Kluwer Arbitration Blog

Event Report: CISG and Arbitration, Old Friends Still Getting to Know Each Other

Rafael Carlos del Rosal (International Centre for Dispute Resolution (ICDR)) · Sunday, May 10th, 2020 · International Centre for Dispute Resolution (ICDR)

The year 2020 marks the 40th anniversary of the United Nations Convention on Contracts for the International Sale of Goods (CISG), one of the most important substantive instruments in international commercial law. To celebrate this occasion, the ICDR Young and International (Y&I) group and NYU's Center for Transnational Litigation, Arbitration, and Commercial Law organized a conference on 3 February 2020 entitled "CISG in International Arbitration".

The conference opened with comments from Dr. Friedrich Rosenfeld (Partner, Hanefeld Rechtsanwälte), who presented broadly on the issue of the law applicable to the merits in international arbitration.[1)] Dr. Rosenfeld explained that, while courts would normally use the forum's conflict of law rules, arbitrators are not bound by the same conflict rules as courts at the seat. Instead, arbitrators should use autonomous conflict of law rules, such as art. 28 of the UNCITRAL Model Law or art. 31 of the ICDR Rules. Such rules are supportive of party autonomy, as they allow parties not only to choose any applicable law, but their reference to "rules of laws" also allows a choice of soft law like the UNIDROIT Principles or *lex mercatoria*; beyond this, parties may even instruct arbitrators to decide on the basis of equitable principles. Absent parties' agreement, arbitrators are granted discretion to decide the applicable law. As far as the exercise of this discretion is concerned, some conflicts rules expressly require arbitrators to identify an additional conflicts rule outside the arbitration framework (*voie indirecte*), whilst others allow arbitrators to directly select the applicable law without such a detour (*voie directe*).

Dr. Rosenfeld asserted that, in practice, most arbitrators would seek guidance from existing conflict rules—even under the voie directe. An example of such a conflicts rule is the closest connection rule found in the Rome Convention, which presumes that the law with the closest connection is that of the country where the characteristic obligation is performed. Finally, Dr. Rosenfeld explained that the choice of law framework is subject to limitations by overriding mandatory rules, which arbitrators should follow even against the parties' agreement.

Subsequently, Marco Torsello (Partner, ArbLit) discussed the applicability of the CISG in arbitration. He explained that, in litigation, only courts of contracting states would consider the applicability of the CISG. The court would in that case consider the internationality (different places of business) and the territoriality requirements (those places of business must be in contracting states as per art. 1(1)(a), or the conflict rules must lead to the law of a contracting state

as per art. 1(1)(b)). The court would also review the CISG applicability *ratione materiae* and that the case is not covered by any exclusion. However, an arbitral tribunal is not a state forum, so Mr. Torsello argued that arbitrators are not bound by art. 1(1)(a) of the CISG, which cannot even be regarded as a conflict rule because it is merely an applicability requirement. In practice, arbitrators have normally applied the CISG when the requirements of art. 1(1)(a) are met, but Mr. Torsello indicated that this is rather an expression of arbitration's discretion in applying autonomous conflict rules. Equally, as per art. 1(1)(b), when these autonomous rules lead to the application of the law of a contracting state, the arbitrators should apply the CISG. This outcome would not be affected by an art. 95 reservation, because while such reservation would make art. 1(1)(b) inapplicable in court, arbitrators are not state forums and would not be bound by reservations. The same would be true regarding art. 96 reservations (which exclude the CISG's freedom of form), but this issue might need to be considered by the arbitrators as a matter of public policy.

After a short break, Prof. Kevin Davis (NYU School of Law) discussed the battle of the forms under the CISG. He described the typical scenario as one in which one party submits an offer with his standard form, and the other party accepts it but also sends his own standard form. In these situations, the CISG generally follows what is called the mirror image rule: the second form would be a counteroffer, which would be accepted if, for example, performance of the contract is initiated, and the first form would be deemed rejected. Art. 19(2) of the CISG also allows a combination of the forms if the reply does not materially alter the terms of the offer, absent an objection from the other party. Nonetheless, art. 19(3) provides a broad list of illustrations of what constitutes a material alteration, and although some scholars argue that art. 19(3) establishes only a rebuttable presumption, this position is difficult to reconcile with the text of the CISG. As a result, the mirror image rule would normally apply, subject to modulations by usages and practices between the parties. Once the applicable standard form is identified, Prof. Davis explained that it would need to be interpreted according to art. 8 of the CISG. For example, if the form includes additional terms by reference, determining if the incorporation is effective would require considering all of the relevant circumstances. In particular, it will be necessary to consider if the parties truly understood what these additional terms mean, which is a factual issue that cannot be decided only on motions.

