# The Powers and Duties of an Arbitrator

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## Liber Amicorum Pierre A. Karrer

Edited by

Patricia Shaughnessy
Sherlin Tung

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**David J. Branson** has been engaged in the practice of international arbitration for forty years. He was a partner with Charles Brower at White & Case when Pierre Karrer was selected by the ICC to serve as the Chair arbitrator in the case Mr. Branson chose to write about in honor of Pierre.

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**Robert Gaitskell, Q.C.,** practises from Keating Chambers, specialising in technology, engineering and construction disputes, often of an international nature. He was called to the Bar in 1978, appointed Queen's Counsel in 1994 and sat as a Recorder (part-time judge) from 2000–2010. He is both a lawyer and a professional engineer. Robert predominately acts as an arbitrator, adjudicator, dispute board member and mediator. He has conducted over 100 arbitrations throughout the world and regularly lectures on the subject, including for the ICC, SIMC and CIArb. He writes extensively and lectures globally on legal/engineering subjects, including at CERN in Geneva and Xerox PARC in Silicon valley.

**Teresa Giovannini** is a founding partner of LALIVE specializing in international arbitration (including setting aside proceedings with the Swiss Supreme Court), as well as art law. She has acted – mainly as arbitrator – in more than 170 international arbitrations. Teresa Giovannini is the Swiss Member of the ICC Court of Arbitration and the ICC Commission on Arbitration and ADR since 1 July 2015 and she is part of several panels of arbitrators as well as of arbitration committees. Mrs Giovannini is also a frequent speaker on international arbitration and the author of various publications in the field.

**Professor Dr. Daniel Girsberger** is a founding member of the Faculty of Law of the University of Lucerne and a tenured professor for Swiss and International Private, Business and Procedural, as well as Comparative Law. Before accepting the Lucerne assignment, he taught at the University of Zurich Law School and as visiting professor at various universities worldwide. He is, moreover, the author of numerous publications focusing primarily on international business law and arbitration. Daniel Girsberger is also of counsel at Wenger & Vieli Ltd., a major Zurich business law firm. In the course of his profession, he has acted as chairman, arbitrator and counsel in various domestic and international arbitration cases.

**Philipp Habegger** is the principal of **Habegger Arbitration** in Zurich, Switzerland. He has acted in more than 170 commercial arbitrations under a variety of arbitration rules and applicable laws. He has been involved in disputes arising out of joint ventures, mergers and acquisitions, international sales, agency and distribution, licensing, franchising, construction and engineering projects, across a wide range of industries. Philipp used to be president of the Arbitration Court of the Swiss Chambers' Arbitration Institution, court member of the ICC International Court of Arbitration, and vice chair of the IBA Arbitration Committee. He teaches international arbitration at the University of Zurich.

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**Michael Hwang S.C.** currently practices as an international arbitrator and mediator based in Singapore. He also serves as the non-resident Chief Justice of the Dubai International Financial Centre Courts. He has two law degrees from Oxford University, to which he gained admission by winning an open scholarship examination. In 2014 he was conferred an Honorary LLD degree by the University of Sydney. His past and present appointments include: (a) Judicial Commissioner of the Supreme Court of

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**Neil Kaplan CBE QC SBS**, has been a full-time practicing arbitrator since 1995. He has been involved in several hundred arbitrations as arbitrator. Called to the Bar of England in 1965, Mr. Kaplan has practiced as a barrister, Principal Crown Counsel at the Hong Kong Attorney General's Chambers, and served as a Judge of the Supreme Court of Hong Kong in charge of the Arbitration List. He was Chair of HKIAC for thirteen years and President of the Chartered Institute of Arbitrators in 1999/2000. Since 2017 he has been the President of the Court of the Mauritius Chamber of Commerce and Industry Arbitration and Mediation Centre.

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# Foreword

It is an honor for us to join in this celebration of Pierre Karrer's 75th birthday. Pierre has been a friend and a respected colleague whom we have both had the good fortune to know throughout our professional careers. We have had the pleasure of working with Pierre in many capacities: as a committee member colleague working on the IBA Rules of Evidence and other reforms, as co-arbitrator, as an arbitrator hearing our cases, as an officer of various arbitration institutions, and as a fellow aficionado of classical music, among others.

Pierre's is undoubtedly one of the great names in international arbitration. He and his work have influenced practitioners around the world. His contributions to the IBA Rules of Evidence were substantial; his training on both sides of the Atlantic and his global experience enabled him to propose solutions that bridged the common law/civil law divide. As the first Vice Chair of the Arbitration Institute of the Stockholm Chamber of Commerce after it internationalized its Board, he helped devise and implement procedures that offer substantial Board input into every major decision that the Institute needs to make in each case, including in particular the selection of arbitrators.

Pierre is as organized and dedicated an arbitrator as one could hope for – indeed it would be no exaggeration to say that these attributes have become the stuff of legend, sufficient to intimidate anyone ill-advised enough even to think about turning up to a hearing unprepared. He has an extensive box of tools, literally and figuratively, to carry out his trade. In each case, he applies his experience to work with the parties to determine the procedures best suited to that particular arbitration. His presence and demeanor exude efficiency, as do his solutions, but he wears his abilities lightly, so that proceedings before him are always managed with fairness and with a humanity that is readily appreciated. As the hearing progresses, his deft touch is even more keenly felt. Because Pierre is so well prepared in every case, he is able to guide the parties through the case effectively.

The range and quality of articles in this Liber Amicorum, and the diversity and excellence of its contributors, are a testament as much to the esteem and affection in which Pierre is held as to his influence upon, and to his own broad interests in improving, the practice of arbitration. At a time when arbitration is under ever greater

scrutiny and subject to ever more searching and sometimes hostile enquiry, his work is an example of how good the process can be when it is in the hands of a master. This volume will be one more substantial contribution resulting from Pierre's career, but more to the point, we hope that he will enjoy it both for its content and as a mark of the appreciation of his professional colleagues and friends for all that he has achieved. We, for our part, offer our warmest congratulations to Pierre and we wish him the happiest of birthdays.

*John Beechey*[*] *and David W. Rivkin*[**]

* **John Beechey CBE** is among the best known arbitrators in the world. He has served as chairman, party-appointed arbitrator, or sole arbitrator on international arbitral tribunals in both 'ad hoc' (including UNCITRAL) and institutional arbitrations under the Rules of, *inter alia,* the European Development Fund (EDF), International Chamber of Commerce (ICC), International Centre for Dispute Resolution/ American Arbitration Association (ICDR/AAA), International Center for the Settlement of Investment Disputes (ICSID), London Court of International Arbitration (LCIA), Permanent Court of Arbitration (PCA), Singapore International Arbitration Centre (SIAC) and the Stockholm Chamber. He is a past President of the International Court of Arbitration of the ICC (2009-2015).

** **David W. Rivkin** is Co-Chair of Debevoise & Plimpton's International Dispute Resolution Group and The Immediate Past President of the International Bar Association (IBA). A litigation partner in the firm's New York and London offices, Mr. Rivkin has broad experience in the areas of international litigation and arbitration. Mr. Rivkin is consistently ranked as one of the top international dispute resolution practitioners in the world. He has handled international arbitrations throughout the world and before virtually every major arbitration institution. Mr. Rivkin also represents companies in transnational litigation in the US, including the enforcement of arbitral awards and arbitration agreements.

