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CISG as the (Rules of) Law Applicable to the Arbitration Agreement: Exploration from an English Perspective

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Can the United Nations Convention on Contracts for the International Sale of Goods (CISG) be applicable to arbitration agreements? The literature has been divided on this matter, with several discernible approaches. This post explores the topic of applicability of the CISG to arbitration agreements from the perspective of the now (in)famous *Enka v. Chubb* case, as well as in relation to the impending reform of the 1996 English Arbitration Act (1996 EAA).

CISG and the United Kingdom (UK)

Despite the fact that the UK has not adopted the CISG, this does not mean that the CISG plays no role in the UK context. Namely, Article 1(1)(b) of the CISG provides that the CISG will be the governing law of a sales contract if the rules of private international law point to the law of a CISG Contracting State. When a state adopts the CISG, it becomes part of its internal law. Since the CISG is a convention, in terms of hierarchy of sources, it takes precedence over national sales law. Moreover, the CISG, because it was designed to govern international sales contracts, is deemed *lex specialis* when juxtaposed to the national sales law of a CISG Contracting State. Thus, if an English court, by virtue of its conflict of laws rules, arrives at the conclusion that the applicable law to the sales contract is the law of, say, Germany (a CISG Contracting State), then the English court ought to apply the CISG.

There are other ways in which the CISG may be relevant in the UK context. For instance, English law gives quite a bit of deference to party autonomy, enabling the parties to choose law to govern their international sales contract. A choice of law of a CISG Contracting State would mean that the parties have opted for the CISG as the governing law of their transaction.

In arbitration, party autonomy enjoys an even greater prominence. For instance, in arbitrations under the auspices of the London Court of International Arbitration (LCIA), parties are not only allowed to select a body of national law to apply to the merits, but may even choose rules of law. This means that parties may choose the CISG as a self-standing body of rules, or even soft law instruments such as the UNIDROIT Principles of International Commercial Contracts to govern their transaction.

In the absence of a choice of law by the parties, the LCIA Rules do not require the arbitrators to

apply conflict of laws rules. Instead, the arbitrators may resort to *voie directe*, i.e., directly choose the applicable law or rules of law to the merits that they deem appropriate. Since the CISG was drafted with international sales transactions in mind – as opposed to national sales laws which are primarily geared towards domestic transactions – it is not uncommon for the arbitrators to apply the CISG in the absence of a choice of law by the parties. There have been examples of arbitrators even applying the CISG when neither of the parties was from a CISG Contracting State.

Applicability of the CISG to Arbitration Agreements

The CISG primarily lays out two sets of substantive rules: (1) those on the formation of the sales contract contained in Part II and (2) those on the rights and obligations of parties to the sales contract contained in Part III. A question has arisen both in the literature and in practice as to whether the CISG could apply to the arbitration agreement. After all, most arbitration agreements tend to be in the form of an arbitration clause inserted into the main or the so-called container contract. If the CISG governs the formation of a sales contract that has an arbitration clause, does the CISG then also govern the latter?

Stefan Kröll has identified three different approaches in the literature to the question posed here. The first camp of authors asserts that arbitration clauses fall outside the purview of the CISG. By virtue of the doctrine of separability, the authors who belong in this camp argue that arbitration clauses are separate agreements from their container contracts, and that consequently an entirely separate analysis should be conducted to determine the law applicable to the arbitration agreement.

In contrast, the second and third camp both opine that the CISG's sphere of application is broad enough to encompass arbitration clauses. The second camp holds that the whole of the CISG applies to the arbitration agreement, including Article 11 which dispenses with the writing requirement and other formalities. The third camp is somewhat more cautious, endorsing the application of only the CISG rules on contract formation to the arbitration agreement. For instance, the CISG makes an express reference to dispute resolution in its Art. 19, clarifying that an attempt by the offeree to accept the offer by altering the terms of dispute resolution shall not be deemed as an acceptance, but a counter-offer since the contractual stipulations on dispute resolution constitute material alterations to the original offer. This reference is taken as a strong indication that dispute resolution terms fall within the purview of the CISG.

