

The Applicability of the CISG to the Arab World

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I. – INTRODUCTION

The *United Nations Convention on Contracts for the International Sale of Goods* (hereinafter: the Convention, or CISG) was signed in Vienna in 1980 and became effective on 1 January 1988. The CISG applies to contracts for the international sale of goods¹ and aims at providing “a neutral, uniform,

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¹ Although the CISG clearly governs the sale of goods, it does not include an express definition of the sale of goods contract. Nevertheless, such definition may be deduced from the CISG provisions themselves, basically Articles 30 and 53. Accordingly, the sale of goods governed by the CISG is a contract “pursuant to which one party (the seller) is bound to deliver the goods and transfer the property in the goods sold and the other party (the buyer) is obliged to pay the price and accept the goods” – see *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sales of Goods – 2008 revision*, 4, available at <http://www.uncitral.org/pdf/english/clout/08-51939_Ebook.pdf>. For a similar definition, see also R. HERBER, in: E. von Caemmerer / P. Schlechtriem (Eds.), *Kommentar zum Einheitlichen UN-Kaufrecht – CISG* [Commentaries by H.-H. Eberstein, G. Hager, R. Herber, P. Huber, W. Junge, H.G. Leser, P. Schlechtriem, I. Schwenzer, H. Stoll, H. Stumpf], 2nd ed., Beck, München (1995), 49. To be noted is that this definition includes the modification of the sale of goods contract under Art. 29 CISG, the contract according to which the supplier has to deliver the goods sold directly to the seller’s customer pursuant to Art. 79 CISG and the contract for delivery of the goods by instalments under Art. 73 CISG. By contrast, the CISG does not cover (1) barter contracts (see Award of the Federal Arbitration Court for the Moscow Region, Russian Federation, No. KG-A40/3225-03 of 26.5.2003, available at <<http://www.unilex.info/case.cfm?id=958>>; K. SIEHR, in: H. Honsell (Ed.), *Kommentar zum UN-Kaufrecht. Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf (CISG)* [Commentaries by M. Karollus, U. Magnus, W. Melis, A. Schnyder, H. Schönle, K. Siehr, R.H. Weber], Springer, Berlin/Heidelberg/New York (1997), 58; HERBER, in: von Caemmerer / Schlechtriem, *cit.*, 50; P. SCHLECHTRIEM, *Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods*, Manz, Vienna (1986), 24); (2) sale of immovable property (see J.O. HONNOLD, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed., Kluwer Law International, Deventer (1999),

harmonised sales law around the world”² to promote international commerce by removing legal barriers in sale of goods transactions between international traders.³ To date, 77 States have acceded, accepted, approved, ratified, or succeeded to the CISG,⁴ among them five Arab countries (Egypt on 1 January 1988, Syria on 1 January 1988, Iraq on 1 April 1991, Mauritania on 1 September 2000, and Lebanon on 1 December 2009).

With regard to disputes arising from international commercial contracts, national courts usually apply their conflict-of-laws rules in order to define the applicable law. In disputes arising from contracts for the international sale of

53); (3) know-how contracts (see HERBER, *cit.*, 51.); (4) distributorship agreements (but not the individual contracts concluded under the distribution agreement) (see Award of the Foreign Trade Court of Arbitration of the Serbian Chamber of Commerce, No. T-8/08 of 28.1.2009, available at <<http://www.unilex.info/case.cfm?id=1432>>); (5) franchise contracts (see Decision No. 11 95 123/357 of 8.1.1997 of the *Obergericht Kanton Luzern* (Switzerland), available at <<http://www.unilex.info/case.cfm?id=241>>; HONNOLD, *cit.*, 54.); and (6) financial leasing contracts (see HERBER, *cit.*, 71). It should also be noted that the goods that are the subject matter of a sale contract covered by the CISG must at the time of delivery be “movable and tangible regardless of whether they are solid, used or new, inanimate or alive” (see UNCITRAL Digest, *cit.*, 5). “Intangibles, such as intellectual property rights, an interest in a limited liability company, or an assigned debt, have been considered not to fall within the Convention’s concept of ‘goods’. The same is true of a market research study” (see UNCITRAL Digest, *cit.*, 5).

² L. SPAGNOLO, “The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers”, 10 *Melbourne Journal of International Law* (2009), 141-216, at 145, also available at <<http://www.cisg.law.pace.edu/cisg/biblio/spagnolo2.html>>.

³ According to the Convention’s Preamble, the States Parties to the CISG hold “that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.”

⁴ Albania, Argentina, Armenia, Australia, Austria, Belarus, Belgium, Benin (entry into force on 1 August 2012), Bosnia and Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Japan, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Lithuania, Luxembourg, Mauritania, Mexico, Mongolia, Montenegro, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saint Vincent and the Grenadines, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, The former Yugoslav Republic of Macedonia, Turkey, Uganda, Ukraine, United States of America, Uruguay, Uzbekistan, Venezuela (Bolivarian Republic of), Zambia. See United Nations Commission on International Trade Law (UNCITRAL), at <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.

goods, however, the court – not only in Contracting States⁵ but also in non-Contracting States⁶ – must first of all determine whether the conditions for application of the CISG (stipulated in Article 1 CISG) have been met or not, independently from the conflict-of-laws rules of the forum.⁷ If the CISG is applicable, it supersedes the otherwise applicable national law.⁸ The CISG is a

⁵ K. BELL, “The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods”, 8 *Pace International Law Review* (1996), 237-258, at 247, also available at <<http://www.cisg.law.pace.edu/cisg/biblio/bell.html>>: “For tribunals sitting in Contracting States, the purpose of sub. (l)(a) is to eliminate the need to go through a conflict of laws analysis, since under these circumstances the rules of private international law are irrelevant.”

⁶ UNCITRAL Digest, *supra* note 1, 6: “Although the Convention does not bind non-Contracting States, it has been applied in courts of non-Contracting States where the forum’s rules of private international law led to the law of a Contracting State.”

⁷ F. FERRARI, “Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing”, 15 *Journal of Law and Commerce* (1995), 1-126, at 34, also available at <<http://www.cisg.law.pace.edu/cisg/biblio/2ferrari.html>>: “Whenever this requirement [i.e., that the parties have their places of business in different Contracting States] is met and whenever the *lex fori* is the law of a Contracting State and the parties have not excluded the CISG, it will be applicable, independently from a different solution provided for by the rules of private international law”; UNCITRAL Digest, *supra* note 1, 4: “Both the Convention and the private international law rules of a forum address international contracts. Before examining the Convention’s substantive, international and territorial sphere of application, therefore, its relationship to private international law rules must be explored. According to case law, courts of Contracting States must determine whether the Convention applies before resorting to private international law”; Decision No. 13 U 51/93 of 20.4.1994 of the *Oberlandesgericht Frankfurt/Main* (Germany), available at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=47&step=FullText>>: “Das UN-Kaufrecht gilt sowohl in der Bundesrepublik Deutschland (seit 1.1.1991) als auch in der Schweiz (seit 1.3.1991 ... und verdrängt, soweit es Geltung erheischt, nationales Recht, insbesondere auch die Vorschriften des internationalen Privatrechts”; Decision No. 3 KFH O 653/93 of 15.9.1997 of the *Landgericht Heilbronn* (Germany), available at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=439&step=FullText>>: “Das Einheitliche UN-Kaufrecht geht bei zwischenstaatlichen Geschäften der europäischen Mitgliedsstaaten sowohl dem deutschen internationalen Privatrecht als auch dem nationalen Privatrecht (BGB) vor”; Decision No. HG 930634 of 30.11.1998 of the *Handelsgericht Zürich* (Switzerland), available at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=409&step=FullText>>: “Damit beansprucht das WKR umfassende Geltung, und es verdrängt daher auch die im erwähnten Haager Abkommen (und im IPRC) vorgesehene Sonderanknüpfung hinsichtlich der Untersuchungsmodalitäten Dies ergibt sich vor allem aus dem Gedanken, dass das WKR eine Vereinheitlichung des Sachrechts darstellt, welche als die tieferegreifende internationale Rechtsharmonisierung den Vorrang gegenüber der Vereinheitlichung des IPR bzw. dem innerstaatlichen IPR beansprucht.”

⁸ A. ROSETT, “Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods”, 45 *Ohio State Law Journal* (1984), 265-305, at 273, also available at

lex specialis that exclusively and comprehensively governs contracts for the international sale of goods;⁹ to say otherwise would undermine the main goal

HeinOnline: "The strategy of the Convention is not to harmonize all commercial law, but only a particular subgroup of transactions, the international sale. Within that subgroup, unified international rules are supreme and displace national rules"; K.A. ROWLEY, "A Brief History of Anticipatory Repudiation in American Contract Law", 69 *University of Cincinnati Law Review* (Winter 2001), 565-639, at 630-631, also available at <<http://www.cisg.law.pace.edu/cisg/biblio/rowley.html>>: "To the extent that the CISG conflicts with the Uniform Commercial Code or state common law, the CISG controls"; A. ALDMOUR, "L'application et l'exclusion de la Convention des Nations-Unies sur les Contrats de Vente Internationales de Marchandises par le juge jordanien", *European Journal of Social Sciences*, Vol. 16, No. 3 (2010), 363-378, at 364, also available at <http://www.eurojournals.com/ejss_16_03_05.pdf>: "[L]a Convention présente la particularité de contenir des règles de droit matériel uniforme, si bien qu'à partir du moment où elle est applicable, ses dispositions se substituent purement et simplement au droit interne de la vente. Elle édicte un corpus de règles matérielles inspirées à la fois des systèmes de common law et civilistes"; Decision No. 979 of 11.4.2006 of the Court of Cassation (Egypt) for judicial year 73, available (in Arabic) in the Arab Legal Network at <<http://cisgw3.law.pace.edu/cisg/text/060411e1arabic.pdf>>: "When a sale of goods made between a seller in a State ratifying CISG and a buyer in another State ratifying CISG, the rules of the Convention shall govern the formation of the sale contract and the rights and duties arising therefrom, regardless of the law applicable according to the conflict-of-laws rules of the forum"; Decision No. 2353/2007 of 8.4.2008 of the Court of Cassation (Jordan) (in Arabic), available at <www.adaleh.com>: "Doctrine and jurisprudence agree that the international Conventions concluded by States take priority over the national laws of these States; these Conventions shall therefore apply even when their rules collide with national laws."

