

# *IURA NOVIT CURIA* AND THE CISG: RESOLUTION OF THE FAUX PROCEDURAL BLACK HOLE

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## 1 INTRODUCTION

A growing line of cases points to a potential black hole in the CISG. Through a combination of domestic procedural rules and waiver principles it seems many cases to which the CISG clearly applies are being determined on the basis of inapplicable law, simply because counsel failed to mention the CISG.

This result is at worst incorrect, and at best, unsatisfactory. In my view, judges (and to a lesser extent, arbitrators) who realize the CISG applies to the case before them rather than the local sales law presented by counsel, often should, and in many cases, must apply the CISG. In this article I will present the case for how and why this should occur, regardless of local procedural ground rules.

The chapter begins in Part 2 with a typical factual setting and examples of it in practice. Part 3 presents the traditional view, according to which the forum's procedural rules should provide the solution, outlines the nature of *iura novit curia*, and queries whether observed diversity in outcomes can be attributed to variance in procedural rules or interpretation of the CISG. The balance of the chapter attempts to provide a resolution to the problem that will improve certainty. Parts 4 and 5 respectively pose and analyse the questions so often obscured by the approach taken in the cases and by the traditional view: is there an obligation to apply the CISG if it is not pleaded? And if so, does failure to plead the CISG

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*per se* amount to an agreement to exclude it? Part 6 puts forward a range of practical solutions, and Part 7 draws some brief conclusions.

## 2 THE TYPICAL SITUATION

Let me describe the relevant situation. Two parties have entered a contract to which the CISG clearly applies, perhaps because the parties have their respective businesses in two different countries that have adopted the CISG,<sup>1</sup> and have failed to include a choice of law. Sometime later, a dispute arises. Counsel for each side present the case as if domestic sales law governed, and fail to mention the CISG.

This happens all too often. In a 2008 Chilean case<sup>2</sup> parties failed to plead or argue the applicable law of the CISG until appeal.<sup>3</sup> In an Austrian case,<sup>4</sup> both parties ignored the applicable CISG, and the court assumed domestic law applied. Only on appeal was the CISG considered.<sup>5</sup> In three Slovak cases, the court simply overlooked the CISG and incorrectly applied the Slovak Commercial Code.<sup>6</sup> In one Australian case the CISG was completely overlooked in argument and the judgment, an oversight not fully corrected upon appeal.<sup>7</sup> The failure to raise the CISG until too late in the trial hearing in the U.S. case of *GPL Treatment* precluded its application and almost cost the plaintiff the case.<sup>8</sup>

1 Thus the CISG would apply: Art. 1(1)(a).

2 *Industrias Magromer Cueros y Pieles SA v. Sociedad Agrícola Sacor Limitada*, Corte Suprema, Chile, 22 September 2008, available at <<http://cisgw3.law.pace.edu/cases/080922ch.html>> (*sub-nom Jorge Plaza Oviedo v. Sociedad Agrícola Sacor Limitada*).

3 *Id.* The CISG was only argued in the Court of Appeal and Supreme Court: J. Oviedo-Albán, 'Exclusión tácita de la ley aplicable e indemnización de perjuicios por incumplimiento de un contrato de compraventa internacional (a propósito de reciente jurisprudencia chilena)', 14 *Int'l Law, Revista Colombiana de Derecho Internacional* 191, at 194 and 195 (2009) (stating the decision was incorrect).

4 *Boiler* case, Oberster Gerichtshof [Supreme Court](OGH), Austria, 2 April 2009, available at <<http://cisgw3.law.pace.edu/cases/090402a3.html>>.

5 Landesgericht [District Court](LG) Steyr, Austria, GZ 4 Cg 146/05m-45, 29 January 2008. At first instance, both parties and the court referred to domestic law including Art. 922 Allgemeines Bürgerliches Gesetzbuch 1811 [Austrian General Civil Code](ABGB): Oberlandesgericht [Appellate Court](OLG) Linz, Austria, 25 July 2008, GZ 3 R 46/08t-49.

6 Regional Court, Nitra, Slovak Republic, 15 October 2008, available at <<http://www.cisg.sk/en/15cob-140-2008.html>>; Supreme Court, Slovak Republic, 26 October 2006, available at <<http://www.cisg.sk/en/3obob-247-2005.html>>; Supreme Court, Slovak Republic, 28 February 2001, available at <<http://www.cisg.sk/en/2cdo-114-2000.html>>.

7 *Italian Imported Foods Pty Ltd v. Pucci Srl*, New South Wales Supreme Court, Australia, 13 October 2006, available at <<http://cisgw3.law.pace.edu/cases/061013a2.html>> (*Italian Imported Foods*). See L. Spagnolo, 'The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers', 10 *Melbourne J. Int'l L.* 141, at 197-199 (2009).

8 *GPL Treatment v. Louisiana-Pacific Corp.*, 894 P. 2d 470 (Or. Ct App., 1995), 12 April 1995; aff'd 914 P. 2d 682 (Or., 1996), Oregon Court of Appeals, U.S.A., available at <<http://cisgw3.law.pace.edu/>

Even in China, which has a converse record of applying the CISG in situations when it is inapplicable,<sup>9</sup> there is at least one case where neither side argued the CISG and the court failed to mention it despite its applicability.<sup>10</sup>

On the other hand, there are cases in which the CISG was applied regardless of the fact that counsel did not present or inadequately argued the CISG.<sup>11</sup>

In many instances, the court or tribunal fails to appreciate that the CISG governs the matter. But what if the adjudicator *does* realize argument has been exclusively presented on the basis of the wrong law?

### 3 THE PROCEDURAL LAW OF THE FORUM AND REASONS FOR DIVERSITY IN PRACTICE

#### 3.1 *The Traditional View*

The resolution traditionally advanced by scholars is that procedural law determines the law to be applied where both sides have not presented argument on the law that is applicable, *ipso iure*. Pursuant to the traditional view, the course which a court must take is determined by the procedural law of the forum, and specifically, whether it follows *iura novit curia* (the court knows the law).<sup>12</sup> Naturally, since procedural rules vary, the traditional

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- cases/950412u1.html> (*GPL Treatment*) (the domestic ‘in writing’ requirement was displaced by the CISG, but counsel for plaintiff failed to raise this until too late, and the case was decided on the basis of the U.C.C.). See also, W.S. Dodge, ‘Teaching the CISG in Contracts’, 50 *Journal of Legal Education* 72, at 74 (2000); Flechtner, *infra* note 111, at 131; Ferrari, *International Legal Forum*, *infra* note 12, at 220, note 742.
- 9 Y. Xiao & W. Long, ‘Selected Topics on the Application of the CISG in China’, 20 *Pace Int’l L.Rev.* 61, at 70 (2008), available at <<http://www.cisg.law.pace.edu/cisg/biblio/xiao-long.html>> (describing this ‘phenomenon’ of application in Chinese cases).
- 10 *Gammatex International Srl v. Shanghai Eastern Crocodile Apparels Co. Ltd.*, Shanghai First Intermediate People’s Court, China, 21 August 2002, available at <<http://cisgw3.law.pace.edu/cases/020821c1.html>>. It is unclear whether the court was unaware of the CISG’s applicability, or was aware but did not apply it due to the parties’ failure to raise it: W. Long, email to author, 2 March 2010; Xiao & Long, *id.*, at 71.
- 11 Tribunale di Vigevano, Italy, 12 July 2000, available at <<http://cisgw3.law.pace.edu/cases/000712i3.html>>; Appellate Court (OLG) Hamm, Germany, 9 June 1995, §§ I & II, available at <<http://cisgw3.law.pace.edu/cases/950609g1.html>>; Landesgericht [District Court](LG) Landshut, Germany, 5 April 1995, available at <<http://cisgw3.pace.edu/cases/950405g1.html>>. See also, M. Torsello, ‘Italy’, in: F. Ferrari (Ed.), *The CISG and Its Impact on National Legal Systems*, 187, at 191–195, notes 20, 22 and 209 (2008); Oviedo-Albán, *supra* note 3, at 204; F. Ferrari, ‘CISG Rules on Exclusion and Derogation: Article 6’, in: F. Ferrari *et al* (Eds.), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention*, 114 at 131 (2004) (Digest & Beyond).
- 12 *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods*, Art. 6 para. 10 (2008), available at <<http://www.cisg.law.pace.edu/cisg/text/digest-art-06.html>> (UNCITRAL

view has the potential to foster divergent outcomes. Depending on whether or not the forum follows the principle of *iura novit curia*, the court may either be obliged to apply the applicable law, irrespective of whether parties have invoked it, or conversely, may be prohibited from applying it at all.<sup>13</sup>

The traditional approach has influenced decisions in practice. Thus the procedural principle of *iura novit curia* has been explicitly relied upon to justify application of the CISG in cases where counsel did not plead it.<sup>14</sup> Criticism has also been levelled at a case where the CISG was not applied on the basis that the court failed to observe the procedural law of the forum which was subject to *iura novit curia*.<sup>15</sup>

In terms of the CISG, this traditional view effectively treats the issue as an external gap, that is, that the duty of the adjudicator is a matter not covered by the CISG itself. It therefore denotes the issue as one for determination under domestic procedural law. In this chapter, I seek to challenge that view.

On its face, it seems inevitable that leaving the matter to domestic procedural law would produce diverse outcomes. But should we be concerned about this in any event? After all,

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- Digest); F. Ferrari, 'Applicability and Applications of the Vienna Sales Convention (CISG)', 4 *Int'l Legal Forum* 138, at 220 (1998) (Ferrari, *International Legal Forum*); Oviedo-Albán, *supra* note 3, at 203, note 22 and 214 (denying applicability of the CISG unless the parties invoke it or [*iura novit curia* applies] (my translation); Oviedo-Albán, *id.*, (citing a similar statement by Illescas-Ortiz & Perales Viscasillas); M. Reimann, 'The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care', 71 *RebelsZ* 115, at note 48 and accompanying text (2007); M. Bridge, 'Uniform and Harmonized Sales Law: Choice of Law Issues', in: J. Fawcett *et al.* (Eds.), *International Sale of Goods in the Conflict of Laws*, 905 at 917 (2005); Torsello, *id.*, at 191–192 and note 20; F. Ferrari, 'Remarks on the UNICITRAL Digest's Comments on Article 6 CISG', 25 *J. L. & Com.* 13, at 30–31 (2005) (Ferrari, *Remarks*); P. Schlechtriem & P. Perales Viscasillas, *Case note on decision of Court of First Instance of Tudela (Spain)* 29 March 2005, at note 10 (2005), available at <<http://www.cisg.law.pace.edu/cisg/biblio/perales4.html>> ('Whether counsel pleading for the parties properly introduced the applicable provisions of the CISG is not known to these annotators, but would be irrelevant, since *jura novit curia*'); A. Pribetic, *An 'Unconventional Truth': Conflict of Laws Issues Arising under the CISG*, at 27, presented at the Continuing Legal Education Program, Toronto, 10 March 2009; F. Mazzotta, 'The International Character of the UN Convention on Contracts for the International Sale of Goods: An Italian Case Example', 15 *Pace Int'l L. Rev.* 437, at 443 (2003); F. Ferrari, 'Applying the CISG in a Truly Uniform Manner: Tribunale di Vigevano (Italy), 12 July 2000', 1 *Uniform L. Rev.* 203, at 211 (2001).
- 13 See also, S.L. Sass, 'Foreign Law in Civil Litigation – A Comparative Survey', 16 *Am. J. Comp. L.* 332, at 334–335 (1968) (breaking the potential scenarios into three categories).
- 14 Tribunale di Vigevano, 12 July 2000, *supra* note 11, para. 5; Tribunale Civile di Cuneo, Italy, 31 January 1996, available at <<http://cisgw3.law.pace.edu/cases/960131i3.html>>; *Georgia Pacific Resins, Inc. v. Grupo Bajaplay, S.A. de C.V.*, Baja California, Fourth Panel of the Fifteenth Circuit Court [Federal Court of Appeals], Mexico, 9 August 2007, available at <<http://cisgw3.law.pace.edu/cases/070809m1.html>> (*Georgia Pacific Resins* case); Tribunale di Padova, Italy, 25 February 2004, available at <<http://cisgw3.law.pace.edu/cases/040225i3.html>>.
- 15 See, e.g., criticism of the Chilean decision in the *Industrias Magromer* case, *supra* note 2, by Oviedo-Albán, *supra* note 3, at 203, note 22 and 214.

perhaps the court or tribunal should be content that both sides have presented their case on the basis of the same law, and proceed to apply the law argued.

In truth, the effect goes beyond the immediate parties concerned. First and foremost, obligations of international law are at stake. Generally, the administration of justice is hindered by ‘incorrect’ application of the substantive law, but when the governing law is a treaty, a court’s failure to apply the applicable governing law can amount to a breach of international obligations.<sup>16</sup> At a practical level, it reduces the extent of influence on uniformity that would be otherwise achieved by the CISG. It deprives the expanding body of CISG case law from valuable additions, and robs the CISG of visibility in those jurisdictions where it is needed most; where the unwillingness of counsel to engage with it may arise from low levels of CISG litigation in their jurisdiction.<sup>17</sup> It signals to other counsel that they really need not bother to plead the CISG, even where it governs. The situation often leads to appeals and wastage of judicial resources and time.<sup>18</sup> Finally, as lawyers we should all be concerned about the effect on the rule of law when an inapplicable law is applied in not just one case, but many.

### 3.2 *The Principle of Iura Novit Curia*

As mentioned, the traditional view answers the question as to the law to be applied by the court in the above situation by referring to the procedural law of the forum, specifically, whether it follows *iura novit curia*.<sup>19</sup> At its core, the procedural principle of *iura novit curia* allocates the burden of establishing the identity of the applicable law and ascertaining its content.<sup>20</sup> It defines the very roles and respective responsibilities of the court and parties in relation to the substantive law.<sup>21</sup>

The suggestion in the traditional view that the outcome depends on whether a jurisdiction follows the principle of *iura novit curia* presupposes its absence in some of them. In truth, some version of *iura novit curia* exists in all jurisdictions. Judges are presumed to know

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16 See Part 4.1 below.

17 L. Spagnolo, ‘A Glimpse through the Kaleidoscope: Choices of Law & the CISG’, 13 *Vindobona Journal of International Commercial Law & Arbitration* 137, at 148 (Table 3) (2009).

18 In some cases like those from the Slovak Republic mentioned earlier, the decision is remitted back to the lower court with a direction that the court apply the CISG: *supra* note 6.

19 *Supra* note 12.

20 T. Isele, ‘The Principle of Iura Novit Curia in International Commercial Arbitration’, 13(1) *Int’l Arbitration L. Rev.* 14, at 14 (2010). This is sometimes referred to as the ‘burden of education’: M.S. Kurkela, ‘Jura Novit Curia’ and the Burden of Education in International Arbitration – A Nordic Perspective’, 21(3) *ASA Bulletin* 486, at 490 (2003).

21 Sass, *supra* note 13, at 332.

and empowered to apply the law, or at least the domestic law.<sup>22</sup> A 'strict' approach to *iura novit curia* obliges the court to *ex officio* identify and apply the substantive law it considers applicable to the case. A 'soft' approach to *iura novit curia* authorizes this, but does not demand it.

