in international business transactions, to derogate from the jurisdiction of state courts and from the path of 'public justice' should not be accepted lightly. The writing requirement has here not only the function to secure reliable proof but also and with greater weight to warn and insofar to protect the party who waives its access to state courts. Where national law upholds the writing requirement for arbitration agreements – as for instance § 1031 German Civil Procedure Code (ZPO) – the CISG should not open a way to circumvent the necessary form.

The CISG thus does not regulate the form of arbitration agreements and other settlements of litigation.

IV. CISG applicable as substantive law in arbitration proceedings?

Must arbitrators apply the CISG as substantive law to the merits of the dispute in question, and if so, when?

A. Parties' choice of law

It is rather undisputed that arbitrators have to apply the CISG as substantive law if the parties have chosen it as the law governing their sales contract (or even as governing law for a non-sales contract).[44] Factually, this rule is

STEFAN KRÖLL, Selected Problems Concerning the CISG's Scope of Application, Journal of Law and Commerce 25 (2005/06) 39 et seq. (44 et seq.); MünchKommBGB/GRUBER (supra fn. 7) Art. 11 CISG n. 5; SCHLECHTRIEM/SCHWENZER/SCHMIDT-KESSEL (supra fn. 4) Art. 11 n. 7; INGEBORG SCHWENZER/DAVID TEBEL, Das Wort ist nicht genug – Schieds-, Gerichtsstands- und Rechtswahlklauseln unter dem CISG, in: Festschrift für Ulrich Magnus (2014) 319 et seq. (329, 333); STAUDINGER/MAGNUS (supra fn. 4) Art. 11 n. 7.

43 See the examples cited by WALKER (supra fn. 41) fn. 19 et seq.

44 See, e.g., PETRA BUTLER, Choice of Law, in: Larry DiMatteo/André Janssen/Ulrich Magnus/Reiner Schulze (eds.), International Sales Law. Contract, Principles & Practice (2016) 1047; FRANCO FERRARI, CISG and the Law Applicable in International

acknowledged by all international and national regulations as well as by the arbitration rules of permanent arbitration institutions such as the ICC.[45] For, because of the predominant principle of party autonomy in arbitration, the arbitrators must respect the parties' choice, and in particular not only an express choice of the parties but also an implied one.[46] An express choice of the CISG happens but is not the rule. However, parallel to the clearly prevailing view of state courts[47] it will be regularly an implied choice if the parties designate the law of a Contracting State of the CISG because the CISG is the special law for international sales in the Contracting States which displaces the internal sales law.[48] Only where there are clear indications that the parties intended to opt for the internal, non-unified sales law (for instance: choice of French law under exclusion of the CISG), the CISG must not be applied but instead the internal law is applicable.[49]

B. Applicable law in the absence of a choice by the parties

1. Institutional arbitration

Where the parties have neither expressly nor implicitly chosen the applicable law, there is a sequence of examination which has to be followed in order to determine the law governing the contract in dispute. In the first line, the rules of the institutional arbitration are decisive if the parties have chosen an institutional arbitration and if the institution disposes of such rules. The parties' choice of the institution includes the choice of the rules which the arbitration institution has obliged itself to follow.

For the following it has again to be assumed that the contract in dispute is an international commercial sales transaction which *ratione materiae* falls within

Commercial Arbitration: Remarks Focusing on Three Common Hypotheticals, in: Mads Bryde Andersen/René Franz Henschel (eds.), A Tribute to Joseph M. Lookofsky (2015) 55 et seq. (56); JANSSEN/SPILKER (supra fn. 3) RabelsZ 77 (2013) 135; MISTELIS (supra fn. 3), in: Janssen/Meyer 381; NILS SCHMIDT-AHRENDTS, CISG and Arbitration, Belgrade L. Rev. 2011, 215; WAINCYMER (supra fn. 41) 595.