Enka v. Chubb and Its Intersection with the CISG

In *Enka v. Chubb*, the Supreme Court of the UK clarified the English approach to law applicable to the arbitration agreement. While the case did not include any CISG legal questions, the arguments put forth by the Court may work towards the position that it is appropriate for the CISG to apply to the arbitration agreement. The Supreme Court determined that where the parties have not chosen the law applicable to the arbitration agreement either expressly or impliedly, but have selected the law applicable to the container contract, then that law shall govern the arbitration agreement, unless there are factors at play that would indicate to the contrary. A quintessential example of such a factor would be a situation whereby the law of the container contract leads to the conclusion that the arbitration agreement is invalid.

The Court opined that if the parties choose the law applicable to their container contract, this is a compelling indication that they intended the same law to apply to the arbitration agreement. In the Court's view, the parties would be reasonable in their expectation that their choice of law is to extend to the contract in its entirety, noting that "[f]or them a contract is a contract; not a contract with an ancillary or collateral or interior arbitration agreement." Moreover, having different laws apply within the purview of one transaction brings with it an array of difficulties and uncertainties, something that goes against the very inclination of business parties who by their nature gravitate towards the exact opposites – simplicity and certainty. If we assume a hypothetical case in which two parties have selected London as the seat of arbitration and the CISG as the governing body of rules of their transaction without choosing the law applicable to the arbitration agreement, then applying some other law to the arbitration agreement other than the CISG would stand in stark contrast to the arguments of the UK Supreme Court.

In practice, when there is a need to determine the law applicable to the arbitration agreement, it is usually the case that one party is disputing its existence or validity. Although Art. 4 of the CISG provides that the Convention does not cover the validity of the contract, the effect of this provision does not mean that the CISG has no say whatsoever on validity matters. Namely, validity questions are often intrinsically related to contract formation matters, and these are undoubtedly governed by the CISG. In arbitrations, the validity question more often than not boils down to whether the pertinent formalities have been met, and thus a valid arbitration agreement formed. Part II of the CISG, comprising rules on contact formation, is more than capable of addressing the question of whether an arbitration agreement has been formed.

Moreover, if one adopts the expansive view that the entire CISG may apply to the arbitration agreement, then the CISG would even determine its appropriate form. Since Article 11 of the CISG dispenses with the writing requirement, an arbitration agreement may even arguably be concluded orally. While at first glance this may seem contradictory to Art. II of the New York Convention which mandates a strict writing requirement, Art. VII(1) of the same Convention offers a way to reconcile the differing approaches of the New York Convention and the CISG. Referred to in the literature as the 'more favourable right' provision, Art. VII(1) of the New York Convention enables the award creditor to rely on a rule in the enforcing jurisdiction when that rule is more favourable to the recognition and enforcement of an award as compared to the New York Convention. The UNCITRAL has recommended that this provision be extended to arbitration agreements as well, and in accordance with this approach, the UNCITRAL amended its Model Law on International Commercial Arbitration (ML) in 2006. What UNCITRAL did was to make the writing requirement in the ML far less stringent than the one found in Art. II of the New York Convention, with Option 2 of Art. 7 of the ML even arguably dispensing with the writing requirement altogether. Thus, the liberal approach of the CISG to form is practically on par with the one found in the ML, with a viable interpretation available to make it in line with the New York Convention, and thus an appropriate set of rules to govern the arbitration agreement.

A Note on the 1996 EAA Reform

It is important to note that the 1996 EAA reform is underway. One of the most significant aspects of this reform is that the draft Arbitration Bill contains a provision that will make the *Enka v. Chubb* holding obsolete. Namely, the Arbitration Bill provides that the arbitration agreement shall be governed by the law of the seat unless the parties have made an express choice of some other

law to govern the matter. Thus, in a hypothetical case laid out above, the draft Arbitration Bill would point to English law as the law applicable to the arbitration agreement, and not the CISG, which would remain the governing law of the container contract.

Conclusion

The applicability of the CISG to arbitration agreements remains a divisive topic in the CISG literature. The arguments put forth by the UK Supreme court in *Enka v. Chubb* seem to work towards the position that a choice of CISG to govern the container contract could result in a situation whereby the CISG is also the governing law of the arbitration agreement, absent an express or implied choice to the contrary. However, with the ensuing reform of the 1996 EAA, the applicable law to the arbitration agreement is expected to be the law of the seat.

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