REMARKS ON THE UNCITRAL DIGEST’S COMMENTS ON
ARTICLE 6 CISG

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I. INTRODUCTION

The text of the UNCITRAL Digest of Case Law on the United Nations Convention on the International Sales of Goods (Digest) relating to Article 6 CISG, not unlike the text relating to other provisions, evidences both the Digest’s usefulness as well as its weaknesses. As far as the former is concerned, it can easily be evinced from the number of court decisions cited in the Digest, the retrieval of which would otherwise be difficult. Furthermore, the Digest is helpful as it organizes all decisions under different headings, thus making the research even easier. Also, the fact that the Digest is published in each of the six official languages of the United Nations allows it to reach more scholars and practitioners than any other instrument of interpretation. However, the use of all six official languages, albeit necessary for achieving a more global outreach, does bear some risk, namely that of certain statements drafted in one language being wrongly translated into another.

Although this appears to be a point too general to be made here, in the beginning of a number of comments on that part of the Digest that deals with Article 6 CISG, this is exactly the time and place where to make this comment, as an error in the translation from (at least) English to French did occur. Having drafted the Digest part to be discussed, I can vouch at least for what the drafter wanted to state in the English version of the relevant part of the Digest.

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1. For an overview of the advantages and disadvantages of the UNCITRAL Digest, see Heinz A. Friehe, Review of The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention, INTERNATIONALES HANDELSRECHT 175-76 (2004).

The error occurred in relation to that part of the Article 6 Digest (para. 5) that deals with those cases where the CISG’s application is excluded with an indication of the applicable law. According to the English version of the Digest, the applicable law is determined by virtue of the rules of private international law of the forum, which in most countries makes applicable the law chosen by the parties, at least in those countries where the 1980 Convention on the law applicable to contractual obligations is to be applied. Unfortunately, the French version of the Digest refers to this solution when dealing with the cases where l’application de la Convention est exclue sans indication du droit applicable, a line of cases specifically dealt with at a later stage.

Apart from this weakness, there are other reasons why one should go beyond the Digest. These reasons can be summarized as follows: since the Digest cites many (albeit not all) decisions that deal with a specific provision, there will be cases where a contrast in case law will emerge. Pursuant to a decision taken by the United Nations Commission on International Trade Law when authorizing the drafting of the Digest, the Digest itself does not criticize any decision; neither does it point out those cases that are worth being followed. This means, however, that ultimately the Digest is not too helpful in guiding the interpreter through the labyrinth of case law which it makes readily available. If one were to look for a guide, one would have to look elsewhere, for instance to comments by legal writers such as those made on the occasion of this Conference.

Furthermore, the Digest does not deal with all the cases that have been decided by courts in relation to a given provision. This is of course a natural consequence of there having to be a deadline for comments to be drafted in order for the Digest to be published, but it poses a problem nonetheless, as important issues may have been dealt with after the deadline for the Digest’s finalization.

In respect of the Digest comments on Article 6 CISG, this is an important issue, given a very recent Italian court decision which dealt with a particular problem—namely the effect of the parties’ choice to apply the CISG to

4. See Jernej Sekolec, Digest of case law on the UN Sales Convention: The combined wisdom of judges and arbitrators promoting uniform interpretation of the Convention, in The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention 1, 14 (Franco Ferrari et al. eds., 2004).
contracts to which it would otherwise not apply. Although this issue is referred to in the Article 6 Digest (para. 12), the Digest does not refer to any court decisions dealing with that issue, even though today there is case law on this issue. 6

In the following pages, I will comment on the decisions referred to in (and missing from) the Article 6 Digest. In doing so, I will be a little more critical than when drafting those Digest comments.

II. EFFECTS OF ARTICLE 6 IN GENERAL

It is common knowledge, that even where all the CISG’s requirements of applicability (international, substantive, temporal, and personal/territorial) 7 are met, the CISG does not necessarily apply, 8 since pursuant to Article 6, 9 the parties may exclude the CISG’s application. Consequently, in order to decide whether the CISG is applicable, one must also look into whether it has been excluded by the parties, 10 as pointed out by several court decisions, 11 some of

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6. For a more detailed analysis of this issue, see infra text accompanying note 118 ff.
7. For comments on these requirements, see, most recently, Franco Ferrari, The CISG’s Sphere of Application: Articles 1-3 and 10, in THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 21 ff. (Franco Ferrari et al. eds., 2004).
which (albeit not all) are quoted in the Digest.\textsuperscript{12} Thus, the lack of an exclusion can be regarded as a (negative) applicability requirement.\textsuperscript{13}

By providing for this possibility, the draftsmen of the CISG reaffirmed one of the general principles already embodied in the 1964 Hague Conventions,\textsuperscript{14} that is, the principle according to which the primary source of the rules governing international sales contracts is party autonomy,\textsuperscript{15} which is why it is no surprise that some court decisions state that the CISG is based upon the general principle of “prevalence of party autonomy.”\textsuperscript{16} By stating

\begin{itemize}
  \item \textsuperscript{13} In this respect, see Landgericht Trier, Germany, 12 Oct. 1995, published in NEUE JURISTISCHE WOCHENSCHRIFT RECHTSprechungs-Report 564 ff. (1996) (expressly mentioning the parties’ not excluding the CISG as a requirement for the CISG’s applicability).
  \item \textsuperscript{14} Despite some textual differences, Article 6 CISG is based upon Article 3 ULIS, as has often been pointed out; see, e.g., M.J. Bonell, \textit{Art. 6, in COMMENTARY ON THE INTERNATIONAL SALES LAW} 51 (C.M. Bianca & M.J. Bonell eds., 1987); FRANCO FERRARI, LA VENDITA INTERNAZIONALE. APPLICABILITÀ ED APPLICAZIONI DELLA CONVENZIONE DI VIENNA 157 (1997); Rolf Heber, \textit{Art. 6, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT} 83 (Peter Schlechtriem ed., 2d ed. 1995).
\end{itemize}
that the CISG can be excluded, the drafters clearly acknowledged the
dispositive nature\(^{17}\)—emphasized also in case law\(^{18}\)—and the “central role
which party autonomy plays in international commerce and, particularly, in
international sales."\(^{15}\)

As far as party autonomy is concerned,\(^{20}\) it must be pointed out (as the
Digest does in para. 3) that Article 6 CISG refers to two different lines of

