CISG APPLICABILITY: A PARTICULAR CASE ON IMPACT OF AN ARTICLE 95 RESERVATION

Alcides Malavone Alberto Nobela
Master Candidate, Intenartional Business Law Program,
Faculty of Law, University of Macau

Abstract

The rules of private international law have been playing a very important role in international trade transactions which historically has been subject to numerous domestic legal systems. Therefore, when disputes arises from those transactions the parts always wonder which law will be applicable to solve the dispute due to the diversity of the various legal systems resulting in a uncertainty and additional transactional costs on the contracting parties. In this context, the Vienna Convention on the Contracts for the International Sale of Goods (CISG) is seen as a very important tool towards legal harmonisation in order to enable certainty, predictability and reduce transaction costs. Although this important role of the CISG, the reservation forseen in the article 95 may "apparently" hinder one of the most precious objectives of the CISG, uniform application of the legal instrument and the particular case in stake is: What is the solution if the parties (which place of business are Art. 95 reservatory Contracting States – and one is the forum State) choose as applicable law the law of a third country, which also is Contracting State. Will the CISG apply?. This is not a very easy question to assess and a reference to "choice of forum" is crutial as also some particular references to the implications of the reservation under Article 95 CISG bearing in mind the objectives of the Convention. So, it is worth to understand that the Convention tends to prevail over recourse to the forum´s private international law rules, meaning that the CISG will still be applicatble although the forum is located in an Article 95 reservatory Contracting State.

Key Words: CISG applicability; Article 95 reservation; Conntracting States; transactional costs; Legal Harmonisation.

1. Introduction

International trade historically has been subject to numerous domestic legal systems, mainly by virtue of the rules of private international law. The disputes arising out of international sales contracts have been settled at times according to the *lex loci contractus*, or the *lex loci solutionis*, or the *lex fori*. This diversity of the various legal systems applied has hindered the evolution of a strong, distinct, and uniform modern *lex mercatoria*. Such legal diversity creates legal uncertainty and imposes additional transactional costs on the contracting parties[1].

The reduction of costs and assurance of certainty in international business transactions was always a concern for the merchants. This concern led to creation of international organizations to deal with legal harmonization regarding business transactions in order to reach that aim. The United Nations Convention on Contracts for the International Sale of Goods is a result of that international effort and provides a uniform law for international sales of goods. But, as FRANCO FERRARI[2] said, in order to create uniformity, it is insufficient to merely create and enact uniform law instruments since these instruments can still be interpreted and, thus, applied differently by the judges of different countries. The problem we will try to analyze in this paper is also a matter of interpretation.

In this paper, with the topic "*CISG Applicability: A Particular Case on Impact of an Article 95 Reservation*" we will try to analyze a specific problem among many others that rise from the problem of the alternative applicability of the CISG when reservation under Article 95 has been made. The particular case is: *What is the solution if the parties (which place of business are Art. 95 reservatory Contracting States – and one is the forum State) choose as applicable law the law of a third country, which also is Contracting State. Will the CISG apply?*

To answer this question we will first present the background of the CISG (historical remarks and its structure) to easily understand the objectives of the Convention. Then questions regarding the applicability of CISG will be addressed, but in general basis. Following this analyze, a reference will be made to the question of "choice of forum" as part of rules of Private International Law once the answer to this question is fundamental for the solution of the whole problem. Last but not least, the particular problem presented above will be analyzed with particular reference to the implications of the reservation under Article 95 CISG

1 FELEMEGAS, John, *An International Approch to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, Cambridge University Press, 2007, p. 1.

2 FERRARI, Franco, *Contracts for the International Sale of Goods: Applicability and Applications of The 1980 United Nations Sales Convention*, Martinus Nijhoff Publishers, Leiden-Boston, 2012, p. 8.

bearing in mind the objectives of the CISG as a Whole.

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2. CISG Background[3]

Conventions are a world apart from domestic laws, and the differences must be understood to fully appreciate the value of an international unified law. The first observation is that conventions are not codes; they are, by necessity, political instruments, a compromise of the desires of the various and diverse drafters, though the 'texts themselves often represent masterpieces of diplomatic negotiations and draftsmanship'[4].

In this section we will address some notes regarding historical remarks and structure of CISG, since we believe that doing so will be easy to understand the main purposes of the Convention. Understanding the objectives of the Convention is half way to solve the particular problem aimed to be analyzed in the paper and draw up a reasonable opinion over the hypothetical case.

2.1. Historical Remarks

The United Nations Convention on Contracts for the International Sale of Goods provides a uniform text of law for international sales of goods. The preparation of the legal document began in 1930 at the International Institute for the Unification of Private Law (UNIDROIT)[5]. The Convention was prepared by the United Nations Commission on International Trade Law (UNCITRAL)[6] and then adopted by a diplomatic conference on 11 April 1980.

The final adoption of the Convention by UNCITRAL was after a long

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3 The basic information of this section is from http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf, accessed on 20th June 2013.

4 ZELLER, Bruno, *CISG and the Unification of International Trade Law - Current Controversies in Law Series,* [e-book], Fountoulakis, Christiana, Taylor & Francis, 2007, p. 8. Available at: MyiLibrary. <http://lib.myilibrary.com?ID=125951>, last visited on 7th July 2013.

5 For more details regarding UNIDROIT visit http://www.unidroit.org.

6 This Commission was formed in 1966 with the task of promoting the progressive harmonization and unification of the law of international trade, to attempt the revision the Uniform Law on the International Sale of Goods (ULIS) and the other was the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). See FERRARI, Franco, *Contracts for the International Sale of Goods: Applicability and Applications of The 1980 United Nations Sales Convention*, Martinus Nijhoff Publishers, Leiden-Boston, 2012, p. 6 .

interruption in the work as a result of the Second World War, the draft was submitted to a diplomatic conference in The Hague in April 1964, which adopted two conventions, one was the Uniform Law on the International Sale of Goods (ULIS) and the other was the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). Twenty-eight participating states approved the conventions; but the laws were not as successful as expected once they came into force only in nine countries[7].

Almost immediately upon the adoption of the two conventions there was widespread criticism of their provisions as reflecting primarily the legal traditions and economic realities of continental Western Europe, which was the region that had most actively contributed to their preparation. But when it became apparent that a revision of the aforementioned Uniform Laws would not be successful without substantial modifications, a working group was established with the task of drafting a new text[8].

As a result, and during the process of revision, one of the first tasks undertaken by UNCITRAL on its organization in 1968 was to enquire of States whether or not they intended to adhere to those conventions and the reasons for their positions. In the light of the responses received, UNCITRAL decided to study the two conventions to ascertain which modifications might render them capable of wider acceptance by countries of different legal, social and economic systems. The result of this study was the adoption of CISG by diplomatic conference held in Vienna from 10 March to 11 April 1980 which wider acceptability is evidenced by the fact that the original eleven States for which the Convention came into force on 1 January 1988 included States from every geographical region, every stage of economic development and every major legal, social and economic system[9]. The original eleven States were: Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, United States, Yugoslavia and Zambia.

Today, 79 States are parties to the Convention. The current updated status of the Convention is available on the UNCITRAL website[10]. Authoritative

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7 FERRARI, Franco, op.cit., p. 6.

