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CISG AND ARBITRATION CLAUSES: ISSUES OF INTENT AND VALIDITY

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AND VALIDITY

*Dmytro V. Vorobey**

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I. INTRODUCTION

This paper will address the question of whether an arbitration agreement in writing that has been subsequently amended orally by the parties can be validated by reference to the provisions of the Vienna Convention on Contracts for the International Sale of Goods (CISG). The paper will also deal with the question of whether an arbitration agreement brought to life with reference to the CISG can withstand a challenge in the country of the seat of the arbitral tribunal and remain valid for the purposes of enforcement. Some attention will also be paid to the standards that the tribunal or a court can employ to determine the parties' consent to arbitrate. The paper will focus on a hypothetical (presented below) in which two parties are unfortunate enough to have orally amended their agreement to arbitrate. All issues in this paper will be discussed with this fact pattern in mind.

A party located in country X (Party X, Buyer) negotiates a contract of sale with a party located in country Y (Party Y, Seller) (both countries are parties to the New York Convention, the UNICTRAL Model Arbitration Law, and the CISG). Country Y is an Article 96 reserving state, and it does not consider itself bound by CISG Article 11 which states that a contract of sale need not be concluded or evidenced in writing, and is not subject to any requirement as to form. The Article 96 reservation applies as long as one of the parties has its place of business in a reserving state.

Party X is a medium-sized importer engaged primarily in textile trading. After two and a half years in business, X is hoping to expand its reach to bigger wholesale chains as soon as possible. With a view to this goal, X's staff surveys potential suppliers in different countries and contacts the national chambers of commerce in each country of interest to obtain a list of reliable suppliers. Y was one of several suppliers with which X later decided to negotiate on a deal. During the negotiations, Party X sent its own standard terms to Party Y. The terms provided for arbitration in the Arbitration Court at X Federal Chamber of Commerce.

Party Y objected to the arbitration clause due to: 1) the distance to the seat of arbitration, 2) a presumed home forum advantage to X, and 3) the high fees charged by the Federal Arbitration Court. The parties amended their arbitration clause by phone.

The amended arbitration clause agreed to by Party X and Party Y allegedly provided for arbitration in Singapore. The parties did not make

this agreement in writing. The Seller, nevertheless, shipped the goods and the Buyer accepted. Subsequently, a dispute arose as to the quality of the textiles that Seller provided. Party X, the Buyer, sued Y, the Seller, in the Federal Arbitration Court of X to recover damages. Seller's counsel challenged the jurisdiction of the X Arbitration Court based on the arbitration agreement amended by the parties by phone. Seller argued that the CISG, as the law applicable to the main contract, should also be applied to determine the content of the arbitration clause concluded between the parties. The CISG, if found to be applicable, would enable Seller Y to prove that there was in fact an arbitration agreement different from the one contained in Buyer's standard contract. Buyer, on the other hand, argued that even if the amended arbitration agreement is found to exist, it would be unenforceable according to both the New York Convention and the applicable domestic law of the Seller.

II. SEPARABILITY: SEPARATE OR SEPARABLE?

Our inquiry will start from the arbitration doctrine of separability, which defines the relationship between the main contract and the arbitration agreement in question. The doctrine of separability recognizes the arbitration clause in a main contract

[A]s a separate contract, independent and distinct from the main contract. The essence of the doctrine is that the validity of an arbitration clause is not bound to that of the main contract, and vice versa. Therefore the illegality or termination of the main contract does not affect the jurisdiction of an arbitration tribunal based on an arbitration clause contained in that contract.¹

In case of a dispute as to whether the main contract was validly formed, the doctrine of competence will still allow an arbitrator to determine whether he is competent to hear the dispute when deciding on its competence, the arbitral tribunal need not inquire into the validity of the main contract.²

Although the doctrine of separability is generally associated with arbitration agreements, a very similar principle is also found within the CISG. Article 81 states that any provision for "resolution of disputes"

¹ JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 102 (2003).

² KLAUS PETER BERGER, *INTERNATIONAL ECONOMIC ARBITRATION* 147 (1993).

survives the remedy of avoidance. Provisions for resolution of disputes “would ‘normally include choice of law clauses’ among those surviving avoidance under Article 81.”³

It is widely agreed that the CISG “does not govern the question of jurisdiction of the courts.”⁴ However, “forum selection clauses and arbitration clauses . . . often form part of a general contract, [and therefore], the often controversial question of whether the parties agreed upon such a procedural clause is closely related to the question of the conclusion of the contract in general.”⁵ The question of the existence of an agreement to arbitrate is a question of consent, and whether there is consent is governed by ordinary principles of contract law.⁶

However, as a consequence of the separability doctrine, the law chosen to govern the main contract will not automatically extend to the arbitration clause. As submitted by some authors, when the formal validity of an arbitration clause is at issue, the CISG will never be applicable. Instead, this issue would be preempted by Article II of the New York Convention, which obliges national courts to recognize “agreements in writing.”⁷ Further, unlike CISG Article 18(3), which permits formation of a contract of sale by conduct, many arbitration laws require a clearer manifestation of consent to be bound by an arbitration agreement.⁸ Under pre-CISG case law, some tribunals considered that when one party sent a written contract containing

³ Jack Graves, *CISG Article 6 and Issues of Formation: The Problem of Circularity*, 108 BELGRD. L. REV. 124, 127 (2011) (quoting CISG Advisory Council Opinion No. 9, Consequences of Avoidance, 3.3 (2008)).

⁴ Stefan M. Kroll, *Selected Problems Concerning the CISG's Scope of Application*, 25 J.L. & COM. 39, 43 (2005).

⁵ *Id.*

⁶ MARGARET M. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 19 (2d ed. 2012).

⁷ Janet Walker, *Agreeing to Disagree: Can We Just Have Words? CISG Article 11 and the Model Law Writing Requirement*, 25 J.L. & COM. 153, 163 (2005).

⁸ For example, Article 807 of the Italian Civil Procedure Code (Title VII of Book IV) provides that “[t]he submission to arbitration shall, under penalty of nullity, be made in writing and shall indicate the subject matter of the dispute. The written form requirement is considered complied with when the intention of the parties is expressed by telegram or telex.”

Article 1031(1) of the German Code of Civil Procedure (Tenth Book) provides that “[t]he arbitration agreement shall be contained either in a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of telecommunication which provide a record of the agreement.” Similar provisions may be found in arbitration acts of other (particularly civil law) jurisdictions.

an arbitration clause and the other never signed or returned it, but nevertheless performed its obligations under the contract, there was no exchange of documents by the parties, and therefore, the arbitration clause was invalid.⁹ According to this approach, unlike the main contract, which can be formed by conduct, an arbitration clause, as a provision separable from the main contract, cannot be formed in such a way.

