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## **The CISG as the Law Applicable to Arbitration Agreements?**

*Robert Koch* [\*]

### INTRODUCTION

Whenever I get involved as arbitrator in an international commercial arbitration, I am pleased when it is possible to apply the United Nations Convention on Contracts for the International Sale of Goods (CISG), rather than familiarizing myself with a set of mostly unknown rules of a given (non-unified) domestic law. Thanks to Al Kritzer's extremely valuable work at the Institute of International Commercial Law at the Pace University School of Law and the support by the Queen Mary Case Translation Programme, the Pace database provides ample access to judicial and arbitral rulings and scholarly writings on the CISG. In my contribution to this commemorative publication for Al Kritzer, I will deal with the question if and to what extent the CISG is applicable to arbitration agreements within international contracts for the sale of goods. This question has been of particular practical importance in international commercial arbitration since Article 11 CISG eliminates form requirements for international sale of goods contracts governed by the CISG.<sup>1</sup> Were Article 11 CISG applicable to arbitration agreements, an arbitration agreement in writing would not be required either in the course of the arbitral proceedings or for the purpose of enforcement and recognition, as illustrated by the decision of the German Supreme Court (Bundesgerichtshof) of 21 September 2005.

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<sup>1</sup> Article 11 CISG provides:

'A contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form. The contract may be proved by any means, including witnesses.'

## THE BUNDESGERICHTSHOF DECISION OF 21 SEPTEMBER 2005

In this case, the parties concluded an oral agreement regarding excavation works to be rendered by the Claimant. The invoice made reference to the Claimant's Standard Terms of Contract, which contained an arbitration clause. The Respondent failed to settle the invoice. As a consequence, the Claimant filed an arbitration claim with an arbitration commission in the Netherlands for the outstanding payments. The Respondent unsuccessfully objected to the jurisdiction of the arbitral tribunal in the course of the arbitral proceedings. In its award, the arbitral tribunal ordered the Respondent to pay 34,387.83 Euro to the Claimant. The Claimant then sought to have the arbitral award declared enforceable in Germany. In the first instance, the Higher Regional Court Oldenburg (Oberlandesgericht Oldenburg) held that a written arbitration agreement for the purpose of Article V(1)(a)<sup>2</sup> and Article II(2)<sup>3</sup> of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (NYC) did not exist. Accordingly, the court refused to declare the award enforceable, holding it was not to be recognized in Germany.

The Oberlandesgericht Oldenburg took the position that the general reference in the invoice to Standard Terms of Contract containing an arbitration clause without a separate reference to the arbitration clause did not meet the requirement that the clause be 'in writing' pursuant to Article II(2) NYC. With regard to the more favourable law provision in Article VII(1) NYC,<sup>4</sup>

<sup>2</sup> Article V(1) NYC provides:

'Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; [...].'

<sup>3</sup> Article II(2) NYC provides:

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

<sup>4</sup> Article VII(1) NYC provides:

'The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement

the court further concluded that the general reference in the invoice to the Standard Terms of Contract did not constitute a document confirming the contents of an agreement according to common usage within the meaning of the more permissive form requirements under Section 1031 German Code of Civil Procedure (ZPO) (*kaufmännisches Bestätigungsschreiben*).<sup>5</sup> The Oberlandesgericht Oldenburg did not address the question of whether or not the more favourable law provision allows Dutch substantive law to be taken into account.

The Claimant filed an appeal against this decision. The Bundesgerichtshof concurred with the Oberlandesgericht Oldenburg in that the arbitration agreement failed to comply with the form requirements stipulated in Article II(2) NYC and Section 1031 ZPO. However, the Bundesgerichtshof did find that the more favourable law provision in Article VII(1) NYC not only permits courts to recur to the more favourable domestic arbitration law, but also allows for the application of the conflicts of law rules and the substantive law pursuant to these rules, if it has more permissive form requirements than Article II NYC.

Applying the German conflict of laws rules (as the *lex fori*), the Bundesgerichtshof concluded that Dutch law governed the arbitration agreement, making allowance for references in invoices in long-standing professional relations (*'facture acceptée'*). As a consequence, the Bundesgerichtshof set

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of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.'

<sup>5</sup> Section 1031(1)-(3) ZPO provides:

'(1) The arbitration agreement shall be contained either in a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of telecommunication which provide a record of the agreement.

(2) The form requirement of subsection 1 shall be deemed to have been complied with if the arbitration agreement is contained in a document transmitted from one party to the other party or by a third party to both parties and - if no objection was raised in good time - the contents of such document are considered to be part of the contract in accordance with common usage.

(3) The reference in a contract complying with the form requirements of subsection 1 or 2 to a document containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.'

aside the decision of the Oberlandesgericht Oldenburg, remanding the case back to the lower court to ascertain, in view of these considerations, whether or not a valid arbitration agreement existed under Dutch law.