8 FERRARI, Franco, op.cit., p. 7.

9 "The compromises in the drafting stage ran along many dimensions, such as between civil law and common law, between developed and developing nations and the old Soviet Bloc and North/South/East and West.[26] With the demise of the Soviet Bloc and the change in the strategic development of China, and with the increased emergence of independent states, it is obvious that the CISG is not a compromise along ideological lines but a compromise among markets and regulations". See: ZELLER, Bruno, *CISG and the Unification of International Trade Law - Current Controversies in Law Series,* [e-book], Fountoulakis, Christiana, Taylor & Francis, 2007, p. 8. Available at: MyiLibrary. <http://lib.myilibrary.com?ID=125951>, last visited on 7th July 2013.

10 http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html, visited on 20th June 2013.

information on the status of the Convention, as well as on related declarations, including with respect to territorial application and succession of States, may be found on the United Nations Treaty Collection on the Internet.

Since the Convention came into force more States adhered to (from 11 member States to 79 States). Although the CISG is from eighties, it does not mean that is a frozen legal instrument and in this line BRUNO ZELLER[11] affirmed that "the CISG is not an instrument that was developed in 1988 and is now 'frozen in time'. On the contrary, article 7 specifically allows the convention to adapt to changing market situations and is, therefore, a sales law for the 'real world'."

2.2. CISG Structure

The preamble introduces the 101 articles of the Convention on Contracts for International Sale of Goods (CISG) and provides the broad justification for the drafting of the Convention as well as the motivation of the signatory parties[12]. The Convention is divided into four parts. Part One deals with the scope of application of the Convention and the general provisions (Articles 1-13). Part Two contains the rules governing the formation of contracts for the international sale of goods (Articles 14-24). Part Three deals with the substantive rights and obligations of buyer and seller arising from the contract (Articles 25-88); is by far the longest and provides the main body of provisions for the Sale of Goods. Part Four contains the final clauses of the Convention concerning such matters as how and when it comes into force, the reservations and declarations that are permitted and the application of the Convention to international sales where both States concerned have the same or similar law on the subject (Articles 89-101).

According to LOUKAS MISTELIS[13], commenting on the Convention's structure, with particular focus to the Preamble of CISG, which is very important since introduces the main objectives of the Contracting States:

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11 ZELLER, Bruno, *CISG and the Unification of International Trade Law - Current Controversies in Law Series,* [e-book], Fountoulakis, Christiana, Taylor & Francis, 2007, p. 8. Available at: MyiLibrary. <http://lib.myilibrary.com?ID=125951>, last visited on 7th July 2013.

12 "*the importance of the Preamble for the application of the CISG is not yet clarified. This is particularly due to the generally diverging approaches of legal systems towards preambles. While lawyers from continental Europe regard preambles primarily as expressing certain intentions and against their methodological background are rather reserved in attributing greater value to preambles, this is different with lawyers from Common Law legal systems where preambles set the frame for the following provisions of a contract or a law and are thus awarded greater – at least – interpretative value.*" (SCHWENZER, Ingeborg, *Commentary on the UN Convention on the International Sale of Goods (CISG),* Third Edition, Oxford University Press, 2010, p. 14).

13 KROLL, Stefan, MISTELIS, Loukas & VISCASILLAS, Pilar Perales, *UN Convention on Contracts for the International Sale of Goods (CISG): Commentary*, C.H.Beck-Hart-Nomos, 2011, p. 19-20.

The Convention fits well with the main objectives of UNCITRAL: i.e. the facilitation and development of international trade and the promotion of friendly relations among States on the basis of equality and harmonization of law. In this regard, harmonization of law is also the convergence of legal systems: one should consider different social, economic and legal backgrounds. It is for this reason that Conventions, such as the CISG, aim at lifting barriers imposed by different legal systems and creating a level playing field amongst nations and their traders. The preamble of the CISG clearly spells out the said objectives.

The most important issue in relation to the Preamble is whether it has any role in the interpretation of the Convention it introduces. Different views have been expressed. Leading commentators have correctly indicated that the Preamble has as its main objective to manifest the "goals of the signatory states" and hence is of no use for interpretation of normative substantive provisions. Moreover, the CISG ultimately has a "technical" character and specific rules of interpretation, such as those found in Article 7, so that "the scope for interpretation in light of the Preamble may not be very wide". However, the contrary view that the Preamble "informs many other provisions" of the Convention also exists in the literature. In this vein, "the spirit of the Preamble should also be taken account of when agreed texts of sales contracts are to be interpreted."

There are references to the Preamble in the case law. In a 2002 case from the United States, the court states that "[t]he intent of the contracting parties to the CISG can be discerned from the introductory text." The issue in question was to decide what law governed the sales contract: state law or the CISG. The court found that the Convention's "expressly stated goal of developing uniform international contract law to promote international trade indicates the intent of the parties to the treaty to have the treaty pre-empt state law causes of action."

Despite the character of the Preamble as an expression of political declaration of the Contracting States which may well contrast with the technical/normative nature of the substantive provisions of the Convention, it may be used for the compliance of the possible interpretations with the spirit of the Convention, especially in legal cultures where the Preamble is looked at customarily.

Although the importance of the Preamble for the application of the CISG

is not yet clarified, the prevailing and correct view under the CISG holds that the Preamble has interpretative value and can help to avoid the interpretation problem of *homeward trend*[14]. It is common knowledge, and has been for some time, that "drafting uniform words is one thing; ensuring their uniformity is another", since "even when outward uniformity is achieved (...), uniform application of the agreed rules is by no means guaranteed, as in practice different countries almost inevitably come to put different interpretations upon the same enacted words." In order to reduce the risk of diverging interpretations of one and the same text, that text must also be interpreted in a uniform way [15]. The intentions of the drafters of the Convention expressed in the Preamble provide guidance in regard to the often difficult task to interpret the CISG in a manner promoting 'good faith in international trade' (Article 7(1)). An interpretation of the Convention's rules under Article 7(1) must therefore ultimately lead to results which are in conformity with the intentions of their drafters and the spirit of the Convention as laid down and embodied in the Preamble[16].

As we can see, the main concern and objective with the enactment of CISG was and still is to have a uniform law regarding international sales of goods, a law broadly applicable. This is what we are going to try to find out if is accomplished when in face of the previous presented problem of reservation under Article 95 CISG.

3. Sphere of application

As mentioned in previous section, Part One of CISG deals with the scope of application of the Convention and the general provisions (Articles 1-13). But our

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14 "the CISG is to be interpreted "autonomously", not "nationalistically", i.e. not in the light of domestic law, as difficult as this may be. Consequently, one should not have recourse to any domestic concept in order to solve interpretive problems arising from the CISG, as also" stated in a recent Swiss court decision, since this nationalistic approach" would not only lead to divergences, but, ultimately, to the promotion of forum hopping,20 which, however, the CISG wants to reduce". See MEYER, Olaf, JANSSEN, Andre, *CISG Methodology*, Sellier European Law Publishers, Munich, 2009, p. 173-174. eBook available at http://ehis.ebscohost.com/ehost/detail?sid=7534fc9a-8222-49a5-9bde-16f176ddf4a4%40sessionmgr115&vid=1&hid=106&bdata=JnNpdGU9ZWhvc3QtbGl2ZQ%3d%3d#db=nlebk&AN=283445&anchor=tocAnchor, visited on 9th July 2013.

15 MEYER, Olaf, JANSSEN, Andre, *CISG Methodology*, Sellier European Law Publishers, Munich, 2009, p. 171-172. eBook available at http://ehis.ebscohost.com/ehost/detail?sid=7534fc9a-8222-49a5-9bde-16f176ddf4a4%40sessionmgr115&vid=1&hid=106&bdata=JnNpdGU9ZWhvc3QtbGl2ZQ%3d%3d#db=nlebk&AN=283445&anchor=tocAnchor, visited on 9th July 2013.