Some scholars believe, however, that one of the CISG's goals is to change this trend. Professor Klaus Peter Berger states that "similar to contracts concluded by tacit acceptance by one party, the admissibility of purely oral agreements [to arbitrate] corresponds to the needs of international commercial practice. This is manifested in the UN Sales Convention."¹⁰ Even though our hypothetical is not concerned with a purely oral arbitration agreement (instead, the parties have orally amended the agreement from the Buyer's standard form), Professor Berger's statement reflects the similar nature of sales contracts and arbitration agreements. Therefore, the question asked in this paper is whether CISG, as the law applicable to the main contract, can be applied to the process of determining the true intent of the parties to arbitrate (or, alternatively, an absence of such intent).

It is argued that the doctrine of separability does not preclude the application of the CISG at the stage of contract formation. Instead, the doctrine is confined to the limits of Article 81 of the CISG. Article 81 comes into effect only upon avoidance of the contract and, as such, does not subject the formation of arbitration agreement to a law different from the one of the main contract. As noted in the Secretariat Commentary on Article 81, "[Article 81] would not make valid an arbitration clause, a penalty clause, or other provision in respect of the settlement of disputes if such a clause was not otherwise valid under the applicable national law; [Article 81] . . . states only that such a provision is not terminated by the

⁹ See *Frey v. Cuccaro e Figli*, 1 Y.B. Comm. Arb. 193 (Ct. App. Napoli 1976). In this case only two out of four contracts were signed and returned. The court subsequently enforced an award based on arbitration clauses in contracts that were signed and returned. The court stated that "where the confirmation of sale is not returned a valid and enforceable arbitration agreement does not exist, regardless of the *lex loci*, which might not require the written form."

¹⁰ BERGER, *supra* note 2, at 352.

avoidance of the contract.”¹¹ There are, however, those who argue against the application of the CISG in order to relax formal requirements to the formation of arbitration agreements.¹² Robert Koch submits that although the CISG may apply to the process of formation, it does not apply to the requirements of formal validity.¹³ The issues of contract formation, interpretation (Article 8 CISG) and validity will be considered in turn.

III. FORMATION OF CONTRACT

Our inquiry will start with *Filanto, S.p.A. v. Chilewich International Corp.*, probably the most famous U.S. case on the topic of contract formation that is still in good standing. In that case, the federal court for the Southern District of New York had to decide whether the parties, through an exchange of correspondence, had formed an arbitration agreement. In making its determination, the court considered the intent of the parties (*inter alia*, in accordance with Article 8 of the CISG). A brief account of the facts is provided below.

An Italian footwear manufacturer (Filanto) brought an action against a New York export-import firm (Chilewich), alleging breach of contract. The dispute originated out of a contract concluded by Chilewich’s agent in London with a Soviet Import-Export Association (Raznoexport). According to the terms of the contract, Chilewich was to supply footwear to Raznoexport. The contract concluded between Chilewich’s agent and Raznoexport contained an arbitration clause providing for arbitration in Moscow. Chilewich then contracted with Filanto to fulfill the orders from Raznoexport. The parties had several exchanges of correspondence. When the dispute later arose, the parties disagreed over whether the sales contract between Chilewich and Filanto included the arbitration clause contained in the original contract concluded by Chilewich’s agent and Raznoexport. Filanto alleged that it expressly refused to be bound by the arbitration

¹¹ See *Secretariat Commentary on Article 66 of the 1976 Draft* (draft counterpart of Article 81) (1976), available at <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-81.html>.

¹² See, e.g., Robert Koch, *The CISG as the Law Applicable to Arbitration Agreements*, in SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: Festschrift for Albert H. Kritzer on the Occasion of His Eightieth Birthday 267, 286 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008).

¹³ *Id.*

clause in the contract of sale and was only to comply with provisions as to packing, shipment, and acceptance of goods. Chilewich, on the other hand, submitted that the Memorandum Agreement, covering the contract between the parties and dated March 13, 1990, expressly incorporated the terms in Chilewich's contract with Raznoexport, including the arbitration clause therein. Chilewich had signed the Memorandum Agreement and sent it to Filanto. Filanto did not sign the Memorandum. Nevertheless on May 7, 1990, Chilewich opened a letter of credit in Filanto's favor.

On August 7, 1990, Filanto finally returned the Memorandum Agreement, signed and accompanied by a cover letter stating that it considered itself bound only by the points of the Chilewich-Raznoexport contract that Filanto specified (i.e. packing, shipping and acceptance). In court, Chilewich argued that the Memorandum Agreements sent to Filanto on March 13, 1990 constituted an offer. Chilewich further contended that the acceptance by Filanto of a letter of credit opened by Chilewich also implied the acceptance of the terms of the Memorandum Agreement.

The CISG was found to be applicable as a federal law. The court invoked Article 19 of the CISG, stating that the August 7, 1990 letter was a counteroffer, which, according to the court, Chilewich then rejected. The court also specifically mentioned Article 81(1) of the CISG, which provides for the "severability" of dispute resolution clauses in case the contract is avoided. The court noted that such clauses are "severable," probably meaning that they are not separate at the beginning and are subject to the same contract formation rules as the rest of the contract. Indeed, according to some commentators, arbitration agreements are not "separate," and as such, Professor Davor Babic rightfully points out that arbitration clauses are only "*separable*" and not "separate."¹⁴

As pointed out by Professors Ronald Brand and Harry Flechtner, in *Filanto v. Chilewich*, the court ends without a clear statement concerning the importance of the Sales Convention to its holding, citing instead to the *Restatement (Second) of Contracts* and case law that supports a general policy favoring arbitration.¹⁵ The *Filanto* court, however, specifically

¹⁴ Statement made during Professor Babic's lectures on European private law at the University of Pittsburgh School of Law in February 2012. Notes are on the file with the author.

¹⁵ Ronald A. Brand & Harry M. Flethner, *Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention*, 12 J.L. & COM. 239, 260 (1993).

pointed out that Article 8(3) of the Sales Convention may be used to ascertain whether the parties intended to conclude a contract containing an arbitration clause.¹⁶ Even though the *Filanto* court considered issues distinct from the ones in our hypothetical, it provided one of the first examples of applying the CISG to the formation of arbitration agreements. It negated, at least in part, the presumption against applying ordinary contract law principles to the process of determining the parties' intent to arbitrate.