\(17\) For this statement, see Sergio M. Carbone, \textit{L’ambito di applicazione ed i criteri interpretativi
della convenzione di Vienna, in La vendita internazionale. La Convenzione dell’11 aprile 1980
78 (1981); Sergio M. Carbone & Riccardo Luzzatto, \textit{I contratti del commercio internazionale, in 11
Trattato di diritto privato 131 (Pietro Rescigno ed., 1984); Johan Eraw, \textit{Waneer is het Weens
koopverdrag van toepassing?, in Het Weens Koopverdrag 47 (Hans van Houtte et al. eds., 1997);
Disposizioni generali 110 (1994); Herber, supra note 14, at 84; Alessandra Lanciotti, \textit{Norme
uniformi di conflitto e materiali nella disciplina convenzionale della compravendita 146
(1992); Burghard Piltz, \textit{Internationales Kaufrecht 64 (1993); Gert Reinhart, UN-Kaufrecht
26 (1991); Giorgio Sacerdoti, \textit{I criteri di applicazione della convenzione di Vienna sulla vendita
internazionale: diritto uniforme, diritto internazionale privato e autonomia dei contratti, 44 Rivista
trimestrale di diritto e procedura civile 744 (1990); Ingo Saenger, \textit{Art. 6, in 3 Kommentar zum
Burgerlichen Gesetzbuch §§ 1297-2385. EGBGB. CISG 2779 (Heinz G. Bamberger & Herbert Roth
eds., 2003); Claude Witz, \textit{L’exclusion de la Convention des Nations Unies sur les contrats de vente
internationale de marchandises par la volonté des parties (Convention de Vienne du 11 avril 1980),

Note, however, that even though the principle of party autonomy is widely accepted, there were some
States which expressed reservations to it; “[t]heir concern was that, in practice, the principle could be
abused by the economically stronger party imposing his own national law or contractual terms far less
balanced than those contained in the Convention,” Bonell, supra note 14, at 51; see also 1 UNCITRAL
Yearbook 168 (1968-1970); 2 UNCITRAL Yearbook 43-44 (1971); 3 UNCITRAL Yearbook 73
(1973).

\(18\) For an express reference to the Convention’s non-mandatory nature, see Cassazione Civile, Italy,
1998, published in \textit{Zeitschrift für Rechtsvergleichung 63 (1999); Handelsgericht Wien, Austria,
4 Mar. 1997, available at http://www.cisg.at/1R4097x.htm; Kreisgericht Wallis, Austria, 29 June 1994,

\(19\) M.J. Bonell, \textit{Commento all’art. 6, Nuove leggi civili commentate 16 (1989); for similar
affirmations in scholarly writing, see Samuel Date-Bah, \textit{The United Nations Convention on Contracts for
the International Sale of Goods: Overview and Selective Commentary, in Review of Ghana Law 54
(1979); Enderlein, supra note 15, at 316; Hoyer, supra note 15, at 41; Peter Schlechtriem,
Einheitliches UN-Kaufrecht 21 (1981). For a reference in case law to the party autonomy’s central role,
see Landgericht Stendal, Germany, 12 Oct. 2000, published in \textit{Internationales Handelsrecht 32

\(20\) Note, that Carbone, supra note 17, at 78, has compared the reaffirmation of party autonomy as
a basic principle of the CISG to “the recognition of a necessity for the development of international
commerce.” See also Luigi Rovelli, \textit{Conflitti tra norme della Convenzione e norme di diritto
internazionale privato, in La vendita internazionale. La Convenzione dell’11 aprile 1980 102
(1981), stating that the introduction of Article 6 CISG and, therefore, the recognition of party autonomy
was, a “political need.”
cases. One where the Convention’s application is excluded, the other where the parties derogate from—or modify the effects of—the provisions of the CISG on a substantive level. These two situations differ from each other in that the former does, according to the CISG, per se not encounter any restrictions, as also pointed out in the Digest (para. 3), whereas the latter is limited, as there are provisions the parties are not allowed to derogate from. Where, for instance, at least one of the parties to the contract governed by the CISG has its place of business in a State that has made a reservation under Article 96, the parties may not derogate from or vary the effect of Article 12. In those cases, according to Article 12, any provision “that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply.”

Although this matter has been referred to in the Digest as well (para. 3), the Digest does not conclusively deal with the effects of such a reservation, not even in its comments on Article 12. It states—correctly—that the effects of Article 12 lead to the principle of freedom from form requirements not being per se applicable where one party has its relevant place of business in a State that made an Article 96 declaration. It then cites the contradictory views held in case law in respect of the effects of an Article 96 declaration, unfortunately without stating which view is the correct one: that according to which the sole fact that one party has its place of business in a State that made an Article 96 reservation does not necessarily mean that the form requirements of that State apply, thus letting it (correctly) depend on the law to which the rules of private international of the forum lead whether any form requirements have to be met; or that pursuant to which where one party has its relevant

21. For this statement, see also Bonell, supra note 14, at 53; Esperanza Castellanos Ruiz, Autonomía de la voluntad y derecho uniforme en la compraventa internacional 37 (1998); Franco Ferrari, La compraventa internacional 119 ff. (1999); Tomás Vázquez Lepinet, Compraventa internacional de mercaderías. Una visión jurisdiccional 86 (2000).

22. For this distinction, see also Lanciotti, supra note 17, at 148 f.; Magnus, supra note 15, at 105 ff.; Dieter Martiny, Kommentar zum UN-Kaufrecht, in 7 Münchener Kommentar zum Bürgerlichen Gesetzbuch 1655 f. (Hans-Jürgen Sonnenberger ed., 1989); Sacerdoti, supra note 17, at 745-46.

23. For this statement, see Hoyer, supra note 15, at 41.


place of business in a State that made an Article 96 reservation, the contract must necessarily be concluded or evidenced or modified in writing.27

It should be noted that although the Convention does not expressly mention it, there are other provisions that the parties cannot derogate from, as also pointed out by the Digest (para. 4), namely the public international law provisions (i.e. Articles 89-101).28 As the Digest correctly states, this is due to the fact that those provisions relate to issues relevant to Contracting States rather than private parties. Even though the Digest holds that there is no case law on this point yet, it should be noted that the Tribunale di Vigevano in its rather famous decision of 12 July 2000, expressly took the view referred to in the Digest and stated that Articles 89-101 cannot be derogated from.29 In a 2005 decision, the Tribunale di Padova not only confirmed that the parties cannot exclude the CISG’s final provisions, but it also stated that the parties cannot derogate from Article 28 either.30 In my opinion, that view is correct, as Article 28 is not directed to the parties, but rather to the courts of

28. For this conclusion, see also BEATE CZERWENKA, RECHTSANWENDUNGSPROBLEME IM INTERNATIONALEN KAUFRECHT 172 (1988); FERRARI, supra note 17, at 111.
Contracting States. However, the aforementioned exceptions are the only ones. All other provisions can be derogated from.