16 SCHWENZER, Ingeborg, *Commentary on the UN Convention on the International Sale of Goods (CISG),* Third Edition, Oxford University Press, 2010, p. 14.

concern is regarding the scope of application: "This part contains two groups of provisions: Articles 1, 2, 3, and 6 lay down which contracts fall within the scope of the CISG; Articles 4 and 5 determine the extent to which they are governed by the Convention, ie which parts of sales law and general contract law are to be governed by the CISG. Article 6 also belongs in the second group in so far as it makes it possible for the parties partially to exclude the CISG"[17].

The articles on scope of application indicate both what is covered by the Convention and what is not covered. The question of *what is covered* is related to the substantive sphere of application, and is not relevant for the purpose of this paper and which answer is: "the Convention applies to contracts of sale of goods"[18] [19]. What really concern for the particular case we are about to solve is not what is covered by the Convention but *to whom the Convention is applicable* regarding their places of business in a particular case (when the parties from different Contracting States have the *forum* located in a reservatory Contracting State and they choose applicable law of other Contracting State). Apparently, the easy answer according to the Convention itself is: "the Convention applies to contracts of sale of goods *between parties whose places of business are in different States and either both of those States are Contracting States or the rules of private international law lead to the law of a Contracting State*. This answer still has to be clarified since concerns regarding its interpretations may arise.

The Part four of the Convention can also have some impact on the sphere of application of the Convention, particularly the Article 95 reservation according to which a Contracting State declare not to be bound by Article 1(1)(b). Detailed

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17 SCHWENZER, Ingeborg, *Commentary on the UN Convention on the International Sale of Goods (CISG),* Third Edition, Oxford University Press, 2010, p. 19. See also HONNOLD, John, *Uniform Law for International Sales Under the 1980 United Nations Convention*, Second Edition, Kluwer Law and Taxation Publishers, USA, 1991, p. 73.

18 Is not our intent to discuss what is "goods" or "sale of goods" but just for reference: goods include "all personal chattels other than things in action and money". And sale of goods is "a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called price". So, "a sale of goods differs, for example, from a contract for hire of goods because the property in the goods (the title to the goods) changes hands. It differs from a gift of the goods because the buyer pays the seller money for goods in sale contract. It also differs from a contract of barter, in which goods are exchanged for goods or a combination of goods and money." (See: LONGSHAW, Alex & TOOKEY, Michael, *Commercial Law and Practice,* College of Law Publishing, Great Britain, 2009, p. 13).

19 "From a combined reading of Art. 1 with Arts. 2 and 3 it is concluded that not all sales contracts will be covered by the CISG. (...) certain restrictions exist in respect of certain goods and certain kinds of contracts of sale". (See: KROLL, Stefan, MISTELIS, Loukas & VISCASILLAS, Pilar Perales, *UN Convention on Contracts for the International Sale of Goods (CISG): Commentary*, C.H.Beck-Hart-Nomos, 2011, p. 22).

analyze of this reservation will be addressed later.

3.1. Notes regarding Article 1 CISG

Article 1 introduces a number of criteria regarding the scope of application of CISG. *First*, the CISG requires the underlying transaction to be a contract of sale, but stops short of providing an express definition of such contract[20]. *Second*, it applies to the international sale of goods: the internationality is established on the basis that the contracting parties have their place of business in different States (Art. 1(1)[21]). This is a relative internationality and has to be assessed at the time of conclusion of contract. *Third*, the CISG requires that the parties of the sales contract relate to more than one Contracting State (Art. 1(1)(a)); such internationality may well be established by operation of private international law which may refer the matter to the law of a Contracting State (Art. 1(1)(b)).

Even if the CISG has to be applicable following the mentioned criteria we still have concern regarding its interpretation. So, two problems can be readily discovered. The first one is that domestic courts are interpreting international instruments; despite the mandate of article 7, ethnocentric interpretation is and will remain a concern. The second problem is that since conventions are not codes, gaps within the Convention will exist. It has been argued that the reason for such phenomena is the fact that conventions are seeking to legislate for the ordinary law, such as sales law, and often 'do so in a piecemeal fashion'[22]. This two problems can undermine the uniformity of the Convention and uncertainty can emerge. But, being the Convention a tool, it is as good as the hands that use it, like happens with most tools.

3.1.1. Substantive application (Contract of Sales of Goods[23])

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20 This definition may be deduced from Articles 30 and 53 of CISG, which goes in line with the definition presented in *supra* note 12.

21 See Article 1(1) CISG: "This Convention applies to contractgs of sale of goods between parties whose places of business are in different states:

(a) When the States are Contracting States; or

(b) When the rules of private international law lead to the application of the law of a Contracting State."

22 ZELLER, Bruno, *CISG and the Unification of International Trade Law - Current Controversies in Law Series,* [e-book], Fountoulakis, Christiana, Taylor & Francis, 2007, p. 9. Available at: MyiLibrary. <http://lib.myilibrary.com?ID=125951>, last visited on 7th July 2013.

23 "The determination that the Convention applies by virtue of Article 1(1) presupposes that the transaction in question can be classified as a 'sale' of 'goods'. Although neither of these key concept is defined in the treaty text, we know that a CISG transaction involves the 'delivery' of 'goods' and also the 'transfer the property' in them". See LOOKOFSKY, Joseph, *Understanding the CISG: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods*, Third (worldwide) Edition, Published by Kluwer Law International,

Adding what was said earlier regarding the subject matters covered by CISG, the *Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods*[24] clarify that:

> *Contracts of sale are distinguished from contracts for services in two respects by article 3. A contract for the supply of goods to be manufactured or produced is considered to be a sale unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for their manufacture or production. When the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services, the Convention does not apply.*
> *The Convention contains a list of types of sales that are excluded from the Convention, either because of the purpose of the sale (goods bought for personal, family or household use), the nature of the sale (sale by auction, on execution or otherwise by law) or the nature of the goods (stocks, shares, investment securities, negotiable instruments, money, ships, vessels, hovercraft, aircraft or electricity). In many States some or all of such sales are governed by special rules reflecting their special nature.*
> *Several articles make clear that the subject matter of the Convention is restricted to formation of the contract and the rights and duties of the buyer and seller arising from such a contract. In particular, the Convention is not concerned with the validity of the contract, the effect which the contract may have on the property in the goods sold or the liability of the seller for death or personal injury caused by the goods to any person.*

3.1.2. Territorial Application

The relevant criterion, for the purposes of this paper, is the third one, particularly in what concerns to Art. 1(1)(b); since our presented problem is linked to Article 95 reservation, according to which a contracting State may prefer not to be bound by the Art. 1(1)(b). A few States have availed themselves of the authorization in article 95 to declare that they would apply the Convention only

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Netherlands, 2008, p. 17.

24 Available at http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf, p. 35. Las visited on 25 June 2013.

in the situation of Art. 1(1)(a) [25] and not in the case of Art. 1(1)(b)[26]. So, these two paragraphs deserve more explanatory notes.