In another case, an arbitral tribunal sitting in Zurich had to decide whether a valid arbitration agreement had been concluded between the parties based on a contractual clause providing for submission of disputes "to international and trade arbitration organization in Zurich, Switzerland."¹⁷ The claimant contended that the Zurich Chamber of Commerce was the designated institution, whereas the respondent argued that, since the clause did not clearly specify the arbitral institution, it should be considered invalid.¹⁸ The arbitrator referred to both Article 18(1) of the Swiss Law of Obligations, which empowered him to ascertain the subjective intent of the parties, and to Article 2 of the Swiss Civil Code, dealing with good faith. Finding a valid arbitration agreement, the arbitrator then referred to Articles 4.1. and 4.2. of the UNIDROIT Principles, in an

¹⁶ *Filanto, S.p.A. v Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1241 (S.D.N.Y. 1992).

¹⁷ Bruno Zeller, *Determining the Contractual Intent of the Parties under the CISG and Common Law—A Comparative Analysis*, 4 EUR. J.L. REFORM 629, 636 (2002) (quoting Case No. 7645, 11 ICC Int'l C. Arb. Bull. 34 (ICC Int's Ct. Arb. 1994)), available at <http://www.cisg.law.pace.edu/cisg/biblio/zeller8.html#32>.

¹⁸ For a similar set of circumstances, see *Lucky-Goldstar Int'l (H.K.) Ltd. v. Ng Moo Kee Eng'g Ltd.*, 2 H.K.L.R. 73 (H.C. 1993). The arbitration clause in the contract provided for arbitration "in a third country, under the rule of a third country and in accordance with the rules of procedure of the International Commercial Arbitration Association." The plaintiff sued for damages in Hong Kong courts and the defendant sought a stay of the proceedings pursuant to Article 8 of the Model Law. The plaintiff argued that the arbitration agreement should be considered either null and void, since it referred by mistake to an unspecified third country, or inoperative, since it referred to a non-existent organization or to non-existent rules. Although it did not reference the CISG, the court found that the arbitration clause sufficiently indicated the parties' intentions to arbitrate.

Judge Kaplan articulated his reasoning as follows:

I believe that the correct approach in this case is to satisfy myself that the parties have clearly expressed the intention to arbitrate any dispute which may arise under this contract. I am so satisfied. As to the reference to the non-existent arbitration institution and rules, I believe that the correct approach is simply to ignore it. I can give no effect to it and I reject all reference to it so as to be able to give effect to the clear intention of the parties.

attempt to reflect the international nature of the dispute. Article 4 of the Principles provides, in essence, that the contract should be interpreted in accordance with common intention of the parties (Article 4.1.(1)), and in cases when “such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.” (Article 4.1.(2)). Regarding statements and “other conduct” of the party, Article 4.2. of the UNDRUIT Principles states that “the statements and other conduct of a party shall be interpreted according to that party’s intention if the other party knew or could not have been unaware of that intention.” (Article 4.2.(1)). Further, “if it is impossible to ascertain the meaning of the party’s statements or conduct in accordance with its intent, such statements and conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.” (Article 4.2(2)). As submitted by Professor Bruno Zeller, the same result would have been reached under Article 8 of the CISG.¹⁹

IV. ARTICLE 8—APPLICABLE STANDARDS OF INTERPRETATION

Article 8 of the CISG provides guidelines for determining the parties’ intentions where their language or conduct is ambiguous or where, to the knowledge of the other party, “the first party was operating under a mistaken assumption of fact.”²⁰ Article 8 provides for a three-step analysis for ascertaining the contractual intent of the parties. Conduct or statements of a party should be interpreted according to that party’s actual (subjective) intent where the other party knew or could not have been unaware of that intent (Article 8(1)). Where the prerequisites for applying the previous rule are not present (i.e., where a party has not shown a particular subjective intent behind its statements or conduct, or the other party did not know and could have been unaware of the first party’s subjective intent), the analysis then turns to a reasonable person’s understanding of the statements or

¹⁹ Zeller, *supra* note 17 n.33.

²⁰ Jacob S. Ziegel & Claude Samson, *Comment on Article 8 of the Convention on Contracts for the International Sale of Goods*, REPORT TO THE UNIFORM LAW CONFERENCE OF CANADA ON CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (July 1981), <http://www.cisg.law.pace.edu/cisg/text/ziegel8.html>.

conduct of a party (Article 8(2)). In determining a party's subjective intent or the reasonable person's understanding of a party's statements or conduct, courts and tribunals are permitted to look into the circumstances surrounding the contract (Article 8(3)).

The practical importance of Article 8 is that it helps to ascertain the intent of the parties when some terms of an arbitration agreement are missing or in cases when an arbitration clause in writing does not (at least allegedly) represent the true intent of the parties. Examples of this would be when parties use a standard form agreement, but in fact intend to validate only parts of it; or in cases similar to the hypothetical above, when only one party sends its standard contract, and later on the parties orally agree to modify some elements of a contractual clause and thereafter one party performs.

The question to be answered is what are the standards for ascertaining the parties' intent in cases when the arbitral tribunal decides to use the CISG to determine the existence of an arbitration agreement? As pointed out above, Article 8(1) states that conduct or statements of a party should be interpreted according to that party's actual (subjective) intent where the other party knew or could not have been unaware of that intent. This means that where an addressee of the statement does not recognize the intent of the party making the statement, even though it is easily recognizable, the addressee will be bound by the declaring party's subjective intentions.²¹ And, if the addressee understands the declaring party's real subjective intentions despite that party's unclear or incorrect language, the declaring party's subjective intention will be binding, regardless of the understanding that the reasonable person might have had.²²

The inquiry into the application of Article 8 of the CISG in the process of ascertaining the content of arbitration agreements should start with the basic premise that different parts of an arbitration agreement may sometimes become subject to a dispute. An arbitration agreement itself may be divided into terms that are deemed material and those that are not.²³

²¹ Franco Ferrari, *Interpretation of Statements: Article 8*, in *THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION* 172, 174 (Franco Ferrari et al. eds., 2005).

²² *Id.*

²³ See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 619 (2009).