III. IMPLIED EXCLUSION OF THE CISG AND CHOICE OF THE APPLICABLE LAW

Party autonomy also played a very important role under the ULIS. A comparison of Article 6 CISG and its “direct predecessor,” Article 3 ULIS, could even lead to the conclusion that under ULIS party autonomy was more widely recognized since the ULIS expressly stated that its exclusion could also be made implicitly. However, this provision was later criticized, which is why the express reference to the possibility of an implicit exclusion

31. For this conclusion, see also AUDIT, supra note 15, at 125 f.; Franco Ferrari, Art. 6, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT (CISG) 125-26 (Peter Schlechtriem & Ingeborg Schwenzer eds., 4th ed. 2004); Martin Karollus, Art. 28, in KOMMENTAR ZUM UN-KAUFRECHT 298, 309 (Heinrich Honsell ed., 1997); contra Amy H. Kastely, The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention, 63 WASH. L. Rev. 607, 641-42 (1988), stating that:
Arguably, however, article 28 differs from most of the Convention’s provisions because it deals directly with a court’s power and discretion to grant injunctive relief. In this way, article 28 is more like article 12, regarding domestic statutes of frauds. Article 12 is expressly exempted from the contractual waiver power in article 6. The parties cannot agree to be bound by an oral modification if any party has its principal place of business in a Contracting State that has preserved its own statute of frauds under article 96. Similarly, one may argue, the parties cannot require specific performance when the court would not otherwise grant it under article 28. On balance, however, article 6 should be interpreted to permit waiver of article 28. First, only article 12, not article 28, is expressly exempted from article 6. Furthermore, the Convention’s drafters reasonably might have concluded that the domestic policies supporting a statute of frauds are more significant than those protecting a court’s discretion to deny specific performance.
Id. (citations omitted).

32. Thus, it cannot surprise that a court has recently stated that Article 55, relating to open-price contracts, is only applicable where the parties have not agreed to the contrary. See Cour d’appel Grenoble, France, 26 Apr. 1995, available at http://witz.jura.uni-sb.de/CISG/decisions/2604952v.htm. Neither is a court decision surprising which expressly states that Article 39, relating to the notice requirement, is not mandatory and can be derogated from. See Landgericht Giessen, Germany, 5 July 1994, published in Neue Juristische Wochenschrift Rechtsprechungs-Report 438 (1995). To make another example, according to the Austrian Supreme Court, Article 57 also can be derogated from. See Oberster Gerichtshof, Austria, 10 Nov. 1994, published in Zeitschrift für Rechtsvergleichung 79 ff. (1995).

33. For a similar statement, see Rolf Herber, Art. 3, in KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT 19 (Hans Dölle ed., 1976); Hoyer, supra note 15, at 41; LANCIOITI, supra note 17, at 145-46.

34. Bonell, supra note 19, at 17.

35. This has already been pointed out by Carbone & Luzzatto, supra note 17, at 132.

36. Article 3 ULIS reads as follows: “The parties to a contract of sale shall be free to exclude the application thereto of the present Law either entirely or partially. Such exclusion may be express or implied.” Uniform Law on the International Sale of Goods (ULIS) ch. 1, art. 3 (1964).

was not retained by the drafters of the CISG,\(^{38}\) even though at the Vienna
Diplomatic Conference proposals to reintroduce that express reference were made.\(^{39}\) In my opinion, this does not mean that under the CISG the exclusion always has to be made expressly,\(^{40}\) as, however, stated in several court
decisions cited—once again, without any comment—in the Digest,\(^{41}\) as well

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See also Arthur Rosett, _Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods_, 45 _Ohio St. L.J._ 265, 281 (1984), where the author criticizes the draftsmen who, although they could have foreseen the problems which the lack of an express reference to the possibility of implicitly excluding the Convention would cause, “chose to provide little guidance.”

as in some other court decisions not cited at all. This is evidenced, inter alia, by the fact that “the majority of delegations was . . . opposed to the proposal according to which a total or partial exclusion of the Convention could only be made ‘expressly.’” Consequently, the lack of express reference to the possibility of an implicit exclusion must not be regarded as precluding such possibility. Rather it has a different meaning, to discourage courts from too easily inferring an ‘implied’ exclusion or derogation. Therefore, an implicit exclusion must be regarded as possible, a view which has already been confirmed by many court decisions. Some of these


43. Bonell, supra note 14, at 52; see also AUDIT, supra note 15, at 38; Piltz, supra note 17, at 48. For the proposal mentioned in the text, see Records, supra note 39, at 86, 249-50.

44. However, several authors have argued that in order to be effective, the exclusion of the Convention’s application must be explicit; see, e.g., Isaac I. Dore & James E. DeFranco, A Comparison of the Non-Substantive Provisions of the UNCTIRAL Convention on the International Sale of Goods and the Uniform Commercial Code, 23 HARV. INT’L L.J. 49, 53-54 (1982), stating that “[u]nlike the U.C.C. . . . the Convention does not seem to recognize implied agreements which exclude the application of the Convention. The Convention may therefore govern contracts which the parties by their implied agreement might have assumed to be governed by domestic law.”


45. For a similar justification of the lack of reference to the possibility of implicitly excluding the CISG’s application, see also Records, supra note 39, at 17 (stating that “[t]he second sentence of ULIS, article 3, providing that ‘such exclusion may be express or implied’ has been eliminated lest the special reference to ‘implied’ exclusion might encourage courts to conclude, on insufficient grounds, that the Convention had been wholly excluded”); Peter Schlechtriem, Uniform Sales Law. The UN Convention on Contracts for the International Sale of Goods 35 (1986) (stating that “[i]n contrast to Article 3 sentence 2 of ULIS, the Convention does not mention the possibility of an ‘implied’ exclusion, but this does not mean that a tacit exclusion is impossible. The intent of deleting the word ‘implied’ was to prevent the courts from being too quick to impute exclusion or the Convention”); see also Bell, supra note 40, at 255; Cappuccio, supra note 40, at 868; Thomas C. Ebenroth, Internationale Vertragsgestaltung im Spannungsverhältnis zwischen ABGB, IPR-Gesetz und UN-Kaufrecht, in JURISTISCHE BLÄTTER 681, 684 (1986); Ferrari, supra note 31, at 128; Magnus, supra note 15, at 104; Piltz, supra note 17, at 48; Reifner, infra note 49, at 55.

decisions the Digest cites (para. 6 ff.) without commenting on, not unlike the cases holding the opposite view. Of course, there must be clear indications that the parties really wanted such an exclusion, 47 that is, there must be a real—as opposed to theoretical, fictitious or hypothetical—agreement of exclusion. 49

This is not a merely theoretical problem, as evidenced by the variety of ways to implicitly exclude the CISG. A typical way of implicitly excluding the CISG is through the parties’ choice of the applicable law. 51 There is no doubt that such a choice must be considered as being an effective exclusion

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47. For a similar affirmation, see Michael J. Bonell, La nouvelle Convention des Nations-Unies sur les contrats de vente internationale de marchandises, DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL 7, 13 (1981) (stating that a “tacit exception may only be admitted if there are valid elements of indications showing the parties’ ‘true’ intention”); FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW 48 (1992) (suggestion that there must be clear indications that an implicit exclusion is wanted); Erauw, supra note 17, at 47 (stating the same); Rovelli, supra note 20, at 105 (stating that “of course, the determination of the applicable law can result from an implicit choice of the parties, but it must be ‘certain’: this means that the intention of implicitly excluding the Convention must be real, not hypothetical”).

