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The Word is not Enough – Arbitration, Choice of Forum and Choice of Law Clauses Under the CISG

INGEBORG SCHWENZER*, DAVID TEBEL**

I. Introduction

Recently, it was stated by a renowned arbitrator that the requirement of an arbitration agreement in writing remains the biggest obstacle on the way to recognition of a foreign arbitral award.¹ In order to overcome this obstacle academics and practitioners have developed a wide array of approaches, one more creative than the other.² One of the more recent ideas is to override any and all international and domestic form requirements with regard to dispute resolution clauses by relying on the CISG, that – as most domestic legal systems³ – lays down in its Art. 11 the principle of freedom of form.⁴ In the

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¹ *Wolfgang Kühn*, Aktuelle Fragen zur Anwendung der New Yorker Konvention von 1958 im Hinblick auf die Anerkennung und Vollstreckung ausländischer Schiedssprüche – Eine Betrachtung der deutschen Rechtsprechung, *Zeitschrift für Schiedsverfahren* 2009, 53, 55.

² See e.g. *Zambia Steel v. James Clark*, [1986] 2 Lloyd's Rep. 225, 226 et seq. CA, where the court found that an oral agreement referring to a written document containing an arbitration clause was indeed a written agreement on said arbitration clause; comparably now s. 5(3) English Arbitration Act 1996: "Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing"; or *Sphere Drake Insurance PLC v. Marine Towing, Inc., et al.*, U.S. Ct. App. 5th Cir., 23.3.1994, 16 F.3d 666, where the court simply ignored the comma in Art. II(2) NYC and found that the signature requirement in said provision only referred to an arbitration agreement but not to an arbitration clause; such alleged unclarity is also perceived by *C. Ryan Reetz*, Recent developments concerning the "writing" requirement in international commercial arbitration: a perspective from the United States, 5 *Spain Arbitration Review* 2009, 29, 34. Cf. also *Richard Hill*, Note – 16 January 1995 – Supreme Court, 14 *ASA-Bulletin* (1996), 488, 492, who tries to circumvent the signature requirement of the NYC by purporting that exchanging a single document without the signatures of the parties constitutes an "exchange of letters" in the sense of Art. II(2) NYC if one party modifies the document and thereby creates a new document, accord *Christoph Reithmann/Dieter Martiny*, *Internationales Vertragsrecht*, 7th edition, Otto Schmidt (2010), para. 6680; see also the interpretation of the 1958 New York Convention in light of the 27 years younger 1985 UNCITRAL Model Law on Arbitration that is oftentimes advocated but questionable from a methodological point of view and probably solely result-oriented, see for this interpretation only *Reithmann/Martiny*, para. 6680.

³ See *Ingeborg Schwenzler/Pascal Hachem/Christopher Kee*, *Global Sales and Contract Law*, Oxford University Press (2012), para. 22.1.

⁴ In particular: *Robert Koch*, The CISG as the Law Applicable to Arbitration Agreements, in *Camilla B. Andersen/Ulrich G. Schroeter* (eds.), *Sharing International Commercial Law across National Boundaries*: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday, Wildy, Simmons & Hill Publishing (2008), 267–286; *Pilar Perales Viscasillas/David Ramos Muñoz*, CISG & Arbitration, in *Andrea Büchler/Markus Müller-Chen*, *Private Law – national – global – comparative*, Festschrift für Ingeborg Schwenzler zum 60. Geburtstag, Stämpfli (2011), 1355–1373; *Jeffrey Waincymer*, *The CISG and International Commercial Arbitration: Promoting a Complimentary*

following we will discuss possible areas of conflict with regard to this approach and present solutions giving due regard to said form requirements on the one hand and to the aims of the CISG on the other hand.

II. International and Domestic Form Requirements

Beyond any form requirements in relation to contracts in general and sales contracts in particular, form requirements can be found with regard to arbitration agreements, forum selection clauses and choice of law clauses. Similarly, problems may arise in the field of government procurement with regard to agents or representatives of public bodies whose power to validly bind the principal may be limited by a writing requirement.

1. Arbitration Agreements

Only a few select jurisdictions, such as France,⁵ Sweden,⁶ New Zealand⁷ and the Canadian provinces of Alberta⁸ and Ontario,⁹ have abandoned any formal requirements for arbitration agreements.¹⁰ Most domestic arbitration statutes to the very day, however, contain a “writing” or “written form” requirement which is often combined with further requirements such as “signature” or “exchange of written communication”.¹¹ For example § 1031(1) of the German Code of Civil Procedure provides:

Relationship Between Substance and Procedure, in *Camilla B. Andersen/Ulrich G. Schroeter* (eds.), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, Wildy, Simmons & Hill Publishing (2008), 582, 599; *Janet Walker*, *Agreeing to Disagree: Can We Just Have Words? CISG Article 11 and the Model Law Writing Requirement*, 25 *Journal of Law & Commerce* (2005–06), 153–164.

⁵ Art. 1507 French CPC.

⁶ *Gary Born*, *International Commercial Arbitration*, Kluwer (2009), 614.

⁷ s. 7(1) Schedule 1 of the New Zealand Arbitration Act 1996.

⁸ Art. 5(1) Alberta Arbitration Act 1991.

⁹ Art. 5(3) Ontario Arbitration Act 1991.

¹⁰ See also the former version of § 1027(2) German CCP for contracts between merchants; s. 5(3) English Arbitration Act 1996 according to which an agreement on an arbitration clause otherwise than in writing by reference to terms which are in writing, constitutes an agreement in writing; s. 81(1)(b) of the English Arbitration Act 1996, which provides for the validity of oral arbitration agreements under common law, i. e. without the specific protective regime of the Arbitration Act. Also Dutch law until 1986 provided for the possibility to conclude arbitration agreements orally, see *Toby Landau*, *The Requirement of a Written Form For an Arbitration Agreement – When “Written” Means “Oral”*, in *Albert Jan van den Berg* (ed.), *International Commercial Arbitration: Important Contemporary Questions*, ICCA Congress Series, 2002 London Volume 11, Kluwer Law International (2003), 19, 56. The same is true for Belgian Law before 1972, see *Jean-François Poudret/Sébastien Besson*, *Comparative Law of International Arbitration*, 2nd edition, Thomson Sweet & Maxwell et al. (2007), para. 191.