⁹ Decision of 29.12.1999 of the *Tribunale di Pavia* (Italy) (Clout case No. 380), available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V01/847/23/PDF/V0184723.pdf?OpenElement>>, "uniform substantive law prevails over the conflict of laws rules due to its speciality;" Decision No. HG 930634 of 30.11.1998 of the *Handelsgericht Zürich* (Switzerland), available at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=409&step=FullText>>: "Damit beansprucht das WKR umfassende Geltung." Decision No. 3095 of 26.11.2002 of the *Tribunale* [District Court] *di Rimini* (Italy), available at <<http://cisgw3.law.pace.edu/cases/021126i3.html>>: "The provisions of the CISG have the character of specialty by definition, since they resolve the substantive issues 'directly', avoiding the double-step approach (identification of applicable law and application thereof), which is needed when one resorts to the rules of private international law;" Decision No. 405 of 12.7.2000 of the *Tribunale* [District Court] *di Vigevano* (Italy), available at <<http://cisgw3.law.pace.edu/cases/000712i3.html>>: "Uniform substantive law is more specific *per definitionem* than the rules of private international law because the former settles 'directly' the ... question of applicable substantive law. It thus avoids the two-step process – consisting first in the identification of the applicable law and then in its enforcement – required by resort to private international law;" Decision No. 6 Ob 311/99z of 9.3.2000 of the *Oberster Gerichtshof* (Austria), available at <<http://www.unilex.info/case.cfm?id=474>>: "Das UN-K schafft selbst materielles Recht." Decision No. 12.19.00036 of 8.6.1999 of the *Cantone del Ticino, Seconda Camera civile del Tribunale d'appello* [Appellate Court] of Lugano (Switzerland), available at <<http://cisgw3.law.pace.edu/cases/990608s1.html>>: "The Vienna Convention of 11 April 1980

of the CISG, *i.e.*, the unification of the law of the sale of goods.. But if the conditions stipulated by the CISG for its application are not met, then the court has no choice but to apply the law referred to by its conflict-of-laws rules.¹⁰ This would also be the case if the contracting parties opted out of the CISG application.¹¹

The aim of this article is to define the conditions that have to be met in order to apply the CISG in Arab (Contracting and non-Contracting) countries, whether in the case of autonomous (direct) application by virtue of Article 1(1)(a) CISG or in the case of indirect application, *i.e.*, according to the conflict-of-laws rules of the forum, pursuant to Article 1(1)(b) CISG. Besides, this article will discuss the possibility of applying the CISG in Arab countries as being a source of the *lex mercatoria*, *i.e.*, the law of merchants.

II. – AUTONOMOUS APPLICATION OF THE CISG

In order to apply the Convention autonomously, Article 1(1)(a) CISG lays down two main conditions. First, the contract for the sale of goods must be international in nature, *i.e.*, the places of business of the contracting parties must be located in different States. Second, these two States must be Contracting States. In addition to these conditions, we will explain the Convention's autonomous application in practice in the Arab world pursuant to Article 1(1)(a) CISG.

A. Internationality of the sale of goods contract

The CISG intends to apply only to international contracts for the sale of goods. Though the word “international” does not appear in the provisions that define the geographical sphere of application of the CISG, the title of the document itself says that it is a “Convention on Contracts for the International Sale of

(CISG) established a body of norms of substantive law that govern the sales of good between individuals established in different countries provided these countries are party to the CISG.”

¹⁰ R. LOEWE, “The Sphere of Application of the UN Sales Convention”, *Pace International Law Review*, Vol. X (1998), 79-88, also available at <<http://www.cisg.law.pace.edu/cisg/biblio/Loewe.html>>: “If the Convention is not applicable because one party or both parties have their places of business outside the member states, national private law rules determine which law applies.” See also: FERRARI, *supra* note 7, 34.

¹¹ According to Art. 6 CISG, “[t]he parties may exclude the application of this Convention.”

Goods".¹² Pursuant to Article 1 CISG, this obviously means that the places of business¹³ of seller and buyer themselves must, at the time of conclusion of the contract,¹⁴ be in different States;¹⁵ it does not therefore suffice that the places of business of their agents are in different States.¹⁶ Thus, "[Article 1 CISG] contains the basic jurisdictional statement of the Convention, laying down a single criterion of internationality: the seller and buyer must have their places of business in different States."¹⁷ Once this subjective

¹² ROSETT, *supra* note 8, 274.

¹³ The concept of the place of business "requires something more than temporary presence ... Neither having a hotel room or a rented office in a city nor engaging in sales transactions on repeated occasions in the nation appear to suffice": ROSETT, *supra* note 8 279. "As a general rule it was accepted that the place of business is where the contracting party has its stable business organization. Consequently, this is the place where the company has its establishment of some duration with certain authorized powers": B. BORISOVA, *Geographic sphere of application of the United Nations Convention on Contracts for the International Sale of Goods*, Pace essay (September 2002), available at <<http://www.cisg.law.pace.edu/cisg/biblio/borisova.html>>. "[It is] a permanent and regular place for the transaction of general business, not including a temporary place of sojourn during *ad hoc* negotiations. Neither a warehouse, the office of the seller's agent, nor a booth at a trade show would seem to qualify as a place of business": BELL, *supra* note 5, 245.

¹⁴ SIEHR, *supra* note 1, 48.

¹⁵ In order to determine the internationality of the sale of goods contract, if one of the contracting parties or both parties have multiple places of business, the relevant place of business is that which is most closely connected to the contract and its performance. Art. 10(a) CISG clearly says: "For the purposes of this Convention: (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract." If either party does not have a place of business, reference is to be made to its habitual residence pursuant to Art. 10/b CISG.

¹⁶ SIEHR, *supra* note 1, 48. E. JAYME, in: C.M. Bianca / M.J. Bonell (Eds.), *Commentary on the International Sales Law*, Giuffrè, Milan (1987) [Commentaries by J. Barrera Graf, H.T. Bennett, C.M. Bianca, M.J. Bonell, G. Eörsi, M. Evans, E.A. Farnsworth, W. Khoo, V. Knapp, O. Lando, D. Maskow, B. Nicholas, J. Rajska, K. Sono, D. Tallon, M. Will], 30.

¹⁷ BELL, *supra* note 5, 244. See also: P. SCHLECHTRIEM, "Requirements of Application and Sphere of Applicability of the CISG", *Victoria University of Wellington Law Review* (2005/4), 781-794, at 782, also available at <<http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem9.html>>: "Article 1(1)(a) CISG requires only that the parties have their places of business in different contracting states;" ROSETT, *supra* note 8, 274: "Application of the Convention shall depend on only one factor, the parties having places of business in different countries;" LOEWE, *supra* note 10, 79-88, also available at <<http://www.cisg.law.pace.edu/cisg/biblio/Loewe.html>>: "The universality principle was replaced by the Article 1 para. 1(a); that is to say, by the application of the Convention only if the places of business of the parties are in two different member states;"

criterion¹⁸ has been established, it does not matter whether or not either party has a connection to the State where the other party has its place of business,¹⁹ or whether the essential factors of the sale of goods contract are connected to a Contracting or a non-Contracting State.²⁰ By contrast, the international character is not established when the parties have their places of business in one and the same State.²¹ In such a case, it does not matter whether the parties have different nationalities,²² or whether either party has another place of business in another State with which the contract has no strong connection.²³ Moreover, it does not suffice in this regard that the contract was concluded in one State to be performed in another State.²⁴

At all events, the fact that the places of business of both parties are in different States must be known or at least may not be unknown to the parties at any time before or at the conclusion of the contract. This means that, in order to exclude the CISG, it suffices that only one party to the contract proves its having been unaware at the time of conclusion of the contract that the other party's place of business was located abroad.²⁵ On the other hand, it

FERRARI, *supra* note 7, 23: "Under the CISG the internationality of a contract depends merely on the parties having their places of business (or habitual residences) in different States."

¹⁸ BORISOVA, *supra* note 13: "The drafters of the CISG decided to accept only the subjective element for description of that term, i.e., a sale of goods will be regarded as international if the contract is concluded between parties having their places of business in different States." See also HERBER, *supra* note 1, 48; JAYME, *supra* note 16, 28.

¹⁹ Decision of the *Cour de Cassation* (France) of 4.1.1995, available at <<http://www.unilex.info/case.cfm?id=106>>.

²⁰ HONNOLD, *supra* note 1, 35.

²¹ Decision No. 2 U 23/91 of 27.11.1991 of the *Oberlandesgericht Köln* (Germany), available at <<http://www.unilex.info/case.cfm?id=128>>.

²² Art. 1(3) CISG says: "Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention."

²³ Decision No. 034305BLS of 28.2.2005 of the Superior Court of Massachusetts (Court of First Instance) (USA), available at <<http://www.unilex.info/case.cfm?id=1019>>: "Contracts between a United States company, like EMC here, and the United States subsidiary of a foreign company, like VSI here, 'do not fall within the ambit of the CISG.' ... Similarly, CISG does not apply to the sale of goods between parties if one party has 'multiple business locations' unless it is shown that that party's international location 'has the closest relationship to the contract and its performance'." See also Art. 10(a) CISG.

²⁴ HERBER, *supra* note 1, 52; FERRARI, *supra* note 7, 24-25. Decision No. 2 U 23/91 of 27.11.1991 of the *Oberlandesgericht Köln* (Germany), available at <<http://www.unilex.info/case.cfm?id=128>>.

