

The Scope and Sphere of Application of the CISG in the Balkans

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I. Introduction

The authors of this article had the pleasure of meeting Professor Rüssmann for the first time in the Vis Moot environment. It was a perfect place to meet, halfway between Serbia and Germany (in Vienna), a place and occasion where lawyers gather to discuss topics which are almost universal in nature – international commercial arbitration and the international sale of goods. Given Professor Rüssmann's keen interest in the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as the "CISG")¹ and in the Balkan region, it felt logical to honor

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** The authors express their gratitude to Prof. Gašo Knežević, the President of the Serbian Foreign Trade Court of Arbitration for providing access to the Court's archives and for his assistance in conducting this research. Special gratitude goes to our colleague Marko Jovanović for his thorough editing of this paper. Any errors of fact or law are, of course, ours.

¹ The Socialist Federative Republic of Yugoslavia (SFRY) signed the Convention on 11 April, 1980 and ratified it on 27 December, 1984. The Law on Ratification of the Convention was published in the Official Gazette of the SFRY, MU 10/84 of 31 December, 1984. The instrument of ratification was deposited with the Secretary-General of the United Nations on 27 March, 1985. Consequently, the CISG has been in force in all former Yugoslav republics (Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia), now independent states, from the date it entered into force i.e. 1 January, 1988. Upon dissolution of the SFRY all newly created states filed notifications of successions to the CISG with retroactive application from the date of country's independence. The Convention has entered into force in respect of Bulgaria on 1 August, 1991, in respect of Romania on 1 June, 1992 and in respect of Greece on 1 February, 1999. Out of the Balkan countries Albania and Turkey were the last ones to sign and ratify the Convention. The Convention has entered into force in respect of Albania on 1 June, 2010 and in respect of Turkey on 1 August, 2011. See STATUS 1980 - United Nations Convention on Contracts for the International Sale of Goods, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html [hereinafter STATUS 1980].

his decades of work and life by presenting an examination of how the CISG is being applied in the Balkans. As former Yugoslavia fragmented and its legislative legacy slowly eroded with every passing year, the CISG emerged as a stable platform of uniformity, not only among former Yugoslav republics, but also in the Balkans. However, covering all the topics which the CISG encompasses would hardly fit in a contribution of this size. We have, therefore, decided to focus our attention on issues of applicability of the CISG, i.e. CISG provisions on its scope and sphere of application and their observation (or lack thereof) in the Balkans. In other words, we wanted to examine whether the uniform law of sales in the Balkans is really uniform, or remains so only on the paper.

For the purposes of this work, we have examined the CISG case-law in the countries which are wholly or partially within the Balkan peninsula: Bosnia and Herzegovina, Bulgaria, Croatia, Greece, FYR Macedonia,² Montenegro, Romania, Serbia and Slovenia. Two CISG signatories from the region - Albania and Turkey - which have only recently acceded to the CISG, are not covered in this paper, since, according to relevant international databases on CISG cases,³ there are no available cases on application of CISG in these countries.⁴ As for the other countries, cases on CISG from these jurisdictions will be the subject-matter of this research only to the extent that they are made available on relevant international databases on CISG cases. This is because, irrespective of the possible misunderstanding regarding the scope of the geo-political term 'Balkans' and the political disagreements of the countries involved, they share one thing in common: the CISG cases decided within their boundaries are not reported as diligently as they are in

² For the sake of brevity and without prejudice to the ongoing dispute surrounding the name of the country, the adjective "Macedonian" will be used in this Chapter to designate parties and laws originating from the FYR Macedonia.

³ See: www.unilex.info, www.cisg.law.pace.edu, www.cisg-online.ch.

⁴ This is likely to change soon, at least with respect to Albania, not only because of the entry into force of the Convention but also because of the reported increase of frequency with which the large law firms in Albania insert the CISG as the applicable rules into the contracts they advise on. See *von Schlabrendorff*, A Report on a GTZ Project, undertaken with the support of UNCITRAL, on Implementation of the United Nations Convention on the International Sale of Goods and of the system of International Commercial Arbitration in Southeast Europe, 2001, 28, available at: http://www.uncitral.org/pdf/english/whats_new/2011_02/GTZ_UNCITRAL_Southeast_Europe.pdf [hereinafter GTZ REPORT].

other jurisdictions.⁵ Fortunately, the Pace Institute's joint efforts with Queen Mary University on translating the CISG cases into English⁶ have recently made a number of cases from these jurisdictions available to global academic community. As a result, there are 77 judgments and arbitral awards from the Balkans available on-line: 12 from Bulgaria, 9 from Croatia, 13 from Greece, 1 from Montenegro, 1 from Romania, 51 from Serbia and 5 from Slovenia.⁷ In addition, there are more than 100 unpublished arbitral awards that were made available to the authors, where the CISG was at stake before the Serbian Foreign-Trade Court of Arbitration at the Serbian Chamber of Commerce (hereinafter: Serbian FTCA), some of which were published subsequently. Finally, the reference to 2 arbitral cases from Macedonia was made possible thanks to the GTZ efforts on promotion of the CISG in Southeast Europe and its collection of country reports.⁸ All these cases form a body of case-law that constituted the subject-matter of this research.

II. Sphere and Scope of Application of the CISG

The initial step towards a correct application, or a correct non-application, of the CISG is the assessment whether the contract falls within its sphere. In

⁵ Although one would occasionally learn of a correct or incorrect application of the CISG, only after the advent of organized electronic databases of court case-law could one actually attempt to assess how often courts in Balkan countries dealt with the CISG. For example, while there are only eight court decisions reported on Paragraf Lex and Ing-Pro, two major Serbian electronic databases of domestic case-law, it is most likely that there are dozens of other CISG cases existing in Serbian courts archives, but one would need to know about them first in order to find them by the case number in the court archives. See: *Pavić/Djordjević*, Application of the CISG before the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce- Looking Back at the Latest 100 Cases, 28 J.L. & Commerce 1, 2009, 3-5.

Moreover, with regards to court cases from former Yugoslavia at the times of the existence of former Yugoslavia (before 1991) the general lack of CISG case-law may be attributed to the fact that courts only rarely had to deal with international sales contracts since they were typically referred to the arbitration system existing at the time. In the recent years, however, there has been reported a new trend of increased application of the CISG before state courts, at least with regards to Serbia and Croatia. See GTZ REPORT (note 4), 27, 31.

⁶ See The Queen Mary Case Translation Programme, available at: <http://www.cisg.law.pace.edu/cisg/text/queenmary.html>.

⁷ See Electronic Library on International Commercial Law and the CISG, available at: <http://www.cisg.law.pace.edu/cisg/text/caselit.html>.

⁸ According to the country reports on the CISG, prepared under the GTZ-UNCITRAL Project on Implementation of the CISG and of the system of international commercial arbitration in Southeast Europe, in June 2008, there are no cases available where the CISG was applied before Albanian and Bosnian courts or in arbitration in the respective countries. On the other hand, Macedonian report prepared by Prof. Arsen Janevski serves as a source of information regarding two arbitral cases in Macedonia where the CISG was applied (unpublished). On the basis of all individual country reports (Albania, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia) submitted to the GTZ, a joint report was prepared and published in 2011. See GTZ REPORT (note 4), 28.

order to be governed by the CISG, Article 1 of the CISG requires a contractual relationship that is international in its character and deals with the 'sale of goods' and a proper connection between the parties to the contract and the laws of the CISG Contracting States. The contract in question also needs to comply with the requirements of Articles 2 and 3 regarding the types of goods and types of transactions covered by the CISG. As a second step towards correct application of the CISG one has to determine whether the particular legal issues fall within its scope of application, as provided by Articles 4 and 5.

1. International character of the contract

The first prerequisite for the application of the CISG is that the underlying contract is international in nature. This requirement is derived from the wording of Article 1, which states that

*"the [CISG] applies to the contracts...between the parties whose places of business are in different states...."*⁹

Where the fact that the parties have their place of business in different states does not appear either from the contract or from any dealings between or information disclosed by them before the conclusion of the contract, this fact is to be disregarded, as required by Art. 1(2) CISG.¹⁰ It is not the nationality of

⁹ The Serbo-Croatian translation of the CISG contained in the Law on Ratification of the Convention (published in the Official Gazette of the SFRY, MU 10/84) refers to the 'seat' of a party in both Articles 1 and 10 and not to its 'place of business,' which is used in the English text of the CISG. Although these two terms often coincide, this may not always be the case.

¹⁰ Application of Art 1(2) of the CISG has led to non-application of the CISG in two cases decided by the Bulgarian arbitral tribunals. In both cases, allegedly, it was not clear at the time of the conclusion of the contract whether the parties have their places of business in different states, although the location of 'the seat' of the seller and of the buyer in one of these cases was in different CISG contracting states (Argentina and Bulgaria). In the second case, the Tribunal invoked both the rationale of this previous Bulgarian award and the text of the CISG explaining that:

"The CISG is not applicable, because the application of the Convention is determined not by the different nationality of the seller and the buyer but by their different places of business (Article 1(1) and (3) CISG). The Convention is applicable only if the fact that the parties have their places of business in different States appears either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract (Article 1(2) CISG). The practice of the Arbitral Tribunal of the Bulgarian Chamber of Commerce and Industry is in accordance with this provision (see Case No. 59/95). Considering the facts of this case, it cannot be concluded that the contracting parties have their places of business in different States."

See Bulgarian Chamber of Commerce and Industry, Arbitral award, Case No. 59/1995, Bulgaria, Feb. 16, 1998, available at: <http://cisgw3.law.pace.edu/cases/980216bu.html>; Bulgarian Chamber of Commerce and Industry, Arbitral award, Case No. 36/1999, Bulgaria, July 24, 2000, available at: <http://cisgw3.law.pace.edu/cases/000724bu.html>.

the parties that matters, but whether they have places of business in different states.¹¹

If a party has several places of business, the relevant place of business for determination of the international nature of the contract will be the one which has "the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract," as set out in Article 10 CISG.¹²

2. Relevant nexus with the CISG Contracting State

Article 1(1) of the CISG defines which contractual relationship triggers application of the CISG.¹³ Specifically, the CISG should be applied when either both of the contracting parties have their place of business in different contracting states or the operation of private international law rules leads to the application

¹¹ See Bulgarian Chamber of Commerce and Industry, *Arbitral award*, Case No. 36/1999, Bulgaria, July 24, 2000, available at: <http://cisgw3.law.pace.edu/cases/000724bu.html>.

¹² The issue of multiple places of business arose only once in the examined cases. In that case, a Swiss seller and a Serbian buyer entered into a contract of sale. When the Serbian buyer defaulted on his payments, representatives of seller's daughter company, based in Serbia, interfered by attempting to ensure that the delay in payment would be as short as possible. It was, therefore, questionable whether, in light of the daughter company's involvement and the contract's language, Serbian, the entire transaction had only superficial contacts with Switzerland and the seller's Serbian establishment was, in effect, the place of business the most closely connected with the contract and its performance within the meaning of CISG Article 10. The sole arbitrator found that the transaction was genuinely international and that the Swiss headquarters had played a decisive role in the conclusion and performance of the contract because that is where it negotiated and signed the contract, it transported and installed the equipment, and the payment was effectuated to its account. Therefore, it was held that the CISG should be applied. The arbitrator also noted that although the Law on the Ratification of the CISG uses the term "seat" instead of "place of business", for the purpose of the uniform interpretation of the Convention, the Serbo-Croatian translation should be interpreted in accordance with the terminology used in one of the official languages of the Convention (English). See Serbian FTCA Award No. T-04/05, Serbia, July 15, 2008, available at: <http://cisgw3.law.pace.edu/cases/080715sb.html>.