¹¹ *Born* (Fn. 6), 580.

“The arbitration agreement must be set out either in a document signed by the parties, or in letters, telefax copies, telegrams, or other forms of transmitting messages as exchanged by the parties, and that ensure proof of the agreement by supporting documents.”

Less demanding formal requirements are established by the Swiss Law on Private International Law in Art. 178(1):¹²

“The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.”

The same approach was taken by the 1985 UNCITRAL Model Law on International Commercial Arbitration in Art. 7. However, under the 2006 revision to the UNCITRAL Model Law this position has been attenuated. Art. 7 UNCITRAL Model Law 2006 offers two options. The first still contains the writing requirement in Art. 7(2) – however the definition of writing has been broadened,¹³ whereas the second option has done away with the writing requirement all together.

An at least at first glance still rather strict writing requirement can be found in Art. II(1), (2) 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards:¹⁴

- (1) *“Each Contracting State shall recognize an agreement in writing ... “*
- (2) *“The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”*

On a closer look, however, as it has been convincingly argued, Art. II(2) NYC only sets a maximum and not a uniform standard.¹⁵ In this context,

¹² Whereas § 1031(2) German CCP is more liberal than Art. 178(1) Swiss PILS in explicitly allowing to rely on “customary standards”, i.e. usages.

¹³ Notably, the 2006 version of this provision does not require a signature anymore.

¹⁴ Very similar: Art. I(2)(a) 1961 European Convention on International Commercial Arbitration; Art. 1 1975 Inter-American Convention in International Commercial Arbitration.

¹⁵ *Gerold Herrmann*, Does the World Need Additional Uniform Legislation on Arbitration? – The 1998 Freshfields Lecture, (1999) 15 *Arbitration International*, 211, 217; Departmental Advisory Committee on Arbitration Law (DAC), Report on Arbitration Bill 1996, February 1996, para. 34; *Walker* (supra fn. 4), 163 et seq.; but see *Chloe Z Fishing Co., Inc., et al. v. Odyssey Re (London) Limited, et al.*, 26.4.2000, S.D. Cal., 109 F.Supp.2d 1236, with justifiable criticism by *Landau* (supra fn. 10), 68; *Albert Jan van den Berg*, The New York Arbitration Convention of 1958 – Towards a Uniform Judicial Interpretation, *Kluwer Law* (1994), 178 et seq.; *Albert Jan van den Berg*, The New York Convention: Its Intended Effects, Its Interpretation, Salient Problem Areas, (1996) ASA Special Series No. 9, 25, 44 et seq. (although with significant doubts); *Gerhard Wagner*, *Prozeßverträge* –

it is also important to note that the NYC addresses the enforcement states, not the parties to an arbitration agreement. Thus, the NYC does not require arbitration agreements to be signed by the parties or contained in an exchange of letters or the like to be valid, but defines the maximum form requirement admissible for the domestic arbitration laws of its member states.

This understanding “that the circumstances described [in Art. II(2) NYC] are not exhaustive” was also adopted by UNCITRAL itself in a recommendation regarding the interpretation of the form requirement of the NYC.¹⁶ Furthermore, it was recommended to apply the most-favourable-law-provision of Art. VII(1) NYC also with regard to the validity of arbitration agreements.¹⁷ Combined, these two approaches provide that the NYC requires its member states to recognize and enforce all arbitration agreements complying with their respective domestic *lex arbitri*, which must not require more than written form as defined in Art. II(2) NYC. Consequently, an arbitration agreement is considered valid even if it does not fulfil the strict definition of writing in Art. II(2) NYC, but is valid under the law of the state the court ruling on the arbitration agreement’s validity is located in, which generally is more favourable.¹⁸

2. Forum Selection Clauses

Generally, forum selection clauses in an international context are required to be in “writing or evidenced in writing” as long as there are no practices or usages establishing a less strict standard. These requirements can be found i. a. in Art. 23(1) of the Brussels I Regulation¹⁹ and Art. 23(1) of the

Privatautonomie im Verfahrensrecht, Mohr Siebeck (1998), 386; cf. also *BGer*, 5.11.1985, 111 Ib 253, 254 et seq. (with specific reference to Art. VII NYC, on which, however, the parties did not rely).

¹⁶ 2006 Recommendation regarding the interpretation of Article II(2) and Article VII(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its 39th session.

¹⁷ Doubtful: *Landau* (supra fn. 10), 73. Cf. also Art. I(2)(a) 1961 European Convention on International Commercial Arbitration which provides that “the term ‘arbitration agreement shall mean ... in relations between states whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws”.

¹⁸ *Emmanuel Gaillard/John F. Savage*, Fouchard, Gaillard, Goldman on International Commercial Arbitration, Kluwer Law (1999), para. 614; *Margaret L. Moses*, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press (2008), 24; but see *Poudret/Besson* (supra fn. 10), para. 74.

¹⁹ Council Regulation (EC) No. 44/2001 of 22.12.2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; see also the recast Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12.12.2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). The content of Art. 23(1) was left unchanged by this recast, see Art. 25(1) of the recast.

Lugano Convention.²⁰ Similarly, domestic German law requires in § 38(2) CPC that “[s]uch agreement must be concluded in writing or, should it have been concluded orally, must be confirmed in writing.” Art. 5(1) sentence 2 Swiss PILS requires a forum selection clause to be “in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text”. Finally, the 2005 Hague Convention on Choice of Court Agreements²¹ sets forth in its Art. 3(c) that an “exclusive choice of court agreement must be concluded or documented – i) in writing; or ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference”.

3. Choice of Law Clauses

Although, for choice of law clauses there rarely is a specific writing requirement, they are often required to be “expressly or clearly demonstrated by the terms of the contract or the circumstances of the case”.²² Further requirements may be established by the law chosen²³ or sometimes alternatively by the law of the country where the agreement was concluded if both contract parties were in the same country at the time of contract conclusion.²⁴ If the parties were in different countries at the time of contract conclusion, then the requirements may come from the law of either of the two respective countries where the parties were present at the time of conclusion, or the law of the country where either of the parties had its habitual residence at that time.²⁵

4. Government Procurement Contracts and Agency

Oftentimes a writing requirement is established with regard to public officials acting as representatives of public bodies in public procurement contracts.²⁶ Likewise, under most agency regimes the

²⁰ 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

²¹ This convention has so far been signed by the European Union and the United States of America and ratified by Mexico, but has not entered into force yet.