Choice of law, arbitral seat, institutional rules and means of selecting arbitrators are usually considered as material.²⁴ In some jurisdictions, this divide has resulted in the application of formal requirements only to the material terms of arbitration agreements.²⁵

MCC Marble Ceramics v. Ceramica Nuova D'Agostino is illustrative of the application of Article 8(1), since it provides an example of a case where the parties subjectively may not have intended to be bound by some provisions of a written contract they had signed. In that case, the Eleventh Circuit found that under Article 8(1) of the CISG, the parties' shared subjective intent governed their contract, even absent objective manifestation of that intent. The court reasoned that "Article 8(1) is not limited to interpretation of the terms of a contract, but by its express terms encompasses interpretation of the parties' *conduct*."²⁶

MCC Marble Ceramics (MCC), a U.S. corporation concluded an agreement to purchase ceramic tiles with Ceramica Nuova D'Agostino (D'Agostino), an Italian tile manufacturer. The parties negotiated the essential terms of the agreement at a trade fair in Bologna. These terms were recorded on D'Agostino's standard order form, written in Italian, which contained provisions as to the sanctions for non-payment by the buyer as well as a clause requiring that the buyer give written notice within 10 days of delivery if the buyer claimed the delivered goods were non-conforming. Later, MCC sued D'Agostino for an alleged failure to fulfill one of its orders. D'Agostino counterclaimed, alleging non-payment by MCC for earlier deliveries. As a defense against MCC's claim of failure to deliver, D'Agostino invoked, among other things, a clause in the signed preprinted form that gave it the right to suspend or cancel the contract in case of a delay in payment by the buyer. As a defense against D'Agostino's counterclaim for the full price of earlier deliveries, MCC argued that those deliveries included non-conforming goods and that MCC had notified D'Agostino by telephone of this fact. D'Agostino countered by invoking

²⁴ *Id.*

²⁵ *Id.*

²⁶ Harry M. Flechtner, *The U.N. Sales Convention (CISG) and MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.P.A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention's Scope, and the Parol Evidence Rule*, 18 J.L. & COM. 259, 265 (1999).

the contract clause requiring that a written notice of claims of non-conformity be given within 10 days of delivery. MCC did not dispute the underlying facts; it argued instead that the parties had no subjective intent to be bound by the terms on the reverse (in particular those that concerned notice and late payment). MCC submitted affidavits supporting this assertion from its own president who had signed the contract in Bologna and from D'Agostino's representatives at the trade fair, both of whom had thereafter left D'Agostino's employ.

Although the court found that sophisticated merchants must generally know the content of the agreement they sign, it nevertheless concluded that MCC's affidavits offered evidence of a subjective intent by *both* the president of MCC and by the representatives of D'Agostino not to be bound by the provisions on the reverse of D'Agostino's form. Thus, the court reasoned, "the case fell 'squarely within article 8(1) of the CISG, and therefore require[d] the court to consider MCC's evidence as it interpret[ed] the parties' conduct.'"²⁷ The determination of consent was largely confined to the subjective intent of the parties. However, in some instances, the application of Article 8(1) requires that the parties have a close relationship and know each other well, or that the import of the statements or conduct was clear and easily understood by the other party.²⁸ Thus, a more substantive inquiry, as provided for in Article 8(3) of the CISG, may often be required. Before one turns to the analysis of Article 8(3), the content of the second subsection of this Article must be mentioned, as Article 8(3) merely clarifies the meaning of Article 8(2). Article 8(2) states that "if the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances."

The express reference of Article 8(2) to the "reasonable person of the same kind" is not accidental. At the Vienna Convention, the delegates agreed "to refer to 'a reasonable person of the same kind as the other party' instead of just 'a reasonable person' in order to indicate the characteristic

²⁷ *Id.* at 266 (quoting *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino*, 144 F.3d 1384, 1388 (11th Cir. 1998)).

²⁸ Magnesium Case, No. 8324 (ICC Int'l Ct. Arb. 1995), available at <http://cisgw3.law.pace.edu/cases/958324i1.html>.

that should be assumed on the part of the reasonable person and to make it clear that the reference is to the party to whom the statement was addressed and not to the party making the statement.”²⁹ As Professor Jelena Vilus explains, “[i]t was considered that these additional words would make the reasonable person criterion more impartial, since it was related to a person engaged in the same branch of business, or in the same trade.”³⁰ As a matter of practice, arbitration clauses are sometimes drafted by people who are either non-lawyers or have very little or no experience in the field of international commercial arbitration. In such a case, the “reasonable person” standard of Article 8(2) would oblige an arbitral tribunal to give regard the level of a party’s knowledge of international arbitration.³¹

Now, our inquiry will focus on the facts of the hypothetical, wherein the amended arbitration clause allegedly designated Singapore as the legal seat. In the absence of the clear intent of the parties, the arbitral tribunal (deriving its authority from the doctrine of competence discussed above) will have power to designate the seat of arbitration.³² Interpretation of the parties’ agreement as to the seat of arbitration should be left to the arbitral tribunal or arbitral institution.³³ Article 8(3) would authorize the tribunal to consider “all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, *usages* and any subsequent conduct of the parties.” It is important to note that this discussion is not concerned with *usages* mentioned in Article 9(2). In contrast to the meaning of “*usages*” under Article 9, Article 8(3) focuses on *usages* “which are only local, national, or followed by a particular group of business people.”³⁴ Professor Peter Schlechtriem provides a clear illustration of different meanings of the term “*usages*” when he states that

²⁹ E. Allan Farnsworth, *Commentary on Article 8 CISG*, in BIANCA-BONELL COMMENTARY ON THE INTERNATIONAL SALES LAW 94, 96 (Massimo Bianca & Michael Bonnel eds., 1987), available at <http://www.cisg.law.pace.edu/cisg/biblio/farnsworth-bb8.html>.

³⁰ Jelena Vilus, *Common Law Institutions in the United Nations Sales Convention*, in 2 STUDIOS EN HOMENAJE A JORGE BARRERA GRAF 1431, 1441 (1989) (Mex.).

³¹ Case No. 10422 (ICC Int’l Ct. Arb. 1994).

³² See BERGER, *supra* note 2, at 106.

³³ BORN, *supra* note 21, at 1720.

³⁴ PETER SCHLECHTRIEM, UNIFORM SALES LAW—THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 39 (1986).

[A]ccording to Article 8(3), the particular circumstances are important, including usages that are possibly significant only to a party making the statements or to a reasonable person in the rule of the addressee. For example, a German who remains silent after having received a letter of confirmation can be understood to have expressed approval, regardless of whether Article 9(2) includes the German customs pertaining to letters of confirmation.³⁵

Applied to our case, the determination of the arbitral seat will likely depend on whether Singapore is a convenient seat and/or whether it is common for the parties from similar or the same geographical location to select Singapore as a seat for international arbitration. There is, however, “no limit under Article 8(3) as to what one can refer to in order to get at the meaning of a statement or conduct.”³⁶ Therefore, when deciding upon the seat of arbitration, the tribunal is free to consider “all other relevant circumstances.”