²⁵ SIEHR, *supra* note 1, 54; HERBER, *supra* note 1, 57.

also follows that, though the contracting parties might not be aware of the applicability or even of the existence of the CISG, the internationality of their sale of goods contract must be apparent to both of them.²⁶

Knowledge by the parties that their places of business are located in different States can be deduced from the contract itself or from any dealing between, or from information disclosed by, the parties. In any event, there must be an objective element that reflects the international character of the contract of sale of goods, such as the foreign language used by the other party, the temporary sojourn of one party in the State where the other has its place of business, or the agreement by both parties to deliver the goods sold in a State other than the seller's State.²⁷ It is quite irrelevant here whether the parties know that the different States in which their places of business are located are Contracting or non-Contracting States,²⁸ or whether they know that the CISG governs their contract or that it even exists.²⁹

Thus, the CISG safeguards the reliance by both parties on the fact that their contract for the sale of goods is national in nature;³⁰ the party claiming otherwise has to prove the international character of the contract.³¹ The CISG will therefore only apply to contracts for the sale of goods which prove to be evidently international.

B. Two Contracting States

The internationality of a sale of goods contract does not *per se* suffice to make the CISG applicable.³² In order to apply the CISG autonomously, the different States in which the places of business of both parties are located must also be Contracting States within the meaning stipulated by Articles 99 (entry into

²⁶ FERRARI, *supra* note 7, 31-32.

²⁷ HERBER, *supra* note 1, 57.

²⁸ SIEHR, *supra* note 1, 53-54; HERBER, *supra* note 1, 57, 87.

²⁹ BORISOVA, *supra* note 13.

³⁰ BORISOVA, *supra* note 13: "It is obvious that the Contracting Parties (when being both domestic) will be more certain when their relationship is regulated by a piece of legislation, as their 'domestic' law, familiar to both of them."

³¹ BELL, *supra* note 5, 246: "The burden of proof should rest with the party seeking to apply the Convention."

Contra FERRARI, *supra* note 7, 33, "the party invoking the impossibility of recognizing the international character of the sales contract (and, thus, the inapplicability of the CISG), carries [the burden of proof]."

³² FERRARI, *supra* note 7, 24.

force of the Convention) and 100 (the Convention's temporal application)³³ of the CISG.³⁴ Thus, Article 1(1)(a) CISG creates an area of certainty:³⁵ if the two different States in which the contracting parties have their relevant places of

33 In a contract for the sale of steel bars concluded between a seller from Yugoslavia (defendant) and an Egyptian buyer (claimant) in 1987, the Court of Arbitration of the International Chamber of Commerce (ICC) in France concluded that the CISG was not then in effect in any country. Pursuant to Art. 100(2) CISG, the tribunal could not apply the Convention; it rather applied the private international law rules of the countries concerned and Art. 3(1) of the Hague Convention of 15 June 1955 on the law applicable to international sales of goods, to which France is a Party, and thus concluded that the applicable law was the law of Yugoslavia, as the law of the place where the seller had its principal place of business and where the contract was performed (see ICC Court of Arbitration, Award No. 6281 of 1989 of 26.8.1981, available at <<http://cisgw3.law.pace.edu/cases/896281i1.html>>). In a contract for the sale of used printing presses concluded between a seller from Germany (defendant) and an Egyptian buyer in 1992, a court in Germany concluded that the CISG was applicable as both parties had their places of business in different Contracting States (Art. 1(1)(a) CISG) and the sales contract had been concluded after the CISG had come into force for these States (Art. 100(2) CISG). The court said: "Das Übereinkommen ist für beide Länder auch so früh in Kraft getreten, nämlich für [...] am 01.08.1988 und für [...] am 01.01.1991 ..., daß der vorliegende Vertrag in seinen zeitlichen Geltungsbereich fällt. Das Übereinkommen findet nur auf Verträge Anwendung, die an oder nach dem Tag geschlossen worden sind, an dem das Übereinkommen für die in Art 1 Ab 1 a genannten Vertragsstaaten in Kraft tritt (Art. 100 Abs. 2). Der vorliegende Vertrag ist 1992 zustandegekommen" (Decision No. 20 U 76/94 of 24.5.1994 of the *Oberlandesgericht Celle* (Germany), available at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=122&step=FullText>>).

34 In many cases, the Convention has been applied pursuant to Art. 1(1)(a) CISG as the Contracting Parties had their places of business in different Contracting States (see, for instance, Decision of the *Cour d'Appel de Rennes* (France) of 27.5.2008, available at <<http://www.unilex.info/case.cfm?id=1354>>; Decision No. 2-2/111/2004 of 19.2.2004 of the *Tallinna Ringkonnakohus* (Estonia), available at <<http://www.unilex.info/case.cfm?id=1000>>; Decision No. 5 Cb/114/2006 of 24.2.2009 of the District Court of Komarno (Slovakia), available at <<http://www.unilex.info/case.cfm?id=1471>>; Decision No. 06 Civ. 3972 (LTS)(JCF) of 19.7.2007 of the U.S. District Court, S.D. New York (USA), available at <<http://www.unilex.info/case.cfm?id=1223>>). By contrast, tribunals cannot apply the Convention by virtue of Art. 1(1)(a) CISG when either party has its place of business in a non-Contracting State (see, for instance, Award No. 11333 of 2002 of the ICC Court of Arbitration (Paris), available at <<http://www.unilex.info/case.cfm?id=1163>>: "In the case at hand, the CISG entered into force in Italy on 1 January 1988, i.e., before the conclusion of the Agreement in 1991. However, the CISG entered into force in Canada on 1 May 1992 only, i.e., after the conclusion of the Agreement. Consequently, the CISG does not apply to the present instance by (the sole) virtue of Art. 1(1)(a)."

35 BELL, *supra* note 5, 246. SPAGNOLO, *supra* note 2, 143: "The internal rules of application greatly simplify the uncertainty of conflict-of-laws rules that might otherwise apply to resolve the governing law of the contract."

business are Contracting States, whether Arab (*i.e.*, Egypt, Syria, Iraq, Mauritania, or Lebanon) or non-Arab States (*e.g.*, Italy, Germany, USA ..., etc.), and the litigation is brought before a forum in a Contracting State, be it the State in which either contracting party has its place of business or another Contracting State, the Convention applies.

Reservations made by the States under Articles 92 and 93 CISG should also be taken into consideration. Under Article 92(1) CISG, “[a] Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.”³⁶ In such a case, the Declaring State “is not to be considered a Contracting State within paragraph (1) of Article 1 of this Convention in respect of matters governed by the Part to which the declaration applies,” Article 92(2) CISG. Accordingly, if a contract for the sale of goods is concluded between an Egyptian buyer and a Danish seller, according to Article 1(1)(a) CISG the CISG will not apply in full.³⁷ The reserved part of the Convention (*i.e.*, Part II on contract formation) may, however, be applied by virtue of Article 1(1)(b) CISG.³⁸

Under Article 93(1) CISG, “[i]f a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another

³⁶ Pursuant to Art. 92 CISG, the Scandinavian States (Denmark, Finland, Norway, Sweden) declared that they would not be bound by Part II of the Convention (Formation of the Contract), see <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.

³⁷ FERRARI, *supra* note 7, 37: “It is possible that a sales contract concluded between two parties having their places of business in two Contracting States, one of which has made a declaration according to Article 92, is governed partly by the rules of the CISG and partly by the rules of domestic law, even in respect to issues normally all governed by the CISG.” BORISOVA, *supra* note 13: “The applicable law for international sale of goods in this case will be partly the rules of the CISG and partly the rules of domestic law, even with respect to issues normally all governed by the CISG.” See also Decision of the Court of Appeal of Turku (Finland) of 12.4.2002, available at <<http://www.unilex.info/case.cfm?id=939>> (the court applied the CISG except for its Part II, since Finland had declared under Art. 92 thereof that it would not be bound by this part of the Convention).

³⁸ SIEHR, *supra* note 1, 52; P. SCHLECHTRIEM, in: von Caemmerer / Schlechtriem (Eds.), *supra* note 1, 136-137.

declaration at any time.”³⁹ “If, by virtue of a declaration under this Article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends,” (Article 93(3) CISG).

C. Article 1/1-a CISG as applied in practice in the Arab World

In its Decision No. 979 for judicial year 73 of 11.04.2006, the Egyptian Court of Cassation found that the Convention was applicable pursuant to Article 1(1)(a) CISG.⁴⁰ The contract had been concluded between an Italian seller (plaintiff) and Egyptian buyer (defendant) for the sale of marble. Since the buyer refused to pay part of the price, the seller brought a case before the first instance court seeking payment of the outstanding amount. Despite the CISG being applicable as Italy and Egypt are Contracting States, the first instance court applied Egyptian national law to the dispute without paying any attention to the CISG. As the court ruled in favour of the plaintiff, the defendant turned to the Court of Appeals, arguing that the plaintiff had failed to prove that the defendant had taken delivery of the goods. The Appeals Court upheld the lower court’s decision, likewise disregarding the CISG. The defendant challenged the decision before the Court of Cassation. The Court quoted, among others, Article 1 CISG and decided that “when a sale of goods made between a seller in a State ratifying the CISG and a buyer in another State ratifying the CISG, the rules of the Convention shall govern the formation of the sale contract and the rights and duties arising therefrom.” The Court of Cassation found that the Appeals Court erred in applying the Egyptian national law to the dispute and remanded the case for the Appeals Court to apply the CISG. In the view of these authors, the Court of Cassation came to the right conclusion. As both Italy and Egypt are Contracting States, the Convention

³⁹ Pursuant to Art. 93 CISG, several States have made territorial declarations. Australia has declared that the Convention shall not apply to the territories of Christmas Island, the Cocos (Keeling) Islands and the Ashmore and Cartier Islands; Denmark has declared that the Convention shall not apply to the Faroe Islands and Greenland; New Zealand has declared that the Convention shall not apply to the Cook Islands, Niue and Tokelau (<<http://www.cisg.law.pace.edu/cisg/countries/contract.html>>).