48. See also Kammergericht Berlin, Germany, 24 Jan. 1994, published in RECHT DER INTERNATIONALEN WIRTSCHAFT 683 (1994) (expressly stating that the CISG’s applicability cannot be excluded by a hypothetical choice of law).

49. For a similar statement, see JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 80 (3d ed. 1999) (stating that “although an agreement to exclude the Convention need not be ‘express’ the agreement may only be implied from facts pointing to real—as opposed to theoretical or fictitious—agreement”); for similar statements, see Christina Reifner, Stillschweigender Ausschluss des UN-Kaufrechts im Prozess?, in INTERNATIONALES HANDELSDRUCK 55 (2002).

Note, however, that according to Murphy, supra note 9, at 749, the possibility of implicitly excluding the CISG contrasts with the need for certainty of law.

50. For this evaluation, see also Ferrari, supra note 31, at 129; Herber, supra note 14, at 81; MAGNUS, supra note 15, at 138.

51. As far as the validity of the choice of law is concerned, it must be evaluated on the grounds of the law applicable to this issue. According to Article 2 of the 1955 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, the electio iuris is governed by the law chosen by the parties; the same is true according to Article 3(4) and 8 of the 1980 EEC Convention on the Law Applicable to Contractual Obligations. For further reference to this problem, see Bonell, supra note 19, at 19; FERRARI, supra note 17, at 115-16; HERBER & CZERWENKA, supra note 40, at 43.
of the CISG, at least where the applicable law chosen by the parties is the law of a non-Contracting State. 52 This was true under the ULIS as well 53 and has been confirmed by a German court decision 54 cited in the Digest.

The choice of the law of a Contracting State as the law governing the contract poses more difficult problems. 55 One of these problems relates to the question of whether the CISG is applicable when the parties agree upon a national law, such as French, U.S. or Italian law, as the law applicable to their contract. As the Digest clearly shows (para. 8), the case law is contradictory on this issue as well. Since the Digest, however, simply lists the contradictory cases, once again without commenting on them, the interpreter has to look elsewhere to determine which cases should be followed.

In respect to the issue at hand, several courts, 56 as well as several legal writers, 57 suggest that the indication of the law of a Contracting State ought

52. For a similar statement, see, e.g., Bonell, supra note 14, at 56 (stating that there is an "[implicit] indication of the parties' intention to exclude the application of the Convention, either entirely or partially, whenever they have chosen as the proper law of their contract the law of a non-Contracting State . . ."); see also Audir, supra note 15, at 39; Carbone & Luzzatto, supra note 17, at 132; Fritz Enderlein et al., Internationales Kaufrecht: Kaufrechtskonvention. Verjährungsverkündung. Vertretungskonvention. Rechtsanspruchskonvention 58 (1991); Ferrari, supra note 14, at 166; Ferrari, supra note 31, at 129; Garro & Zuppi, supra note 40, at 95; Holthausen, supra note 40, at 515; Ole Lando, The 1985 Hague Convention on the Law Applicable to Sales, in Rabels Ztschrift für ausländisches und internationales Privatrecht 84 (1987); Liguori, supra note 40, at 158; Lindbach, supra note 40, at 308; Magnus, supra note 15, at 138; Martiny, supra note 22, at 1656; Piltz, supra note 17, at 48; Reifner, supra note 49, at 55; Sacerdoti, supra note 17, at 746; Christian Thiele, Das UN-Kaufrecht vor US-amerikanischen Gerichten—zugleich Anmerkung zu Viva Vino Import Corp. v. Franese Vini S.r.l. (E.D.Pa. 2000), in Internationales Handelsrecht 9 (2002); Winship, supra note 40, at 1.35.

53. See Herber, supra note 33, at 20.

See, however, Rechterbank Koophandel Tongeren, Belgium, 18 Mar. 1976, in Internationale Rechtsprechung zu EKG und EAg 136 f. (Peter Schlechtriem & Ulrich Magnus eds., 1987); Rechterbank Koophandel Tongeren, Belgium, 9 June 1977, in Internationale Rechtsprechung zu EKG und EAg 138.


55. For an overview of this issue, see Franco Ferrari, Zum vertraglichen Ausschluss des UN-Kaufrechts, in Zeitschrift für Europäisches Privatrecht 743 (2002); Magnus, supra note 15, at 138-39.


57. See, e.g., Franz Bydlinski, Diskussionsbeitrag, in Das UNCITRAL-Kaufrecht im Vergleich zum österreichischen Recht 48 (Peter Doralt ed., 1985); Martin Karollus, Der Anwendungsbereich des UN-Kaufrechts im Überblick, Juristische Schulung 381 (1993).
to amount to an (implicit) exclusion of the CISG, because otherwise the indication of the parties would have no practical meaning. 58 In my opinion, 59 however, this solution is not tenable under the CISG, 60 not unlike under the ULIS. 61 The indication of the law of a Contracting State, if made without particular reference to the domestic law of that State, 62 as in two of the cases cited by the Digest, 63 does not per se exclude the Convention’s application, 64


60. This view was also expressed on the occasion of the Vienna Diplomatic Conference, when a large number of delegations rejected proposals by Canada and Belgium (for these proposals, see Records, supra note 39, at 250) according to which the domestic sales law, and not the CISG, would have to be applied whenever the parties indicated the law of a Contracting State as the proper law for their contract.

61. This view was predominant under the 1964 Hague Conventions; for a reference to this view in legal writing, see, e.g., Enderlein & Maskow, supra note 47, at 49; Herber, supra note 33, at 21; Gert Reinhart, Dix ans de jurisprudence de la République Fédérale d’Allemagne à propos de la loi uniforme sur la vente internationale d’objets mobiliers corporels, Uniform Law Review 424 (1984); Wirz, supra note 17, at 110; Konrad Zweigert & Ulrich Drobnig, Einheitliches Kaufrecht und internationales Privatrecht, Rabels Zeitschrift für ausländisches und internationales Privatrecht 162-63 (1965).

62. There is no doubt that the CISG’s application is excluded where the parties merely refer to the domestic law of a Contracting State; for a similar conclusion, see Bonell, supra note 19, at 18; Brunner, supra note 40, at 70; Cappuccio, supra note 40, at 873; Erauw, supra note 17, at 49; Ferrari, supra note 17, at 117; Schlechtriem, supra note 45, at 35. Consequently, where the parties state, for instance, that “the contract be governed by American law as laid down in the U.C.C.,” the CISG’s application should be considered as being excluded.