V. ARTICLE 29 CONCERN

In our hypothetical, the parties have orally amended the arbitration clause from the Buyer’s standard form. Under Article 29 of the CISG, a contractual provision may be amended in any form. Article 29(1) provides that “a contract may be modified or terminated by the mere agreement of the parties.” The second subsection of the Article suggests, nevertheless, that the parties will be barred from orally amending the contract, in cases where the contract contains a clause that expressly prohibits such an amendment (Article 29(2)). However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

An oral agreement to modify a contract could be considered “‘conduct’ that would preclude [a party] from invoking the contract clause ‘to the extent that the other party has relied on that conduct.’”³⁷ In order to

³⁵ *Id.*

³⁶ Chan Leng Sun, *Interpreting an International Sale Contract*, CELEBRATING SUCCESS: 25 YEARS UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (COLLATION OF PAPERS AT UNCITRAL-SIAC CONFERENCE) 78 (Sept. 22–23, 2005), available at <http://www.cisg.law.pace.edu/cisg/biblio/sun1.html>.

³⁷ JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 231 (3d ed. 1999) (quoting *Secretariat Commentary* art. 27, para. 9, O.R. 28, Docy. Hist. 418).

determine the party's reliance on the conduct of the other party, courts and arbitral tribunals may invoke Article 8.³⁸ As one of the CISG's general provisions, Article 8 applies whenever a statement or conduct of a party is to be interpreted with a view to determining its contents.³⁹ The CISG case law supports this proposition. In a case decided by the Appellate Court of Dusseldorf (Oberlandesgericht Dusseldorf) a German buyer (defendant) entered into a contract of sale with an Italian seller (plaintiff). The contract concerned the sale of clothes. Twenty-five days after the date of delivery, the buyer notified seller that the goods were non-conforming. The seller recovered the goods for examination and granted a *pro forma* credit note to the buyer. After examination, the seller denied non-conformity and sued the buyer for the purchase price. The court had to consider, *inter alia*, whether the seller granting a credit note constituted acceptance of the termination of the contract, as the buyer had proposed. With reference to Article 8(2), the court held that

the contract was not terminated by agreement of the parties as provided under Article 29 CISG. When granting the credit note, the seller had no intention to accept the buyer's proposed termination. The note was issued *pro forma*, and there was no reason for the buyer to interpret this as the outcome of the examination of the goods by the seller.

The court expressly referred to the standard of Article 8(2) when determining whether the buyer had reasonably interpreted the actions of the seller. For the purposes of our hypothetical, even if the Buyer's standard contract contained a no-oral-modification clause, the Buyer would be precluded from invoking that clause because the Seller relied on the oral amendment by thereafter shipping the goods.

As outlined above, this discussion will now turn to the question of whether or not the award based on an amended arbitration agreement, such as the one in our hypothetical, would be able to avoid the challenge of setting aside and be enforced under the New York Convention.

³⁸ See, e.g., Oberlandesgericht Innsbruck, Docket No. 1 R 273/07t (App. Ct. Innsbruck 2007) (Austria), available at <http://cisgw3.law.pace.edu/cases/071218a3.html> (expressly stating that when considering whether to give effect to the no-oral-modification clause in the parties' contract, "it is in any case decisive what the parties themselves determined as written form and how this agreement has to be interpreted by applying Article 8 CISG").

³⁹ Ferrari, *supra* note 21.

VI. FORMAL VALIDITY

The provisions of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and the UNCITRAL Model Law on International Commercial Arbitration sets out the formal validity requirements that an arbitration agreement needs to meet in order to be considered valid for the purposes of enforcement. Article V(1) of the New York Convention commands the courts of each contracting state “to recognize an agreement *in writing* under which the parties intend to submit to arbitration all or any differences which have arisen, or which may arise between them in respect of defined legal relationship.”

Most authorities hold that Article II(2) of the New York Convention set forth an *exclusive*, uniform rule of formal validity for arbitration agreements.⁴⁰ Article II(2) states, that in order to be considered as “in writing” an arbitration agreement must “include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.” Some argue that the requirements of the Convention are obsolete and are not representative of modern commercial practices.⁴¹ Earlier, the idea of limiting the application of an obligation to arbitrate was largely based on concern over forfeiture of a party’s right to present its case in a national court, thus prompting the special validity rule of Article II(2) of the New York Convention as a heightened burden necessary to prove the party’s will to abandon its fundamental right to go to court.⁴² Whereas the New York Convention treats arbitration as a truly “alternative” means of dispute resolution, the modern practice shows that it has become rather “normative.”⁴³

⁴⁰ GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 23 (2d ed. 2001).

⁴¹ See, e.g., Jack Graves, *ICA and the Writing Requirement: Following Modern Trends Towards Liberalization or are We Stuck in 1958?*, 107 BELGRD. L. REV. 36, 44 (2009) (Serb.).

⁴² Jeffrey Waincymer, *The CISG and International Commercial Arbitration: Promoting a Complimentary Relationship Between Substance and Procedure*, in *SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: Festschrift for Albert H. Kritzer on the Occasion of His Eightieth Birthday*, *supra* note 12, at 582, 588.

⁴³ Graves, *supra* note 41, at 43.

Although the New York Convention provides for rather rigid formal validity requirements, it also provides an escape clause in Article VII,⁴⁴ which gives the parties an opportunity to rely on more favorable provisions of the laws and treaties of the country where the award is sought to be enforced. “In other words,” Professor Nina Tepes explains, the “application of the New York Convention cannot result in the situation where a party would be deprived of any rights it has according to more liberal provisions of the law of the country where enforcement procedures are taking place.”⁴⁵ The question here is whether the CISG may be used as a more favorable international treaty by the party attempting to validate an award in cases where the other party seeks to bar enforcement based on alleged flaws and ambiguities in the agreement itself, or based on the fact that the parties have (at least according to the winning party) made an oral amendment to the agreement in writing. The strict writing requirement of Article II of the New York Convention, if read literally, would bar such a clause from recognition notwithstanding “the more favorable law” provision of Article VII. Professor Janet Walker formulates the general problem in clearer terms when she states that:

The concern is not, *and has never been*, with those situations in which the parties are able to arrange their affairs so as to make plain their intentions for dispute resolution. The concern is with the increasingly rapid and routine transaction of business across borders, particularly business between small firms and sole proprietorships, in which there is little or no scope for negotiating the form or forum for dispute resolution.⁴⁶

Some authors submit, however, that whenever the New York Convention proves to be less favorable to a party “seeking to avail himself of an arbitral award” than the provisions of another treaty or law of the country where the enforcement is sought, “the more favorable law” provision of Article VII shall prevail over the strict formal requirements of

⁴⁴ Article VII(1) of the Convention reads: “The provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.”

⁴⁵ Nina Tepes, *The More Favorable Right Provision of Art. VII of the New York Convention and Its Application to the Form of the Arbitration Agreement*, 12 CROAT. ARBIT. Y.B. 125, 125–26 (2005).

⁴⁶ Walker, *supra* note 7, at 162.