²² Art. 3(1) Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17.6.2008 on the law applicable to contractual obligations (Rome I); Art. 116(2) sentence 1 Swiss PILS.

²³ Art. 11(1), (2) Rome I Regulation; Art. 116(2) sentence 2 Swiss PILS.

²⁴ Art. 11(1) Rome I Regulation.

²⁵ Art. 11(2) Rome I Regulation.

²⁶ E. g. various German Local Government Codes: § 54(1), (2) Baden-Württemberg; § 38(2) Bavaria; § 67(2)–(5) Brandenburg; § 71(2) Hesse; § 63(2)–(4) Lower Saxony; § 38(6) Mecklenburg-Vorpommern; § 64 North Rhine-Westphalia; § 49 Rhineland-Palatinate; § 62 Saarland; § 60 Saxonia; § 70 Saxony-Anhalt; § 51(2)–(4) Schleswig-Holstein; § 31(2) Thuringia; § 23 Allgemeines

principal can limit the agent's authority by requiring all acts of the latter on its behalf to be in writing.²⁷

III. The CISG's Freedom of Form

In assessing whether the freedom of form principle under the CISG can override any of the aforementioned form requirements regard is to be had to the general scope of application of the CISG as well as the aims of its freedom of form principle and special provisions relating to the interplay of different international instruments on a global or regional level.

1. Scope of Application – Art. 4 CISG

According to Art. 4 sentence 1 CISG, the CISG governs “only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract”.

From this provision some authors deduce that neither the formation of an arbitration agreement nor the rights and obligations of the parties arising from such an agreement are governed by the CISG.²⁸ The reason being that an arbitration agreement is not a contract of sale in the terms of Art. 4 sentence 1 CISG. Rather these authors subject all questions related to the arbitration agreement to the otherwise applicable domestic law. The same result sometimes is reached by authors relying on the doctrine of separability.²⁹

Likewise, as regards forum selection and choice of law clauses some authors favour the application of the *lex fori* instead of the *lex causae*.³⁰

These approaches cannot convince.³¹ On the one hand, the CISG is not only suitable but also intended to apply to dispute resolution clauses. This is

Zuständigkeitsgesetz Berlin; § 46(2) Stadtverfassung Bremerhaven; the consequences of not adhering to these formal requirements are in dispute, see *Ingo Ludwig/Jérôme Lange*, Die Kompetenz der Länder zum Erlass kommunalrechtlicher Formvorschriften für Verpflichtungserklärungen, *Neue Zeitschrift für Verwaltungsrecht* 1999, 136–140. Cf. also § 7(1) UNCITRAL Model Law on Public Procurement, Official Records of the General Assembly, 66th Session, Supplement No. 17 (A/66/17), annex I.

²⁷ *Ingeborg Schwenger*, Schweizerisches Obligationenrecht Allgemeiner Teil, 6th edition, Stämpfli (2012), para. 42.10; cf. Münchener Kommentar zum BGB/*Jürgen Basedow*, edited by *Franz Jürgen Säcker/Roland Rixecker*, 6th edition, München (2012), § 305b BGB, para. 14.

²⁸ *Koch* (supra fn. 4), 285; cf. also *Stefan Kröll*, Selected Problems Concerning the CISG's Scope of Application, 25 *Journal of Law & Commerce* (2005–06), 39, 45 (referring to Arts. 1–3 CISG).

²⁹ *Kröll* (supra fn. 28), 44 et seq.; but see *Perales Viscasillas* (supra fn. 4), 1368 et seq.

³⁰ Choice of forum: *Frank Vischer/Lucius Huber/David Oser*, Internationales Vertragsrecht, 2nd edition, Stämpfli (2000) para. 1188; Choice of law: *Vischer/Huber/Oser*, para. 158

evidenced by the explicit mentioning of these clauses in Art. 19(3) CISG and the underlying purpose of this provision.³² According to this provision the addition of a dispute settlement clause constitutes a material alteration of an offer. Characterising such addition as a material alteration only makes sense if this clause is considered part of the sales contract and thus governed by the CISG provisions on contract formation. Were such clause not governed by the CISG, acceptance with the addition of a dispute resolution clause would not be an alteration of the original offer at all, but the sales contract would be concluded in combination with an additional offer to conclude a dispute settlement agreement. Consequently, the mentioning of dispute resolution clauses in Art. 19(3) CISG evidences that the CISG generally governs dispute resolution clauses.³³ Some authors also rely on the wording of Art. 81(1) CISG in this regard, according to which avoidance of the contract does not affect dispute resolution clauses.³⁴

³¹ Also applying the CISG to questions of formation of dispute resolution agreements: *Julius von Staudinger/Ulrich Magnus*, J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen – Wiener Kaufrecht (CISG), Beck (2005), Vorbem. zu Art. 14 ff. CISG, para. 8; *Peter Schlechtriem/Ingeborg Schwenzer/Ingeborg Schwenzer/Pascal Hachem*, Commentary on the UN Convention on the International Sale of Goods (CISG), 3rd edition, Oxford University Press (2010), Art. 4, para. 11; *Slechchtriem/Schwenzer/Ulrich G. Schroeter*, Intro to Arts. 14–24, para. 16 et seq.; arbitration: *District Court (Rechtbank) Arnhem*, 17.1.2007, CISG-online 1476; *Filanto S.p.A. v. Chilewich International Corp.*, U.S. Dist. Ct. (S.D. N. Y.), 14.4.1992, CISG-online 45; choice of forum: *Ulrich G. Schroeter*, UN-Kaufrecht und Europäisches Gemeinschaftsrecht: Verhältnis und Wechselwirkungen, Sellier (2005), § 15, para. 24; *Supreme Court of France (Cour de Cassation)*, 16.7.1998, CISG-online 344; *Appellate Court (Cour d’appel) Paris*, 13.12.1995, CISG-online 312; *Solea LLC v. Hershey Canada Inc.*, U.S. Dist. Ct. (D. Del.), 9.5.2008, CISG-online 1769; *Chateau des Charmes Wines Ltd. v. Sabate USA Inc., Sabate S.A.*, U.S. Ct. App. (9th Cir.), 5.5.2003, CISG-online 767; *Appellate Court (Gerechtshof)’s-Hertogenbosch*, 19.11.1996, CISG-online 323, sub 4.4. et seq.; *Higher Regional Court (OLG) Oldenburg*, 20.12.2007, CISG-online 1644; *Higher Regional Court (OLG) Köln*, 24.5.2006, CISG-online 1232; *Higher Regional Court (OLG) Braunschweig*, 28.10.1999, CISG-online 510 *Regional Court (LG) Landshut*, 12.6.2008, CISG-online 1703, sub 31 et seq.; *Regional Court (LG) Gießen*, 17.12.2002, CISG-online 766 (obiter); cf. also *Chateau Des Charmes Wines Ltd. v. Sabate, USA Inc. et al.*, Superior Court of Justice Ontario, 28.10.2005, CISG-online 1139, sub 13; left unresolved by *Higher Regional Court (OLG) Düsseldorf*, 30.1.2004, CISG-online 821. But see *Kröll* (supra fn. 28), 44 et seq.; probably also *Cámara Nacional en lo Comercial*, 14.10.1993, 45626/1993, UNILEX (reasoning not published); *Thomas Rauscher*, Zuständigkeitsfragen zwischen CISG und Brüssel I, in *Stephan Lorenz/Alexander Trunk/Horst Eidenmüller/Christiane Wendehorst/Johannes Adolff*, Festschrift für Andreas Heldrich zum 70. Geburtstag, 933, 949 et seq.

