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Dr. Nils Schmidt-Ahrendts

Attorney at Law, CMS Hasche Sigle  
Visiting Lecturer  
University of Freiburg Faculty of Law  
*Nils.Schmidt-Ahrendts@cms-hs.com*

## CISG AND ARBITRATION

*The paper identifies common principles, values and ideas of the CISG and Arbitration and focuses on the complementary character of the two concepts represented by these terms. The author proceeds in five steps. He identifies obvious differences between the CISG and Arbitration; indicates how often the CISG is applied by tribunals by relying on data available in the public domain as well as data provided by the ICC; illustrates where the CISG and Arbitration may interface – namely regarding the questions how arbitrators decide to apply the CISG and whether arbitration agreements are governed by the CISG; highlights common features of the CISG and Arbitration; and, in a fifth and final step, identifies a number of potential benefits which the CISG might provide for Arbitration and, vice versa, Arbitration might provide for the CISG.*

Key words: *CISG. – Arbitration. – Substantive validity. – Conflict of laws.*

### 1. INTRODUCTION

The title of this paper *CISG and Arbitration* may appear surprising. The terms “CISG” and “Arbitration” stand for two different legal concepts. At first sight, these concepts have little in common, other than forming the legal background of the world’s largest law student competition, the Willem C. Vis International Commercial Arbitration Moot<sup>1</sup>.

However, a second look reveals that these concepts are less alien than they appear. The purpose of this paper is to identify common princi-

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<sup>1</sup> In this moot, the students are asked to represent a party in a mock arbitration case in which the CISG applies as the law applicable to the substance of the dispute. For more information: <http://www.cisg.law.pace.edu/vis.html>, last visited on 31 December 2010.

ples, values and ideas of the CISG and Arbitration and to show that, at least to some extent, the two concepts are complementary.

In order not to put the cart before the horse, I will first identify some obvious differences between the CISG and Arbitration (I). Second, I will indicate how often the CISG is applied by tribunals (II). Third, I will illustrate where the CISG and Arbitration may interface (III). Fourth, I will highlight common features of the CISG and Arbitration (IV). Finally, I will identify potential benefits which the CISG might provide for Arbitration and, *vice versa*, Arbitration might provide for the CISG (V).

## 2. OBVIOUS DIFFERENCES

### 2.1. The CISG

The CISG, the United Nations Convention on Contracts for the International Sale of Goods, is an international treaty. The CISG was developed by the United Nations Commission on International Trade Law (UNCITRAL) and signed in 1980. As of 31 December 2010, has been ratified by 76 countries. These countries account for a significant proportion of world trade, rendering the CISG the most successful international uniform law project of the last century<sup>2</sup>. The CISG only applies to “*contracts of sale of goods*”. Thus, it does not apply to contracts which either cannot be qualified as contracts of sale or do not cover the sale of goods<sup>3</sup>. Further, the CISG only governs the parties’ substantive rights and obligations and does not address procedural issues. For example, the CISG does not provide for rules of evidence<sup>4</sup>. Finally, the CISG – at least in theory – applies in the same manner regardless of the judges’ or the arbitrators’ nationality. Indeed, it is one of the main goals of the CISG to provide for rules which do not favor the principles and values of one national legal system over another.

### 2.2. Arbitration

Arbitration, by contrast, is neither a statute, nor a single convention. On the contrary, it is a method of dispute resolution based on various international and national conventions, statutes, rules and principles. Arbitration as a means of dispute settlement is not only used to settle dis-

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<sup>2</sup> See, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html), showing the full list of member states, last visited on 31 December 2010.

<sup>3</sup> Articles 2–5 CISG further define (narrow) the CISG’s scope of application.

<sup>4</sup> For the related question regarding the extent to which the CISG governs the issue of burden of proof, see the article of Dr. S. Kröll “The burden of proof for the non-conformity of goods” (also published in this issue).

putes over sales contract, but also other types of commercial disputes. For example, arbitration is also used to settle post M&A, joint venture, construction, investment and sport disputes<sup>5</sup>. Arbitration laws and rules govern the parties' procedural rights and obligations. They do not govern the parties' substantive rights. Further, despite continuing efforts to harmonize arbitration rules and laws, arbitration proceedings are conducted differently depending on the place of arbitration and/or the nationality of the arbitrators, the parties and their counsel.

Given these differences, one may legitimately ask what the CISG has to do at all with Arbitration and why both concepts should be addressed in one and the same paper.