While civil law jurisdictions overtly acknowledge the principle, it has been claimed that it has no application in common law jurisdictions.<sup>23</sup> Yet it is probably more accurate to say that common law courts operate under a 'soft' form of *iura novit curia* in relation to domestic law, since common law judges also have an inherent power to apply points of law not invoked by counsel, subject to due process concerns.<sup>24</sup> The same due process concerns obviously also apply in courts which overtly follow the *iura novit curia* principle.

In the present context, the most important due process issue is the principle of *audi alteram partem*, the right to be heard, the contours of which are defined differently in different jurisdictions.<sup>25</sup> The breadth or narrowness with which the right to be heard is defined essentially determines the degree to which the court will feel constrained in a situation where counsel have not presented the case on the basis of the relevant law, as the ensuing decision may be overturned for failure to accord due process if counsel have not been invited to comment.<sup>26</sup>

22 See Isele, *supra* note 20, at 14-15; Kurkela, *supra* note 20, at 489. See also, International Law Association, *Final Report: Ascertainning the Contents of the Applicable Law in International Commercial Arbitration 3* (2008), available at <<http://www.ila-hq.org/en/committees/index.cfm/cid/19>> (ILA Final Report).

23 F.A. Mann, 'Fusion of the Legal Profession', 93 *L.Q.R.* 367, at 375 (1977) (stating absence of *iura novit curia* distinguishes English legal procedure vis-à-vis civil law). This has led to assertions of the so-called principle of 'judicial unpreparedness': Mann, *id.*, at 369.

24 In fact 'courts are typically expected to know their law': ILA Final Report, *supra* note 22, at 8. Isele also concludes some form of the principle applies in England: *supra* note 20, at 23, since 'the [English] judge may suggest new legal reasoning and is free to decide in accordance with such reasoning, and that rejection of application of law not pleaded in *Goldsmith v. Sperrings Ltd* [1977] 1 WLR 478, 486 (U.K.) was not due to 'lack [of] authority [in the court] to do so, but due to the lack of the opportunity to be heard on the specific legal issue': *id.*, at 15; Mann, *id.*, at 369 (English courts may put new legal questions to counsel, but are under no obligation to do so).

25 The right to be heard is often found in specific provisions designed to prevent 'surprise' decisions. For example, in Austria: Art. 182 Zivilprozessordnung [Austrian Code of Civil Procedure 1895] (Austrian ZPO); see *Boiler* case, *supra* note 4 (Austrian Supreme Court holding the Court of Appeal had infringed the ZPO Art. 182 in applying the CISG where parties had overlooked it, but ultimately the error did not affect the outcome). See also, Art.139 Zivilprozessordnung, Germany (German ZPO), (5 December 2005 version), available at <<http://www.gesetze-im-internet.de/bundesrecht/zpo/gesamt.pdf>>. Regarding common law approaches, see T. Ingman, *The English Legal Process* 491 (2008); M. Cappelletti & B.G. Garth, 'Introduction – Policies, Trends and Ideas in Civil Procedure', in: M. Cappelletti (Ed.), *International Encyclopedia of Comparative Law*, Ch. 1, Vol. XVI, Civil Procedure, at 81, §1-81 (1987).

26 Isele, *supra* note 20, at 15 noting the strict right to be heard in relation to legal reasoning in common law; M. Rosenberg *et al.*, *Elements of Civil Procedure: Cases & Materials* 9 (1970) (parties may otherwise be denied

Therefore it is the breadth of the right to be heard and its effect in triggering potential appeals rather than whether a particular jurisdiction overtly follows *iura novit curia* that might, under the traditional view, impact on outcomes. These will be taken into account in the solutions proposed in Part 6 below.

### 3.3 *Causes of Diversity in Current Outcomes*

There is no doubt that reactions to the failure to plead the CISG have been highly variable. As might be expected, domestic procedural rules have had an impact. However, the real causes of the diversity deserve closer attention, since differences in domestic procedural rules do not entirely explain the range of outcomes in the cases.

As mentioned earlier, some courts have directly referred to the domestic procedural principle of *iura novit curia* to justify the application of the CISG despite failure of counsel to mention it, in keeping with the traditional view.<sup>27</sup> Others have implicitly done so by relying upon the interplay between domestic procedural practice and due process rules to view such failures as a waiver pursuant to domestic conceptions. For example, in the U.S. case of *GPL Treatment*, counsel's failure to argue the CISG was held to amount to a waiver, which permitted the court to apply the inapplicable domestic law that had been pleaded.<sup>28</sup> The Court of Appeal made no attempt to interpret whether there had been an exclusion pursuant to the CISG, but merely dismissed the CISG by way of footnote in the dissenting judgment which concluded that because the 'attempt to raise the CISG was untimely [...] that they had waived reliance on that theory'.<sup>29</sup> It must therefore be taken as having concluded waiver pursuant to a domestic framework. Similarly, in the Australian *Playcorp* case, although the court was awake to the CISG's relevance, it was still convinced its application was 'unnecessary' not due to any conclusion that it had been excluded by the parties, but due to its purported similarity to domestic law. The case had been primarily argued on the basis of domestic law, and the court relied upon the absence of any suggestion

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the opportunity to test or address research conducted by the judge outside of court). Similarly, see also, *supra* note 25.

27 *Georgia Pacific Resins* case, *supra* note 14 (where the court found it was irrelevant whether or not the parties had mentioned the CISG because of the principle of law 'da mihi factur, dabo tibi ius' and principle of '*iura novit curia*'); Tribunale Civile di Cuneo, 31 January 1996, *supra* note 14 ('[a]lthough the parties did not refer to the CISG, its rules must be followed by this Court from the principle *iura novit curia*'); Tribunale di Vigevano, 12 July 2000, *supra* note 11, para. 5 ('[t]hus according to the principle *iura novit curia*, it is up to the judge to determine which Italian rules should be applied'); Tribunale di Padova, 25 February 2004, *supra* note 14 ('by virtue of the principle of *iura novit curia*, it is for the judge to determine the applicable Italian rules'). See also, for commentary in support of the traditional view, *supra* note 12.

28 The CISG was raised in argument only very late in the trial: *GPL Treatment*, *supra* note 8. See also *Italian Imported Foods*, *supra* note 7.

29 *GPL Treatment*, *id.*, Leeson J (dissenting, at note 8).

by counsel that the CISG was ‘inconsistent’ with local sales law. It therefore determined it was permissible to apply the domestic law. Again, this conclusion was reached by way of domestic principles.<sup>30</sup>

Then there are cases in which courts appear to interpret the CISG in determining whether the conduct amounts to an exclusion. Yet, vastly different approaches are apparent amongst such cases. Italian and German courts have expressly denied that mere failure to argue the CISG amounts to an implicit agreement to exclude it.<sup>31</sup> One Italian case stated the fact that ‘the parties based their arguments exclusively on [...] domestic law [...] cannot be considered an implicit manifestation of an intent to exclude application of the [CISG]’.<sup>32</sup> Other decisions have held that failure to argue due to a misapprehension that domestic law was applicable or because parties were simply unaware of the CISG does not support an imputation of intent to exclude it.<sup>33</sup> One case held that argument on German domestic law amounted to an agreement to apply German law, but not to exclude the CISG.<sup>34</sup>

On the other hand, the very same conduct has been construed as demonstrating an intention to exclude pursuant to the CISG. An implicit exclusion of the CISG was upheld in a Chilean case,<sup>35</sup> where the failure of parties to plead the CISG until the appellate stages was characterized as involving a tacit exclusion or implied waiver of the CISG pursuant

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30 The implementing legislation stated the CISG was to have the force of law, and was to prevail to the extent of any inconsistency: ss. 5 & 6 Sale of Goods (Vienna Convention) Act 1987 (Victoria). The court elevated the ‘inconsistency’ concept to effectively bypass the force of law given to the CISG, and ignores the inevitability that the unique interpretive methodology of the CISG will always render it different to domestic law despite any superficial resemblances. See *Playcorp Pty Ltd v. Taiyo Kogyo Ltd*, Victorian Supreme Court, Australia, 24 April 2003, at [235] and [245], available at <<http://cisgw3.law.pace.edu/cases/030424a2.html>>.

31 Tribunale di Cuneo, 31 January 1996, *supra* note 14; Tribunale di Vigevano, 12 July 2000, *supra* note 11, paras. 5 and 6; C. Sant’Elia, *Editorial Remarks*, available at <<http://cisgw3.law.pace.edu/cases/000712i3.html>>; Tribunale di Forli, Italy, 16 February 2009, §4.3.3, available at <<http://cisgw3.law.pace.edu/cases/090216i3.html>>; Appellate Court (OLG) Stuttgart, Germany, 31 March 2008, available at <<http://cisgw3.law.pace.edu/cases/080331g1.html>>; Appellate Court (OLG) Hamm, 9 June 1995, *supra* note 11; District Court (LG) Landshut, 5 April 1995, *supra* note 11, §II.1.a (the fact that both parties based their case on the BGB ‘does not change anything’). See also, International Chamber of Commerce (ICC) Award No. 7565 of 1994, available at <<http://cisgw3.law.pace.edu/cases/947565i1.html>>; UNCITRAL Digest, *supra* note 12, Art. 6, para. 10.

32 Tribunale di Vigevano, 12 July 2000, *supra* note 11, para. 5 (‘The fact that [parties] based their arguments exclusively on Italian domestic law without any references to the [CISG] cannot be considered an implicit manifestation of an intent to exclude’).

33 Tribunale di Vigevano, 12 July 2000, *supra* note 11 (stating it was to be assumed ‘the parties wanted to exclude the application of the [CISG] only if it appears in an unequivocal way that they recognized its applicability and they nevertheless insisted on referring only to national, non-uniform law’); UNCITRAL Digest, *supra* note 12, Art. 6 at para. 10.

34 Appellate Court (OLG) Hamm, 9 June 1995, *supra* note 11. The OLG Hamm decision stated that litigation exclusively based on BGB provisions implied a choice of German law, and hence the CISG applied; *id.*, I.

35 *Industrias Magromer* case, *supra* note 2.



to Article 6.<sup>36</sup> A Slovak court interpreted such conduct as a choice of law.<sup>37</sup> Although decided on other grounds, a Spanish court also determined the CISG was tacitly excluded partly due to the failure of parties to raise it until the appeal stage.<sup>38</sup> The French Cour de Cassation has in two cases applied the domestic law on the basis that failure by the parties to invoke the CISG was tacit exclusion under Article 6.<sup>39</sup> Furthermore, it seems the same may have occurred in China.<sup>40</sup> In all these cases the domestic law was ultimately applied despite the CISG's *prima facie* applicability.

This demonstrates current outcomes are unpredictable and diverse. It would be wrong to blame the differing outcomes completely on the natural consequences of the traditional view. As discussed above, all jurisdictions employ some version of *iura novit curia*, tempered by due process concerns, and plainly, some jurisdictions which overtly follow *iura novit curia* have interpreted such conduct as waiver, and applied domestic law instead. Indeed, even within a single jurisdiction, conflicting decisions have been reached.<sup>41</sup> Clearly, the domestic procedural rules are only partly the cause of the diversity.

Those cases approaching the matter as one dependent on domestic procedural rules are incorrect at law, at least in Contracting States. Likewise, decisions which instead rely upon

36 *Id.*; Oviedo-Albán, *supra* note 3, at 194, 195, 198, 199 and note 7.

37 Regional Court, Bratislava, Slovak Republic, 10 October 2007, available at <<http://www.cisg.sk/en/3cob-102-2007.html>> (interpreting failure to plead or argue the CISG as an exclusion of CISG and tacit choice of Slovakian domestic law pursuant to §9(1) of act no. 97/1963 Coll., on International Private and Procedural Law as amended) (translation by J. Kotrusz).

38 *BSC Footwear Supplies Ltd v. Brumby St.*, Audiencia Provincial de Alicante, Spain, 16 November 2000, available at <<http://cisgw3.law.pace.edu/cases/001116s4.html>> (deciding the CISG was tacitly excluded for three reasons, including failure to raise the CISG in pleadings and failure to argue the CISG until appeal); see also, P. Perales Viscasillas, *Abstract*, available at <<http://cisgw3.law.pace.edu/cases/001116s4.html>>.

39 *Société Muller Ecole et Bureau v. Société Federal Trait*, Cour de Cassation, France, 26 June 2001, available at <<http://www.cisg-france.org/decisions/2606012v.htm>> and <<http://cisgw3.law.pace.edu/cases/010626f1.html>> (stating that while French judges must apply the CISG as the substantive law of French international sales, the parties had tacitly excluded under Art. 6 by 'failing to invoke the [CISG] before the French court') (my translation); Cour de Cassation, France, 25 October 2005, CISG-online 1098, available at <<http://cisgw3.law.pace.edu/cases/051025f1.html>> ('that by invoking and discussing, without any reservation, the [French Civil Code] all of the parties [...] voluntarily placed the resolution of their dispute under French domestic law' by exclusion under Art. 6).

40 In *Gammatex International* case, *supra* note 10; Xiao & Long, *supra* note 9, at 71 (the court ignored the CISG's applicability despite fulfilment of the requirements of Art. 1(1)(a) and no apparent intent to exclude). From the Chinese text of the decision 'it is unclear whether the court is unaware of the applicability of CISG, or it is indeed aware of the applicability, but nevertheless did not apply the CISG because the parties did not raise the applicability issue' (translation by W. Long). Chinese law has now altered to allow parties to make choices of law until the end of the first instance oral hearings: Y. Xiao & W. Long, 'Private International Law in China: Selected Topics; Contractual Party Autonomy in Chinese Private International Law', 11 *Yearbook of Private Int'l L.* 193, at 199 (2009).

41 For example, compare Regional Court, Bratislava, 10 October 2007, *supra* note 37; Regional Court, Nitra, 15 October 2008, *supra* note 6; Supreme Court, Slovak Republic, 26 October 2006, *supra* note 6.

conclusions of implicit waiver or agreement to exclude based purely on the conduct of the case are also incorrect unless derived from an application of the CISG itself. By contrast, cases which rely on interpretation of the CISG in determining exclusion indeed rely on the correct source of law, but unfortunately presently display a wide range of inconsistent interpretations. While some might be explicable on their facts, most appear too quick to conclude there has been a tacit exclusion without careful consideration of the issue.

### 3.4 *Critique of Traditional View*

The manner in which the traditional view leaves the issue to the myriad of local domestic procedural rules is arguably unsatisfactory and in many circumstances, incorrect.

It is unsatisfactory because, to the extent of diversity in domestic procedural rules, the traditional view contributes to uncertainty of outcomes in the application of a uniform law, as seen above. It is often incorrect because it ignores the duty in certain fora to apply the CISG. This will be discussed in Part 4. Further, the traditional view demonstrates a lack of faith in the capacity of the CISG to deal with inferences from the failure to plead. It is submitted the CISG is more than capable of this, as discussed in Part 5.

The balance of this chapter seeks to provide a more satisfactory approach with the aim of improving certainty and predictability in outcomes. It attempts to do so by concentrating on the two crucial questions which must be answered in the typical situation described: if the CISG is not pleaded, is there an obligation upon the adjudicator to apply it? And secondly, does failure to plead the CISG amount to an exclusion of it pursuant to Article 6?