# Preface

Dr. Pierre A. Karrer stands out as an exceptionally accomplished international arbitrator, practitioner and expert. The authors who have contributed to this book – all of whom are also prominent in the field of international arbitration – have come to know and respect Dr. Karrer from sitting with him on tribunals, appearing before him as counsel, and/or working with him on projects such as the IBA Rules on the Taking of Evidence. We the editors had the fortune of getting to know Dr. Karrer through his role as a teacher and mentor. It is within this role that he has enthusiastically helped foster the interest, knowledge, skills and networks of generations of young lawyers. We are therefore pleased and delighted to honor Dr. Karrer's remarkable contributions to developing international arbitration and to enhancing the professionalism and collaboration of the global arbitration community.

When putting together this project, we sought to find a theme that would focus on an important feature of Dr. Karrer's philosophical and practical approach to arbitration After some brainstorming, there was no doubt in our minds that the theme of the book celebrating Dr. Karrer's career should focus on the powers and duties of an arbitrator.

Dr. Karrer exemplifies the characteristics of a "maestro" arbitrator who has built and earned his reputation with talent, skill, creativity, integrity and congeniality. His reputation for his good judgment in an expansive array of cases reflects his wide range of knowledge and interests as well as his openness to new ideas and diverse cultures. Dr. Karrer believes in the importance of the arbitrator conducting the proceedings with attention to detail, careful preparation, a firm hand and an open-mind. He believes in the powers of the arbitrator to ensure a fair and efficient conduct of an arbitration and he takes the duties and responsibilities of the arbitrator seriously. It is well known that "an arbitration is only as good as the arbitrator," and all of the contributors to this book know that when Dr. Karrer is the arbitrator, the arbitration will be expertly conducted.

Attracting prominent contributors to this book was an easy task as Dr. Karrer enjoys professional and collegial friendships across the globe. We tried to bring together a diverse group of his colleagues in this book. Many have enjoyed long careers over many years of interacting with Dr. Karrer, while others more recently had the fortune of getting to know him when they were young practitioners and benefited from

his willing helping-hand to bring new talent into the arbitration community. Regrettably, we could not include all of the potential contributors who would naturally be a welcomed part of this book.

We hope that the readers of this book will gain insights into the role of the arbitrator and continue the discussions of the issues addressed in these chapters. Arbitrators continue to develop during their careers and arbitration theory and practice evolves over the years. It is only through the sharing of experience, knowledge and ideas that we can guide the developments and evolution to better achieve the promise of arbitration to promote international trade and relations through resolving disputes in a fair, efficient and reliable manner. Dr. Karrer loves to share his knowledge and experience with students and young practitioners in a variety of settings: at universities, through the Willem C. Vis Arbitration Moot, through his writings, at conferences and seminars, and social events. We are delighted to offer this book to readers to carry-on his tradition of sharing experience and knowledge in the hopes of inspiring discussion and thought, just as Dr. Karrer has inspired us.

We would like to express our appreciation of working with Vincent Verschoor and Eleanor Taylor of Wolters Kluwer, as well as their team. They were immediately on board with the idea of publishing a Liber Amicorum for Dr. Karrer and have offered continuous encouragement and support.

Without the dedication and hard work of the team at Wolters Kluwer and the outstanding contributors, this book would not be the success that it is in honoring Dr. Karrer's career.

*Patricia Shaughnessy & Sherlin Tung*
*April 1, 2017*

# CHAPTER 30
# The CISG in International Arbitration

*Ingeborg Schwenzer & Florence Jaeger*

## §30.01 INTRODUCTION

At first, it might be surprising what the CISG[1] and international arbitration have in common. While the CISG is considered substantive law, arbitration is qualified as procedural law. However, both have greatly facilitated international trade during the last twenty to thirty years by harmonising and unifying the applicable law.[2] Predictability as one of the most important factors for parties in international trade has been considerably increased.

Today, the CISG is applicable in eighty-five States, nine of the ten most influential trade nations are Member States.[3] Thus, it potentially covers more than 80% of global trade.[4] This international success is further underlined by the fact that during the last twenty years most of the national and international reform or legislative projects used the CISG as a starting point.[5] To name a few recent developments; the reform of the

1. The United Convention on Contracts for the International Sale of Goods (1980) (CISG).
2. Cf. Jeffrey Waincymer, *The CISG and International Commercial Arbitration: Promoting a Complimentary Relationship Between Substance and Procedure*, 582, 583, 584 (C. Andersen & Schroeter, Sharing International Commercial Law across National Boundaries, Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday, London: Wildy, Simmonds & Hill, 2008). For further shared characteristics Morten Fogt, *The Interaction and Distinction Between the Sales And Arbitration Regimes – the CISG and Agreements or Binding Practice to Arbitrate*, 26 Am. Rev. Int. Arb. 365, 385 et seq. (2015).
3. *See* for the current number of contracting states, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (accessed 11 May 2016).
4. Nils Schmidt-Ahrendts, *CISG and Arbitration*, Belgrade L. Rev. 3, 211, 220 (2011).
5. Cf. the reform of the German law of obligations; the Dutch Wetboek; the sales law of the Slavic countries and of the OHADA States; the former socialist States as well as the subsequent States of the former Soviet Union, Yugoslavia and the Czechoslovakia. The CISG has also strongly influenced the contract law of Japan and South Korea, but even more so the new Chinese contract law; one exception is Turkey. A similar tendency can be made out with international rules: the

Spanish Commercial Code, the Argentinian and the Hungarian as well as the Korean and Japanese Civil Code. If one was to resort to the term of *lex mercatoria*,[6] the CISG would undoubtedly constitute the core of its contractual rules.[7]

A comparable story of worldwide success is the development of international arbitration.[8] The New York Convention (NYC) is applicable in 156 countries[9] and the UNCITRAL Model Law was implemented in seventy-two countries encompassing more than 100 jurisdictions.[10] In the last twenty years the number of arbitration proceedings has tripled. Today, it can be well assumed that 60% of all international contracts contain an arbitration clause, whereas the likelihood increases even more with a rising in contract volume.[11] Consequently, in practice significant international disputes are no longer litigated before state courts.[12] Remarkably, while traditional arbitral institutions in Western countries experience a certain stagnation of the number of arbitral

UNIDROIT Principles for International Commercial Contracts (PICC) and the Principles of European Contract Law (PECL). For further evidence, *see* Ingeborg Schwenzer, *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods*, Art. 35 para. 4 (6th ed., Oxford: Oxford University Press, 2013); Ingeborg Schwenzer & Pascal Hachem, *The CISG – A Story of Worldwide Success*, 119, 123 et seq. (Kleinemann, CISG Part II Conference, Stockholm: Iustus Forlag, 2009).