45 See Art. 21 (1) ICC Rules of Arbitration.

46 Also JANSSEN/SPILKER (supra fn. 3) RabelsZ 77 (2013) 136.

47 See BGH NJW 1997, 3309; BGH NJW 1999, 1259; French Cour de cassation 13 September 2011, database CISG-France; Hof Arnhem Nederlands Internationaal Privaatrecht (NIPR) 1996 no. 397; OGH IHR 2009, 246; *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F. Suppl. 2d 1142 (ND Cal., 2001); for further references UNCITRAL Digest.

48 JANSSEN/SPILKER (supra fn. 3) RabelsZ 77 (2013) 136.

49 The choice of a specific law is generally the choice of the substantive rules of that law not of the private international law rules of that country.

the scope of the CISG and meets the Convention's territorial and temporal applicability requirements.

a) Specific national law

The rules of the arbitration institution may – in the absence of the parties' choice of the proper law of their contract – prescribe the application of a specific national law;[50] then, this law governs the contract without any prior redress to private international law. If the designated law is that of a CISG-state, again and unless there is a clear indication to the contrary,[51] the arbitrators are bound to apply the CISG as the special part of national law that regulates international commercial sales if the contract as such falls under the Convention.

The rules of the arbitration institution designate a specific national law also if they cite and focus on a specific internal law (e.g., cite relevant provisions of the French Code civil) without which the rules cannot be reasonably applied. This is an implicit choice of the ununified domestic law. The CISG cannot be applied irrespective whether or not the designated law is that of a CISG Contracting State.

b) Application of private international law

The institutional arbitration rules may also prescribe that the arbitrators shall apply the law designated by the private international law either of the country where the arbitration takes place or which the arbitrators regard appropriate.[52]

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50 See as an example the «Einheitsbedingungen im Deutschen Getreidehandel» (Uniform Conditions in German Grain Trade); Art. 44 of these conditions determines German law as applicable to the contract.

51 This is the case with the «Einheitsbedingungen im Deutschen Getreidehandel»; Art. 44 of these conditions does not only refer to German law as applicable to the contract but also expressly excludes the CISG. Therefore, under these Conditions the internal German sales law has to be applied which, however, is rather similar to the CISG rules because it has been adapted to the CISG in 2002.

52 Extensively to the applicable conflict of laws-rules FERRARI (supra fn. 44) 81 et seq.; also LINDA SILBERMAN/FRANCO FERRARI, Getting to the law applicable to the merits in international arbitration and the consequences of getting it wrong, in: Franco Ferrari/Stefan Kröll (eds.), Conflict of Laws in International Arbitration (2011) 257 et seq.; for the different approaches of arbitral tribunals see also MISTELIS (supra fn. 3), in: Janssen/Meyer 384.

Where private international law then leads to the law of a CISG Contracting State, again the arbitrators must apply the CISG.[53]

c) Free discretion of the arbitral tribunal

Not rarely the rules of the arbitration institution leave it to the discretion of the arbitral tribunal which law to apply.[54] This rule obliges the arbitrators to apply a certain law but leave it to their decision which law they opt for. Law includes here the CISG because the Convention is a systematic codification of most relevant sales problems that can be applied like any national sales law which not infrequently also leaves some gaps and doubts.[55] The arbitral tribunal therefore is entitled to directly apply the CISG (whether or not its applicability conditions are met). Is the tribunal obliged to apply the CISG in such a case? My answer is no.[56] The CISG does not bind arbitration courts but merely Contracting States and their courts. The tribunal may for good reasons which it should however communicate apply another law. This is the consequence that the parties have deliberately chosen an arbitration institution which grants the arbitrators this freedom. The application of the CISG may be generally recommendable in the cases discussed here, but the tribunal does not make a mistake of law when it applies another law instead.

Where in such a case the arbitral tribunal decides – as it is also free to do – to apply the rules of private international law (whether or not those of the place of arbitration) it must, however, follow this path and consequently apply the law thus designated. At the risk of repetition, if the designated law is that of a CISG-state – and the contract falls under the Convention – the CISG must be applied.[57]

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53 Also PETER MANKOWSKI, in: Münchener Kommentar zum Handelsgesetzbuch (4th ed. 2018) Art. 1 CISG n. 57; MünchKommBGB/P. HUBER (supra fn. 7) Art. 1 CISG n. 60 .

