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Arbitration Conflict of Laws Rules and the 1980 International Sales Convention

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The 1980 Vienna Convention for the International Sale of Goods [2] (hereinafter the "Convention") is the major instrument for the unification of private law in the last decades. The fact that it has so far attracted 57 acts of ratification, acceptance or accession testifies to its importance. What is more, the Contracting States form a representative political, legal, and economic sample of the world community [3].

In the eleven years that the Convention has been in force it has been applied in a significant number of arbitral awards. Such awards have been made not only under the auspices of the International Chamber of Commerce (hereinafter "ICC"), which is traditionally at the forefront of developments in international uniform law, but also national Chambers of Commerce. Nonetheless, and despite the vast amount of writing the Vienna Convention has engendered, there is a certain paucity in the literature on the particular topic of the reception of the Convention by arbitrators.

This paper seeks critically to survey the significant body of arbitral case law available so far in order to clarify the issue of the applicability of the Convention by arbitral tribunals. The usefulness of the exercise is eminently practical. Statistics demonstrate the increasing currency of arbitration as the normal means of dispute resolution for commercial disputes in an international setting [4], as they demonstrate the augmenting volume of international trade in goods [5].

The Convention would seem directly to contemplate its application by arbitral tribunals in Articles 45(3) and 61(3) [6]. On the other hand, Article 1 of the Convention on its sphere of application reads in material part as follows:

> "1. This Convention applies to contracts 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."

The rule of Article 1 is supplemented by Article 100(2) on the temporal scope of application, which provides that:

> "1. This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(*a*) or the Contracting State referred to in subparagraph (1)(*b*) of article 1."

Schematically, the Convention retains a simple "subjective" internationality criterion (the places of business of the seller and the buyer), which is always a threshold condition for the application of the Convention [7]. In other words, the Convention will never apply by its own terms if the parties have their places of business in the same (Contracting) State. Sub-paragraph (*a*) requires that those States be Contracting States whereas sub-paragraph (*b*) extends the scope of application to those cases where only one, or even none, of these States is a

Contracting State.

Two things are clear from sub-paragraphs (*a*) and (*b*). First, the two rules in sub-paragraphs (*a*) and (*b*) are independent and alternative, the latter rule being auxiliary to the former. If the requirements of 1(1)(*a*) are fulfilled, an enquiry into 1(1)(*b*) is superfluous; conversely, for 1(1)(*b*) to apply, the requirement of 1(1)(*a*) must not be satisfied in the case at hand. Nonetheless, State courts and arbitral tribunals alike tend to treat these two provisions as complementary, so that the Convention would apply through sub-paragraph (*b*) even though the case at hand is prima facie one that would fall under sub-paragraph (*a*).

An award made under the auspices of the China International Economic and Trade Commission (CIETAC) is an example of such accumulation of bases. In a case between a United States seller and a Chinese buyer, and concerning a c.i.f. China contract concluded in 1988, the tribunal found that Chinese law was applicable (as the law having the closest connection with the dispute). But, idiosyncratically, the tribunal went on to hold that the Convention was also applicable, on the grounds that both China and the US were Contracting parties (that is, through Article 1(1)(*a*)) [8]. Though the reasoning is summary, the tribunal probably meant that the Convention would apply through either of the bases in Article 1(1), but that Chinese law was the law applying in matters not covered by the Convention.

One reason for substituting the bases provided for in Article 1(1) concerns the temporal scope of the Convention, Article 100(2). ICC 8611/1997 [9] is an example. A German sole arbitrator sitting in Germany had to determine a dispute between a German seller and a Spanish buyer regarding a framework agreement of exclusive representation of the former by the latter party concluded in 1988. The arbitrator applied German conflicts rules and determined that the law applicable was that of the seller, that is, German law. The arbitrator then held that the Convention would be applicable to the individual sales contracts made under the umbrella of the framework agreement. He then distinguished between the case where the Convention would apply through Article 1(1)(*a*) (in which case the date of entry in force for Spain would be taken into account -- see Article 99(2)), and the case where it would apply through Article 1(1)(*b*) as part of German law (in which case the date of entry in force for Germany would be taken into account). However, it is not demonstrated further in the award to what extent that distinction affected any individual contract.

A domestic court decision, *Société Ytong v Lalaosa* [10], illustrates the issue more clearly. The case concerned an oral agreement made sometime in February 1991 between a French seller and a Spanish buyer. The Convention entered in force as between those two States in August 1991 [11]. The court applied the Convention through Article 1(1)(*b*), that is, as part of French law, without giving any reasons for that holding, but it is clear that it did so because it was impossible to apply the Convention through Article 1(1)(*a*).

At first sight such reasoning would amount to by-passing the temporal requirements through the material requirements of the Convention. The crucial question would then be whether sub-paragraphs (*a*) and (*b*) should be treated not merely as independent but also as covering different *cases*. In the latter hypothesis the forum would first determine whether the case falls under Article 1(1)(*a*) (are both parties from Contracting States?) or (*b*), and then check whether the requirements of Article 100(2) are fulfilled for each case. If not, the enquiry would stop there. Granted the analytical merits of such a conception, there is a construct that satisfactorily explains away the decisions outlined above. If "Contracting States" in sub-paragraph (*a*) is narrowly construed to cover States that have not only ratified etc the Convention but also in respect of which the Convention has already entered in force (Article 100(2)), then the forum would be legitimately resorting to sub-paragraph (*b*) when that requirement is not fulfilled. In other words, the word "Contracting" would be interpreted in the light of Article 100(2). This construct would apply *mutatis mutandis* to States with Article 92 reservations [12].

The second point is that the rules of Article 1(1)(*a*) and (*b*) serve different purposes and perform different functions. Sub-paragraph (*a*), a unilateral provision on the scope of application of the Convention, purports to eliminate, subject to Article 90, the consideration of conflicts rules [13]. Sub-paragraph (*b*) on the other hand

serves a two-fold, and distinct, purpose. It does extend the scope of application of the Convention, but this is only a side-effect of the primary purpose, that is, to replace the internal sales law of the Contracting States by the provisions of the Convention -- or at a minimum that effect is presupposed by the Convention. In other words, the present formulation of Article 1(1)(*b*) is a more elegant, if indirect, way of expressing the principle that:

> The provisions of this Convention constitute the law of Contracting States applicable to contracts of sales of goods between parties whose places of business are in different States.

From this difference between the two legs of Article 1(1) follows a second one. The Convention, as any international treaty, is binding only on Contracting *States* [14]. Thus, only the organs of those States are obliged to apply it, which practically means that only the courts of Contracting States are obliged to take account of it. Arbitrators on the other hand cannot by any stretch of imagination be equiparated to organs of any State. They are thus on a par with organs of non-Contracting States, in that they are not obliged to look at the Convention [15]. This of course leaves open a possibility or faculty that they may have to apply the Convention as an objectively applicable law, of which more below [16].

Summing up: In contrast with Article 1(1)(*a*), Article 1(1)(*b*) does not depend for its application on who is to apply it [17]. For it only says that the Contracting States have made the provisions of the Convention their domestic *common law* for international sales of goods [18]. So Article 1(1)(*b*) operates objectively to render the Convention applicable every time the conflicts rules applied by any tribunal (be that of a Contracting or non-Contracting State, or an arbitral tribunal), point to the (domestic) law of a Contracting State. Applying the Convention through Article 1(1)(*b*) has thus, from the arbitrator's point of view, the advantage that it eliminates the conceptual problem of justifying the application of an international treaty by a forum that is not bound by it.

Having examined the mechanism that allows arbitrators to take account of the Convention, one now turns to the underpinning legal premise. It is proposed, rather unconventionally for a Convention commentary, to start with the more straightforward case of Article 1(1)(*b*).

I. The Convention as Part of Domestic Law: Article 1(1)(*b*)

It seems that the forerunner of Article 1(1)(*b*) is the Dutch implementing legislation of the ULIS [19], although neither the ULIS nor the ULF contained a provision similar to Article 1(1)(*b*) as that now stands [20]. The premise behind such regulation seems clearly enough to be that the international uniform law is more appropriate than internal sales law to govern international sales. The idea has since caught on, as is evinced by identical or similar provisions in international conventions adopted since [21].

Without prejudice to the analysis to follow, an example of resorting to the Convention through Article 1(1)(*b*) would run as follows. Suppose a contract between a Greek seller and an Italian buyer that does not stipulate the law applicable to it. The tribunal finds that the appropriate conflicts rule is the one common to the laws of both parties, that is, the one contained in Article 4(2) of the 1980 Rome Convention [22], which would in turn point to the law of the seller, that is, Greek law. The tribunal will apply the Vienna Convention as part of the Greek sales law applicable.