6. Reflecting the critical views Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria*, 32, 33 (The Hague: Kluwer Law International 1999) and regards *lex mercatoria* in general; *see also* Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration*, paras 3.167 et seq. (6th ed., Oxford: Oxford University Press, 2015).
7. Pilar Perales Viscasillas & David Ramos Muñoz, *CISG & Arbitration*, 1366, 1359 (Büchler & Müller-Chen, Private Law – national – global – comparative, Festschrift für Ingeborg Schwenzer zum 60. Geburtstag, Berne: Stämpfli, 2011); Gustav Flecke-Giammarco & Alexander Grimm, *CISG and Arbitration Agreements: A Janus-faced Practice and How to Cope with It*, 25 J Arb. Stud. 33, 47 (2015). Mainly the *lex mercatoria* is seen in the PICC und PECL, *see* Ingeborg Schwenzer, Pascal Hachem & Christopher Kee, *Global Sales and Contract Law*, para. 3.73 (Oxford: Oxford University Press 2012); Blackaby, Partasides, Redfern & Hunter, *supra* n. 6, at paras 3.167 et seq., particularly at paras 3.183 et seq.; PICC und PECL draw their basis strongly from the CISG, *see* Ingeborg Schwenzer, *Uniform Sales Law – Brazil Joining the CISG Family*, 21, 22 (Schwenzer, Pereira & Tripodi, A CISG e o Brasil, São Paulo: Marcial Pons, 2015).
8. Ingeborg Schwenzer & Claudio Marti Whitebread, *Legal Answers to Globalization*, 1, 2 et seq. (Schwenzer, Atamer & Butler, Current Issues in the CISG and Arbitration, The Hague: Eleven International Publishing, 2014).
9. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), for the current status, *see* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (accessed 11 May 2016).
10. UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments of 2006, for the current status, *see* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (accessed 11 May 2016).
11. Stefan Vogenauer, *Civil Justice Systems in Europe*, 2008, Questions 49.1 and 51.1, https://www3.law.ox.ac.uk/themes/iecl/pdfs/Oxford%20Civil%20Justice%20Survey%20-%20Summary%20of%20Results,%20Final.pdf (accessed 11 May 2016); Ingeborg Schwenzer & Christopher Kee, *International Sales Law – The Actual Practice*, 29 Penn St. Int'L. Rev. 425, 446, 447 (2011); Schwenzer & Marti Whitebread, *supra* n. 8, at 1, 2.
12. As a result, different States try to make their national litigation more attractive for international disputes by establishing specialised courts, cf. particularly Singapore International Commercial Court; cf. for Germany Landgericht Mannheim (Regional Court), proceedings in English at the Chamber of Commerce.

proceedings, it is increasing immensely in Asia[13] and new arbitration institutions are founded particularly in Latin America, Africa and the Arabic States.

In arbitral practice the CISG is often applied.[14] This is closely related to the international composition of the arbitral tribunal which possesses comprehensive practical comparative legal experience and is therefore accustomed to bridge the differences arising out of different legal traditions.[15] In that regard, the CISG serves as a very successful compromise between the continental European and Anglo-American legal backgrounds.[16]

Numerous scholarly writings discuss the application of the CISG by arbitral tribunals. In addition to theoretical questions such as the application and interpretation of the CISG by arbitral tribunals, there are also a number of writings shedding light on the practical perspective to illustrate how often the CISG is applied in arbitration. The analysis showed that approximately 25% of all published CISG cases were rendered by arbitral tribunals.[17] Bearing in mind how little arbitral awards are published in general, it can be assumed that a majority of proceedings dealing with the CISG take place before arbitral tribunals and not national courts.

From the wide range of interesting issues, the following two questions are being discussed: (1) When is the CISG applied in arbitral proceedings? (2) Can the CISG be applied to the arbitration clause?

## §30.02 CISG AS SUBSTANTIVE LAW

### [A] Preliminary Remarks

According to Article 1(1) CISG the CISG applies if the parties have their seat in two different contracting states or the applicable rules of private international law lead to the application of the law of a Contracting State. The CISG thereby determines its sphere of application autonomously. Due to obligations arising out of international law this is binding for national courts.[18] Arbitral tribunals, however, as a private dispute resolution instance chosen by the parties, are not bound by these international law

13. Cf. the statistics by the China International Economic and Trade Arbitration Commission (CIETAC) http://cietac.org/index.php?m=Page&a=index&id=40&l=en (accessed 11 May 2016); cf. also statistics by the Hong Kong International Arbitration Centre (HKIAC), http://220.241.190.1/en/hkiac/statistics (accessed 11 May 2016).
14. *See* on this Stefan Kröll, *Arbitration and the CISG*, 59, 61, 62 (Schwenzer, Atamer & Butler, Current Issues in the CISG and Arbitration, The Hague: Eleven International Publishing, 2014), who could even make out a pro-CISG attitude by the arbitrators based on a case study – in 57% of the analysed cases the CISG was chosen by the arbitral tribunal. Similarly Loukas Mistelis, *CISG and Arbitration*, 373, 388 (Janssen & Olaf, CISG Methodology, Munich: Sellier 2009).
15. Likewise Schmidt-Ahrendts, Belgrade L. Rev. 3, 211, 220 (2011); Kröll, *supra* n. 14, at 59, 69.
16. Schwenzer, *supra* n. 7, at 21, 36 f.
17. Schmidt-Ahrendts, Belgrade L. Rev. 3, 211, 213 (2011); Kröll, *supra* n. 14, at 59, 61.
18. Burghard Piltz, *Internationales Kaufrecht*, § 2 para. 6 (2nd ed., Munich: Beck 2008); Kröll, *supra* n. 14, at 59, 62 et seq.; Alexis Mourre, *Application of the Vienna International Sales Convention in Arbitration*, ICC ICArb. Bull. 17, 43 (2006).

obligations.[19] As there is no *lex fori* for arbitral tribunals comparable with the one for national courts, they are not requested to abide by the private international law rules.[20] It is rather the law at the seat of arbitration according to which the arbitral tribunal has to determine the applicable substantive law.[21] Subsidiarily, the arbitral rules chosen by the parties are to be applied.[22]

Recent developments in international arbitration show a remarkable congruence. Primarily, the arbitral tribunal decides the dispute according to the law chosen by the parties.[23] Today, such a choice of law is considered to be a direct choice of a substantive law of the selected state excluding its rules of international private law.[24] In absence of such a choice of law some of the national arbitration statutes still refer the arbitral tribunal to the rules of international private law.[25] According to a more modern view, the arbitral tribunal shall directly apply the law which is most closely connected to the dispute.[26] This approach is also mirrored by the most important arbitration rules.[27] In general, it is internationally recognised that in addition to the law of a state, rules of law, i.e., soft law, may be applied.[28]

### [B] Choice of Law by the Parties

Nowadays the overwhelming majority of jurisdictions acknowledges the possibility of the parties to choose the applicable law at least for arbitral proceedings.[29] The Hague