64. This view is shared by the majority of commentators; see, e.g., Audit, supra note 15, at 39; Bonell, supra note 14, at 56; Erauw, supra note 17, at 21, 25, 48; Farnsworth, supra note 62, at 442; Ferrari, supra note 17, at 117; Rolf Herber, Anwendungsvoraussetzungen und Anwendungsbereich des Einheitlichen Kaufrechts, in Einheitliches Kaufrecht und nationales Obligationenrecht 104 (Peter Schlechtriem ed., 1987); Herber & Czerwenka, supra note 40, at 44; Albert H. Kritzer, Guide to
as confirmed by many court decisions\textsuperscript{65} and arbitral awards\textsuperscript{66} cited in the


66. See Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 9187, June 1999, available at http://www.unilex.info/case.cfm?id=1&do=case&uid=466&step=FullText (CISG applicable pursuant to the choice of French law, \textit{i.e.}, the law of a Contracting State); Schiedsgericht der Handelskammer Hamburg, Germany, 21 Mar. 1996, \textit{published in \textsc{Monatschrift für Deutsches Recht} 781} (1996) (applying the CISG on the grounds that the choice of the Hamburg arbitral tribunal was to be analogized to the choice of German law, \textit{i.e.}, that of a Contracting State); Court of Arbitration of the Hungarian Chamber of Commerce and Industry, 17 Nov. 1995, available at http://www.unilex.info/case.cfm?id=1&do=case&uid=217&step=FullText (stating that the CISG was applicable, among others, because the parties had chosen the law of two (!) Contracting States as the law governing the contract); Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 8324, 1995, \textit{published in \textsc{Journal du droit international} 1019} (1996) (applying the CISG to a contract which the parties had subjected to French law, \textit{i.e.}, the law of a Contracting State); Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 7844, 1994, \textit{published in \textsc{ICC Court of Arbitration Bulletin} 72} (1995) (stating that the CISG is applicable where the parties have chosen the law of a Contracting State to govern their international sales contract); Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 7660, 23 Aug. 1994, \textit{published in \textsc{ICC Court of Arbitration Bulletin} 68} (1995) (holding that the CISG was applicable on the grounds that the parties had agreed upon the law of a Contracting State (Austria) as the law governing their contract and that the choice of the law of a Contracting State included the CISG); Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 7565, \textit{published in \textsc{ICC Court of Arbitration Bulletin} 64} (1995) (applying the CISG to a contract to which the parties had made applicable "the Laws of Switzerland" based upon the
Digest. This is true even where the law chosen is that of a Contracting State that made an Article 95 reservation.67

The application of the Convention does not make the national law irrelevant, as suggested.68 The indication of the law of a Contracting State must be interpreted as both making the CISG applicable (as part of the chosen law)69 and as determining the law applicable to the issues not governed by the CISG (to the extent to which the parties are allowed to make a choice in respect of those issues),70 such as the issues relating to the validity, thus avoiding to have to resort to the complex rules of private international law in order to determine the law applicable to the issues not governed by the CISG.71

Quid iuris if under the 1964 Hague Conventions the parties have established practices between themselves according to which the reference to the law of a Contracting State had to be interpreted as an exclusion of the uniform sales law and the parties continue to refer to the law of that State even

argument that “Swiss law, when applicable, consists of the Convention itself as of the date of its incorporation into Swiss law”); Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 6653, published in JOURNAL DU DROIT INTERNATIONAL 1040 (1993) (applying the CISG to a contract which the parties had agreed upon to subject to French law, the law of a Contracting State to the CISG); Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, Arbitral Award No. SCH-4366, 15 June 1994, published in RECHT DER INTERNATIONAL EN WIRTSCHAFT 590 (1995) (expressly stating that “the parties’ choice of the law of a Contracting State is understood as a reference to the corresponding national law, including the CISG as the international sales law of that State and not merely to the—non-unified—domestic sales law”).

67. For this solution, see also Gerold Herrmann, Anwendungsbereich des Wiener Kaufrechts—Kollisionsrechtliche Probleme, in WIENER KAUFRECHT. DER SCHWEIZERISCHE AUSSENHANDEL UNTER DEM ÜBEREINKOMMEN ÜBER DEN INTERNATIONALEN WARENKAUF 95 (Eugen Bucher ed., 1991); MAGNUS, supra note 15, at 139.

Contra, in the sense that in this line of cases the CISG should not apply, Audit, supra note 15, at 39 n.3.

68. For this affirmation, see also FERRARI, supra note 14, at 170.

69. See SCHLECHTRIEM, supra note 19, at 13.


71. For a similar conclusion in respect of the consequences of the parties’ choice of the law of a Contracting State as the proper law for their contract, see ENDERLEIN & MASKOW, supra note 47, at 49, stating that:

When a state participates in the Convention the latter can be assumed to be part of his domestic law so that additional reference to it could be considered as superfluous at first, and/or for the reference to make sense, as an exclusion of the CISG. But the application of the Convention does in no way make the application of the other parts of the national law irrelevant . . . . Therefore, it must be recommended to the parties to determine the national law that is applicable in addition to the Convention . . . so that they can avoid the uncertainties involved in determining that law, using the conflict-of-law norms.
after that State becomes a Contracting one to the CISG? Does the continuing reference to the law of that State have to be considered as an exclusion of the CISG? Even though several authors have argued in favor of an affirmative answer to this question, 72 most recently the opposite view was adopted by a German court. 73

IV. EXCLUSION OF THE CISG BY VIRTUE OF STANDARD CONTRACT FORMS AND CHOICE OF FORUM

The choice of the law of a State—whether Contracting or not—does not constitute the sole kind of implicit exclusion which can be used to bar the Convention’s application. 74 Indeed, in certain situations, and this was also true under the 1964 Hague Conventions, 75 the use of standard contract forms can lead to the exclusion of the CISG’s application. 76 This is true provided that these forms become part of the contract 77 and that (a) their contents are so profoundly influenced by the rules and the concepts of a specific legal system that their use is incompatible with the CISG and implicitly manifests the parties’ intention to have the contract governed by that legal system 78 and

72. See, e.g., FERRARI, supra note 17, at 118; Holthausen, supra note 40, at 516.
73. Compare Landgericht Düsseldorf, Germany, 11 Oct. 1995, available at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/180.htm (stating that the express exclusion of the 1964 Uniform Sales Law did not amount per se to an implied exclusion of the CISG and therefore applied the CISG to an international sales contract which the parties had agreed upon subjecting to the sole law of Germany, i.e., the law of a Contracting State to the CISG).
74. See also ACHILLES, supra note 40, at 26; FERRARI, supra note 14, at 172 ff; MAGNUS, supra note 15, at 140 ff.
75. For a similar statement, see ENAUW, supra note 17, at 49; Herrmann, supra note 67, at 95-96; Martiny, supra note 22, at 1656.
76. See SCHLECHTRIEM, supra note 19, at 14.
77. The possibility of an implicit exclusion of the CISG by means of standard contract forms has also been favored by Bonell, supra note 14, at 56-57, stating that:
[T]he use of general conditions or of standard form contracts whose content is influenced by principles and rules typical of the domestic law of a particular State, is certainly an element from which one could infer the intention of the parties to have that domestic law rather than the Convention govern their contract. Before reaching such a conclusion, however, due consideration should be given to other circumstances of the case.
(b) their use tends at the same time to exclude the application of the CISG as a whole. Where, on the contrary, standard contract forms are intended to merely regulate specific issues in contrast with the CISG, one must presume that only a derogation of some of the CISG provisions is desired.