### 3. STATISTICS

One answer is that the CISG is commonly applied by tribunals instead of by national courts and, *vice versa*, arbitration disputes are frequently governed by the CISG.

The homepages of "Pace"<sup>6</sup>, "CISG-online"<sup>7</sup> and "Unilex"<sup>8</sup> suggest that approximately 25% of CISG cases are decided by tribunals<sup>9</sup>. Arguably, the actual percentage rate of cases may be significantly higher since a large number of awards are not published. *Vice versa*, an inquiry with a counsel from the Secretariat of the ICC Court of Arbitration has disclosed that in 155 out of 3000 cases randomly selected from a certain period of time, the CISG was applied. At first sight, this number may appear rather small. Yet, considering that the 3000 cases involved all kind of disputes and not only commodity disputes the number is actually surprisingly high.

### 4. ISSUES OF INTERFERENCE

At times, the provisions of the CISG and those of the applicable arbitration rules and laws may overlap. In this paper, I will focus on two

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<sup>5</sup> N. Schmidt-Ahrendts, M. Schmitt, "Einführung ins Schiedsverfahrensrecht", *Juristische Ausbildung* 7/2010, 520.

<sup>6</sup> <http://www.cisg.law.pace.edu>, last visited on 31 December 2010.

<sup>7</sup> <http://www.globalsaleslaw.org/index.cfm?pageID=28>, last visited on 31 December 2010.

<sup>8</sup> <http://www.unilex.info>, last visited on 31 December 2010.

<sup>9</sup> The same conclusion is reached by Professor Loukas Mistelis for awards rendered prior to 2008 in his article "CISG and Arbitration", *CISG Methodology* (eds. A. Janssen, O. Meyer), Sellier European Law Publishers, Munich 2009, 387–388. Professor Mistelis also suggests that since only a very small percentage of arbitral awards are published, one may assume that up to 70% of CISG cases are decided by arbitral tribunals.

examples: the first one is best described by the question how arbitrators decide to apply the CISG; the second one by the question whether arbitration agreements are governed by the CISG.

#### 4.1. . How do Arbitrators decide to apply the CISG?

The question which conflict of law rules tribunals follow to decide whether to apply the CISG is subject to debate. Some scholars are of the view that if the place of arbitration is in a contracting state, arbitrators, similar to state court judges, are bound to directly apply the conflict of law rules contained in Article 1 CISG. They argue that Article 1 CISG forms part of the *lex loci arbitri*<sup>10</sup>. Relying on Article 1 (1) (a) CISG, also tribunals have applied the CISG simply because both parties had their places of business in contracting states<sup>11</sup>.

In my view, the better approach is that tribunals, regardless whether the place of arbitration lies in a contracting or a non-contracting state, are not bound to directly apply Article 1 CISG. They are primarily bound by the conflict of law rules contained in the applicable arbitration rules or laws<sup>12</sup>. Tribunals are not an organ of the state of the place of arbitration. Thus, regardless of whether or not the place of arbitration lies in a state which has signed and ratified the CISG, a tribunal is not under a (international public law) duty to apply the CISG. Tribunals primarily have to apply the conflict of law rules set forth in the applicable institutional or ad-hoc arbitration rules. If the parties have not agreed on such rules, tribunals have to apply the conflict of law rules contained in the applicable national law on arbitration, the *lex loci arbitri*.

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<sup>10</sup> C. Brunner, *UN-Kaufrecht – CISG*, Stämpfli Verlag AG, Bern 2004, Article 1, 1; F. Ferrari, “Article 1”, *Kommentar zum Einheitlichen UN-Kaufrecht* (ed. I. Schwenzer), C.H. Beck, Munich 2008, para. 2 and U. Magnus, *Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen – Wiener UN-Kaufrecht*, Sellier European Law Publishers, Munich 2005, Article 1, para 120.

<sup>11</sup> ICC Award 8962, 1 September 1997, CISG-online No. 1300; Hungarian Chamber of Commerce and Industry Court of Arbitration Award VB 99144, 1 January 2000, CISG-online No. 1613 and Serbian FTCA Awards Nos. T-18/07 (15 October 2008), T-13/05 (5 January 2007) and T-22/03 (19 January 2004). See also: ICC Award 11333, 1 January 2002, CISG-online No. 1420 and ICC Award 8324, 1 January 1995, CISG-online No. 569. In these awards, the tribunal directly relied on Article 1 (1) (a) CISG, but held that its requirements were not met.