This is hardly the place to elaborate on the conflicts rules applicable by arbitrators, but insofar as relevant here it seems that a few rules or principles have emerged in practice [23]. The cardinal rule is based on party autonomy in the choice of law [24], subject perhaps to mandatory rules of legal systems connected to the dispute but not belonging to the *lex contractus* chosen by the parties [25]. In the absence of choice the traditional rule was, and it is believed that this is still the dominant position in practice, that arbitrators must apply the conflicts rule "deemed appropriate" in the circumstances [26]. If the legal systems of the arbitrating parties share the same conflicts rule this is in practice sufficient evidence that the rule is the most appropriate

one in the circumstances [27]. These considerations are subject to two principles. First, that the actual determination of the law applicable must never take the parties by surprise [28] and, second, that the arbitrator must ensure that the choice of law will not prejudice the enforceability of the award [29]. Moreover, it is clear that the conflicts rules of the law of the seat of the tribunal (however the notion of seat may be defined) are not *obligatory* for the arbitrator [30]. As a perusal of any modern domestic arbitration law, as well as multilateral Convention, will demonstrate, an "erroneous" choice of law is never a ground for annulment of, or refusal to enforce, an international award. But this of course in no way prejudices the possibility for an arbitrator to apply the conflicts rules of the seat, as "neutral" or appropriate rules, which often occurs in practice [31].

A second preliminary matter relates to the impact of Article 95 of the Convention, according to which:

> "Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(*b*) of article 1 of this Convention."

Though such declarations have been made only by four States, one of them is the United States, whose law, it may be presumed, will be determined as applicable quite often in practice [32].

It is submitted that Article 95 seeks to eliminate the possibility that the internal sales law will be systematically replaced by the Convention, and it should be construed accordingly. Article 95 does *not*, despite the somewhat infelicitous formulation, seek to eliminate the consideration and application of Article 1(1)(*b*) *per se*, except when the law displaced by the Convention is that of a State which has made the reservation. So a United States court can apply the Convention as part of German law through Article 1(1)(*b*) [33], but it cannot apply it as part of United States law, and neither can a German court in the same circumstances [34]. This is exemplified in a declaration by the Federal Republic of Germany upon its ratification of the Convention [35]:

> "[T]here is no obligation to apply [Article 1(1)(*b*)] when the rules of private international law lead to the application of the law of a Party that has made a declaration to the effect that it will not be bound by subparagraph (1)(*b*) of article 1 of the Convention."

Even if that construction were not accepted, however, the courts of a Contracting State could still apply the Convention as part of the domestic law, through normal principles of private international law and on the premise that the international treaties ratified by the State whose law the court is applying are in that State part of the law of the land.

The question is whether an arbitral tribunal is bound by an Article 95 declaration. At first sight, an arbitrator is *vis-à-vis* an Article 95 State in the same position as the courts of any non-Article 95 State, even where he sits in that State. Because his forum is contractually created by private parties, he does not have to defend the policy of the "forum" where he sits [36]. But the issue here must be distinguished from a similar one, whether an arbitrator is bound by the mandatory rules of the place of the arbitration -- the matter there being whether he finds those rules to be applicable or not. By contrast, when an arbitrator finds the law of a certain State to be applicable, he must apply it *exactly as that State has enacted it*. An arbitrator is thus precluded from applying the Convention as part of the law of an Article 95 State because that State has made the sovereign choice of excluding the Convention becoming its law in an Article 1(1)(*b*) scenario [37] -- in other words, one is within the "protective scope" of a reservation [38]. An alternative construct to the same effect would be to consider the arbitrator bound by the Convention itself, Article 95.

The application of the Convention as part of domestic law has been confirmed in a number of varying hypotheses, both where the parties had made a choice of law and where they had not.

A. In Default of Choice of Law

The cases where the application of the Convention resulted from the application of the conflicts rules of the place of arbitration are rare. A good example is afforded by a 1996 award made in a case between a Hong Kong seller and a German buyer by an arbitral tribunal of the Hamburg Chamber of Commerce. The tribunal held that in the view of the "forum" [39] the law applicable was to be determined, in the absence of an express choice of law clause, in accordance with German private international law. The tribunal said: "It is consonant with an arbitration clause [made] pursuant to German law to conclude on a choice of German law" [40]. It is of note that the tribunal considered the *locus* of the proceedings as a decisive criterion for an implicit choice of law, without mentioning any corroborating or countervailing circumstances in the case. However, a reasoning according to which an arbitration clause imports a choice of law as a matter of irresistible or irrebuttable presumption is largely outdated [41]. Be that as it may, the tribunal went on to say that the relevant German law for international sales was the Convention.

Not surprisingly, however, the majority of awards apply a "neutral" conflicts rule to reach the application of the Convention. Such rule could be the one of the 1955/1986 Hague Sales Conventions [42], which designates the law of the seller. Thus a tribunal of the Zurich Chamber of Commerce applied the Convention because it found that under the 1955 Convention Russian law, the law of the seller, was applicable [43].

Equally uncontroversially, the Convention may apply as a result of the so-called cumulative approach to conflicts rules. ICC 7197/1992 [44] for instance concerned a contract that only contained a reference to INCOTERMS. The tribunal held that it was still necessary to determine the law applicable. It found certain elements of implicit choice of Austrian law, the law of the seller, and went on to confirm this by referring to "general rules" of conflicts. Both Austrian and Bulgarian (the law of the buyer) laws pointed to the law of the seller, part of which was the Convention.

In fact, it would seem that the conflicts rule designating the law of the seller is generally accepted by arbitral tribunals [45]. Two awards of the Vienna Chamber of Commerce for example curtly say that the law of the seller applies in absence of a choice of law, and go on to apply the Convention as part of the Austrian law of the seller [46].

The last case to be discussed it this section is ICC 8128/1995 [47]. A single arbitrator sitting in Basle had to determine a dispute between a Swiss buyer and an Austrian seller. The contract not being expressly subject to any law, the arbitrator applied Article 13(3) of the 1975/1988 ICC Rules [48] and held that the all four laws connected with the dispute (that is, Swiss, Austrian, German -- the law of the nationality of the arbitrator -- and Ukrainian -- the law of the place of delivery) had incorporated the Convention before the conclusion of the contract. So the arbitrator in effect avoided the choice of law problem on (unavowed) grounds of judicial economy: the applicable law would be the Convention in any event. This approach warrants a note of caution.

Article 92(1) of the Convention allows the Contracting States to the Convention to exclude Part II on the formation of contracts or Part III on substantive rules. Denmark, Finland, Norway and Sweden have availed themselves of that facility, to exclude Part II of their contractual obligations [49]. In line with what has been said above in relation to Article 95, if the Convention applies *qua* national law then an arbitrator cannot apply the provisions of the Convention that the Contracting State whose law is applicable has sought to exclude from its contractual obligations in accordance with Article 92(1) [50]. As Article 92(2) makes explicit, to the extent that a Contracting State has excluded the application of Part II or III of the Convention, it is not considered to be a Contracting State for the application of the relevant Part of the Convention. No Article 92 State was involved in ICC 8128/1995, but when the law of even one of such State is involved [51], then the arbitrator will have to determine precisely whose State is the law he is applying: if the Convention applies as part of an Article 92 State, the relevant part of the Convention will not be applicable.

A good example of such caution is ICC 7585/1994 [52]. A sole arbitrator sitting in Geneva determined that the law applicable in a contract between a Finnish and an Italian party was Italian law, the law of the seller. The arbitrator applied the Convention "in its entirety" as the applicable Italian sales law, noting that Italy had

not reserved the application of any provision of the Convention.

And, of course, the question of the domestic law applicable becomes important when the provisions of the Convention cannot resolve the (or one of the) issues in dispute (for instance the validity of the contract), and where the arbitrator has to fall back to the law applicable according to conflicts principles (Article 7(2), second leg). This was the case in an unreported ICC award made in 1997, where the tribunal found that the Convention would apply as part of the Danish law applicable, but in the case at hand the Convention did not provide any answers. So the parties may legitimately disagree on the question of the (domestic) law applicable, even when the Convention would be part of any of the laws potentially applicable, as is the case in a case pending before an ICC tribunal at the time of writing.

B. When there is a Choice of Law

A considerable number of awards concern cases where the parties had made an express choice of law. There are three themes to be discussed here.

(i) The Principle

The evidence demonstrates that arbitrators do not hesitate to apply the Convention when the law chosen is that of a Contracting State. This approach would tally with that of State courts of Contracting parties [53]. This is explained by the fact that party autonomy is one of the conflicts rules referred to in Article 1(1)(*b*) of the Convention [54]. ICC 6653/1993 [55] is illustrative in that respect. A German seller and a Syrian buyer had agreed, in a contract dated 3 November 1988, that the "substantive laws of France would be applicable". The tribunal held that, the Convention being in force for France since 1 January 1988 and there being an international sales contract within the meaning of the Convention, "the intention of the parties to choose French law is equivalent to a choice of . . . the Convention, which now forms an integral part of their respective domestic laws" [56].