Furthermore, as pointed out also by the Digest (para. 9), the choice of forum can lead to the exclusion of the CISG’s application, and the same is true with reference to the choice of an arbitral tribunal, provided that two requirements are met: (a) one must be able to infer from the parties’ choice their clear intention to have the domestic law of the State where the forum or arbitral tribunal is located govern their contract, and (b) the forum must not be located in a Contracting State, otherwise the CISG would be applicable, as confirmed by two arbitral rewards referred to in the Digest.

This view is shared by other authors as well; see, e.g., Audit, supra note 15, at 39; Ulrich Huber, Der UNCITRAL-Entwurf eines Übereinkommens über internationale Warenkaufverträge, Rabels Zeitschrift für ausländisches und internationales Privatrecht 426 (1979); Schlechtriem, supra note 19, at 21.

79. See also Magnus, supra note 15, at 141 (stating that standard contract forms which contrast with specific provisions of the CISG should not per se be looked upon as excluding the CISG as a whole). This was true under the Hague Conventions as well; see, for instance, Oberlandesgericht Hamm, Germany, 7 May 1979, in Internationale Rechtsprechung zu EAG und EKG, supra note 53, at 141 f.

80. For a similar solution, see Enderlein & Maskow, supra note 47, at 49 (stating that “[i]n no account can the exclusion of the Convention be deduced merely from agreement of such terms of contract which contradict specific provisions because deviating individual exclusions are indeed compatible with the CISG”). This view is also held by Ferrari, supra note 17, at 119; Witz, supra note 17, at 111.

81. Note to this regard, that it has been asserted that “[i]f the parties have not provided otherwise, but have included a choice of forum clause, courts are inclined to rule that the choice of forum indicates a choice of that jurisdiction’s substantive law,” Ronald A. Brand, Nonconvention Issues in the Preparation of Transnational Sales Contracts, 8 J.L. & Com. 145, 167 (1988).


82. For this conclusion, see Holhausen, supra note 40, at 517-18; Magnus, supra note 15, at 140-41.

83. Several authors have pointed out that, even though the choice of a forum or of an arbitral tribunal may indicate the parties’ intention to exclude the CISG, that choice by itself is not sufficient to bar the Convention’s application; for similar affirmations, see Herber & Czerwenka, supra note 40, at 43 (stating that an arbitration clause or the choice of a forum might indicate the parties’ intention to exclude the Convention); Huber, supra note 78, at 426 (stating that the choice of an arbitral tribunal by itself does not lead to the exclusion of the Convention); Schlechtriem, supra note 45, at 35 (stating that the choice of an arbitral tribunal does not by itself imply that the parties wish to exclude the Convention’s application).

84. For similar, albeit not identical conclusions, see Eraw, supra note 17, at 49; Herber, supra note 14, at 87; Holhausen, supra note 40, at 519; Reifner, supra note 49, at 55.

85. For this solution, see Gerhard Walter, Kaufrecht, Handbuch des Schuldrechts 632 (1987) (stating that whenever the arbitral tribunal chosen by the parties is located in a Contracting State, the CISG is applied).

86. See Schiedsgericht der Hamburger freundlichen Arbitrage, Germany, 29 Dec. 1998, published in Internationales Handelsrecht 36-37 (2001) (applying the CISG on the grounds that the choice of
Finally, although this possibility is nowhere referred to in the Digest, parties can exclude the CISG by agreeing that specific issues of their contract be subject to specific provisions of a law different than the CISG, provided, however, that those issues are fundamental ones\(^87\) and that from the subjection of those issues to a domestic sales law one can infer the parties’ clear intention to have the contract governed by a law different from the uniform one, as pointed out by various court decisions rendered in respect of the 1964 Hague Conventions.\(^88\) As correctly stated in a decision referred to in the Digest (para. 11), the inclusion of Incoterms by the parties does not amount to an implicit exclusion of the CISG.\(^89\)

V. IMPLICIT EXCLUSION AND PLEADINGS ON THE SOLE BASIS OF DOMESTIC LAW

Quid iuris where the parties argue a case on the sole basis of a domestic law despite the fact that all of the CISG’s criteria of applicability are met? Although this issue is referred to in the Digest (para. 10), as there is case law on it, the Digest itself does not help to answer the question. The cases it cites are contradictory and the Digest once again does not help to solve the contradiction.

In my opinion,\(^90\) the mere fact that the parties argue on the sole basis of a domestic law does not per se lead to the exclusion of the CISG,\(^91\) a view recently confirmed by several courts,\(^92\) unless the parties are aware of the CISG’s applicability or the intent to exclude the CISG can otherwise be

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87. For this prerequisite, see Herber, supra note 14, at 87.
90. See Ferrai, supra note 55, at 744 ff.
91. For this conclusion, see SCHLECHTRIEM, supra note 19, at 14.
inferred with certainty. If the parties are not aware of the CISG’s applicability and argue on the basis of a domestic law merely because they believe that this law is applicable, the judges will nevertheless have to apply the CISG on the grounds of the principle *iura novit curia*, provided that this principle is part of the *lex fori*.

One of the courts stated this very clearly:

The fact that during the preliminary legal proceedings in this case the parties based their arguments exclusively on Italian domestic law without any references to the [CISG] cannot be considered an implicit manifestation of an intent to exclude application of the Convention . . . . [R]eference in a party’s brief to the non-uniform national law of a Contracting State—even though it is theoretically some evidence of an intent to choose the national law of that State—does not imply the automatic exclusion of the [CISG]. We will assume that the parties wanted to exclude the application of the Convention only if it appears in an unequivocal way that they recognized its applicability and they nevertheless insisted on referring only to national, non-uniform law. In the present case, it does not appear from the parties’ arguments that they realized that the [CISG] was the applicable law . . . ; we cannot, therefore, conclude that they implicitly wanted to exclude the application of the Convention by choosing to refer exclusively to national Italian law. Thus according to the principle *iura novit curia*, it is up to the judge to determine which Italian rules should be applied; for the reasons mentioned above, the applicable rules are those in the Vienna Convention.93

In light of what has been said thus far, one has to reject the opposite view held by two tribunals (a state court94 and an arbitral tribunal95) according to which pleadings on the sole grounds of domestic law automatically leads to the exclusion of the CISG.