<sup>12</sup> I. Schwenzer, P. Hachem, “Article 1”, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (ed. I. Schwenzer), Oxford University Press, Oxford 2010<sup>3</sup>, para. 11; V. Pavić, M. Djordjević, “Application of the CISG before the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce – Looking back at the latest 100 cases”, *Journal of Law and Commerce* 1/2009, 15; P. Mayer, “L’application par l’arbitre des conventions internationales de droit privé”, *L’internationalisation du droit: Mélanges en l’honneur de Yvon Loussouarn*, Dalloz, Paris 1994, 287; A. Mourre, “Application of the Vienna International Sales Convention in Arbitration”, *ICC International Court of Arbitration Court Bulletin* 1/2006, 43–44.

Although the exact wording of the conflict of law rules set forth in the applicable arbitration rules or law may differ, it is safe to say that the CISG may apply either because of the parties' choice of law or due to the tribunal's determination of the law applicable<sup>13</sup>:

In the first scenario, *i.e.*, where the parties have agreed on the law, the CISG may apply either because the parties have specifically chosen the CISG<sup>14</sup> or because the parties have chosen the law of a contracting state. The choice of the law of a contracting state leads to the application of the CISG. At least in principle, it may not be interpreted as an (implied) exclusion of the CISG<sup>15</sup>. The CISG applies because it (i) forms part of the law chosen by the parties and (ii) supersedes domestic sales law. While if the parties have specifically chosen the CISG it is irrelevant whether the requirements of Article 1 CISG are met, such requirements have indeed to be met if the parties have chosen the law of a contracting state. In this regard, tribunals have correctly pointed out that the applicable arbitration rules and/or laws constitute "*rules of international private law*" within the meaning of Article 1 (1) (b) CISG<sup>16</sup>.

In the second scenario, *i.e.*, where the parties have not agreed on the law to apply, the tribunal has to determine the law applicable. While some arbitration rules and law provide that the tribunal shall first determine the conflict of law rule (*voie indirecte*)<sup>17</sup>, most modern arbitration

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<sup>13</sup> All modern arbitral rules and laws provide that arbitral tribunals primarily have to apply the law chosen by the parties. If no such choice was made, they shall employ other objective criteria to determine the law applicable.

<sup>14</sup> Netherlands Arbitration Institute Award 2319, 15 October 2002, CISG-online No. 740; ICC Award 8644, 1 April 1997, CISG-online No. 904; Award 226/1999 of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, 11 February 2000, CISG-online No. 1345. There is agreement that the CISG may be chosen either as a "non-state law" at the level of conflict of law (if the applicable arbitration rules allow for such choice) or as a "set of substantive rules" at the level of substantive law. In the latter case, the rights and obligations set forth in the CISG will become part of the parties' contract, but the arbitrators will still have to determine the law applicable to that contract.

<sup>15</sup> Bundesgerichtshof Germany, Case No. VIII ZR 259/97, 25 November 1998, CISG-online No. 353; Cour de Cassation France, Case No. Y 95–20.273, 17 December 1996, CISG-online No. 220; ICC Award 9187, 1 June 1999, CISG-online No. 705. Naturally, the CISG does not apply if the parties have expressly excluded the CISG. Further, it also does not apply if it is otherwise clear from the facts that the parties intended to have their contract governed by domestic provisions.

<sup>16</sup> ICC Award 8611, 23 January 1997, CISG-online 236; Award 97/2002 of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, 6 June 2003, CISG-online No. 1345 available at <http://www.unilex.info/case.cfm?pid=1&id=1043&do=case>, last visited on 31 December 2010.

<sup>17</sup> For example, Article 28 (2) UNCITRAL Model Law: "*Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable*".

rules and law require the tribunal to directly determine the substantive law (*voie directe*)<sup>18</sup>. In either scenario, *voie indirect* or *voie directe*, the arbitrators may find that the CISG applies “*per se*” or that it applies as part of the law of a contracting state. In the *voie indirecte* scenario, the conflict of law rules chosen by the tribunal will usually lead to the CISG via the law of a contracting state<sup>19</sup>. However, the applicable conflict of law rule may also lead directly to the CISG. For example, the arbitrator may decide to apply Article 1 (1) (a) CISG as a “*unilateral*” conflict of law rule and to apply the CISG on this basis<sup>20</sup>. Likewise, in the *voie directe* scenario, the tribunal may find that the law of a contracting state is the “*appropriate*” law. However, the tribunal may also find that the CISG *per se* is the “*appropriate*” law.