¹³ This provision has given rise to a great deal of controversy with respect to the assessment of its character, prevailing methodology, and interaction with the reservation contained in Article 95. See *Bernasconi*, *The Personal and Territorial Scope of the Vienna Convention on Contracts for the International Sale of Goods* (Article 1), 46 *Netherlands Int'l L. Rev.* 1999, 137, 141; *Mistelis*, *CISG and Arbitration*, in: *Janssen/Meyer* (eds.), *CISG Methodology*, 375, *passim*; *Honnold*, *Uniform Law for International Sales under the 1980 United Nations Convention*, *passim*, 3^d ed. 1999; *Mourre*, *Application of the Vienna International Sales Convention in Arbitration*, 17 *ICC International Court of Arbitration Bulletin* 2006, 43-44; *Petrochilos*, *Arbitration Conflict of Laws Rules and the 1980 International Sales Convention*, 52 *Revue Hellénique de Droit International*, 1999, 191-218, available at: http://www.cisg.law.pace.edu/cisg/biblio/petrochilos.html#N_15_; *Ziegel*, *The Scope of the Convention: Reaching Out to Article One and Beyond*, 25 *J.L. & Commerce* 2005, 59, 59.

of the law of a Contracting State.¹⁴ Given that cases before the courts and arbitration institutions in the region usually involve a 'Balkan-based' company as one of the parties and given the trade patterns in the region, i.e. predominant exports and imports towards and from other Contracting States,¹⁵ there are numerous cases where conditions for CISG application are met. However, this does not mean that the CISG was always applied in these cases.¹⁶ On the other hand, there is at least one case where the CISG was found applicable although, the conditions for its application from Article 1(1) were not met.¹⁷

In the majority of the analyzed cases, parties have not exercised their freedom and have omitted to insert a choice of law clause in their contract. On several occasions, parties reached an agreement on the applicable law during the arbitral hearing. There have been only two cases where the CISG as the applicable law was expressly chosen in the contract¹⁸ and only four cases where the CISG was expressly excluded either in the contract or at the

¹⁴ CISG Art. 1(1)(a), (b). In the context of this study, the reservation of Article 95 has not appeared to be relevant since none of the Balkan countries has made this reservation and there were no situations which called for taking the said reservation into account (even if one were to take an expansive interpretation of the reach of Article 95 reservation).

¹⁵ E.g. in 2009 trade with businesses located in the CISG Contracting States accounted for: 85% of Serbian exports and over 80% of imports; 91% of Bosnian exports and 86% of imports; over 82% of Croatian exports and over 85% of imports. Similar patterns of trade have been noted with respect to other Balkan countries. See Trade Profiles, available at: <http://stat.wto.org/CountryProfile/WSDBCountryPFHome.aspx?Language=E>.

¹⁶ Due to the limited availability of the reported cases from the region, it is rather difficult to make an assessment of the number of cases where the CISG was not applied although all conditions for its application were met. If it is any indication, an overview of 100 Serbian FTCA cases showed that in ca 12-15% of the cases arbitrators have failed to apply the CISG, although it should have been applied. See Pavić/Djordjević (note 5), 21-22.

¹⁷ In one case arising out of a sales contract concluded by the seller from Liechtenstein and the buyer from Slovenia, the Slovenian court found that the CISG is, in principle, applicable (although not to the disputed issue of usury, on the basis of Art. 4(a)). However, given that Liechtenstein is not a party to the CISG, and given that the court found that the law of the seller applies to the contract, it remains unclear how could the CISG have played any role in this case. See Supreme Court of the Republic of Slovenia III Ips 60/96, Slovenia, Apr. 8, 1998, available at: <http://cisgw3.law.pace.edu/cases/980408sv.html>.

¹⁸ Award of the Permanent Court of Arbitration attached to the Economic Chamber of the Republic of Macedonia, No. 44-13/12, Macedonia, Dec. 6, 2001 (unpublished); Award of the Permanent Court of Arbitration attached to the Economic Chamber of the Republic of Macedonia, No. 44-13/11, Macedonia, Feb. 6, 2003 (unpublished). Both awards were referred to in the Country Report on the Implementation of the CISG in Macedonia, prepared by Prof. Janevski (unpublished).

hearing.¹⁹ However, it has been reported that the practice of excluding the CISG is quite common in some Balkan countries, especially through general contract forms of international firms doing business in those countries.²⁰ On the other hand, Balkan case-law offers a few awkward examples where the CISG was forced upon the parties who have expressly or impliedly excluded its application.²¹ Overall, the application of the CISG in the Balkans has arisen either as a result of the parties' choice of the law of a Contracting State as applicable or by direct application on the basis of Art. 1(1)(a) or as a result of the conflict-of-laws approach under Art. 1(1)(b). The issues which

¹⁹ See: Serbian FTCA, Award No. T-17/09, Serbia, Dec. 27, 2010 (unpublished); Serbian FTCA, Award No. T-19/08, Serbia, Apr. 28, 2009 (unpublished); Serbian FTCA, Award No. T-15/07, Serbia, Aug. 17, 2007, available at: <http://cisgw3.law.pace.edu/cases/090817sb.html>; High Commercial Court, Case No. X Pž. 9418/2006, Serbia, July 10, 2007, available at: <http://cisgw3.law.pace.edu/cases/070710sb.html> in connection with Commercial Court in Čačak, Case No. P 33/06, Serbia, June 28, 2006, available at: <http://cisgw3.law.pace.edu/cases/060628sb.html>.

²⁰ It has been stated that such a practice in Croatia, for example, might be explained with the unfamiliarity with the CISG rules and lack of sufficient level of legal certainty in their application. See: *Baretić/Nikšić*, Croatia, in: Ferrari (ed.), *The CISG and its Impact on National Legal Systems* 95, 2008; GTZ REPORT (note 4), 30, 31.

²¹ Namely, in the *Fresh plums case* the underlying sales contract contained the following provision: "the provisions of the Law on Contracts and Torts shall apply to all the issues not covered by this Contract." The sole arbitrator erred when interpreting this provision as an imprecise agreement on the applicable law since "it was not clear which Law the parties have in mind" (although the same 1978 Yugoslav LCT was in force in both countries where parties had their places of business, albeit now in the guise of their own domestic laws). Hence, the arbitrator engaged in the conflict-of-laws analysis in order to determine the applicable law. The end result was the application of the Serbian law and primarily the application of the CISG as part of the Serbian law. Although the outcome of the dispute would have been the same under the CISG and the LCT since the claimant requested payment of the remainder of the price, which he is entitled to under both legal documents, the arbitrator's disregard for the express choice of the parties is striking (See Serbian FTCA, Award No. T-2/2008, Serbia, Sept. 30, 2008, available at: <http://cisgw3.law.pace.edu/cases/080930sb2.html>). In another case, where the contract called for the application of 'domestic substantive law' and the parties coming from former Yugoslavia extensively invoked the Serbian (then Yugoslav) Law on Contracts and Torts in their written submissions, the arbitral tribunal nevertheless erroneously concluded that the CISG also applies as part of the Serbian law (that the parties have allegedly opted for by invoking the Serbian LCT) (See Serbian FTCA, Award No. T-6/10, Serbia, Nov. 30, 2010 (unpublished)). Finally, in one case the arbitrator applied the CISG as part of the applicable law chosen by the parties (Serbian law), although the contract contained an explicit reference to the Serbian Law on Contract and Torts for all the issues not covered by the contract (Serbian FTCA, Award No. T-5/09, Serbia, May 6, 2010, available at: <http://cisgw3.law.pace.edu/cases/100506sb.html>). Fortunately, these were isolated incidents in the Serbian arbitral practice. However, a similar error was reported in Serbian court case-law. Namely, in a case decided by the Commercial Court in Čačak, the court applied the CISG, although the Serbian seller and a German buyer explicitly excluded its application in the sales contract (Case No. P-33/06, Serbia, June 28, 2006, available at: <http://cisgw3.law.pace.edu/cases/060628sb.html>). On appeal, this case was remanded by the High Commercial Court because of the wrong application of the law (Case No. X Pž. 9418/2006, Serbia, July 10, 2007, available at: <http://cisgw3.law.pace.edu/cases/070710sb.html>).

might be of special attention regarding the application of the CISG in the Balkans is the issue of dissolution of Yugoslavia and its effect on application of the CISG, and the effect that Kosovo unilateral declaration of independence might or might not have on application of the CISG.

2.1 Choice of the law of a Contracting State

One of the main principles of the CISG is party autonomy. Article 6 of the CISG embodies this by allowing parties to contract out of the CISG or vary the effect of any of its provisions.²² However, the majority of courts and tribunals worldwide have taken a firm position that choosing the law of a Contracting State does not amount to the exclusion of the application of the CISG.²³ Exclusion of the CISG has to be either explicit, (e.g., in the form of a contract term stating that "the CISG shall not be applied")²⁴ or at least im-

²² The importance of party autonomy was underlined in *Bullet-proof vest case*:

"The CISG does not contain any provisions of compulsory law. On the contrary, the fundamental principle of private autonomy is confirmed therein, i.e., it allows the parties to agree upon provisions which derogate from the provisions of the Convention or even to completely exclude its application with express and/or tacit agreement ("opting out" clause) (Article 6 of the CISG). It is understood that, when no agreement to the contrary exists as above, the provisions of the CISG apply."

See Multi-Member Court of First Instance of Athens Decision 4505/2009, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/094505gr.html>.

²³ See: Oberster Gerichtshof, Austria, Apr. 2, 2009 available at: <http://cisgw3.law.pace.edu/cases/090402a3.html>; Rechtbank Rotterdam, The Netherlands, Nov. 5, 2008, available at: <http://cisgw3.law.pace.edu/cases/081105n2.html>; Easom Automation Systems, Inc. v. Thyssenkrupp Fabco, Corp. U.S. District Court, Eastern District Michigan No. 06-14553, United States, Sept. 28, 2007, available at: <http://cisgw3.law.pace.edu/cases/070928u1.html>; Rechtbank van Koophandel Hasselt, Belgium, Feb. 15, 2006, available at: <http://cisgw3.law.pace.edu/cases/060215b1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry award No. 24/2003, Russia, Sept. 17, 2003, available at: <http://cisgw3.law.pace.edu/cases/030917r1.html>; ICC Arbitration Case No. 11333 (2002), available at: <http://cisgw3.law.pace.edu/cases/021333i1.html>; Perry Engineering v. Bernold, Supreme Court of South Australia, SCGRG-99-1063 Judgment No. [2001] SASC 15, Australia, Feb. 1, 2001, available at: <http://cisgw3.law.pace.edu/cases/010201a2.html>; Bundesgerichtshof, Germany, Nov. 25, 1998, available at: <http://cisgw3.law.pace.edu/cases/981125g1.html>; Cour de Cassation, France, Dec. 17, 1996, available at: <http://cisgw3.law.pace.edu/cisg/text/draft/961217case.html>; Schiedsgericht der Handelskammer Hamburg (Arbitral Tribunal), Germany, Mar. 21, 1996, available at: <http://cisgw3.law.pace.edu/cases/960321g1.html>; Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft (Arbitral Tribunal), Austria, June 15, 1994, available at: <http://cisgw3.law.pace.edu/cases/940615a3.html>; etc.