54 See, e.g., Art. 21 (1) sent. 2 ICC Arbitration Rules; Art. 35 (1) sent. 2 UNCITRAL Arbitration Rules (version 2013); for further examples see JANSSEN/SPILKER (supra fn. 3) RabelsZ 77 (2013) 143 et seq.

55 In this sense, e.g., ICC Arbitration case no. 9887 of August 1999 (available on the Pace Databank); also JANSSEN/SPILKER (supra fn. 3) RabelsZ 77 (2013) 145.

56 Also STEFAN KRÖLL, Arbitration and CISG, in: Ingeborg Schwenzer/Yeşim M. Atamer/ Petra Butler (eds.), Current Issues in CISG and Arbitration (2013) 59 et seq.; MünchKommBGB/P. HUBER (supra fn. 7) Art. 1 CISG n. 60, 62; GEORGIOS PETROCHILOS, Arbitration Conflict of Laws Rules and the 1980 International Sales Convention, Revue Hellenique de Droit International 52 (1999) 191 (also available at the Pace Databank); INGEBORG SCHWENZER, in: Peter Schlechtriem/Ingeborg Schwenzer (eds.), Commentary on the UN Convention on Contracts for the International Sale of Goods (3rd ed. 2011) 22; however contra: KNETSCH (supra fn. 3) 41 et seq.; MünchKommHGB/MANKOWSKI (supra fn. 53) Art. 1 CISG n. 57; probably also BUTLER (supra fn. 44) 1048 et seq.

57 Also BUTLER (supra fn. 44) 1051; JANSSEN/SPILKER (supra fn. 3) RabelsZ 77 (2013) 141.

If the tribunal opts directly for a specific national law,[58] it is the tribunal's further discretion to apply either the ununified sales law or the CISG if the national law is that of a CISG-state. The tribunal is also here not bound to apply the Convention although it may do so. In the light of the circumstances it may often be recommendable to apply the CISG as a neutral and well-balanced system of sales law. However, the tribunal is not under an obligation to apply the Convention to the merits of the dispute even though the conditions of applicability of the CISG are fulfilled.[59]

It may sound as a contradiction and inconsistency to argue on the one hand that, as advocated here, arbitrators must apply the CISG to the formation and interpretation of an arbitration clause (in a CISG-contract and in the absence of any choice of law by the parties) while on the other hand they are not bound to apply the CISG to the merits of the contract in dispute. However, both issues are not identical but different. The arbitration clause is part of the underlying contract and should follow the law governing the contract unless good reasons require otherwise. The law governing the contract should principally extend to the arbitration clause. If the CISG is the governing law of the underlying contract it can be presumed that reasonable parties would generally also have opted for its application with respect to the formation and interpretation of any of the contract clauses. The situation is, however, different with respect to the case that the rules of the arbitration institution which the parties have chosen give the arbitrators free discretion. There, no intention can be presumed that reasonable parties would have opted for the CISG. The parties' indirect intention (via the choice of the arbitral institution and its rules) is that the arbitrators shall have *carte blanche* with respect to the applicable law. This includes that the arbitrators may not opt for the CISG despite the conditions of its applicability are fulfilled.

d) Decision *ex aequo et bono*

Where the institutional rules or the parties so allow the arbitral tribunal may even decide *ex aequo et bono*. This means a decision not bound to apply exactly any law or legal rules but the tribunal may render a mere equitable decision. Such entirely free decision (which nonetheless must be fair and neutral)

58 See to this alternative also extensively FERRARI (supra fn. 44) 62 et seq.

59 See JANSSEN/SPILKER (supra fn. 3) RabelsZ 77 (2013) 137; KRÖLL (supra fn. 56) 65. Therefore, an arbitral award cannot be successfully attacked with the argument that the arbitrator failed to apply the CISG where the ICC-Rule Art. 21 (1) allows the application of the law which the arbitrator deems "appropriate»; see *Triulzi Cesare SRL v. Xinyi Group (Glass) Co. Ltd.* [2014] SGHC 220 (n. 161).

must be expressly authorised.[60] The rule that the arbitrators may choose the applicable system of law is no such authorisation.