## 1.2. Applicability of the CISG to Arbitration Agreements

The question regarding which law applies to arbitration agreements is subject to substantial controversy. The question is complex since one must distinguish between different aspects of the arbitration agreement, including, *inter alia*, substantive validity, formal validity, arbitrability, capacity and authority<sup>21</sup>. Each of these aspects might be governed by a different law. This paper merely focuses on the aspect of substantive validity, i.e., on the formation and interpretation of the arbitration agreement. This focus is warranted since the fact that the CISG does not apply to questions of arbitrability, capacity and authority is beyond any doubt. Further, it has been convincingly argued that the CISG does not govern questions of formal validity, i.e., whether the agreement has to be concluded in writing, either<sup>22</sup>.

<sup>18</sup> For example, Article 17 (1) s. 2 ICC Rules: “*In the absence of such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate*”. See also: Article 22.3 LCIA Rules, Art. 28 (1) AAA Rules, Article 24 (1) SCC Rules, Article 24 (2) Vienna Rules; and Article 33 Swiss Rules.

<sup>19</sup> ICC Award 7197, 1 January 1992, CISG-online No. 36; Award 406/1998 of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, 6 June 2000, CISG-online No. 1249.

<sup>20</sup> K. Bell, “The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods”, *Pace International Law Review* 8/1996, 236–247.

<sup>21</sup> For example: M. Blessing, “The Law Applicable to the Arbitration Clause”, *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ed. A. van den Berg), ICCA Congress Series No. 9, 1999, 168; O. Chukwumerije, *Choice-of-Law in International Commercial Arbitration*, Quorum Books, Westport 1994; E. Gaillard, J. Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International, Alphen aan den Rijn 1999, 385–741; J. Lew, L. Mistelis, S. Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, Alphen aan den Rijn 2003, paras. 6–1 to 6–74; A. Redfern, M. Hunter, *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell, London 2004, paras. 2–85 to 2–94.

<sup>22</sup> R. Koch, “The CISG as the Law Applicable to Arbitration Agreements”, *Sharing International Commercial Law Across National Boundaries: Festschrift for Albert H.*

The question regarding which law governs the substantive validity of an arbitration agreement is also far from being settled. An accurate overview of the opinions expressed by scholars, tribunals and courts would exceed the scope of this paper<sup>23</sup>.

A significant number of state courts<sup>24</sup> and scholars<sup>25</sup> have expressed the view that the substantive validity of arbitration agreements may be governed by the CISG. Others have rejected such view relying on the doctrine of severability according to which the sales contract is a separate and distinct contract from the arbitration agreement<sup>26</sup>.

Of course, the CISG applies to an arbitration agreement if the parties have expressly agreed on the application of the CISG. However, as far as my research has revealed, this has never been the case and, thus, appears to be a rather theoretical scenario. Indeed, parties rarely ever agree at all on a choice of law clause specifically applicable to the arbitra-

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*Kritzer on the Occasion of his Eightieth Birthday* (eds. C. B. Andersen, U. G. Schroeter), Wildy, Simmonds & Hill Publishing, London 2008, 267–286; U.G. Schroeter, “Intro to Articles 14–24”, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (ed. I. Schwenzer), Oxford University Press, Oxford 2010<sup>3</sup>, 18; U. Magnus, *Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen – Wiener UN-Kaufrecht*, Sellier European Law Publishers, Munich 2005, Article 11, 7; U.G. Schroeter, *UN-Kaufrecht und Europäisches Gemeinschaftsrecht: Verhältnis und Wechselwirkungen*, Sellier European Law Publishers, Munich 2005, § 6, 37; KG Zug, 11 December 2003, CISG-online No. 958. The opposite view taken by Auto Tribunal Supremo, 17 February 1998, CISG-online No. 1333 and *Chateau des Charmes Wines Ltd vs. Sabaté USA Inc., Sabaté S.A.*, U.S. Court of Appeals, 9<sup>th</sup> Circuit, 5 May 2003, CISG-online No. 767 and J. Walker, “Agreeing to Disagree: Can We Just Have Words? CISG Article 11 and the Model Law Writing Requirement”, available at <http://www.cisg.law.edu/cisg/biblio/walker1.html>, last visited on 31 December 2010 fails to convince.