⁴⁰ See a presentation of this case at <<http://cisgw3.law.pace.edu/cases/060411e1.html>>. The full text of the decision (in Arabic) is available at <<http://cisgw3.law.pace.edu/cisg/text/060411e1arabic.pdf>>.

applies pursuant to Article 1(1)(a) CISG. The Court should, however, have made it clear that the places of business of both parties, not the seller and buyer themselves, were in different Contracting States (*i.e.*, Italy and Egypt).

In its Award No. 50/1994 of 3 October 1995, the Cairo Regional Centre for International Commercial Arbitration (CRCICA) applied the CISG.⁴¹ A seller from an African country and a U.S. buyer concluded a contract for the sale of a certain number of apparatuses. Article 23(3) of the contract provided for all issues to be interpreted according to (1) the conditions of the contract; (2) the CISG; and (3) the law of the African State (Egypt). A dispute arose between the parties, concerning the lack of conformity of the goods and the extension of the bank guarantee of each unit released by the seller. Although the Convention was applicable to this contractual dispute by virtue of Article 1(1)(a) CISG, the sole arbitrator rejected the allegations made by the buyer regarding the lack of conformity of the goods without referring to the CISG. On the other hand, making express reference to Article 45 CISG, the arbitrator held that the seller had breached its contractual duties by refusing to extend the bank guarantee in favour of the buyer. The arbitrator also found that the CISG rules on remedies did not differ from the conditions of the contract and from the law of the African State (*i.e.*, Egyptian law). To support his opinion, he even cited a decision rendered by the Egyptian Court of Cassation applying the Egyptian national law with regard to the contractual liability. The arbitrator accordingly awarded damages to the buyer, in accordance both with the applicable domestic law (Egyptian law) and the CISG (Article 74). To these authors, the sole arbitrator erred in applying the Egyptian national law to the dispute besides the CISG; the arbitrator should only have applied the CISG since it was clearly applicable to the contract in dispute pursuant to Article 1(1)(a) CISG.

In its award of 18 September 2006, an *ad hoc* arbitration panel at the Egyptian National Committee for International Chambers of Commerce in Cairo did not apply the CISG even though it was apparently applicable to the contract in dispute.⁴² A seller from Austria (respondent) and an Egyptian buyer (claimant) concluded a contract for the sale of electronic scales and spare parts in January 2004. After taking delivery of the goods, the buyer found that they

⁴¹ See a presentation of this case at <<http://cisgw3.law.pace.edu/cases/951003e1.html>>. The full text of the decision (in English) is available at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=427&step=FullText>>.

⁴² See a presentation of this case at <<http://cisgw3.law.pace.edu/cases/060918e1.html>>.

did not meet the technical specifications stipulated under the contract. Since the contract contained a dispute settlement clause that provided for arbitration in Cairo, the buyer initiated arbitration proceedings there. The panel applied the Egyptian civil law to the dispute. Since the places of business of both parties were located in Contracting States, *i.e.*, Austria and Egypt, the Panel should have applied the CISG to the dispute.⁴³

III. – INDIRECT APPLICATION OF THE CISG

In addition to autonomous (direct) application, the Convention may – pursuant to Article 1(1)(b) CISG – apply indirectly when the conflict-of-laws rules of the forum refer to the law of a Contracting State. Under Article 95 CISG, however, each State may declare that it will not be bound by Article 1(1)(b) CISG. Besides these two matters, we will explain the indirect application of the Convention as it is practised in the Arab world pursuant to Article 1(1)(b) CISG.

A. Conditions for indirect application of the CISG

Once the international character of the sale of goods contract has been established, the CISG may also apply if the conflict-of-laws rules, applied by national courts or by arbitral tribunals,⁴⁴ indicate the application of a

⁴³ It should also be noted that the panel erred again in applying the Egyptian Civil Code. Even if Egyptian national law were really applicable to the dispute, the panel should have applied the Egyptian Commercial Code, not the Egyptian Civil Code, since the former expressly covers commercial sales similar to the disputed contract. For more details see H.A. EL-SAGHIR, “The Interpretation of the CISG in the Arab World”, in: Janssen / Meyer (Eds.), *CISG Methodology*, Sellier, Munich (2008), also available at <<http://www.cisg.law.pace.edu/cisg/biblio/el-saghir.html>>.

⁴⁴ Award No. 11333 of 2002 of the ICC Court of Arbitration (Paris), <<http://www.unilex.info/case.cfm?id=1163>>: “It is commonly acknowledged that ‘the rules of private international law’ referred to in Art. 1(1)(b) of the CISG are the conflict of law rules of the forum. However, an arbitrator, unlike a national judge, has no forum. It follows from this premise that arbitrators are not bound by the conflict of laws rules of a forum to choose the law applicable to the substance of the dispute. “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.” See also Art. 45 of Yamani arbitration law No. 22 (1992) and Art. 19(2) of Palestinian arbitration law No. 3 (2000) (according to which, in the absence of a law chosen by the parties, the arbitral tribunal must apply the law pointed to by the conflict-of-laws rules in national law, *i.e.*, Yamani or Palestinian law, respectively) and Art. 28 of Bahraini arbitration law No. 9 (1994) and Art. 33(1) of the CRCICA arbitration rules (according to which, in the absence of rules of law chosen by the parties, the arbitral tribunal must apply the law pointed to by the conflict-of-laws rules which it considers applicable).

Contracting State's national law. In such a case, "the CISG will be applied for the reason that the Convention is part of the domestic law of each country that has ratified it and also it is the *lex specialis* in connection with international sale of goods."⁴⁵ It should, however, be noted that the CISG has to be applied in such situations as a uniform law of sale of goods, not as a foreign law. It follows, therefore, that the court itself must identify and apply the CISG provisions concerned,⁴⁶ while its decision can be challenged before the Court of Cassation.

It makes no difference in this regard whether the State in which the court or arbitral tribunal is located is a Contracting or non-Contracting State.⁴⁷ Thus,

⁴⁵ BORISOVA, *supra* note 13; SPAGNOLO, *supra* note 2, 143. See also R. LOEWE, "The Sphere of Application of the UN Sales Convention", *Pace International Law Review*, Vol. X (1998), 79-88, also available at <<http://www.cisg.law.pace.edu/cisg/biblio/Loewe.html>>, according to whom the authors of the Convention were of the opinion that CISG, and not the residual national law, should apply when the conflict-of-laws rules of the forum point to the law of a Contracting State, and this for several reasons: "The Convention is published and known as well as the national sales law. The Convention is especially conceived for international affairs. For an exporter or importer, the Convention will be a set of rules which he is accustomed to use. No party should be confronted with unknown or difficult to discover rules of civil or commercial law. To place a foreigner in a worse situation because he knows the law less well than you is not acceptable." ALDMOUR, *supra* note 45, 366, "[s]i le contrat a prévu la loi applicable, par exemple la loi française, dans ce cas, c'est la Convention de Vienne qui sera applicable, puisqu'elle fait partie du droit français."

⁴⁶ HERBER, *supra* note 1, 54-55. Decision No. 979 of 11.4.2006 of the Court of Cassation (Egypt) for judicial year 73, available (in Arabic) at <<http://cisgw3.law.pace.edu/cisg/text/060411e1arabic.pdf>>: "The court shall by itself find out the legal rule applicable to the parties' relationship; the court shall give such relation the correct characterization even if neither party requested it to do so." Decision No. 2353/2007 of 8.4.2008 of the Court of Cassation (Jordan), available (in Arabic) at <www.adaleh.com>: "Doctrine and jurisprudence agree that the international conventions concluded by States take priority over the national laws of these States; ... the application of Conventions and national laws falls within the jurisdiction's competence; the parties may not select the Convention or national law they wish to apply." Decision No. 99-12879 of 25.10.2005 of the *Cour de Cassation, 1^{ère} Chambre civile* (France), available (in French) at <<http://www.cisg-france.org/decisions/251005v.htm>>, "La Convention de Vienne du 11 avril 1980, instituant un droit uniforme sur les ventes internationales de marchandises, en constitue le droit substantiel français; qu'à ce titre, elle s'impose au juge français, qui doit en faire application".

⁴⁷ HERBER, *supra* note 1, 40. K.S. QTAISHAT, "L'applicabilité de la Convention des Nations-Unies sur la vente internationale de marchandises selon le système jordanien de droit international privé", *European Journal of Scientific Research*, Vol. 42, No. 4 (2010), 548-557, at 554: "Les tribunaux jordaniens s'obligent, bien que la Jordanie ne soit pas un pays contractant, à appliquer la Convention des Nations-Unies sur la vente internationale de marchandises chaque fois où la loi applicable est une loi d'un pays contractant".

courts in all Arab countries may be faced with a situation where the contracting parties have selected the law of a Contracting State as the *lex contractus*,⁴⁸ since this concept of party autonomy is universally recognised in domestic private international law codifications.⁴⁹ Where the parties do not select the law applicable or where their choice is not valid, recourse must be had to the criteria set forth by the conflict-of-laws rules of the forum to determine whether the Convention is applicable by virtue of Article 1(1)(b) CISG.⁵⁰ According to Article 19(1) of the Egyptian Civil Code,⁵¹ in such a case recourse must be had

In practice, the Convention has been applied by the courts of non-Contracting States when the forum's conflict-of-laws rules have led to the law of a Contracting State. The *Landgericht Hamburg* (Germany), in its Decision No. 5 0 543/88 of 26.9.1990 (available at <<http://www.unilex.info/case.cfm?id=7>>), applied the CISG as part of the Italian law applicable pursuant to the conflict-of-laws rule, though Germany was not then a Contracting State (CISG entered into force in Germany on 1 January 1991). In its Decision No. 5 C 73/89 of 24.4.1990, the *Amtsgericht Oldenburg* in Holstein (Germany), came to the same conclusion (available at <<http://www.unilex.info/case.cfm?id=5>>). With regard to a dispute between a French producer of printers (seller) and a German company arising from a contract dated 7.11./1.12.1983, the *Oberlandesgericht Koblenz* (Germany), in its Decision No. 2 U 1230/91 of 17.9.1993 (available at <<http://www.unilex.info/case.cfm?id=64>>), also applied the CISG as part of the applicable French law. Similarly, the *Rechtbank van Koophandel* of Hasselt (Belgium), in its Decision No. AR 1970/95 of 8.11.1995 (available at <<http://www.unilex.info/case.cfm?id=265>>), applied the CISG as part of the Italian law applicable pursuant to the conflict-of-laws rule, though Belgium was not then a Contracting State (CISG entered into force in Belgium on 1 November 1997). Also, the *Arrondissementsrechtbank Dordrecht* (the Netherlands), in its Decision No. 2762/1989 of 21.11.1990 (available at <<http://www.unilex.info/case.cfm?id=32>>), applied the CISG as part of the French law applicable pursuant to the conflict-of-laws rule, though the Netherlands was not then a Contracting State (CISG entered into force in the Netherlands on 1 January 1992). For more case law in this direction, see UNCITRAL Digest, *supra* note 1, 12, fn 68 and the accompanying text.