## 4 IS THERE A DUTY TO APPLY THE CISG IF IT IS NOT PLEADED?

If the CISG is the governing law of the contract, then to begin with domestic procedural rules is to start on the wrong foot. The first question to be asked is whether the CISG is applicable despite the failure to plead it. Essentially, one must ascertain whether there is an obligation upon the adjudicator to apply the CISG flowing from international law. Depending on the answer, domestic procedural rules may have no relevance at all.

The primary enquiry turns on the location and nature of the forum making the determination; whether the forum is a court or arbitral tribunal, and if it is a court, whether it is located in a Contracting State to the CISG. A further permutation is whether the matter is a trial or appeal case.

#### 4.1 *Courts in Contracting States*

This presents the simplest permutation. Where a court in a Contracting State hears a matter at the trial stage, it would be incorrect to consider domestic procedural laws such as *iura novit curia* relevant in the decision as to which law the court should apply.

##### 4.1.1 **Obligation to Apply the CISG**

In Contracting State courts where argument is solely based on inapplicable domestic law in relation to a contract to which the CISG applies, the court is *obliged* to apply the CISG to resolve the effect of such conduct. In my view, this is true irrespective of whether the Contracting State operates as a monist or dualist system, provided the CISG has been effected.<sup>42</sup> I will deal with each in turn.

In summary, a court in a monist Contracting State is obliged to apply the CISG to the extent it covers a particular issue, as a matter of international law. Any domestic procedural rules relating to issues of *iura novit curia* are therefore irrelevant due to this obligation. Only the right to be heard is not.

The obligation arises as a matter of international law, because of course the CISG is an international treaty. The Vienna Convention on the Law of Treaties 1969<sup>43</sup> at Article 26 states:

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Provided its basic criteria are met,<sup>44</sup> the CISG is the applicable law. The applicability of the CISG to the typical situation described earlier arises under Article 1(1)(a) CISG, but the same would be true should the CISG apply via Article 1(1)(b). Absence of argument from counsel on the CISG cannot alter the court's fundamental obligation, as an organ of a Contracting State to the CISG, to apply it under these circumstances.<sup>45</sup> The imposition of

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<sup>42</sup> The CISG is not necessarily in effect in all regions of Contracting States: see W. Long, 'The Reach of the CISG in China: Declarations and Applicability to Hong Kong and Macao' and F. Yang, 'Hong Kong's Adoption of the CISG: Why do we need it now?', both in this volume.

<sup>43</sup> Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, Vol. 1155 U.N.T.S. 331.

<sup>44</sup> The CISG applies when its geographical, temporal and material criteria are satisfied: Oviedo-Albán, *supra* note 3, at 199; H.M. Flechtner (Ed.), J.O. Honnold, *Uniform Law for International Sales*, Art. 1, at 29-48 (2009) (Honnold 4th edn); F. Ferrari, 'The CISG's Sphere of Application: Articles 1-3 and 10', in: *Digest and Beyond*, *supra* note 11, 21, *passim*.

<sup>45</sup> Stating the applicability of the CISG is not dependent on a claim by the parties, but is to be examined *ex officio* by the court: I. Schwenzer & P. Hachem, in: I. Schwenzer (Ed), *Schlechtriem & Schwenzer: Commentary*

a treaty obligation to apply the CISG as the applicable law *ipso iure* means that the court's obligation is a strict duty to apply the correct law rather than a softer authority to do so.

Lest it be thought that domestic procedural rules could still play a part in relation to waiver by conduct of the CISG as a directory substantive law, the Vienna Convention on the Law of Treaties at Article 27 states:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty [...]

Thus to the extent that any rule of domestic procedure interferes with the application of the CISG, its observance by a court in a Contracting State would amount to a breach of that State's international obligation to apply the CISG. This is true of both dualist and monist systems.

The description of the obligation to apply the CISG as a matter of international law is relatively unproblematic in monist states, where a theory of unity of legal systems and primacy of international law ensures that international treaty obligations directly bind national courts without 'transformation',<sup>46</sup> although this can be sometimes less than straightforward in practice.<sup>47</sup> However, the proposition will not generally hold true in dualist states, where the accepted theoretical construct suggests two distinct legal orders of international law and municipal law, and in which, consequently, international law is not necessarily recognized as directly binding upon national courts, until 'transformed' in a manner determined internally.<sup>48</sup>

It is interesting to contemplate how courts have dealt with this. In some dualist systems, particularly those in the EU, courts have evolved a more 'internationalist' approach over

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*on the UN Convention on the International Sale of Goods (CISG)*, Arts 1-6, at 19-20 para. 3 (2010)(Schwenzer 3<sup>rd</sup> edn).

46 Thus in Europe, municipal courts are 'accustomed to the doctrine of "direct effect" under community law', such that the content of clear and unconditional international norms apply directly once integrated into the domestic legal order: A. Bianchi, 'International Law and US Courts: The Myth of Lohengrin Revisited', 15 *Eur. J. Int'l L.* 751, at 758 (2004); B. Conforti, *International Law and the Role of Domestic Legal Systems*, 25 (1993); A. Cassese, *International Law*, 213-216 (2005).

47 Conforti, *id.*, at 26 (noting that even in some monist states there is reluctance to implement treaties without internal directives to do so). Also, consider regions within some Contracting States, such as Macao: see Long, *supra* note 42; Yang, *supra* note 42.

48 See (writing extra-curially) Chief Justice Robert French, *International Law and Australian Domestic Law*, presented at the Annual Conference of the Supreme Court of New South Wales, Hunter Valley, 21 August 2009, at 23, available at <<http://www.highcourt.gov.au/speeches/frenchcj/frenchcj21aug09.pdf>>; Cassese, *supra* note 46, at 214.

time to increasingly recognize the direct effect of international law.<sup>49</sup> Many courts in dualist systems have developed a presumption to the effect that domestic laws should be interpreted to conform to international law whenever possible, on the basis that, having entered into a treaty, the state is presumed to have intended to give it effect unless the contrary is evident.<sup>50</sup> However, in certain dualist states, even though such presumptions are recognized, they are seldom utilized.<sup>51</sup> Indeed, there is a much-criticized persistent reluctance in the U.S. to accept the integration of international law, expressed in the doctrine of non-self-execution.<sup>52</sup> Perhaps anachronistically,<sup>53</sup> in the U.K. and Australia, national courts are not bound by international law *per se*, and will uphold domestic law, despite the fact that to do so where the domestic and international laws conflict involves a violation of international treaty obligations on the part of the State.<sup>54</sup>

Whatever may be the case generally, the CISG presents a special case. First, the CISG has been integrated into the internal legal systems of Contracting States, in the case of dualist states, either by being ‘incorporated’ or ‘transformed’ at the domestic level.<sup>55</sup> For example,

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- 49 This has been the case in Italy, without constitutional or statutory change, in relation to EU Regulations: Conforti, *supra* note 46, at 39. Of course, the EU itself is a monist system.
- 50 See, e.g., Italy, see Cassese, *supra* note 46, at 229-230; Sweden, C. Ehrenkrona, ‘The Impact of International Law Instruments on National Legislation’, Report to the European Commission for Democracy through Law (Venice Commission), 7 July 2010, at 6, available at <[www.venice.coe.int](http://www.venice.coe.int)>. See, e.g., Australia, see *Mabo v. Queensland* (No 2) (1992) 175 CLR 1, at 41-43, High Court of Australia; *Minister for Foreign Affairs and Trade v. Magno* (1992) 112 ALR 529, at 534-535, High Court of Australia (*Magno* case). See also, Conforti, *supra* note 46, at 42.
- 51 In the U.S.A. this is known as the ‘Charming Betsy’ rule of statutory interpretation: *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, at 81; 2 Cranch 64 (1804); *Talbot v. Seeman*, 5 U.S. 1, at 76; 1 Cranch 1 (1801). See also, American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, at §114 (1987); Bianchi, *supra* note 46, at 761 and 771-773. By contrast, in Australia, international obligations have impacted upon interpretation of domestic common law in some of the most prominent cases: see *Magno* case, *id.*
- 52 In the U.S., constitutional norms govern the internal binding effect of treaties. Despite the constitutional Supremacy Clause rendering treaties self-executing, this is said to depend on construction of intent: see, e.g., *Medellin v. Texas*, 555 U.S. 491, at 504-505 (2008), U.S.A.; *Hamdi v. Rumsfeld*, 316 F.3d 450 (4<sup>th</sup> Cir., 2003), U.S.A.. This has allowed a doctrine of non-self-execution to flourish, based on constitutional doctrine, including the separation of powers and federalism: J. Yoo, ‘Globalism and the Constitution: Treaties, Non-Self-Execution and the Original Understanding’, 99 *Colum. L. Rev.* 1955, at 1959-1960 and 1982 (1999); Bianchi, *id.*, at 759 and 760. The U.S.A. has signed but not ratified the Vienna Convention on the Law of Treaties.
- 53 Conforti, *supra* note 46, at 20 and 83 (pointing out that dependency of the judiciary on the executive to implement international law is inconsistently upheld and hard to justify).
- 54 Cassese, *supra* note 46, at 236 (describing this as extreme ‘statism’); Conforti, *supra* note 46, at 40. See also, French CJ, *supra* note 48646, at 23-29; *R v. Jones*, [2007] 1 AC 136, House of Lords, U.K.; *Magno* case, *supra* note 50, at 534-535; Ehrenkrona, *supra* note 50, at 6 (commenting generally).
- 55 Note Ghana and Venezuela have signed but not ratified the CISG: UNCITRAL website, available at <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html)>. In Ghana, ad hoc legislation is required: Cassese, *supra* note 46, at 229; E. Laryea, ‘Why Ghana Should Enact Certain Interna-

in Australia, the CISG has been adopted in the form of a statute in each of the jurisdictions within its federation.<sup>56</sup> In the U.S.A., even following the decision in *Medellin v. Texas*,<sup>57</sup> it is likely the CISG would be considered a self-executing treaty.<sup>58</sup> From a dualist perspective, there is no conflict between the international obligations of the Contracting State and domestic law. The CISG forms part of the domestic law, and its provisions incontrovertibly bind national courts in dualist systems.

Secondly, in Contracting States, the CISG applies automatically and dictates both when and how it is to apply. Where the CISG is applicable pursuant to Article 1, the domestic law itself demands its application. Thus in a dualist system, the court is charged by the domestic law with the task of enforcement of the CISG where it is the applicable law according to its own terms.<sup>59</sup> It might be argued that courts can still observe procedural rules or principles which recognize the freedom of litigants to run their cases.<sup>60</sup> However, implementation of the CISG is not left to the court as a matter of domestic procedure. There is no discretion granted to the court in relation to whether or not it should be applied.<sup>61</sup> The CISG sets out the hierarchy of laws in relation to matters within its scope in Article 7(2) CISG, and imposes upon courts in Contracting States a duty to take into account the CISG's international nature in its interpretation,<sup>62</sup> and a duty to interpret it in a manner that promotes uniformity, in other words, in accordance with the CISG's own internal methodology: Art 7(1) CISG.<sup>63</sup> Essentially, the domestic law *directs* the court to

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tional Legal Instruments relating to International Sale of Goods Transactions', 19(1) *African J. Int'l & Comp. L.* 1, at 9-17 (2011). See also, Long, *supra* note 42; Yang, *supra* note 42.

56 Spagnolo, *supra* note 7, at 143, note 4.

57 *Medellin* case, *supra* note 52, at 505 and 520-523 (majority conclusion that to be self-executing treaties must convey by their textual provisions an intention to be so, and resort may be had to secondary sources).

58 M. Cantora, 'The CISG after *Medellin v. Texas*: Do U.S. Businesses Have It? Do they Want It?', 8 *J. Int'l Bus. & L.* 111, at 113, 114 (2009) (concluding that sufficient indications of an intention by the President and the Senate for the CISG to apply as a self-executing treaty pursuant to the principles espoused by the majority in *Medellin* can be found in a clear statement by the U.S. President to the Senate demonstrating an understanding that the CISG was self-executing).

59 *Contra* Bridge, *supra* note 12, at 917 (arguing that Art. 1 does 'not with sufficient clarity abridge' the long-standing freedom of litigants to ignore foreign law).

60 *Id.*

61 Other than (irrelevantly for present purposes) regarding specific performance orders: Art. 28 CISG.

62 Art. 7(1) demands that, in interpreting the CISG, 'regard is to be had to its international character'.

63 Describing theses as international obligations: P. Schlechtriem, 'The Borderland of Tort and Contract – Opening a New Frontier?', 21 *Cornell Int'l L. J.* 467, at 468-469 (1988) (*Borderland*); J.O. Honnold, *Documentary History of the Uniform Law for International Sales* 89 (1989); Honnold 4<sup>th</sup> edn, *supra* note 44, at 128 para. 92; Bridge, *supra* note 12, at 922; J.S. Ziegel, 'The Future of the International Sales Convention from a Common Law Perspective', 6 *New Zealand Business L. Q.* 336, 342, note 30 (2000); C.B. Andersen, 'The Uniform International Sales Law and the Global Jurisconsultorium', 24 *J. L. & Com.* 159, at 166 (2005) (recourse to foreign CISG jurisprudence is a duty); Spagnolo, *supra* note 7, at 167; Schwenzer & Hachem, *supra* note 45, Art. 7, at 123 para. 7 ('regard is to be had' as a 'command' directed to courts and tribunals).

honour the international obligations of the Contracting State in relation to the CISG in relation to individual cases.

Similarly, in *Fothergill v. Monarch Airlines Ltd* in relation to Article 32 of the Vienna Convention on the Law of Treaties and consultation of *travaux préparatoires* by English courts in interpretation of a treaty, Lord Diplock stated:

By ratifying that Convention, [the] Government has undertaken an international obligation on behalf of the United Kingdom to interpret future treaties in this manner and since under our constitution the function of interpreting the written law is an exercise of judicial power and rests with the courts of justice, that obligation assumed by the United Kingdom falls to be performed by those courts.<sup>64</sup>

Hence the issues foreshadowed above regarding dualist states are not problematic for present purposes. While in monist states, courts are bound by the direct effect of the CISG as international law, courts in dualist states are bound by the terms of the CISG as municipal law to implement the international obligations of the Contracting State, in a manner which reflects the CISG's nature as international uniform law. It could be argued that the CISG effectively 'pierces the armour' of the dualist international-domestic law dichotomy<sup>65</sup> in a practical sense. However, in any event, the direction within the CISG to apply it where it is the governing law *ipso iure* will bind courts in dualist Contracting States to apply the CISG *ex officio* if necessary, even if the obligation technically arises as a matter of domestic law.

It should be noted that when the court is in a Contracting State, the CISG is not a foreign law. Despite the fact it is simultaneously a treaty, it forms part of the domestic law of the jurisdiction – a part of the law of the forum.<sup>66</sup> Therefore in Contracting States, how the forum treats foreign law is irrelevant.<sup>67</sup> Its applicability and content are a question of law, not fact. Any default rule regarding substitution of domestic for a foreign law has no place

<sup>64</sup> *Fothergill v. Monarch Airlines Ltd* [1981] AC 251 (U.K.). The House of Lords was concerned with the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air, as amended (1955), implemented in the Carriage by Air Act (1961) (U.K.).