In this case, the agreement was not a contract of sale, therefore, the CISG was neither applicable to the main contract nor, under the principle of separability,<sup>6</sup> to the arbitration agreement. The Bundesgerichtshof's finding that the more favourable law provision in Article VII(1) NYC requires consideration not only of procedural law but also of substantive law, however, triggers the question whether the CISG is applicable to arbitration agreements in international contracts of sale governed by the CISG, not only for the purpose of enforcement and recognition but also in the course of the arbitral proceedings.<sup>7</sup>

## CAN WE JUST HAVE WORDS?

### Scholarly Writing

*Janet Walker* forcefully answers the above question in the affirmative. She concludes from the existence of Articles 19(3) and 81(2) CISG that arbitration agreements in international sales contracts governed by the CISG are likewise subject to the CISG, including the Article 11 CISG provision for freedom from formality.<sup>8</sup> Article 19(3) CISG lists provisions for the settlement of disputes, including 'the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other,'

<sup>6</sup> Section 1040(1) sentence 2 ZPO, which is identical with Article 16(1) sentence 2 UNCITRAL Model Law on International Commercial Arbitration, provides:

'For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.'  
(emphasis added)

<sup>7</sup> It is to be noted that due to the principle of separability the arbitration agreement may be submitted to a different law than the main contract. For an extensive discussion on the consequences of the doctrine see Lew, JDM, Mistelis, LA and Kröll, SM (2003) *Comparative International Commercial Arbitration* Kluwer Chapter 6-8.

<sup>8</sup> Walker, J (2005/06) 'Agreeing to Disagree: Can We Just Have Words? CISG Article 11 and the Model Law Writing Requirement' (25) *Journal of Law and Commerce* 153 at 163, available at: <http://www.cisg.law.pace.edu/cisg/biblio/walker1.html>.

as material provisions of the contract.<sup>9</sup> Article 81(1) CISG gives effect to the principle of separability, under which a dispute resolution clause survives the avoidance of the contract.<sup>10</sup> *Maurice Dahan*<sup>11</sup>, *Burghard Piltz*<sup>12</sup> and *Jerzi Rajski*<sup>13</sup> have also previously expressed similar views.

The majority of legal writers share *Walker's* view, inferring on the basis of Articles 19(3) and 81(2) CISG that arbitration agreements in international sales contracts are subject to the CISG.<sup>14</sup> They take the position, however, that the CISG only governs the formation of an arbitration agreement within a sales contract, ie, the mechanics of how the contract is concluded (eg, by offer and acceptance, the so-called 'external consensus'), but does not deal with requirements as to its form.<sup>15</sup> *Ulrich Magnus* and *Peter Schlechtriem*

<sup>9</sup> Article 19(3) CISG provides:

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

<sup>10</sup> Article 81(1) CISG provides:

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

<sup>11</sup> Dahan, M (1992) *La pratique française du commerce international, Tome 1: Les échanges internationaux* Centre Français du Commerce Extérieur at 656.

<sup>12</sup> See Piltz, B (1993) *Internationales Kaufrecht* C.H. Beck at 106.

<sup>13</sup> See Rajski, J (1987) in Bianca, CM and Bonell, MJ (eds) (1987) *Commentary on the International Sales Law* Giuffrè Art. 11 no. 2.3 (concluding from the second sentence of Article 11 CISG that the rule established in the first sentence also applies for procedural purposes).

<sup>14</sup> Magnus, U in (2005) *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Wiener UN-Kaufrecht (CISG)* Sellier-de Gruyter at Art 90 para 11; Huber, P in (2004) *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 3: Schuldrecht – Besonderer Teil I* (4th ed) C.H. Beck at Art. 90 para 5; Ferrari, F in Schlechtriem, P and Schwenger, I (eds) (2005) *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd ed) Oxford University Press at Art 4 para 40; Schroeter, UG (2005) *UN-Kaufrecht und Europäisches Gemeinschaftsrecht: Verhältnis und Wechselwirkungen* Sellier. European Law Publishers at § 6 para 37.

<sup>15</sup> Magnus *Kommentar* supra fn 14 at Art 11 para 7; Achilles, WA (2000) *Kommentar zum UN-Kaufrechtsübereinkommen (CISG)* Luchterhand at Art 11 para 1; Saenger, I in Bamberger, HG and Roth, H (eds) (2007) *Online-Kommentar zum Bürgerlichen Gesetzbuch* C.H. Beck at Art 11 para 6; Herber, R and Czerwenka, B (1991)

both point out that the freedom of form principle only applies to contract provisions that deal with matters covered by the sale of goods law, but not to matters of arbitration.<sup>16</sup>

For *Ulrich G. Schroeter*, it follows from the drafting process of Article 11 CISG and within the context of Article 12 CISG that the freedom from formality principle does not apply to arbitration clauses.<sup>17</sup> Article 12 CISG deals with the effect of a declaration under Article 96 CISG, which permits Contracting States requiring contracts of sale to be evidenced in writing to declare Article 11 CISG inapplicable. *Schroeter* concludes from the fact that Article 12 CISG was only included in the CISG because many socialist legal systems required a binding foreign trade contract to be in writing that the drafters of the CISG did not want to touch the formal requirements for forum and arbitration clauses under their arbitration laws. Otherwise, almost all Contracting State whose arbitration laws required an arbitration agreement to be in writing could have made a reservation under Article 96 CISG. That, however, was not intended by the authors of the CISG.<sup>18</sup>