³² *Perales Viscasillas/Ramos Muñoz* (supra fn. 4), 1366; *Anne-Kathrin Schluchter*, Die Gültigkeit von Kaufverträgen unter dem UN-Kaufrecht, Nomos (1996), 93.

³³ This outcome is not changed by the fact that during the drafting process of the CISG a proposal by Mexico, Panama and Peru to introduce an article on dispute settlement (A/CONF.97/L.19, Official Records, 174) was rejected as “outside the competence of the Conference”, see Official Records, 228. The proposed article only addressed questions of jurisdiction and arbitral procedure. Contractual questions were neither addressed in the proposed article nor in the subsequent discussions.

³⁴ *Slechchtriem/Schwenzer/Schroeter* (supra fn. 31), Intro to Arts. 14–24, para.17; *Perales Viscasillas/Ramos Muñoz* (supra fn. 4), 1366; *Walker* (supra fn. 4), 163; *Schluchter* (supra fn. 32), 91;

On the other hand, special provisions regarding arbitration, forum selection and choice of law clauses regularly only address formal requirements. In particular, this applies to the *lex arbitri*, which generally is not concerned with questions of contract formation as such. If one were to apply the *lex fori* also with regard to the substantive validity of the respective clause one would have to turn to the general contract law. This, however, would contradict the international public law obligation to apply the CISG where according to its own provisions it wants to be applied.

Furthermore, it is widely recognized to apply the *lex causae* to questions of substantive validity of dispute resolution clauses.³⁵ This approach is i. a. followed by Arts. 3(5), 10 Rome I Regulation and Art. 116(2) sentence 2 Swiss PILS³⁶ with regard to choice of law clauses and by various authors with regard to forum selection clauses.³⁷ Thus, it follows therefrom that if the CISG is the *lex causae* it also governs the substantive validity of such clauses as far as it is covered by the CISG.

Finally, one may not argue that the clauses discussed here are of a procedural nature³⁸ and that the CISG is only concerned with substantive but not with procedural matters.³⁹ It is now widely held that it is up to the CISG itself to autonomously decide which questions are covered by it, regardless of whether domestic laws characterize them as procedural and or substantive in nature.⁴⁰ Additionally, it has been convincingly argued that the strict

but see *Alejandro M. Garro*, The U.N. Sales Convention in the Americas: Recent Developments, 17 *Journal of Law & Commerce* (1998), 219, 238.

³⁵ For arbitration agreements: *German Supreme Court (BGH)*, 3.5.2011, *Neue Juristische Wochenschrift Rechtsprechungs-Report* 2011, 1350, 1353; *German Supreme Court (BGH)*, 20.1.1986, *Neue Juristische Wochenschrift* 1986, 1438, 1439; but see *Reinhold Geimer*, *Internationales Zivilprozessrecht*, 6th edition, Otto Schmidt (2009), para. 3789 (*lex arbitri*, but subsidiarily *lex causae*).

³⁶ *Basler Kommentar zum Internationalen Privatrecht/Marc Amstutz/Nedim Peter Vogt/Markus Wang*, Hrsg. von *Heinrich Honsell/Nedim Peter Vogt/Anton K. Schnyder/Stephen V. Berti*, 2nd edition, Helbing Lichtenhahn (2007), Art. 116, para. 33; but see *Vischer/Huber/Oser* (supra fn. 30), para. 157 f.

³⁷ *German Supreme Court (BGH)*, 18.3.1997, *Neue Juristische Wochenschrift* 1997, 2885, 2886; *BaslerKomIPRG/Pascal Grolimund* (supra fn. 36), Art. 5, para. 39; but see *Geimer* (supra fn. 35), para. 1677.

³⁸ See for the disputed question of the legal nature of arbitration agreements: *Wagner* (supra fn. 15), 578 et seq. (procedural); *Perales Viscasillas/Ramos Muñoz* (supra fn. 4), 1366 (substantive); *Vischer/Huber/Oser* (supra fn. 30), para. 1354 (mixed).

³⁹ Cf. for this argumentation *Zapato Hermanos S.A. v. Hearthside Baking, Inc.*, 19.11.2002, U.S. Ct. App. 7th Circuit, CISG-online 684: “The Convention is about contracts, not about procedure”; according: *Harry M. Flechtner/Joseph Lookofsky*, *Viva Zapata!* *American Procedure and CISG Substance in a U.S. Circuit Court of Appeal*, 7 *Vindobona Journal of International Commercial Law and Arbitration* (2003), 93, 97. With specific regard to dispute clauses see *MünchKommBGB/Westermann* (supra fn. 27), Art. 4 CISG, para. 7.