(ii) Exclusion of the Convention

That last-mentioned case raises a interesting related issue. As will be recalled, the Convention allows for its exclusion or variation of its provisions in Article 6. When are the parties deemed to have excluded the Convention, which would otherwise apply, by a choice of law clause or agreement? The issue is still hotly debated.

Unequivocal exclusion clauses are occasionally to be found. Possible formulations, taken from cases pending before ICC tribunals at the time of writing, would run as follows:

> "This agreement shall be governed by and construed in accordance with the laws of [State X]. . . . This agreement shall not be governed [*sic*] in accordance with the [Convention]."
>
> Or:
>
> "[State X] substantive law. The [Convention] shall not apply."

And of course the parties may exclude the application of the Convention at the later stage of drawing up the Terms of Reference for the tribunal. In a pending ICC case, the Terms of Reference provided that:

> *"Le Tribunal Arbitral . . . décidera selon le droit* [of State X] *applicable au contrat à l'exclusion de la convention de Vienne."*

The premise must however be that exclusion may be implied as well as explicit [57]. On the other hand, a presumption that the parties intended the Convention to apply in expressly choosing the law of a Contracting

State without further qualifying such choice is generally accepted in domestic case law [58].

The ICC award discussed here says in effect that there is a presumption in favour of importation of the Convention, not a hard-and-fast rule [59]. Therefore, regard must be had to the surrounding circumstances. The tribunal fathomed the intentions of the parties on the consideration that, at least when the arbitration proceedings were in progress, the Convention was part of both Syrian and German law, the laws of the parties. But this was admittedly not a strong indication, if only because, in the circumstances of the case, it was not contemporaneous with the making of the contract.

It is to be assumed that objective factors, extraneous to the presumed intentions of the parties, will find their way in the analysis. One of them is the objective impact of the terms of the contract on the provisions of the Convention. ICC 6076/1989, discussed below [60], rightly considered a reference to INCOTERMS as a circumstance that did not point to the exclusion of the ULIS. As with the Convention, Articles 9(1) and 6, a reference to commercial usages will amount, if at all, to variation and not exclusion of the Convention.

Policy considerations are also likely candidates. Suppose for instance a putative contract between a New York seller and an Italian buyer concluded by exchange of standard terms. The terms of the New York party contain a New York law clause. That party subsequently fails to provide the goods to its Italian counterparty. If the question arises for consideration, the applicable law clause will doubtless be held to be a material alteration in the sense of § 2-207(2) of the Uniform Commercial Code, under whose terms the contract would come into existence without the impugned clause. Under the Convention however, Article 19(2) and (3), the clause would probably be a material alteration preventing the formation of a contract. Depending on what the courts or arbitrators find on the effect of that clause (did it exclude or did it import the Convention?), there will or will not be a breach of contract. This in turn will be affected by policy considerations on whether to uphold the contract or not.

Finally, a pro-Convention bias by arbitrators is probable too, and ICC 7565/1994 [61] seems to provide an illustration of that. There a contract between a Dutch seller and a United States buyer provided for the application of "the laws of Switzerland". The seller argued that this clause imported the Swiss Code of Obligations, stating further that:

> "Such interpretation should particularly apply where . . . parties have clearly made choice of a neutral law, i.e., the law of a country of which neither party is a national or resident."

The argument did not find favour with the tribunal, which cited three grounds to refute it. First, applicable Swiss law consists of the Convention; second, the neutrality argument is satisfied because the "Convention's objectives and contents are more than consistent with it"; third, a choice of "Swiss law" rather than "the laws of Switzerland" might have pointed to internal Swiss law [62].

Such reasoning is ultimately convincing. The second of the adduced arguments, it is submitted, is the most convincing. The Convention is a set of tailored-made rules for international sales, acceptable to and applicable as between a significant part of the international community of trading nations. Thus, when in doubt, the Convention is reasonably the most appropriate and neutral substantive law -- in any event, clearly more appropriate than any domestic law. This brings us to the last point to be addressed: may the Convention be considered as a genuine choice of law?

(iii) The Convention as the law chosen by the Parties

There is an academic debate on whether designating an international treaty as the law applicable amounts to a genuine choice of law. The theoretical aspect of the issue is whether such choice may be considered the choice of a legal system or juridical order that would fill contractual gaps, provide rules of interpretation and so forth -- and this is an impossible standard for any international treaty. The practical aspect is that, if such a

choice amounted to a choice of law, the mandatory provisions of the Convention would prevail over contract terms [63]. These issues are indeed wide-ranging. For the purposes of this analysis, suffice it to say the following.

It is a fact that the international Conventions that contain substantive law provisions do not prejudice the application of applicable mandatory rules of domestic laws connected with the dispute. Moreover, the applicable conflicts rule will often make provision for the application of such rules regardless of what the law applicable to the merits is. At all events, the enforcement forum (normally one of the States connected with the dispute) will always be able to refuse enforcement on the grounds of violation of (international) public policy if mandatory rules of the forum were violated. These remarks go to the issue of safeguarding vital interests protected by mandatory rules.

Further, if a certain domestic law applies to questions not dealt with by an international Convention, would that make the treaty less of a "law" than it would otherwise be? Would the treaty apply *because of* that domestic law? Even if this were the case [64], which it is submitted it is not, the issue would be merely theoretical. The prevailing conception in international arbitration law is that the parties need not select a legal order to govern their relationship; mere "rules of law" will do [65]. The UNCITRAL Model Law [66] is expressive of that conception.

Nonetheless, a distinction must be drawn here. For an international Convention to apply as the chosen applicable "law", it must be in force. For any provision to become "law" in any real sense of the term an act and/or condition of promulgation is necessary. International Conventions enter in force in accordance with terms they themselves contain [67]. On the other hand, if a Convention is not in force, making it applicable is tantamount to choosing "rules of law" in the sense of the UNCITRAL Model Law for instance, but it is doubtful that this could be more than a contractual incorporation for any other purposes [68].

An ICC award discusses these issues extensively [69]. The contract provided expressly that it was governed by the Convention. The arbitrator reasoned that if the Convention applies by its own terms, Article 1(1)(*a*) or (*b*), it applies with the force of law; if on the contrary the parties have chosen it directly, this amounts to contractual incorporation that would yield to a contrary mandatory provision of the *lex contractus*. The arbitrator went on to hold that the Convention applied through Article 1(1)(*b*) because even if the parties had not made a choice of law, Italian law (which imports the Convention) would apply, as the law of the seller [70].

The practical reason for this rather peculiar way of going from A to B does not appear on the face of the award as reported. Even if a choice such as the parties intended to make would not render the Convention applicable *qua* law, the arbitrator should have treated the crucial contract clause as a confirmation of the applicability of the Convention (through a national law: Article 1(1)(*b*)), by analogy with Article 6 of the Convention. This is in effect what a tribunal of the Stockholm Chamber held, albeit without elaboration, in a similar case between a United States seller and a Chinese buyer, and where the contract had been concluded when the Convention had been in force as between those two States [71].

The suggestions made above would be consonant with the legislative history of the Convention. It will be recalled that the ULIS contained an Article 4 that read thus:

> "The present Law shall also apply where it has been chosen as the law of the contract by the parties, whether or not their places of business or their habitual residences are in different States and whether or not such States are Parties to the Convention. . . ."

Though no provision to similar effect is contained in the Convention, the legislative history indicates that the drafters never sought to exclude that possibility.

As confirmatory should be interpreted clauses like the following one, taken from a case pending before an ICC tribunal:

> *"Il presente contratto è regolato dalla legge italiana. Per tutto quanto non previsto nel presente contratto varranno le norme del codice civile e quelle della Convenzione delle Nazioni Unite. . . ."*[72].

Or more indirectly, and in a similar context:

> *"Tous différends découlant du présent contrat, en ce qui concerne les ventes internationales seront tranchés* [in accordance with the ICC Rules]. *Le terme "vente internationale" a la signification lui attribué dans l'article 1* [of the ULIS]."

Clearly, these issues will be practically significant when the Contracting parties do not have their places of business in Contracting State(s) and choose the Convention as a neutral régime. If, as is suggested here, such a choice is considered as a veritable choice of law, the additional advantage is that a requirement of reasonable connection between the parties, the transaction and the law so chosen would be readily established. In other words, the Convention being a uniform sales law capable of being ratified by any one State, its appropriateness and connection must be presumed.