⁴⁸ UNCITRAL Digest, *supra* note 1, 6: "The Convention may be selected by the parties as the law applicable to the contract." Award of the Netherlands Arbitration Institute, No. 2319 of 15.10.2002, available at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=836&step=FullText>>: "The parties agree on ... the application of the Convention on International Sale of Goods concluded in Vienna on April 11, 1980 ... to the respective contracts." See also Award No. 9083 of 00.08.1999 of the ICC Court of Arbitration (Paris), available at <<http://www.unilex.info/case.cfm?id=465>>, and Award No. 11333 of 2002 of the ICC Court of Arbitration (Paris), available at <<http://www.unilex.info/case.cfm?id=1163>>.

⁴⁹ FERRARI, *supra* note 7, 40. See also Arts. 19(1), 20(1), 20(1), and 19(1) of the Civil Codes of Egypt, Jordan, Syria and the United Arab Emirates, respectively.

⁵⁰ UNCITRAL Digest, *supra* note 1, 6.

⁵¹ It reads: "Contractual obligations are governed by the law of the domicile when such domicile is common to the Contracting Parties, and in the absence of a common domicile by the law of the place where the contract was concluded. These provisions are applicable unless the parties agree, or the circumstances indicate, that it is intended to apply another law." [An English

to the law of the (Contracting) State in which both parties are domiciled,⁵² if any, and in the absence of such a law, to the law of the (Contracting) State in which the contract of sale of goods was concluded, *i.e.*, the *lex loci contractus*.⁵³ Under Article 62 of the Tunisian private international law code, in such a case recourse shall be had to the law of the (Contracting) State to which the contract is most closely connected. In such situations, Arab courts must

translation of the Egyptian Civil Code is available at <http://www.tashreaat.com/view_studies2.asp?id=483&std_id=82>]. A similar provision is stipulated by Art. 20(1) of the Jordanian Civil Code, Art. 20(1) of the Syrian Civil Code, Art. 19(1) of the Emirates civil transactions law and Art. 25(1) of the Palestinian civil law draft. It is also worth mentioning that, in its Decision 214 of 13.6.1974 for the year 38, the Court of Cassation in Egypt applied the English law chosen by the Contracting Parties (*i.e.*, the 1924 law on carriage of goods by sea) – see this decision (in Arabic) in the *Arab Legal Information Network*, at <<http://www.eastlaws.com/Ahkam/AhkamHokmSearch.aspx>>. In its Decision No. 1835/1999 of 31.1.2000, the Court of Cassation in Jordan applied the law chosen by the parties to the labour contract, *i.e.*, Bermudan law, to the extent that it did not conflict with public order in Jordan – see this decision (in Arabic) in *Adaleh*, at <www.adaleh.com>.

⁵² In its Decision No. 67/1987 of 28.2.1988, the Court of Cassation in Jordan applied the Jordanian law since Jordan was the common domicile of both parties to the disputed labour contract – see this decision (in Arabic) in *Adaleh*, at <www.adaleh.com>. However, in the opinion of these authors, the Court mistakenly concluded that the parties may not select the law applicable unless they have two different domiciles. Indeed, pursuant to the explicit wording of Art. 20(1) of the Jordanian Civil Code, the law chosen by the parties takes priority over the law of common domicile of the Contracting Parties. This has also been emphasised by the Court of Cassation in Egypt with respect to Art. 19(1) of the Egyptian Civil Code, the historical origin of Art. 20(1) of the Jordanian Civil Code. See, for instance, Decision No. 8714 of 14.3.1999 of the Court of Cassation (Egypt) for the year 66; Decision No. 1114 of 4.12.1989 of the Court of Cassation (Egypt) for the year 52 – both decisions are available (in Arabic) in the *Arab Legal Information Network*, at <<http://www.eastlaws.com/Ahkam/AhkamHokmSearch.aspx>>. The same conclusion has also been emphasised by courts in the United Arab Emirates (UAE) with respect to Art. 19(1) of the Emirates Code on civil transactions, comparable to Art. 20(1) of the Jordanian Civil Code: see, for instance, Decision No. 36 of 5.1.2003 of the Court of Cassation in Dubai for the year 2003; Decision No. 84 of 16.11.1993 of the United Supreme Court in the UAE for judicial year 15; and Decision No. 270 of 15.2.1998 of the United Supreme Court in the UAE for judicial year 18 – all these decisions are available (in Arabic) in the *Arab Legal Information Network*, at <<http://www.eastlaws.com/Ahkam/AhkamHokmSearch.aspx>>.

⁵³ See also Decision No. 697/1995 of 21.5.1995 of the Court of Cassation (Jordan) (the law applicable is Jordanian law since the contract was concluded in Jordan); Decision No. 3210/2004 of 16.1.2005 of the Court of Cassation (Jordan) (the law applicable is Kuwaiti law since the contract was concluded in Kuwait) – both decisions are available (in Arabic) in *Adaleh*, at <www.adaleh.com>; Decision No. 383 of 30.4.1975 of the Court of Cassation (Egypt) for the year 39 (the law applicable is Egyptian law since the insurance contract was concluded in Egypt) – see this decision (in Arabic) in the *Arab Legal Information Network*, at <<http://www.eastlaws.com/Ahkam/AhkamHokmSearch.aspx>>.

apply the CISG if the law applicable according to the forum's conflict-of-laws rule is the law of a Contracting State; otherwise, they would defeat the objective of achieving uniform application of this international sales law.

When applying the Convention pursuant to Article 1(1)(b) CISG, *i.e.*, by virtue of the so-called "classical solution",⁵⁴ it does not matter whether or not either party's or both parties' place of business is located in a Contracting State.⁵⁵ Likewise, it is of no importance whether the law applicable is the national law of an (Arab) Contracting State whose courts have to settle the dispute⁵⁶ or the law of another (Arab or non-Arab) Contracting State.⁵⁷ Moreover, the courts in an Arab State must apply the CISG once its conflict-of-laws rules point to the law of a Contracting State, regardless of whether or not the CISG is also applicable according to the private international law rules of that Contracting State.⁵⁸

B. Reservation to exclude the indirect application of the CISG

Obviously, Article 1(1)(b) CISG aims at extending the geographical sphere of application of the Convention.⁵⁹ As a result, the CISG may be applied in countries that have not yet adopted it. Similarly, the Convention may –

⁵⁴ FERRARI, *supra* note 7, 38.

⁵⁵ HERBER, *supra* note 1, 53; JAYME, *supra* note 16, 32.

⁵⁶ Compare: Decision No. 105665 of 21.7.2002 of the *Camara Nacional de Apelaciones en lo Comercial de Buenos Aires* (Argentina), available at <<http://www.unilex.info/case.cfm?id=925>>, in which the appellate Court found that CISG was applicable as the Argentinean conflict-of-laws rules led to the application of Argentinean law as the governing law of the contract, and then to CISG by virtue of its Art. 1(1)(b). See also Award of the China International Economic and Trade Arbitration Commission (CIETAC) of 21.10.2005, available at <<http://www.unilex.info/case.cfm?id=1202>>; Decision No. 147/2007 of 13.3.2007 of the *Audiencia Provincial de Valencia* (Spain), available at <<http://www.unilex.info/case.cfm?id=1254>>.

⁵⁷ Compare: ALDMOUR, *supra* note 45, 366-367 (in a contract concluded between a French seller and a Jordanian buyer, if the forum's conflict-of-laws rule in either Jordan or France refers to French law, CISG will apply). Decision No. 2001/AR/1982 of 8.10.2004 of the *Hof van Beroep* of Gent (Belgium), available at <<http://www.unilex.info/case.cfm?id=1205>> (the law applicable was Italian law); Decision No. 1997/AR/384 of 2.12.2002 of the *Hof van Beroep* of Gent (Belgium), available at <<http://www.unilex.info/case.cfm?id=1203>> (the law applicable was German law); Decision No. 44/69 of 11.12.2007 of the Supreme Commercial Court of Ukraine, available at <<http://www.unilex.info/case.cfm?id=1379>> (the law applicable was Swiss law).

⁵⁸ SIEHR, *supra* note 1, 51.

⁵⁹ BELL, *supra* note 5, 247: "The incorporation of conflict of laws analysis into the Treaty increases the number of situations in which the Convention applies." FERRARI, *supra* note 7, 43, "[Article 1/1-a] extends the CISG's sphere of application which otherwise would have been too restrictive."

pursuant to Article 1(1)(b) CISG – apply in a State in which the contract is neither concluded nor performed, and even though the contracting parties never contemplated such application.⁶⁰ The CISG may therefore successfully fulfil its role as a uniform law for the international sale of goods.