Art. 1(1) provides that the basic criterion for the application of CISG to a contract for the sale of goods as well as to its formation is that the parties' places of business are in different States[27]. For the CISG to be applicable as part of the law of forum, it is not *per se* sufficient that the sales contract is an international one, unlike under the 1964 Hague Uniform Sales Laws, which had adopted a 'universalist' approach[28] pretending "to avoid the uncertainty inherent in general rules of private international law"[29]. This is apparent from Article 1(1) CISG which lists, as we saw, two alternative applicability requirements[30]. One alternative criterion can be found in Art. 1(1)(a) – direct application – and the other alternative application is found in Art. 1(1)(b) – indirect application.

i. CISG's Direct Application (Article 1(1)(a))

According to Article 1(1)(a) of the Convention, it is applicable when place of business of the seller and the buyer are in different Contracting States. In other words, it means that the CISG directs de *fora* of all Contracting States to apply the Convention in such cases. So, Article 1(1)(a) establishes the principle of *direct application of the Convention*. Of course the domestic *lex forum* can still be applicable simultaneously with the Convention for those issues not covered by the Convention like, for instance, the validity of the Sales Contract. In the words of BRUNO ZELLER[31] "Article 7(2)

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25 "(...) Art. 1(1)(a) makes the application of the Convention 'automatic' or 'autonomous' or 'direct', withoutany need for recourse to private international law rules". (See KROLL, Stefan, MISTELIS, Loukas & VISCASILLAS, Pilar Perales, *UN Convention on Contracts for the International Sale of Goods (CISG): Commentary*, C.H.Beck-Hart-Nomos, 2011, p. 35.)

26 The CISG apply "where only one (or neither) party has its relevant place of business in Contracting States, if the rules of private international law lead to the law of a Contracting State"

27 KROLL, Stefan, MISTELIS, Loukas & VISCASILLAS, Pilar Perales, *UN Convention on Contracts for the International Sale of Goods (CISG): Commentary*, C.H.Beck-Hart-Nomos, 2011, p. 23.

28 In the sense that "Contracting States would apply the to international sales without regard to whether there was any connection between the transaction and any State that had adopted the Convention". See HONNOLD, John, *Uniform Law for International Sales Under the 1980 United Nations Convention*, Second Edition, Kluwer Law and Taxation Publishers, USA, 1991, p. 80.

29 HONNOLD, John, *Uniform Law for International Sales Under the 1980 United Nations Convention*, Second Edition, Kluwer Law and Taxation Publishers, USA, 1991, p. 80.

30 FERRARI, Franco, *Contracts for the International Sale of Goods: Applicability and Applications of The 1980 United Nations Sales Convention*, Martinus Nijhoff Publishers, Leiden-Boston, 2012, p. 59.

31 ZELLER, Bruno, *CISG and the Unification of International Trade Law - Current Controversies in Law Series,* [e-book], Fountoulakis, Christiana, Taylor & Francis, 2007, p. 29. Available at:

has recognized that there are gaps within the Convention which need filling and, at least indirectly, it clarifies the relationship between the CISG and domestic law".

Article 7(2) is a significant, albeit elusive rule which provides a tool for plugging certain 'gaps' in the CISG text. According to JOSEPH LOOKOFSK[32] if in a given case a CISG 'general principle' is discerned and deemed capable of filling a gap in the Convention text, that principle may obviate the need to find and apply a potentially 'competing' domestic rule. Article 7(2) affects only matters which are 'governed' by the Convention, but which are not expressly 'settled' in it. Other matters *not* 'governed' by the Convention must be 'settled' by resort to *non*-Convention rules and principles. In other ('borderline') situations, it may be difficult to draw a clear line between matters which are 'governed' by the Convention and those that are not.

In this section first we will address some notes related to the genesis of Article 1(1)(a) and then focus attention to its applicability.

a. Genesis of Article 1(1)(a) [33]

As all the CISG, this subparagraph was developed in framing the previous two 1964 Hague Conventions, ULIS and ULF. So, the drafts for ULIS and ULF that were laid before the 1964 Hague Conference provided, as we mentioned before, that Contracting States would apply the law to international sales without regard to whether there was any connection between the transaction and any State that had adopted the Convention. This was done by providing that the uniform Law 'shall apply' to transactions between parties whose places of business were in two '*different* States'; the fact that neither State had adopted the Convention was irrelevant (ULIS Art. 1; ULF Art. 1). To drive the point home, both uniform laws provided: 'Rules of private international law shall be excluded for the purpose of the application of the present Law…'. ULIS Art. 2; ULF Art. 1-9.

Many delegates criticized this 'universalist' approach as 'legal imperialism'. To overcome this impasse a provision was added permitting Contracting States, by reservation, to amend the definition of international sale so that it would refer to transactions between parties 'whose places of business are in the territories of different *Contracting States*…'. For the CISG approval there was prompt agreement that the Convention would apply when the places of business of the

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MyiLibrary. <http://lib.myilibrary.com?ID=125951>, last visited on 7th July 2013.

32 LOOKOFSKY, Joseph, *Understanding the CISG: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods*, Third (worldwide) Edition, Published by Kluwer Law International, Netherlands, 2008, P. 38-39.

33 For more information see: HONNOLD, John, *Uniform Law for International Sales Under the 1980 United Nations Convention*, Second Edition, Kluwer Law and Taxation Publishers, USA, 1991, p. 80.

seller and buyer were in different Contracting States (Sub (1)(a)).

The convention's central objective was, as said earlier, to reduce the legal uncertainty that plagued trade between different legal systems – uncertainty as to which legal system was applicable under rules of private international law and uncertainty that inherent in the likelihood that the applicable domestic law would be unknown to at least one of the parties. Applicability based on Sub (1) (a) responds to this central interest in certainty in two ways: (1) Applicability is not subject to the uncertainties inherent in general rules of conflicts (Private International Law); and (2) When the parties have their places of business in different Contracting States, the applicable domestic law, whether chosen by agreement or pursuant to conflicts rules, is likely to be unknown to at least one of the parties; these uncertainties are replaced by the applicability of a single uniform law to which both countries (among many others) have agreed.

b. Article 1(1)(a) Applicability

According to Article 1(1)(a) CISG the Convention is directly applicable provided that the parties in the sale of goods contract are from different Contracting States. "In such cases the Convention directs the *fora* of all Contracting States to apply the Convention"[34]. In other words, the application of the CISG is autonomous or direct when the States in which the parties have their relevant places of business are Contracting States. According to this criterion, is not required to the parties to be aware to the fact that the States where their place of business is located are Contracting States. So, whenever the mentioned requirements are met and the forum is located in a CISG Contracting State and *the parties have not excluded the Convention*[35], the CISG is applicable irrespective of the law applicable by virtue of the rules of private international law.

But where, however, the parties have their places of business in different Contracting States, but the forum is located in a non-Contracting State and its rules of private international law lead to the application of either the law of the forum or the law of a non-Contracting State, the CISG will not be applicable automatically. According to FRANCO FERRARI[36], when the number of Contracting States was

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34 HONNOLD, John, *Uniform Law for International Sales Under the 1980 United Nations Convention*, Second Edition, Kluwer Law and Taxation Publishers, USA, 1991, p. 80.

35 "the CISG will not be automatically applied if a third country's law would apply because of a choice of law agreement by which the parties to the sales contract express their intention to exclude the CISG, a right the parties have pursuant to Art. 6 of the Convention". (KROLL, Stefan, MISTELIS, Loukas & VISCASILLAS, Pilar Perales, *UN Convention on Contracts for the International Sale of Goods (CISG): Commentary*, C.H.Beck-Hart-Nomos, 2011, p. 36)

36 FERRARI, Franco, *Contracts for the International Sale of Goods: Applicability and Applications of The 1980 United Nations Sales Convention*, Martinus Nijhoff Publishers, Leiden-Boston, 2012, p. 62.

still rather small, the mentioned criterion of applicability rarely led to the CISG's application. Today, however, as there are *seventy-nine*[37] Contracting States already, this criterion is the one which most often leads to the CISG's application.