II. The Convention as Objectively Applicable Law

A minority of reported arbitral awards apply the Convention through Article 1(1)(*a*), that is, directly by its own terms. As has been seen above, however, the Convention cannot be considered as binding on an arbitrator, at least in an international context, because an arbitrator is neither the organ of the State where he sits nor obliged to adopt that State's law as his *lex fori* for conflicts of laws purposes. There is thus only one plausible explanation for such direct application of the Convention, and this is its persuasive force. Professor Mayer similarly suggests that in such cases the Convention has a natural vocation to apply because it renders conflicts rules redundant and contains uniform substantive law [73].

An additional advantage is that, when the Convention is held to apply directly through Article 1(1)(*a*), the arbitrators need not justify its applicability on the ostensible grounds that it is in force in the States of the parties in arbitration [74], for that will *ex hypothesi* be the case. So applicability and concrete conditions for application in this case coincide.

The reported awards would seem to confirm these suggestions, if only by implication. There are of course awards that summarily say that the requirements of the Convention, Articles 1(1)(*a*) and 100, were fulfilled and the Convention was thus applicable [75]. Some awards contain slightly more elaborate reasoning, according to which if the parties have not explicitly excluded, or opted out of, the Convention, the Convention applies if the requirements of Articles 1(1)(*a*) and 100 are fulfilled [76]. It is of note that this sort of reasoning would be remarkably identical to a Contracting *State* court's reasoning [77]. A number of these awards would further, for the issues not settled by the Convention, resort to conflicts rules in accordance with Article 7(2) of the Convention.

The relevant ICC awards are less straightforward [78]. In ICC 6281/1989 [79] the tribunal held that it could not apply the Convention in a dispute between an Egyptian buyer and a Yugoslav seller because the contract had been concluded before its entry in force, thereby implying that it would be prepared to apply the Convention through Article 1(1)(*a*). ICC 7153/1992 [80] is less clear. It concerned a contract concluded in 1989 between an Austrian buyer and a Croatian seller for the sale and assembly of certain construction equipment. The tribunal had this to say on the question of the law applicable:

> *"Selon l'intime conviction du tribunal arbitral,* [the Vienna Convention] *s'applique à defaut d'un accord entre les parties afférant au droit applicable en l'espèce*."

There is a minor discrepancy insofar as the "firm conviction" of the tribunal is said to stem from an application of Article 13(3) of the 1975/1988 version of the ICC Rules, whose text, it will be recalled, requires resorting to a conflicts rule [81]. On the other hand, it was conceded even under that version of the ICC Rules that Article 13(3) would allow the so-called direct approach [82], which is what the tribunal seems to have opted for. However that may be, the tribunal does not really explain why the Convention was applicable.

ICC 8128/1995, a case discussed above [83], was ostensibly decided on the basis of Article 1(1)(*a*), but the sole arbitrator's real reasoning was that the Convention would apply as domestic law whichever law would be applicable of the ones connected with the dispute. This is not a genuine application of Article 1(1)(*a*); rather, the case was decided on the ground that a detailed conflicts analysis was in the particular circumstances of the case superfluous.

On the other hand, certain awards demonstrate uneasiness with the proposition that the Convention may be the law applicable *tout court*. ICC 6076/1989 [84], a ULIS case where the Convention was discussed *obiter*, concerned a contract between a Dutch seller and an Italian buyer providing for the application of Dutch law and the 1953/1967 version of INCOTERMS. The tribunal found that the effect of such agreement was to render the ULIS applicable, but went on to hold that the ULIS applied both by its own terms and through the Dutch implementing legislation which contains a provision similar to the Convention's Article 1(1)(*b*) [85]. As has been said above, however, the Convention provides for two alternative and independent bases of application, and thus cannot logically apply through both of them. If, as seems to be the case, the tribunal cited both provisions *ex abudante cautela*, there is no real harm, but analytically the following distinction should be made.

Where the parties have chosen the law of a Contracting State to apply, there are two possibilities: either the Convention would apply through Article 1(1)(*a*) because both parties have their places of business in Contracting States or it would apply through Article 1(1)(*b*) if they do not have their places of business in Contracting States. In the former case the Convention applies through Article 1(1)(*a*) insofar as the parties have not excluded its application (Article 6) or, by analogy, because they have confirmed its application by stipulating it would be the law applicable. In the latter case the Convention applies through Article 1(1)(*b*) because the only connecting factor is the choice of the parties, that is, the operation of a conflicts rule; and the same would *mutatis mutandis* apply when the parties have made no choice.

The distinction is important in respect of Article 95 reservations. In ICC 7399/1993 [86] the tribunal dealt with a contract between a seller from the State of California and a Swiss buyer. The contract, the tribunal found, had its closest connection with the law of the seller, Californian law. The tribunal did not, however, apply the Convention through Article 1(1)(*b*) but through 1(1)(*a*) -- one presumes because of the relevant United States reservation. This solution was entirely legitimate: because Article 1(1)(*b*) is auxiliary to 1(1)(*a*), the Convention should and would have applied through that latter provision anyway.

Conversely, in ICC 7197/1992 [87], the Convention could not apply through Article 1(1)(*a*) because it had not entered in force at the relevant time as between the two States concerned, but it was applied as part of the law of the seller. The legal foundation for such interchanging has been discussed above [88].

Two awards of the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry would seem to confirm the construct suggested above, though admittedly not decisively [89]. In both cases the parties had explicitly chosen as law applicable the law of a Contracting State and, at the same time, the requirements of Article 1(1)(*a*) were fulfilled. In both cases the court cited both provisions to hold the Convention applicable. In other words, the court did not feel it could rely exclusively on Article 1(1)(*b*), though the interpretation advanced above goes further in that it would decide the matter on the sole basis of Article 1(1)(*a*).

III. The Spill-Over Effect of the Convention

In a number of awards the Convention has been applied not because it was applicable by its own terms but, rather, as evidence of general principles of commercial law recognised by modern national laws or as evidence of international custom or usage -- what is collectively but perhaps with some lack of precision called *lex mercatoria*. This raises some difficult questions.

The first, and most (in)famous, instance of such application was in ICC 5713/1989 [90]. Neither the nationality of the parties or the arbitrator nor the place of the arbitration appear on the face of the award. What we do know is that the buyer and the seller had their places of business in different States and that in 1979 they had concluded three f.o.b. sales contracts. In accordance with the terms of each contract, the buyer had payed the seller 90% of the price of each shipment upon presentation of the relevant shipping documents. The buyer refused, however, to pay the outstanding 10% for the second shipment, on the grounds that that shipment did not meet the contractual specifications. The seller sued for that amount outstanding and the seller counterclaimed by way of set-off the losses incurred as a result of the alleged non-conformity.

The tribunal first determined that the law applicable, lacking an applicable law clause in the contracts, was that of the State of the seller, referring to the 1955 Hague Sales Convention and "general trends in conflicts of law" [91]. The arbitrators Stated further that they would also take account of the "relevant trade usages", as provided for by the then current 1975/1988 version of the ICC Rules. After an evaluation of the legal situation in accordance with the law applicable (which law does not appear on the face of the report), the arbitrators went on to examine trade usages. They had this to say [92]:

> "[T]here is no better source to determine the prevailing trade usages than the terms of the [Convention]. This is so even though neither [the country of the Buyer] nor [the country of the Seller] are parties to the Convention. If they were, the Convention might be applicable to this case as a matter of law and not only as reflecting the trade usages."

From that point on in the award, it seems, the tribunal exclusively relies on the Convention, in total disregard of the law it had previously found to be applicable. The premise for that departure seems to be that the requirements of the Convention for the inspection of goods (Articles 38 and 39) "are considerably more flexible" than those under the law applicable. The tribunal said that the seller's law "by imposing extremely short and specific time requirements . . . appears to be an exception . . . to the generally accepted trade usages" [93]. Moreover, Article 40 of the Convention precluded the seller from relying on Articles 38 and 39 if the lack of conformity "relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer". The tribunal awarded the amount of the counterclaim to the buyer.

The holding has met with some approval, but there are stronger reasons, it is suggested, to be critical of it. Insofar as it appears from the face of the report, the parties had neither made their pleadings on the basis of the Convention nor anticipated and commented on its application. It should be noted that the contracts were passed in 1979, one year before the Convention was made and nine years before its entry into force. It is entirely legitimate then to ask how the parties were supposed to have even contemplated its application, on any basis, at the time of conclusion of the contracts or of the crucial facts in litigation [94]. It may of course be countered that the Convention was not said to apply as law but rather as *evidence* of usage, presumably pre-existing and current at the time of the making of the contracts [95]. However, this is questionable too.