19. Pierre Mayer, *L'application par l'arbitre des conventions internationales de droit privé*, 275, 287 (Loussouarn, L'internationalisation du droit, Paris: Dalloz 1994); also Schmidt-Ahrendts, Belgrade L. Rev. 3, 211, 214 (2011).
20. Kröll, *supra* n. 14, at 59, 64; cf. also Mourre, ICC ICArb. Bull. 17, 43, 46 (2006), especially at 44 regarding the parties' choice of law, which bases on party autonomy and thereby excludes the provision of conflict law in Art. 1(1)(b) CISG.
21. Kröll, *supra* n. 14, at 59, 64; Blackaby, Partasides, Redfern & Hunter, *supra* n. 6, at paras 3.213 et seq.; Gary Born, *International Commercial Arbitration*, 525 et seq. (2nd ed., Alphen aan der Rijn: Kluwer, 2014) with further references.
22. Blackaby, Partasides, Redfern & Hunter, *supra* n. 6, at paras 3.50 et seq.; cf. the concrete example of § 23 DIS-Arbitration Rules 98; Art. 17(1) ICC Arbitration Rules; Art. 22.3 LCIA Rules; Art. 28(1) AAA Rules; Art. 35(1) HKIAC Rules; Art. 24(1) SCC Rules; Art. 24(2) Vienna Rules und Art. 33 Swiss Rules; *see* also Art. 35 UNCITRAL Arbitration Rules.
23. Germany: § 1051(1) s. 1 CCP; Switzerland: Art. 187(1) PILS; United Kingdom: English Arbitration Act 1996, s. 46(1)(a).
24. *See* § 1051(1) s. 2 German CCP; English Arbitration Act 1996, s. 46(2).
25. English Arbitration Act 1996, s. 46(3); *see* also in Art. 28(2) UNCITRAL Model Law.
26. Germany: § 1051(1) CCP; Switzerland: Art. 187(1) PILS.
27. Article 33(1) Swiss Rules; §§ 23.1, 23.2 DIS-Arbitration Rules 98; Art. 21(1) ICC Arbitration Rules, which do not focus on the *closest connection* but on the law which the arbitral tribunal determines to be the most *appropriate* law.
28. English Arbitration Act 1996, s. 46 (1)(b); § 1051 German CCP includes explicitly *rules of law*; Joachim Münch, *Münchener Kommentar zur Zivilprozessordnung*, § 1051 para. 14 (Krüger et al., 4th ed., Munich: Beck, 2013); explicitly in the Introduction I.18 und Art. 3 The Hague Principles on Choice of Law in International Commercial Contracts; however, arbitration clauses are excluded from their scope pursuant to Art. 1(3)(b); further *Genevève Saumier*, 40 Brook. J. Int'l L. 1, 18 et seq. (2014); Frank Vischer, Lucius Huber & David Oser, *Internationales Vertragsrecht*, paras 114 et seq (2nd ed., Berne: Stämpfli, 2000).
29. *See* Gary Born, *International Arbitration and Forum Selection Agreements*, 167, 168 (4th edn, Alphen aan der Rijn: Kluwer, 2013).

Principles on Choice of Law in International Commercial Contracts first adopted in 2015 affirm this principle and will attribute even greater importance to it in the future. In practice, in more than 70% of all international contracts parties embrace this possibility to conclude a choice of law clause.[30]

In general, the parties simply choose the law of a particular state without further specifications, for example clauses like 'This contract is governed by Swiss law'. In such a case it is questionable whether the parties have exclusively chosen the Swiss Code of Obligations as non-harmonised Swiss law or also the CISG, since Switzerland is a contracting state of the CISG.

National courts have repeatedly discussed the question, whether the choice of the law of a contracting state constitutes an opting-out of the CISG according to Article 6 CISG. There is agreement that the choice of the law of a contracting state by itself cannot be interpreted as an exclusion of the CISG.[31] Rather, further specifications are required, for example, 'the law of the State X excluding the CISG', 'the Swiss Code of Obligations' or 'application of Articles 184 et seq. of the Swiss Code of Obligations'.[32]

However, this case law cannot be directly applied to Article 6 CISG in arbitral proceedings. It derives from the national courts' obligation by international law to apply the CISG in case the preconditions of Article 1(1) CISG are met. A national court has to decide in a second step, if there is a valid opting-out according to Article 6 CISG at hand. Since the arbitral tribunal – as already mentioned – is not bound by Article 1(1) CISG, it is not requested to assess opting-out of the CISG, but to establish its application.[33] This is achieved by interpretation of the parties' choice of law clause. It remains questionable, whether this interpretation is conducted in accordance with the non-harmonised domestic law or Article 8 CISG.[34] Despite existing differences between domestic principles of interpretation and Article 8 CISG, the result of interpreting choice of law clauses in international settings might hardly ever lead to diverging results.[35] After all, it is decisive what reasonable parties intended by agreeing on a

30. Vogenauer, *supra* n. 11, Questions 15 et seq., https://www3.law.ox.ac.uk/themes/iecl/pdfs/Oxford%20Civil%20Justice%20Survey%20-%20Summary%20of%20Results,%20Final.pdf (accessed 11 May 2016). Cf. further Schwenzer, Hachem & Kee, *supra* n. 7, at paras 5.21 et seq.
31. CISG Advisory Council, Opinion No. 16, Rapporteur Spagnolo, *Exclusion of the CISG under Article 6*, n. 4.2; Waincymer, *supra* n. 2, at 582, 595.
32. *See* also Born, *supra* n. 29, at 167; Mourre, ICC ICArb. Bull. 17 (2006), 43, 44, 45.
33. Schwenzer & Hachem, *Schlechtriem & Schwenzer Commentary on the Convention on the International Sale of Goods (CISG)*, Art. 6 para. 13 (Schwenzer, 4th ed., 2016).
34. In favour of an application of Art. 8 CISG, *Chateau des Charmes Wines Ltd. v. Sabate USA Inc., Sabate S.A.*, 9th Cir., 5 May 2003, CISG-online 767; OLG Stuttgart, 15 May 2006, CISG-online 1414; OLG Düsseldorf, 30 Jan. 2004, CISG-online 821; CISG Advisory Council, Opinion No. 16, *supra* n. 31, n. 3.6 et seq.; Schmidt-Kessel, *Schlechtriem & Schwenzer Commentary on the CISG* (2016), Art. 8 para. 5. Critical Waincymer, *supra* n. 2, at 582, 586, 587.
35. With a comparison of §§ 133, 157 German CC also the BGH, VIII ZR 125/14, 25 Mar. 2015, CISG-online 2588, n. II.2.a).

specific clause.[36] For this evaluation, the principles developed under Article 6 CISG can be applied by analogy.[37]

When parties choose the law of a Contracting State, it has to be emphasised that the CISG is an integral part of this law and is, furthermore, the law that particularly applies to international contracts.[38] Moreover, as mentioned above, the CISG presents modern regulations tailored to international legal transactions.[39] By contrast, most of the domestic legal systems are not only outdated, but also exclusively focusing on domestic matters. Further, their provisions – contrary to the CISG – do not always balance the interests of both parties.[40] Finally, for reasonable parties it makes sense to choose a national law even when they are not opting-out of the CISG. As it is well known, the CISG does not govern all questions related to a sales contract. Accordingly, these questions are governed by the subsidiarily applicable law.[41]

By means of a choice of law clause parties can also agree on the CISG to govern disputes not ordinarily covered by the CISG (opting-in).[42] Under these circumstances it is not considered as national law; however, as demonstrated above, it is for the arbitral tribunals to decide on the application of rules of law in addition to the national law chosen by the parties. In that case the CISG contains rules of law.[43] Opting into the CISG is advisable especially for framework contracts, in which the performance of services is outweighing the sales obligations of the parties and hence would not be covered by the CISG according to Article 3(2) CISG.

### [C] Applicable Law in Absence of a Choice of Law Clause

As demonstrated above, different approaches are still present in different national arbitration statutes.[44] If the arbitral tribunal needs to follow the conflict of law rules in order to determine the applicable law,[45] it is decisive whether they refer to the law of a contracting state. In this case, the CISG can be applied without any difficulty.