<sup>65</sup> The description used in a different context by Cassese regarding the inroads modern international law has made into various municipal systems: *supra* note 46, at 217.

<sup>66</sup> Similarly, see Bridge, *supra* note 12, at 916; Schwenger & Hachem, *supra* note 45, Introduction to Arts 1-6, at 19 para. 3; L. Sevón, 'Method of Unification of Law for the International Sale of Goods', in: K. Buure-Hägglund (Ed.), *The Finnish National Reports to the Twelfth Congress of the International Academy of Comparative Law*, 11 at 14 (1986); *Georgia Pacific Resins* case, *supra* note 14.

<sup>67</sup> See discussion below in Part 4.2, at note 78 and accompanying text.

in the process.<sup>68</sup> This will be true regardless of how the CISG applies. In the case of Article 1(1)(a), where the CISG's requirements for application are satisfied, the CISG applies automatically.<sup>69</sup> If, on the other hand, the forum's private international law leads to the law of a Contracting State in accordance with Article 1(1)(b), then a Contracting State court is still bound to apply the CISG.<sup>70</sup> Normally, once conflict rules have identified the applicable foreign law, the manner in which its content would be ascertained would turn on whether the forum's procedural rules treat foreign law as law or fact, as discussed below.<sup>71</sup> However, where the forum is located in a Contracting State, the CISG is not foreign law at all. Thus the CISG should always be treated as a matter of law *where it forms part of the forum's own law*. To the extent it governs a particular issue, the forum of a Contracting State is bound to apply it.

Most importantly, the obligation to apply the CISG *ex officio* arises from the CISG itself, not from any domestic procedural principle. This is contrary to the traditional view discussed above, and also contradicts cases which have upheld the CISG on the express basis of the local procedure of *iura novit curia*.<sup>72</sup>

#### 4.1.2 Displacement of Domestic Procedural Rules

The corollary of this obligation to apply the CISG *ex officio*, is that, where the CISG covers an issue, its provisions take precedence over any domestic procedural rules which would interfere with the fulfilment of that duty by the court. The legitimacy of such rules is essentially limited by the extent to which they can be reconciled with the Contracting State's obligation to apply the CISG. Even domestic procedural rules themselves often recognize the need to modify default rules in light of international obligations.<sup>73</sup>

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68 See discussion below in Part 4.2, at note 81 and accompanying text.

69 Honnold 4<sup>th</sup> edn, *supra* note 44, Art. 1, at 29-48; Ferrari, *supra* note 44, *passim*.

70 The only complicating factor here is whether or not the forum Contracting State, or indeed the Contracting State whose laws are determined applicable under conflicts rules have made an Art. 95 declaration. It is beyond the scope of this chapter to deal with this issue. See instead, Bridge, *supra* note 12, at 919-921 and 980-981; Ferrari, *id.*, at 52; see also W. Long, 'The Reach of the CISG in China: Declarations and Applicability to Hong Kong and Macao', in this volume.

71 See discussion below in Part 4.2, at note 78 and accompanying text.

72 See discussion of traditional view in Part 3.1, and see also, *supra* note 27 (cases expressly relying upon *iura novit curia* to apply the CISG).

73 T.C. Hartley, 'Pleading and Proof of Foreign Law: The Major European Systems Compared', 45 *Int'l & Comp. L. Q.* 271, at 287-288 (1996)(U.K.) (describing how the default rule of application of English law in substitution of an unproven foreign law is displaced by international obligations). See also, Hartley, *id.*, at 277, note 25 (mentioning that the Swiss default rule substituting the *lex fori* for foreign law may not apply where application is pursuant to an international obligation); Art. 142(2) 1986 General Principles of the Civil Law, China, which provides that to the extent of any inconsistency, treaty obligations prevail over substantive civil laws, unless China has made a reservation. In this regard, China's Art. 95 declaration may be relevant: see W. Long, 'The Reach of the CISG in China: Declarations and Applicability to Hong Kong and Macao', in this volume.



The issues addressed by domestic *iura novit curia* and tacit waiver in domestic law have the potential to interfere with the obligation of courts in Contracting States to apply the CISG. To that extent, such rules have no place in determining the appropriate course for such a court when faced with counsel who fail to plead the CISG. The duty requires the CISG to be applied to the extent of issues governed by it. While some disagree with blanket pre-emption,<sup>74</sup> others hold that the CISG applies exclusively in relation to matters covered by it, on the basis that, were it otherwise, the CISG could not implement uniform outcomes.<sup>75</sup> The CISG deals on its own terms with its exclusion by choice of law, as discussed below in Part 5.

At this point, there is no longer room for any domestic rule which says another law is to be applied by the court, either because of procedural rules relating to the court's role, local concepts of waiver, or due to rules of pleading.<sup>76</sup> The function of determining which law should be applied by the court has already been performed by the duty imposed upon the court. Consequently, it would be impermissible for any domestic procedural rules to confine the court to the inapplicable laws argued. It follows that these rules have been effectively displaced, leaving only the residual effect of the right to be heard.

Thus the obligation of courts to apply the CISG uniformly and internationally inexorably leads to the imperative that the CISG prevails over domestic procedural rules, at least to the extent such rules allow application of inapplicable law.<sup>77</sup> A domestic rule of procedure which would enable parties to oust the CISG from a contract to which it applies without actual agreement, would relegate the Contracting State's treaty obligations to the unfettered whims of counsel and threaten the harmonizing effect of the CISG.

Displacement of local procedural rules by a uniform approach under the CISG may in any event further the very aims to which domestic procedural rules aspire; proper administration of justice, development and clarity of the law, and judicial efficiency in the reduction of wasteful appeals. It encourages counsel to properly argue the case on the basis of relevant

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74 See, e.g., J. Lookofsky, 'In Dubio Pro Conventione? Some Thoughts about Opt-Outs, Computer Programs and Preemption under the 1980 Vienna Sales Convention (CISG)', 13 *Duke J. Comp. & Int'l L.* 263 (2003).

75 See generally: Schlechtriem, *Borderland*, *supra* note 63, *passim*; P. Schlechtriem & I. Schwenzer, in: Schwenzer 3<sup>rd</sup> edn, *supra* note 45, Introduction 8-9.

76 Inferences from rules of pleading that preclude entitlement to argue the CISG cannot be relied upon to demonstrate inferences of an intent to exclude, although it must be conceded that loss of entitlements due to issues outside the CISG's scope, such as limitation periods, will obviously have such an effect and are not displaced. See also, the discussion regarding appeals, Part 4.4 below.

77 The author has previously asserted this point: *supra* note 7, at 215, note 522. See also, Pribetic, *supra* note 12, at 27 (arguing that if applicable the CISG must be applied despite differences between common and civil law on this point).

law, or to inform clients of their rights and obligations under relevant law and advise them to expressly agree to exclude it.

Displacement is important to resolving the erratic and unpredictable outcomes seen in practice, as outlined in Part 3.3. A straightforward solution under the CISG will result in improvements to uniformity and certainty. The suggested range of practical solutions in Part 6 also seeks to address non-displaced considerations of due process.

#### 4.2 Courts in Non-Contracting States

Obviously a court in a non-contracting state is not bound by any obligation to apply the CISG of the type discussed above in Part 4.1, even if its conflict rules point to the law of a State which has adopted the CISG. Application of the CISG in such circumstances amounts to application of a foreign law.

Since in this permutation the CISG applies as foreign law, the extent to which a court considers itself either obliged, empowered or prohibited from applying the foreign law will be influenced by whether the forum's procedural rules treat foreign law as a question of fact or law.

The classification profoundly alters the burden of discovering the foreign law and applying it.<sup>78</sup> Proof of foreign law is frequently a matter for the parties, who might bear the onus of proof of the foreign law as a matter of fact, even in jurisdictions where *iura novit curia* overtly applies to domestic law.<sup>79</sup> Also, irrespective of where the primary burden lies, courts can normally require parties to assist in establishing foreign law, irrespective of character-

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78 English courts cannot take judicial notice of foreign law: S. Geeroms, *Foreign Law in Civil Litigation: A Comparative and Functional Analysis* 114 (2004); Cappelletti & Garth, *supra* note 25, at 29, notes 176-177, §1-26. In the US, foreign law is now treated as a question of law, and federal courts and certain state courts are empowered (but not obliged) to take judicial notice of it: Rule 44.1 Federal Rules of Civil Procedure, U.S.A.. See *Frummer v. Hilton Hotels International, Inc.*, 60 Misc. 2d 840, 304 N.Y.S. 2d 335, Supreme Court, New York, U.S.A., 18 August 1969 (courts can take judicial notice of foreign law, but are not obliged to raise it *sua sponte*, unlike domestic law). By contrast, a duty to establish foreign law *ex officio* if necessary exists in some jurisdictions: see, e.g., F. Galgano, 'The New Lex Mercatoria', 2 *Ann. Surv. Int'l & Comp. L.* 99, at 105 and note 11 (1995) (Italian judges must ascertain and apply foreign law *ex officio*); Sass, *supra* note 13, at 357 and note 85 (Italy); B. Bastuck & B. Gopfert, 'Admission & Presentation of Evidence in Germany', 16 *Loy. L.A. Int'l & Comp. L. J.* 609, at 622-623 (1994) (Germany); G. Dannemann, *Establishing Foreign Law in a German Court, Joint Workshops on Comparative Litigation Practice*, presented at British Institute of Int'l & Comparative Law & British-German Jurists Association, 30 June 1994, at text accompanying notes 4-7.

79 See, e.g., in Scandinavian countries different aspects of foreign law are treated variously as law or fact: I. Zajtay, Ch. 14, 'The Application of Foreign Law', in: K. Lipstein (Ed.), *International Encyclopedia of Comparative Law*, Vol. III, Private International Law, at 8, §14-13 (1972).

ization.<sup>80</sup> Finally, when the content of foreign law cannot be ascertained, pursuant to domestic procedural rules, domestic law usually operates as a default.<sup>81</sup> A non-contracting state court's classification of foreign law as fact or law is therefore crucial, and will influence the manner in which the CISG's applicability and content are to be ascertained.<sup>82</sup> In these circumstances, the forum's procedural rules are determinative. Clearly, the traditional view that domestic procedural law determines the law to be applied holds true in non-contracting states.

#### 4.3 Arbitrations

Except for tribunals such as ICSID which have been established pursuant to Conventions and are therefore of a public law nature,<sup>83</sup> arbitral tribunals are private institutions. They are not organs of the state, and have no duty to fulfil treaty obligations. Arguably, the tribunal owes duties only to the parties involved.

Yet arbitral tribunals do not operate in a complete vacuum. Their authority is derived from the arbitration agreement and the *lex arbitri*, however tribunals may need to consider a host of laws and rules to determine the respective roles of the tribunal and parties in relation to identification and application of the substantive law. These include the *lex arbitri*, and in particular, its mandatory rules including rules of due process,<sup>84</sup> any arbitration

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80 The court may require parties to assist in ascertaining foreign law in many jurisdictions. See, e.g.: Rule No. 44.1 Federal Rules of Civil Procedure, U.S.A.; Art. 293 German ZPO; Isele, *supra* note 20, at 15-16 (Germany & France); Sass, *supra* note 13, at 356-358 (Germany); Art. 12(6) Código Civil [Spanish Civil Code]; Isele, *id.*, at 15 (Switzerland); Art. 14 Lei de Introdução ao Código Civil Brasileiro 1942 [Brazilian Law of Introduction to the Civil Code], Decreto-Lei Nº 4.657; Art 13 Code de procédure civile [French Code of Civil Procedure]; Sass, *id.*, at 356 (Italy); Kurkela, *supra* note 20, at 493 (Finland); J. Dolinger, 'Application, Proof and Interpretation of Foreign Law: A Comparative Study in Private International Law', 12 *Ariz. J. Int'l & Comp. L.* 225, at 235-236 and 247-248, notes 55-59 and 110-111 (1995)(Greece).

81 L. Collins (Ed.), 'Dicey & Morris: The Conflict of Laws', 221 (2000)(Rule 18)(U.K.); Hartley, *supra* note 73, at 285 (U.K.); R. Fentiman, 'Foreign Law in English Courts', 108 *L. Q. R.* 142, at 147 (1992) (asserting a different basis for the English rule); Dannemann, *supra* note 78, at text accompanying note 23 (Germany); Bundesgerichtshof [Federal Supreme Court](BGH), Germany, 23 December 1981, NJW (1982), 1215; Kurkela, *supra* note 20, at 486 and note 5 (Finland); J. Rajska, 'The New Polish Private International Law, 1965', 15 *Int'l & Comp. L. Q.* 457, at 463 (1966)(Poland); Geeroms, *supra* note 78, at 113 (France).

82 Noting classification of the CISG as foreign law in such circumstances: Schwenzer & Hachem, *supra* note 45, Art. 1, at 40 para. 31.

83 I. Kalniņa, 'Iura Novit Curia: Scylla and Charybdis of International Arbitration?', 8 *Baltic Yearbook Int'l L.* 89, at 95 *et seq* (2005).

84 G. Born, *International Commercial Arbitration*, 426 (2009); J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* 524 para. 21-17 (2003). Generally, see G. Cordero Moss, 'Can an Arbitral Tribunal Disregard the Choice of Law made by the Parties?', 1 *Stockholm Int'l Arbitration Rev.* 1, at 4 (2005).

rules agreed by the parties, and conflict rules under the *lex arbitri* or arbitration rules.<sup>85</sup> Additionally, unlike courts, arbitral tribunals have no default substantive law of the forum upon which to fall back.<sup>86</sup>

Debate has recently arisen as to whether a principle of *iura novit arbiter* should be employed by arbitrators facing the type of situation posed in this chapter. Arbitral tribunals are bound by the procedure contained within the relevant arbitral law and arbitration rules. The arbitral law of the seat normally requires the tribunal to follow the choice of law made by the parties, and provides it with discretion where no choice has been made.<sup>87</sup> A choice of particular arbitral rules can clarify the role of the tribunal, as some rules contemplate the *iura novit arbiter* issue. For example, Rule 22(1) LCIA Rules gives the tribunal the power to ascertain and apply the law *sua sponte*, provided the parties have not agreed otherwise.<sup>88</sup> Similarly, the U.K. Arbitration Act s. 34(1) & (2)(g) is an arbitration law that specifically deals with this aspect of procedure.<sup>89</sup> These point to a soft version of *iura novit arbiter*; the tribunal is empowered to look beyond party legal submissions (unless parties have agreed to the contrary), but is not obliged to do so. In the case of the LCIA Rules, the power is subject to the due process proviso that parties must be given an opportunity to comment on independent research or novel legal points.<sup>90</sup>

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85 R. Goode, 'Litigation or Arbitration? The Influence of the Dispute Resolution Procedure on Substantive Rights', 19 *Pace Int'l L. Rev.* 53, at 56 (2007) (noting that while arbitrators often follow the conflict rules of the seat of arbitration, they are normally not *obliged* to do so); Lew *et al, id.*, at 427, para. 17-51; Schwenzer & Hachem, *supra* note 45, Arts 1-6, at 23 para. 13; G. Kaufmann-Kohler, 'Globalization of Arbitral Procedure', 36 *Vand. J. Transnat'l L.* 1313, *passim* (2003). The tribunal might also consider rules relevant to enforceability, although normally these are essentially similar to the requirements of the *lex arbitri*. For example, Art. 36 UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006, Gen. Ass. Res. 40/72, U.N. Doc. A/40/17, annex I, 11 December 1985, Gen. Ass. Res. 61/33, 4 December 2006 (UNCITRAL Model Law); Art. V Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, 330 UNTS 38 (New York Convention).