As a general matter, it must be queried whether the draft of the Convention as it stood in 1979 had received the "notoriety" requisite for a commercial usage or custom. In the same vein, and though there is no conceptual objection to an international convention applying independently of its strict scope of application, as evidence of customary law [96], it is doubtful whether the Convention purports to codify pre-existing usage to any extent at all. True as it may be that the drafters intended a text in line with the expectations and needs of the mercantile community [97], a cursory look at the preparatory works shows that the Convention is the

product of a laborious comparative law exercise and political accommodation more than anything else [98]. There is here, in other words, a difference between codifying or crystallizing public international law treaties and private law unifying treaties. The former may accurately reflect pre-existing or emerging custom because the codifiers and the makers of the custom are the same persons, namely sovereign States, whereas such coincidence of actors is lacking in private law treaties. This gives rise to doubt that any private law treaty may conceivably be merely codifying of a *spontaneous* but settled practice "which is carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by . . . a rule of law requiring it" [99]. On this premise the Vienna Convention would at most seem to contain rules of law generally accepted by the international community [100].

Be that as it may, a more specific issue is that the Convention only lays down a very general, and in fact considerably relaxed, fall-back time limit for notice of non-conformity on the part of the buyer, namely two years. This is substantially longer than most internal sales laws require, and it is clear that it is part and parcel of an "overall compromise" achieved in Articles 38-40 of the Convention [101]. It may therefore reasonably be suspected that there would exist a custom specific to the particular trade sector of the (unnamed) product concerned in the case that would defeat the general notice period rule. This is in fact the general mechanism provided by the Convention itself for particular trade usages in Article 9 [102]. Further, it is not demonstrated whether the relevant provisions of the law applicable were suppletive so that they could be supplanted by trade usage.

On the other hand, the application of Article 40 of the Convention, which seems a particular application of the principle of good faith, could perhaps more comfortably be justified as a general principle of international trade law rather than a usage [103].

In conclusion, even if the application of the Convention was warranted as a corrective measure appropriate in the "equities" of the case, the tribunal seems to have lost sight of its duty not to surprise the parties and, at all events, failed to provide concrete evidence why the Convention was to be regarded as reflecting trade usage in respect of time limits for the making of notices of non-conformity in the particular trade sector concerned [104].

At least one commentator would urge ICC tribunals to follow the path of ICC 5713 [105], but subsequent ICC awards have in fact taken a much more cautious approach. First, arbitrators tend not to look at the Convention when the contractual relationship does not involve a sale of goods, even though some of its rules could arguably be relevant to other types of commercial contracts. Thus in ICC 8356/1996 for instance, a case regarding an inter-bank letter of guarantee, the arbitrators held that there was a negative choice of law in the sense that the parties had implicitly chosen the usages and general principles of international trade, as opposed to a domestic legal system, to apply, but did not consider the Convention as a possible source of evidence for such usages or principles [106]. A similar solution was reached in ICC 6149/1990 [107]. There the dispute was between a Korean seller and a Jordanian buyer, related to a series of contracts for the sale of goods to be delivered to an end buyer in Iraq. The Korean seller sued on breach of contract and unjust enrichment. The tribunal determined, through the cumulative application of the conflicts rules of the countries of the seller, the buyer, the end buyer and the place of arbitration, that the law applicable was Korean law. In an interesting twist, the Korean seller then argued that the application of Korean law would be impracticable, and pleaded the application of *lex mercatoria*, which was, in the view of the seller, tantamount to the Convention. The tribunal agreed with the proposition, but held that the Convention did not contain any provisions on unjust enrichment whereas the parties were presumed to have tacitly excluded any *dépeçage*. The tribunal declined to apply the Convention on any ground.

On the other hand, a New York Federal Court applied the Convention, and Article 9 in particular, as part of "general principles of contract law" to decide whether the requirement of writing of Article II of the New York Arbitration Convention [108] was fulfilled by an exchange of correspondence [109]. Similarly, Advocate General Tesauro, in his conclusions to the *Gravières Rhénanes* case [110], cited Article 18(1) of the

Convention in support of his interpretation of Article 17(*c*) of the Brussels Convention [111].

Second, though in a given case the law applicable under conflicts rules may lead to the same result as the Convention, the Convention will be cited only as a persuasive factor for the international currency of the substantive solution given by the domestic law applicable [112]. In such cases, one presumes, the dispute would be resolved by the (domestic) law applicable even if the provisions of that law were discordant with the Convention; in other words the Convention is used here only *ad abudantiam*, to enhance the credibility of the substantive solution arrived at.

Finally, a case of non-genuine application of the Convention as *lex mercatoria* must be distinguished. In ICC 7331/1994 the arbitral tribunal had to resolve a dispute between a Yugoslav seller and an Italian buyer arising out of a contract concluded in 1989, at which time the Convention had entered in force both for Yugoslavia and Italy [113]. The tribunal did apply the Convention but, eccentrically, as evincing in the "most complete way" international trade usages and general principles of law, which it found to govern the contract. The tribunal rejected the application of the Convention as part of the law of the seller (that is, through Article 1(1)(*b*)), and it seems that it did not even contemplate its application objectively, through Article 1(1)(*a*). This solution is all the more odd if it is taken into account that the tribunal applied, *inter alia*, Article 8(3) of the Convention, which deals with usage established between the parties, in order to determine the effect, if any, on the original contract of certain subsequent acts of the parties. In sum, the tribunal held that the Convention as a whole evinces general usage which, in turn, provides for the application of a specific, *inter partes*, usage (Article 8(3)).

This, however, is only a vicious circle. What can then be said of the usages referred to in Article 9(2) of the Convention? How can the construct of the Convention *qua* general usage be reconciled with another general usage (in Article 9(2)) provided for in, or rather by, the *ex hypothesi* referring usage? This is too muddled to be useful: the Convention should have applied through either of the two mechanisms provided for in Article 1(1) [114].

It is suggested in conclusion to this section that the Convention may apply as part of *lex mercatoria* only if it is considered, as it may, as the articulation of rules of law generally accepted by a constantly enlarging community of trading nations. The Iran-US Claims Tribunal was thus on firmer ground in holding that the right of the seller to sell undelivered goods in mitigation of his damages, as embodied in Article 88 of the Convention, "is consistent with recognized international law of commercial contracts" [115]. As such, the Convention is a distillation of rules of sales law which were considered to be appropriate for international sales contracts -- that is to say, generally accepted rules of law.

IV. Conclusions

The evidence adduced above suggests that arbitration is one of the most fertile grounds of application of the Convention. Though papers on the Convention regularly discuss the substantive solutions adopted by arbitrators applying the Convention, no detailed discussion had so far been made on the particular issues concerning the mechanics and underpinning legal principles that make the Convention part of the law applicable by arbitrators.

This essay has suggested that while the application of the Convention through Article 1(1)(*b*) presents no significant methodological problem insofar as arbitrators are concerned, applying the Convention through Article 1(1)(*a*) entails acceptance on the part of arbitrators that the Convention is objectively applicable. It was submitted that such construct draws or is based on the persuasive value of the Convention, and was commended. Systematically applying the Convention through Article 1(1)(*b*), straightforward as it may be, distorts the complementary character of the bases of application of the Convention. It was submitted that it would be more convincing and in accordance with the Convention's own terms if the Convention was applied directly through Article 1(1)(*a*) when the requirements of that provision were fulfilled. The evidence supports

the feasibility of this construct and, moreover, suggests that it will not be long until arbitrators will resort to the Convention directly (that is, not through the medium of a domestic law), including Article 1(1)(*a*) and (*b*), without further elaboration.

Finally, the question of the Convention as part of *lex mercatoria* was considered, and was argued that the Convention should essentially be regarded as embodying generally accepted rules of sales law rather than usage or custom of the mercantile community.

FOOTNOTES

1. LL.B (Athens), Diplômé (Strasbourg), M.Jur (Oxon), of the Hellenic Bar. Doctoral candidate, Trinity College, Oxford.

2. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980), (1988) 1489 UNTS 3. The Convention entered in force on 1 January 1988 in accordance with Article 99(1) of the same.

3. See *Multilateral Treaties Deposited with the Secretary-General*, status as at 10 February 1999, available at <www.un.org/Depts/Treaty>. Greece acceded to the Convention on 12 January 1998 and implemented it by Act No 2532/1997 (Government Gazette A 227/1997).

4. See *e.g.* the annual statistics contained in the first issue of *ICC Bull* of each year (1990-).

5. See *e.g.* WTO Press Release PRESS/98 (19 March 1998) and the relevant statistics at <www.wto.org/wto /statis>.

6. Article 28 in contrast makes reference only to courts. The accepted interpretation is that the omission of arbitral tribunals in that provision is not legally significant; see *e.g.* Huber in Schlechtriem, P (ed), *Commentary on the United Nations Convention on the International Sales of Goods* (Thomas trans of the German 2nd edn, 1998), 208.