Nevertheless, each State may – pursuant to Article 95 CISG – declare “that it will not be bound by subparagraph (1)(b) of Article 1 of this Convention.” China, the Czech Republic, Saint Vincent and the Grenadines, Slovakia and the United States of America have done so. Upon ratifying the Convention, Germany declared that it would not apply Article 1(1)(b) in respect of any State that had made a declaration that that State would not apply Article 1(1)(b).⁶¹ Obviously, none of the Arab Contracting States have made such a declaration pursuant to Article 95 CISG.

If the conflict-of-laws rules of the reserving State (e.g., the USA) refer to the law of a Contracting State, then the courts in the reserving State will not apply the Convention;⁶² rather, they will apply the national law of that Contracting State⁶³ unless the Convention is applicable pursuant to Article 1(1)(a) CISG. But if a court, finding that the dispute is located in a non-reserving State (e.g., Egypt or Lebanon), and if its conflict-of-laws rules point to the law of a Contracting reserving State, that court must apply the Convention⁶⁴ since declarations made under Article 95 CISG – contrary to declarations made under Articles 92 and 93 CISG – do not cause the reserving State to be treated as a Non-Contracting State in this regard.⁶⁵ Besides, as long as a court in a Contracting (non-reserving) State apply the Convention pursuant to Article 1(1)(b)CISG even when one of the parties has its place of business in a non-Contracting State, that court may *a fortiori* apply the CISG *vis-à-vis* a reserving (Contracting) State.⁶⁶

60 JAYME, *supra* note 16, 33. BELL, *supra* note 5, 247.

61 See <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.

62 SCHLECHTRIEM, *supra* note 17, 784.

63 SIEHR, *supra* note 1, 47; BELL, *supra* note 5, 248: “The Article 95 reservation narrows the applicability of the Convention and enlarges the applicability of the domestic law.”

64 SCHLECHTRIEM, *supra* note 17, 783; FERRARI, *supra* note 7, 46.

65 HERBER, *supra* note 1, 55-56.

66 *Ibid.*, 55.

C. Article 1(1)(b) CISG as applied in practice in the Arab World

In its Award No. 6/2003 of 16 January 2005,⁶⁷ the panel at Alexandria Center for International Arbitration applied the CISG pursuant to Article 19 of the Egyptian Civil Code. The dispute arose between an Egyptian seller (claimant) and a Moroccan buyer (respondent) who concluded two contracts in July and August 2002 to sell semi-dried dates. The Egyptian seller claimed payment of outstanding contract losses as well as demurrages and storage fees incurred by the claimant as a result of the respondent's breach of its contractual obligations, in addition to expenses and attorney's fees. Neither contract stipulated the law applicable to the dispute between the parties. Whereas the respondent took no part in the arbitral proceedings, the claimant requested payment of the sum referred to above for breach of contract and argued the applicability of the CISG to the dispute. Pursuant to Article 33(1) of the arbitration rules of the Alexandria Center for International Arbitration,⁶⁸ the panel applied the Egyptian conflict-of-laws rule (stipulated in Article 19(1) of the Egyptian Civil Code) in order to define the law applicable to the dispute. Since both contracts between the parties were concluded in Alexandria, the panel decided to apply the Egyptian law (*i.e.*, the *lex loci contractus*), namely the Egyptian Civil Code. It also quoted, among others, Article 1 CISG (in full) and applied the Convention since Egypt had acceded and became a Contracting State on 1 January 1988. According to the panel, "it must be clarified that the provisions of the Vienna Convention do not apply to the exclusion of national Egyptian law but in addition to it. However, since both tests coincide, it is worth mentioning that applying either, *i.e.*, the Vienna Convention or the ECC, would not affect the decision on the principal issues in dispute."

Since Morocco is not a Contracting State, it seems that the panel applied the CISG pursuant to Article 1(1)(b) CISG. Pursuant to Article 19 of the Egyptian Civil Code, the panel applied Egyptian law, *i.e.*, the law of a Contracting State, since the disputed contracts were concluded in Egypt. Nevertheless, the panel did not apply the CISG in lieu of Egyptian national law; rather, it applied the CISG in addition to it. These authors cannot agree with this conclusion. As the CISG is a *lex specialis* of the international sale of

⁶⁷ See a presentation of this case at <<http://cisgw3.law.pace.edu/cases/050116e1.html>>.

⁶⁸ According to which the arbitral tribunal must apply "the law determined by the conflict of laws rules which it considers applicable."

goods, the panel ought to have applied it exclusively and comprehensively. The panel should have excluded the application of Egyptian national law.⁶⁹

IV. – APPLICABILITY OF THE CISG AS *LEX MERCATORIA*

The (new) *lex mercatoria* includes, *inter alia*, the CISG, the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law (“PECL”) and Incoterms.⁷⁰ The *lex mercatoria* finds its subjective sphere of application in the field of contracts,⁷¹ and particularly in that of contracts for the international sale of goods.⁷² The *lex mercatoria* is generally described as more neutral and more flexible than any particular national law; the CISG constitutes an essential part of it.⁷³ In the *Daewoo v. Farhat* case, a seller from the Republic of Korea (claimant) and a buyer from Jordan (defendant) entered into a contract for the sale of clothing. The ICC Court of

⁶⁹ It should also be noted that the panel erred again in applying the Egyptian Civil Code. Even if the Egyptian national law really had been applicable to the dispute, the panel should have applied the Egyptian commercial law, not the Egyptian civil law, since the former expressly covers commercial sales similar to the disputed contracts: for more details see EL-SAGHIR, *supra* note 43.

⁷⁰ M.T. DAVIDSON, *The Lex Mercatoria in Transnational Arbitration: An Analytical Survey of the 2001 Kluwer International Arbitration Database*, available at <<http://www.cisg.law.pace.edu/cisg/biblio/davidson.html>>. See also G. BARON, *Do the UNIDROIT Principles of International Commercial Contracts form a new lex mercatoria?*, Pace essay (June 1998), available at <<http://www.cisg.law.pace.edu/cisg/biblio/baron.html>>: “Many jurists see it as a growing body of uniform and a-national rules consisting of customs and usages of international trade and of those principles, concepts and institutions which are common to all or most of the states engaged in international trade. ... Some authors take a wide approach and equate the *lex mercatoria* with transnational commercial law. Hereby, they do not only classify international standard form contracts, general commercial practices, trade usages, customary law, codes of conduct, rules of international organisations and generally recognized principles of law as constituent elements of the *lex mercatoria*, but also international conventions and uniform laws.” ALDMOUR, *supra* note 45, 368.

⁷¹ ALDMOUR, *supra* note 45, 369, “*Dans le contexte des contrats internationaux, les parties sont présumées avoir accepté la mise en œuvre des usages commerciaux, considérés comme les normes objectives de leur secteur d’activités.*”

⁷² DAVIDSON, *supra* note 70.

⁷³ B. AUDIT, “The Vienna Sales Convention and the *Lex Mercatoria*”, in: *Lex Mercatoria and Arbitration*, Th.E. Carbonneau (Ed.), rev. ed. [reprint of a chapter of the 1990 edition of this text], Juris Publishing (1998), 173-194, at 175, also available at <<http://www.cisg.law.pace.edu/cisg/biblio/audit.html>>: “[CISG] itself can be regarded as the expression of international mercantile customs”; “the purpose of the Vienna Convention is not only to create new, State-sanctioned law, but also to give recognition to the rules born of commercial practice and to encourage municipal courts to apply them,” *ibid*, 173.

Arbitration, in its Decision No. 1649 of 1990, concluded “that the application of the *lex mercatoria* would be tantamount to the application of the Vienna Convention, *i.e.*, the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980,”⁷⁴ though the CISG was not by its terms applicable to the contract in question. In its Award No. 8817 of December 1997, the ICC Court of Arbitration, pursuant to Article 13(3) of the ICC Rules of Conciliation and Arbitration, decided to apply the CISG and its general principles as perfectly suited to resolving the dispute between a Spanish and a Danish company over an agreement for the exclusive distribution and sale of food products.⁷⁵ In its Award No. 5713 of 1989, the ICC Court of Arbitration, pursuant to Article 13(5) of the 1975 ICC arbitration rules, decided to take into account the CISG as a source of prevailing trade usages.⁷⁶

In the following, this article will show to which extent the CISG, as part of the *lex mercatoria*, may apply, not only before arbitral tribunals, but also before national courts in Arab countries.

A. Application of the CISG as *lex mercatoria* by national courts

National courts, in most legal systems, traditionally apply the law of a sovereign State to cases involving an international private relationship, *i.e.*, a relationship with foreign element(s). Some conflict-of-laws regimes may therefore render the selection of the *lex mercatoria* as the *lex contractus* particularly unstable. Such might be the case with the Rome I Regulation (EU Regulation 593/2008) on the law applicable to contractual obligations, which came into force on 17 December 2009.⁷⁷ According to some doctrines, the contracting parties may not identify the *lex mercatoria* as the law of the contract⁷⁸ since Article 4 of the Rome I Regulation repeatedly refers to “the

⁷⁴ See a presentation of this case at <<http://cisgw3.law.pace.edu/cases/906149i1.html>>.

⁷⁵ See the full text of this Award at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=398&step=FullText>>.

⁷⁶ See a presentation of this case at <<http://www.cisg.law.pace.edu/cases/895713i1.html>>.

⁷⁷ Regulation published in the *Official Journal of the European Communities*, No. L 177, (p.) 6 ff. and also available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:EN:PDF>>.