²⁴ See: *Olivaylle Pty Ltd v. Flottweg GmbH & Co KGAA*, Federal Court of Australia, Australia, May 20, 2009, available at: <http://cisgw3.law.pace.edu/cases/090520a2.html>; *Easom Automation Systems, Inc. v. Thyssenkrupp Fabco, Corp.* U.S. District Court, Eastern District Michigan No. 06-14553, United States, Sept. 28, 2007, available at: <http://cisgw3.law.pace.edu/cases/070928u1.html>.

PLICIT – either by choosing the law of a non-contracting state²⁵ or pinpointing applicable provisions within the chosen legal system (e.g., “Swiss Code of Obligations shall apply”).²⁶

Taking into account that all countries from the Balkans are Contracting States to the CISG and that most of the foreign partners of the companies from the region come from other Contracting States, choice of law clauses, when inserted, usually point to the law of a Contracting State, be it one of the Balkan countries or another country. In the majority of the cases, judges and arbitrators have correctly identified the consequences of such choice.

In *Aluminum case*, the sole arbitrator determined that the fact that a Serbian and a Ukrainian company had chosen the Swedish law as applicable triggered application of the CISG on the basis that Sweden is a Contracting State and that the CISG is incorporated in its legal order.²⁷ Similarly, choice of Austrian law in a contract concluded between a Serbian company and a German company has justly been interpreted to primarily point to the CISG, with provisions of the Austrian Civil Code as a fall-back source.²⁸ The tribunal pointed out that:

Article 6 of the CISG allows parties to exclude application of the [CISG]. However, a contract provision which points to Austrian law as applicable does not appear to manifest the parties’ intention to exclude application of the [CISG], particularly due to the fact that Austria has ratified the [CISG] and that, consequently, its provisions have become part of Austrian law.²⁹

In the *Paper production lines case* the choice of “the law of the Republic of Serbia” was correctly found to mean choice of Serbian law, including the

²⁵ See: Oberster Gerichtshof, Austria, Apr. 2, 2009 available at: <http://cisgw3.law.pace.edu/cases/090402a3.html>; Audiencia Provincial de Alicante, Spain, Nov. 16, 2000, available at: <http://www.cisg.law.pace.edu/cases/001116s4.html>.

²⁶ Rechtbank Utrecht, The Netherlands, Apr. 15, 2009, available at: <http://cisgw3.law.pace.edu/cases/090415n1.html>; Oberlandesgericht Frankfurt am Main, Germany, Aug. 30, 2000, available at: <http://cisgw3.law.pace.edu/cases/000830g1.html>; ICC Arbitration Case No. 10329 (2000) available at: <http://cisgw3.law.pace.edu/cases/000329i1.html>.

²⁷ In addition, the arbitrator noted that both parties have their places of business in the contracting states and that irrespective of the choice-of-law clause the CISG would be applicable. See Serbian FTCA, Award No. T-2/00, Serbia, Dec. 9, 2002, available at: <http://cisgw3.law.pace.edu/cases/021209sb.html>.

²⁸ Serbian FTCA Award No. T-1/06, Serbia, Dec. 20, 2006, available at: <http://cisgw3.law.pace.edu/cases/061220sb.html>.

²⁹ Serbian FTCA Award No. T-1/06, Serbia, Dec. 20, 2006, available at: <http://cisgw3.law.pace.edu/cases/061220sb.html>.

CISG.³⁰ The sole arbitrator accepted such contractual provision „as it represents the expression of free will of the Parties, allowed by law and based on fundamental legal principles.“³¹ Moreover, even when the sales contract was concluded between a seller from a Contracting State (Serbia) and a buyer from a non-contracting state (Albania), contractual choice of law pointing to the law of the Contracting State (Serbia) was considered to trigger application of the CISG pursuant to Article 1(1)(b) since the CISG “became an integral part of Serbian law” upon ratification.³² Furthermore, in explaining the reasons for such a finding the arbitrator referred to the foreign case-law stating that: “It has generally been held that the choice of law of the Contracting State, absent explicit exclusion of the CISG or exercise of Article 95 reservation, means that the CISG will be applicable [...]“³³ This view has been confirmed in Greek court practice as well. Namely, it has been explicitly stated in the *Bullet-proof vest case* that: “[w]here the parties have selected the law of a country to be the applicable law, then the provi-

³⁰ Serbian FTCA, Award No. T-13/08, Serbia, Mar. 16, 2009, available at: <http://cisgw3.law.pace.edu/cases/090316sb.html>. See also: Serbian FTCA, Award No. T-05/08, Serbia, Jan. 5, 2009, available at: <http://cisgw3.law.pace.edu/cases/090105sb.html>; Serbian FTCA, Award No. T-6/06, Serbia, July 31, 2007, available at: <http://cisgw3.law.pace.edu/cases/070731sb.html>; Serbian FTCA Award No. T-23/97, Serbia, Apr. 15, 1999, available at: <http://cisgw3.law.pace.edu/cases/990415sb.html>.

³¹ Serbian FTCA, Award No. T-13/08, Serbia, Mar. 16, 2009, available at: <http://cisgw3.law.pace.edu/cases/090316sb.html>.

³² Serbian FTCA, Award No. T-08/08, Serbia, Jan. 28, 2009, available at: <http://cisgw3.law.pace.edu/cases/090128sb.html>.

³³ Serbian FTCA, Award No. T-08/08, Serbia, Jan. 28, 2009, available at: <http://cisgw3.law.pace.edu/cases/090128sb.html>. See also: Serbian FTCA, Award No. T-5/09, Serbia, May 6, 2010, available at: <http://cisgw3.law.pace.edu/cases/100506sb.html> (quoting foreign case law and doctrine with references to UNCITRAL Digest and Pace web-site). However, despite the numerous useful references to foreign case law and doctrine, the arbitrator in this case erred in finding that the applicable national (Serbian) law includes the CISG since the contract contained, besides the clause calling for application of the “applicable laws of the Republic of Serbia,” the clause calling for “application of the Law on Contracts and Torts of the Republic of Serbia in relation to all the issues not expressly regulated by the Contract”. The arbitrator herself interpreted the above-mentioned contractual provision in the following manner: “The aim of this Article was to incorporate certain provisions of the Law on Contracts and Torts into the Contract, derogating from related provisions of the Vienna Convention, in the same manner that particular provisions of the Contract establish certain rights and obligations of the parties. This possibility is confirmed by the Article 6 of the Vienna Convention.” However, she then went on invoking Article 59 of the CISG as legal grounds for buyer’s obligation to pay the price whereas the Serbian LCT expressly governs the issue. Consequently, there was no room for application of the CISG in this case since all the issues governed by the CISG were derogated from either by the express contract terms or by reference to the Serbian Law on Contracts and Torts. On the other hand, it should be noted that the unnecessary application of the CISG did not adversely impact the case outcome since both the CISG and Serbian LCT prove for the seller to request the buyer to pay the price.

sions of CISG apply, to the extent that the CISG has been adopted by that country.”³⁴

Although the selection of applicable law is more likely to happen at the time of the conclusion of the contract, it can also take place at a later stage, even at the hearing. For example, one Serbian award dealt with a contract between companies from Macedonia and Serbia that did not contain a choice of law clause.³⁵ However, the parties’ representatives agreed at the hearing that Yugoslav law should be applied. The sole arbitrator noted that the parties had expressed their choice. Still, given that Yugoslavia had ceased to exist (and so did its successor, State Union of Serbia and Montenegro) the arbitrator had to further interpret such a choice in order to give it any effect. He found that the applicable law should be that of Serbia, and within it, primarily CISG provisions, while Serbian Law on Contracts and Torts (LCT) should be used to fill any gaps in the CISG.³⁶ In another case, where the contract did not provide a choice-of-law clause, the judge went on to apply the Serbian Law on Contracts and Torts although both parties came from the CISG contracting state.³⁷ Amongst other reasons, the court decided to apply the LCT in this case because both parties have invoked its provisions at the hearing,³⁸ which, according to the court, amounted to implicit choice of the LCT (and consequently, to an implied exclusion of the CISG). However, the rationale of this judgment does not indicate that the court had the

³⁴ Multi-Member Court of First Instance of Athens Decision 4505/2009, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/094505gr.html>.

³⁵ Serbian FTCA award number T-17/06, Serbia, Sept. 10, 2007 (unpublished).

³⁶ The parties’ agreement at the hearing as to the applicable substantive law was respected in several other awards. See Serbian FTCA, Award No. T-09/07, Serbia, Jan. 23, 2008, available at: <http://cisgw3.law.pace.edu/cases/080123sb.html>; Serbian FTCA, Award No. T-16/04, Serbia, July 18, 2005 (unpublished); Serbian FTCA, Award No. T-18/04, Serbia, May 24, 2005 (unpublished); Serbian FTCA, Award No. T-19/03, Serbia, June 15, 2004 (unpublished); Serbian FTCA, Award No. T-13/02, May 9, 2003, available at: <http://cisgw3.law.pace.edu/cases/030509sb.html>.

³⁷ High Commercial Court, Pž. 1006/2004/1, Serbia, July 9, 2004, available at: <http://cisgw3.law.pace.edu/cases/040709sb.html>.

³⁸ The views are divided on the issue whether invoking provisions of the national law at the hearing should be deemed to constitute an implicit exclusion of the CISG. See Landgericht Saarbrücken, Germany, June 1, 2004, available at: <http://cisgw3.law.pace.edu/cases/040601g1.html>; Oberlandesgericht Zweibrücken, Germany, Feb. 2, 2004, available at: <http://cisgw3.law.pace.edu/cases/040202g1.html>; Tribunale di Vigevano, Italy, July 12, 2000, available at: <http://cisgw3.law.pace.edu/cases/000712i3.html>. See Cour de cassation (Supreme Court), France, Oct. 25, 2005, available at: <http://cisgw3.law.pace.edu/cases/051025f1.html>; Chemicals case, China International Economic and Trade Arbitration Commission (CIETAC), China, May, 2006, available at: <http://cisgw3.law.pace.edu/cases/060500c3.html>; Audiencia Provincial de Alicante, Spain, Nov. 16, 2000, available at: <http://www.cisg.law.pace.edu/cases/001116s4.html>.

CISG "on its radar" at all. Rather it appears that it was oblivious to the potential application of the CISG absent its implied exclusion by the parties. Finally, in the *Ice-cream case*, although the contract called for application of the law of the CISG Contracting State (Serbia), the arbitrators did not apply the CISG since the parties explicitly excluded its application at the hearing.³⁹

The Balkan case law also contains decisions where the CISG was not applied although a disputed contract contained the choice of law clause calling for application of the law of a CISG Contracting State. For example, in a case decided by Bulgarian arbitral tribunal arising out of a contract of sale concluded between Bulgarian seller and Russian buyer, the choice of Bulgarian law was interpreted as an exclusion of the CISG.⁴⁰ Namely, the arbitrators stated:

*"The choice of the applicable [Bulgarian] law excludes according to the prescription of Article 6 of the CISG (ratified by Bulgaria as well as the USSR, whose successor is the Russian Federation) its application towards the sales contract concluded between the parties [...]. For this reason, the reliance of the respondent on the CISG cannot be taken into consideration when deciding the dispute, because it is in contradiction with the prescription of Article 6 of the CISG."*⁴¹

Also, in a dispute between a Polish company and a Serbian company arising out of a contract calling for application of Swiss law, the tribunal erroneously concluded that the parties chose to apply Swiss domestic provisions, specifically the Federal Code of Obligations, although Switzerland is a party to the CISG.⁴² A similar slip occurred in another case between a Serbian company and a Macedonian company where the contract provided for Yugoslav law as applicable.⁴³ Instead of applying the CISG, arbitrators applied the Yugoslav (Serbian) LCT.⁴⁴

³⁹ Serbian FTCA, Award No. T-17/09, Serbia, Dec. 27, 2010 (unpublished).