86 See also, Kaufmann-Kohler, *id.*, at 1332 (tribunals only have foreign law, and 'no *lex fori*'); Isele, *supra* note 20, at 16 (arbitral tribunals have 'no forum law to fall back on').

87 See, *e.g.*, Art. 28 UNCITRAL Model Law.

88 London Court of International Arbitration Rules 1998 (LCIA Rules) Rule 22(1): 'Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views: [...] (c) [...] to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying the issues and ascertaining the relevant facts and the law(s) or rules of law applicable to the arbitration'. See also, Art. 17(1) International Chamber of Commerce, Rules of Arbitration 1998 (ICC Rules 1998).

89 U.K. Arbitration Act 1996 s. 34(1) & (2)(g) states that unless parties agree otherwise, the arbitral tribunal may decide 'whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law'. See also, Kurkela, *supra* note 20, at 493.

90 *Supra* note 88. Indeed, some rules require tribunals to take account of contractual terms and usages 'in all cases', which by implication includes those where parties have not invoked them: Art. 17(2) ICC Rules 1998; Art. 35(3) UNCITRAL Arbitration Rules 2010.

It is submitted that, even where LCIA Rules are not applicable, they encapsulate the preferable approach to which tribunals should aspire. The soft form *iura novit arbiter* achieves the right balance between the respective roles of the parties and the tribunal, and provides flexibility to deal with inadequate submissions.<sup>91</sup>

Why is this flexibility inherently useful? Unless the tribunal is expressly appointed as *amiable compositeur*,<sup>92</sup> its mandate is to decide the dispute *according to law*.<sup>93</sup> A tribunal cannot decide a matter capriciously. If the tribunal can ignore the relevant law, the duty to decide according to law is rendered purely fictional.<sup>94</sup> Treatment of applicable law as a merely evidentiary matter is not compatible with this duty.<sup>95</sup> Faced with counsel who fail to address the relevant law, flexibility ensures the tribunal can draw on its own experience and research to direct counsel toward the correct law.<sup>96</sup>

Moreover, the soft version of *iura novit arbiter* combined with a broad right to be heard maintains standards that safeguard against challenges to the arbitration or award.<sup>97</sup> The need for due process is an overriding principle of arbitration,<sup>98</sup> and while awards by tribunals employing a narrow right to be heard have been upheld, there are also awards that have been set aside for failure of due process, even in courts renowned for upholding narrow definitions of the right to be heard in relation to arbitral awards.<sup>99</sup> Careful observance of a broadly defined 'right to be heard' is therefore prudent.

91 ILA Final Report, *supra* note 22, Recommendation No.7 (the tribunal is not confined to sources invoked by the parties, subject the opportunity to be heard in Recommendation No. 8). *Contra*, Recommendation No. 6 (arbitrators should not generally introduce new legal issues unless due to public policy rules or issues which may later lead to challenges to the award); A. Dimolitsa, 'The Equivocal Power of the Arbitrators to Introduce Ex Officio New Issues of Law', 27(3) *ASA Bulletin* 426, at 427 (2009) (describing the power (but not obligation) of a tribunal to ascertain the contents of applicable law as 'a facet of their jurisdictional mission').

92 That is, appointed to decide *ex aequo et bono*. Generally tribunals must be expressly authorized to decide in this manner: see, e.g., Art. 28(3) UNCITRAL Model Law; Art. 17(3) ICC Rules 1998. Nappert also alludes to this: S. Nappert, 'Observations', 3 *Stockholm Int'l Arbitration Rev.* 283, at 286 (2008). See also: ILA Final Report, *supra* note 22, at 6.

93 ILA Final Report, *id.*, at 19.

94 Kurkela, *supra* note 20, at 495.

95 *Id.*

96 Swiss courts consider *iura novit curia* to apply to arbitrations: Dimolitsa, *supra* note 91, at 431; ILA Final Report, *supra* note 22, at 14 and note 42.

97 Art. V New York Convention; Art. 34(2) UNCITRAL Model Law.

98 Kaufmann-Kohler, *supra* note 85, at 1322-1323; ILA Final Report, *supra* note 22, at 20.

99 See, e.g., Bundesgericht [Federal Supreme Court], Switzerland, 4A\_108/2009, 9 June 2009. 28(3) *ASA Bulletin* 553 (2010) (inapplicable law not invoked but applied by tribunal); *Louis Dreyfus SAS v. Holding Tusculum BV*, Quebec Superior Court, Canada, 8 December 2008 (*Dreyfus v. Tusculum*) (annulling an award imposing a remedy neither side had pleaded for failure of the right to be heard and *ultra petita*); S. Nappert, *Arbitral Activism: The Manifold Guises of Iura Novit Arbiter* (2010), available at <<http://demo.kluwerarbitration.com/arbitration/Newsletter.aspx?month=march2009>> (commenting on the *Dreyfus* case); B. Grob & G. von Segesser, available at <<http://kluwerarbitrationblog.com/blog/2009/08/27/iura-novit-curia-the-right>>

Naturally, this would mean that tribunals cognizant that the CISG applies would need to suggest this to the parties before they would be empowered to apply it pursuant to this approach. Some have remarked upon the potential threat to the appearance of neutrality that such intervention might invite, since this could lead to the award being set aside for bias.<sup>100</sup> Nonetheless, if attention of counsel is focussed on clarification of the legal point involved, the success of such a challenge is difficult to envisage.

Awards or indeed arbitrations can also be challenged on an *ultra petita* basis.<sup>101</sup> This will be particularly so if the tribunal awards relief not claimed or greater relief than claimed. Alternatively, the tribunal in applying novel legal points might be considered to have gone beyond its arbitral mandate.<sup>102</sup> However, such attacks are rarely upheld,<sup>103</sup> so provided the arbitration agreement submits 'all disputes arising out of or in connection with the contract' to the tribunal, decisions based on the CISG are unlikely to be beyond the tribunal's mandate, even if impeachable for breach of due process.<sup>104</sup>

There are parallels to the issues that face courts.<sup>105</sup> It may be true that, unlike court decisions, arbitral awards are not generally reviewable on questions of law,<sup>106</sup> but both are vulnerable for failures to observe due process. The competing constraints under which a tribunal operates of ensuring discharge of its obligation to render a decision according to law while affording due process, ensure that ultimately, tribunals are faced with much the same dilemma. Essentially this boils down to a policy choice between:

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to-be-heard-decision-of-the-swiss-federal-supreme-court-as-of-9-june-2009-4a\_1082009/> (discussing the Swiss Federal Supreme Court decision of 9 June 2009).

100 Dimolitsa, *supra* note 91, at 429 & 438; Isele, *supra* note 20, at 24; Kalniņa, *supra* note 83, at 101; ILA Final Report, *supra* note 22, at 21.

101 Art. 34(2)(a)(iii) Model Law; Art. V(I)(c) New York Convention; Born, *supra* note 84, at 2606-2607; ILA Final Report, *supra* note 22, at 19; Cordero Moss, *supra* note 84, at 2; Kurkela, *supra* note 20, at 490; Kalniņa, *id.*, at 90 and 110.

102 Kurkela, *id.*, at 297-298.

103 See, e.g., *Werfen Austria GmbH v. Polar Electro Europe BV*, Supreme Court, Finland, 2 July 2007, reported in translation at 3 *Stockholm Int'l Arbitration Rev.* 260 (2008) (*Werfen* case). See, e.g., Federal Supreme Court, Switzerland, 4A\_220/2007, 21 September 2007, 26(4) *ASA Bulletin* 742. Upholding this ground: *Systembolaget Aktiebolag v. V & S Vin & Sprit Aktiebolag*, Svea Court of Appeal, Stockholm, Sweden, T4548-08, 1 December 2009 (translation by K.B. Vinge); *Dreyfus v. Tusculum*, *supra* note 99. See also, A.J. van den Berg, *Yearbook of Commercial Arbitration*, Vol. 28 at 656 (2003); Born, *supra* note 84, at 2589 and 2607-2608; Lew *et al*, *supra* note 84, at 675 paras. 25-38 to 25-39; Nappert, *supra* note 92, at 286; Cordero Moss, *supra* note 84, at 3. For discussion of the *Werfen* case, see Nappert, *id.*, and P. Kiurunen, 'Finality of Arbitral Awards – Common Grounds?', 3 *Stockholm Int'l Arbitration Rev.* 273, at 277 and 280 (2008).

104 See generally regarding applicable law, Cordero Moss, *supra* note 84, at 3-4.

105 See Isele, *supra* note 20, at 20-24.

106 Some jurisdictions still allow merits review: see Born, *supra* note 84, at 2646-2647.

(i) a decision based on the wrong law thus incorrect on its merits but with little chance of challenge (application of inapplicable, but argued law);<sup>107</sup>

(ii) a decision correct on the merits but which risks being overturned for procedural error (*ex officio* application of applicable but unargued law);<sup>108</sup> or

(iii) a decision both correct on its merits and with little chance of challenge (application of relevant law after affording an opportunity to either address it in argument or to agree to restrict the tribunal's discretion to apply that law).

Of course the preferable course is for the tribunal to suggest the parties agree openly on the procedural rules as a preliminary matter. The tribunal might propose a soft form *iura novit arbiter* rule with a broadly defined right to be heard and leave it to the parties to agree upon a more restrictive approach if they can.<sup>109</sup>

Thus although tribunals are not subject to the same obligation to apply the CISG as courts in Contracting States, nonetheless, the suggested approach to interpretation regarding exclusions in Part 5.3 and practical solutions proposed in Part 6 will hold relevance for arbitral tribunals as they seek to balance their own competing obligations.

#### 4.4 Appeals

A range of approaches is evident in appeals. The Slovak decisions mentioned earlier in which the lower court applied the wrong law were remitted by the appeal court back to the lower court for re-determination under the correct law.<sup>110</sup> Other systems might limit the scope of appeal to grounds already raised by parties, sometimes due to specific rules limiting the subject matter of the jurisdiction of the appeal court. Thus an appeal court might be constrained from applying a law overlooked at the trial stage. For example, in

107 Unlikely to provide grounds for refusal of enforceability, unless mandatory rules are overlooked: ILA Final Report, *supra* note 22, at 17 and 22.

108 A rare example of the Swiss courts upholding breach of the right to be heard for 'surprise' is Federal Supreme Court, 4A\_400/2008, 9 February 2009, 27(3) *ASA Bulletin* 501 (2009) (quashing Court of Arbitration for Sport (CAS) award on the basis that the tribunal applied without warning a law which was not only inapplicable, but went beyond legal argument by the parties). Doubting this is likely in Sweden: M. Wallin & K. Mild, 'Observations', 1 *Stockholm Int'l Arbitration Rev.* 148, at 149 (2007).

109 G. Kaufmann-Kohler, 'The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions', 21(4) *Arbitration Int'l* 631, at 636 (2005); Nappert, *supra* note 91, at 287. See also, Dimolitsa, *supra* note 91, at 433; Kalniņa, *supra* note 83, at 103; ILA Final Report, *supra* note 22, at 16; J. Waincymer, *International Arbitration and the Duty to Know the Law* (forthcoming, *J. Int'l Arb.* 2010).

110 *Supra* note 6.

the *GPL Treatment* case in the U.S., the appeal court refused to hear CISG arguments.<sup>111</sup> Similarly, in accordance with rules of appeal and pleading, counsel was refused permission to amend pleadings to incorporate CISG argument for the first time at the appeal stage in the Australian case of *Italian Imported Foods*.<sup>112</sup>

Sometimes the grounds of appeal are matters of judicial discretion,<sup>113</sup> which itself might turn on whether new arguments would be 'futile'. Where this is so, preliminary CISG argument should always be permitted so as to gauge the extent of potential futility.<sup>114</sup>

It could be argued that appeal rules fall within the more general proposition asserted earlier, and that they are procedural rules displaced by the CISG. This chapter does not make this assertion. Instead, it is submitted that, where rules of appeal allow for judicial discretion regarding new grounds, the matters raised above should be carefully taken into account in the exercise of that discretion to the fullest extent possible. A view inclined to allowing new argument will support the aims of the CISG and more closely align them with its application in practice. It will also encourage closer attention to it by counsel and therefore enhance familiarity with it in the jurisdiction concerned.

## 5 CAN THE CISG BE EXCLUDED BY FAILURE TO PLEAD IT?

Once it has been determined that the CISG is to be applied, then the remaining question is how the adjudicator should view the failure to plead the CISG and presentation of the case on the basis of inapplicable local sales laws. What is a court or tribunal to make of such conduct? Can failure to plead the CISG amount to a waiver or tacit exclusion of it?

Since the contract is governed by the CISG, the adjudicator must look to its provisions alone to decide if such conduct amounts to an exclusion. It is the CISG which controls the 'choice of law rule' when a CISG contract exists, not domestic procedural rules or domestic waiver principles. If parties choose to exercise that option during proceedings, they will

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111 *GPL Treatment*, *supra* note 8. Counsel was not allowed to alter the pleadings and was held to have waived the CISG argument since it was not raised until late in the trial: *GPL Treatment*, *id.*, Leeson J (dissenting, at note 8); H.M. Flechtner, 'Another CISG Case in the US Courts: Pitfalls for the Practitioner and Potential for Regionalized Interpretations', 15 *J. L. & Com.* 127, at 129 and note 11 (1995).

112 *Italian Imported Foods*, *supra* note 7; see Spagnolo, *supra* note 7, at 197-199.

113 *GPL Treatment*, *supra* note 8; *Italian Imported Foods*, *supra* note 7; *Summit Chemicals Pty Ltd v. Vetrotex Espana SA*, Court of Appeal, Western Australia, 27 May 2004, available at <<http://cisgw3.law.pace.edu/cases/040527a2.html>> (*Summit Chemicals*); see Spagnolo, *id.*, at 193-199 (discussing this aspect of the *Italian Imported Foods* & *Summit Chemicals* cases).

114 Unfortunately, this is not always appreciated in applications to amend pleadings: Spagnolo, *id.*



need to comply with the CISG's internal requirements before their autonomous choice is effective.

The ability of parties to choose to exclude its application is therefore controlled by Article 6 which deals with exclusion. This is so whether parties seek to exclude the CISG within the original contract or sometime thereafter.

