Kluwer Arbitration Blog

When is the Arbitrator Bound to Apply the CISG?

Vitória Zanotto Farina · Saturday, October 10th, 2020

The relationship between arbitration and the United Nations Convention on Contracts for the International Sale of Goods ("CISG" or "Convention") is not a clear one, and the question of when an arbitrator is bound to apply the CISG is still not answered with clarity either by scholars or by practitioners. At a recent conference organized to celebrate the 40th anniversary of the CISG, Marco Torsello argued that the arbitrators should apply the CISG, on the basis of art. 1(1)(b) CISG, when conflict rules lead to the application of the law of a Contracting State. Contrary to this view, I consider that the arbitrator's duty to apply the CISG rather derives from the party autonomy. I will briefly address below the context, diverging views in practice and then put forward my analysis of the issue.

Scholarly Position: Majority v. Minority View

Most scholars adopt the view that the CISG does not bind arbitrators. According to Ulrich Magnus, whose opinion reflects the predominant understanding in scholarly writings, for interpreting the Convention's scope of applicability, one should resort to the Vienna Convention on the Law of Treaties ("VCLT").[1)] According to Article 26 of the VCLT, since the treaties only oblige the parties that have adhered to them, it is only the Contracting States and their organs that are bound by the treaties' provisions. Consequently, as arbitrators are not state organs, they are not bound by the CISG, including its Article 1, unless the parties have manifested their intention to apply it.

While most scholars agree with this view, some authors are of the understanding that arbitral tribunals may have to apply the Convention as a consequence of Article 1(1)(b) CISG. According to Article 1(1)(b) CISG, the Convention applies to contracts of sale of goods between parties whose places of business are in different States when the rules of private international law lead to the application of the law of a Contracting State. These authors treat the rule of party autonomy as a rule of conflict and sustain that, where parties have chosen the law of a Contracting State as the governing substantive law, the CISG – as an integral part of the chosen domestic law – should apply. In fact, the applicability of the CISG can only be avoided if the parties expressly provide so. However, these authors do not explain clearly the reasoning behind the *ex officio* applicability of Article 1(1)(b) of the Convention.

Analysis of Arbitral Awards: Three Different Approaches Dominate the Landscape

An analysis of arbitral awards shows that the Convention was applied, but on different grounds. The awards can be divided into three main groups: the first, in which the arbitral tribunal applied the Convention *ex officio*, based on Article 1 of the CISG; the second, a hybrid approach in which the arbitral tribunal applied the Convention due to an implicit choice of the parties, but also in reliance on Article 1 of the CISG; the third, in which the awards justified the applicability of the Convention for reasons other than Article 1 CISG.

In the first category, arbitral tribunals applied the Convention due to Article 1(1)(a) or 1(1)(b) CISG the same way state courts do. In the ICC Case n. 8128 (Chemical fertilizer case) and in the ICC Case n. 7197 (Failure to open letter of credit and penalty clause case), the parties had not chosen an applicable substantive law, and, in order to solve the conflict of laws issue, the arbitrators evoked Article 1 CISG without mentioning the reasons why the latter is being analysed in the first place.

A slightly different approach is taken by arbitral tribunals when parties have expressly chosen the law of a Contracting State to govern the substantive issues of their contract.

In the ICC Case n. 8324 (Magnesium case), ICC Case n. 10377 (Textile product machines case) of 2002 and in the ICC Case n. 6653 (Steel bars case), it is mentioned that the choice of law of a Contracting State entails the applicability of the CISG as such choice constitutes an implicit choice of the CISG. These awards highlight that party autonomy is a connecting factor in international arbitration, fulfilling the requirements for the applicability of the CISG set out in Article 1(1)(b) CISG – namely, that the applicable rules of private international law lead to the application of the law of a Contracting State.

For example, in the arbitral award ICC Arbitration Case n. 11333 of 2002 (Machine case), the parties had chosen French law to govern their contract. The arbitral tribunal held that the Convention should be applied, since it was an integral part of French contractual law that addressed issues of international buying and selling of goods. The tribunal further explained that, in this case, the Convention would apply as a consequence of Art. 1(1)(b) of the Convention, since party autonomy fulfilled the requirements of Art. 1(1)(b) CISG:

> *The principle of party autonomy, according to which the parties may freely choose the law governing their relationship, is without doubt part of 'the rules of private international law' referred to in Art. 1 (1)(b) of the CISG […] Accordingly, unless the parties agreed to exclude the application of the CISG, the reference made to 'French law' in the Agreement leads to the application of the CISG, which is, since 1 January 1988, the French law of international sales of goods.*

Similarly, this reasoning was adopted in Italy 22 February 2008 Milan Chamber of Arbitration Case No. 5706, in X v. Y, Award, CAM Case No. 13209, 1 December 2010 and in ICC Case n. 7660.

The third group of arbitral awards does not resort to Article 1 of the CISG for justifying the applicability of the CISG. Those applied the CISG to the extent that the Convention prevails over non-harmonized domestic law.

In the Arbitration proceeding 95/2004 held in Russia in May 2005, the arbitral tribunal applied the CISG instead of non-harmonized domestic Russian law since the CISG was part of the Russian law and should be applied with priority. The non-harmonized Russian law would apply in a subsidiary manner in accordance with Article 7(2) CISG.

Similarly, in the ICC Case 9187 the CISG was applied with priority over non-harmonized domestic law, with the tribunal recognizing that the CISG was part of the domestic law system chosen by the parties:

> *As a rule, Swiss law encompasses every international convention to which Switzerland is a party. Since Switzerland is a party to the CISG, the latter, consequently, is a part of Swiss law. Therefore, should contracting parties wish to exclude the application of CISG to a contract, the parties must explicitly state that CISG does not apply to the contract, or alternatively, that only Swiss domestic law is applicable to the Contract.*

My View on the Matter: Arbitrator's Duty to Apply the CISG Can Only Stem from Party Autonomy

In my view, the correct interpretation is that the arbitrator's duty to apply the CISG derives from the party autonomy. Thus, when parties choose the law of a Contracting State as the applicable law, the arbitrator must apply the CISG as an implicit choice of law and not, as many scholars and arbitral awards have sustained, as a consequence of Article 1 of the CISG.

As such, the CISG consists in the segment of the domestic law designed to regulate contracts for the international sales of goods. Since the CISG would apply primarily to the contract for the international buying and selling of goods, the choice of the law of a Contracting State is to be interpreted as an implicit choice of the CISG.

The arbitrator generally must apply a choice of law made by the parties, otherwise there is a risk that the enforcement of the award could be refused as per Article V(1)(d) of the New York Convention, on the basis of excess of authority or the irregularity of the procedure that was not in accordance with the parties' agreement.[2)] Therefore, where parties have chosen the law of a Contracting State as the governing substantive law, the arbitral tribunal must enforce the parties' will in applying the CISG. Otherwise, this could serve as a reason to refuse enforcement of the award due to a procedural irregularity.

Thus, it is not necessary to rely on Article 1 CISG to justify the applicability of the Convention to arbitral awards.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

References

?1 MAGNUS, Ulrich. Tracing Methodology in the CISG: Dogmatic Foundations. In: JANSSEN, André; MEYER, Olaf. CISG Methodology. Munich: Sellier, 2009, p. 46.

?2 MOSES, Margaret, L. The principles and practice of international commercial arbitration. Cambridge: Cambridge University Press, 2017. p. 67.

This entry was posted on Saturday, October 10th, 2020 at 8:00 am and is filed under CISG, International arbitration, Party autonomy
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.