2. *Ad hoc arbitral tribunals*

If an *ad hoc*-arbitral tribunal decides, there is little difference to the rules just discussed for institutional arbitration tribunals. Have the parties chosen the law applicable to their contract or to the merits of the dispute the tribunal has to apply this law, as the case may be, also the CISG.

If the parties have neither expressly nor impliedly made such a choice there are, in contrast to institutional arbitration, no pre-formulated rules on the applicable substantive law. International or national arbitration law then comes into play. In cases falling under the European Convention on International Commercial Arbitration, Art. VII of this Convention provides that the tribunal "shall apply the proper law under the rule of conflict that the arbitrators deem applicable." The tribunal must therefore follow the conflict of laws path and first determine the applicable rules of private international law. Where these rules then lead to the law of a CISG-state the tribunal is bound to apply the CISG. The New York Convention does not provide an answer since it merely deals with the arbitration agreement, not with the law governing the underlying contract.

National arbitration law that has adopted the UNCITRAL Model Law on International Commercial Arbitration prescribes as well that "the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."[61] Where this national law has to be observed the private international law may lead to a CISG-Contracting State and – again – oblige the tribunal to apply the CISG. National law may also provide that the law most closely connected with the subject of the dispute has to be determined and applied by the arbitrators.[62]

Where no rules at all exist, the arbitrators may choose the applicable law. However, a decision *ex aequo et bono* is, as already mentioned, only admissible if explicitly authorised by the parties.

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60 See, e.g., 28 (3) UNCITRAL Model Law on International Commercial Arbitration; Art. 21 (3) ICC Arbitration Rules; § 1051 (1) German ZPO; Art. 187 (2) Swiss IPRG; where the parties did not in advance authorise an ex *aequo et bono*-decision a respective arbitral award can be quashed; see, e.g., OLG München SchiedsVZ 2005, 308.

61 Art. 28 (2) UNCITRAL Model Law on International Commercial Arbitration.

62 See, e.g., § 1051 (2) German ZPO; Art. 187 (1) Swiss IPRG.

3. State courts

State courts can be confronted with the question whether the arbitration agreement was valid either where the agreement is raised as defence against a suit before a state court or where the setting aside of the arbitral award is sought or in proceedings for the recognition and enforcement of the award. However, whether the arbitration tribunal applied the correct law to the merits of the case is as such no reason which allows a control of an award by state courts. International and national law requires that such error of law constitutes a violation of the *ordre public* or of the rule that the aggrieved party must be given a reasonable opportunity to be heard.[63]

In the first lane, like the arbitral tribunal, the state court concerned with the validity of the arbitration agreement has to apply the law expressly or implicitly chosen by the parties.[64] In the absence of such a choice the state court has to apply the law of the country where the arbitral award was or will be rendered if the New York or the European Convention is applicable;[65] in the other cases the *lex fori* is applicable if national law so provides.[66]

V. Consequences of arbitrators' failure to apply the CISG

An arbitrator's failure to apply the CISG although it should have been applied does generally not render the award contestable. In particular is it no ground to refuse the recognition and enforcement of the award. The only possible ground in this context would be the violation of the public order; however, the mere omission to apply the actually applicable law is by itself not yet an *ordre public* violation.[67] The same reasoning is true for the case that the arbitrator applied the CISG wrongly. State courts do generally not control the correct application of the law that the tribunal applied.[68] But things become

63 See in particular Art. V (1) (b) and (2) (b) New York Convention; Art. IX (1) (b) European Convention on International Commercial Arbitration (without ordre public reservation); Art. 34 (2) (a) (ii) and (b) (ii) and Art. 36 (1) (a) (ii) and (b) (ii) UNCITRAL Model Law on International Commercial Arbitration; § 1059 (2) no. 1 lit. b and no. 2 lit. b German ZPO; Art. 190 (2) (d) and (e) Swiss IPRG.

64 See Art. V (1) (a) New York Convention; Art. VI (2) (a) European Convention on International Commercial Arbitration; § 1059 (2) no. 1 lit. a German ZPO; Art. 178 (2) Swiss IPRG.