Until Article 6 is enlivened, the CISG remains the governing law of the contract. Whilst there is minority opinion to the contrary, the effect of the majority view is that any agreement to exclude must be formed pursuant to the formation provisions of the CISG, and will need to satisfy Article 6.<sup>115</sup> The CISG's applicability from the outset is not 'subordinated to the will of the parties' unless that will amounts to an agreement to exclude in accordance with the CISG, since the CISG already applies pursuant to Article 1.<sup>116</sup>

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<sup>115</sup> See, e.g., Appellate Court (OLG) Oldenburg, Germany, 20 December 2007, available at <<http://cisgw3.law.pace.edu/cases/071220g1.html>>; *Golden Valley Grape Juice and Wine, LLC v. Centrisys Corp.*, 2010 U.S. Dist. LEXIS 11884 (E.D. Cal.), 22 January 2010, available at <<http://cisgw3.law.pace.edu/cases/100121u1.html>> (*Golden Valley* case); *Easom Automation Systems, Inc. v. Thyssenkrupp Fabco, Corp.*, 2007 WL 2875256, U.S. District Court (E.D. Mich.), 28 September 2007, CISG-online 1601, available at <<http://www.cisg-online.ch/cisg/urteile/1601.pdf>> (*Easom Automation* case); Spagnolo, *supra* note 7, at 205 (CISG should determine the matter, at least until the point at which exclusion is established under its formation provisions); Schwenger & Hachem, *supra* note 45, Art. 6, at 104 and 105 (formation and interpretation of exclusion clauses subject to CISG rules); M. Schmidt-Kessel, in: Schwenger 3<sup>rd</sup> edn, *id.*, Art. 8, at 177 para. 61 (incorporation of choice of law clauses including exclusions of CISG within the sphere of CISG formation provisions). But see P. Schlechtriem, in: P. Schlechtriem & I. Schwenger (Eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Art. 6, at 85-89 paras. 7-10 (2005) (Schlechtriem & Schwenger 2<sup>nd</sup> edn) (stating that rules of private international law determine the issue).

<sup>116</sup> *Sté Ceramique Culinare de France v. Sté Musgrave Ltd*, Cour de Cassation, France, 17 December 1996, available at <<http://cisgw3.law.pace.edu/cases/950926f1.html>> (the CISG 'applies at the outset; its applicability is not subordinated to the will of the parties, express or tacit'). See also, Tribunale di Padova, 25 February 2004, *supra* note 14 ('[f]urther, the silence in the pleadings on the matter of the applicability of the law at issue is immaterial because, in the presence of all requisites mentioned above [the CISG] is applicable by operation of law').

In other words, once in, the only way out is via the CISG's own rules.

### 5.1 Exclusion within the Original Contract

Much has been written about 'opting out' at the contractual stage, so it is useful to examine these requirements for present purposes as a point of comparison.

Generally, courts and commentators have taken a rather restrictive approach to exclusion of the CISG within contractual clauses. The predominant view amongst scholars cautions against swift conclusions of implicit exclusion within the contract.<sup>117</sup> At a minimum, a 'certain' or 'real' tangible intent is required for implicit exclusion to be effective, as opposed to a hypothetical or 'theoretical' intent.<sup>118</sup> While some cases have upheld implicit opt-outs,<sup>119</sup> most courts and tribunals have been slow to infer exclusion where the contractual clause is unclear.<sup>120</sup> Thus a reference to INCOTERMS has been held insufficient to demonstrate an intent to exclude the CISG.<sup>121</sup> A choice of national law excluding ULIS was held not to exclude the CISG.<sup>122</sup> A few cases have gone further still, by denying even

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117 Against implicit exclusion: F. Enderlein & D. Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods: Convention on the Limitation Period in the International Sale of Goods: Commentary*, Art. 6, at 48-49 paras. 1.2 and 1.3 (1992) (Enderlein & Maskow); Schlechtriem, in: Schlechtriem & Schwenzer 2<sup>nd</sup> edn, *supra* note 115, Art. 6, at 88-89 para. 12 (noting reluctance of legal writers to infer exclusion). See also, UNCITRAL Digest, *supra* note 12, Art. 6 paras. 6-9. In support of implicit exclusion: M. Bridge, 'Choice of Law and the CISG: Opting In and Opting Out', in: H.M. Flechtner *et al* (Eds), *Drafting Contracts Under the CISG*, 65 at 77 (2008), but see *id.*, at 78 (cautioning parties bear the burden of making their intent plain); Honnold 4th edn, *supra* note 44, Art. 6, at 108-110 and note 19 para. 77.1.

118 Cour de Cassation, 17 December 1996, *supra* note 116 (implied exclusion must be 'certain'); Honnold 4<sup>th</sup> edn, *id.*, Art. 6, at 107-108 para. 77 (requiring 'real' and not 'theoretical' intent, thus exclusions must be 'express' or 'clearly implied in fact'). See also, Enderlein & Maskow, *id.*, Art. 6, at 48; F. Ferrari, 'Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing', 15 *J. L. & Com.* 1, at 88, note 614 (1996); Ferrari, *International Legal Forum*, *supra* note 12, at 220.

119 See, e.g., *Olivaylle Pty Ltd v. Flottweg GmbH & Co KGAA (No 4)* (2009) 255 ALR 632, Federal Court, Australia, 20 May 2009, available at <<http://cisgw3.law.pace.edu/cases/090520a2.html>>; District Court (LG) München, Germany, 29 May 1995, available at <<http://cisgw3.law.pace.edu/cases/950529g1.html>>; Bezirksgericht [Lower District Court] (BG) Weinfeld, Switzerland, 23 November 1998, available at <<http://cisgw3.law.pace.edu/cases/981123s1.html>>; Cour d'appel de Colmar, France, 26 September 1995, available at <<http://cisgw3.law.pace.edu/cases/950926f1.html>> (in a decision criticized in this respect on appeal by the Cour de Cassation, 17 December 1996, *id.*)

120 Schlechtriem, in: Schlechtriem & Schwenzer 2<sup>nd</sup> edn, *supra* note 115, Art. 6, at 88-89 para. 12 (noting the reluctance of courts to infer exclusion).

121 *Gasoline and Gas Oil* case, Supreme Court, Austria, 22 October 2001, available at <<http://cisgw3.law.pace.edu/cases/011022a3.html>>.

122 District Court (LG) Düsseldorf, Germany, 11 October 1995, available at <<http://cisgw3.law.pace.edu/cases/951011g1.html>>.

the possibility of implicit exclusion within the contract.<sup>123</sup> By contrast, one case in which a clause provided for ‘exclusion of UNCITRAL law’ was upheld as manifesting an intent to exclude the CISG.<sup>124</sup>

Frequently the issue arises when a choice of law clause indicates the law of a Contracting State governs the contract. The widely accepted view upheld by most courts and tribunals is that this will not exclude the CISG, since the CISG forms part of the law of the Contracting State.<sup>125</sup> Of particular interest is a long line of cases in the U.S.A.. These have also held that the CISG will not be excluded implicitly merely by a clause providing for a choice of the law of a Contracting State.<sup>126</sup> In only one recent U.S. case has choice of the law of a province within a Contracting State been upheld as sufficient to exclude the CISG.<sup>127</sup> On the other

123 See District Court (LG) Landshut, 5 April 1995, *supra* note 11, §II.1.a (stating ‘[t]he parties can only exclude the application of the CISG by explicit agreement’); *Orbisphere Corp. v. United States*, 726 F. Supp. 1344, Federal Court of International Trade, U.S.A., 24 October 1989, note 7, available at <<http://cisgw3.law.pace.edu/cases/891024u1.html>>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Award 54/1999, 24 January 2000, para. 1, available at <<http://cisgw3.law.pace.edu/cases/000124r1.html>>.

124 *Olivaylle Pty Ltd v. Flottweg GmbH & Co KGAA (No 4)*, 20 May 2009, *supra* note 119.

125 Cour de Cassation, 17 December 1996, *supra* note 116 (‘[r]eferring only to the law of a Contracting State in a clause [...] is not sufficient’); Supreme Court, Austria, 26 January 2005, available at <<http://cisgw3.law.pace.edu/cases/050126a3.html>>; ICC Award No. 7565/1994, *supra* note 31; Federal Supreme Court (BGH), Germany, 25 November 1998, available at <<http://cisgw3.law.pace.edu/cases/981125g1.html>>; Kantonsgericht [District Court] Zug, Switzerland, 11 December 2003, available at <<http://cisgw3.law.pace.edu/cases/031211s1.html>>; Cour d’appel Paris, 6 November 2001, available at <<http://cisgw3.law.pace.edu/cases/011106f1.html>>. See also, UNCITRAL Digest, *supra* note 12, Art. 6 para 8; Schlechtriem, in: Schlechtriem & Schwenzler 2<sup>nd</sup> edn, *supra* note 115, Art. 6, at 90 para. 14 (‘prevailing opinion [...] holds that a reference to the law of a Contracting State *in itself* does not amount to an exclusion’).

126 *Valero Marketing & Supply Co. v. Greeni Oy*, 373 F.Supp.2d 475, Federal District Court New Jersey, U.S.A., 15 June 2005, available at <<http://cisgw3.law.pace.edu/cases/050615u1.html>>; *Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd.*, 2003 U.S. Dist. LEXIS 1306 (N.D. Ill.), 29 January 2003, available at <<http://cisgw3.law.pace.edu/cases/030129u1.html>>; *American Mint LLC v. GOSoftware, Inc.*, 2006 U.S. Dist. LEXIS 1569 (M.D. Pa), 6 January 2006, available at <<http://cisgw3.law.pace.edu/cases/060106u1.html>>; *Travelers Property case*, *infra* note 131 (‘absent an express statement that the CISG does not apply, merely referring to a particular state’s law does not opt out of the CISG’); *Easom Automation case*, *supra* note 115; *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, U.S. District Court (N.D. Cal.), 27 July 2001, available at <<http://cisgw3.law.pace.edu/cases/010727u1.html>>; *St. Paul case*, *infra* note 131 (‘Where parties [...] designate a choice of law clause in their contract - selecting the law of a Contracting State without expressly excluding application of the CISG’ this results in application of the CISG ‘as the law of the designated Contracting state’); *BP International, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333, U.S. Court of Appeals (5th Cir.), 11 June 2003, available at <<http://cisgw3.law.pace.edu/cases/030611u1.html>> (‘Where parties seek to apply a signatory’s domestic law in lieu of the CISG, they must affirmatively opt-out of the CISG’).

127 See *American Biophysics v. Dubois Marine Specialties*, Federal District Court Rhode Island, 411 F.Supp.2d 61, U.S.A., 30 January 2006, available at <<http://cisgw3.law.pace.edu/cases/060130u1.html>> (upholding exclusion by choice of law of the state of Rhode Island). The case cited five earlier decisions for the (inaccurate) proposition that the CISG applies when the ‘contract does not contain a choice of law provision’. Yet the cases relied upon simply used ‘imprecise descriptions, in dicta’: W. Johnson, *Understanding Exclusion of the*

hand, mention of a specific domestic statute or code is seen as denoting a choice of domestic non-uniform law.<sup>128</sup>

The unmistakable impression is that, while implicit exclusion remains possible, an intent to exclude is not readily inferred via Article 6 within the original contract. Courts and tribunals in this context are slow to jump to the conclusion that parties intended to exclude.

Of course, each case turns on its particular facts, and the task of adjudicators is to balance competing inferences. At a positive level, this can be seen as a three step exercise conducted within the framework of Articles 6 and 8 CISG, whereby the adjudicator first considers an intent to exclude as the purported meaning of words used; secondly, considers any competing hypothesis for their meaning; and thirdly, determines on balance, which meaning is the most likely to have been intended.

What the cases demonstrate in the context of contractual clauses is that this balance generally tips in favour of non-exclusion where the facts do not support an inference of clear intent to exclude that is more plausible than any competing alternatives. This is because the burden is on parties to make their choice of law plain enough that it would be reasonably understood as bearing the purpose of exclusion: Article 8(2) CISG.<sup>129</sup> Selection of INCOTERMS concerns a narrow range of issues, therefore cannot of itself objectively manifest a clear intent to exclude the entire CISG rather than mere derogation of provisions relating to risk etc. On the other hand, a reasonable person would understand a clause excluding UNCITRAL law to evince an intent to exclude something, and it is difficult to envisage an alternative hypothesis as to what was intended other than exclusion of the CISG.

At a normative level, there are good policy reasons for adjudicators to set the evidentiary bar at this level. It accords with the timbre of the Diplomatic Conference, where the concern was that uniform law would be rendered ineffective if courts were too quick to find

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*CISG: A New Paradigm of Determining Party Intent* (2010), at 20-21, available at <[http://works.bepress.com/william\\_johnson/2](http://works.bepress.com/william_johnson/2)>. The same imprecise proposition has since been repeated as dicta in the *Golden Valley* case, *supra* note 115, and in the *Easom Automation* case, *id.*, yet, despite the rote repetition, the analysis in *Easom* under the CISG was 'largely ultimately sound': Johnson, *id.*, at 22, and parties in the *Golden Valley* case agreed the CISG applied. Thus *American Biophysics* stands alone in actually applying the incorrect proposition.

128 Appellate Court (OLG) Stuttgart, 31 March 2008, *supra* note 31 (commenting that were German law to apply, it should not be assumed the BGB or HGB rather than CISG applied, since 'the CISG is incorporated into German law'. Words such as 'the provisions of the BGB are applicable' would be required to denote domestic non-uniform law).

129 Bridge, *supra* note 117, at 78.

exclusion.<sup>130</sup> The policy concern of governments to maximize uniformity in practice has therefore been realized by what might be termed a 'strict approach' to the burden of proof regarding inferences of exclusion at the contractual stage. Some cases have even recognized these policy implications in their reasoning.<sup>131</sup> Thus the norm now feeds back into the decision making process by way of Article 7 in the form of the guidance provided by the predominant view in cases and scholarship.

The question is whether this same 'strict approach' is appropriate for exclusions that occur after the contractual stage.

## 5.2 Post-Contractual Exclusion

Inexplicably, this stringent stance on *ex ante* implicit exclusion stands in stark contrast to the cases on implicit waiver of the CISG during proceedings. As we have seen, some courts have allowed mere conduct of litigation to stand as a choice of law subsequent to conclusion of the contract.

The paradox is even more puzzling when one takes into account that in determining *ex ante* exclusion, whether or not a CISG contract even exists is still in question.<sup>132</sup> By contrast, *ex post* waivers or exclusions are already within the CISG's gravitational pull. Undoubtedly, determination of the efficacy of any purported post-contractual exclusion must be made pursuant to CISG rules. After all, a CISG contract already exists. Even the minority who advocate the use of conflict rules to test *ex ante* exclusion clauses reject this stance in regard to post-contractual exclusions.<sup>133</sup> One might think that, if contractual exclusions are construed strictly, then post-contractual exclusions should be construed just as stringently. Why then do courts consistently show great restraint regarding *ex ante* exclusion, yet fre-

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130 The Diplomatic Conference declined special reference to the ability to impliedly exclude the CISG 'lest the special reference [...] might encourage courts to conclude, on insufficient grounds, that the [CISG] had been wholly excluded': *Official Records of the United Nations Conference on Contracts for the International Sale of Goods*, Vienna, 10 March-11 April 1980, UN Doc. A/CONF.97/19, at 17.