⁴⁰ Bulgarian Chamber of Commerce and Industry, Arbitral award, Case No. 71/94, Bulgaria, Sept. 29, 1997, available at: <http://cisgw3.law.pace.edu/cases/970929bu.html>.

⁴¹ Bulgarian Chamber of Commerce and Industry, Arbitral award, Case No. 71/94, Bulgaria, Sept. 29, 1997, available at: <http://cisgw3.law.pace.edu/cases/970929bu.html>.

⁴² Serbian FTCA, Award No. T-01/07, Serbia, Oct. 18, 2007 (unpublished).

⁴³ Serbian FTCA, Award No. T-2/03, Serbia, Oct. 21, 2003 (unpublished).

⁴⁴ A similar outcome, where a contractual choice of Serbian (Yugoslav) law led to application of the Serbian LCT, was reached in at least six more cases resolved by the Serbian FTCA. See Pavić/Djordjević (note 5), 11-12.

Greek courts were not immune to this 'trend' either. In one Greek case where the parties have agreed that "... the validity, conclusion and performance of the agreement shall be governed and construed in accordance with Greek law."⁴⁵ Although Greece was a party to the CISG at the time the contract was concluded, it seems that the lower court understood the choice-of-law provision as calling for application of the Greek Civil Code and not the CISG. Perhaps not entirely convinced about the correctness of its approach, the court ventured into an elaborate analysis of the CISG provisions in order to show that "even if the Convention applie[d]" the same result would have been reached.⁴⁶

However, despite these occasional errors in interpreting the choice-of-law clauses noted in the Balkan case-law, it must be pointed out that the vast majority of the analyzed cases led to correct application of the CISG where the parties agreed to the law of a Contracting State either in the contract or at the hearing.

2.2 Application of the CISG when there was no choice of law of a Contracting State

Where the parties refrain from exercising their freedom of choice, or where their choice is imperfect,⁴⁷ there are two additional scenarios for applying the CISG. The first approach is to have the CISG directly applicable where both parties have their places of business in the Contracting States. This approach is preferable, especially when the case is being decided by the national court,⁴⁸

⁴⁵ Court of Appeals of Athens 4861/2006, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/060000gr.html>.

⁴⁶ It may be important to note that the contract in question was qualified as an exclusive distribution agreement, to which the CISG may or may not apply depending on whether the issue is related to the framework agreement or to the individual sales performed under such an agreement, as already pointed out in case-law. See section II.3. *infra*.

⁴⁷ For example, in the *Sweet corn, peas and green beans case* involving Yugoslav and Greek companies, the parties made a clearly imperfect choice, providing for application of either Serbian or Greek law. This alternative clause was naturally impossible to effectuate once the dispute arose. Arbitrators therefore disregarded it and, through conflict-of-laws technique, decided to apply Yugoslav substantive rules. As their primary Yugoslav source of rules of law they have chosen the CISG in accordance with Article 16 of the Yugoslav Constitution. See Serbian FTCA, Award No. T-19/99, Serbia, Nov. 22, 2000, available at: <http://cisgw3.law.pace.edu/cases/001122sb.html>.

⁴⁸ Direct application of the CISG on the basis of Article 1(1)(a) is quite different in the arbitral setting because the arbitral tribunal is not a state organ and as such, is not bound by the treaties ratified by the state where it is situated. See Mayer, *L'application par l'arbitre des conventions internationales de droit privé*, in: *L'internationalisation du droit: Mélanges en l'honneur de Yvon Loussouarn*, 1994, 275 (287); *Petrochilos*, 52 *Revue Hellénique de Droit International* 1999, 191-218, available at: http://www.cisg.law.pace.edu/cisg/biblio/petrochilos.html#N_15_.

but it is often employed in arbitral practice too.⁴⁹

While application of the CISG was often neglected in the region (especially by state courts), recent practice suggests a change in attitude and a 2003 decision of the Croatian Supreme Court is a good example.⁵⁰ This case dealt with the contract for sales of shoes concluded between a Croatian buyer and

⁴⁹ This was the technique used, *inter alia*, in: Serbian FTCA Award No. T-8/10, Serbia, Mar. 2, 2011 (unpublished); Serbian FTCA, Award No. T-3/09, Serbia, Jan. 26, 2010 (unpublished); Serbian FTCA, Award No. T-7/08, Serbia, June 4, 2009 (unpublished); Serbian FTCA, Award No. T-16/03, Serbia, Jan. 27, 2009, available at: <http://cisgw3.law.pace.edu/cases/090127sb.html>; Serbian FTCA, Award No. T-01/08, Serbia, Nov. 17, 2008 available at: <http://cisgw3.law.pace.edu/cases/081117sb.html>; Serbian FTCA, Award No. T-18/07, Serbia, Oct. 15, 2008 (unpublished); Serbian FTCA, Award No. T-8/07, Serbia, May 9, 2008 (unpublished); Serbian FTCA, Award No. T-13/05, Jan. 5, 2007, available at: <http://cisgw3.law.pace.edu/cases/070105sb.html>; Serbian FTCA, Award No. T-12/04, Serbia, Jan. 24, 2006, available at: <http://cisgw3.law.pace.edu/cases/060124sb.html>; Serbian FTCA, Award No. T-22/03, Serbia, Jan. 15, 2004, available at: <http://cisgw3.law.pace.edu/cases/040115sb.html>; Serbian FTCA Award No. T-17/01, Serbia, Apr. 12, 2002, available at: <http://cisgw3.law.pace.edu/cases/020412sb.html>; Bulgarian Chamber of Commerce and Industry, Arbitral award, Case No. 26/99, Bulgaria, Feb. 28, 2002, available at: <http://cisgw3.law.pace.edu/cases/020228bu.html>. In several cases the CISG has been applied as "the most suitable primary source of law" and the conflict-of-laws technique was consulted only to fill the gaps in the CISG. See Serbian FTCA, Award No. T-22/05, Serbia, Oct. 30, 2006, available at: <http://cisgw3.law.pace.edu/cases/061030sb.html>; Serbian FTCA, Award No. T-09/01, Serbia, Feb. 23, 2004, available at: <http://cisgw3.law.pace.edu/cases/040223sb.html>; Serbian FTCA, Award No. T-18/01, Serbia, Nov. 27, 2002, available at: <http://cisgw3.law.pace.edu/cases/021127sb.html>; Serbian FTCA, Award No. T-15/01, Serbia, May 25, 2001, available at: <http://cisgw3.law.pace.edu/cases/010525sb.html>. It is important to note that although the application of the CISG in these cases was correct, the tribunals avoided spelling out whether they used Article 1(1)(a) as a unilateral conflict-of-laws rule, which seems plausible given that the Rules of the Serbian FTCA require conflict-of-laws methodology in determining applicable substantive provisions, or for its persuasive force.

⁵⁰ Supreme Court of the Republic of Croatia, II Rev-61/99-2, Croatia, Mar. 12, 2003, abstract by *Babic*, available at: <http://cisgw3.law.pace.edu/cases/030312cr.html>. For court cases from other Balkan countries along these lines see: Appellate Commercial Court, Pž. 10784/2010, Serbia, July 6, 2011, available at: <http://cisgw3.law.pace.edu/cases/110706sb.html>; Multi-Member Court of First Instance of Athens, Decision 4505/2009, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/094505gr.html>; Single-Member Court of First Instance of Thessalonika 43945/2007, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/080002gr.html>; High Commercial Court, Pž. 865/2005(3), Serbia, Sep. 1, 2006, available at: <http://cisgw3.law.pace.edu/cases/060901sb.html>; Court of Appeals of Lamia 63/2006, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/060001gr.html>; Single-Member Court of First Instance Larissa 165/2005, Greece, excerpt from *Zervogianni*, Greece, in: Ferrari (ed.), *The CISG and its Impact on National Legal Systems*, 2008, 172-174, available at: <http://cisgw3.law.pace.edu/cases/050165gr.html>; High Commercial Court, Pž. 1937/2004/2, Serbia, Aug. 23, 2004, available at: <http://cisgw3.law.pace.edu/cases/040823sb.html>; Higher Court in Ljubljana, 1 Cpg 577/98, Slovenia, Oct. 13, 1999, available at: <http://cisgw3.law.pace.edu/cases/991013sv.html>; Higher Court in Ljubljana, 1 Cpg 1305/2003, Slovenia, Dec. 14, 2005, available at: <http://cisgw3.law.pace.edu/cases/051214sv.html>; Higher Court in Ljubljana, 1 Cpg 951/2006, Slovenia, Apr. 9, 2008, edited by *Tratnik*, available at: <http://cisgw3.law.pace.edu/cases/080409sv.html>.

an Italian seller. Upon buyer's failure to pay the price the seller commenced litigation before the Croatian courts. The first and second instance courts ignored the international element and decided the matter under the Croatian domestic contract law. The Supreme Court, however, ruled that by failing to apply the relevant rules of conflict, the courts erred in the application of substantive law. The Court held that,

*"unless it can be proved that the parties have chosen another law, the contract was governed by the CISG because the parties had their places of business in different Contracting States within the meaning of article 1(1)(a) CISG."*⁵¹

The second approach to CISG application is to have a conflict-of-laws rule point to the law of a Contracting State. This conflict-of-laws rule is usually the rule of "the closest connection,"⁵² or a variant of the "characteristic performance" or a combination of the two and in the preponderance of the cases leads to *lex loci venditoris*.⁵³ There is a large number of cases where the judges and arbitrators applied the CISG on this basis. For example, in a dispute between Serbian and Romanian companies, the tribunal determined that Serbian law had the closest connection to the disputed contract. This was based on the fact that the preponderance of factors pointed to Serbia as the proper choice: the language of the contract was Serbian; the seller's seat was in Serbia; and the stipulated place of performance was in Serbia. In addition, a 'split' dispute resolution clause provided, in addition to jurisdiction of the Serbian FTCA, for alternative jurisdiction of Serbian courts. Alt-

⁵¹ Id. This seems to be a landmark case in Croatian case-law since subsequent to this decision a number of cases where the CISG was applied before the High Commercial Court followed. See High Commercial Court XXVIII Pž-2728/4-3, Croatia, July 26, 2005, abstract by *Babic*, available at: <http://cisgw3.law.pace.edu/cases/050726cr.html>; High Commercial Court XXVIII Pž-5580/03-3, Croatia, Sept. 26, 2006, abstract by *Babic*, available at: <http://cisgw3.law.pace.edu/cases/060926cr.html>; High Commercial Court XXVIII Pž- 7602/03-3, Croatia, Oct. 24, 2006, abstract by *Babic*, available at: <http://cisgw3.law.pace.edu/cases/061024cr.html>; High Commercial Court XXVIII Pž-4301/04-3, Croatia, Feb. 20, 2007, abstract by *Babic*, available at: <http://cisgw3.law.pace.edu/cases/070220cr.html>; High Commercial Court XXVIII Pž-1134/05-3, Croatia, Oct. 30, 2007, abstract by *Babic*, available at: <http://cisgw3.law.pace.edu/cases/071030cr.html>.

⁵² See ICC Arbitration Case No. 8247 (1996), available at: <http://cisgw3.law.pace.edu/cases/968247i1.html>.