<sup>23</sup> For an excellent overview, see G. Born, *International Commercial Arbitration*, Wolters Kluwer Law & Business, The Netherlands 2009, 407–563. See also, M. Blessing, “The Law Applicable to the Arbitration Clause”, *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ed. A. van den Berg), ICCA Congress Series No. 9, 1999, 168.

<sup>24</sup> Netherland Arbitration Institute, 10 February 2005, CISG-online No. 1621; Auto Tribunal Supremo, 17 February 1998, CISG-online No. 1333; *Chateau des Charmes Wines Ltd vs. Sabaté USA Inc., Sabaté S.A.*, U.S. Court of Appeals, 9<sup>th</sup> Circuit, 5 May 2003, CISG-online No. 767; OLG Frankfurt, 26 June 2006, CISG-online No. 1385; OLG Stuttgart, 15 May 2006, CISG-online No. 1414 and LG Hamburg, 19 June 1997, CISG-online No. 283.

<sup>25</sup> U.G. Schroeter, (2010), 18; C. Brunner, (2004), para. 39; P. Schlosser, “*Europäisches Zivilprozess- und Kollisionsrecht*”, Sellier European Law Publisher, Munich 2010, Article 23 EuGVVO, para. 19; J. Walker, “Agreeing to Disagree: Can We Just Have Words? CISG Article 11 and the Model Law Writing Requirement”, available at <http://www.cisg.law.edu/cisg/biblio/walker1.html>, last visited on 31 December 2010); B. Piltz, *Internationales Kaufrecht*, C. H. Beck, Munich 1993, 106; U. G. Schroeter, § 6, para. 37.

<sup>26</sup> S. Kröll, “Selected Problems Concerning the CISG’s Scope of Application”, available at <http://www.cisg.law.edu/cisg/biblio/kroll.html>, last visited on 31 December 2010.



tion agreement but usually rather on a choice of law clause which applies to the main contract<sup>27</sup>.

Considering factual scenarios which are more likely to occur, in my view, the CISG may govern an arbitration agreement if (i) the arbitration clause is either contained in or intrinsically connected to a sales contract; (ii) the sales contract is governed by the CISG; and (iii) in addition one of the following scenarios is met (a) the CISG was specifically chosen by the parties and there is evidence of the parties' will to have the arbitration agreement governed by the CISG; (b) the competent authority employs the *lex contractus* approach and applies the same law to the arbitration agreement as to the main contract; (c) the competent authority employs the *substantive rules of the lex arbitri* approach and the CISG forms part of these law; or (d) the competent authority employs the validation principle approach and the application of the CISG renders the arbitration agreement effective.

If for one reason or the other the CISG is found applicable to the substantive validity of the arbitration agreement, the question arises regarding which aspects of the arbitration agreement are covered by the term "substantive validity" and are potentially governed by the CISG.

The CISG applies to issues of contract formation, *i.e.*, to the question whether the arbitration agreement was formed by virtue of a meeting of the minds<sup>28</sup>. Further, the CISG (Article 8) applies to issues of contract interpretation<sup>29</sup>. A question which, as far as my research has revealed, has not yet been addressed is whether a party may claim damages under the CISG if the other party has breached the arbitration agreement.

The most obvious breach of an arbitration agreement is for a party to initiate state court proceedings. Here, the question arises whether the non-breaching party may claim damages under the CISG for its costs incurred in the state court proceedings (if these costs are not recoverable in full under the applicable procedural rules before the state court). A related matter was subject to series of decisions by U.S. courts: The courts had to decide whether a Mexican seller was entitled to recover its legal fees under Article 74 CISG although such fees were not recoverable under the applicable U.S. rules of procedure. While the competent U.S. Federal District Court had awarded damages to the Mexican seller, the U.S. Court of Appeals presided by Judge Posner overruled this decision stressing that

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<sup>27</sup> G. Born, 444.

<sup>28</sup> R. Koch, (2008), 267–286.

<sup>29</sup> *Chateau des Charmes Wines Ltd vs. Sbata USA Inc., Sabata S.A.*, U.S. Court of Appeals, 9<sup>th</sup> Circuit, 5 May 2003, CISG-online No. 767; OLG Stuttgart, 15 May 2006, CISG-online No. 1414; OLG Düsseldorf, 30 January 2004, CISG-online No. 821; M. Schmidt-Kessel, "Article 8", *Kommentar zum Einheitlichen UN-Kaufrecht* (ed. I. Schwentzer), C.H. Beck, Munich 2008, para. 5.