131 *Travelers Property Casualty Company of America v. Saint-Gobain Technical Fabrics Canada Ltd*, 2007 WL 313591, U.S. District Court, Minnesota, 31 January 2007, available at <<http://cisgw3.law.pace.edu/cases/070131u1.html>> (*Travelers Property* case) ('an affirmative opt-out requirement promotes uniformity and the observance of good faith in international trade, two principles that guide interpretation of the CISG'); *St. Paul Guardian Insurance Company and Travelers Insurance Company v. Neuromed Medical Systems & Support, GmbH*, 2002 U.S. Dist. LEXIS 5096 (S.D. N.Y.), 26 March 2002, available at <<http://cisgw3.law.pace.edu/cases/020326u1.html>> (*St Paul* case) (stating that choice of the law of a Contracting State did not exclude the CISG, and that '[t]o hold otherwise would undermine the objectives of the [CISG]').

132 Schlechtriem, in: Schlechtriem & Schwenzer 2<sup>nd</sup> edn, *supra* note 115, Art. 6, at 89 & 91 paras. 12 and 14.

133 Schlechtriem, *id.*, Art. 6, at 89 and 91 paras. 12 and 14.

quently are ready to quickly accept *implicit or tacit* waiver as sufficient where a CISG contract already exists?

The absurdity of this proposition provides the key to its resolution. To recognize tacit waiver or implied post-contractual exclusion is to recognize a change to the governing law of the contract. Essentially, courts are endorsing exclusion by modification of a pre-existing CISG contract. This must be done by application of Articles 6, 14-24 and 29.

Yet the cases demonstrate that this approach is not always employed. Even amongst cases which purportedly apply these provisions, we find vastly divergent approaches.<sup>134</sup> Moreover, it appears in many cases that the evidentiary bar is set far lower than it is at the contractual stage, and in some cases the court appears eager to conclude tacit waiver without careful consideration of the issue. A greater level of predictability can be fostered by integration of the correct approach with an appropriate assessment of inferences.

### 5.3 *Exclusion by Failure to Argue*

Failure to invoke the CISG in argument can only constitute an *ex post* implied agreement to exclude if it actually modifies the pre-existing CISG contract. Thus, in addition to Article 6, the conduct would need to satisfy Article 29 and Articles 14-24.<sup>135</sup>

More coherent and uniform outcomes require Article 29 to be consistently applied to all post-contractual modifications, and a realignment of the *ex ante* and *ex post* interpretations of Article 6. This would redress the anomaly of the lax standard presently applied to post-contractual exclusions in the current context by comparison with the 'strict approach' applied to exclusions within the original contract. Likewise, there is a need to reconcile the restraint evident in modifications pursuant to Article 29 in more general settings with the tendency to jump to conclusions of tacit exclusion during proceedings.

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<sup>134</sup> See cases discussed above in Part 3.3, at notes 31-40 and accompanying text.

<sup>135</sup> Schlechtriem, in: Schlechtriem & Schwenzer 2<sup>nd</sup> edn, *supra* note 115, Art. 6, at 91 para. 14; Schwenzer & Hachem, *supra* note 45, Art. 6, at 114 and 116 paras. 24 and 28 (agreements to derogate by modification are 'only' subject to the CISG, not conflicts rules). Contracts modifying contracts falling within CISG are also subject to CISG formation provisions: U. Schroeter, in: Schwenzer 3<sup>rd</sup> edn, *supra* note 45, Art. 29, at 472 and 473 paras 2 and 4; P. Schlechtriem, *Uniform Sales Law* 63, §A5 (1986)(*Uniform Sales Law 1986*); Ferrari, *supra* note 44, at 61 ('contracts modifying an international sales contract fall under the CISG as well, since they directly affect the [parties'] rights and obligations').

Article 7(1) requires courts to interpret the CISG in a manner that promotes uniformity.<sup>136</sup> While a general principle of party autonomy underlies the CISG and Article 6 undoubtedly permits post-contractual exclusion, the divergence observed demonstrates the need to develop a balanced and consistent approach as to *how* party autonomy may be legitimately exercised in the current context.

Unlike exclusion within the original contract, it is incontrovertible that CISG formation provisions apply to post-contractual exclusions.<sup>137</sup> This means that although parties can agree to exclude the CISG during litigation,<sup>138</sup> there must be appropriate evidence of a clear intent to exclude. An analysis of the provisions of the CISG, as well as certain pragmatic considerations discussed below, support the argument that the evidentiary balance should be set at a higher level than it is at present in many cases.

It follows from Article 14 CISG that *ex post* offers to exclude should exhibit an ‘intent to be bound’. It is improbable that absence of argument on applicable law in litigation could constitute such an offer. Failure to mention the law sought to be excluded must render most purported offers to modify hopelessly indefinite pursuant to Article 14 CISG. Additionally, mere failure to object could only rarely amount to assent under Article 18 in this context. A defence which answers only those arguments raised by the claimant is a long way from what is generally understood as acceptance of a unilateral attempt to modify. In fact, generally speaking, under Article 29 CISG, failure to object to modification offers will

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136 The need to promote uniformity in the CISG’s interpretation is described by Schlechtriem as a ‘maxim’: *Uniform Sales Law 1986, id.*, at 38, §IVA.

137 Unlike exclusions within the original contract, about which there is still some disagreement. Compare, *supra* notes 115 and 133 and accompanying text.

138 Bridge, *supra* note 12, at 917 and 922. Note that Bridge argues that where the forum would otherwise be obliged to apply the CISG, parties can post-contractually agree to apply non-CISG domestic law if, for example, Art. 3(2) of the 1980 Rome Convention applies (now Art. 3(2) Rome I Regulation, *infra* note 155); Ziegel, *supra* note 63, at 342, note 30. See generally, Zajtay, *supra* note 79, at 9, §14-13.

be acceptance only in 'very exceptional cases',<sup>139</sup> since there is already a contractual balance of rights and obligations on foot.<sup>140</sup>

Moreover, if the original contract contained a 'no oral modification' clause, the potential for tacit waiver by conduct of the case is further reduced, unless there has been reliance on the conduct: Article 29(2) CISG. The 'mere fact that a party has not pursued his remedies against the other party should [...] not constitute a sufficient reliance' for the purposes of Article 29(2).<sup>141</sup> It must be doubted that in formulation of its response to claims, a respondent has relied upon any absence of form. A purported offer to modify must be understood as such by a reasonable person to be effective.<sup>142</sup> The intention to be bound must be tested objectively under Article 8(2), not 'rashly' assumed.<sup>143</sup> This is certainly so in the context of attempts to modify during the contractual performance phase, where caution has been urged in interpreting conduct as acceptance of offers to modify.<sup>144</sup> Mere performance of the contract is normally not enough,<sup>145</sup> and clear assent is required. Since

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139 Schroeter, *supra* note 135, Art. 29, at 476 para. 11; U. Magnus, 'Incorporation of Standard Contract Terms under the CISG', in: C.B. Andersen & U. Schroeter (Eds.), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, 303 at 324 (2008); P. Perales Viscasillas, 'Modification and Termination of the Contract (Art. 29 CISG)', 25 *J. L. & Com.* 167, at 172 (2005-6); Schmidt-Kessel, *supra* note 115, Art. 8, at 172 para. 53; *Macromex Srl v. Globex International Inc.*, American Arbitration Association Award, 23 October 2007, available at <<http://cisgw3.law.pace.edu/cases/071023a5.html>> (aff'd 2008 WL 1752530 (S.D.N.Y.)); aff'd 330 Fed Appx. 241, U.S. Court of Appeal (2<sup>nd</sup> Cir.) 26 May 2009 ('failure to object to a unilateral attempt to modify a contract is not an agreement to modify a contract'); *Solae, LLC v. Hershey Canada, Inc.*, 557 F.Supp.2d 452, U.S. District Court Delaware, 9 May 2008, available at <<http://cisgw3.law.pace.edu/cases/080509u1.html>> (*Solae v. Hershey*) ('Nothing in the [CISG] suggests that the failure to object to a party's unilateral attempt to alter materially the terms of an otherwise valid agreement is an 'agreement' within the terms of Article 29').

140 Magnus, *id.*, at 324; Schroeter, *id.*, Art. 29, at 476 para. 11.

141 Schroeter, *supra* note 135, Art. 29, at 486 para. 37.

142 Art. 8(2). Thus courts have rejected supposed offers to modify consisting of standard terms on the reverse of invoices sent after conclusion of the contract: *Solae v. Hershey*, *supra* note 139; *Chateau des Charmes Wines Ltd v. Sabaté USA Inc.*, 328 F.3d 528, U.S. Court of Appeals (9<sup>th</sup> Cir.), 5 May 2003, available at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=899&step=FullText>>. See also, Schroeter, *id.*, Art. 29, at 475 and 476 paras. 10 and 11; Schmidt-Kessel, *supra* note 115, Art. 8, at 173-174 para. 58.

143 Schwenzer & Hachem, *supra* note 45, Art. 6, at 113 and 115 paras. 21 and 26.

144 Schroeter, *supra* note 135, Art. 29, at 476 para. 11 (urging 'particularly careful assessment' as to whether acceptance of an offer to modify has occurred); Schroeter, *id.*, at 480 para. 19, (arguing in the context of agreements to terminate that 'courts and arbitrators are well advised to exercise appropriate restraint in finding an agreement between the parties').

145 Acts of performance are not acts of assent: CIETAC Arbitration Award, China, 23 May 2000, available at <<http://cisgw3.law.pace.edu/cases/000523c1.html>> ('Partial performance of the Contract should not be deemed as a modification of the quantity of the goods under the Contract'); *Chateau des Charmes Wines v. Sabaté*, *supra* note 142 (payment of invoice containing new choice of forum clause); *Solae v. Hershey*, *supra* note 139.



in the current litigation context parties are frequently unaware of the ‘right’<sup>146</sup> they supposedly relinquish, there will often be an objective absence of agreement to modify where the CISG is not raised in argument. As stated by one court:

in the presence of all requisites mentioned above [the CISG] is applicable by operation of law [...] Neither can it be [sustained] that the silence of the parties constitutes an implied manifestation of the intent to exclude the application of [the CISG].<sup>147</sup>

Several commentators agree that the ‘mere fact that the parties argue on the sole basis of a domestic law’<sup>148</sup> is anything but a clear indication of intent. Parties cannot intend to exclude the relevant law unless they are aware of its applicability.<sup>149</sup> Only then can parties ‘knowingly’ depart from the CISG by agreement.<sup>150</sup> Prof. Schlechtriem perhaps stated this most clearly when he said:

[i]f the parties mistakenly ignore the applicability of the CISG and refer to provisions of domestic law in their pleadings or in the oral hearing in court, this cannot constitute an agreement to modify their contract. *Statements based on ignorance are not agreements, because they lack the necessary ‘intention to be bound’*; therefore they cannot alter the contents of a contract.<sup>151</sup>

Failure by counsel to mention the CISG speaks of the likelihood it was simply overlooked. A belief that domestic law applies is not *per se* evidence of an agreement to exclude the CISG,<sup>152</sup> as echoed in better decisions on point.<sup>153</sup> Under these circumstances it would be

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146 Schroeter, *supra* note 135, Art. 29, at 485, note 119 para. 33; Schmidt-Kessel, *supra* note 115, Art. 8, at 164 para. 38.

147 Tribunale di Padova, 25 February 2004, *supra* note 14.

148 Ferrari, *International Legal Forum*, *supra* note 12, at 220 (arguing that this cannot ‘per se lead to the exclusion of the CISG’); Schlechtriem, in: Schlechtriem & Schwenger 2<sup>nd</sup> edn, *supra* note 115, Art. 6, at 91 para 14.

149 Ferrari, *id.*; Appellate Court (OLG) Rostock, Germany, 10 October 2001, available at <<http://cisgw3.law.pace.edu/cases/011010g1.html>>; Tribunale di Vigevano, 12 July 2000, *supra* note 11.

150 Schwenger & Hachem, *supra* note 45, Art. 6, at 113 para. 21 (stating that ‘conduct of the parties still needs to sufficiently indicate [...] whether the parties knowingly departed from the otherwise applicable CISG’); Schmidt-Kessel, *supra* note 115, Art. 8, at 164 para. 38.

151 Schlechtriem, in: Schlechtriem & Schwenger 2<sup>nd</sup> edn, *supra* note 115, Art. 6, at 91 para. 14 (emphasis added).

152 Ferrari, *International Legal Forum*, *supra* note 12, at 220; Schwenger & Hachem, *supra* note 45, Art. 6, at 113 para. 21 (arguing that ‘basing arguments on provisions of domestic sales law is simply a mistake on the part of the attorneys’ rather than evidence of an intent to exclude); Schlechtriem, *id.*, Art. 6, at 90-91 para. 14.

153 See Appellate Court (OLG) Stuttgart, 31 March 2008, *supra* note 31 (failure by parties to base allegations on the CISG does not imply post-contractual exclusion, since ‘[t]here is no mutual agreement of intent [...] as this requires an express declaration of intent [...]’; the application of the wrong provisions due to a legal

erroneous for a court to infer an intent to exclude, without carefully considering the competing inference of ignorance or misapprehension.

With these points in mind, the disparate standards can be now realigned. General restraint is shown before *any* type of post-contractual modification is upheld under Article 29 CISG. Clear intent is required for inferences in relation to exclusion clauses in the original contract pursuant to Article 6 CISG. In view of the fact that exclusion by modification during litigation involves *both* Articles 6 and 29, it is proposed that the appropriate measure of intent should be no less stringent.

In setting the evidentiary standard for exclusion during proceedings, it is important to keep in mind the pragmatic consideration that, by contrast with the contractual stage, the evidentiary record is not static. At any time during proceedings, greater levels of proof are attainable upon enquiry by the adjudicator, simply by asking counsel.<sup>154</sup> This means that provided the adjudicator raises the matter, whether before, during or after the hearings, the balance of inferences need not be hypothetical at all. A court can be sure that parties clearly intend to modify their contract to exclude the CISG at the litigation stage if counsel present an express agreement by informed parties to that effect during proceedings. On the contrary, a court can only rarely be sure that ‘tacit agreements to exclude’ by mere reason of the way counsel conducts the case evince a clear inference that satisfies both Articles 6 and 29. Adjudicators, in balancing inferences, must consider the alternative hypotheses; that counsels’ conduct is, rather than demonstrative of tacit agreement by the parties, a product of counsels’ own ignorance, misapprehension or simply convenience. Ignorance is not to be equated with intent. Thus the misapprehension of counsel or even stubborn refusal to argue the applicable law should never be accepted as manifesting an informed intent by the parties to exclude the CISG by modification of the contract. Consistently with the predominant view on contractual exclusions, the adjudicator should be

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misapprehension does not meet this requirement’); Tribunale di Padova, 25 February 2004, *supra* note 14 (pleadings referring only to non-uniform domestic law cannot of themselves amount to an exclusion of the CISG, as an intent to exclude the CISG, ‘it must clearly show that [the parties] were aware of its applicability, and that they nonetheless insisted on referring only to the domestic rule’); Appellate Court (OLG) Rostock, 10 October 2001, *supra* note 149 (‘Merely referring to [the domestic provisions] is insufficient, because such reference might also be made because the parties think that that law was applicable anyway’); Appellate Court (OLG) Linz, Austria, 23 January 2006, available at <<http://cisgw3.law.pace.edu/cases/060123a3.html>>; Appellate Court (OLG) Hamm, 9 June 1995, *supra* note 11; Tribunale di Forli, 16 February 2009, *supra* note 31, at §4.3.3; District Court (LG) Landshut, 5 April 1995, *supra* note 11, §II.1.a (argument solely on the BGB ‘does not change anything’); District Court (LG) Bamberg, Germany, 23 October 2006, available at <<http://cisgw3.law.pace.edu/cases/061023g1.html>>. See also, ICC Award No. 7565/1994, *supra* note 31; Tribunale di Vigevano, 12 July 2000, *supra* note 11, paras. 5 and 6; Tribunale di Cuneo, 31 January 1996, *supra* note 14 (although the latter two were based on the domestic procedural rule).