If the applicable national arbitration statute refers the arbitral tribunal to determine the applicable substantive law according to the closest connection test or the most

36. For a comparative approach, *see* Schwenzer, Hachem & Kee, *supra* n. 7, at paras 26.10 et seq.: it becomes evident that in fact a multitude of jurisdictions already apply the standard of *a reasonable person in the shoes of the recipient* to the interpretation, moreover there is a tendency in the same direction in a few Civil law jurisdictions, *see* particularly para. 26.12.
37. Cf. for the general principles Schwenzer & Hachem, *Schlechtriem & Schwenzer Commentary on the CISG* (2016), Art. 6 paras 12 et seq.; CISG Advisory Council, Opinion No. 16, *supra* n. 31, at n. 3.1 et seq.
38. Piltz, *supra* n. 18, at § 2 para. 6; cf. Franco Ferrari, *Kommentar zum Einheitlichen UN-Kaufrecht*, Art. 6 para. 7 (Schwenzer, 6th ed., Munich: Beck, 2013) with further references.
39. Waincymer, *supra* n. 2, at 282, 283, 284.
40. Waincymer, *supra* n. 2, 282, 284, 285.
41. *See* also Waincymer, *supra* n. 2, at 282, 298.
42. Mourre, ICC ICArb. Bull. 17, 43, 46 (2006).
43. Mourre, ICC ICArb. Bull. 17, 43, 46 (2006).
44. Article 17(3) ICC Arbitration Rules; Art. 28 UNCITRAL Model Law; Art. 33 UNCITRAL Arbitration Rules.
45. English Arbitration Act 1996, s. 4(5) and Art. 28(2) UNCITRAL Model Law.

suitable law,[46] this will frequently lead to the application of the CISG.[47] Primarily, this will be the case when both parties have their places of business in contracting states.[48] The CISG was further applied to contracts between parties from non-contracting states, when arbitral tribunals found that the CISG represents international trade[49] or is part of the *lex mercatoria*.[50] Bearing in mind that – as shown above – the CISG served as a blue print for most modern law revisions,[51] this reasoning seems to be justified.

## §30.03 CISG AS THE LAW APPLICABLE TO THE ARBITRATION CLAUSE

### [A] General Remarks Regarding the Applicable Law to the Arbitration Clause

Only very few national arbitration legislation contain an explicit regulation regarding which law governs the arbitration clause.[52] There is consensus that the law explicitly chosen by the parties is decisive.[53] Moreover, in absence of a choice of law some national arbitration statutes revert back entirely to the law of the seat of arbitration;[54] on the basis of the validation approach others either declare the *lex causae* or the law at the seat of arbitration to be applicable.[55]

Also in scholarly writings there is consensus about the parties' possibility to choose the applicable law.[56] The revised arbitration rules of the Hong Kong International Arbitration Centre (HKIAC) even include such a choice of law in their model clause.[57] Nevertheless, parties make use of this possibility very rarely,[58] even though – as shown above – the choice of the substantive law for the main contract is common

46. Born, *supra* n. 21, at 517, 518.
47. Also international conventions may be considered, such as Art. 4 Rome I Regulation.
48. Differentiating Kröll, *supra* n. 14, at 59, 64; also in case law represented, ICC case 8962 (1997); ICC case 7331 (1994); ICC case 7531 (1994); ICC case 7844 (1994), cited in: Mourre, ICC ICArb. Bull. 17, 43, 47 (2006).
49. Cf. Mourre, ICC ICArb. Bull. 17, 43, 49 (2006) with further references., also with reference to ICC case 8501 (1996) in fn. 34.
50. Similarly Mourre, ICC ICArb. Bull. 17, 43, 49, 50 (2006), who notes that arbitrators attribute a great importance to the great number of contracting states, critical towards the application of the CISG as *lex mercatoria*; ICC case 6281 (1989), cited in: Arnaldez, Derains & Hascher, *Collection of ICC Arbitral Awards* 1991–1995, 409 (Paris: Kluwer, 1997): *universal* impact of the CISG.
51. *See supra* n. 5.
52. As for example Switzerland: Art. 178(2) PILS as a conflict of law rule with an *alternative character*; *see* in absence of a choice of law in Austria: § 35(2) PILA, where the law of the party performing the characteristic performance is decisive; cf. Dietmar Czernich, *Das auf die Schiedsvereinbarung anwendbare Recht*, SchiedsVZ 181, 185 (2015).
53. Czernich, SchiedsVZ 181, 183 (2015) (Austria: § 35(1) PILA); *Tamil Nadu Electricity Board v. St-CMS Electric Co. Pvt. Ltd.* [2007] EWHC 1713 (Comm); *Braes of Doune Wind Farm (Scotland) Ltd. v. Alfred McAlpine Business Services Ltd.* [2008] EWHC 426 (TCC).
54. Turkish International Arbitration Act, Art. 4; Swedish Arbitration Act 1999, s. 48.
55. As for example Art. 178(2) Swiss PILS.
56. Born, *supra* n. 21, at 472 et seq., 478 with further references.
57. As an option the following wording is suggested: 'The law of this arbitration clause shall be …'.
58. Klaus Peter Berger, *Re-Examining the Arbitration Agreement*, 301, 302 (van den Berg, International Arbitration 2006: Back to Basics?, ICCA Congress Series Vol. 13, Alphen aan der Rijn: Kluwer, 2007).

practice. Only in exceptional cases its interpretation will show that the parties' also intended to apply the choice of law to the arbitration clause in the contract.

Highly disputed is the question, which law applies to the arbitration clause in absence of any choice of law by the parties regarding the arbitration agreement. One author is of the opinion that he can make out up to nine different theories in international practice.[59] Even though this number seems fairly high, at least three main approaches can be clearly distinguished.

The majority of scholars in arbitration primarily advocate the application of the law of the seat of arbitration.[60] This reasoning relies on the *doctrine of separability*.[61] Accordingly, the validity of the arbitration agreement and the main contract are to be assessed on an independent basis; the invalidity of the main contract generally does not affect the validity of the arbitration agreement.[62] Equally, notwithstanding an avoidance of the main contract the arbitration agreement is upheld.[63] Today, this *doctrine of separability* is widely accepted in international arbitration.[64] The CISG, too, acknowledges the *doctrine of separability*, as it explicitly states in Article 81(1) CISG that the avoidance of a contract does not affect the dispute resolution clause.[65]

In case law, however, there are many examples that the law applicable to the main contract has also been applied to the arbitration agreement without a detailed reasoning.[66] English courts traditionally tended to reach this conclusion if the parties made an explicit choice of law for the main contract.[67] The *doctrine of separability* shall

59. Marc Blessing, The Law Applicable to the Arbitration Agreement, 168, 169, 170 (van den Berg, Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, ICCA Congress Series Vol. 9, The Hague: Kluwer, 1999).
60. Berger, *supra* n. 58, at 301, 320 with further references.
61. Born, 26 SacLJ 814, 818 (2014); Czernich, SchiedsVZ 181, 182 (2015): so called *Trennungsprinzip* in Austria; so called *Autonomiegrundsatz* in Germany and in Switzerland, Münch, *Münchener Kommentar zur ZPO* (2013), § 1040 paras 8 et seq. for Germany; Dieter Gränicher, *Basler Kommentar zum Internationalen Privatrecht*, Art. 178 paras 89 et seq. (Honsell et al., 3rd ed., Basel: Helbing Lichtenhahn, 2013) for Switzerland.
62. Gränicher, *Basler Kommentar IPRG* (2013), Art. 178 para. 90 f.; for Austrian law Czernich, SchiedsVZ 2015, 181, 182 with further references; Lawrence Collins et al., *Dicey, Morris and Collins on Conflict of Laws* vol 2, para. 16-008 (15th ed., London: Sweet & Maxwell 2012).
63. Cf. Gränicher, *Basler Kommentar IPRG* (2013), Art. 178 paras 84, 85.
64. *See* § 1040(1) German CCP; Art. 178(3) Swiss PILS; English Arbitration Act 1996, s. 7; Art. 16(1) First Schedule Singapore International Arbitration Act (CAP. 143A, rev 2002); Art. 16(1) UNCITRAL Model Law; as regards wide recognition Gränicher, *Basler Kommentar IPRG* (2013), Art. 178 para. 89. As an independent agreement also laid down in Art. II NYC.
65. Janet Walker, *Agreeing to Disagree: Can We Just Have Words? CISG Article 11 and the Model Law Writing Requirement*, 25 J. L. & Comm. 153, 163 (2005–2006); *see* the decision by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, 13 Jun. 2000, CISG-online 1083, n. 3.1.
66. *Motorola Credit Corp. v. Uzan*, 2d Cir, 22 Oct. 2004, 388 F.3d 39, 51; accordingly *FR 8 Singapore Pty. Ltd. v. Albacore Maritime Inc.*, SD NY, 13 Oct. 2010, 754 F.Supp.2d 628, 636; *Sphere Drake Ins Ltd. v. Clarendon Nat'l Ins. Co.*, 2d Cir, 28 Aug. 2001, 263 F.3d 26, 32, fn. 3; cf. with a detailed overview on international case law, Born, *supra* n. 21, at 580 et seq.
67. *Arsanovia Ltd. v. Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm), n. 21; *Karl Leibinger, Franz Leibinger v. Stryker Trauma GmbH* [2005] 690 (Comm), 8; *Sonatrach Petroleum Corp. (BVI) v. Ferrell International Ltd.*, 2001 WL 1476318, para. 32; *Sumitomo Heavy Industries v. Oil and Natural Gas Commission* [1994] 1 Lloyd's Rep. 45; *Channel Group v. Balfour Beatty Ltd.* [1993] Adj.L.R. 01/21, n. 67 (House of Lords); regarding the incentive for a clear rule, *see* Born, *supra* n. 21, at 590. Different, however, in a recent case *C v. D* [2007] EWCA Civ 1282, n. 22