“*the Convention is about contracts, not about procedure*”<sup>30</sup>. While some authors have supported both the result and the reasoning of Judge Posner<sup>31</sup>, the CISG Advisory Council in its opinion No. 6 stamped the substance-procedure decision as “*outdated and unproductive*”<sup>32</sup>.

However, there are also other ways an arbitration agreement may be breached. One example would be that either the agreement itself or the arbitration rules agreed upon oblige the parties to keep the proceedings confidential and one of the parties ignores this obligation<sup>33</sup>.

Here as well, the question may arise whether the non-breaching party may claim damages under Article 74 CISG for loss of reputation or profit. In my view, if the arbitration agreement is governed by the CISG, there is no reason why a party should not rely on Article 74 CISG when claiming damages for breach of the arbitration agreement. Article 74 CISG suggests that all kinds of “*loss, including loss of profit*” suffered by one party due to the other party’s breach are recoverable. This also includes loss of reputation<sup>34</sup>. Further, there is also no reason why the recoverable loss should not include legal fees. In particular such view is not disproved by the reasoning of Judge Posner in the Zapata case. The decisive difference is that in Zapata, the non-breaching party sought reimbursement of legal fees incurred in the U.S. court proceedings themselves. In the present scenario, the non-breaching party would merely seek reimbursement of legal fees incurred in the state court proceedings, not for those incurred during the arbitration.

## 5. COMMON FEATURES

Contrary to what was suggested in the beginning of this paper, the CISG and Arbitration share quite a variety of common features:

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<sup>30</sup> *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, U.S. Court of Appeals, 7<sup>th</sup> Circuit, CISG-online 684.

<sup>31</sup> For a complete and rather humorous summary of the case history and the ensuing academic discussion see, J. Lookofsky, H. Fletcher, “Zapata Retold: Attorney’s Fees are (still) not governed by the CISG Reloaded”, available at [http://jlc.law.edu/articles/26/Lookofsky\\_Fletcher.pdf](http://jlc.law.edu/articles/26/Lookofsky_Fletcher.pdf), last visited on 31 December 2010.

<sup>32</sup> CISG Advisory Council Opinion No. 6, Calculation of Damages under CISG Article 74, heading 5 (2006) available at <http://cisg.law.pace.edu/cisg/CISG-AC-op6.html>, last visited on 31 December 2010.

<sup>33</sup> A similar scenario is subject to this year’s “problem” of the Willem C. Vis Arbitration Moot which may be downloaded at [http://www.cisg.law.pace.edu/cisg/moot/Problem\\_with\\_clarifications.pdf](http://www.cisg.law.pace.edu/cisg/moot/Problem_with_clarifications.pdf).

<sup>34</sup> M. Bridge, *The International Sale of Goods: Law and Practice*, Oxford University Press, Oxford 2007, 590.

Both the CISG and Arbitration aim at the promotion and facilitation of international trade. The CISG does so by minimizing the risk of commercial disputes and arbitration by swiftly settling commercial disputes once they have arisen<sup>35</sup>. Moreover, the CISG and Arbitration are both based on the concept of good faith and party autonomy<sup>36</sup>. Further, the CISG and Arbitration share the same standard of interpretation. In theory, sales contracts subject to the CISG and arbitration agreements shall primarily be interpreted in accordance with the parties' actual intent. However, since such intent is in most cases almost impossible to establish, in practice, sales contract and arbitration agreements are frequently interpreted in accordance with the understanding of a reasonable third person<sup>37</sup>.

Finally, both the CISG and Arbitration aim at the unification of law. As regards the CISG, UNCITRAL decided to create a single uniform law. This law was ratified by the contracting states and incorporated into their national law. As a result, as of today approximately 80 % of international sales contracts fall within the ambit of a uniform law which – at least in theory – is applied in one and the same manner by national courts and tribunals worldwide. The arbitration community, by contrast, took a different approach to “unification”. It decided to rely on a mix of (i) international treaties (for example, the 1958 United Nations Conventions on the Recognition and Enforcement of Foreign Arbitral Awards<sup>38</sup>), model laws (for example the 1985 UNCITRAL Model Law on International Commercial Arbitration<sup>39</sup>) and non-binding soft laws (for example the

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<sup>35</sup> The complementary function of the CISG and Arbitration is best described by Professor Waincymer in “The CISG and International Commercial Arbitration: promoting a Complementary Relationship between Substance and Procedure”, *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (eds. C. B. Andersen, U. G. Schroeter), Wildy, Simmonds & Hill Publishing, London 2008, 582–599. He points out that the CISG “*promotes clarity and reasonableness*” and, thus, “*operates to prevent disputes arising between traders from different legal and political cultures*”. At the same time he stresses that “*disputes inevitably arise in international trade owing to the increased physical and legal risks accompanying cross-border trade*”. Thus, the true value of the CISG “*depends to a significant degree on the fairness and efficiency of the procedural dispute resolution model underlying the [parties'] relationship*”.