Article II.⁴⁷ Others argue a different point, that even if applied in an attempt to validate an oral arbitration agreement or an agreement the terms of which are ambiguous, the CISG will not affect the application of any other treaties (Article 90 CISG), such as the New York Convention. According to this view, the New York Convention should prevail as *lex specialis*, that is, the law applicable directly to recognition and enforcement, as opposed to the CISG as *lex generalis* in order to validate arbitration clauses in the main container contract. Professor Walker submits that “Article 90 of the CISG provides for deference to international agreements, raising the possibility that, despite the treatment of the dispute resolution clause as just another term of the contract, the CISG intended to permit the writing requirement of the New York Convention to prevail.”⁴⁸

The courts of some countries have nevertheless deviated from the strict mandate of Article II of the New York Convention. These deviations go so far as favoring recognition of arbitration clauses based on an oral agreement. The two different approaches taken by the drafters of the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration reflect the discrepancies between attitudes towards arbitration clauses. Article 7 of the Model Law lays out formal requirements for arbitration clauses. In regard to Article 7, the Model Law jurisdictions can adopt either one of the two options provided within the text of the Model Law. Option I provides that the arbitration agreement shall be in writing. It also states that an arbitration agreement is considered to be “in writing” as long as “its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.” Option II removes any requirement as to form including the “record” provision.

In the New York Convention Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, UNCITRAL urged the Model Law countries to apply the “most favorable law” provision of Article VII so that it will relax the formal validity requirements contained in Article II. Therefore, the New York Convention

⁴⁷ EMMANUEL GAILLARD, ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 69–70 (Emmanuel Gaillard & Domenico di Pietro eds., 2008).

⁴⁸ Walker, *supra* note 7, at 163.

Article II, if read in light of UNCITRAL's Recommendation would recognize a record of the "contents" of the agreement "in any form" as equivalent to a traditional "writing" in requiring an arbitration agreement to be in written form.⁴⁹ The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded.⁵⁰ An arbitration agreement, if made orally, can be enforced if the parties can sufficiently provide evidence that the parties consented to arbitrate.⁵¹ Some courts have held that a witness testimony would generally serve the purpose of providing a sufficient record of an oral agreement.⁵²

The amended provisions of the Model Law represent a conscious effort to modernize the outdated mandate of Art. II of the New York Convention, an effort supported by the majority of leading arbitration jurisdictions.⁵³ It is natural that the New York Convention is often construed in light of the UNCITRAL Model Law, which represents the development of the line of thought upon which the Convention is based.⁵⁴ However, on the other hand, the signatory countries may or may not adopt the amendments proposed by UNCITRAL.

The UNCITRAL Working Group II on Arbitration and Conciliation, charged with the task of creating model legislative provisions for written form of the arbitration agreements, was certainly aware of the disparities in interpretation of formal validity provisions. To accommodate the objection concerning the reference in an oral contract to a set of arbitration rules in particular, the Working Group agreed to include a proviso, the effect of which is to rely on domestic, or other applicable law to determine whether an oral reference to a set of procedural rules is such as to make that clause part of the contract notwithstanding that the contract or the arbitration

⁴⁹ UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION art. VII (2006).

⁵⁰ *Id.*

⁵¹ Peter Kucherepa, *Reviewing Trends and Proposals to Recognize Oral Agreements to Arbitrate in International Arbitration Law*, 16 AM. REV. INT'L ARB. 409, 416 (2005).

⁵² H. Small Limited v. Goldroyce Garment Ltd. [1994], 2 H.K.L.R. 526 (H.C.), <http://interarb.com/clout/clout064.htm>.

⁵³ Tepes, *supra* note 45.

⁵⁴ Giuditta Cordero-Moss, *Risk of Conflict Between the New York Convention and the Newer Arbitration-Friendly National Legislation?*, FOLK UIO NO, <http://folk.uio.no/giudittm/Form%20of%20arbitration%20clause.pdf> (last visited Feb. 9, 2013).

agreement has been concluded orally.⁵⁵ Therefore, at least according to the current trend exhibited under the 2006 version of the UNCITRAL Model Law on International Arbitration, the ultimate validity of an arbitration clause depends greatly on the applicable domestic law.

Although the Recommendation of UNCITRAL might be given considerable weight when construing the New York Convention, it remains to be seen whether the adoption of a more relaxed form of Article 7 of the Model Law Option II will be sufficient to shift the by-far persistent formalistic attitudes in treatment and interpretation of Article II(2) of the New York Convention.⁵⁶ A brief discussion of relevant domestic law provisions enacted in some leading arbitration jurisdictions follows below.

A. France

France is home to the headquarters of the International Chamber of Commerce (ICC). As a result, it is often picked as a legal seat for international arbitrations. As explained below, in May 2011, the French arbitration policy experienced a shift towards a more liberal attitude to the question of the formality of arbitration clauses.

The prior provisions of the French Code of Civil Procedure relating to this issue required an arbitration clause to be in writing.⁵⁷ Article 1443 of the 1981 French Code of Civil Procedure provided that, in order to be valid, “an arbitration clause shall be in writing and included in the contract or in a document to which it refers.” Furthermore, to be valid, an arbitration clause should appoint the arbitrator or arbitrators, or provide for a method of their appointment. Quite to the contrary, the current Article 1507, as amended by the arbitration decree of 13 January, 2011 (décret n° 2011-48 portant réforme de l’arbitrage), states that “an agreement to arbitrate is not

⁵⁵ *Note on the Deliberations of the Working Group II (Arbitration and Conciliation) on Preparation of a Model Legislative Provision on a Written Form for Arbitration Agreement*, UNCITRAL Forty-Third Session, U.N. Doc. 4 A/CN.9/WG.II/WP.136 (July 19, 2005), available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V05/867/53/PDF/V0586753.pdf?OpenElement> (see ¶ 11 at 4).

⁵⁶ *Id.* at 5.

⁵⁷ CODE DE PROCÉDURE CIVILE [C.P.C.] art. 1443 (Fr. 1981).

subject to any requirements as to form.”⁵⁸ According to some commentators, this reform was introduced with a view to sustaining France’s leading role in international arbitration.⁵⁹

As perceived in France, the arbitration agreement in international arbitration was not subject to any national law at all, but was governed exclusively by material principles derived from French conceptions of international public policy.⁶⁰ In *Bomar*,⁶¹ the Cour de Cassation decided the question of validity based on “a material rule of international commercial arbitration,” without alluding to any particular law.⁶² Therefore, the amended articles of the French Code of Civil Procedure seem to only confirm a prior liberal attitude of French courts towards arbitration agreements.