⁴⁰ Cf. e. g. Art. 11 sentence 2 CISG. See also *Bruno Zeller*, *Interpretation of Article 74 – Zapata Hermanos v. Hearthside Baking – Where Next?*, *Nordic Journal of Commercial Law* 2004, 1, 7.

distinction between procedural and substantive matters in general is “outdated”.⁴¹

The application of the CISG in all of these cases is not confined to questions of consent as laid down in Arts. 14–24 CISG. It should also be applied to issues of interpretation⁴² as well as breach and the respective remedies.⁴³

2. Aim of the Freedom of Form Principle – Art. 11 CISG

The pre-emption of domestic law regarding formation, interpretation and breach of arbitration, forum selection and choice of law clauses by the CISG does, however, not necessarily extend to the exclusion of the application of special international or domestic form requirements for such clauses.⁴⁴ Whether this is the case is again autonomously decided by the CISG, in particular by Art. 11 CISG. Thereby, special emphasis is to be put on the aims and purposes of this provision.

Freedom of form was discussed from the very beginning of the endeavours to unify international sales laws as far back as the 1930s.⁴⁵ Throughout the drafting processes of ULIS,⁴⁶ ULF,⁴⁷ and CISG there was always fierce opposition against this principle.⁴⁸ This opposition was voiced by two groups of legal systems: On the one hand by the so called former socialist countries, which imposed direct form requirements in order to control international legal transactions,⁴⁹ on the other hand by many

⁴¹ CISG-AC Opinion No. 6 (Rapporteur *John Y. Gotanda*), Comment 5.2.

⁴² *District Court (Rechtbank) Arnhem*, 17.1.2007, CISG-online 1476; *Higher Regional Court (OLG) Stuttgart*, 15.5.2006, CISG-online 1414; *Chateau des Charmes Wines Ltd. v. Sabate USA Inc., Sabate S.A.*, U.S. Ct. App. (9th Cir.), 5.5.2003, CISG-online 767; *Filanto S.p.A. v. Chilewich International Corp.*, U.S. Dst. Ct. (S.D. N. Y.), 14.4.1992, CISG-online 45; *Schlechtriem/Schwenzer/Schlechtriem/Martin Schmidt-Kessel* (supra fn. 31), Art. 8, para. 5.

⁴³ *Nils Schmidt-Ahrendts*, CISG and Arbitration, *Belgrade Law Review* 2011, 211, 218 et seq. For damages in case of breach of an arbitration clause, see *Olivier Luc Mosimann*, *Anti-suit Injunctions in International Commercial Arbitration*, Eleven (2010), 127 et seq.; *Perales Viscasillas/Ramos Muñoz* (supra fn. 4), 1366.

⁴⁴ Cf. *Wagner* (supra fn. 15), 350 et seq. This distinction is overlooked by *Perales Viscasillas/Ramos Muñoz* (supra fn. 4), 1369.

⁴⁵ *Ernst Rabel*, *Der Entwurf eines einheitlichen Kaufgesetzes*, *RabelsZ* 9 (1935), 1, 55 et seq.

⁴⁶ Convention relating to a Uniform Law on the International Sale of Goods.

⁴⁷ Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods.

⁴⁸ See the references in *Schlechtriem/Schwenzer/Schlechtriem/Schmidt-Kessel* (supra fn. 31), Art. 11, para. 1; *Hans Dölle/Gert Reinhart*, *Kommentar zum Einheitlichen Kaufrecht*, München: Beck (1976), Art. 15 EKG, para. 29; *Ulrich Huber*, *Der UNCITRAL-Entwurf eines Übereinkommens über internationale Warenkaufverträge*, *RabelsZ* 43 (1976), 411, 434.

⁴⁹ Cf. *Dölle/Reinhart* (supra fn. 48), Art. 15 EKG, para. 14 et seq.

jurisdictions from the French and common law legal tradition containing an indirect form requirement based on the value of the transaction.⁵⁰ In contrast, form requirements relating to dispute resolution clauses or the like were – as far as perceivable – never mentioned during all the 50 years of discussion although they existed, and continue to exist, in most legal systems. This strongly indicates that Art. 11 CISG was never intended to apply to dispute resolution clauses. To the contrary, throughout the drafting negotiations of the CISG the delegates were particularly concerned to avoid “undesirable effect[s] of impinging upon national rules on jurisdiction”.⁵¹

The possibility to make a declaration under Art. 96 CISG excluding freedom of form under Art. 11 CISG confirms this starting point. Some authors argue that, had it been intended to extend the freedom of form to the clauses discussed here, nearly all member states would have been forced to make a declaration under Art. 96 CISG⁵² in order to preserve their form requirements in this regard.⁵³ However, as the development has shown, the declaration under Art. 96 CISG was made use of only by Eastern-European former socialist countries, China, and some Latin-American countries.⁵⁴ There are, however, doubts whether such reservation would be possible with regard to the form requirements for dispute resolution clauses since Art. 96 CISG requires that the domestic law of the reservation state submits contracts of sale in general to a writing requirement.⁵⁵ During the drafting process of said article a proposal of the Netherlands to make partial reservations with regard to certain categories of contracts possible was rejected with 11 to 16 votes.⁵⁶ Yet, the fact that during the extensive discussions on this proposal neither of the clauses discussed here were mentioned, underlines that the drafters did not intend dispute resolution clauses to be encompassed by the CISG's freedom of form: Considering the importance the formal requirements for dispute resolution clauses had in most countries, it is reasonable to assume that otherwise there would have been at least some

⁵⁰ A contract above a certain amount under these systems cannot be evidenced by witnesses, i. e. unless it is in writing. In common law jurisdictions this rule derives from the 1677 Statute of Frauds. See for USA § 2-201(1) UCC, for France Art. 1341 CC. See also *Schwenger/Hachem/Kee* (supra fn. 3), para. 22.09 et seq.

⁵¹ As stated by the Indian delegate *Kuchibhotla*, Official Records, 369, para. 33; similarly, the Argentinian delegate *Boggiano*, Official Records, 369, para. 31; cf. *Schroeter* (supra fn. 31), § 6, para. 32, note 61. See also the discussions on the proposal mentioned in fn. 33, Official Records, 228.

⁵² In favour of this possibility *Burghard Piltz*, *Internationales Kaufrecht*, 2nd edition, Beck (2008), para. 2-130.

⁵³ *Schroeter*, (supra fn. 31), § 6, para. 32.