<sup>36</sup> J. Waincymer, 582–599.

<sup>37</sup> See, Article 8 (1) and (2) CISG. My research has not revealed a single national or international law on arbitration which expressly sets forth rules of interpretation for an arbitration agreement. The Swiss PILA, for example, merely refers to the rules of interpretation set forth in the Swiss Code of Obligations. Yet, the primacy of actual intent and the factual prevalence of the standard of reasonableness are common ground.

<sup>38</sup> [http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/1958\\_NYC\\_CTC-e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/1958_NYC_CTC-e.pdf), last visited on 31 December 2010.

<sup>39</sup> [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf), last visited on 31 December 2010.

IBA Rules on the Taking of Evidence in International Arbitration<sup>40</sup>). In addition, the arbitration community actively sought to develop so-called “standards of best practice” to promote uniformity. As a result, also arbitration proceedings have become more and more standardized and streamlined.

## 6. JOINT OPPORTUNITIES

I am convinced that the CISG may benefit from being applied in arbitration proceedings instead of in state court proceedings. This is mainly for two reasons:

First, arbitration proceedings may foster and promote uniform legal interpretation and application of the CISG<sup>41</sup>. It is common ground that the CISG requires uniform legal interpretation and application<sup>42</sup>. Article 7 (1) CISG requires that “*in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application*”. According to Professor Lookofsky this provision compels scholars and courts to take into account the “*international view*” when applying and interpreting the CISG<sup>43</sup>. The duty to consider foreign sources or precedents is also commonly accepted<sup>44</sup>. However, despite numerous proposals, as of today no judicial body exists which would ensure a uniform interpretation and application of the CISG<sup>45</sup>. In particu-

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<sup>40</sup> [http://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Arbitration/IBA\\_Rules\\_Evidence/Publications.aspx](http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/IBA_Rules_Evidence/Publications.aspx), last visited on 31 December 2010.

<sup>41</sup> The need for a uniform interpretation and application of the CISG and how this goal may be achieved was addressed in more detail by Professor Rogers in “The Establishment of a Global Jurisconsultorium for the CISG” (also published in this issue).

<sup>42</sup> C.B. Andersen, “The Global Jurisconsultorium of the CISG Revisited”, *Vindobona Journal of International Commercial Law & Arbitration* 1/2009, 43–70; J.O. Honnold, “Uniform Words and Uniform Application. The 1980 Sales Convention and International Juridical Practice”, in P. Schlechtriem (ed.), *Einheitliches Kaufrecht und Nationales Obligationenrecht*, Nomos, Baden-Baden 1987, 146–147; H. Fletchner, “The Several Texts of the CISG in a Decentralized System: “Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)”, *Journal of Law and Commerce*, 1998, 187.

<sup>43</sup> J. Lookofsky, *Understanding the CISG*, Kluwer Law International, 2008, 35.

<sup>44</sup> P. Schlechtriem, “Uniform Sales Law – The Experience with Uniform Sales Law in the Federal Republic of Germany”, available at <http://cisg3.law.pace.edu/cisg/biblio/schlech2.html>, last visited on 31 December 2010; F. Ferrari, “CISG Case Law: A New Challenge for Interpreters?”, *Journal of Law and Commerce*, 1999, 26; B. Zeller, “Traversing international waters: With the growth of international trade, lawyers must become familiar with the terms of the Convention on Contracts for the International sale of Goods”, *Law Institute Journal*, Victoria 2004, 52.

<sup>45</sup> L. Sohn, “Uniform Laws Require Uniform Application: Proposals for an International Tribunal to Interpret Uniform Legal Texts”, *Uniform Commercial Law in the*

lar, there is no “CISG Supreme Court”, comparable, for example, to the European Court of Justice. Further, although deplorable, state courts continue to often rely on national preconceptions when applying the CISG. On a positive note, recent decisions have shown that some national courts have made substantial efforts in ensuring that their decisions are in line with decisions of courts from other jurisdictions<sup>46</sup>. My submission is that tribunals – which in international proceedings are usually composed of arbitrators from different jurisdictions – are particularly apt to achieve uniform interpretation and application of the CISG. A tribunal composed of scholars and practitioners from different jurisdictions will not rely on national preconceptions. Rather, it will favor an interpretation of the CISG which is truly international. If one of the arbitrators were to apply the CISG in a manner which was particular to his jurisdiction, chances are high that the other arbitrators would simply overrule this arbitrator. Further, for arbitrators who speak different languages, the resources (case law and scholarly contributions) available are greater than those for national courts.