only lead to the application of the law of the seat of arbitration in case the arbitration agreement was void under the *lex causae*.[68]

Notwithstanding which of these two views prevails, it has to be distinguished closely between the procedural and the contractual dimension of an arbitration agreement. The *lex causae* approach is in only suitable for the contractual dimension of the arbitration agreement, while the procedural dimension of an arbitration agreement has to be determined according to the law of the seat of arbitration pursuant to Article V(1)(a) NYC. On the other hand, the approach that favours the law of the seat of arbitration, fails to break it down into the (procedural) arbitration statute and the possible application of the contract law at the seat of arbitration regarding the contractual dimension of the arbitration agreement.[69]

This distinction, which is inevitable, becomes apparent especially in Swiss law. While Article 178(1) of the Swiss Law on Private International Law Statute (PILS)[70] contains a substantive provision for the arbitration agreement, Article 178(2) PILS[71] only provides a conflict of laws provision for all further questions of validity of the arbitration agreement. Hence, for all those questions a substantive contract law needs to be determined. Most other national arbitration statutes, such as § 1031 German Civil Procedural Law, only contain form requirements, without specifying the law applicable to other questions of validity. Provisions regarding the law applicable to the interpretation of the arbitration agreement as well as the remedies for a breach of the arbitration agreement are – as far as can be seen – not contained in any arbitration statute.

All the difficulties just described are circumvented by the so called *a-national approach* by French courts, but also partly promoted in literature.[72] According to this approach no particular national law is applicable – except the mandatory (French)

et seq.; *Shashoua v. Sharma* [2009] EWHC 957 (Comm), n. 29 et seq., where it was stated that the law applicable to the arbitration clause only rarely differs from the law at the seat of arbitration. *See* also Collins et al., *supra* n. 64, at paras 16-017, 16-018.

68. *See* for the leading case *Sulamérica Cia Nacional de Seguros S.A. v. Enesa Engenharia S.A.* [2012] EWCA Civ 638. *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi A.S. v. VSC Steel Company Ltd.* [2013] EWHC 4071 (Comm), n. 99 et seq.; *XL Insurance Ltd. v. Owens Corning* [2001] 1 All E.R., 530. On the inconsistent case law in the United Kingdom, *see* Sabrina Pearson, Sulamérica v. Enesa, *The Hidden Pro-validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement*, 29 Arb. Int'l 115, 124, 125 (2013), rightly titled as the 'hidden pro-validation approach'. *See* further Born, *supra* n. 21, at 575.
69. Similarly Kröll, *supra* n. 14, at 59, 82, 83.
70. Article 178(1) Swiss PILS: '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.'
71. Article 178(2) Swiss PILS: 'Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law'.
72. Cass (1re Ch. civ.), *Municipalité de Khoms El Mergeb v. société Dalico*, 20 Dec. 1993, 1993 Rev. Arb. 116, 117; Cass (1re Ch. civ.), *Renault v. société V 2000 (Jaguar France)*, 21 May 1997, 1997 Rev. Arb. 537. Cf. Emmanuel Gaillard & John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, paras 435 et seq., 525 et seq. (The Hague: Kluwer, 1999).

provisions. Rather, the arbitration agreement shall be assessed on the basis of the parties' intent as well as general principles and trade usages in international trade.[73] Although this approach is very appealing due to the fact that it avoids all difficult questions of conflict of laws references,[74] it is nonetheless mostly dismissed as an unnecessary exaggeration of transnational thinking.[75] Furthermore, it does not correspond to the hypothetical parties' intent anymore.[76]

Against this background the question will be discussed in the following, whether and to which aspects of the arbitration agreement the CISG can be applied.

### [B] General Applicability of the CISG to Arbitration Agreements

Some authors are of the opinion that the CISG is generally not applicable to arbitration agreements.[77] Beside the *doctrine of separability* it is mainly argued that arbitration agreements fall outside the scope of the CISG due to their procedural nature lacking the sales contract characteristics.[78] As elaborated above, one must distinguish between the procedural and the contractual components of an arbitration agreements. With regard to the contractual dimension the question is whether harmonised or non-harmonised law applies. Article 19(3) (dispute resolution clauses as material alteration of the offer) and Article 81(1) CISG (continuation of the arbitration clause in spite of the avoidance of the main contract) clearly state that dispute resolution clauses are not excluded from the CISG's application.[79] The wording by itself suggests that the CISG puts the arbitration agreement a par with other contractual provisions.[80]

### [C] Formal Validity

Most national arbitration statutes still submit arbitration agreements to a form requirement. Only very few states abolished the form requirements for the arbitration

73. For an overview, *see* Berger, *supra* n. 58, at 301, 380 et seq.
74. Berger, *supra* n. 58, at 301, 310.
75. Piero Bernardini, *Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause*, 197, 202 (van den Berg, Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, ICCA Congress Series Vol. 9, The Hague: Kluwer, 1999); Berger, *supra* n. 58, at 301, 310. Detailed in Fogt, 26 Am. Rev. Int. Arb. 365, 369 et seq. (2015), with further convincing arguments why this approach has to be dismissed.
76. Bernardini, *supra* n. 75, at 197, 202.
77. *See* for further references Kröll, *supra* n. 14, at 59, 82 et seq.
78. Stefan Kröll, *Selected Problems Concerning the CISG's Scope of Application*, 25 J. L & Comm. 39, 45, 46 (2005) with further references; idem, *supra* n. 14, at 59, 81 f.; BGer, 4C.100/2000, 11 Jul. 2000, CISG-online 627, n. 3.
79. Perales Viscasillas & Ramos Muñoz, *supra* n. 8, at 1366, 1355; Walker, 25 J. L. & Comm. 153, 163 (2005–2006); Robert Koch, *The CISG as the Law Applicable to Arbitration Agreement*?, 267, 280, 281 (B. Andersen & Schroeter, Sharing International Commercial Law across National Boundaries, Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday, London: Wildy, Simmonds & Hill, 2008); Schroeter, *Schlechtriem & Schwenzer Commentary on the CISG* (2016), Intro. to Arts 14–24 paras 16 et seq.
80. Similarly Perales Viscasillas & Ramos Muñoz, *supra* n. 7, at 1355, 1366.

agreement, namely France,[81] Sweden,[82] New Zealand[83] and some Canadian provinces.[84] Also the NYC still contains a form requirement in Article II(1) and (2).