65 Art. V (1) (a) New York Convention; Art. VI (2) (b) and (c) European Convention on International Commercial Arbitration.

66 See, e.g., § 1059 (2) no. 1 lit. a German ZPO; Art. 178 (2) Swiss IPRG.

67 See *Triulzi Cesare SRL v. Xinyi Group (Glass) Co. Ltd.* [2014] SGHC 220 (n. 161).

68 KRÖLL/KRAFT, in: Böckstiegel/Kröll/Nacimiento (supra fn. 10) § 1059 n. 80, 82.

different if the arbitrator's decision is completely arbitrary and equals a decision *ex aequo et bono* without the parties' authorisation. Then, the basis for the arbitration is lacking and the outcome of the award may infringe public policy. An evident misapplication of law with grave consequences for the aggrieved party would impair the public order in that it would undermine the trust of the general public in arbitration proceedings and their legal certainty.[69]

VI. Summary

1. Arbitral tribunals must apply the CISG with respect to the conclusion and interpretation of the arbitration agreement if the parties have so chosen. It is an implied choice of the CISG if the parties have chosen the law of a Contracting State of the CISG unless there are clear signs of a contrary intention of the parties.
2. Where there is no direct express or implicit choice of the law applicable to the arbitration agreement, in the absence of any indication to the contrary the intention of the parties should be assumed that the law governing the main contract shall also regulate the formation and interpretation of the accompanying arbitration agreement. If the governing law is the law of a CISG-State the CISG has to be applied.
3. If the parties have chosen an institutional arbitration which prescribes the application of a specific law this is generally also an implied choice of that law for the formation of the arbitration agreement. If the institution does not regulate the question of the applicable law, the seat of the institution as such does not justify the inferral of an implicit choice of the law at this seat.
4. If there is neither an explicit nor an implicit choice of the applicable law (neither for the arbitration agreement nor for the main contract) but the main contract is a CISG-contract it is advocated here that the CISG-provisions on formation shall apply also to the formation of the arbitration agreement. Since the New York Convention of 1958 and the European Convention on International Commercial Arbitration require an arbitration "agreement" but do not contain rules on the formation of such an agreement the CISG can and should step in.
5. With respect to the incorporation of an arbitration clause into a contract governed by the CISG, the addressee must have had the opportunity to take knowledge of the clause and respective standard terms before the conclusion of the contract. A mere reference to the own terms without making them easily available to the addressee does not suffice to incorpo-

[69] See OLG Dresden SchiedsVZ 2005, 210 (213).

rate them. With respect to the battle between competing arbitration clauses in a CISG-contract the "knock-out rule" is gaining increasing acclaim under the CISG and should be adopted: If the parties show that they wish to perform the contract despite the contradicting terms (for instance, by part-performance or preparations of performance etc.), those terms neutralise each other and no arbitration agreement has been reached; the competent state courts remain to have jurisdiction.

6. The CISG does not regulate the form of arbitration agreements and other settlements of litigation. Where international, European or national law upholds the writing requirement for arbitration agreements the CISG does not open a way to circumvent such form requirement.
7. If the parties have expressly or impliedly chosen the CISG (or the law of a CISG-State) as applicable to their main contract the arbitral tribunal has to apply the CISG also to the merits of the case. Only where there are clear indications that the parties intended to opt for the internal, non-unified sales law (for instance: choice of French law under exclusion of the CISG), the CISG must not be applied but instead the internal law is applicable.
8. Where the arbitral tribunal has to, or is entitled to, apply the rules of private international law (whether or not those of the place of arbitration) it must follow this path and consequently apply the law thus designated to the contract in dispute. Does private international law then lead to the law of a CISG-state the arbitrators must apply the CISG.
9. Even in situations where the tribunal is not bound to apply the CISG, in the light of the circumstances it may often be recommendable to apply the Convention since it is a neutral and well-balanced system of sales law.
10. The arbitrator's failure to apply the CISG although it should have been applied does generally give not rise to challenge an award. Only where the award is completely arbitrary it may offend public policy and be unenforceable.