In principle, this criterion causes no problems. Problems may only arise in respect of whether a State is considered a Contracting State or not[38]. It is important to fix and bear in mind when a State becomes a Contracting State. This is to be determined by Art. 99; inter-temporal rules about the application of the CISG pursuant Art. 1(1)(a) are contained in Art. 100. In addition, one should also ascertain whether the States in which the parties have their relevant places of business have made either an Art. 92 or an Art. 93 reservation[39].

For purposes of this paper we will focus more on the indirect application, so there is no need to deeply analyze all problems concerning the direct application of CISG.

ii. CISG Indirect Application (Article 1(1)(b))

Article 1(1)(b) establishes the second ground of applicability of the Convention, according to which the Convention is applicable only if the rules of Private International Law of the *forum* leads to application of the Law of a Contracting State; but the State where the *forum* is located only apply the Convention if is not an Article 95 reservatory Contracting State. So, because the Convention is therefore indirectly applicable by virtue of Article 1(1)(b) we are in face of the principle of *indirect application of the Convention*. Again, the domestic law of the State to which the rules of Private International Law led to application can still be applicable simultaneously with the Convention for those issues although 'governed' by the CISG are not 'settled' therein, and issues not covered by the Convention like, for instance, the validity of the Sales Contract[40].

In this section first we will address some notes related to the genesis of

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37 Available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html, visited on 26 June 2013.

38 Generally, a Contracting State is any State which has implemented the Convention by ratification or accession pursuant to Art. 91(2) and Art. 91(3) and by its entry into force in accordance with Art. 99(2) and Art. 91(4). For more discussions regarding this kind of problems see: FERRARI, Franco, *Contracts for the International Sale of Goods: Applicability and Applications of The 1980 United Nations Sales Convention*, Martinus Nijhoff Publishers, Leiden-Boston, 2012, p. 63ss.

39 KROLL, Stefan, MISTELIS, Loukas & VISCASILLAS, Pilar Perales, *UN Convention on Contracts for the International Sale of Goods (CISG): Commentary*, C.H.Beck-Hart-Nomos, 2011, p. 36.

40 Regarding *gap-filling methodology* see also FELEMEGAS, John, *An International Approch to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, Cambridge University Press, 2007, p. 22-27.

Article 1(1)(a) and then focus attention to its applicability.

a. Genesis of Article 1(1)(b)

Though there was prompt agreement on Sub 1(a) of Article 1, as mentioned in previous section, the same did not occur regarding the second ground for applicability, Sub 1(b) since was sharply contested on the ground that basing applicability on rules of private international law would undermine the legal certainty that was the CISG's central goal. So, to meet this objection the Conference added Article 95 which permitted Contracting States to reject Sub (1)(b).

c. Article 1(1)(b) Applicability

As expressly stated by Article 1(1)(b) CISG, the Convention can be applicable, despite some statements to the contrary, where one or even both parties do not have their place of business in Contracting States, provided that the rules of private international law lead to the application of the law of a Contracting State.

With the following example, given and explained by JOHN HONNOLD[41], we can understand the reasons behind this subparagraph: *Seller's place of business is in State A and the Buyer's place of business is in State B. State A is a Contracting State; State B is not. Buyer brings an action against Seller in State A; State A has retained Sub (1)(b). The rules on private international law of State A point to the law of Seller's state – State A.*

In this example, Sub (1)(a) is not applicable since the parties do not have their places of business in two different *Contracting* States. However, Sub (1)(b) does invoke the Convention, since 'the rules of private international law lead to the application of the law of a Contracting State'; in this event Article 1(1) states that 'This Convention Applies.'

It is not always clear which rules of private international law would be relevant, but it is reasonable to assume that they will be those of the forum, at least in the context of litigation[42]. According to the OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE[43] it appears that the "*law* of a Contracting State" referred to in Article 1(1)(b) is the substantive law.

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41 HONNOLD, John, *Uniform Law for International Sales Under the 1980 United Nations Convention*, Second Edition, Kluwer Law and Taxation Publishers, USA, 1991, p. 84.

42 KROLL, Stefan, MISTELIS, Loukas & VISCASILLAS, Pilar Perales, *UN Convention on Contracts for the International Sale of Goods (CISG): Commentary*, C.H.Beck-Hart-Nomos, 2011, p. 37.

43 *Apud* FERRARI, Franco, *Contracts for the International Sale of Goods: Applicability and Applications of The 1980 United Nations Sales Convention*, Martinus Nijhoff Publishers, Leiden-Boston, 2012, p. 73 *note* 360.

4. Choice of forum as Part of Private International Rules

As we mentioned in previous sub-section, to understand how the Article 1(1)(b) operates and, so, when it can lead to the application of CISG, it is fundamental to first determine what is meant by 'private international law', a concept which the Convention does not define.

There are differences between the rules of private international law in different countries. Whilst, for instance, the parties' freedom to choose the law applicable to their contract has long been accepted in many countries, such as all Member States of the European Union, in other countries, a similar choice does not necessarily produce any effect.

Other difference between States, regarding private international law in respect to contracts, is that many countries have, as have many international conventions, rejected the doctrine of renvoi; nevertheless, there are a few countries which still accept that doctrine.

In the opinion of FRANCO FERRARI[44] the concept of 'private international law' is one of the concepts which is to be construed in the light of domestic law. 'Private international law' (i.e., choice of law) rules continue to play a role even if the CISG is in force[45]. And this is why it is not surprising that in some Contracting States, which have acknowledged party autonomy as a connecting factor, the CISG has been applied by virtue of a choice of law in cases where it was not applicable by virtue of Article 1(1)(a). In practice this means, for instance, that where the forum is located in a Contracting State in which the relevant rules of private international law of sales contracts are based upon the *Rome Convention*[46] or the Regulation as in many European countries, the Convention will generally be applicable when the law either chosen by the parties or, absent choice of law, that having the *closest connection*[47] with the contract, is the law of a Contracting State. As result of this common understanding, several courts as well as arbitral tribunals have already relied upon the parties' designation of the applicable law to make the CISG applicable by virtue of Article 1(1)(b).

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44 FERRARI, Franco, *Contracts for the International Sale of Goods: Applicability and Applications of The 1980 United Nations Sales Convention*, Martinus Nijhoff Publishers, Leiden-Boston, 2012, p. 75.

45 SPANOGLE, John A., WINSHIP, Peter, *International Sales Law: A Problem-Oriented* Coursebook, Second Edition, West, A Thomson Reuters business, 2012, P. 57.

46 Convention on the Law Applicable to Contractual Obligations – opened for signature in Rome on 19 June 1980 (80/934/EEC). Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41980A0934:EN:NOT, visited on 9th July 2013.

47 For details regarding the principle read Article 4 of the Rome Convention.

In His conclusions regarding this matter, FRANCO FERRARI[48] suggests one general rule: "provided that the parties have not excluded the CISG and that no *election iuris* occurred, the CISG should be applicable in the courts of Contracting States – which did not limit the scope of Article 1(1)(b) by means of an Article 95 reservation – *at least* to most international sales contracts involving a seller who has its place of business in a Contracting (non-reservatory) State."

The *Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods*[49], in the same vein, states that the Convention may also apply as the law applicable to the contract if so chosen by the parties. In that case, the operation of the Convention will be subject to any limits on contractual stipulations set by the otherwise applicable law.

The basic principle of contractual freedom in the international sale of goods is recognized by the provision that permits the parties to exclude the application of this Convention or derogate from or vary the effect of any of its provisions. This exclusion will occur, for example, if parties choose the law of a non-contracting State or the substantive domestic law of a contracting State as the law applicable to the contract. Derogation from the Convention will occur whenever a provision in the contract provides a different rule from that found in the Convention.