⁵⁴ Argentina, Armenia, Belarus, Chile, China (withdrawn), Estonia (withdrawn), Hungary, Latvia (withdrawn), Lithuania, Paraguay, Russian Federation, Ukraine.

⁵⁵ *Schlechtriem/Schwenger/Schlechtriem/Schwenger/Hachem* (supra fn. 31), Art. 96, para. 2.

⁵⁶ See Official Records, 271 et seq.

discussion on the question whether it should be possible for states to preserve those writing requirements via a reservation under Art. 96 CISG. This confirms that it was never intended that the freedom of form under Art. 11 CISG should affect international and domestic form requirements for dispute resolution clauses and the like.⁵⁷

It has been submitted that the principle of *lex specialis* militates in favour of an application of Art. 11 CISG to the formal validity of dispute resolution clauses over the formal requirements of the *lex fori*.⁵⁸ The opposite, however, is true: The specific characteristic of a dispute resolution clause is the effect it has on the way a dispute between the parties is resolved.⁵⁹ This does not change if the clause is included in an international sales contract. Consequently, provisions of the *lex fori* more specifically deal with the formal validity of a dispute resolution clause in an international sales contract than provisions dealing with international sales contracts in general.⁶⁰

The intention of the drafters of the CISG as well as the precedence of the *lex fori*'s formal requirements make it sufficiently clear that freedom of form under Art. 11 CISG does not extend to dispute resolution clauses in international sales contracts.⁶¹

⁵⁷ But see *Koch* (supra fn. 4), 281 (although tentative).

⁵⁸ *Perales Viscasillas/Ramos Muñoz* (supra fn. 4), 1370 (with regard to arbitration agreements).

⁵⁹ For arbitration agreements: *Bernhard Berger/Franz Kellerhals*, *International Arbitration in Switzerland*, 2nd edition, Sweet&Maxwell (2010), para. 296.

⁶⁰ Cf. *Schroeter* (supra fn. 31), § 14, para. 45; *Rauscher* (supra fn. 31), 950.

⁶¹ See *Schlechtriem/Schwenger/Schlechtriem/Schwenger/Hachem* (supra fn. 31), Art. 90, para. 9; *Staudinger/Magnus* (supra fn. 31), Art. 90 CISG, para. 11; for arbitration agreements *Schlechtriem/Schwenger/Schlechtriem/Schmidt-Kessel* (supra fn. 31), Art. 11, para. 8; *Schlechtriem/Schwenger/Schroeter* (supra fn. 31), Intro to Arts. 14–24, para. 18 et seq.; *MünchKommBGB/Westermann* (supra fn. 27), Art. 11 CISG, para. 4; *Higher Regional Court (OLG) Stuttgart*, 15.5.2006, CISG-online 1414; *Schmidt-Ahrendts* (supra fn. 43), 216; see also *Koch* (supra fn. 4), 285 (relying on Art. 4 CISG); for choice of forum clauses *Appellate Court (Cour d'appel) Paris*, 13.12.1995, CISG-online 312; *Appellate Court (Gerechtshof)'s-Hertogenbosch*, 19.11.1996, CISG-online 323, sub 4.5.; *Appellate Court (KG) Zug*, 11.12.2003, CISG-online 958; *Appellate Court (Audiencia Provincial) Navarra*, 27.12.2007, CISG-online 1798; *Higher Regional Court (OLG) Oldenburg*, 20.12.2007, CISG-online 1644; *Higher Regional Court (OLG) Köln*, 24.5.2006, CISG-online 1232; *Higher Regional Court (OLG) Köln*, 21.12.2005, CISG-online 1201; *Higher Regional Court (OLG) Düsseldorf*, 30.1.2004, CISG-online 821; *Regional Court (LG) Landshut*, 12.6.2008, CISG-online 1703, sub 31 et seq.; *Regional Court (LG) Gießen*, 17.12.2002, CISG-online 766 (obiter). But see for arbitration agreements *Piltz* (supra fn. 53), para. 2-130; *Walker* (supra fn. 4), 163; *Stefan Kröll/Loukas Mistelis/Pilar Perales Viscasillas/Perales Viscasillas*, UN-Convention on the International Sales of Goods (CISG), Beck (2011), Art. 11, para. 13; *Perales Viscasillas/Ramos Muñoz* (supra fn. 4), 1366; *Wayncymer* (supra fn. 4), 588; *MünchKommBGB/Westermann* (supra fn. 27), Art. 4 CISG, para. 7; *Tribunal Supremo*, 17.2.1998, CISG-online 1333, sub 9; *Filanto S.p.A. v. Chülewich International Corp.*, U.S. Dst. Ct. (S.D. N. Y.), 14.4.1992, CISG-online 45; for choice of forum clauses *Kröll/Mistelis/Perales Viscasillas/Perales Viscasillas* (supra fn. 61), Art. 11, para. 12, note 29; *Solea LLC v. Hershey Canada Inc.*, U.S. Dst. Ct. (D. Del.), 9.5.2008, CISG-online 1769; *Chateau des*

Although the discussion focusses on arbitration, forum selection and choice of law clauses, these considerations must equally apply to form requirements that can be found in connection with government procurement contracts or agency. Form requirements for government procurement contracts that are stricter than for comparable private contracts are linked to the contractual party as such and not to the contract of sale. Therefore, they are outside of the CISG's scope and thus unaffected by Art. 11 CISG.⁶² This position may be supported by the idea that from the perspective of the CISG such form requirements are closely connected to agency issues which are clearly not addressed by the CISG.⁶³

3. Interplay With Other International Instruments – Art. 90 CISG

According to Art. 90 CISG the CISG does not prevail over any international agreement that contains provisions concerning the matters governed by it. Thereby, it is of no relevance whether the international agreement in question lays down substantive, procedural or conflict of laws rules. It is unanimously held that at least the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the 1961 European Convention on International Commercial Arbitration, the 1968 Brussels Convention on Jurisdiction and the Enforcements of Judgements in Civil and Commercial Matters, the 1975 Inter-American Convention in International Commercial Arbitration, the 1980 Rome Convention on the Law Applicable to the Obligations, and the 1988/2007 Lugano Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters are international agreements that prevail over the CISG as far as they conflict with the latter. Thus, the form requirements of these conventions certainly apply.⁶⁴

Charmes Wines Ltd. v. Sabate USA Inc., Sabate S.A., U.S. Ct. App. (9th Cir.), 5.5.2003, CISG-online 767 (both courts referring to Arts. 11, 29(1) CISG); cf. also *Chateau Des Charmes Wines Ltd. v. Sabate, USA Inc. et al.*, Superior Court of Justice Ontario, 28.10.2005, CISG-online 1139, sub 13.