<sup>154</sup> See also Xiao & Long, *supra* note 9, at 77 and 81-82.

careful to exercise caution before jumping to the conclusion of exclusion by conduct in proceedings. In keeping with Article 29, adjudicators should be slow in accepting inferences that conduct of litigation amounts to an offer to modify and acceptance of that offer. Such inferences should of course be accepted when they are the *most* plausible explanation for counsels' conduct, but rejected when more plausible reasons, such as those suggested above, exist.

This approach results in a standard of proof of similar rigour to that shown in cases dealing with *ex ante* exclusions, and the restraint apparent in relation to general modifications. The balance suggested need not interfere with party autonomy. On the contrary, it mirrors the requirement for free choice to be 'clearly demonstrated' in other private international law contexts.<sup>155</sup> It does no harm to the general principle of party autonomy to require a clear intent to alter the existing law of the contract, particularly when it is open to the parties to manifest that intent during proceedings. The current prevailing approach to waiver is anything but clear, and instead seems to facilitate confusion and avoidance of the applicable CISG by judicial fiat.

The requirement of a clear intent does not rule out the possibility of implicit intent altogether, but acknowledges that it will rarely satisfy the relevant provisions of the CISG when applied in an integrated and coherent manner. Adjudicators, above all, must be confident that, amongst the range of competing inferences, not only must an agreement to exclude the CISG be clearly capable of inference from counsels' conduct, but also that, on balance, that such an inference is much more plausible than any other.

This standard has the advantage of encouraging adjudicators to seek clarification, which would not only promote evidentiary efficiency,<sup>156</sup> but also reduce the number of wasteful appeals on this point.

Importantly, the suggestion realigns the standards relating to inferences of intent to exclude at the contractual and post-contractual stages, so that the balance of proof is consistent at each stage. This brings improved coherence throughout the CISG and ensures it can be

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<sup>155</sup> Art. 7(1) Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, 39 October 1986, 24 I.L.M. 1573, 1575 (1985) ('[t]he parties' agreement on this choice must be express or be clearly demonstrated') and Art. 3(1) Rome Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (L 266), 19 June 1980, 19 I.L.M. 1492 (1980) ('[t]he choice must be expressed or demonstrated with reasonable certainty'); Art. 3(1) Rome I Regulation (EC) No 593/2008 on the Law Applicable to Contractual Obligations, 2008 O.J. (L 177/6), 4 July 2008 ('[t]he choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case').

<sup>156</sup> The author thanks Prof. John Gotanda for this suggestion after presentation of this paper at the 13 March 2010 conference in Hong Kong.

more easily understood and consistently applied, while still providing a clear avenue for true expression of party autonomy, if indeed parties really wish to exclude at the litigation stage.

## 6 PROPOSED SOLUTIONS

If the above propositions are accepted, how in a practical sense should courts proceed once they realize the CISG applies?

For a court in a Contracting State the CISG constitutes the entire picture. Essentially, the obligation to apply the CISG *ex officio* approximates the strict version of the *iura novit curia* principle. This means that, irrespective of its own domestic procedural inclination, the court must take a less than passive role. The only remaining question is how to implement it, given the availability of appeal for failure of due process. This calls for some flexibility in implementation, and leads us to three potential solutions for courts within Contracting States.

### 6.1 *Simpliciter Application Ex Officio*

Domestic systems that already follow the strict version of *iura novit curia* and have a narrowly defined right to be heard might simply apply the CISG. Where the right to be heard is limited to questions of fact in respect of domestic law, there is arguably no need for counsel to address the CISG before the court is entitled to apply it. Yet it is important to note that this result flows not from application of the domestic procedural rule, but from the CISG itself. Such courts would also need to ensure appropriate interpretation of Article 29 so that merely failing to plead is not instantly seen as tacit waiver. Rather than jump to such a conclusion, the court should carefully consider the competing inferences in the manner suggested in Part 5.3 to determine whether counsels' conduct is a sufficient clear basis for an inference of intent to exclude, and whether such an inference is the most likely on balance.

What of jurisdictions which do not employ strict *iura novit curia*? It is not impossible to imagine application of the CISG even so. There have been cases where common law courts have applied the CISG despite a near (but not complete) absence of it from pleadings and/or argument. In the Australian *Roder Zelt* case,<sup>157</sup> nothing appeared in pleadings, and

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<sup>157</sup> *Roder Zelt - und Hallenkonstruktionen GmbH v. Rosedown Park Pty Ltd*, (1995) 57 FCR 216, Federal Court, Australia, 28 April 1995, available at <<http://cisgw3.law.pace.edu/cases/950428a2.html>>.

despite only a ‘passing mention’ in argument, the court applied the CISG at length. *Sua sponte* decisions might also occur in the U.S.

While possible to argue that all Contracting State courts should employ this solution on the basis of their obligation to apply the CISG, some will be uncomfortable with ‘dusty’ judges.<sup>158</sup> There is also a need to reconcile the obligation to apply the CISG with broader definitions of the right to be heard, which may still underpin grounds of appeal. In these circumstances less radical approaches might be more effective in practice, to reach similar ends by means that take account of differing conceptions of due process.

### 6.2 *Dismissal of the Claim*

The first type of compromise achieves a correct, but harsh result. It remains similar to the first solution in that, having formed the view that the CISG is applicable, the court gives it some effect.

Where the CISG is not mentioned in argument, the case can be justifiably dismissed on the basis that any local procedural rules which might have constrained the court to the law argued by counsel are effectively displaced by the CISG. The judge does not go so far as to apply the substantive provisions of the CISG, but pursuant to the court’s obligation to apply the CISG *ex officio*, takes judicial notice of its existence and effect in displacing the law argued by counsel. Counsel has simply not made its case.

Of course, the fact that a valid case might have existed under the law that *is* applicable makes this result rather harsh. It may also offend more broadly defined rights to be heard. However, this may alert counsel to the need to argue the applicable law.

### 6.3 *Intervention by Warning & Invitation*

The final suggested compromise is that, upon realizing the CISG applies, counsel are warned that the CISG is the applicable law, and an indication is given that the court intends to apply it because it displaces domestic sales law. Ideally, the court should also explain to counsel that any local procedural rules that might otherwise constrain the court to the law

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<sup>158</sup> The reader will forgive my reference to a case describing the common law’s discomfort with interventionist judges: *Yuill v. Yuill* [1945] P. 15, at 20 (U.K.) (Lord Greene MR warning a judge who questions the witness ‘so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict’).

argued by counsel are also displaced by the court's obligation to apply the CISG *ex officio*.<sup>159</sup> The case might appropriately be adjourned to allow counsel time to prepare CISG based arguments.

After an appropriate warning, the following range of possibilities might eventuate:

1. Counsel might return and present argument on the CISG. The court can then apply it. This obviously presents no problems, since the court can both comply with its obligation and accord the right to be heard on the law.
2. Counsel return and inform the court that an agreement has been reached that the CISG is not to apply. This also presents no problem, provided counsel have the informed consent of their clients. Express exclusion by agreement will invoke the operation of the CISG's modification rules pursuant to Article 29. Thus the court should make a formal ruling regarding the satisfaction of Articles 6 and 29 CISG in the manner indicated above in Part 5.3, taking care to apply the appropriate standard of proof in weighing conflicting inferences.<sup>160</sup> The court is then relieved of its obligation, and accordingly justified in applying the law indicated by (now applicable) domestic procedural rules. The court should not propose that, unless counsel objects, conduct of the case alone will be treated as an implicit agreement to exclude.<sup>161</sup> This course would effectively subvert the correct methodology, including application of Articles 6 and 29, and the weighing of competing inferences in accordance with an appropriate standard of proof. In making the suggestion, the court would breach its obligation to apply the CISG *ex officio*. Instead, the court should give an appropriate warning to counsel, in order to encourage proper investigation of the rights and obligations arising from the applicable law, and if desired, formation of an *ex post* exclusion agreement with the informed consent of the clients.
3. Counsel return and assert they do not need to argue the CISG, on the basis of that local procedural rules preclude *ex officio* applications of law. It is at this point that the issue of displacement is critical. If the court has already explained its view that such domestic procedural rules have been displaced, then in performing its inherent obligation to properly apply and interpret the CISG, it would be justified in then dismissing the case. Moreover, unlike the dismissal discussed in Part 6.2 above, a broad right to be heard will have been accorded.

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159 Obviously in the case of arbitration, this will not apply. Instead, the tribunal would refer to the procedural law and/or procedural rules applicable to the arbitration as the basis for its intent to apply the CISG. See discussion in Part 4.3 above.

160 The court should also consider the effect of any 'no oral modification' clauses.

161 Taking such an approach, see Appellate Court (OLG) Köln, Germany, 28 May 2001, available at <<http://cisgw3.law.pace.edu/cases/010528g1.html>>.

It seems unbelievable, but this actually occurred in an Australian case.<sup>162</sup> During its five hearings neither counsel nor the court recognized that the CISG applied. Only after the fifth hearing had finished did the court subsequently realize the CISG was relevant. Counsel for the plaintiff was properly invited to make further submissions on the applicable law. Incredibly, counsel declined, stating that it was unnecessary. Despite being an uncontested claim in which default judgment had already been ordered, counsel's stance ultimately cost the plaintiff dearly. The court denied damages, saying the failure to address the CISG was 'fatal'.<sup>163</sup> Interestingly, this occurred in Australia, a country that does not overtly employ the *iura novit curia* principle.<sup>164</sup>

4. Alternatively, if counsel assert they do not need to argue the CISG, then rather than dismiss the case, provided the court has provided adequate warning and opportunity, it could proceed to decide the case by application of the CISG *ex officio* rather than dismiss it.<sup>165</sup> This solution will be available in most jurisdictions. Parties have been accorded an opportunity to be heard, yet chosen not to present argument on the applicable law. Clearly, the outcome would not result in a surprise application of law in a manner that could not be foreseen by parties, given the court's earlier warning. In my view, this approach is feasible even in common law courts, because it accords the broadest of opportunities to be heard.

Overall, the interventionist third solution is a sound compromise. It is practical, acceptable, and has the advantage of complying with broad conceptions of due process; parties cannot complain on appeal that they were denied the opportunity to be heard, or surprised by application of the CISG. Importantly, it maintains that local procedural rules are displaced by the CISG, and in accordance with the interpretation of Articles 6 and 29 suggested above, rejects the application of domestic law despite the conduct of the case.

The third solution fulfils the obligation of a court in a Contracting State to apply the CISG. At a minimum, it ensures displacement to the extent necessary to preserve the CISG's

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<sup>162</sup> *Perry Engineering Pty Ltd v. Bernold AG*, South Australian Supreme Court, 11 February 2001, available at <<http://cisgw3.law.pace.edu/cases/010201a2.html>>. See B. Zeller, *CISG Cases* (2004), available at <<http://www.business.vu.edu.au/cisg/Cases.htm>>. Something similar has also occurred in Germany: see Appellate Court (OLG) Rostock, 10 October 2001, *supra* note 149 ('The parties have not made such a declaration even though they had been informed of its necessity by this Chamber. Merely referring to [the domestic provisions] is insufficient, because such reference might also be made because the parties think that that law was applicable anyway').

<sup>163</sup> *Perry Engineering, id.*, at para. 16.

<sup>164</sup> This stands in stark contrast to other Australian cases where the CISG's applicability has sometimes been incorrectly bypassed on the basis of purely domestic interpretive principles: see, e.g., *Playcorp Pty Ltd v. Taiyo Kogyo Ltd*, 24 April 2003, *supra* note 30.

<sup>165</sup> See, e.g., cases cited *supra* note 27. However, contrary to the purported source in those cases, the *ex officio* power derives not from domestic procedural law of the forum, but rather the CISG itself.

integrity. At its maximum, it amounts to a form of *iura novit curia* which fits well with the CISG obligations and the due process sensibilities of most jurisdictions.

It was noted earlier that the solution to the procedural dilemma was more complex in arbitration than in litigation. Nonetheless, in some ways the solution is simpler too, since far more discretion is usually accorded to arbitral tribunals under arbitral laws and rules, and appeal is generally not available on the merits. In the case of arbitration, unless the tribunal's mandate has been specifically restricted to exclude consideration of the CISG, or procedural rules which constrain the tribunal's discretion have been agreed by parties, the third approach is also suitable for arbitrators. While it cannot be said that an arbitral tribunal is under any *obligation* to apply the CISG in the same way as a court in a Contracting State, it will still be bound to decide according to law. In these cases the interventionist third approach represents a safe solution. Arbitral tribunals adopting it will normally render an award impervious to challenge on the basis of *ultra petita*, failure of due process, or on grounds of bias.

Likewise, courts in non-contracting states that nonetheless conclude the CISG is applicable bear no *obligation* to apply the CISG, but may nonetheless find the third solution attractive and, in many instances, compatible with their own (applicable) procedural rules.

## 7 CONCLUSION

This chapter seeks to highlight a flaw in the traditional view that generally, the procedural rule of the forum is determinative of the law to be applied when the parties fail to present argument on the applicable law of the CISG. Courts in Contracting States in fact have a duty to apply the CISG to resolve the issue. This means that in many instances domestic procedural rules of *iura novit curia* and any domestic conceptions of waiver are displaced.

In my view, the only way a court in a Contracting State can discharge its obligation to apply the CISG in the absence of argument from counsel is by the proper application of Articles 6 and 29. This is the sole route by which a pre-existing CISG contract can be transformed into something else. The matter of exclusion by modification lies clearly within the CISG. Thus the CISG itself provides the means by which modification during litigation must be tested. It is submitted that mere failure to argue the CISG will rarely satisfy this test under a proper application of those provisions due to plausible competing inferences. A standard of proof in keeping with widely accepted interpretations of analogous situations under the CISG not only improves its coherence, but is particularly apt given the pragmatic consideration that it remains open to the parties during proceedings to agree



to exclude. Such a balance also ensures the purpose of the CISG in creating practical uniformity is not diminished, and improves the predictability of outcomes in practice.

Provided courts and tribunals alert counsel to the applicability of the CISG and afford them an opportunity to either address it in argument or expressly agree to exclude it, they will conform with the broadest notions of due process and can render enforceable outcomes which apply the CISG as the governing law. In the case of courts in Contracting States, they have an obligation to do so. The preferred solution demonstrates how courts and arbitrators can provide less erratic outcomes and, in the interests of certainty, ensure international sales law gravitates towards uniformity.