Choice of Law clauses are very common in international sale of goods contracts[50]. Normally, the choice will be expressly contained in a choice of law clause in the contract. According to FAWCETT/HARRIS/BRIDGE[51] the choice of law made by the parties in a contract of international sale of goods can have different effects *in a forum which is a Contracting State to the CISG* and *in a forum which is a non-Contracting State of the CISG*.

4.1 Effect in a forum which is a Contracting State to the CISG

One question that has emerged in the case law concerns the significance of a choice of law clause in the contract selecting as the applicable law the law of a state that happens to be a Contracting State to the CISG. The parties might choose the law of a Contracting State where otherwise the CISG is applicable

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48 FERRARI, Franco, *Contracts for the International Sale of Goods: Applicability and Applications of The 1980 United Nations Sales Convention*, Martinus Nijhoff Publishers, Leiden-Boston, 2012, p. 83ss.

49 Available at http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf, p. 35ss. Las visited on 25 June 2013.

50 "An express choice of law clause will be valid, even if the contract is otherwise wholly unconnected with the law chosen". (FAWCETT, James, HARRIS, Jonathan, BRIDGE, Michael, *International Sale of Goods in the Conflict of* Laws, Oxford University Press, 2005, p. 690).

51 FAWCETT, James, HARRIS, Jonathan, BRIDGE, Michael, *International Sale of Goods in the Conflict of* Laws, Oxford University Press, 2005, p. 680 ss.

because the parties are resident in different Contracting States to the CISG. If their choice, as interpreted by the forum of a Contracting State to the CISG, were to lead to the CISG by way of Article 1(1)(b), then the result would be the same as if the applicable law clause had been disregarded and the CISG applied by way of Article 1(1)(a).

Where they are resident in different states, where neither or only one of these is a Contracting State to the CISG, the effect of that choice in a forum that accepts the autonomy of the parties to select their own applicable law is that where the forum is a Contracting State to the CISG, it will be bound to apply the Convention on the basis of Article 1(1)(a).

4.2. Effect in a forum which is a non-Contracting State to the CISG

If the forum is not a Contracting State to the CISG the position is more difficult. This forum is under no obligation to apply the CISG directly. The CISG could only be reached by way of the forum's private international law rules (an approach similar to the Article 1(1)(b) route taken by Contracting States to the CISG). This would mean giving effect to the clause as leading into the CISG in so far as the forum respects the parties' freedom to choose their own applicable law.

5. Reservations Under Article 95 CISG

As previously mentioned, the CISG's "*indirect*" application has been criticized, mainly by so-called socialist countries, which "*wanted to avoid the excessive restriction of the applicability of their domestic statutes governing the relationships with foreign parties*", but also by the United States. As a consequence of such criticism, the drafters of the CISG provided for a reservation clause, Article 95 CISG, which gives the Contracting States the option not to be bound by Article 1(1)(b)[52].

As we said earlier, the Part four of the Convention (Final Provisions) permits a certain number of declarations. There is a special declaration for States that have different systems of law governing contracts of sale in different parts of their territory. Further, a State may declare that it will not be bound by Part II on formation of contracts or Part III on the rights and obligations of the buyer and seller. According to SCHLECHTRIEM/SCHWENZER/HACHEM[53] the

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52 FERRARI, Franco, *Overview of Case Law on the CISG's International Sphere of Application and Its Applicability Requirements (Articles 1(1)(A) and (B))*, in: International Business Law Journal 961, 2002, p. 967. Available at http://www.heinonline.org/HOL/Page?handle=hein.journals/ibuslj18&id=963&collection=journals&index=journals/ibuslj, visited on 2nd July 2013.

53 In SCHWENZER, Ingeborg, *Commentary on the UN Convention on the International Sale of*

provisions of Part four can be divided into different groups which are diplomatic clauses, clauses containing or dealing with reservations, clauses dealing with temporal aspects of the Convention, and clauses intending to clarify the relationship of the CISG to other legal instruments.

The provisions concerning reservations are contained in Articles 92-97, but for purposes of this paper the relevant declaration is that of Article 95. A State's article 95 declaration, made at the time of the deposit of its instrument of ratification, acceptance, approval or accession of the Convention, excludes the application of the Convention via article 1 (1) (b) – i.e., if the rules of private international law lead to the law of a Contracting State. Accordingly, if there is a dispute between a party from a Contracting State that has made an article 95 declaration and a party located in a non-contracting State, the applicable law is determined based on the domestic conflict of laws rules. The declaration does not impact the application of the Convention between two Contracting States under article 1 (1) (a)[54].

Back to the example given by JOHN HONNOLD (*Supra note* 30) in which State A, the place of business of the seller, was a Contracting State but State B, where the buyer was located, was not a Contracting State. Now let us assume that State A in ratifying the Convention made the declaration permitted by Article 95. State A will now apply the Convention only to the sales covered by Sub (1) (a) – transactions between parties in two *Contracting* States. Since Sub (1)(b) is excluded, State A's rules of private international law designating the law of State A now invoke its domestic law rather than the Convention.

Logically, as effect, an Article 95 declaration narrows the applicability of CISG and enlarges the applicability of the domestic law of the declaring State, where the Convention does not apply by virtue of Article 1(1)(a) upon which the Article 95 reservation does not impact. So, in certain sense, the Article 95 declaration undermines the pretended uniformity and universality of the Convention. Unfortunately, however, there is no agreement on the extent to which the Article 95 reservation narrows down the CISG's applicability[55].

Currently, the following States have made an Article 95 declaration: the People's Republic of China, Armenia, Czech Republic, Saint Vincent and the

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Goods (CISG), Third Edition, Oxford University Press, 2010, p. 1171.

54 See UNCITRAL, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, 2012 Edition, p. 442. Available at http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf, last visited on 3rd July 2013.

55 FERRARI, Franco, *Contracts for the International Sale of Goods: Applicability and Applications of The 1980 United Nations Sales Convention*, Martinus Nijhoff Publishers, Leiden-Boston, 2012, p. 87.

Grenadines, Singapore, Slovakia, and the United States of America[56].

Interesting questions arise from the interplay of these differing choices[57]. Three main situations are discussed regarding the consequences of Article 95 reservations[58]: 1) the *forum is located in a reservatory State* the rules of private international law of which lead to the applicability of the law of a Contracting State – independently from whether this State declared a reservation or not; 2) the *forum is located in a Contracting non-reservatory State* the rules of private international law of which lead to the applicability of the law of a Contracting State that has declared an Article 95 reservation; 3) the *forum is located in a non-Contracting State* the rules of private international law of which lead to the law of a Contracting State that declared an Article 95 reservation.

Although according to JOHN HONNOLD[59] "*Sub (1)(b) is irrelevant when both the seller and the buyer are in Contracting States*" we think that this assertion is apparently true, and besides the previous three main situations one can be added as the fourth one. This is the case where the *forum is located in a reservatory State* the rules of private international law of which (*the choice made by the parties*) lead to the application of the law of a Contracting State – independently from whether this State declared an Article 95 reservation or not. This is the main problem we assumed to try to solve and purpose of this paper.

5.1 Forum Located in a Reservatory State and Lead to Application of the Law of a Contracting State Regardless if is Reservatory One or Not

In this line of cases the CISG cannot apply at all in those instances, since the Contracting reservatory States are bound to apply the CISG only where both parties have their places of business in Contracting States according to Article 1(1)(a). It is certainly true that in this line of cases the courts of reservatory States cannot apply the CISG by virtue of Article 1(1)(b). Nevertheless, it is here suggested that even the courts of a reservatory State should apply the CISG in the aforementioned line of cases – not by virtue of Article 1(1)(b), of course – but

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56 For more information see http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html, visited on 3rd July 2013.