⁷⁸ See the doctrine cited by J.Ch. VON WICHARD, “Die Anwendung der UNIDROIT-Prinzipien für internationale Handelsverträge durch Schiedsgerichte und staatliche Gerichte”, *RabelsZ* 60 (1996), 269-302, at 275. See also the Decision of the *Tribunale Padova – Sez. Este* (Italy) of 11.01.2005 (Abstract), available at <<http://www.unilex.info/case.cfm?pid=>

law of the country".⁷⁹ "Law" here means residual national law only, i.e., State-made law. The parties should therefore base their contract on the domestic law of one State. The selection by the parties of the CISG as the law of the contract is not admitted; in such cases, the CISG will rather be incorporated into the contractual terms and thus be subject to mandatory rules in the applicable domestic law.⁸⁰

By contrast, this is not the case under the conflict-of-laws rules in Arab countries. For instance, Article 19 of the Egyptian Civil Code expressly

1&do=case&id=1005&step=Abstract>: "A reference by the parties to non-State rules of supranational or transnational character such as the *lex mercatoria*, the UNIDROIT Principles of International Commercial Contracts as well as the CISG when the Convention is not *per se* applicable cannot be considered a veritable choice-of-law clause by the parties, but only amounts to an incorporation of such rules into the contract, with the consequence that they will bind the parties only to the extent that they do not conflict with the mandatory rules of the applicable domestic law."

⁷⁹ It clearly provides: "1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows: (a) a contract for the sale of goods shall be governed by *the law of the country* where the seller has his habitual residence; (b) a contract for the provision of services shall be governed by *the law of the country* where the service provider has his habitual residence; (c) a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property shall be governed by *the law of the country* where the property is situated; (d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by *the law of the country* where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country; (e) a franchise contract shall be governed by *the law of the country* where the franchisee has his habitual residence; (f) a distribution contract shall be governed by *the law of the country* where the distributor has his habitual residence; (g) a contract for the sale of goods by auction shall be governed by *the law of the country* where the auction takes place, if such a place can be determined; (h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law. 2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by *the law of the country* where the party required to effect the characteristic performance of the contract has his habitual residence. 3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, *the law of that other country* shall apply. 4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by *the law of the country* with which it is most closely connected." [Emphasis added].

⁸⁰ SPAGNOLO, *supra* note 2, 144-145.

provides that "... unless the parties agree, or the circumstances indicate, that it is intended to apply another law." As the selection by the parties of the law applicable to their contract is not limited to a State law, they might choose the *lex mercatoria*, including the CISG, as the *lex contractus*.⁸¹ Most importantly, Arab State courts may also find it necessary to apply the CISG as part of the *lex mercatoria* in the following cases.

First, when the content of the foreign law applicable according to the conflict-of-laws rule of the forum cannot be defined – This would certainly be the case if it became impossible to ascertain the content of such law. In other cases, although ascertaining the content of the applicable foreign law is not *per se* impossible, such a process may involve onerous costs and much time and effort, with the risk of exceeding the time limits set for deciding the case.

In such situations, the court may not dismiss the case; that would be tantamount to denying justice. Moreover, courts in civil law systems, which include most Arab countries, may not impose upon the parties the duty to prove the applicable foreign law. Thus, the court has no other option but to apply another law.

The predominant opinion holds that the courts must, in such cases, replace the foreign law with their own national law, *i.e.*, the *lex fori*.⁸² This opinion is questionable, however, especially where the case does not have a clear connection with the forum. Therefore, according to these authors, the courts should apply the CISG in such cases so long as their national law does not prevent them from doing so.⁸³ The reason is that the CISG is a *lex specialis* of the sale of the goods that suits the needs of international trade much better than any domestic law.⁸⁴

81 ALDMOUR, *supra* note 45, 366, "[l]es parties [quelles que soient leur nationalité et leur domicile, choisissent la Convention. Toute personne, même résidente d'un pays non signataire, a la faculté, dans un contrat, de se référer à la Convention et celle-ci sera alors la loi des parties."

82 For more details, see A. DAWWAS, *Conflict of laws in Palestine*, Shorok Press (in Arabic) (2001), 223-225.

83 In fact, Art. 37 of the Palestinian civil law draft requires the court to do so. It clearly provides: "If the dispute relates to personal affairs, the Palestinian law shall apply when the foreign law applicable, or its content, cannot be determined. But if the dispute relates to financial transactions, the norms of private international law shall apply."

84 ALDMOUR, *supra* note 45, 364: "[l]a Convention] permet ainsi d'assurer aux échanges commerciaux une réglementation moderne, adaptée aux exigences effectives de la pratique commerciale."

Second, when the foreign law applicable according to the conflict-of-laws rule collides with the public order of the forum – According to the prevailing opinion amongst jurists, the law applicable in such a case should be the *lex fori*.⁸⁵

These authors are not convinced that this is true. In some cases, the dispute might have a weak connection to the forum. At all events, the CISG might be a better law to govern disputes over contracts for the international sale of goods than any national law. As an international convention, the CISG would not collide with the public order of the forum. Thus, Article 36 of the Palestinian civil law draft provides for the application of private international law norms when the foreign law applicable by virtue of the conflict-of-laws rule collides with the public order in Palestine.

Third, when the applicable law itself points to the *lex mercatoria* – The conflict-of-laws rule of the forum may refer to a national commercial law that, in turn, implies the application of the usages and customs prevailing among traders. For instance, Article 88(2) of Egyptian Commercial Law No. 17 (1999) subjects international commercial sales contracts to international conventions effective in Egypt and to international commercial usage. This provision clearly recognises the *lex mercatoria* at the legislative level.⁸⁶ Since Egypt is a Contracting State, an Egyptian court should prioritise the CISG over the residual national law. This would also be the case in relation to Syria (a Contracting State), where Article 116(1) of Syrian commercial law No. 32 (2007) subjects, *inter alia*, the sale contract to the rules of the Civil Code in conformity with usage.

Article 89(2) of the Palestinian commercial law draft includes a provision identical to the Egyptian rule. Given that Palestine is not a Contracting State, Palestinian courts – once the Palestinian commercial law draft is enacted – would apply the CISG as part of the *lex mercatoria*, *i.e.*, international

⁸⁵ For more details, see DAWWAS, *supra* note 82, 242-243. It is also worth mentioning that this view is expressly adopted by certain legislations, *e.g.*, Art. 73 of Kuwaiti Law No. 5 (1961) and Art. 36/5 of Tunisian private international law code No. 97 (1998). Besides, in its Decision No. 1835/1999 of 31.1.2000, the Court of Cassation in Jordan applied the Bermudan law chosen by the parties to the labour contract, and when it conflicted with public order in Jordan, the court applied Jordanian law – see this decision (in Arabic) in *Adaleh*, at <www.adaleh.com>. Also, in its Decision No. 29 of 10.4.1997 for the year 22, the Libyan Supreme Court decided to apply the Libyan law to an insurance contract “since the matter disputed touched the social and economic order of the state” – see this decision (in Arabic) in the *Arab Legal Information Network*, at <<http://www.eastlaws.com/Ahkam/AhkamHokmSearch.aspx>>.

⁸⁶ EL-SAGHIR, *supra* note 43.

commercial usage. The CISG is actually one of the international trade conventions that encompasses the norms prevailing in the markets of international trade.

In particular, Arab national courts may also apply the CISG as part of the *lex mercatoria* without recourse to the conflict-of-laws rules. For instance, Article 103(1) of the Jordanian Constitution refers to the possibility of applying international usages by Jordanian courts in disputes arising in international trade. Accordingly, a Jordanian court may apply the CISG to an international sales contract.⁸⁷

B. Application of the CISG as *lex mercatoria* by arbitral tribunals

Although the Convention applies – in accordance with Article 1 CISG – only when the parties have their places of business in different Contracting States or when the conflict-of-laws rules of the forum point to the law of a Contracting State, the contracting parties or arbitral tribunals can nevertheless give the CISG provisions a broader reach.⁸⁸ The CISG, as part of the *lex mercatoria*, may therefore apply as the law chosen by the contracting parties or as the law selected by the arbitral tribunal itself.

1. Choice of the CISG by the contracting parties

Under the different arbitration laws in the Arab countries, the parties may choose the law that they wish to be applicable to their contract.⁸⁹ Some of these laws allow the parties not only to select a State law, but also to identify the rules of law that are to govern their contract. According to Article 39(1) of Egyptian arbitration law No. 3 (1994),⁹⁰ “[t]he Arbitral Tribunal shall apply the

⁸⁷ ALDMOUR, *supra* note 45, 369: “L’Article 103, à notre avis, n’écarte nullement la possibilité de déterminer le droit applicable dans un contexte de vente internationale par le détour des conflits de lois. Il ajoute seulement à la méthode indirecte une méthode directe permettant d’appliquer un droit substantiel sans passer par une technique de conflit de lois. Il s’agit de la mise en place de la théorie des usages commerciaux.”

⁸⁸ AUDIT, *supra* note 73, 178.

⁸⁹ For example, Section 73(1) of Tunisian Arbitration Law No. 42 (1993) provides that “[t]he arbitral tribunal shall decide the dispute in conformity with the law chosen by the parties.”

⁹⁰ For similar provisions in Arab countries, see Art. 813 of the Lebanese Law on International Arbitration; Art. 45 of Yamani Arbitration Law No. 22 (1992); Art. 28(1) of Bahraini Arbitration Law No. 9 (1994); Art. 39(1) of Omani Arbitration Law No. 47/97; Art. 36(a)-(b) of Jordanian Arbitration Law No. 31 (2001); and Art. 38(1)-(2) of the (new) Syrian Arbitration Law (2008).

rules agreed by the parties to the subject matter of the dispute.”⁹¹ This implies that the parties may choose the *lex mercatoria*, including the CISG, as the law applicable to the contract in dispute.