⁵³ Occasionally, even Article 1(1)(a) of the CISG is interpreted as a unilateral conflict-of-laws rule pointing to the rules common to both contracting parties which are the rules of the CISG when both parties have their relevant places of business in different Contracting States. See *Bell*, *The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods*, 8 *Pace Int'l L. Rev.* 237 (1996), 246-247; *Mourre*, *Application of the Vienna International Sales Convention in Arbitration*, 17 *ICC International Court of Arbitration Bulletin* 2006, 43 (44); *Saf*, *A Study of the Interplay between the Conventions Governing International Contracts of Sale*, § 2.1, Sept. 1999, available at: <http://www.cisg.law.pace.edu/cisg/text/saf7.html>.

though the claimant had based its request on provisions of the Serbian LCT, the tribunal correctly determined that the CISG applied instead.⁵⁴ Also, in a dispute between Italian seller and a Greek buyer the CISG was applied by virtue of Art. 1(1)(b) since the private international law rules of the forum (Greece) referred to the law of a Contracting State (Italy), being the law which is more closely connected to the contract.⁵⁵ According to the court, in the sales contract the seller has to perform the characteristic obligation i.e., the delivery of the goods against payment of its price) and, therefore, in the absence of an agreement to the contrary, the law of the seller's country (Italy) should be applied. Since Italy had ratified the CISG at the time of conclusion of the contract, the court applied the CISG by virtue of CISG Art. 1(1)(b).⁵⁶

However, it has been also noted that the arbitrators and judges in a number of cases are rather reluctant in elaborating specifically which of these two alternatives they have decided to follow in applying the CISG (Art 1(1)(a) or

⁵⁴ See Serbian FTCA, Award No. T-08/06, Serbia, Oct. 1, 2007, available at: <http://cisgw3.law.pace.edu/cases/071001sb.html>.

⁵⁵ Single-Member Court of First Instance Athens 1314/2000, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/000308gr.html>.

⁵⁶ Id. See also: Serbian FTCA, Award No. T-13/09, Serbia, Sep. 14, 2010 (unpublished); Serbian FTCA, Award No. T-11/09, July 9, 2010 (unpublished); Multi-Member Court of First Instance of Athens 2282/2009, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/092282gr.html>; Serbian FTCA, Award No. T-14/07, Serbia, May 23, 2008 (unpublished); Serbian FTCA, Award No. T-9/01, Serbia, Feb. 23, 2004, available at: <http://cisgw3.law.pace.edu/cases/040223sb.html>; See also: Single-Member Court of First Instance of Thessalonika 14953/2003, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/030001gr.html>; Serbian FTCA Award No. T-4/01, Serbia, May 10, 2002, available at: <http://cisgw3.law.pace.edu/cases/020510sb.html>; Serbian FTCA, Award No. T-3/01, Serbia, Sept. 24, 2001, available at: <http://cisgw3.law.pace.edu/cases/010924sb.html>; Serbian FTCA, Award No. T-16/99, Serbia, Feb. 12, 2001, available at: <http://cisgw3.law.pace.edu/cases/010212sb.html>.

Art. 1(1)(b)).⁵⁷ This ambivalence has already been noticed in the practice of other arbitral institutions.⁵⁸

Despite the changing (and more positive attitude) taken by the Balkan courts in the recent years, there are numerous cases where the higher courts failed to quash lower courts' erroneous application of the domestic law *in lieu* of the CISG. This was often done under the unwelcomed pretext that the end result (decision) would have been the same irrespective of the legal instrument applied.⁵⁹

⁵⁷ E.g., Serbian FTCA, Award No. T-14/10, Serbia, July 27, 2011, available at: <http://cisgw3.law.pace.edu/cases/110727sb.html>; Serbian FTCA, Award No. T-2/10, Serbia, Apr. 4, 2011 (unpublished); Serbian FTCA, Award No. T-5/10, Serbia, Nov. 4, 2010 (unpublished); Serbian FTCA, Award No. T-10/09, Serbia, May 31, 2010 (unpublished); Serbian FTCA, Award No. T-6/08, Serbia, Oct. 19, 2009 (unpublished); Single-Member Court of First Instance of Athens, Decision 8161/2009, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/090000gr.html>; Serbian FTCA, Award No. T-7/07, Serbia, Aug. 19, 2008 (unpublished); Serbian FTCA, Award No. T- 16/07, Serbia, June 18, 2008, available at: <http://cisgw3.law.pace.edu/cases/080618sb.html>; Serbian FTCA, Award No. T-15/06, Serbia, Jan. 28, 2008, available at: <http://cisgw3.law.pace.edu/cases/080128sb.html>; Single-Member Court of First Instance of Thessalonika 16319/2007, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/080001gr.html>; Serbian FTCA, Award No. T-14/03, Oct. 18, 2007 (unpublished); Court of Appeals of Thessalonika 2923/2006, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/070001gr.html>; Serbian FTCA, Award No. T-17/02, Serbia, Oct. 2, 2006 (unpublished); Serbian FTCA, Award No. T-03/06, Serbia, Sept. 14, 2006 (unpublished); Serbian FTCA, Award No. T-15/04, Serbia, Feb. 21, 2005, available at: <http://cisgw3.law.pace.edu/cases/050221sb.html>; Bulgarian Chamber of Commerce and Industry, Arbitral award, Case No. 41/00, Bulgaria, June 12, 2001, available at: <http://cisgw3.law.pace.edu/cases/010612bu.html>. See also: High Commercial Court, Pž. 1937/2004/2, Serbia, Aug. 23, 2004, available at: <http://cisgw3.law.pace.edu/cases/040823sb.html>; High Court of Cassation and Justice, No. 2957/2003 (Dossier no. 945/2002), Romania, June 6, 2003, available at: <http://cisgw3.law.pace.edu/cases/030606ro.html>; Bulgarian Chamber of Commerce and Industry, Arbitral award, Case No. 33/98, Bulgaria, Mar. 12, 2001, available at: <http://cisgw3.law.pace.edu/cases/010312bu.html>; Bulgarian Chamber of Commerce and Industry, Arbitral award, Case No. 56/1995, Bulgaria, Apr. 24, 1996, available at: <http://cisgw3.law.pace.edu/cases/960424bu.html>.

⁵⁸ Arbitration Court of the Chamber of Commerce and Industry of Budapest VB 94131, Hungary, Dec. 5, 1995, available at: <http://cisgw3.law.pace.edu/cases/951205h1.html>; Arbitration Court of the Hungarian Chamber of Commerce and Industry VB/94124, Hungary, Nov. 17, 1995, available at: <http://cisgw3.law.pace.edu/cases/951117h1.html>.

⁵⁹ According to the Court:

„[...] the fact that the Court of First Instance applied the improper substantive law does not prejudice the validity of the decision it has rendered and does not constitute sufficient grounds for its annulment. Pursuant to Article 53 of the CISG, the main obligation of the buyer is to pay the price for the goods and take delivery of them as required by the contract and the Convention. Therefore, in that respect the provisions of the CISG do not differ from the provisions of domestic law, so the application of the CISG would not have materially altered the decision rendered by the court of first instance.”

See: High Commercial Court, XVIII Pž. 9326/2005, Serbia, Feb. 7, 2006, available at: <http://cisgw3.law.pace.edu/cases/060207sb.html>. See also: High Commercial Court, Pž. 53/2009, Serbia, Apr. 2, 2009, available at: <http://cisgw3.law.pace.edu/cases/090402sb.html>; High Com-

2.3 Effects of dissolution of SFRY to application of the CISG

The CISG entered into force on the territory of former Yugoslavia (SFRY) on 1 January, 1988.⁶⁰ However, the dissolution of Yugoslavia in the 1990's raised the question of application of the CISG in the case of state succession by what are now six independent countries – the former federal units, republics of the SFRY.⁶¹ Namely, were the newly independent ex-Yugoslav republics to be regarded as the CISG contracting states automatically upon dissolution of SFRY or not?⁶²

The fact that many of the former Yugoslav republics have, together with their declarations of independence, made firm commitments that the treaties entered into by the SFRY will remain in force in their territories may be

mercial Court, Pž-6176/04-3, Croatia, Sept. 27, 2007, abstract by *Babic*, available at: <http://cisgw3.law.pace.edu/cases/070927cr.html>; Court of Appeals of Athens 4861/2006, Greece, *Flambouras* (ed.), available at: <http://cisgw3.law.pace.edu/cases/060000gr.html>. Cf. High Commercial Court, Pž. 1937/2004/2, Serbia, Aug. 23, 2004, available at: <http://cisgw3.law.pace.edu/cases/040823sb.html>.

- ⁶⁰ The Socialist Federative Republic of Yugoslavia (SFRY) signed the CISG on 11 April, 1980 and ratified it on 27 December, 1984. The instrument of ratification was deposited with the Secretary-General of the United Nations on 27 March, 1985. See STATUS 1980 (note 1).
- ⁶¹ Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro and Macedonia. See Notifications of successions, available at: <http://treaties.un.org/pages/CNs.aspx>. For more historical information on dissolution of the SFRY and its effect on succession to the CISG see: <http://treaties.un.org/pages/HistoricalInfo.aspx>.
- ⁶² The answer to this question is simple if one accepts the position of Article 34 of the 1978 Vienna Convention on Succession of States in respect of Treaties (Aug. 23, 1978, 1946 U.N.T.S. 3). This Article provides, in case of dissolution of a state, for automatic continuation of application of the multilateral treaties signed by the predecessor state in the territory of the successor state. This Convention applies, pursuant to its Article 7, only to the successions which have occurred after the Convention entered into force, as of November 6, 1996, unless the concerned states agree otherwise. Given that the dissolution of SFRY was held completed in 1992, it can be argued that the 1978 Vienna Convention is inapplicable to this issue. Furthermore, it has often been said in the legal doctrine that the formulation of Article 34 of the 1978 Vienna Convention cannot be taken as reflective of international customary law. Even the automatic state succession to humanitarian treaties is highly controversial and is not supported by much state practice. Moreover, the International Court of Justice never expressed an opinion to the question whether or not the automatic succession reflects international customary law. Consequently, the area of state succession is still deemed as "an area of great uncertainty and controversy", even amongst the international public law scholars. See generally *Brownlie*, *Principles of Public International Law*, 5th ed. 1998, 650, 663-64; *Cassese*, *International Law*, 2001, 53; *International Law Association*, 2002 ILA Rapport final sur la succession en matière de traités, 14, available at: <http://www.ila-hq.org/Rasulov>, *Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?* 14 *Eur. J. Int'l L.* 2003, 141; *Shaw*, *International Law*, 6th ed. 2008, 976-977; *Tamke*, *Succession of States to Multilateral Treaties*, 2001, available at: <http://www.hausarbeiten.de/faecher/vorschau/104018.html>.

viewed as an argument in favor of automatic succession.⁶³ With respect to the CISG, these promises were further formalized by filing notifications of successions with retroactive application covering the period from the date of state succession to the date of filing of notification.⁶⁴ However, these actions were not made with the same expeditiousness by all of the former Yugoslav republics, thus creating legal uncertainty for private parties as to the status of the CISG in the legal systems concerned.⁶⁵ While Montenegro waited only four and a half months from the date of its independence to file a notification of succession to the CISG, it took Bosnia little less than two years, Slovenia two and a half years, Croatia six and a half years, and over 15 years in the case of Macedonia.⁶⁶ Although the area of uncertainty regarding the CISG application in all former Yugoslav republics existed in the time period after the dissolution of the SFRY to filing notifications of the succession,⁶⁷ the legal consequences of Macedonian belated notification are especially harsh given that it was not listed as a CISG contracting state on the UNCITRAL website for 15 years.⁶⁸ As a consequence, it remained un-

⁶³ See *International Law Association*, 2002 ILA Rapport final sur la succession en matière de traits, 14, available at: <http://www.ila-hq.org>.