In contrast, *Stefan Kröll*<sup>19</sup> draws an opposite conclusion from the principle of separability. He points out that the fact that the main contract is

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*Internationales Kaufrecht* C.H. Beck at Art 11 para 5; Ferrari, F in (2004) *Münchener Kommentar zum Handelsgesetzbuch* C.H. Beck at Art 11 para 4; Schlechtriem, P in Schlechtriem & Schwenzler *Commentary* supra fn 14 at Art 11 para 7; Witz, W in Witz, W, Salger, H-C and Lorenz, M (2005) *Internationales Einheitliches Kaufrecht* Verlag Recht und Wirtschaft at Art 11 para 7; Neumayer, KH and Ming, C (1993) *Convention de Vienne sur les contrats de vente internationale de marchandises, Commentaire* CEDIDAC at Art 11 para 1; Melis, W in Honsell, H (ed) (1997) *Kommentar zum UN-Kaufrecht* Springer at Art 11 para 5.

<sup>16</sup> See *Magnus Kommentar* supra fn 14 at Art 11 para 7 (stating that the freedom of form principle only applies to agreements whose content is related to sales law not to arbitration agreements); Schlechtriem in Schlechtriem & Schwenzler *Commentary* supra fn 14 at Art 11 para 7 (stating that where a contract includes partly matters covered by sale of goods law and partly other matters, Article 11 CISG applies only to the former part).

<sup>17</sup> See *Schroeter UN-Kaufrecht und Europäisches Gemeinschaftsrecht* supra fn 14 (commenting on forum selection clauses in § 6 paras 31 et seq., and later, in § 6 para 40, stating that the same considerations apply to arbitration agreements).

<sup>18</sup> See *Schroeter UN-Kaufrecht und Europäisches Gemeinschaftsrecht* supra fn 14 at § 6 para 32.

<sup>19</sup> See Kröll, S (2005/06) 'Selected Problems Concerning the CISG's Scope of Application' (25) *Journal of Law and Commerce* 39 at 42 et seq., available at: <http://>

governed by the CISG does not automatically lead to the conclusion that the arbitration clause contained in this contract is also subject to the CISG. He further concludes from Articles 1-3 CISG that it is not intended to regulate the conclusion of arbitration agreements. Accordingly, no one would apply the CISG to an arbitration agreement concluded as a separate agreement after a dispute has arisen or after the main contract has been concluded. He goes on to say that since it is widely accepted that the arbitration agreement must be in writing, irrespective of the existence of form requirements for the main contract, at least in terms of form requirements, different clauses of the same contract will be governed by different regimes.

Finally, *Harm Peter Westermann* argues that arbitration agreements are subject to procedural laws,<sup>20</sup> particularly to international agreements in the sense of Article 90 CISG.<sup>21</sup>

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[www.cisg.law.pace.edu/cisg/biblio/kroll.html](http://www.cisg.law.pace.edu/cisg/biblio/kroll.html); Garro, AM has expressed a similar view with regard to forum selection clauses, see (1998) 'The U.N. Sales Convention in the Americas: Recent Developments' (17) *Journal of Law and Commerce* 219 at 244.

<sup>20</sup> See Westermann, HP in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* spura fn 14 at Art 4 para 7.

<sup>21</sup> Article 90 CISG provides:

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

As the decision of the Bundesgerichtshof shows, the New York Convention does not take priority over the CISG when it comes to the recognition and enforcement of an arbitral award. Concerning the enforcement of an arbitration agreement in the course of the arbitration proceedings, it is to be noted that the UNCITRAL Model Law is not an agreement in the sense of Article 90 CISG. The term 'international agreement' is used generically and applies to both bilateral and multilateral treaties (see Enderlein, F and Maskow, D (1992) *International Sales Law Oceana* at Art 90 no 5). The UNCITRAL Model Law, however, is not an international agreement concluded between States. Therefore, even if a state has modelled its arbitration law according to the UNCITRAL Model Law and incorporated the written form requirement under Article 7 UNCITRAL Model Law in its domestic arbitration law, the CISG would not allow the respective domestic provision to prevail.

### Case Law

In cases where the main contract was governed by the CISG, the courts have also applied the CISG to the arbitration agreement. However, they did not deal with the problem of whether Article 11 CISG applies to govern the form of the arbitration clause. In all reported cases, the formal validity of the agreement was not in dispute, but the issue was rather the formation of arbitration agreement, ie, the 'external consensus.'