B. Sweden

Sweden is home to the world-renowned Arbitration Institute of the Stockholm Chamber of Commerce (SCC). The Swedish Arbitration Act is silent on any formal requirements for an agreement to arbitrate. An oral agreement is sufficient for arbitration in Sweden.⁶³ Thus, general contract law principles would be applicable to determine whether parties have a valid agreement to arbitrate.⁶⁴ This may, however, cause problems at the enforcement stage.⁶⁵ In order to enforce arbitration awards abroad on the basis of the New York Convention, the safest course is to assume that the documentation requirement stated in the Convention must be fulfilled.⁶⁶ If the opposing party denies the existence of an arbitration agreement, the

⁵⁸ CODE DE PROCÉDURE CIVILE [C.P.C.] art. 1507 (Fr. 2011) (the writing requirement of Article 1443 is now mandatory only for domestic arbitrations).

⁵⁹ Maxi Scherer, *Long Awaited New French Arbitration Law Revealed*, NYU TRANSNATIONAL NOTES, <http://blogs.law.nyu.edu/transnational/2011/02/long-awaited-new-french-arbitration-law-revealed/> (last visited Feb. 11, 2013).

⁶⁰ JEAN-FRANÇOIS POUURET & SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL COMMERCIAL ARBITRATION* 163 (2007).

⁶¹ Cour de Cassation [Cass.] [Supreme Court for judicial matters] 1e civ., Oct. 11, 1989 Bull. Civ. I, No. 314 (Fr.).

⁶² POUURET & BESSON, *supra* note 60.

⁶³ *Id.*

⁶⁴ FINN MADSEN, *COMMERCIAL ARBITRATION IN SWEDEN* 47 (2d ed. 2007).

⁶⁵ POUURET & BESSON, *supra* note 60.

⁶⁶ *Id.*

application for enforcement must also provide the arbitration agreement or otherwise prove (in case of an oral agreement) that an arbitration agreement has been entered into.⁶⁷ This leaves the question of consent and validity entirely to the Swedish domestic contract law.

C. Germany

In Germany the formal validity requirements for arbitration agreements are spelled out in Section 1031 of the Code of Civil Procedure (ZPO).⁶⁸ Under German law, oral consent to arbitration is now impossible even between merchants.⁶⁹ The most-favorable treatment principle does not apply regardless of whether the issue is one of enforcement, or when the arbitration clause is raised as a defense against admissibility of court proceedings.⁷⁰ Moreover, if the parties have additionally subjected the arbitration agreement to the law of another country, the relevant provisions of that country and Section 1031 ZPO apply cumulatively.⁷¹ Thus, under German law, a party wishing to set an arbitration award aside on the basis of formal invalidity has a greater chance of success than in many other jurisdictions.

D. Austria

Similarly to Germany, Austria adheres to a more restrictive approach toward the form of arbitration agreements.⁷² This is due to several reasons.

⁶⁷ Olga Zalepukina, Hans Bagner & Julia Lannerheim, *Recognition and Enforcement of Foreign Awards in Sweden*, UKR. J. BUS. & L. 42, 43 (2008), available at http://www.vinge.se/upload/bocker_artiklar/Eastern%20European%20Desk%20article.pdf.

⁶⁸ Zivilprozessordnung [Code of Civil Procedure] § 1031(1) (“The arbitration agreement shall be contained either in a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of telecommunication which provide a record of the agreement.”).

⁶⁹ Rolf Trittman & Inka Hanefeld, *Form of Arbitration Agreement*, in *ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE* 126, 129 (Karl Bockstiegel, Stefan Kroll & Patricia Nacimiento eds., 2008).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Schiedsrechts-Änderungsgesetz [Austrian Arbitration Act] § 581(1) (“An arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. The

According to the Official Commentary to the new Austrian Arbitration Act of 2006, one of the primary concerns was that a provision too far removed from the New York Convention would lead to arbitral awards which were—contrary to general expectations—less easily enforceable in comparison to decisions of domestic courts.⁷³ Due to this, Austria may lose its attractiveness as a place of arbitration and be demoted to a mere recognition-and-enforcement country. On the other hand, however, Austria may enjoy an advantage in the latter regard because arbitral awards that are not enforceable under the New York Convention, because they are based on “defaulted” arbitration agreements, would have been enforceable under Austrian law.⁷⁴

VII. ARBITRAL CONFLICT OF LAWS AND THE CISG: GENERAL OVERVIEW

For the purposes of this paper, the author will briefly discuss the factors the tribunal should consider to determine whether or not it should apply the CISG to determine the existence (and validity) of an arbitration clause. Article 28(2) of the Model Law on International Commercial Arbitration expressly states: “failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.” Some institutional rules also grant arbitrators the power to apply the rules of law they consider appropriate.⁷⁵

There are several connecting factors the arbitral panels normally consider in order to determine the rules appropriate for a specific dispute. These include the law of the place of arbitration, the law of the place where the arbitration agreement was concluded, the seat of a domestic trade

arbitration agreement may be concluded in the form of a separate agreement or as a clause within a contract.”)

⁷³ AUSTRIAN ARBITRATION ACT, OFFICIAL COMMENTARY 16 (2006), <http://www.cm.arbitration-austria.at/dokumente/OfficialCommentAustrianArbitrationAct2006.pdf>.

⁷⁴ *Id.*

⁷⁵ INTERNATIONAL CHAMBER OF COMMERCE, RULES OF ARBITRATION 11 (2010) (Article 17(1)) (expressly authorizes an arbitral tribunal to “apply the rules of law which it determines to be appropriate. Article 17(2) further provides that “In all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages.”).

organization which has published a standard form contract/arbitration agreement, and the law of the enforcing jurisdiction.⁷⁶

In practice, however, the law applicable to the main contract would be also deemed the law applicable to the arbitration agreement, unless there is a clear indication of the contrary.⁷⁷ Also, the majority of arbitration agreements concluded throughout the world fall under the sphere of the application of the New York Convention.⁷⁸ The following discussion will focus on two connecting factors, namely the law of the arbitral seat as well as the law of the enforcing jurisdiction, since the New Convention expressly makes arbitration agreements and subsequent awards subject to the scrutiny of these two legal regimes. Article V(1)(e) provides that the enforcement of an arbitral award shall be refused in cases when the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made. Article V(2)(b) further provides that an award shall be refused enforcement if the recognition and enforcement would be contrary to the public policy of the enforcing country. Although it is commonly understood that a mere violation of a law of the enforcing country is not enough to constitute a public policy violation,⁷⁹ the public policy factor remains significant at the enforcement stage.