⁶² But see *Schluchter* (supra fn. 32), 93 et seq.; *Huber* (supra fn. 48), 435; *Jacob Ziegel*, The Scope of the Convention: Reaching Out to Article One and Beyond, 25 *Journal of Law & Commerce* (2005–06), 59, 62 (not entirely clear).

⁶³ *John O. Honnold/Harry M. Flechtner*, Uniform Law for International Sales under the 1980 United Nations Convention, 4th edition, Wolters Kluwer (2009), Art. 11, para. 127; but see *Schluchter* (supra fn. 32), 93 et seq.

⁶⁴ This is even admitted by supporters of the view that Art. 11 CISG covers dispute resolution clauses: *Walker* (supra fn. 4), 163: “admittedly”; *Waincymer* (supra fn. 4), 588; *Piltz* (supra fn. 53), para. 2-130; *MünchKommBGB/Westermann* (supra fn. 27), Art. 4 CISG, para. 7.

It is disputed whether Art. 90 CISG can also be applied with regard to legal instruments of the European Union, such as regulations and directives.⁶⁵ Of special interest for form requirements are the Rome I Regulation with regard to choice of law clauses and the Brussels I Regulation with regard to forum selection clauses. Although both of them are successors to international agreements that hitherto clearly fell into the sphere of application of Art. 90 CISG, nowadays it is at least doubtful whether these instruments prevail over the CISG.

Certainly, the application of any domestic form requirements that have been discussed above could never be based on Art. 90 CISG.

IV. The Most-Favourable-Law-Approach

In relation to arbitration clauses recently it has been argued that the application of Art. 11 CISG is called for by the so called most-favourable-law-approach.⁶⁶ This approach is developed from Art. VII(1) NYC, which provides that any party seeking enforcement of an arbitral award can rely either on the provisions of the NYC or on any other treaty or even the domestic law of the country where the award is to be enforced, whichever is more favourable. It seems to be the opinion of the authors favouring this approach, that Art. VII(1) NYC allows for the application of the CISG to the question of formal validity of the arbitration agreement. However, a thorough interpretation of Art. VII(1) NYC reveals that this approach proves to be untenable.

Art. VII(1) NYC addresses two different issues: The first half sentence relates to the relationship between the NYC and other international agreements concerning the recognition and enforcement of arbitral awards.⁶⁷ The second allows the party seeking enforcement to rely on the most favourable treaty or law. Both of them are only concerned with treaties or laws specifically relating to recognition and enforcement of arbitral awards.⁶⁸

⁶⁵ See *Schlechtriem/Schwenzer/Schlechtriem/Schwenzer/Hachem* (supra fn. 31), Art. 90, para. 4 et seq.; *Kröll/Mistelis/Perales Viscasillas/Johnny Herre* (supra fn. 61), Art. 90, para. 8.

⁶⁶ *Walker* (supra fn. 4), 164; *Perales Viscasillas/Ramos Muñoz* (supra fn. 4), 1372. Similarly, *Herrmann* (supra fn. 15), 216 suggests “to allow an oral arbitration clause if the applicable law does not impose any form requirement on the main contract”, without, however, referring to Art. VII(1) NYC.

⁶⁷ In this regard, Art. X(7) 1961 European Convention on International Commercial Arbitration is comparable.

⁶⁸ Cf. *van den Berg* (supra fn. 15, 1994), 81, 118 et seq.; *van den Berg* (supra fn. 15, 1996), 44 et seq. (“this solution will only work if the forum has its own rules for referral to international arbitration and enforcement of foreign arbitral awards”); unclear *Karl Heinz Schwab/Gerhard Walter*, *Schiedsgerichtsbarkeit*, 7th edition, Beck (2005), chapter 44, para. 12 (referring to “contract law” as well as to § 1031(1) German CPC).

They are, however, not concerned with sales law or general contract law. Therefore, whether the law applicable to the underlying contract between the parties, allows for freedom of form is of no relevance for the formal validity of the arbitration agreement.⁶⁹ The same holds true for the question whether or not the substantive general contract law of the enforcement state grants freedom of form.

For example, if an award rendered in Switzerland based upon an oral arbitration clause is sought to be enforced in France, where Art. 1507 CPC allows arbitration clauses in international contracts to be concluded orally, Art. VII(1) NYC enables the party seeking enforcement to rely on French arbitration law. Thus, the arbitration clause was validly concluded despite the fact that it does not comply with the definition of writing in Art. II(2) NYC.⁷⁰ If, however, the party were to seek to enforce the award in Germany, where § 1031(1) CCP requires arbitration agreements to be in writing, the mere fact that under general contract law no form requirements apply could not be relied upon and thus enforcement would be denied. The result cannot be different if the CISG is governing the contract or is part of the domestic law of the enforcement state.

The CISG is not concerned with recognition and enforcement of arbitral awards.⁷¹ Therefore, the CISG's application is not envisaged by Art. VII(1) NYC. Consequently, it cannot be the most favourable law applicable to the question of form of the arbitration agreement.

With regard to formal requirements, this result is also confirmed by the mandatory nature of formal requirements of the *lex arbitri*.⁷² These

⁶⁹ Art. 9(6) Spanish Arbitration Act (English translation available by *David J. A. Cairns/Alejandro López Ortiz*, Spain's New Arbitration Act, 22 ASA-Bulletin (2004), 695, 701) provides that in international arbitration an arbitration agreement is valid if it complies either with the rules of law designated by the parties with regard to the arbitration agreement, Spanish law or the rules of law applicable to the merits of the dispute. Although not entirely clear, it appears that this rule also encompasses the formal validity of the arbitration agreement. Yet, this provision has – as far as perceivable – remained an exception, and rightly so. Art. 178(2) Swiss PILS, on the other hand, also provides for the validity of the arbitration agreement if it complies either with the *lex causae* or Swiss law, but is restricted to the substantive validity (“im Übrigen”).