In the *Filanto v. Chilewich* case,<sup>22</sup> for instance, Chilewich, an American trading company, had contracted to supply footwear to a buyer in the then Soviet Union. To meet its contractual obligation, Chilewich entered into a series of transactions with the plaintiff Filanto, an Italian footwear maker. The purchase contract provided that it would be governed by 'the conditions which are enumerated in the standard contract in effect with the Soviet buyers.' This standard contract provided for arbitration in Russia. Filanto declared that it considered itself only bound by certain clauses of the standard contract. In its latest letter submitted after initiating proceedings with the Federal District Court for the Southern District of New York, however, Filanto relied on provisions in the standard contract stating that its relationship with Chilewich was governed by the provisions therein. Chilewich in turn asked the District Court to stay the action and refer the parties to arbitration in Russia, in accordance with the terms of the standard contract. In determining whether the parties had actually agreed on arbitration, the District Court held that the question is not governed by the U.C.C., but by the CISG. Relying on Article 18(1) and Article 8(3) CISG, the District Court found that Filanto was under an obligation to reject Chilewich's offer, which included the arbitration clause, within a reasonable time if it did not want to be bound by it. As a consequence, the District Court held that Filanto was bound by the arbitration agreement, since it took Filanto five months to reply to the offer and accept modifications that would have excluded the arbitration clause.<sup>23</sup>

<sup>22</sup> U.S. Federal District Court [Southern District of New York], 14 April 1992 (*Filanto v. Chilewich*), available at: <http://cisgw3.law.pace.edu/cases/920414u1.html>.

<sup>23</sup> In the *Chateau des Charmes Wines v. Sabaté* case, the Ninth Circuit applied the CISG to determine whether the parties had actually agreed on a *forum selection clause* contained in an invoice. See U.S. Court of Appeals [9th Circuit], 5 May 2003

There are two reported Spanish cases, decided by the Spanish Supreme Court (Tribunal Supremo), where a declaration of recognition and enforcement of arbitral awards was sought. According to the English language case abstracts provided at the Pace database, in both cases the Respondents argued that an arbitration agreement had not been concluded. In case No. 3587/1996, the Tribunal Supremo decided in favour of the Claimant, the buyer, on the basis of the presented evidence: a confirmation of sale from the mediating society including an arbitration clause and a telefax sent by the defendant seller in response to another telefax which included a copy of the aforementioned confirmation. In the replying telefax, the Defendant stated that it agreed with all of the clauses. The Tribunal Supremo applied Article 18(1) and (3) CISG, holding that the contract did exist and was concluded by the performance of certain acts.<sup>24</sup>

In the case No. 2977/1996, the Tribunal Supremo refused to declare the recognition and enforcement of an award rendered by Arbitral Tribunal of the Hamburg Stock Market Association on the basis that an arbitration clause was not proven to have been concluded between the parties. The Tribunal held that the documents presented were proof enough of the existence of commercial relations between the parties, and even showed a contract had been concluded through the performance of customary contractual acts according to Articles 18 and 19 CISG. However, such acts did not prove the existence of an arbitral clause.<sup>25</sup>

In a German case decided by the District Court Hamburg (Landgericht Hamburg), the plaintiff sought a court declaration for the recognition and enforcement of an award rendered by the Arbitral Tribunal of the Hamburg Stock Market Association. The plaintiff argued that there was no arbitration agreement since the arbitration clause only included in the confirmation of sale. The Landgericht Hamburg, relying inter alia on Article 9 CISG, held

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(*Chateau des Charmes Wines Ltd. v. Sabaté USA, Sabaté S.A.*), available at: <http://cisgw3.law.pace.edu/cases/030505u1.html>.

<sup>24</sup> Tribunal Supremo (Spain), 17 February 1998, 3587/1996 (*Epis-Centre v. La Palentina*), available at: <http://cisgw3.law.pace.edu/cases/980217s5.html>.

<sup>25</sup> Tribunal Supremo (Spain), 17 February 1998, 2977/1996, available at: <http://cisgw3.law.pace.edu/cases/980217s4.html>.

that an arbitration agreement did exist due to Defendant's signature of the confirmation letter.<sup>26</sup>

### EVALUATION OF THE DIFFERENT APPROACHES

As a CISG scholar and active arbitrator, I have greatest sympathy for *Walker's* prudent approach to submit arbitration agreements to Article 11 CISG. It must be indeed puzzling to businesspeople that, under the doctrine of separability, an arbitration agreement (not only) in a contract of sale remains intact when (all) other terms of the contract are invalid, but it fails to come into existence in an otherwise valid and binding oral contract. I have strong doubts, however, whether the CISG can be employed as an instrument to relax the formal requirements of arbitration agreements. Before I go into more detail on this point, in the light of *Westermann's* statement that arbitration agreements are subject to rules on procedural law and, for that reason, not subject to the freedom of form principle, I will first address the relevance of the classic substance/procedure dichotomy for the applicability of Article 11 CISG to arbitration agreements.

#### The CISG is about contract, not about procedure

When parties agree to arbitration they want their dispute to not be resolved by national courts. While an arbitration agreement, in the same way as every contract, creates respective rights and obligations between the parties, its primary purpose is to oust the jurisdiction of national courts. For that reason, one may be inclined to adopt Judge Posner's position taken in the Seventh Circuit *Zapata Hermanos vs. Hearthside Baking* decision that 'the Convention [CISG] is about contracts, not about procedure';<sup>27</sup> and furthermore, con-

<sup>26</sup> Landgericht Hamburg (Germany), 19 June 1997, available at: <http://cisgw3.law.pace.edu/cases/970619g1.html>.