Second, arbitration proceedings may foster and promote factual diversity. In order to fully develop a law, it is important to have a significant body of cases and factual scenarios to which this law is applied. It is not sufficient to have scholars writing on the law and imagining factual scenarios. Regardless of how inventive scholars may be, the factual diversity presented by international trade will never be fully matched by the scholar’s imagination. In addition, it is equally important that the person applying the law to the factual scenarios have the requisite knowledge of the affected business sector. Otherwise, their decision risks not meeting the expectations and requirements of the respective business community. A decision which does not meet such expectations often provokes criticism not only of the decision itself but also of the law applied in such decision. Thus, it is of particular importance that the person making the decision has at his command either the requisite knowledge or the requisite resources to obtain such knowledge. My submission is that arbitrators are more likely to have the requisite knowledge than state court judges. Arbitrators may either stem from (company representatives or technical experts) or focus exclusively on the respective sector (lawyers). This is not possible for a state court judge. Further, arbitrators usually have available more time and greater financial resources than state court judges.

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*Twenty-First Century: proceedings of the Congress of the United Nations Commission on International Trade Law*, 18–22 May 1992, 50–54; F. de Ly “Uniform Interpretation: What is being Done? Official Efforts” *The 1980 Uniform Sales Law* (ed. F. Ferrari), Seller European Law Publishers, Munich 2003, 346.

<sup>46</sup> The most recent and complete overview of case law where judges have used a “practical jurisconsultorium” is provided by Dr. Camilla Andersen in “The Global Jurisconsultorium of the CISG Revisited”, *Vindobona Journal of International Commercial Law & Arbitration* 1/2009, 43–70.

On the other hand, I am also convinced that Arbitration may benefit from the application of the CISG (instead of a national law on contract of sales).

Different than national laws on contract of sales, the CISG is available in several languages. Further, scholarly contributions and case law on the CISG are easily accessible<sup>47</sup>, and a large number of these contributions are written in the world's *lingua franca*: English. Moreover, the CISG is neutral. It does not favor any nationality or the buyer or the seller. The CISG's application at least significantly reduces the risk of complex disputes over conflict of law rules<sup>48</sup>. As a consequence, decisions which are made on the basis of the CISG are more predictable than decisions rendered on the basis of a national law which may be unfamiliar to parties, counsel and arbitrators alike<sup>49</sup>. Further, the CISG also facilitates the appointment of tribunals. The applicability of the CISG instead of a national law significantly enlarges the pool of suitable arbitrators. Most importantly, it expands the number of countries from which arbitrators can be selected. Therefore, institutions such as the ICC welcome the application of the CISG in arbitration proceedings. Finally, the CISG may support the young arbitration generation: It is no secret that parties and institutions alike are reluctant to appoint young and naturally less experienced arbitrators if the amount in dispute is large. However, CISG commodity cases, unlike M&A, construction or investment cases frequently, include small amounts in dispute, *i.e.*, amounts significantly below one million or even below 100,000 EURO. These cases provide an ideal opportunity for the young generation of arbitrators to gather their first experience.

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<sup>47</sup> See the cases and scholarly contributions available at: <http://www.cisg.law.pace.edu>; <http://www.unilex.info> and <http://www.globalsaleslaw.org>, all visited on 30 December 2010.

<sup>48</sup> Of course, conflict of law rules continue to play an important role in cases where a sales contract is not covered by (Article 2 CISG) or excluded from (Article 3 CISG) the Convention or where certain issues are not covered by the Convention (Articles 4 and 5 CISG). In addition, they may have to be used to determine the domestic laws used to fill gaps in matters covered by the Convention (Article 7 (2) CISG).

<sup>49</sup> It is all but unusual that parties agree on the applicability of a national law that they are not familiar with, simply because this law is neutral. Further, it is also not uncommon that the arbitrators have no particular knowledge of the national law applicable to the dispute, but have been chosen for other reasons such as their experience in arbitration, nationality or knowledge of the business sector.