⁶⁴ See STATUS 1980 (note 1). On one hand, the practice of making notifications by the successor states and the acceptance by the depositories could be interpreted as a statement against automatic succession, since had it been otherwise, the status of a Contracting State to the multilateral treaty would be established *ipso facto* from the date when such state declares independence. On the other, the practice of filing notifications of successions should be interpreted as concerned state's assistance to the depository for clarifying the situation and enabling the depository to modify the list of the Contracting States, thus preventing the risk of annulling their acts in the future. See *Tamke* (note 61).

⁶⁵ Bernasconi advises businesspersons wanting to conclude an international sale contract with a partner who has his place of business in one of the newly independent Republics of both the former USSR and the former Yugoslavia, in order to avoid uncertainty as to CISG's application, to implement into the contract a clear and unequivocal choice of law rule, either in favor of the CISG or in favor of one particular national legal order. See *Bernasconi*, 46 *Netherlands Int'l L. Rev.* 1999, 137, 154.

⁶⁶ See STATUS 1980 (note 1).

⁶⁷ For example, in one case decided in 1993, one year before Slovenia filed a notification of succession to the CISG, the dispute arose out of the contract concluded between Slovenian and Italian parties. Although both Italy and SFRY (at the time when Slovenia was a Republic in the SFRY) were parties to the CISG, the Slovenian court concluded that the CISG does not apply. The judge stated in particular: "It is true that this Convention was ratified by both Italy and ex Socialist Federal Republic of Yugoslavia, however, *Slovenia did not take over this Convention in its legal system with any succession act.*" (emph. added). See Higher Court in Koper, 1Cpg 90/93, Slovenia, May 4, 1993, available at: <http://cisgw3.law.pace.edu/cases/930504sv.html>.

⁶⁸ The controversies regarding legal character of notification of succession are also relevant with respect to the 1974 Convention on the Limitation Period in the International Sale of Goods. Former Yugoslavia acceded to this convention on Nov. 27, 1978. Yet, only those former Yugoslav republics who have filed notifications of succession are listed on the UNCITRAL web-site as Contracting States. Neither Croatia nor Macedonia, which are undisputedly successor states to the SFRY, are, at this moment, listed as Contracting States. See STATUS 1974 - Convention on the Limitation Period in the International Sale of Goods, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_status.html.

clear should Macedonian parties to contracts concluded in the period between the date of state succession, 17 November, 1991, and the date of receipt of notification of succession to the CISG, 22 November, 2006, be considered as coming from a CISG contracting state for the purposes of Article 1(1)(a) CISG or not. Also, it was unclear if Article 1(1)(b) of the CISG points to Macedonian law, should the CISG be applied when the contract was concluded in the abovementioned period?⁶⁹

Recently, there was another plot twist when it came to applicability of the CISG in the Balkans. On 17 February, 2008, Kosovo (or, as ICJ puts it – certain individuals who happen to be holding highest offices who acted in their capacity as ordinary individuals⁷⁰) declared independence from Serbia. Some countries, including many of the CISG Contracting States, recognized Kosovo. Many more, including again many of the CISG Contracting States, did not.⁷¹ Consequently, Kosovo is neither a member of the United Nations nor a contracting

⁶⁹ These questions are not purely academic since some of them have already been addressed in the Serbian arbitral practice. As a matter of fact, 14% of the analyzed Serbian cases involved a Macedonian party and only one award deals with the dispute arising out of a contract concluded after Macedonia's filing of notification of succession to the CISG. However, the approach of arbitral tribunals with respect to this issue has not been unanimous. In some of these cases, the contract contained a choice-of-law clause calling for application of Serbian (Yugoslav) law and the tribunals have reached different results, deciding on some occasions to apply the CISG, resorting to the application of the LCT on others. Where there was no choice of law, tribunals did not address the issue of Macedonia's contracting status to the CISG and instead chose Serbian rules as the most appropriate, pursuant to Article 46(2) of the Serbian FTCA Rules. There is one case where the tribunal, without addressing the issue of applicable law, went straightforward to applying the Serbian LCT. Finally, in one third of these cases the arbitrators addressed the issue of whether Macedonia was to be considered a CISG Contracting State prior to filing a notification of succession. In three of these cases the arbitrators invoked the provisions of the 1978 Vienna Convention on Succession of States in respect of Treaties allegedly calling for automatic succession to multilateral treaties. On the other hand, in at least one case, the arbitrator stated in the *obiter dictum* that the analysis of the CISG application on the basis of Art. 1(1)(a) was purposefully omitted since the contract was concluded before Macedonia filed notification of succession. The CISG was nevertheless applied on the basis of Art. 1(1)(b). See Pavić/Djordjević (note 5), 17-20.

⁷⁰ International Court of Justice, Advisory Opinion on Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, July 22, 2010, para. 109, available at: <http://www.icj-cij.org/docket/files/141/15987.pdf>.

⁷¹ Out of the countries in the region, Kosovo's independence is not recognized by Serbia, Bosnia and Herzegovina, Romania and Greece. Also, Kosovo's independence is not recognized by Cyprus, Slovakia, Spain, China, Russia and many other CISG Contracting States.

state to the CISG.⁷² How does that reflect on the law applicable to the contract concluded between someone doing business in Kosovo and someone located in another state and when is the CISG applicable? The answer is not that simple. While Kosovo is not listed among Contracting States to the CISG, it may be viewed as a part of the Contracting State (Serbia) by those sitting in a country which has not recognized Kosovo as a sovereign state, thus leading to application of the CISG. On the other hand, the view of those sitting in the countries who have recognized Kosovo might be exactly the opposite and, in countries who made Article 95 reservation, further restrict the applicability of the CISG. Additionally, the way in which former Yugoslav laws continued to remain in force in Kosovo after 1999 and the effect of such instruments after February 2008, plants further doubts with respect to the CISG applicability and deserve a study which far exceeds the scope of this paper.

3. *Meaning of 'contract for sale' of 'goods'*

Dispute resolution practice regularly encounters contracts which elude clear-cut classification. The CISG is, in accordance with Article 1(1) and Article 4, applicable to the contracts for *sale of goods*. While the CISG does not positively define what constitutes goods, it enumerates in Article 2 which sales of 'goods' and which types of sales transactions are not considered as contracts to which it applies. Consequently, the sale of electricity, ships, vessels, hovercraft and aircraft, stocks, shares, investment securities, negotiable instruments and money is to be excluded from the CISG and so are the sales by auction, on execution or otherwise by authority of law and most of the consumer sales.

The application of Article 2 was triggered in at least two of the observed cases. In the *Private leisure boat case* the court held, invoking Art. 2(a) and 2(e), that the CISG does not apply to a contract for sale of a private leisure

⁷² Similarly, it is not being considered as a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (see *Konrad*, Kosovo and Arbitration - The Birth of a New State, Nov. 17, 2010, available at: <http://kluwerarbitrationblog.com/blog/2010/11/17/kosovo-and-arbitration-%E2%80%93-the-birth-of-a-new-state/comment-page-1/#comment-70421>). However, the officials from Kosovo may consider them bound with its provisions given the wording of the Kosovo Declaration of Independence, Article 9: "We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK) and treaty and other obligations of the former Socialist Federal Republic of Yugoslavia to which we are bound as a former constituent part, including the Vienna Conventions on diplomatic and consular relations." See: <http://www.assembly-kosova.org/?cid=2,128,1635>.

boat.⁷³ Similarly, in the *Fishing boat case* the sole arbitrator did not apply the CISG although the choice of law clause pointed to the Yugoslav law, and the CISG, being part of the Serbian law.⁷⁴ However, the arbitrator concluded that "the reference to Yugoslav law in this case should not be understood as a reference to the CISG, but rather as a reference to the internal substantive law of Yugoslavia" since the contract in question was for a sale of a ship, "a special category of goods", thus falling under the exception provided in CISG Article 2(e).⁷⁵

Furthermore, the definition of a contract for sale is not contained in the CISG but it can be derived autonomously from the list of essential obligations of the parties to the contract stipulated in Articles 30 and 53 of the CISG.⁷⁶ This view has been confirmed in the *Bridgestone/Firestone GmbH v. Weimar d.o.o. case*.⁷⁷ The Court, referring to Article 7(2) CISG in the context of defining a contract of sale, held that "although the CISG does not provide a definition of the contract of sale, this can be inferred from Articles 30 and 53 CISG."⁷⁸ In light of such an understanding of the sales contract, the arbitrator was right in the *Beer case* not to apply the CISG on the part of the claim relating to restitution of payment made for the purposes of market research and advertising and not relating to the sales of goods.⁷⁹

Article 3 further clarifies that the CISG covers contracts for the supply of goods to be manufactured or produced unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for

⁷³ Court of Appeals of Piraeus 520/2008, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/080000gr.html>.

⁷⁴ Serbian FTCA Award No. T-23/97, Serbia, Apr. 15, 1999, available at: <http://cisgw3.law.pace.edu/cases/990415sb.html>.

⁷⁵ Serbian FTCA Award No. T-23/97, Serbia, Apr. 15, 1999, available at: <http://cisgw3.law.pace.edu/cases/990415sb.html>.

⁷⁶ See Tribunale di Forli, Italy, Feb. 16, 2009, available at: <http://cisgw3.law.pace.edu/cases/090216i3.html>.

⁷⁷ In the case at hand, the Croatian company had instructed the seller to invoice an offshore company organized under the laws of Delaware and owned by a manager of the Croatian company. When the Croatian company refused to pay for the last delivery, the seller filed a suit for the payment of price in the Commercial Court of Zagreb. The Croatian company claimed that the seller had never entered into a contractual relationship with the Croatian company, but with the offshore company to which invoices were issued. The first instance court found that there was indeed a contract of sale under the CISG with the Croatian company and that the company was liable for the payment of price. See High Commercial Court Pž-2047/03-8, Croatia, Dec. 19, 2006, abstract by *Babic*, available at: <http://cisgw3.law.pace.edu/cases/061219cr.html>.

⁷⁸ High Commercial Court Pž-2047/03-8, Croatia, Dec. 19, 2006, abstract by *Babic*, available at: <http://cisgw3.law.pace.edu/cases/061219cr.html>.

⁷⁹ Serbian FTCA Award No. T-9/03, Serbia, Apr. 28, 2010 (unpublished).

such manufacture or production. Also, if the contract is of a hybrid sales-labor/services nature, the CISG is applicable if the labor/services component is not the preponderant part of the obligations of the party who furnishes the goods.

There were several awards made in the Balkans in which the mixed nature of the underlying contract had to be examined in order to determine applicability of the CISG. For example, the application of the CISG was correctly rejected in *Equipment installation case*, where although the underlying contract was labeled a "Contract of Sale", the tribunal determined that the subject matter of the contract was installation of equipment and not its sale.⁸⁰ On the other hand, in a *Protective Steel Fence case* the tribunal correctly noted that a contract for supply and installation of the protective steel fence, where the value of the goods amounted to EUR 490.000 and the value of installation amounted to EUR 60.000, should be qualified as a contract for sale which satisfies all requirements for application of the Convention as stipulated in Art. 3(2) CISG.⁸¹ In another case, the CISG application was rejected because the buyer had to supply the seller with almost all materials needed for production.⁸² On the other hand, the court in *Textile case* correctly noted that the CISG applies to the contracts of sale and manufacture where the buyer does not supply the seller with the substantial part of the materials necessary for such manufacture.⁸³

The majority of Serbian FTCA cases that examined the question of legal qualification dealt with distribution contracts.⁸⁴ For example, in the *Mineral water and wooden pallets case* the sole arbitrator determined that the CISG was not applicable, although the parties had labeled the contract as a contract of sale.⁸⁵ Examination of the parties' rights and obligations revealed

⁸⁰ Serbian FTCA Award No. T-13/02, Serbia, May 9, 2002, available at: <http://cisgw3.law.pace.edu/cases/030509sb.html>. See also: Serbian FTCA Award No. T-40/2003, Serbia, June 1, 2005 (unpublished).