<sup>27</sup> See U.S. Court of Appeals [7th Circuit], 19 November 2002 (*Zapata Hermanos v. Hearthside Baking*), available at: <http://cisgw3.law.pace.edu/cases/021119u1.html>. The Court of Appeals denied a rehearing *en banc* on 9 January 2003 (2003 U.S. App. LEXIS 375). On 16 June 2003 the U.S. Supreme Court requested the U.S. Solicitor General to file a brief requesting the United States to express a view in this case (Supreme Court Reporter 123, 2599).

cur with *Westermann's* conclusion that an arbitration agreement, at least with regard to its formal validity, falls outside the scope of the CISG.

In *Zapata*, the main issue before the Court was whether a successful litigant's legal fees constitute 'losses' within the meaning of the CISG and whether a plaintiff who prevails in a suit under the CISG is therefore automatically entitled to their reimbursement. The U.S. Court of Appeals for the Seventh Circuit reversed the decision of the District Court for the Northern District of Illinois, which had awarded lawyers' fees as damages under Article 74 CISG.<sup>28</sup> The Court of Appeals drew a distinction between procedural law and substantive contract law. It found that the question of whether a losing party must reimburse the winner for the latter's litigation expenses is not a question of substantive law, such as contract law, but a part of procedural law, which is not covered by the CISG. To support its view that the issue of whether 'loss' includes attorneys' fees must be decided according to domestic procedural law, the Court of Appeals posed the hypothetical question of the likelihood that the United States would have signed the Convention had it thought that in doing so it was abandoning the hallowed 'American rule,' requiring winners to bear their own litigation expenses.

While there are plausible reasons to argue that the recovery of attorney's fees is not an issue governed by the CISG, the Court of Appeals' reasoning is not very persuasive on this point. It is undisputed in the 'CISG world' that the convention is about contract, and not procedure.<sup>29</sup> The crucial question, however, concerns the basis on which a procedural rule is to be distinguished from one of substantive law. The decision does not give any explanation, nor does it provide any guidance in this regard. Moreover, the Court of Appeals' conclusions based on the drafting history of the CISG are unconvincing since they rest on assumptions and lack any factual basis. More importantly, the

<sup>28</sup> Article 74 sentence 1 CISG provides:

'Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.'

<sup>29</sup> For such a statement see eg Flechtner, HM and Lookofsky, JM (2003) 'Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal' (7) *Vindobona Journal of International Commercial Law and Arbitration* 93 at 96, available at: <http://www.cisg.law.pace.edu/cisg/biblio/flechtner5.html>; Zeller, B (2004) 'Interpretation of Article 74 – Zapata Hermanos v. Hearthside Baking – Where Next?' *Nordic Journal of Commercial Law* 1 at 7.

question of whether the United States would have signed the convention is irrelevant for the qualification of the recovery of attorneys' fees as a matter of substantive law covered by the CISG or of domestic procedural law.

Unlike the decision in *Zapata*, the ruling of the Court of Appeals for the Eleventh Circuit in *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino* is more helpful in resolving the issue of whether the formal validity of an arbitration agreement is subject to Article 11 CISG. In the *MCC-Marble* case, the issue was whether the domestic law parol evidence rule applies to the interpretation of a contract governed by CISG.<sup>30</sup> This rule excludes evidence of an oral agreement which contradicts or varies the terms of a subsequent or contemporaneous written contract.<sup>31</sup> The buyer brought a breach of contract action in the U.S. District Court for the Southern District of Florida against the seller for failure to deliver the tiles ordered. In defence, the seller relied on a standard term in its order form that authorized the seller to suspend deliveries if the buyer failed to pay and the seller brought a counterclaim for non-payment. To the buyer's response that the tiles were non-conforming, the seller contended that the buyer had not given written notice of defects within ten days of receipt, as required by a term in the order form. The buyer presented affidavits from its president and two of the seller's employees stating that the parties did not intend to be bound by the standard terms set out in the order form. The District Court excluded this evidence on the basis of the domestic parol evidence rule, giving effect to the standard terms and granted summary judgment to the seller.

The Court of Appeals reversed the District Court's grant of a summary judgment. It found that the parol evidence rule, contrary to its title, is a substantive rule of law, and not a rule of evidence. As such, a federal district court could not simply apply the parol evidence rule as a procedural matter. The Court of Appeals held that Article 8(3) CISG precludes the application of the parol evidence rule. Consequently, the appellate court found that

<sup>30</sup> U.S. Court of Appeals [11th Circuit], 29 June 1998 (*MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino*), available at: <http://cisgw3.law.pace.edu/cases/980629u1.html>.

<sup>31</sup> As for the meaning of the parol evidence rule see the CISG-AC Opinion no 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, 23 October 2004 (Rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA), available at: <http://www.cisg.law.pace.edu/cisg/CISG-AC-op3.html>.

the affidavits of the subjective intent of both parties raised sufficient factual questions as to the terms of the parties' contract under Article 8(1) CISG such that summary judgment was inappropriate.<sup>32</sup>

In its reasoning, the Eleventh Circuit Court of Appeals rejected a decision of the Fifth Circuit Court of Appeals in *Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr.*, where the defendant sought to avoid summary judgment on a contract claim by relying on evidence of contemporaneously negotiated oral terms that were not included in the parties' written agreement. The plaintiff, a Chinese corporation, relied on Texas law, while the defendant, apparently a Texas corporation, asserted that the CISG governed the dispute. Without resolving the choice of law question, the Court of Appeals stated that the parol evidence rule would apply regardless of whether Texas law or the CISG governed the dispute.<sup>33</sup>

The Court of Appeals pointed out that 'One of the primary factors motivating the negotiation and adoption of the CISG was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party's legal system might otherwise apply.' It went on to say that 'Courts applying the CISG cannot, therefore, upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result. We may only achieve the directives of good faith and uniformity in contracts under the CISG by interpreting and applying the plain language of Article 8(3) CISG as written and obeying its directive to consider this type of parol evidence.'