VI. EXPRESS EXCLUSION OF THE CISG

In addition to problems concerning the CISG’s implicit exclusion, problems can also arise with respect to its explicit exclusion.96 In this respect, two lines of cases have to be distinguished: the exclusion with and the

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exclusion without indication of the applicable law to the contract between the parties. 97

Nulla quaestio in the case in which the CISG is excluded with the indication of the applicable law, which under the CISG can, not unlike under the Hague Conventions, 98 also be made in the course of a legal proceeding, 99 at least where this is admissible according to the lex fori, 100 as in Germany 101 and Switzerland for instance, 102 even though the parties will normally make their choice before the conclusion of the contract. 103 In this case, the judge has to apply the law chosen by the parties, 104 and it is this law on the basis of which he has to decide upon the validity of the choice of law, at least where the applicable rules of private international law correspond to those laid down in the 1980 Convention on the applicable law to contractual obligations. 105 Where the parties’ choice of law is invalid, the contract should

97. For this distinction, see Ferrari, supra note 17, at 121.

98. Under the 1964 Hague Conventions, the indication of the applicable law could be made during the legal proceeding. For a reference to this rule in respect of ULIS and ULF, see Volker Stötter, Stillschweigender Ausschluß der Anwendbarkeit des internationalen Kaufabschlußübereinkommens und des Einheitlichen Kaufgesetzes, RECHT DER INTERNATIONALEN WIRTSCHAFT 38 (1980); Christoph von der Seipen, Zum Ausschluß des Einheitlichen Kaufrechts im deutsch-englischen Rechtsverkehr, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 246 (1984).

For judicial applications of this principle, see Bundesgerichtshof, Germany, 26 Nov. 1980, published in NEUE JURISTISCHE WOCHENSCHRIFT 1156 (1981); Bundesgerichtshof, Germany, 26 Oct. 1983, published in RECHT DER INTERNATIONALEN WIRTSCHAFT 151 (1984).

99. See Erauw, supra note 17, at 47; Karollus, supra note 40, at 38; Schlechtriem, supra note 19, at 14.

100. See Achilles, supra note 40, at 27; Czerwenka, supra note 28, at 169-70; Holthausen, supra note 40, at 515; Ulrich Magnus, Zum räumlich-internationalen Anwendungsbereich des UN-Kaufrechts und zur Mängelrüge, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 391 (1993).


103. In this respect, it has been stated that:

One might expect that, in practice, the parties would normally indicate their intention at the beginning of their negotiations, or at least before the contract is concluded. Nonetheless, there is nothing to prevent them from deciding at a later stage, even after the initiation of a legal proceeding relating to their contract. . . . It should, however, be borne in mind that any exclusion of or derogation from the Convention agreed upon after the conclusion of the contract amounts to a modification of the contract, which in some cases may require a particular form.

Bonell, supra note 14, at 58.

104. For this solution see also Sacerdoti, supra note 17, at 746.

105. Although it is common knowledge that the question of whether the parties’ choice of law is valid falls outside the sphere of application of the Convention, there is uncertainty about the law on the basis of which to decide whether the parties have validly excluded the Convention, as has been pointed out, for
be governed by the law to be determined on the basis of the rules of private international law of the forum.\footnote{106} If this law turns out to be that of a Contracting State to the CISG, its domestic law rather than the CISG will have to be applied.\footnote{107}

*Quid iuris*, however, in the case of an express exclusion without indication of the applicable law, an issue also referred to in the Digest, although there is no case law on it yet?\footnote{108} In this case, the preferable view, held by most legal scholars,\footnote{109} is the one according to which “if the parties merely agree that the Convention does not apply, rules of private international law would determine the applicable domestic law.”\footnote{110} And whenever these rules refer to the law of a Contracting State, its domestic sales law, not the uniform one, should apply.\footnote{111}

Undoubtedly, this rule applies in cases in which the CISG is excluded *in toto*.\footnote{112} However, its application to cases in which it is excluded only partially created disagreement among legal scholars.\footnote{113} Some authors favor the view according to which the issues dealt with in the excluded provisions must be

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\footnote{106}{This solution is shared by Bonell, *supra* note 14, at 61; Ferrar, *supra* note 17, at 121; Honnold, *supra* note 49, at 126.}

\footnote{107}{However, see Herber & Czerwenka, *supra* note 40, at 44 (favoring the view according to which the invalidity of the parties’ choice of law leads to the application of the CISG).}

\footnote{108}{Note, that while at one point an exclusion without indication of the applicable law was considered inadmissible, this view is no longer tenable. See Michael J. Bonell, *UN-Kaufrecht und das Kaufrecht des Uniform Commercial Code im Vergleich*, Rabels Zeitschrift für ausländisches und internationales Privatrecht 28 (1994); Honnold, *supra* note 49, at 78.}

\footnote{109}{This solution has been favored, for instance, by Ferrar, *supra* note 14, at 179; Herber & Czerwenka, *supra* note 40, at 41–42; Karollus, *supra* note 40, at 38; Martiny, *supra* note 22, at 1655; Sacerdoti, *supra* note 17, at 746; Schlechtriem, *supra* note 19, at 21.}


\footnote{112}{For this affirmation, see Bonell, *supra* note 14, at 59.}

\footnote{113}{For a recent overview of the discussion on this issue, see Magnus, *supra* note 15, at 142-43.}
settled, according to Article 7(2) CISG, in conformity with the CISG’s general principles.\(^{114}\) In my opinion,\(^{115}\) the better view seems to be the opposite one: the rules to substitute the excluded CISG provisions are to be determined, not unlike in the case of an exclusion in toto of the Convention, by applying the rules of private international law (of the forum State)\(^{116}\)—without resorting to the general principles of the CISG—otherwise the exclusion would have no practical meaning. Indeed, it would make little sense to substitute specific solutions provided for by the Convention and which, therefore, are necessarily in conformity with its general principles, with solutions that are “in conformity with the general principles on which [the Convention] is based.”\(^{117}\)

### VII. Applicability of the CISG and Opting-In

As stated, the CISG provides for the parties’ possibility of excluding (totally or partially) its application. To contrast, the Convention does not address the issue of whether the party may make the Convention applicable when it would otherwise not apply,\(^ {118}\) that is, where the prerequisites for application are not met.\(^ {119}\)

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114. For this view, see Bonell, supra note 14, at 59; Herber, supra note 14, at 88-89; Herber & Czerwenka, supra note 40, at 42.
115. See Ferrari, supra note 17, at 122.
116. Compare also Ferrari, supra note 14, at 180.
117. CISG art. 7(2).
118. For a discussion of this problem, see Audit, supra note 15, at 40; Ferrari, supra note 17, at 124-26.
119. Note, that according to Bonell, supra note 14, at 63-64, the issue of the possibility of “opting-in” arises only where State courts are involved, since generally the parties are not allowed to select by virtue of a choice of law an international convention, instead of a particular domestic law.