7. But see, erroneously, Paris, 22 April 1992, *Société Fauba France FDIS GC Eléctronique v Société Fujitsu Mikroelektronik GmbH*, unreported but available at <www.jura.uni-sb.de/FB/LS/Witz>, *aff'd*, Cass Civ 1re, 4 January 1995, *Société Fauba France FDIS GC Eléctronique v Société Fujitsu Mikroelektronik GmbH* [1995] *D* 289, note Witz, Case Law on UNCITRAL Texts ("CLOUT", UN Docs A/CN.9/SER.C/ABSTRACTS/1- (1993-)) Case 155.

8. See CIETAC award of 1 April 1993 in CIETAC, *Selected Works of CIETAC Awards (1963-1988) updated to 1993* (1995) *sub no* 75, 308 at 314. The tribunal applied Articles 19 and 74-76 of the Convention.

9. See ICC 8611/1997, unreported but available at <www.cisg.law.pace.edu>.

10. See Grenoble, 16 June 1993, *Société Ytong v Lalaosa*, unreported but translated in English in (1995) 14 *J L & Comm* 109 and abstracted as CLOUT Case 25.

11. The Convention entered in force for France on 1 January 1988 and for Spain on 1 August 1991; see *Status of Conventions and Model Laws*, UN Doc A/CN.9/449 (1998).

12. See ICC 7585/1994, *infra* note 52 and accompanying text, where the tribunal applied the Convention through Italian law though the parties had their places of business in Contracting States, Italy and Finland. Finland has made an Article 92 reservation excluding the application of part II of the Convention and to that extent it is not a Contracting party (see *infra* note 49 and accompanying text). As it happened, however, no

provisions from that part of the Convention were applied.

13. See the Secretariat Commentary (UN Doc A/CONF.97/5), Official Records, UN Doc A/CONF.97/19, 16 at para 4, *reprinted in* Honnold, J, *Documentary History of the Uniform Law for International Sales* (1989) 404-405.

14. See the Convention on the Law of Treaties (Vienna, 22 May 1969), (1980) 1155 UNTS 331, Article 26: "Every treaty in force is binding upon *the parties to it* and must be observed *by them* in good faith" (emphasis added).

15. Cf. Mayer, P, "L'application par l'arbitre des conventions internationales de droit privé" in *L'internationalisation du droit: Mélanges en l'honneur de Yvon Loussouarn* (1994) 275, 282.

16. But see Sajko, K, "Determining Substantive Law in Arbitral Disputes: The Application of the Rome and Vienna Conventions", (1997) 4 Croatian Arb YB 123, 132-4, who does not seem to contemplate the application of the Convention directly through Article 1(1)(*a*).

17. Cf. the Secretariat Commentary, *supra* note 13, paras 6-7; and see the cases cited by Bonell, MJ & Liguori, F, "The U.N. Convention on the International Sale of Goods: a Critical Analysis of Current International Case Law (Part I)", [1996] *ULR* 147, 153-154, note 36.

18. Cf. ICC 7585/1994, *infra* note 52: "[L]es dispositions du droit interne italien . . . ont été rémplacées par celles de la Convention qui est donc appliquable dans son intégralité."

19. The 1971 Dutch implementing legislation read as follows in pertinent part (as quoted in ICC 6076/1989, *infra* note 84):

> "[T]he present law shall also apply, if, by virtue of any rule of private international law, Dutch law applies to an international sale of goods in the sense of the present law."

20. See Convention Relating to a Uniform Law on the International Sale of Goods (The Hague, 1 July 1964), (1972) 834 UNTS 107 ("ULIS"); and Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (The Hague, 1 July 1964), (1972) 834 UNTS 169 ("ULF"). The ULIS and ULF were the predecessors of the Vienna Convention; see Article 99 of the Convention.

21. See the following Conventions: United Nations Convention on the Limitation Period in the International Sale of Goods (New York, 19 June 1974, as amended by Protocol of 11 April 1980), (1988) 1151 UNTS 3, Article 3(1)(*b*); United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 11 December 1995), GA Res 50/48 (1995), Article 1(1)(*b*) (the Convention will enter in force in 2000; the text is contained in UN Doc A/50/17, Annex I (1995)); Unidroit Convention on Agency in the International Sale of Goods (Geneva, 17 February 1983), [1983] *ULR* 161, Article 2(1)(*b*). And cf. Unidroit Convention on International Financial Leasing (Ottawa, 28 May 1988), [1988] *ULR* 135, Article 3(1)(*b*); Unidroit Convention on International Factoring (Ottawa, 28 May 1988), [1988] *ULR* 163, Article 2(1)(*b*).

22. See Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980), [1998] OJ C27/34-46 (consolidated version), Article 4(2). The principle in Article 4(2) is widely accepted in modern treaty practice; see Convention on the Law Applicable to International Sales of Goods (The Hague, 15 June 1955), (1964) UNTS 149, Article 3(1); and Convention on the Law Applicable to Contracts for the International Sales of Goods (The Hague, 22 December 1986), [1985] *Proceedings of the Hague Conference* 691, Article 8(1).

23. See further Derains, Y, "L'application cumulative par l'arbitre des systèmes de conflit de lois intéressés au litige", [1972] *RevArb* 99; Lalive, P, "Les règles de conflit de lois appliquées au fond du litige par l'arbitre

international siégeant en Suisse", [1976] *RevArb* 157; Grigera Naón, HO, *Choice of Law Problems in International Commercial Arbitration* (1992).

24. See ICC 1512/1970, (1980) 5 *YCA* 174.

25. This proposition is not entirely uncontroversial: see von Hoffman, B, "Internationally Mandatory Rules of Law before Arbitral Tribunals" in Bökstiegel, KH (ed), *Acts of State and Arbitration* (1997) 3; Petrochilos, GC, "Note: The Legal Relevance of 'Foreign' Mandatory Procedural Rules in the Context of International Commercial Arbitration", (1998) 51:2 *RHDI* (forthcoming).

26. See *e.g.* European Convention on International Commercial Arbitration (Geneva, 21 April 1961), (1964) 484 UNTS 349, Article VII; Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between two Parties of which only one is a State (1993), *reprinted in* (1994) 19 YCA 338, (1994) 9 ICSID Rev - FILJ 237, Article 33(1); UNCITRAL Model Law, UN Doc A/40/17, Annex I (1985), *reprinted in* (1985) 24 *ILM* 1302, Article 28(2); UNCITRAL Arbitration Rules, GA Res 31/98 (1976), Article 33(1). However, the so-called "direct approach" according to which arbitrators determine the rules of law applicable rather than the conflicts rule applicable is gaining currency in practice; see ICC Rules (1998), ICC Publication No 581, 1997, *reprinted in* (1997) 36 ILM 1604, Article 17(1); London Court of Arbitration Rules (1998), *reprinted in* (1998) 37 ILM 669, (1998) 23 YCA 336, (1998), Article 22.3 (and cf. the 1997 Draft Rules, Article 19(1)(*a*)); Court of Arbitration and Mediation for the Americas (CAMCA) Rules (1996), Article 30(1); American Arbitration Association International Arbitration Rules (1998), Article 28(1); Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (1999), Article 24(1). For an example in practice see ICC 2730/1982, (1984) 111 *JDI* 914, note Derains.

27. Cf. European Court of Arbitration Rules (1997), Article 11(3).

28. See *e.g.* Derains, Y, "Attente légitime des parties et droit applicable au fond en matière d'arbitrage commercial international", [1984-85] *TrComFr DIP* 81; Lalive, P, "L'arbitrage international et les Principes UNIDROIT" in Bonell, MJ & Bonelli, F (eds), *Contratti Commerciali Internazionali e Principi UNIDROIT* (1997) 71, 85.

29. Cf. ICC Rules (1998), Article 35; ICC Rules (1975/1988), ICC Publication No 447-3, 1993, Article 26.

30. According to a traditional view, all aspects of an arbitration, including the conflicts of laws rules, are subject to the law of the seat of the tribunal; see *e.g.* the Resolution of the *Institut de Droit International* on "Arbitration in Private International Law", (1957) 47ii *AnnIDI* 491 (English translation); *ibid* 479 (French original). The *Institut* itself reversed course in its 1989 Resolution on "Arbitration between States, State Enterprises, or State Entities, and foreign Enterprises", (1990) 63ii *AnnIDI* 324, in particular Article 6. See further *e.g.* De Ly, F, "The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning", (1991) *Nw J Int'l L & Bus* 48, 61-69, and the references there.

31. See *e.g.* ICC 5551/1988, (1996) 7 No 1 *ICC Bull* 82.

32. The other three States are China, Czechoslovakia (which has meanwhile been succeeded by the Czech Republic and Slovakia) and Singapore; see *Status of Conventions and Model Laws*, UN Doc A/CN.9/449 (1998).