<sup>32</sup> See also U.S. Federal District Court [Michigan], 17 December 2001 (*Shuttle Packaging Systems v. Tsonakis et al.*), available at: <http://cisgw3.law.pace.edu/cases/011217u1.html> (stating that 'international sales agreements under the Convention are not subject to the parol evidence rule'); U.S. Federal District Court [Illinois], 27 October 1998 (*Mitchell Aircraft Spares v. European Aircraft Service*), available at: <http://cisgw3.law.pace.edu/cases/981027u1.html>; U.S. Federal District Court [Southern District of New York], 6 April 1998 (*Calzaturificio Claudia v. Olivieri Footwear*), available at: <http://cisgw3.law.pace.edu/cases/980406u1.html> (stating that 'contracts governed by the CISG are freed from the limits of the parol evidence rule and there is a wider spectrum of admissible evidence to consider in construing the terms of the parties' agreement'). In the *Filanto* case, *supra* fn 22, the District Court tangentially observed that Article 8(3) CISG 'essentially rejects [...] the parol evidence rule.'

<sup>33</sup> See U.S. Court of Appeals [5th Circuit], 15 June 1993 (*Beijing Metals v. American Business Center*), available at: <http://cisgw3.law.pace.edu/cases/930615u1.html>.

This reasoning is in line with the interpretation rule found in Article 7(1) CISG, according to which in the interpretation of the CISG 'regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.' Given the need to promote the CISG's international character and uniformity of application, reliance on applicable procedural law may be counterproductive since whether a matter is considered substantive or procedural often varies from jurisdiction to jurisdiction and may depend on the circumstances of a particular case.<sup>34</sup> Instead, the analysis must focus on whether the matter is one governed by the CISG by examining the purposes and policies of individual provisions as well as the CISG as a whole, giving due regard to the need for a uniform interpretation.<sup>35</sup> I will therefore now turn to the interpretation of Article 11 CISG.

### Interpretation of Article 11 CISG

#### *Text of Article 11 CISG*

Looking at the wording of this provision, it is to be noted that it refers to a contract of sale and not to an agreement to arbitrate. The reference in Article 19(3) and Article 81(2) CISG to settlement of dispute provisions, however,

<sup>34</sup> See Orlandi, CG (2000) 'Procedural law issues and law conventions' (5) *Uniform Law Review* 23 at 24, available at: <http://www.cisg.law.pace.edu/cisg/biblio/orlandi.html> (stating that there always will be tensions between domestic and international law and as a result depending on the jurisdiction varying judgements are the outcomes).

<sup>35</sup> See Schlechtriem in Schlechtriem & Schwenger *Commentary* supra fn 14 at p. 7 (stating with regard to the issue of recoverability of litigation costs and lawyers' fees that 'If national courts simply qualify the recoverability of litigation costs and lawyers' fees as a procedural matter to be decided under their own *lex fori*, thereby circumventing Article 74 and the analysis of whether such costs are a risk to be borne by any party having to litigate in the U.S., there will soon be more enclaves of domestic law, which for the deciding judge may seem self-evident and which conform to his or her convictions, formed by historic rules and precedents, but which will not be followed in other jurisdictions and, thereby, will cause an erosion of the uniformity achieved'); Orlandi 'Procedural law issues' supra fn 34 (stating that 'abstract distinctions between substantive and procedural law become redundant if not harmful, especially when the parties turn to the courts for equal enforcement of their contractual rights pursuant to these uniform bodies of rules').

seems to justify the conclusion that Article 11 CISG applies to all provisions in a contract of sale including an arbitration clause. Whether one can draw a different conclusion on the basis of the historic background of Article 11 CISG and its context with Article 12 CISG is questionable since there is no debate reported on that point in the drafting process of the CISG. Rather, the underlying ratio of Article 11 CISG seems to support *Walker's* view that the freedom of form principle does extend to arbitration agreements.

### *Systematic structure of the CISG*

According to the systematic structure of the CISG, the application of Article 11 CISG depends on the requirements of Articles 1-6 CISG being met. First, there must be a contract of sale as required under Article 1 or Article 3 of the CISG. Second, none of the exceptions under Article 2 CISG can apply. Third, pursuant to Article 4 and Article 5 CISG, the Convention's scope is limited to the formation of the contract and the rights and obligations arising from the sales contract excluding claims for death or personal injury caused by the goods sold. Fourth, pursuant to Article 6 CISG, the parties must not have excluded the CISG as a whole, Article 11 CISG specifically, or the formation provisions under Part II of the CISG.