The situations may be different if the parties agree to submit the disputes arising from their contract to arbitration. Arbitrators are not necessarily bound by a particular domestic law. This is self-evident, if they are authorized by the parties to decide ex aequo et bono. . . . But even in the absence of such an authorization there is a growing tendency to permit arbitrators to base their decisions on principles and rules different from those adopted by State courts. This tendency has recently received a significant confirmation by the UNCITRAL Model Law on International Commercial Arbitration, where it is expressly stated that “[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute” (Article 28(1)). . . . Following this approach the parties to an international contract would be free to indicate in the Convention the “rules of law” according to which the arbitrators shall decide any dispute, with the result that the Convention would directly apply regardless of whether or not the positive and negative conditions for this application are fulfilled in the single case.

Id.
As also pointed out in the Digest (para. 12), this issue did not arise at all under the ULIS which embodied a provision, Article 4,\textsuperscript{120} that expressly provided for the parties’ possibility of “opting-in.”\textsuperscript{121} The fact that the drafters did not retain that express reference to the parties’ possibility of opting-in should, however, not be interpreted as preventing the parties from being entitled to do so.\textsuperscript{122} This view can be justified on the grounds that the proposal (made by the former German Democratic Republic),\textsuperscript{123} according to which the CISG should apply even where the preconditions for its application are not met, as long as the parties wanted it to be applicable, was rejected on the sole ground that an express provision to allow such possibility was not necessary,\textsuperscript{124} because of the already existing principle of party autonomy.\textsuperscript{125} Most recently, this view was confirmed by a Chinese court decision which applied the CISG by virtue of the parties’ opting-in to a contract for the sale

\textsuperscript{120} See Article 4 ULIS.

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 dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods, to the extent that it does not affect the application of any mandatory provisions of the law which would have been applicable if the parties had not chosen the Uniform Law.

\textit{Id.}

\textsuperscript{121} For a reference to Article 4 ULIS in scholarly writing relating to Article 6 CISG, see \textsc{Ferrari}, \textit{supra} note 14, at 182-83; \textsc{Herber & Czerwenka}, \textit{supra} note 40, at 45.

\textsuperscript{122} For the possibility of “opting-in,” see \textsc{Enderlein & Maskow}, \textit{supra} note 47, at 51 (stating that “[t]he Convention can be interpreted in such a way that its application . . . can be agreed. In this case the substantive and territorial, and hence personnel and time \textit{scope of application, can be extended”}; \textsc{Schlechtriem}, \textit{supra} note 45, at 36 (stating that “[n]ot only can the parties agree to reject the application of the Convention, but they can also agree to apply the Convention when the preconditions for application have not been met”); \textsc{Winship}, \textit{supra} note 40, at 1.34, stating that:

Although the conference rejected an amendment which would have expressly permitted parties to derogate from Articles 2 and 3 the debate suggests that delegations could not agree on how to express the limitations on party autonomy required by ‘mandatory’ national laws. Parties should not be foreclosed, therefore, from agreeing to have the convention apply to a transaction otherwise excluded as long as the policy behind the specific exclusion is not contravened.

\textit{Id.}

\textsuperscript{123} For this proposal, see \textsc{Records}, \textit{supra} note 39, at 86 (reporting the proposal according to which Article 6 should be amended as follows: “Even if this Convention is not applicable in accordance with articles 2 . . . or . . . 3, it shall apply if it has been validly chosen by the parties. . . .”).

\textsuperscript{124} For a similar reasoning, see \textsc{Ferrari}, \textit{supra} note 17, at 125; \textsc{Honnold}, \textit{supra} note 49, at 83; \textsc{Magnus}, \textit{supra} note 15, at 145.

\textsuperscript{125} For this argument, see the considerations of the delegate of the Republic of Korea at the Vienna Conference, \textit{reported in Records}, \textit{supra} note 39, at 252 (stating that “the provision proposed by the [former] German Democratic Republic was not necessary because of the principle of the autonomy of the will of the parties. It [is] thus always permissible for the parties to decide to apply the Convention, even in the cases covered by articles 2 and 3”).
of fish powder which otherwise would have fallen outside the CISG’s scope of application or its substantive scope,\(^{126}\) a decision not referred to in the Digest.

As far as the significance of the parties’ “opting-in” is concerned, it must be emphasized that by virtue of the “opting-in,” the CISG becomes part of the contract not unlike any other contractual clause.\(^ {127}\) In other words, the choice of the CISG in contracts to which it would otherwise not apply does not constitute a “choice of law,” as there are no private international law rules that allow such a “choice” to have a different value. Consequently, it can be presumed, that “[t]he mandatory rules of the applicable law are . . . not affected by this [opting-in].”\(^ {128}\) Very recently, this view has been confirmed by the Tribunale di Padova in a decision of 11 January 2005,\(^ {129}\) a decision which the Digest does (obviously) not refer to. Referring to both the 1980 Convention on the law applicable to contractual obligations as well as the 1955 Hague Convention on the law applicable to contracts for the international sale of goods, the Italian court correctly decided that the choice of the CISG as the “law” applicable to a contract in cases where the CISG would otherwise not apply cannot amount to a “choice of law,” since the aforementioned conventions do not allow for a choice of law different from State law.


\(^{127}\) For a similar statement, see AUDIT, supra note 15, at 40.

\(^{128}\) ENDERLEIN & MASKOW, supra note 47, at 51.

For a similar conclusion, see Bonell, supra note 19, at 19 (stating that the result of the parties’ “opting-in” “will be that the individual provisions of the Convention like any other contractual term may bind the parties only to the extent that they are not contrary to mandatory rules of the proper law of contract, i.e., the domestic law which by virtue of the rules of private international law of the forum governs the transaction in question”); Horacio Grigera Naon, The UN Convention on Contracts for the International Sale of Goods, in 2 THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 101 (Norbert Horn & Clive M. Schmitthoff eds., 1982) (stating the same); HEBB & CZERWENKA, supra note 40, at 45 (stating the same); HÖNNOLD, supra note 49, at 87 (stating that “[t]he mandatory rules of domestic law that are not disturbed when the Convention becomes applicable by virtue of an agreement by the parties”); MAGNUS, supra note 15, at 111; Sacerdoti, supra note 17, at 746 (stating the same).

Note, however, that a similar statement had already been made at the Vienna Conference; see Records, supra note 39, at 252, reporting the Egyptian delegate’s statement:

[T]he draft amendment was an attractive one but was unnecessary because of the principle of the autonomy of the will of the parties. If the latter agreed to apply the Convention, even in cases where it would normally not apply, their wish should be respected. Naturally, if the applicable law did not admit certain provisions of the Convention, that law would prevail. But it was not for the Convention to settle that question.

Although it is not surprising that the aforementioned Italian decision is not included in the Digest, it poses the problem of how to deal with new case law, of which there is a lot. This is for sure one of the challenges UNCITRAL will face in the future.