57 HONNOLD, John, *Uniform Law for International Sales Under the 1980 United Nations Convention*, Second Edition, Kluwer Law and Taxation Publishers, USA, 1991, p. 89.

58 For reference to this three cases see: FERRARI, Franco, *Contracts for the International Sale of Goods: Applicability and Applications of The 1980 United Nations Sales Convention*, Martinus Nijhoff Publishers, Leiden-Boston, 2012, p. 88-92; & HONNOLD, John, *Uniform Law for International Sales Under the 1980 United Nations Convention*, Second Edition, Kluwer Law and Taxation Publishers, USA, 1991, p. 90-94.

59 HONNOLD, John, *Uniform Law for International Sales Under the 1980 United Nations Convention*, Second Edition, Kluwer Law and Taxation Publishers, USA, 1991, p. 89.

as part of the law of Contracting State to which the conflict of law rules lead. There is, however, a limit: if it is true, as it has been suggested, that the rationale behind the possibility of Article 95 reservation is to promote the application of domestic law, it must be concluded that in cases where the forum is located in a Contracting reservatory State the private international law rules of which lead to the law of the forum, the CISG is inapplicable.

5.2 Forum Located in a Contracting Non-Reservatory State and Lead to Application of the Law of a Reservatory State

Here also, according to some commentators, the CISG should not be applicable because the judges from the reservatory States would themselves not apply the CISG. Consequently, for instance, in the situation where State A has not taken the reservation under Article 95 and State B has done so, and where the parties have their places of business in State B and in non-Contracting State C, consistency would appear to require that a court in State A should, if it finds of State B to be applicable, select the domestic law of that State as the law governing the contract rather than the Convention. But the preferable view, however, seems to be the contrary, not only because generally a reservation of the kind at hand made by one State cannot bind another State, but also because all the prerequisites for the applicability of the Convention set forth in Article 1(1)(b) are met.

5.3 Forum Located in a Non-Contracting State and Lead to Application of the Law of a Reservatory State

In this line of cases the CISG should be applied. Obviously, in this cases the application cannot be based upon Article 1(1)(b); rather, it must be based upon the CISG being part of the applicable (foreign) law. One should, in other words, adopt the same solution employed in those cases where the rules of private international law of the non-Contracting State lead to application of the law of a Contracting State that did not declare a reservation. In this line of cases the courts have to apply the CISG for the very same reasons, *i.e.*, not by virtue of Article 1(1)(b), as wrongly stated by very many courts, by which they are not bound, but rather by virtue of the CISG being part of the applicable foreign law. This view is not only held by commentators, but it has already found judicial application in many instances.

FRANCO FERRARI[60] summarizes his opinion, regarding this three line of cases, saying that "the Article 95 reservation impacts on the application of the CISG – by excluding it – solely in those cases where the forum is located in a

60 FERRARI, Franco, *Contracts for the International Sale of Goods: Applicability and Applications of The 1980 United Nations Sales Convention*, Martinus Nijhoff Publishers, Leiden-Boston, 2012, p. 92.

reservatory State the private international law rules of which lead to the forum State's own law. In this case the CISG cannot be applied, as this would violate the rationale behind the Article 95 reservation".

5.4 Forum is located in a Reservatory State and the Choice of the Parties Lead to the Application of the Law of a Contracting State Regardless if is Reservatory One or Not

As we already assumed earlier, the choice of applicable law by the parties in a contract is broadly considered part of the rules of private international law. So, if in an international contract of sales of goods the parties choose, as applicable law, the law of a certain State, this choice is deemed to be done on the ground of rules of private international and the law of the chosen State will be applicable by virtue of this rules.

In this case, what is the solution if the parties in the contract have their place of business, each, in reservatory States (one of them is the forum) and they choose as applicable law the law of other Contracting State. In other words, does an Article 95 reservation impact in this kind of cases? If yes, in what extent? If not, in which basis? These are the questions we can make and try to solve. To answer this questions two other problems have to be discussed: **a.** *The meaning of the choice made by the parties* and **b.** *The impact of the Article 95 reservation*. This problems are also analyzed by FAWCETT/HARRIS/BRIDGE[61].

5.4.1 Construction of a choice of law clause for a Contracting State to the CISG

The question is what do the parties mean when they stipulate that the *law* of a country, which happens to be a Contracting State to the CISG, shall apply to their contract? Clauses of this sort are highly ambiguous. Do they signify an intention to select the domestic law of that state minus the CISG?

In view of the freedom given to the parties to oust the application of the CISG, the matters to be considered are, first, whether the Convention may be excluded by implication or must be excluded expressly, and second, whether the parties by designating a national law have thereby indicated an intention to exclude the Convention in favour of the rules applicable to non-international sale transactions.

In the CISG context a number of tribunals have rejected in principle the possibility of implied exclusion. The better view, in a Convention that eschews formal requirements for a contract of sale, is that the parties may achieve by

61 FAWCETT, James, HARRIS, Jonathan, BRIDGE, Michael, *International Sale of Goods in the Conflict of* Laws, Oxford University Press, 2005, p. 682-686.

implied means an exclusion or derogation from the provisions of the CISG. The clarity of an implied exclusion is of course a different matter.

So the question that has to be faced is what the parties mean when they select the law of a Contracting State to the CISG to govern the contract. The question is not easy and depends upon varied circumstances. Nevertheless, the case law heavily favours the view that they do not intend thereby to opt out of the CISG under Article 6. First of all, if they are not resident in different Contracting State to the CISG, the selection of the law of a Contracting State is the most effective way of reaching the CISG since it brings them in under Article 1(1)(b). The solution is the same in cases where the parties are from different Contracting States. "This is an issue of considerable importance, and numerous CISG precedents confirm that an express contractual choice of (e.g.) 'Austrian law', 'the laws of Switzerland' ... should all be understood/interpreted – not as *only* a reference to domestic sales law, but rather – as the parties' express contractual reaffirmation of the applicability of the CISG"[62]. It would take quite compelling additional evidence to show that their intention was to oust the CISG in this instance.

The position is very difficult to unravel and the only practical advice to give is that parties, if seeking to avoid the application of the CISG, should do as is done by the various commodities trading forms and exclude the Convention in express terms. However, inadvisable it might be to seek such a result impliedly by reference to a stated national law, sound contractual practice should not be necessary as a matter of law for the CISG to be excluded between the parties.

With this solution is stressed the idea that the objective of the CISG is to be largely applied in order to reduce transaction costs and achieve uniformity.