⁷⁰ The follow-up question, whether relying on a more favourable formal requirement under Art. VII(1) NYC excludes the regime of the NYC *in toto* (see *van den Berg* (supra fn. 15, 1994), 85 et seq.) or merely constitutes an exception from the formal requirement in Art. II(2) NYC (see *Gaillard/Savage* (supra fn. 18), para. 271), is in dispute, but of no relevance for the issues discussed at hand.

⁷¹ *Schlechtriem/Schwenger/Schlechtriem/Schwenger/Hachem* (supra fn. 31), Art. 90, para. 11; *Staudinger/Magnus* (supra fn. 31), Art. 90, para. 11; Münchener Kommentar BGB/*Peter Huber* (supra fn. 27), Art. 90 CISG, para. 5; *Schroeter* (supra fn. 31), § 9, para. 85 et seq.

⁷² *Poudret/Besson* (supra fn. 10), para. 294; *Wagner* (supra fn. 15), 376; *Geimer* (supra fn. 35), para. 3795; *Berger/Kellerhals* (supra fn. 59), para. 393; but see Art. 9(6) Spanish Arbitration Act, which allows parties to choose the law applicable to the arbitration agreement with regard to its validity.

requirements cannot be derogated from by the parties by agreeing on a law applicable to the arbitration agreement. If the parties are unable to specifically designate the CISG as the law governing the formal validity of the arbitration agreement, the CISG should *a majore ad minus* not apply to this question just because it is the *lex causae*.

At first sight with regard to choice of law clauses Arts. 3(5), 11 Rome I Regulation also seem to follow a most-favourable-law-approach. This, however, does not extend to the specific requirement of Art. 3(1) Rome I Regulation, that calls for the choice to be made expressly or clearly demonstrated by the terms of the contract.⁷³ As concerns forum selection clauses or government procurement contracts or the like there are no indications of any most-favourable-law-rules.

V. Conclusion

It has been argued that at least in B2B-contracts the law in general is moving towards freedom of form.⁷⁴ This is most prominently brought forward with regard to arbitration clauses.⁷⁵ Some authors submit that businesspersons are “puzzled” by being able to orally conclude a contract for sale regardless of its value but having to lay down the accompanying arbitration clause in writing.⁷⁶ While this observation might be accurate, it must be emphasised that doing away with overly strict form requirements must be done by abolishing or

⁷³ *Staudinger/Magnus* (supra fn. 31), Art. 3 Rom I, para. 66.

⁷⁴ *Schwenger/Hachem/Kee* (supra fn. 3), para. 22.7; *Walker* (supra fn. 4), 155; *Landau* (supra fn. 10), 48 and 58 (for forum selection clauses).

⁷⁵ *Perales Viscasillas/Ramos Muñoz* (supra fn. 4), 1367; *Walker* (supra fn. 4), 165; *Neil Kaplan*, Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice? (Sixth Goff Lecture), (1996) 12 *Arbitration International*, 28, 44; *Gerold Herrmann*, The Arbitration Agreement as the Foundation of Arbitration and Its Recognition by the Courts, in *Albert Jan van den Berg* (ed.), *International Arbitration in a Changing World*, ICCA Congress Series, 1993 Bahrain Volume 6, Kluwer Law International (1994), 41, 45; *Herrmann* (supra fn. 15), 215 et seq.; *Landau* (supra fn. 10), 41 et seq.; *Alain Redfern/Martin Hunter*, *Law and Practice of International Commercial Arbitration*, Sweet&Maxwell (2004), para. 2.13. See also the Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards (Miami Draft) by *Albert Jan van den Berg* (available at <http://www.newyorkconvention.org/draft-convention>), which does not contain a writing requirement anymore. But see *Berger/Kellerhals* (supra fn. 59), para. 413a; Art. 1021 Dutch Draft Arbitration Law, that intends to convert the current formal requirement from an evidentiary requirement into a requirement of validity, see *Albert Jan van den Berg*, *Toelichting op voorstel tot wijziging van de arbitragewet* (available at <http://www.arbitragewet.nl/downloads/ToelichtingDec2006.pdf>), 13; *Vesna Lazic*, Arbitration Law Reform in the Netherlands: Formal and Substantive Validity of an Arbitration Agreement, 11.1 *Electronic Journal of Comparative Law* 2007, 1, 7 (available at <http://www.ejcl.org/111/art111-16.pdf>).

⁷⁶ *Walker* (supra fn. 4), 155; *Koch* (supra fn. 4), 276; cf. also *Landau* (supra fn. 10), 46 et seq. (“defeating legitimate commercial expectations”); *Kaplan* (supra fn. 75), 29 (“absurd result”); *Herrmann* (supra fn. 75), 44 et seq.

adjusting these very form requirements and not by having recourse to the CISG or other contract laws to circumvent them.

The same holds true with regard to forum selection and choice of law clause, albeit the necessity to lower formal requirements for these clauses might not appear as urgent since already today they are less strict than with regard to arbitration clauses. Likewise, if a need is felt to ease contracting with government bodies, the respective form requirements have to be changed themselves. In all these cases, however, the CISG is not the adequate instrument to reach this result. In a nutshell: The end does not justify the means.

Ingeborg SCHWENZER, David TEBEL, *The Word is not Enough – Arbitration, Choice of Forum and Choice of Law Clauses Under the CISG*

Summary

Form requirements particularly for arbitration clauses are widely perceived as an obstacle for efficiently resolving disputes on an international level. The paper discusses recent suggestions that the freedom of form principle under Art. 11 CISG extends to arbitration, forum selection or choice of law clauses in international sales contracts and thus supersedes any and all formal requirements in this regard.

The authors establish that said clauses indeed are generally within the CISG's scope of application and that, consequently, questions of contract conclusion, interpretation, and remedies for breach of these clauses are governed by the CISG. Freedom of form under the CISG, however, was neither intended to nor should it apply to arbitration, forum selection or choice of law clauses. This result is further confirmed by the interplay of the CISG with other international conventions, first and foremost the 1958 New York Convention, as well as a careful analysis of the so called most-favourable-law-approach. The recent aim to do away with form requirements for arbitration, forum selection or choice of law clauses can thus not be reached by taking a detour to the CISG, but only by directly abolishing or adjusting these form requirements.

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Aims & Scope

Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

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