Of the aforementioned provisions, Article 4 sentence 1 CISG is decisive regarding the question of whether Article 11 CISG is applicable to arbitration agreements. Article 4 sentence 1 CISG provides that 'This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract.' It follows from that provision that *the scope of Article 11 CISG is limited in that neither for the formation of a contract of sale nor for the validity and enforcement of the rights and obligations under such a contract an agreement in writing is required.*<sup>36</sup>

<sup>36</sup> See Honnold, JO (1999) *Uniform Law for International Sales* (3rd ed) Kluwer at § 127 (stating that Article 11 CISG removes any impediment to enforcement between the parties based on any domestic 'requirement as to form'); 'Commentary on the Draft Convention on Contracts for the International Sale of Goods. Prepared by the Secretariat' in (1981) *United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980, Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings*

## FORMATION IN THE MEANING OF THE CISG

As pointed out above, ‘formation’ in the meaning of the CISG concerns the mechanics of how the contract is concluded by offer and acceptance. Article 19(3) CISG, through its reference to dispute resolution clauses, makes clear that an offer to conclude a contract of sale may include an offer to arbitrate any dispute arising out of such a contract. In that case, the arbitration agreement is not only subject to the CISG’s rules on contract formation (Articles 14-24 CISG) but also to the CISG’s general provisions (Articles 7-13 CISG). By contrast, where the agreement to arbitrate was concluded *after* a dispute has arisen or *after* the main contract has been concluded, the CISG is not applicable as part of system of law in accordance with Article 1(1)(a) CISG or pursuant to conflicts rules but only by virtue of an agreement by the parties. In the absence of such an agreement, the law of the place of arbitration chosen by the parties will be regarded as the applicable law.<sup>37</sup>

## RIGHTS AND OBLIGATIONS OF THE PARTIES UNDER THE CISG

While the formation process of an arbitration agreement within a contract of sale governed by the CISG affords the benefit of the informality of the CISG, the crucial question is whether the freedom of form principle under Article 11 CISG applies when it comes to enforcement of an oral arbitration agreement. The answer to that question depends on whether the reference under Article 4 sentence 1 CISG to the parties’ rights and obligations arising from a contract of sale includes the rights and obligations ensuing from an arbitration clause *within* such contract.

The reference under Article 4 sentence 1 CISG must be interpreted in light of Part III of the CISG. The primary obligations of the seller to deliver conforming goods, which are free from rights or claims of third parties, the corresponding rights of the buyer as well as buyer’s remedies in the event

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*of the Main Committees* United Nations 14 at 20, available at: <http://cisgw3.law.pace.edu/cisg/conference.html>.

<sup>37</sup> See Redfern, A and Hunter, M (2004) *Law and Practice of International Commercial Arbitration* (4th ed) Sweet & Maxwell at para 2-93; Lew, Mistelis and Kröll *Comparative International Commercial Arbitration* supra fn 7 at paras 6-23 et seq (with further references to arbitration case law).

that the seller fails to perform are the subject of Article 30 CISG and Chapter II (Articles 31-52 CISG). Article 53 CISG and Chapter III govern the buyer's primary obligations to pay the purchase price and take delivery of the goods, as well as the seller's corresponding rights and remedies for the buyer's breach (Articles 54-65 CISG).

In addition, Chapter V Section VI deals with the obligations and corresponding rights of the parties concerning the preservation of goods (Articles 85-88 CISG); and Chapter V Section I deals with remedies available to both parties in the event of a 'deterioration' of the other party's position (Articles 71-73 CISG). The seller's ancillary obligations, which are associated with the contract such as packaging, dispatching the goods, concluding contracts with carriers, etc., are also subject to the (remedial system of the) CISG.<sup>38</sup> The same is true if the sales contract imposes (implied) duties on the parties related to the goods to act (eg, to inform or to warn) or to refrain from an act in order not to jeopardize the purpose of the contract.<sup>39</sup>

Obviously, the rights and obligations arising out of an arbitration agreement are different from the rights and obligations constituting a contract of sale. An arbitration agreement establishes right to arbitration for each contractual party. The obligations of the parties to an arbitration agreement are limited to co-operation in the arbitration proceedings, ie, each party must participate in the establishment of the arbitral tribunal including payment of

<sup>38</sup> See Landgericht Mainz (Germany), 26 November 1998 (*Cylinder case*), available at: <http://cisgw3.law.pace.edu/cases/981126g1.html>. In this case, the parties agreed on the production and delivery of a crepe-cylinder for the production of tissue paper. Although the discussion was in relation with Article 3(2) CISG, it is stated that 'The court is aware that before the cylinder (which had been fitted for [buyer's] individual needs) was produced and delivered, a major engineering effort as well as planning and conceptual work was required. However, these engineering efforts contributed to the production and delivery of the unit, determine its value, and therefore do not change the fact that the focus of the contract was the cylinder itself. [Seller's] further contractual obligations (transport, installation, maintenance) are therefore accessory obligations that pale in comparison to the value of the manufactured cylinder. This assessment leads to the application of the United Nations Convention on Contracts for the International Sale of Goods.'