33. *Contra* Herber in Schlechtriem, *supra* note 6, at 26, 27; Evans in Bianca, CM & Bonell, MJ (eds), *Commentary on the International Sales Convention. The 1980 Vienna Sales Convention* (1987) 656-657.

34. But see, erroneously, OLG Düsseldorf, 2 July 1993, (1993) 39 *RIW* 845, [1993] *IPRspr* 323, CLOUT Case 49, where the court applied the Convention as part of United States (Indiana) law through Article 1(1)(*b*). For

a comment see *e.g.* Schlechtriem, [1993] *EWiR* at 1075-1076 or in Kritzer, A (ed), *Guide to the Practical Applications of the United Nations Convention*, vol 2, supp 9 (1994).

35. Declaration contained in notice of ratification, reproduced in *Multilateral Treaties Deposited with the Secretary-General*, status as at 10 February 1999, available at <www.un.org/Depts/Treaty>.

36. This only means of course that the arbitrator's *lex fori* is does not necessarily coincide with the law of the place of the arbitration. The arbitrator must follow or construct a *lex fori*, because a system of reference is a logical prerequisite for the resolution of any legal dispute; see Von Mehren, A & Jimenez de Aréchaga, E, Preliminary Report, (1989) 63i *AnnIDI* 31, 193, sub no 7; Ehrenzweig, A, "The *Lex Fori* -- Basic Rule in the Conflict of Laws", (1960) 58 *Mich LR* 637. But see for an overbroad formulation ICC 1512/1971, (1976) 1 *YCA* 128, (1974) 101 *JDI* 905, note Derains: "the international arbitrator has no lex fori, from which he can borrow rules of conflict of laws. . . ."

37. Cf., for the hypothesis of a non-Contracting State's court, Lando, O, "The 1985 Hague Convention on the Law Applicable to Sales", (1987) 51 *RabelsZ* 60, 84. And see ICC 7197/1992, *infra* note 44 (obiter); ICC 7531/1994, *infra* note 78 (obiter).

38. Herber, *supra* note 33.

39. It is unclear whether the tribunal meant by "forum" itself or Germany.

40. See Schiedsgericht der Handelskammer Hamburg, 21 March 1996, (1996) 42 *RIW* 766, (1996) 49 *NJW* 3229, (1996) 50 *MDR* 781, CLOUT Case 166. Cf. Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, award of 10 December 1996, case No VB/96074, CLOUT Case 163, <www.cisg.law.pace.edu> (full text), where the court applied Hungarian conflicts rules.

41. In English law for instance the leading case for that proposition is *Compagnie d''Armement Maritime SA v Compagnie Tunisienne de Navigation* [1971] AC 572, HL.

42. See *supra* note 22.

43. See award of 31 May 1996 in case No 273/95, unreported but available at <www.cisg.law.pace.edu>. Cf. *e.g.* Grenoble, 23 October 1996, *SCEA GAEC des Bauches B Bruno v Société Teso Ten Elsen GmbH & CoKG* (1997) 86 *RCDIP* 756, note Sinay-Cytermann, (1998) 125 *JDI* 125, note Huet.

44. See ICC 7197/1992, (1993) 120 *JDI* 1028, note Hascher.

45. See *e.g.* ICC 5885/1989, (1996) 7 No 1 *ICC Bull* 83.

46. See Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, awards of 15 June 1994, cases Nos SCH-4366 and SCH-4318, (1995) 41 *RIW* 590, note Schlechtriem, (1995) 122 *JDI* 1055, UNILEX D.1994-13, -14.

47. See ICC 8128/1995, (1996) 123 *JDI* 1024, note Hascher.

48. Article 13(3) reads in relevant part:

> "In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate."

49. See *Status of Conventions and Model Laws*, UN Doc A/CN.9/449 (1998).

50. Accord: H Muir-Watt, "L'applicabilité de la Convention des Nations Unis sur les contrats de vente

internationale de marchandises devant l'arbitre international", [1996] *RDAI* 401, 405.

51. ICC 8782/1997 (unreported).

52. See ICC 7585/1994, (1995) 122 *JDI* 1015, note Derains. Note that the award was reported in (1995) 6 No 2 *ICC Bull* 60 as a 1992 award.

53. See the references in Herber, *supra* note 33. And see BGH, 23 July 1997, [1997] *EWiR* 985.

54. See *e.g.* ICC 8324/1995, (1996) 123 *JDI* 1019, note Hascher.

55. See ICC 6653/1993, (1993) 119 *JDI* 1040, note Arnaldez. The award was annulled on other grounds by Paris, 6 April 1995, *Thyssen Stahlunion GmbH v Société General Foreign Trade Organisation Building Materials* (1995) 121 *JDI* 971, note Loquin.

56. See to the same effect ICC 7660/1994, (1995) 6 No 2 *Bull ICC* 72, UNILEX E.1994-20; ICC 7844/1994, (1995) 6 No 2 *Bull ICC* 72; ICC 6076/1989, *infra* note 83; ICC 8087/1995, unreported, cited by Hascher, (1996) 123 *JDI* 1024.

57. Much of the discussion has centred on the fact that, unlike the ULIS (Article 3, second sentence), the Convention does not provide expressly for its implied exclusion. The Secretariat Commentary, *supra* note 12, at 17, clarifies that the omission purported merely to discourage courts from excluding the Convention on weak evidence. Of the same view *e.g.* Nicholas, B, "The Vienna Convention on International Sales Law", (1989) 105 *LQR* 201, 208. As it stands, the text would support the reading that in doubt the Convention is applicable; see Herber, *supra* note 33.

58. See *supra* note 53. Two Italian decisions, one of the Tribunale Civile, Monza (14 January 1993, *Nuova Fucinati SpA v Fondmetal International AB* [1994] *Giur It* I.146, note Bonell, [1994] *Foro It* I.916, note Di Paola, *translated in* (1995) 15 *J L & Comm* 153) and one of an ad hoc arbitral tribunal in Florence (award of 19 April 1994, CLOUT Case 92) held that a clause providing for the application, or the exclusive application, of Italian law is an implicit exclusion of the Convention or excludes consideration of the Convention altogether. The cases are widely criticised; see *e.g.* Bonell & Liguori, *supra* note 16, at 156-157.

59. Thus ICC 9187/1999 (unreported), where the contract provided for the application of the law of a Contracting party to the Convention, and the tribunal applied the Convention despite the defendant's assertion that the parties intended the internal law of that State to apply.

60. See *infra* note 84.

61. See ICC 7565/1994, (1995) 6 No 2 *Bull ICC* 64, UNILEX E.1994-30.

62. But see OLG Hamm, 9 June 1995, (1996) 6 *IPRax* 269, note Schlechtriem, *ibid* 256, (1996) 42 *RIW* 689, [1996] *NJW-RR* 179.

63. Thus Cass Comm, 4 February 1992, *Karkaba v Société Navale Chargeurs Delmas Vieljeux* (1992) *RCDIP* 495, note Lagarde (a case on the 1924 Maritime Mortgages and Liens Convention).

64. Thus Mayer, *supra* note 15, at 287.

65. See thus the three unreported ICC awards applying the UNIDROIT Principles as proper law of the contract, discussed by Garro, AJ, "The Contribution of the UNIDROIT Principles to the Advancement of International Commercial Arbitration", (1995) 3 *Tul J Int'l & Comp L* 93, 109-111; Berger, KP, "The Lex Mercatoria Doctrine and the UNIDROIT Principles of International Commercial Contracts", (1997) 28 *Law &*

Pol'y Int'l Bus 943, 984-987; Bonell, MJ, "The UNIDROIT Principles in Practice: The Experience of the First Two Years", [1997] *ULR* 34, 42-43; Lalive, *supra* note 28, at 81, 86-87.

66. See UNCITRAL Model Law, *supra* note 25, Article 28(1); and the arbitration rules cited in the same note. See also the preparatory materials reproduced in Holtzmann, HM & Neuhaus, JE, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (1989) 768.

67. See Vienna Convention on the Law of Treaties, *supra* note 14, Article 24(1).

68. But see Lando, *supra* note 37, at 83, who seems to consider this as a case of veritable choice of law.

69. See ICC 7585/1994, *supra* note 52 and accompanying text.

70. Cf. the award in case No VB/96074, *supra* note 40, where the parties agreed that the Convention was applicable, but the tribunal applied the Convention through Article 1(1)(*b*) and Hungarian conflicts rules.