A. The Law of the Seat

The seat of arbitration plays an important role in the New York Convention. Arbitral awards rendered by tribunals sitting in Contracting States have been confirmed when the claimant was a national of a country that had not acceded to the Convention.⁸⁰ The practical implication of the

⁷⁶ Leonardo Graffi, *The Applicable to the Validity of the Arbitration Agreement: A Practitioner's View*, in CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION 19, 33 (Franco Ferrari & Stefan Kroll eds., 2011).

⁷⁷ *Id.* at 36.

⁷⁸ *Id.*

⁷⁹ ALBERT JAN VAN DEN BERG, NEW YORK ARBITRATION CONVENTION OF 1958: AN OVERVIEW 19 (1981).

⁸⁰ Javier Rubinstein & Georgina Fabian, *The Territorial Scope of the New York Convention and Its Implementation in Common and Civil Law Countries*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS THE NEW YORK CONVENTION IN PRACTICE 91, 96 (Emmanuel Gaillard et al. eds., 2008).

choice of the seat is such that, even if the parties choose the law governing the contract, and even if they also chose some of the procedural rules to be applied by the arbitrators (e.g. institutional rules), they are nevertheless deemed to not have chosen the law governing the arbitration, except indirectly through choice of its situs.⁸¹

Approaches nevertheless differ in how much significance is given to the seat.⁸² Suffice it to say, that the only place in the New York Convention where a reference is made to “law” directly, as opposed to rules, principles and public policy, is in Article V(1)(a), which states that enforcement of an arbitral award “may be refused if the said agreement is not valid under the law of the country where the award was made.”

Even though there have been instances where the winning party managed to enforce an award that has been set aside on the basis of the “more favorable law” provision of Article VII,⁸³ subsequent case law restored the previous order of things at least in the United States.⁸⁴ The award, once set aside, cannot be (or is very unlikely to be) enforced in the United States. This is, however, not the case in France, where the mere fact that the award has been set aside would not bar enforcement in French courts.⁸⁵

The CISG, as any international treaty, is binding only on Contracting States. Arbitrators, on the other hand, cannot be equated to organs of any State.⁸⁶ Thus, regardless of whether or not the place of arbitration lies in a state that has signed and ratified the CISG, a tribunal is not under the duty to apply the CISG.⁸⁷ It, thus, follows that a tribunal sitting in a CISG state that has made a reservation under Article 96 it is not under an automatic obligation to apply the writing requirement either to the main contract or to the arbitration agreement.

⁸¹ William W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT’L & COMP. L.Q. 21, 23 (1983).

⁸² *Id.* at 24.

⁸³ In the Matter of Arbitration Between Chromalloy Aero Services, A Div. of Chromalloy Gas Turbine Corp. & Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C. 1996).

⁸⁴ TermoRio S.A. E.S.P. v. Electranta, 487 F.3d. 928 (D.C. Cir. 2007).

⁸⁵ GAILLARD, *supra* note 47, at 77.

⁸⁶ Giorgios C. Petrochilos, *Arbitration Conflict of Laws Rules and the 1980 International Sales Convention*, 52 REV. H.D.I. 191, 218 (1999), available at <http://cisgw3.law.pace.edu/cisg/biblio/petrochilos.html>.

⁸⁷ Nils Schmidt-Ahrendts, *CISG and Arbitration*, 107 BELGRD. L. REV. 211, 214 (2011).

B. The Law of the Enforcing Country

As stated by Professor Emmanuel Gaillard, “the New York Convention considerably minimizes the importance of the law of the Seat and although it leaves the State of the seat free to control arbitrations carried out on its territory as it sees fit, it shifts the focus to the conditions of recognition of awards in the national legal orders where enforcement is sought.”⁸⁸ The Convention thus clearly departs from the idea that the law of the seat is the only source of an award’s legal force.⁸⁹

While Article V(1)(a) of the New York Convention specifically refers to the “law of the country where the award was made,” in Article V(2)(b) a reference is made to “the public policy of that country,” meaning the public policy of the enforcing jurisdiction. The scope of the term “public policy” is broader and less precise than the term “law.” Also, public policy has been characterized as “relative” and “purely theoretical.”⁹⁰

When considering whether a principle is sufficiently fundamental to justify refusing enforcement of an award, the enforcement court is entitled to have regard to the connections the parties and the subject matter have with the jurisdiction where enforcement is sought. Where there are few connections, the court would be entitled to take a more liberal approach.⁹¹

Further, an award’s violation of a mere “mandatory rule” (i.e. an imperative rule of law that cannot be excluded by the agreement of the parties) should not bar its recognition or enforcement of the award, even when said rule forms part of the law of the forum, the law governing the contract, the law of the place of performance of the contract or the law of the seat of the arbitration.⁹²

It could, therefore, be suggested that non-application of the writing requirement by a tribunal does not render an award unenforceable in an Article 96 reserving state. The adoption of reservations, as expressed in

⁸⁸ EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL COMMERCIAL ARBITRATION* 29 (2011).

⁸⁹ *Id.*

⁹⁰ Karl-Heinz Bockstiegel, *Public Policy as a Limit to Arbitration and its Enforcement*, IBA J. DISP. RESOL. 123, 124–25 (2008).

⁹¹ Report to Committee on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, para. 40, New Delhi Conference (2002).

⁹² *Id.* at para. 48.

Articles 12 and 96, only makes the freedom of form provisions of the CISG inapplicable.⁹³ The text of the reservation does not itself set any restrictions as to form.⁹⁴ Rather, the question whether an Article 96 reservation results in a requirement that an arbitration agreement be in writing should be answered with reference to the law applicable pursuant to conflicts of law provisions.⁹⁵

VIII. CONCLUSION

For a party trying to prove the content of an arbitration clause the use of CISG for that purpose does not seem to be an entirely hopeless exercise. In an attempt to determine the validity of an arbitration clause, a court or an arbitral tribunal would find at its disposal a good number of interpretative tools provided within Article 8 CISG. At the enforcement stage, the CISG may well be used as a more favorable treaty for the purposes of Article VII of the New York Convention. The amended UNCITRAL Model Law as well as many national arbitration laws, support this proposition.

The parties should nevertheless be warned that the consequences of applying the CISG to the validation of arbitration agreements will ultimately depend on the national attitudes of at least two jurisdictions, that is, the country of the seat and the country of enforcement.

⁹³ Aleksandr Dolzhich (*Отдельные Вопросы Заключения Договора Купли—Продажи Товаров по Венской Конвенции 1980*) *Otdelnyie Voprosy Zaklucheniia Dogovora Kupli Prodazhi Tovarov po Venskoi Konventsii 1980 (Some Problems Related to the Conclusion of Sales Contracts under the Vienna Convention of 1980)* (2005), <http://25.cisg.ru/content/publikation.php?id=3> (last visited May 7, 2012).

⁹⁴ *Id.*

⁹⁵ *Id.*