<sup>39</sup> See Müller-Chen, M in Schlechtriem & Schwenger *Commentary supra* fn 14 at Art 45 para 3; Magnus *Kommentar supra* fn 14 at Art 45 para 33.

his share of the advance of costs for the members of the tribunal.<sup>40</sup> Except for the obligation to pay, there are no corresponding enforceable rights of the non-defaulting party.<sup>41</sup> Non-compliance with the obligation to participate may only have detrimental effects for the defaulting party if, for example, he loses his right to appoint an arbitrator,<sup>42</sup> is precluded from raising objections to the jurisdiction of the Tribunal,<sup>43</sup> or is ultimately faced with a binding and enforceable default award.<sup>44</sup>

<sup>40</sup> See Bundesgerichtshof, 12 November 1987, (1988) *Neue Juristische Wochenschrift* at 1215; U.S. Court of Appeals [9th Circuit], 10 December 2003 (*Sink v. Aden Enterprises, Inc.*), 352 F.3d 1197 (holding that a party's failure to pay its pro-rata share of arbitration fees was a material breach of the arbitration agreement), available at: <http://caselaw.lp.findlaw.com/data2/circs/9th/0235323p.pdf>.

<sup>41</sup> See Lew, Mistelis and Kröll *Comparative International Commercial Arbitration* supra fn 7 at paras 7-81 et seq (with further references to arbitration case law); Schwab, KH and Walter, G (2005) *Schiedsgerichtsbarkeit* (7th ed) C.H. Beck at 60.

<sup>42</sup> Article 11(3)(a) UNCITRAL Model Law on International Commercial Arbitration provides:

'(3) Failing such agreement [between the parties on the appointment of the arbitrators

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party [...], the appointment shall be made, upon request of a party, by the court.'

<sup>43</sup> Article 16(2) UNCITRAL Model Law on International Commercial Arbitration provides:

'(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers that the party has justified the delay.'

<sup>44</sup> Article 25 UNCITRAL Model Law on International Commercial Arbitration provides:

'Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings

The contractual right to arbitration is, in fact, neither an essential feature of a contract of sale, nor is the obligation to co-operate in the arbitral proceedings ancillary for parties to a contract of sale to fulfil the obligations under such a contract. The latter is confirmed by the fact that avoidance of the arbitration agreement, pursuant to Article 81(1) CISG, has no effect on any other provision of the contract governing the rights and obligations of the parties.

For these reasons, the rights and obligations arising out of an arbitration agreement cannot be subsumed under the rights and obligations under Article 4 sentence 1 CISG. As a consequence, neither Part III nor Article 11 CISG is applicable when it comes to the enforcement of the arbitration agreement. Rather, the enforcement of the rights and obligations of an arbitration agreement is subject to the applicable domestic law. The fact that the reference under Article 4 sentence 1 CISG includes the remedial rights of the parties does not give rise to a different conclusion. Of the remedies under the CISG, the right to claim damages under Article 45(1)(b) and Article 61(1)(b) CISG and/or to terminate the arbitration agreement for fundamental breach of this agreement pursuant to Articles 49(1)(a) and Article 64(1)(a) CISG might be appropriate remedies in case of the breach of the duty to participate in an arbitration.<sup>45</sup> Remedial rights, however, are secondary in that they serve the purpose of protecting or enforcing the primary rights of the parties. Consequently, the previously mentioned remedies under the CISG require a breach of an obligation 'under the Contract or this Convention.' The fitness of certain remedial rights under the CISG for breach of an arbitration agreement is therefore not a criterion, because their availability depends on the preliminary question of whether the rights and obligations arising out of an agreement to arbitrate can be subsumed under the rights and obligations in the sense of Article 4 sentence 1 CISG.

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without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.'

<sup>45</sup> See Bundesgerichtshof supra fn 40; U.S. Court of Appeals [9th Circuit] supra fn 40.

## CONCLUSIONS

The CISG cannot be employed for relaxing the formal requirements of arbitration agreements. The scope of the freedom from form principle under Article 11 CISG is limited to the formation process of an agreement to arbitrate, while the requirements for its enforcement, both in the course of the arbitral proceedings as well as for the purpose of enforcement and recognition, are subject to non-unified domestic law. If the latter requires an agreement in writing and the arbitration agreement lacks this form, it is unenforceable, unless the non-compliance with the form requirement is cured, eg, by entering into argument on the substance of the dispute in the arbitral proceedings without objection to the validity of the arbitration agreement.<sup>46</sup> For the latter reason, it is up to the parties to live up to their reasonable expectation that their dispute will be resolved by an international arbitral tribunal.

<sup>46</sup> See Article 16(2) UNCITRAL Model Law on International Commercial Arbitration, *supra* fn 43, and Holtzmann, HM and Neuhaus, JE (1989) *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* Kluwer at 510 (stating that the pertinent observation of the Working Group was that a party who failed to raise an objection to the validity of the arbitration agreement should be precluded from raising such objections not only during later stages of the arbitral proceedings but also in setting aside proceedings or enforcement proceedings); see also Section 1031(6) ZPO that provides: 'Any non-compliance with the form requirements is cured by entering into argument on the substance of the dispute in the arbitral proceedings.'