Lex mercatoria, including the CISG, may also be implicitly chosen by the parties when they agree to settle their dispute amicably.⁹² In such cases, the arbitral tribunal may apply those rules of the *lex mercatoria* which it considers to be fair and just.⁹³

See also Art. 19(2) of Palestinian Arbitration Law No. 3 (2000) which says: “In case of international arbitration taking place in Palestine and that the parties do not reach agreement on the law to be applicable, substantive rules referred to by the conflict-of-laws rules in the Palestinian law shall apply, taking into consideration that the rules of *renvoi* cannot apply unless they stipulate for application of the Palestinian law. ...” Obviously, this provision does not require the law chosen to be a State law; it may also be the *lex mercatoria*. This is made clear in Art. 43 of this law which expressly says: “All of the parties to arbitration shall have the right to appeal against the decision of arbitration before the competent court for any of the following reasons: ... violation of what the parties had agreed on regarding application of *legal rules* on the issues in dispute ...”. [Emphasis added]

⁹¹ It is also worth mentioning that, in its Decision No. 86 of 26.11.2002 for the year 76, the Court of Cassation in Egypt concluded that the arbitral tribunal should apply to the subject-matter of the dispute the legal rules agreed by the Contracting Parties – see this decision (in Arabic) in the *Arab Legal Information Network*, at <<http://www.eastlaws.com/Ahkam/AhkamHokmSearch.aspx>>. In its Decision No. 2468/2007 of 3.2.2008, the Court of Cassation in Jordan concluded that the parties may – under the arbitration law – choose the law applicable to the contract disputed – see this decision (in Arabic) in *Adaleh*, at <www.adaleh.com>.

⁹² Art. 36 of Palestinian Arbitration Law No. 3 (2000) says: “The parties in conflict may delegate the arbitration panel to proceed with conciliation among them on the basis of justice. The arbitration panel may upon request of any of the parties or by its own decision suggest a friendly settlement or the dispute.” For similar provisions in Arab countries, see Art. 317 of the Moroccan Law of Civil Procedure (1974); Art. 182 of Kuwaiti Law of Civil Procedure No. 38 (1980); Art. 45 of Yemeni Arbitration Law No. 22 (1992); Art. 73(3) of Tunisian Arbitration Law No. 42 (1993); Art. 28(3) of Bahraini Arbitration Law No. 9 (1994); Art. 39(4) of Egyptian Arbitration Law No. 27 (1994); Art. 39(4) of Omani Arbitration Law No. 47/97; Art. 813 of the Lebanese Law on International Arbitration; Art. 212(2) of the Emirates Law of Civil Procedure; Art. 198 of the Qatari Law of Civil Procedure; Art. 451 of the Algerian Law of Civil Procedure; Art. 36(d) of Jordanian Arbitration Law No. 31 (2001); and Art. 38(4) of the (new) Syrian Arbitration Law (2008).

⁹³ AUDIT, *supra* note 73, 178: “If arbitrators are not bound to apply a given domestic law, they might look to the Convention for guidance, especially when they are empowered to rule in equity as *amiables compositeurs*.”

In the ICC Final Award of 28.03.1984 in Case No. 3267, involving a dispute between a Mexican construction company and a Belgian enterprise, the *amiables compositeurs* used the *lex mercatoria* as an index of the fairness of the decision they reached using their equitable powers – cited in: DAVIDSON, *supra* note 70, fn 43 and the accompanying text.

In its award No 19/1990 of 13 April 1991, the Cairo Chamber of Commerce and Industry applied the CISG.⁹⁴ A seller from an Asian country (claimant) and a buyer from an African country (respondent) concluded a contract for the sale of a certain amount of grain. A dispute arose when the goods arrived at their place of destination and, upon examination by a local agency, were found to be insect-ridden. According to the contract, “any dispute arising out of the implementation of the previous condition and specifications which may be confirmed shall be settled in accordance with the provisions and terms of international contracts in practice in foreign commercial transactions for the sale of such commodities. Arbitration shall be conducted in Cairo according to the UNCITRAL Arbitration Rules.” The arbitral tribunal held that the buyer should sustain the expense of disinfecting the goods. In reaching this conclusion, it pointed out that the parties had concluded an international C & F contract of sale, where the risk is transferred to the buyer at the time of shipping and where it is the buyer who has to prove that the defects of the goods already existed at that moment. In doing so, the Arbitral Tribunal referred to Article 36 CISG.⁹⁵ As the choice-of-law clause, which expressly authorised the arbitral tribunal to settle the dispute “in accordance with the provisions and terms of international contracts in practice in foreign commercial transactions for the sale of such commodities”, implies reference to the *lex mercatoria* – according to these authors –, the arbitral tribunal applied the CISG (Article 36 CISG).

2. Application of the CISG by the arbitral tribunal itself

The arbitral tribunal may apply the *lex mercatoria* to the contract in dispute⁹⁶ in addition to the law governing the contract, whether chosen by the

⁹⁴ See a presentation of this case at <<http://cisgw3.law.pace.edu/cases/910413e1.html>>. The full text of this Award is available (in English) at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=426&step=FullText>>.

⁹⁵ It runs as follows: “(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time. (2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.”

⁹⁶ In its Award No. 50 of 3.10.1995, the Cairo Regional Centre for International Commercial Arbitration (CRCICA) applied international trade usages to the dispute; it concluded that “the contracting party may not be given absolute freedom to delay the performance of his

contracting parties or otherwise applicable. For instance, Article 19(2) of Palestinian arbitration law No. 3 (2000) says: "In case of international arbitration taking place in Palestine and where the parties do not reach agreement on the law to be applicable, substantive rules referred to by the conflict-of-laws rules in the Palestinian law shall apply, taking into consideration that the rules of *renvoi*⁹⁷ cannot apply unless they stipulate for application of the Palestinian law. In all cases, the arbitration panel shall take into consideration the customs applicable to the relation between the parties in conflict."⁹⁸ Thus, the arbitral tribunal might apply the CISG provisions in so far as they reflect trade usages.

In other situations, the arbitral tribunal should on its own initiative apply the CISG as part of the *lex mercatoria* when the parties have failed to select the law applicable. For instance, Article 813 of the Lebanese law on international arbitration provides that, "[t]he arbitrator shall decide the dispute in conformity with the rules of law chosen by the parties; in the absence of a party choice, he shall decide according to the rules that he deems appropriate." Also, Article 39(2) of Egyptian arbitration law No. 27 (1994) requires the arbitral tribunal to apply to the dispute, in the absence of a law chosen by the contracting parties, "the substantive rules of the law it deems most closely connected to the dispute."⁹⁹ Furthermore, Section 73(1)-(2) of

obligation regardless of the nature of transaction, type of the goods, trade usages, particularly international trade usages, and legitimate interest of the other party." See this Award (in Arabic) in the *Arab Legal Information Network*, at <http://www.eastlaws.com/Tahkeem/Tahkeem_View.aspx>.

⁹⁷ In Conflict of Laws, *renvoi* (from the French, meaning "send back" or "to return unopened") is a subset of the choice-of-law rules and it may be applied whenever a forum court is directed to consider the law of another State. [<en.wikipedia.org/wiki/Renvoi>].

⁹⁸ See also Art. 39(3) of Egyptian Arbitration Law No. 27 (1994) which says: "The Arbitral Tribunal must, when adjudicating the merits of the dispute, take into account the conditions of the contract, the subject of the dispute and the usages of commerce in similar transactions." For similar provisions in the Arab countries, see Art. 45 of Yamani Arbitration Law No. 22 (1992); Art. 73(4) of Tunisian Arbitration Law No. 42 (1993); Art. 28(4) of Bahraini Arbitration Law No. 9 (1994); Art. 39(3) of Omani Arbitration Law No. 47/97; Art. 813 of the Lebanese Law on International Arbitration; Art. 36(3) of Jordanian Arbitration Law No. 31 (2001); and Art. 38(3) of the (new) Syrian Arbitration Law (2008).

⁹⁹ It clearly says: "1. The Arbitral Tribunal shall apply the rules agreed by the parties to the subject matter of the dispute. If they agree to apply the law of a specific state, then the substantive rules of that law, not those governing conflict of laws, shall be followed, unless the parties otherwise agree. 2. If the parties fail to agree on the legal rules to be applied to the subject matter of the dispute, the Arbitral Tribunal shall apply the substantive rules of the law it deems most closely connected to the dispute." For similar provisions in the Arab countries, see Art. 39(1)-

Tunisian arbitration law No. 42 (1993) provides that, “[t]he arbitral tribunal shall decide the dispute in conformity with the law chosen by the parties; in the absence of a party choice, it shall decide according to the law that it deems appropriate.” The arbitral tribunal might therefore apply the CISG where it constitutes “the rules that [it] deems appropriate”, “the substantive rules of the law it deems most closely connected to the dispute” – *i.e.*, the law most suitable to govern disputes arising from contracts for the international sale of goods – or “the law that it deems appropriate.”

V. – CONCLUSION

The CISG is a *lex specialis* of the international sale of goods. In order for the Convention to be applied by the courts of Arab Contracting States (*i.e.*, Egypt, Syria, Iraq, Mauritania and Lebanon), either the conditions set forth in Article 1(1)(a) (direct application) or those laid down in Article 1(1)(b) (indirect application) must be satisfied. In order for it to be applied by the courts of non-Contracting Arab States, the conflict-of-laws rules of the forum must point to the law of a Contracting State, whether a reserving State or not. In practice, the CISG has been applied by Egyptian tribunals to contracts for the sale of goods between parties having their places of business in different Contracting States (by virtue of Article 1(1)(a) CISG) and when the Egyptian private international law rules lead to the law of a Contracting State (pursuant to Article 1(1)(b) CISG).

In other situations, Egyptian tribunals did not apply the CISG even though the conditions necessary for its application were satisfied. According to the reported cases, none of the Arab tribunals availed itself of the possibility of applying the CISG as part of the *lex mercatoria*, although the available legal texts allow them to do so. Clearly, then, raising the Arab legal community’s awareness of the CISG should be a priority. For a start, the universities in the Arab countries should offer courses on the CISG, at least at the higher level(s).¹⁰⁰



(2) of Omani Arbitration Law No. 47/97; Art. 36(a)-(b) of Jordanian Arbitration Law No. 31 (2001); and Art. 38(1)-(2) of the (new) Syrian Arbitration Law (2008).

¹⁰⁰ Some Palestinian universities, such as the Arab American University – Jenin and Birzeit University, have already started offering such a course at magister level. For information on the Egyptian universities that offer a course on CISG, see EL-SAGHIR, *supra* note 43.