By contrast, according to its Article 11 the CISG is based on the freedom of form principle. Consequently, some authors argue that the freedom of form principle contained in the CISG prevails over any form requirement for arbitration agreements.[85] This view is, however, not compelling.[86]

The form requirements aim particularly at the procedural dimension that is generally governed in all those national arbitration statutes that have not yet implemented the freedom of form principle.[87]

Also by interpretation of the CISG the same result is reached. The application of Article 11 CISG to arbitration agreements was never intended. The freedom of form principle has been disputed since the beginning of the initiatives to harmonise sales law.[88] Objections were mainly raised by former socialist states and countries which have an indirect form requirement tied to the value of the transaction in their national law.[89] The form requirements of an arbitration agreement have never been part of the discussions about the freedom of form.[90]

The possibility to make a reservation according to Article 96 CISG in order to exclude the freedom of form principle further affirms this reasoning. This reservation was mainly made by States that (originally) intended to control their international sales contracts.[91] If the intention had been to submit arbitration agreements to the freedom of form principle of Article 11 CISG most of the contracting states would have been obliged to make such a reservation.[92]

Further, the argument that the CISG prevails as *lex specialis* over national arbitration statutes[93] does not hold up. Rather the contrary is the case. Also from the wording in Article 90 CISG it derives that the CISG does not prevail over the NYC.

81. Article 1507 CCP.
82. The Sweden arbitration statute (1999) waives any sort of form requirements for arbitration agreements.
83. New Zealand Arbitration Act 1996, Sch. 1, s. 7(1).
84. Alberta: Alberta Arbitration Act 1991, Art. 5(1); Ontario: Ontario Arbitration Act 1991, Art. 5(3).
85. Walker, 25 J. L. & Comm. 153, 163 (2005–2006); Perales Viscasillas & Ramos Muñoz, *supra* n. 7, at 1355, 1366; Anne-Kathrin Schluchter, *Die Gültigkeit von Kaufverträgen unter dem UN-Kaufrecht*, 91 (Baden-Baden: Nomos, 1996).
86. Of the same opinion Piltz, *supra* n. 18, at § 3 para. 119; Kröll, *supra* n. 14, at 59, 83; Koch, *supra* n. 79, at 267, 276 et seq.
87. Cf. the UNCITRAL Model Law, which offers two options for Art. 7 that consciously reflects both alternatives.
88. Ernst Rabel, *Der Entwurf eines einheitlichen Kaufgesetzes*, RabelsZ 9, 1, 55, 56 (1935).
89. Hans Dölle & Gert Reinhart, *Kommentar zum Einheitlichen Kaufrecht*, Art. 15 paras 14 et seq. (Dölle, Munich: Beck, 1976); such provisions are present for example in the USA: § 2-201(1) UCC; France: Art. 1341 CC. Cf. also Schwenzer, Hachem & Kee, *supra* n. 7, at paras 22.09 et seq.
90. Cf. Schwenzer & Tebel, *The Word Is Not Enough – Arbitration, Choice of Forum and Choice of Law Clauses Under the CISG*, ASA Bull. 4, 740, 748 (2013), *see* fn. 51 with further details on the different positions taken by the delegates throughout the drafting of the CISG.
91. The contracting states, which have originally made an Art. 96 CISG reservation: Argentina, Armenia, Chile, China (withdrawn), Estonia (withdrawn), Latvia (withdrawn), Lithuania (withdrawn), Paraguay, Russian Federation, Ukraine, Hungary and Republic of Belarus.
92. *See* Piltz, *supra* n. 18, at § 2 para. 130.
93. Perales Viscasillas & Ramos Muñoz, *supra* n. 7, at 1355, 1370.

Finally, the same conclusion is reached considering the *most favourable law approach* of Article VII(I) NYC. This provision is dealing with the relation of the NYC to other provisions specifically with regard to recognition and enforcement, however, not with regard to provisions of sales contracts or any other general contractual provisions.[94]

Due to all these reasons it can be assumed that mandatory form requirements of the *lex arbitri* have to be always applied.[95] Whether the CISG is the substantive contract law at the seat of the arbitral tribunal or the *lex causae*, is – like any other applicable contract law – irrelevant.

### [D] Substantive Validity

Contrary to the formal validity which depends regularly on the applicable national arbitration statute, the CISG can be applied to questions of substantive validity, when dealing with questions of contract formation (Articles 14 et seq. CISG).[96] As already pointed out, for this discussion only the contractual dimension of the arbitration clause is of importance.

The application of the CISG is unproblematic, if the law governing the main contract is applied. A great number of courts have chosen this approach, without even discussing other viable options.[97] The overwhelming majority of scholars agree on this view.[98] The application of the CISG might not appear as evident if the law of the seat of arbitration is considered to be decisive for the contractual dimension of the arbitration clause. Here the question arises whether to apply the non-harmonised

94. Cf. Ulrich Schroeter, *UN-Kaufrecht und Europäisches Gemeinschaftsrecht: Verhältnis und Wechselwirkungen*, § 14 para. 45 (Munich: Sellier, 2005); Thomas Rauscher, *Zuständigkeitsfragen zwischen CISG und Brüssel I*, 933, 950 (Lorenz et al., Festschrift für Andreas Heldrich zum 70. Geburtstag, Munich: Beck, 2005).
95. For a detailed overview, *see* Schwenzer & Tebel, ASA Bull. 4, 740, 749 (2013); also Fogt, 26 Am. Rev. Int. Arb. 365, 396 et seq. (2015).
96. *Filanto S.p.A. v. Chilewich Int'l Corp.*, SD NY, 14 Apr. 1992, CISG-online 45, 789 F.Supp. 1229; LG Hamburg, 19 Jun. 1997, CISG-online 283; Tribunal Supremo (Spain), 17 Feb. 1998, CISG-online 1333; Tribunal Supremo (Spain), 17 Feb. 1998, CISG-online 1335; Koch, *supra* n. 79, at 267, 282.
97. Rechtbank Arnhem, 17 Jan. 2007, CISG-online 1476; *Filanto S.p.A. v. Chilewich International Corp.*, SD NY, 14 Apr. 1992, CISG-online 45; *see* for case law on choice of forum clauses: Cass (1re Ch. civ.), 16 Jul. 1998, CISG-online 344; CA Paris, 13 Dec. 1995, CISG-online 312; *Solea LLC v. Hershey Canada Inc.*, D. Del., 9 May 2008, CISG-online 1769; *Chateau des Charmes Wines Ltd. v. Sabate USA Inc., Sabate S.A.*, 9th Cir., 5 May 2003, CISG-online 767; Gerechtshof 's-Hertogenbosch, 19 Nov. 1996, CISG-online 323, n. 4.4. et seq.; OLG Oldenburg, 20 Dec. 2007, CISG-online 1644; OLG Köln, 24 May 2006, CISG-online 1232; OLG Braunschweig, 28 Oct. 1999, CISG-online 510; LG Landshut, 12 Jun. 2008, CISG-online 1703, n. 31 et seq.; LG Giessen, 17 Dec. 2002, CISG-online 766 (obiter); cf. also *Chateau Des Charmes Wines Ltd. v. Sabate, USA Inc. et al.*, Superior Court of Justice Ontario, 28 Oct. 2005, CISG-online 1139, n. 13; left open by OLG Düsseldorf, 30 Jan. 2004, CISG-online 821.
98. Application of the CISG to dispute resolution clauses: Magnus, J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen – Wiener Kaufrecht (CISG), 2005, Vorbem. zu Arts 14 et seq. para. 8; Schwenzer & Hachem, *Schlechtriem & Schwenzer Commentary on the CISG* (2016), Art. 4 para. 11; Schroeter, *Schlechtriem & Schwenzer Commentary on the CISG* (2016), Intro. to Arts 14–24 paras 18, 19; the same applies to choice of forum clauses: Schroeter, *supra* n. 94, at § 15 para. 24; dissenting Kröll, 25 J. L & Comm. 39, 44, 45 (2005); presumably also Rauscher, *supra* n. 94, at 933, 949 f.