⁸¹ Serbian FTCA Award No. T-8/10, Serbia, Mar. 2, 2011 (unpublished).

⁸² Serbian FTCA Award No. T-22/06, Serbia, Oct. 22, 2007 (unpublished). See also: Serbian FTCA, Award No. T-19/03, June 25, 2004 (unpublished).

⁸³ Court of Appeals of Thessalonika 2923/2006, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/070001gr.html>.

⁸⁴ For the purposes of this paper the term 'distribution contract' is understood as defined by the International Chamber of Commerce. See: The ICC Model Distributorship Contract, Sole Importer-Distributor, ICC Publication No. 646, 2nd ed. 2002.

⁸⁵ Serbian FTCA, Award No. T-25/06, Serbia, Nov. 13, 2007, available at: <http://cisgw3.law.pace.edu/cases/071113sb.htm>.

that they had actually concluded a distribution contract.⁸⁶ The reasoning contained observation that the CISG is not applicable to contracts of distribution, except in the cases where the subject matter of the dispute are individual shipments within the larger framework of the distribution contract. This reasoning was supported by reference to three foreign court and arbitral decisions and later endorsed in the *Medicaments case*.⁸⁷ The *Medicaments case* arose from a dispute under a 'Sales and Distribution Contract' concluded between a Serbian supplier and Albanian distributor. The facts of the case led to application of the CISG since the merits of the case revolved around an unpaid shipment of drugs that was made pursuant to the sales and distribution contract. Relying on both Serbian FTCA practice and foreign case law, the sole arbitrator held that the "CISG is applicable... to individual sales transactions concluded within the framework of the distribution contract and not to the distribution contract as a whole."⁸⁸ However, in the *Original DVD recordings case* the CISG was applied to the contract for export and distribution of DVDs without making a distinction whether the CISG applies to individual deliveries made under such contract or to the framework contract as well.⁸⁹

The application of the CISG to commercial agency contract has been, not surprisingly, a matter of some controversy in the region. In one case Serbian judges examined whether a contract in question was a contract for sale (to which the CISG applies, as determined by the first instance court) or a

⁸⁶ The contract provided, *inter alia*, that the Respondent undertook to resell the goods only within certain areas of Macedonia and the Claimant could rescind the contract if the reselling was directed to other areas as well. Also, distributor (respondent) was to monitor sales on relevant markets and inform the seller-supplier (claimant) about the figures. See: Serbian FTCA, Award No. T-25/06, Serbia, Nov. 13, 2007, available at: <http://cisgw3.law.pace.edu/cases/071113sb.htm>

⁸⁷ Serbian FTCA, Award No. T-8/08, Serbia, Jan. 28, 2009, available at: <http://cisgw3.law.pace.edu/cases/090128sb.html>.

⁸⁸ This position was also followed in at least one court decision in Serbia. See decision of the High Commercial Court, Pž. 6104/2007(1), Serbia, Apr. 22, 2008, available at: <http://cisgw3.law.pace.edu/cases/080422sb.html>.

⁸⁹ The arbitrator explicitly stated that relationship between the parties in the case at hand „has characteristics of the sales contract, regardless of other rights and obligations of the parties specified in the contract“. See Serbian FTCA, Award No. T-23/08, Serbia, Nov. 10, 2009, available at: <http://cisgw3.law.pace.edu/cases/091110sb.html>.

commission agency contract. In the opinion of the Court, the commission agency elements "prevailed," thus excluding the application of the CISG.⁹⁰ However, the view of the Bulgarian arbitrators appears to be consistently the opposite.⁹¹ Generally, in the absence of special circumstances it is very hard to see how the CISG can be applied to the relationship between the commission agent and the principal, given that this relationship predominantly has the characteristics of the agency contract.

The description of the contract is certainly not decisive. For example, in the *Paper handkerchiefs production line case*, although the contract was named 'Agency contract', the arbitrator found that:

*"regardless of the terminology that parties used to define the Contract of 5 October 2004 (Agency Contract), the issue in this case is the delivery (sale) of the line for the production and packaging of paper handkerchiefs, where Claimant is the [Seller] and Respondent is the [Buyer]. This can be deduced from both Annex No. 1 and Annex No. 2 which mention delivery of goods in relation with a typical sales contract (even the parties to the Agency Contract are named as parties to the sales contract), documentation connected with this delivery (invoice and customs declaration), as well as the conduct of the parties after the delivery ([Buyer] giving a cheque as a guarantee, which was listed as an obligation of the buyer in Annex No.2, [Buyer]'s payment of the price)."*⁹²

⁹⁰ The court stated:

"Bearing in mind that the disputed contract provided that the Plaintiff was the exclusive importer and distributor of the Defendant's publications in the territory of the FRY and that, upon the sale of these publications Plaintiff was entitled to a commission in the percentage determined by the contract and Plaintiff had the right to return the copies which remained unsold (this is also supported by the way in which the Plaintiff was doing business in 1996 and 1997 proven by report of an expert witness), the actual nature of the business relation in question was a commission agency, or the sale by commission agency as its special form."

See High Commercial Court, Pz. 6584/2004, Serbia, Sept. 13, 2004, available at: <http://cisgw3.law.pace.edu/cases/040913sb.html>.

⁹¹ In a case decided by the Bulgarian Arbitration court, it appears that the CISG was found applicable to a contract arising out of commission agency. Namely, although the provisions of Bulgarian Law of Obligations were extensively discussed with regards to the liability of the commission agent for third party's failure to perform, the provision of Article 71 CISG was also invoked as applicable law regarding the "obligation" of the commission agent to suspend performance of the contract with the third party. The award also refers to two similar decisions decided by the same Court of Arbitration. See Bulgarian Chamber of Commerce and Industry, Arbitral award, Case No. 39/93, Bulgaria, Jan. 24, 1994, available at: <http://cisgw3.law.pace.edu/cases/940124bu.html>.

⁹² Serbian FTCA, Award No. T-05/08, Serbia, Jan. 5, 2009, available at: <http://cisgw3.law.pace.edu/cases/090105sb.html>.

Finally, the *Milk packaging equipment case* addressed the issue of whether a contract of leasing might fall within the scope of the CISG.⁹³ As a rule, leasing contracts are not covered by the CISG.⁹⁴ However, there might be instances where the analyses of the contract provisions warrant application of the CISG.⁹⁵ In this particular case, the sole arbitrator had found that the preconditions for CISG application were met.⁹⁶

4. Issues excluded from the CISG

Article 4 delimits the scope of the CISG to issues regarding formation of the sales contract and rights and obligations of the parties arising therefrom, while explicitly excluding the issues of validity of the contract or any of its provisions or of any usage and the effects which the contract may have on the property in the goods sold. As correctly noted by the court in the *Bullet-proof vest case*: "the reference of the phrase "in particular" in Article 4 of the Convention shows that the reference made is indicative. Therefore, apart from the issues referred to in this provision, there is a series of other issues beyond the sphere of application of the Vienna Convention."⁹⁷ Some of these issues have been addressed in the Balkan case-law.

⁹³ Serbian FTCA, Award No. T-04/05, Serbia, July 15, 2008, available at: <http://cisgw3.law.pace.edu/cases/080715sb.html>.

⁹⁴ *Huber/Mullis*, *The CISG: A New Textbook for Students and Practitioners*, 2007, 48; *Schlechtriem*, *Uniform Sales Law - The Experience with Uniform Sales Laws in the Federal Republic of Germany*, *Juridisk Tidskrift* 9, 1991, available at: <http://www.cisg.law.pace.edu/cisg/biblio/schlech2.html>.

⁹⁵ See *Schlechtriem*, Article 1, in: *Schlechtriem/Schwenzer* (eds.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd edition 2005, 27 [hereinafter *Schlechtriem & Schwenzer COMMENTARY 2005*]; *Huber/Mullis* (note 94), 48.

⁹⁶ The dispute between a Swiss company and a Serbian company arose out of a "Leasing Contract," whereby the Swiss company was to transport and install a machine, while the Serbian company was to pay half of the contract price in advance and the remaining half during the five-year contract period. Once the last installment was paid, the machine would become the property of the buyer. Although the claimant argued that this was a lease, the sole arbitrator found that the contract was actually an installment sale coupled with a *pactum reservati domini* clause and based his conclusion primarily on the fact that half of the price was paid in advance and that the right of ownership would be transferred at the very moment the last installment would be paid, i.e. that financing does not constitute a preponderant part of seller's obligations. Invoking the need to promote uniformity in application, decision referred to a similar treatment of a contract labeled as leasing in one Australian case. See: Serbian FTCA, Award No. T-04/05, Serbia, July 15, 2008, available at: <http://cisgw3.law.pace.edu/cases/080715sb.html>.

⁹⁷ Multi-Member Court of First Instance of Athens Decision 4505/2009, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/094505gr.html>.

The fact that the CISG does not govern the validity of the contract was rightfully emphasized by one Slovenian court decision⁹⁸ and in two Serbian arbitral awards.⁹⁹ Also, it has been correctly noted that the CISG does not apply to assumption of debt, transfer of claim or assignment of obligation.¹⁰⁰ Moreover, the issues of joint liability¹⁰¹ and pre-contractual liability¹⁰² were said not to be governed by the CISG. It has also been underlined in several cases that the issue of prescription or limitation of claims is not covered by the CISG and that it should be resolved by law applicable by virtue of private international law.¹⁰³ What is more, since the Convention does not deal with the effect of the contract on the property of the goods sold (Article 4(b) CISG), the question of the retention of property over the delivered goods by the seller should not be governed by the CISG.¹⁰⁴ Finally, according to the available case-law, there is no room for concurrent application of domestic provisions for tort with the provisions of the CISG if they are based on the same facts, since this would jeopardize the uniform

⁹⁸ In the *Caprolactum case* the validity issue at stake was the alleged 'ursury,' to which the otherwise applicable domestic law was applied. See Supreme Court of the Republic of Slovenia III Ips 60/96, Slovenia, Apr. 8, 1998, available at: <http://cisgw3.law.pace.edu/cases/980408sv.html>.

⁹⁹ Serbian FTCA, Award No. T-10/09, Serbia, May 31, 2010, available at: <http://cisgw3.law.pace.edu/cases/100531sb.html>; Serbian FTCA, Award No. T-4/05, Serbia, July 15, 2008, available at: <http://cisgw3.law.pace.edu/cases/080715sb.html>.

¹⁰⁰ Serbian FTCA, Award No. T-14/04, Serbia, Feb. 21, 2005, available at: <http://cisgw3.law.pace.edu/cases/050221sb2.html>; Serbian FTCA, Award No. T-23/06-13, Serbia, Sep. 15, 2008, available at: <http://cisgw3.law.pace.edu/cases/080915sb.html>.