71. See award of 5 June 1998, *Beijing Light Automobile Co, Ltd v Connell Limited Partnership*, unreported but available at <www.cisg.law.pace.edu>. See also Metropolitan Court (Forárosi Bíróság), Budapest, 19 January 1992, *Pratt & Wittney v Malev Hungarian Airlines*, *translated in* (1993) 13 *J L & Comm* 49, *reversed on other grounds*, Supreme Court (Legfelsobb Bíróság), 25 September 1992, *Malev Hungarian Airlines v Pratt & Wittney*, *translated in* (1993) 13 *J L & Comm* 31.

72. Translation: "This contract is governed by Italian law. Wherever this contract is silent, the provisions of the Civil Code and of the United Nations Convention will be applicable . . . ".

73. See Mayer, *supra* note 15, at 287.

74. This is a reasoning arbitral tribunals often deploy to justify the application of international treaties; see *e.g.* ICC 6379/1990, (1992) 17 *YCA* 212, where the tribunal applied the 1958 New York and 1961 Geneva Arbitration Conventions.

75. See the Mexican Commission for the Protection of Foreign Trade (Compromex) award in *Morales v Nez Marketing*, case No M/66/92, *quoted by* Gonzalez & Cohen, (1997) 17 *J L & Comm* 363-367, para 3 (not explicitly). This would also seem to be the case for the six China International Economic and Trade Arbitration Commission (CIETAC) awards rendered in 1992-1995 between Chinese and overseas parties; the awards are abstracted at <www.cisg.law.pace.edu>.

76. See the 1995 award of the Tribunal attached to the Russian Federation Chamber of Commerce and Industry made in case 304/1993, *quoted by* Rozenberg, (1995) 2 *RCL/IPG-LAW* 10-13. There is a considerable number of awards of the same Tribunal that would seem to follow the same reasoning, abstracted at <www.cisg.law.pace.edu>.

77. See *e.g. Delchi Carrier, SpA v Rotorex Corp*, 71 F.3d 1024 (2d Cir 1995).

78. With the exception of ICC 7531/1994, (1995) 6 No 2 *ICC Bull* 67, UNILEX E.1994-31, where the tribunal simply held the Convention applicable to a contract between a Chinese seller and an Austrian buyer and where that contract was concluded before the entry in force of the Convention.

79. See *infra* note 112.

80. See ICC 7153/1992, (1992) 119 *JDI* 1005, note Hascher, *translated in* (1995) 14 *J L & Comm* 217.

81. See *supra* notes 26, 48.

82. See Hasher's note, *supra* note 80, with further references.

83. See *supra* note 47 and accompanying text.

84. See ICC 6076/1989, (1990) 15 *YCA* 83.

85. See *supra* note 19.

86. See ICC 7399/1993, (1995) 6 No 2 *ICC Bull* 68.

87. See 7197/1992, *supra* note 44. See also Tribunal Commercial, Bruxelles, 13 November 1992, *Maglificio Dalmine Srl v SC Covires*; 5 October 1994, *Calzaturificio Moreo Junior Srl v SPR LU Philmar Diff*, both in UNILEX 1996.

88. See *supra* notes 9-11 and accompanying text.

89. See award of 5 December 1995, case No VB/94131, [1996] *NJW-RR* 1145 (segments), CLOUT Case 164, <www.jura.uni-freiburg.de/ipr1/cisg> (full text); award of 8 May 1997, Case No VB/96038, CLOUT Case 174.

90. ICC 5713/1989, (1990) 15 *YCA* 70.

91. See *ibid* sub [2]-[3].

92. *Ibid* sub [5].

93. *Ibid* sub [8].

94. See extensively Goode, R, "Usage and its Reception in Transnational Commercial Law", (1997) 46 *ICLQ* 1, 20-22; and see Hyland, R, "Commentary on ICC Case No 5713 of 1989" in Kritzer, *supra* note 34.

95. When an international Convention applies only as evidence of customary law and/or because of its persuasive force, its not having entered in force is not a circumstance necessarily precluding such application; cf. Paris, 27 November 1986, *Wuetig v Société International Harvester* (1988) 77 *RCDIP* 314, note Lyon-Caen (a case on Article 6 of the 1980 Rome Convention).

96. See *Military and Paramilitary Activities in and against Nicaragua* (Merits), *ICJ Reports 1986*, at 94, para 175: "[E]ven if a treaty norm and a customary norm . . . have exactly the same content, this would not be a reason . . . to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability."

97. See *e.g.* Audit, B, *La vente internationale de marchandises: Convention des Nations-Unies du 11 avril 1980* (1990) 44; *id*, "The Vienna Sales Convention and the Lex Mercatoria" in Carbonneau, Th (ed), *Lex Mercatoria and Arbitration* (revised edn 1998) 173, 187 *et seq*.

98. For instance, Article 68, on sales of goods in transit, was an accommodation between developed and developing countries; see *e.g.* Honnold, J, *Uniform Law for International Sales* (2nd edn 1991) **?** 372.

99. *North Sea Continental Shelf Cases*, *ICJ Reports 1969*, at 44, para 77.

100. See further on the distinction *e.g.* Gaillard, E, "La distinction entre principes généraux du droit et usages du commerce international" in *Études offertes à Pierre Bellet* (1991) 203.

101. See Honnold, *supra* note 98, **?** 288.

102. Incidentally, this would tally with the proposition that usages of international trade bind the arbitrator even in the face of an explicit and exclusive choice of law clause, and such usages prevail over the (non-mandatory) rules of the law otherwise applicable; see ICC 8873/1997, (1998) 125 *JDI* 1017, note Hascher. Note however the strong contrary opinion that such trumping of the choice of the parties would amount to an excess of jurisdiction on the part of the arbitrators with the consequence that the award would be unenforceable; cf. the 1992 Resolution of the International Law Association on International Commercial Arbitration, (1992) 65 *ILA Reports* 6, 117-128; and see Gaillard, E, "Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules", (1995) 10 *FILJ-ICSID Rev* 208, 219-222.

103. Cf. ICC 8486/1996, (1998) 125 *JDI* 1047, note Derains: a *clausula rebus sic stantibus* must in an international context be interpreted strictly, as is also evinced by Articles 1.3 and 6.2.1 of the UNIDROIT Principles, which on this point are consonant with the "*convictions juridiques en vigueur dans le droit des contrats internationaux*".

104. Cf. ICC 8873/1997, (1998) 125 *JDI* 1017, note Hascher, where the sole arbitrator found that provisions of the UNIDROIT Principles on hardship (Articles 6.2.1 and 6.2.3(4)) were not expressive of trade usage.

105. Alvarez, in his comment to ICC 5904/1989, a case where the parties were agreed that the "normal and general usages of international commerce" were applicable, notes that the tribunal could or should have applied Articles 18(3), 38 and 39 of the Vienna Convention considered as a "receptacle of usages"; see ICC 5904/1989, (1989) 115 *JDI* 1107, note Alvarez.

106. See ICC 8356/1996, (1996) 123 *JDI* 1978, note Arnaldez.

107. See ICC 6149/1990, (1995) 21 *YCA* 41.

108. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), (1959) 330 UNTS 3, 38, Article II.

109. See *Filanto SpA v Chilewich International Corp,* 789 F.Supp 1229 (SDNY 1992), *appeal dismissed,* 984 F.2d 58 (2d Circ 1993), *followed by Borsack v Chalk & Vermilion Fine Arts Ltd,* 974 F.Supp 293, 300 (SDNY 1997). For comment see Brand & Flechtner, (1993) 12 *J L & Comm* 239; Nakata, (1994) 7 *Transnat'l L* 141.

110. See Case C-106/95 *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL* [1997] ECR I-911, 929, para 29, [1997] 1 All ER (EC) 385.

111. See Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 27 September 1968), [1998] OJ L27/1-27 (consolidated text), Article 17(*c*).

112. See ICC 6281/1989, (1990) 15 *YCA* 96, (1989) 115 *JDI* 1114, note Alvarez, (1991) 117 *JDI* 1054, note Hascher, where the tribunal noted that the applicable Yugoslav law yielded the same result as the Convention, Article 75. Note, however, that the tribunal had found that the Convention as such was not applicable in the circumstances.

113. See ICC 7331/1994, (1995) 121 *JDI* 1001, note Hascher. The fact that the contract of sale was part of a wider commercial transaction involving a third party, the provider of the goods, is irrelevant for our purposes.

114. See the critical comments of Hascher, *ibid.*

115. See *Watkins-Johnson Company et al v Islamic Republic of Iran et al* (1990) 22 Iran-US CTR 218, 244, para 95, (1990) 15 *YCA* 220, 226. It will be recalled that the Tribunal is governed by the UNCITRAL Arbitration Rules, *supra* note 26. See for a similar approach the ICC award quoted by Lalive, *supra* note 28, at 81, 86 (that award concerned the UNIDROIT Principles); and *supra* note 109.

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