contract law or – if the seat of arbitration is located in a contracting state – the CISG. Supporters of the application of non-harmonised law point out the similarity to arbitration agreements that are concluded independently from a contract.[99] For those always the non-harmonised law and never the CISG would apply. The German Federal Supreme Court has taken a similar stance in a dictum in a recent case in which it decided upon a choice of forum clause pursuant to Article 23 Brussels Regulation.[100]

At least for arbitral tribunals this argument is not convincing. As demonstrated above, arbitral tribunals do not apply the substantive law based on any obligation by international law if all preconditions are met, but rather in absence of a parties' choice of law they apply the law with the closest connection. This rule is not only valid for the selection between different national laws but also applies accordingly for the decision between the non-harmonised and harmonised law of one and the same jurisdiction to be applied to the arbitration agreement. An international dispute, which is governed by the CISG, will regularly be more closely connected to harmonised contract law, which thus is the preferable law.

Even when following the French approach, according to which arbitration agreements are not governed by national but by a-national law, the CISG presents itself as the most viable option of a transnational contract regulation.

### [E] Interpretation

Substantive validity and interpretation of an agreement are closely interrelated. The question of what the parties agreed upon cannot be separated from the question whether the parties reached an agreement at all. This is generally the case but especially with regard to the facts that can be taken into account to interpret the parties' conduct. Many Anglo-American legal systems for example apply the *parol evidence rule*[101] according to which oral ancillary agreements cannot serve to interpret the written contract.[102] The CISG, on the contrary, in Article 8(3) CISG explicitly provides for a basis to consider the parties' negotiations, customs, established practices between themselves and subsequent conduct of the parties. The Anglo-American *parol evidence rule* is thus excluded under the CISG.[103] Applying contradicting substantive contract formation provisions and principles of interpretation would lead inevitably to frictions.

99. Kröll, 25 J. L & Comm. 39, 45 (2005).
100. BGH, VIII ZR 125/14, 25 Mar. 2015, CISG-online 2588, n. 23.
101. For example., USA: § 2-202 UCC; Singapore: Evidence Act 1997, s. 101; India: Evidence Act 1997, s. 99. Only as rebuttable presumption in England and Wales, cf. Schwenzer, Hachem & Kee, *supra* n. 7, at para. 26.47.
102. CISG Advisory Council, Opinion No. 3, Rapporteur Hyland, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG*, n. 1.2.3; Schwenzer, Hachem & Kee, *supra* n. 7, at paras 26.45 et seq.
103. With a detailed overview on case law and scholarly writings, Schmidt-Kessel, *Schlechtriem & Schwenzer Commentary on the CISG* (2016), Art. 8 para. 33, in fn. 183. On the reasons why the *parol evidence rule* was not incorporated in the CISG, *see* CISG Advisory Council, Opinion No. 3, *supra* n. 102, at n. 2.4. with further references: complexity, unknown to most legal systems and in general strongly criticised.

As a result, the CISG tends to always provide the more suitable provisions tailored to international trade than most of the national laws.[104]

The situation may be different if the applicable national arbitration statute entails specific interpretation rules only and exclusively for arbitration agreements.[105] Such provisions prevail, like form requirements as discussed above, over general contract provisions as *leges speciales*.[106]

### [F] Remedies for a Breach of the Arbitration Agreement

Lastly, the question of possible remedies upon a breach of the arbitration agreement is discussed. Can a party claim damages if the other party calls on a national court in violation of the arbitration agreement? Does this possibly result in the right to avoid the whole contract? Again, national arbitration statutes leave these questions open.

Arbitration agreements as well as choice of forum clauses are not merely procedural agreements, but also create contractual obligations.[107] The violation of those contractual obligations in turn may trigger contractual remedies. Accordingly, a solution has to be sought in national contract laws. Once more the choice is to be made between the law of the seat of arbitration and the law applicable to the main contract. An arbitral tribunal has recently upheld a claim for damages due to a breach of the arbitration agreement based on the Swiss Code of Obligations.[108] The Swiss Federal Tribunal affirmed this decision.[109]

Again, the starting point should be the reasonable expectations of the parties. It would be met with confusion if a breach of obligations arising out of the main contract faced different remedies than a breach of the arbitration agreement.[110] As a result one should strive for a congruence in regard to the main contract, be it to apply the *lex causae* or at least when applying the law at the seat of the arbitration when making the choice between the non-harmonised domestic and the harmonised contract law.[111]

## §30.04 CONCLUSIONS

Internationally, both the CISG and arbitration are a story of worldwide success. Hardly any other legal framework promotes the international trade as effectively as these two

104. Cf. Schmidt-Ahrendts, Belgrade L. Rev. 3, 211, 220 (2011).
105. Such as the *liberal construction principle according to the ordinary understanding of businessmen* as it is known in English law, *see* on this Collins et al., *supra* n. 64, at para. 16-016.
106. *Premium Nafta Products Ltd. (20th) Defendant et al. v. Fili Shipping Company Ltd. et al.* [2007] EWCA Civ 20, n. 17 f.
107. Cf. also Tan, 47 Va. J. Int'l Law 545, 602 (2006–2007).
108. Simon Gabriel, *Arbitration in Switzerland: The Practitioner's Guide*, 1473, 1475 (Arroyo, Alphen aan der Rijn: Kluwer 2013): awarding of damages on the basis of Art. 97 Swiss CO.
109. BGer, 4A_444/2009, decision of 11 Feb. 2010.
110. Affirmed by Schmidt-Ahrendts, Belgrade L. Rev. 3, 211, 219 (2011), who agrees on the application of Art. 74 CISG in case of a breach of the arbitration agreement.
111. For an application of the CISG: Schmidt-Ahrendts, Belgrade L. Rev. 3, 211, 219 (2011). Dissenting Koch, *supra* n. 79, at 267, 285; Perales Viscasillas & Ramos Muñoz, *supra* n. 7, at 1355, 1346.

international instruments. This increases legal predictability and simultaneously reduces transaction costs.

Arbitrators apply the CISG on a regular basis as substantive law to the international sales contracts. Although the arbitral tribunals are not obliged to apply the CISG on the basis of international law, the CISG is applied due to the parties' choice-of-law or alternatively as suitable law with the closest connection to the dispute.

Further, the CISG plays an important role as the applicable law to the arbitration agreement. Regarding the formal validity arbitration agreements are governed by the applicable law of the seat of arbitration; the freedom of form principle of the CISG is thus not applicable. However, the CISG can be applied to all questions of the substantive validity of an arbitration agreement, its interpretation, as well as the remedies available upon a breach of the agreement.