¹⁰¹ Serbian FTCA, Award No. T-23/06-13, Serbia, Sep. 15, 2008, available at: <http://cisgw3.law.pace.edu/cases/080915sb.html>.

¹⁰² In this regard the court emphasized that:

"except for the cases in which the CISG regulates specifically an issue for the period before the conclusion of the contract (e.g., CISG Article 16(2)). Therefore, any remedy related to pre-contractual liability which derives from the provisions of domestic law to which the rules of the private international law of the forum refer to [...], may apply in parallel with the provisions of the CISG, since the regulation of pre-contractual liability as a whole was excluded in the CISG intentionally by the international legislators."

See: Multi-Member Court of First Instance of Athens Decision 4505/2009, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/094505gr.html>.

¹⁰³ See Single-Member Court of First Instance Larissa 165/2005, Greece, excerpt from *Zervogianni, "Greece"*, in: Ferrari (ed.), *The CISG and its Impact on National Legal Systems*, 2008, 172-174, available at: <http://cisgw3.law.pace.edu/cases/050165gr.html>; Serbian FTCA, Award No. T-12/04 Jan. 24, 2006, available at: <http://cisgw3.law.pace.edu/cases/060124sb.html>; High Commercial Court Pž-1134/05-3, Croatia, Oct. 30, 2007, abstract by *Babic*, available at: <http://cisgw3.law.pace.edu/cases/071030cr.html>; Serbian FTCA, Award No. T-13/05, Jan. 5, 2007, available at: <http://cisgw3.law.pace.edu/cases/070105sb.html>; Higher Court in Koper, 1Cpg 90/93, Slovenia, May 4, 1993, available at: <http://cisgw3.law.pace.edu/cases/930504sv.html>.

¹⁰⁴ Serbian FTCA, Award No. T-4/05, Serbia, July 15, 2008, available at: <http://cisgw3.law.pace.edu/cases/080715sb.html>. See also Court of Appeals of Athens 4861/2006, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/060000gr.html>.

application of the CISG.¹⁰⁵ The same is said to apply for unjust enrichment claims.¹⁰⁶

In line with the prevailing view expressed in case law and doctrine,¹⁰⁷ the conditions for exercising a set-off represent an external gap in the CISG according to Balkan case-law.¹⁰⁸ However, the opinions are divided with regard to the issue of burden of proof. Namely, it can be implied from the *Hartman case* and many others that the court did not deem this as an issue governed by the CISG.¹⁰⁹ Quite the contrary, in the *Bullet-proof vest case* the court considered the issue of burden of proof to be covered by the CISG when discussing the issue of shifting of the burden of proof of non-conformity after the buyer takes over the goods.¹¹⁰

¹⁰⁵ Multi-Member Court of First Instance of Athens Decision 4505/2009, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/094505gr.html>.

¹⁰⁶ Multi-Member Court of First Instance of Athens Decision 4505/2009, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/094505gr.html>.

¹⁰⁷ Bonelli, *The CISG, European Contract Law and the Development of a World Contract Law*, 56 *American Journal of Comparative Law*, 2008, 1 (3); Eiselen/Kritzer, in: Kritzer/Vanto/Vanto/Eiselen (eds.), *International Contract Manual*, Vol. 4, 2008, § 84:33(c); Ferrari, *Scope of application: articles 4-5*, in: Ferrari/Flechtner/Brands (eds.), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention* 235, 250, 2004, 108 [hereinafter *The DRAFT DIGEST*]; Hornold/Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention*, 4th edition 2009, 83, 84; Schlechtriem, *Article 4*, in: Schlechtriem & Schwenger *COMMENTARY* 2005 (note 95), 72, 73; Huber, *Some introductory remarks on the CISG*, 6 *Internationales Handelsrecht*, 2006, 234; Bundesgerichtshof, Germany, June 23, 2010, available at: www.cisgw3.law.pace.edu/cases/100623g1.html; Bundesgericht, Switzerland, Dec. 20, 2006, available at: www.cisgw3.law.pace.edu/cases/061220s1.html; Tribunale di Padova, Italy, Feb. 25, 2004, available at: www.cisgw3.law.pace.edu/cases/040225i3.html; Oberster Gerichtshof, Austria, Jan. 14, 2002 available at: www.cisgw3.law.pace.edu/cases/061220s1.html; Tribunale di Padova, Italy, Feb. 25, 2004, available at: www.cisgw3.law.pace.edu/cases/020114a3.html; Arbitral Award, Chamber of National and International Arbitration of Milan, Italy, Sep. 28, 2001, available at: www.cisgw3.law.pace.edu/cases/010928u3.html; Gerechtshof 's Hertogenbosch, Netherlands, Oct. 2, 1997, available at: www.cisgw3.law.pace.edu/cases/971002n1.html.

¹⁰⁸ See Multi-Member Court of First Instance of Athens Decision 4505/2009, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/094505gr.html>; Single-Member Court of First Instance of Thessalonika 43945/2007, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/080002gr.html>; Serbian FTCA, Award No. T-14/04, Serbia, Feb. 21, 2005, available at: <http://cisgw3.law.pace.edu/cases/050221sb2.html>.

¹⁰⁹ The issue of burden of proof was not expressly mentioned as an issue not covered by the CISG but since the provisions of the domestic law on civil proceedings were invoked in this regard, it is obvious that the court did not find it covered by the CISG. See Appellate Court of Montenegro in Podgorica, Mal. Br 118/04, Montenegro, Feb. 20, 2007, available at: <http://cisgw3.law.pace.edu/cases/070220mo.html>. See also: Serbian FTCA, Award No. T-13/05, Serbia, Jan. 5, 2007, available at: <http://cisgw3.law.pace.edu/cases/070105sb.html>; Higher Court in Ljubljana, 1 Cpg 577/98, Slovenia, Oct. 13, 1999, available at: <http://cisgw3.law.pace.edu/cases/991013sv.html>.

¹¹⁰ See Multi-Member Court of First Instance of Athens Decision 4505/2009, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/094505gr.html>.

This is in line with the majority view on this point.¹¹¹

While it has been correctly noted in the *Tomatos and lemons case* that the CISG does not govern the issue of place of conclusion of the contract,¹¹² the issue of computation of time period (for payment of price) was erroneously said not to be governed by the CISG in the *Original DVD recording case*.¹¹³ Instead of applying the domestic Serbian law to this issue, the arbitrator should have applied the provision of Article 20 CISG (by analogy) in order to determine when the buyer fell in default regarding payment of the price (the contract called for payment within 180 days at the latest from the date of delivery of the goods as specified in the customs declaration).

III. Conclusion

Is CISG a truly uniform sales law of the Balkans? Since some of the accessions have been made only recently, a definite answer cannot be given at the moment. However, the story so far invites cautious optimism.

'Balkanization' of the Balkans in itself multiplied the number of the CISG Contracting States. Given the trade patterns in the region and the recent accessions, this means that a lot of transactions which once upon a time

¹¹¹ *Ferrari*, Burden of Proof under the United Nations Convention on Contracts for International Sale of Goods (CISG), 5 *International Business Law Journal* 835, 2000, 666; *Kröll*, Selected Problems Concerning the CISG's Scope of Application, 25 *Journal of Law and Commerce* 2005-2006, 39 (48); *Orlandi*, Procedural Law Issues and Law Conventions, 5 *Uniform Law Review* 2000, 23 (27 et seq.); *Perales Viscasillas*, Battle of the Forms and the Burden of Proof: An Analysis of BGH 9 January 2002, 6 *Vindobona Journal of International Commercial Law & Arbitration* 2002, 217 (228); *Schwenzer/Hachem*, Article 4, in: *Schwenzer* (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 4th edition 2010, at 85 (86) [hereinafter *Schlechtriem & Schwenzer COMMENTARY* 2010]; *Magnus*, Die allgemeinen Grundsätze im UN-Kaufrecht, 59 *RabelsZ* (1995), 485 footnote 86 et seq; Oberster Gerichtshof, Austria, Sep. 12, 2006, available at: <http://cisgw3.law.pace.edu/cases/060912a3.html>; Federal Court of Appeals (7th Cir.), USA, May 23, 2005, available at: <http://cisgw3.law.pace.edu/cases/05023u1.html>; Bundesgericht, Switzerland, July 7, 2004, available at: <http://cisgw3.law.pace.edu/cases/040707s1.html>; Tribunale di Rimini, Italy, Nov. 26, 2002, available at: <http://cisgw3.law.pace.edu/cases/021126i3.html>; Bundesgerichtshof, Germany, Jan. 9, 2002, available at: <http://cisgw3.law.pace.edu/cases/020109g1.html>; Audiencia Provincial de Barcelona, Spain, June 20, 1997, available at: <http://cisgw3.law.pace.edu/cases/970620s4.html>; Gerechtshof Arnhem, Netherlands, May 21, 1996, available at: <http://cisgw3.law.pace.edu/cases/960521n1.html>.

¹¹² From the methodological point of view perhaps it would be more correct to state that this is a matter governed by the Convention but not expressly settled in it. See Single-Member Court of First Instance of Thessalonika 16319/2007, Greece, Flambouras (ed.), available at: <http://cisgw3.law.pace.edu/cases/080001gr.html>.

¹¹³ Serbian FTCA, Award No. T-23/08, Serbia, Nov. 10, 2009, available at: <http://cisgw3.law.pace.edu/cases/091110sb.html>.

would have been domestic are now subject to CISG. This significantly increases the number of cases in which the CISG can potentially be applied. Yet, only 92 cases have been reported so far.

Nevertheless, the number of cases reported from the region is not insignificant or disheartening. While it is true that the majority of them come from one jurisdiction (Serbia) and while it is true that some countries are lagging behind a lot, scarce reporting of the CISG is not unique to the Balkans. One may expect that the number of reported decisions will grow in the future as the awareness of the CISG (through education, training and moot court activities) continues to rise for at least three reasons. Firstly, a number of universities from the region traditionally participate at the Willem C. Vis Moot and that fosters teaching and studying of the CISG.¹¹⁴ This, in turn, raises awareness of the unique nature of the CISG and invokes interest in those who, one can hope, will become future case reporters. Furthermore, Queen Mary and Pace University Translation Program has a growing presence in the region and its continuous support of the translation of the cases will inevitably yield tangible results in the years to come.

As expected, some courts and arbitral tribunals exhibited a 'homeward' trend and applied domestic legislation where CISG should have been applied. Sometimes they disregarded CISG completely. On other occasions its scope of application was unduly restricted, which paved way for some domestic provisions to creep in. Overall, the frequency of such mistakes was not surprising and was comparable to the picture one gets from studying case law of other regions worldwide.

In a number of cases, and especially in arbitration cases, CISG was applied correctly and with due regard to the spirit of the Convention. Again, only some arbitration cases (all of them from Serbian FTCA) made reference to foreign court decisions and arbitral awards. Hopefully, such a trend will continue to grow in the region.

¹¹⁴ The universities from all of the Balkan countries, except for Albania and Bulgaria, have at least once participated at the Willem C. Vis International Commercial Arbitration Moot. Moreover, many of the teams from the region are not only regular participants at the Vis Moot qualification rounds but also regular participants in the final rounds of the Moot including semi-finals and finals of the competition and recipients of the prestigious awards for the best memoranda and the best speakers. Furthermore, teams from the region regularly take part at the Belgrade Open Pre-Moot, which is an annually held at the University of Belgrade Faculty of Law (Serbia) one week before the Vienna competition. See <http://www.cisg.law.pace.edu/cisg/moot/mootlist.html#18> and <http://www.ius.bg.ac.rs/moot/premoot.htm>.