5.4.2 The impact of the reservation permitted by Article 95 CISG

As we said previously, in this paper we are trying to find a solution to a given case: *what is the solution if the parties in the contract have their place of business, each, in reservatory States (one of them is the forum) and they choose as applicable law the law of other Contracting State. In other words, does an Article 95 reservation impact in this kind of cases? If yes, in what extent? If not, in which basis?.*

The first answer to the problem is that the choice made by the parties has to be seen as part of rules of private international law, and so, despite being both place of business from Contracting (reservatory) States the Convention will be applied but not on the ground of Article 1(1)(a) because their choice of law lead

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62 Italic is our. See: LOOKOFSKY, Joseph, *Understanding the CISG: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods*, Third (worldwide) Edition, Published by Kluwer Law International, Netherlands, 2008, p. 28

to application of other Contracting State fulfilling the requirement of Article 1(1)(b) although both parties have their place of business in Contracting States. As affirmed earlier, *the selection of the law of a Contracting State is the most effective way of reaching the CISG since it brings them in under Article 1(1)(b).*

But, what if the *forum* State made an Article 95 reservation? In this case will the CISG still be applicable? In other words: what is the impact of Article 95 reservation in these situations? Is true that the *forum* State, as Contracting State is always bound to apply the CISG when the parties have their place of business in a Contracting State, as is the case. But at the same time the choice made by the parties is relevant to take in account since according to the principle of contractual freedom[63] they can always choose the applicable law to their contract[64]. Just to clarify, although some restrictions to the principle, Article 3 of Rome Convention provides the parties with ample freedom to select the law they wish to govern their agreement. Specially, the chosen law need not have any connection with the transaction or the parties[65].

Apparently, with this choice of applicable law the *forum* State is exempted to apply the CISG because made Article 95 reservation. Have to be noted that the Article 95 reservation is relevant only when one of the parties in a contract of international sale of goods have its place of business in a non-Contracting State, and this is not the case.

In this scenario, we do not see other solution than to conclude that the CISG will still be applicable because, as we said, the *selection of the law of a Contracting State is the most effective way of reaching the CISG since it brings them (*the parties*) in under Article 1(1)(b)*. So, the fact that the *forum* State made Article 95 reservation will not be taken in account since could undermine the *will of the parties*[66] and the *uniformity and certainty* aimed to be achieved by the Convention, and only possible if, first, the domestic tribunals (where the forum is

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63 "(...) freedom of contract is the main rule everywhere, i.e., even in jurisdictions not bound by CISG regime". See: LOOKOFSKY, Joseph, *Understanding the CISG: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods*, Third (worldwide) Edition, Published by Kluwer Law International, Netherlands, 2008, p. 29.

64 "A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract." (Article 3, Number 1 of the Convention on the Law Applicable to Contractual Obligations – Rome Convention). Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41980A0934:EN:NOT, visited on 9th July 2013.

65 SPANOGLE, John A., WINSHIP, Peter, *International Sales Law: A Problem-Oriented* Coursebook, Second Edition, West, A Thomson Reuters business, 2012, p. 61.

66 Since if the parties wanted to exclude the application of the Convention could have done it explicitly according to Article 6.

located) interpret the CISG provisions in a uniform manner, and second, if those same tribunals adopt uniform approach to the filling of gaps in the law. Once more, "the Convention governs *all* contracts between parties with places of business in different nations, so long as both nations are signatories to the Convention"[67].

We have to remember that the reason of Article 95 reservation was to *avoid the excessive restriction of the applicability of the domestic law in relationship with foreign parties*. So, this aim is still achieved once the parties have chosen as applicable law of that Contracting State just to take advantages of the domestic solutions for *those issues although 'governed' by the CISG are not 'settled' therein, and issues not covered by the Convention like, for instance, the validity of the Sales Contract*. The parties could have chosen as applicable law, the law of other Contracting State thinking that its domestic law has the best solutions to fill the gaps of the Convention. In truth, the rules of private international law (choice-of-law) not only determine whether the CISG governs a particular transaction, as also may be used to fill gaps if the answer cannot be found in the Convention or derived from the general principles on which it is based[68].

Last but not least, we may say that this is the case where although the transaction is clearly within the scope of the CISG (*since both parties are from Contracting States*, case in which is directly applicable) and the parties agree to choose a governing law (*law of other Contracting State*) for those matters that are not within the rather limited scope of the CISG[69]. With this interpretation of the situation all the objectives of the CISG is considered achieved and the fact that the *forum* State has made Article 95 reservation is not taken in account.

6. Conclusion

This paper, with the topic "*CISG Applicability: A Particular Case on Impact of an Article 95 Reservation*" is a result of discussions regarding CISG applicability held during the lessons of Commercial Contract in the *Master and Postgraduate Programme in International Business Law*.

In what concern the reservation under art. 95 CISG, some believe that as the Convention becomes more widely adopted, the practical significance of such

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67 *Filano, S.p.A. v. Chilewich Intern. Corp.*, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992) (emphasis in original). *Apud* SPANOGLE, John A., WINSHIP, Peter, *International Sales Law: A Problem-Oriented* Coursebook, Second Edition, West, A Thomson Reuters business, 2012, p. 89.

68 SPANOGLE, John A., WINSHIP, Peter, *International Sales Law: A Problem-Oriented* Coursebook, Second Edition, West, A Thomson Reuters business, 2012, p. 57.

69 REILEY, Eldon H., *International Sales Contracts: The UN Convention and Related Transnational Law*, Carolina Academic Press, Durham-North Carolina, 2008, p. 55.

a declaration will diminish. This is also our believe since in the discussed case we saw that the choice of applicable law made by the parties, although being regulated by rule of private international law, when both are from Contracting States and choose the law of other reservatory Contracting State the Convention will always be applicable to their contractual relation.

The CISG's provisions contained in Chapter I of Part I (relating to the "Sphere of Application") are without any doubt the Convention's most important provisions. Despite the large number of court decisions and arbitral awards concerning the issue at hand, there are many issues regarding the CISG's applicability that have not yet been touched upon in any decision[70]. The discussed case is one example of this fact.

Whenever a contract for the sale of goods is international (in some sense of that term), courts cannot simply resort to their own substantive law to solve disputes arising out that contract. Rather, courts must determine which substantive rules to resort to in order to do so. Traditionally, when a situation is international, courts resort to the private international law rules in force in their country to determine which substantive rules to apply; and the choice of law made by the parties is considered to be also part of the rules of private international law, so having to be respected. In those countries, however, where international uniform substantive rules are in force, such as those set forth by the Convention, courts must determine whether those international uniform substantive rules apply before resorting to private international law rules at all. This means that recourse to the Convention prevails over recourse to the forum's private international law rules. This approach has been justified on the grounds that, as a set of uniform substantive law rules, the Convention is more specific insofar as its sphere of application is more limited and leads directly to a substantive solution, whereas resort to private international law requires a two-step approach—that is, the identification of the applicable law and the application thereof[71]. This solution is also valid even if the choice of law made by the parties (from Contracting States) lead to the application of law of a Contracting State which made Article 95 reservation.

Assuming that the limited scope of issues addressed by the CISG leaves many matters that are not addressed by the Convention we suggest that every

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70 FERRARI, Franco, *Overview of Case Law on the CISG's International Sphere of Application and Its Applicability Requirements (Articles 1(1)(A) and (B))*, in: International Business Law Journal 961, 2002, p. 961. Available at http://www.heinonline.org/HOL/Page?handle=hein.journals/ibuslj18&id=963&collection=journals&index=journals/ibuslj, visited on 2nd July 2013.

71 UNCITRAL, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods UNCITRAL: Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods—2012*, 2012 Edition, United Nations, New York, 2012, p. 22. Available at http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf, last visited on 9th July 2013.

contract within the CISG should contain a governing law clause and when it occur in a situation like the one discussed in this paper (where the parties are from Contracting State and choose other Contracting State law as applicable one) the CISG will still be applicable although the *forum* is located in an Article 95 reservatory Contracting State. ELDON H. REILEY[72] has the same opinion.

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72 REILEY, Eldon H., *International Sales Contracts: The UN Convention and Related Transnational Law*, Carolina Academic Press, Durham-North Carolina, 2008, p. 274 ss.

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Legislations

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- 1980 – Convention on the Law Applicable to Contractual Obligations (Rome Convention)