Afterwards, Gretta Walters (Counsel, Chaffetz Lindsey) addressed specific performance under the CISG. She highlighted that art. 46, which covers specific performance, is the first substantive remedy the CISG presents for buyers, consistent with the goal of preserving the contractual relationship. Although art. 46 does not limit the kinds of specific performance that a buyer may seek, art. 28 provides that a court is not required to order specific performance if it considers that it would not do so under its own domestic law. Ms. Walters described how the drafters of the CISG had in mind that civil law countries tend to prefer specific performance, while common law ones often rather award damages, and art. 28 reflects this difference. Although it could be argued that art. 28 could lead to a lack of uniformity in how courts apply the CISG, she argued that, in practice, most parties have claimed damages and such lack of uniformity has not resulted. As to whether art. 28 would apply in arbitration, Ms. Walters concluded that, as remarked by Mr. Torsello, arbitrators are not a state forum and are therefore not bound by art. 28, an idea reinforced by this article's reference exclusively to courts and not arbitrators. Nevertheless, she noted that the CISG contains some limitations to specific performance. For instance, specific performance cannot be requested together with inconsistent remedies (such as contract avoidance or price reduction), and substitute goods can only be demanded if the lack of conformity constitutes a fundamental breach.

Finally, Prof. Clayton Gillette (NYU School of Law) analyzed economic hardship under the CISG. He indicated that it is unclear whether hardship was intended to be covered by the CISG. Prof. Gillette analyzed four possible approaches. First, it could be argued that art. 79 of the CISG, which deals with exemptions from performance, encompasses hardship as a potential impediment. This position seems to be prevalent at least in civil law countries. Another interpretation would argue that the existence of hardship is generally governed by the CISG, but the strict language of art. 79 excludes the possibility of considering it an impediment. An alternative approach argues that hardship is governed by the CISG, but not by any specific article, which means that it must be decided in conformity with CISG's general principles, as per art. 7. Finally, it is also possible that hardship is not governed by the CISG, in which case the issue would be decided by the law applicable pursuant to private international law rules. Prof. Gillette stated that, assuming the CISG governs hardship, art. 79 also requires it to be unforeseeable or unavoidable. He criticized some courts' narrow interpretation of this requirement that focuses on the price increase for the specific contract, ignoring the underlying reason for the price change and the general volatility of the market. Along the same lines, he argued that some companies might knowingly enter into some contracts with high price volatility as part of a portfolio of contracts, so the company's financial health would not be affected even if those contracts are subject to large price increases.

A related issue not directly addressed by the speakers is whether the CISG can apply to arbitration agreements. This has generated some controversy, mostly focused on whether the CISG's freedom of form in art. 11 would prevail over the form requirement in art. II of the New York Convention, especially if, as explained by Mr. Torsello, art. 96 reservations would not bind arbitral tribunals. A common argument against it is that art. 90 establishes that the CISG does not prevail over any previous international treaty, which would include the New York Convention. However, art. VII(1) of the New York Convention could point in the opposite direction, as it states that the New York Convention shall not deprive any party of any right to recognition and enforcement under more favorable laws or treaties, which could arguably encompass the CISG's freedom of form. For the purpose of contract formation, art. 19(3) of the CISG indicates that dispute settlement clauses are material terms, which seems to support the idea that at the very least the CISG's rules on formation explained by Prof. Davis could apply to arbitration agreements. As we progress through the year, it is to be expected that, despite postponements due to COVID-19, there will be many other events around the globe about the CISG, so hopefully the celebration of the CISG's 40th anniversary will serve to provide more clarity on these questions and to promote a better understanding of the CISG.

References

?1 This presentation was based on a forthcoming article, *see* F. Rosenfeld / F. Ferrari, 'The Law Applicable to the Merits in International Commercial Arbitration', forthcoming in: A. Bjorklund / F. Ferrari / S. Kröll, *Cambridge Compendium of International Commercial and Investment Arbitration* (Cambridge University Press, 2020).

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