CISG AND PARTY AUTONOMY

Can the parties to a contract for the sale of goods implicitly exclude the application of the United Nations Convention on Contracts for the International Sale of Goods?

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RESUMÉ

Formålet med denne masteroppgaven er å undersøke hvorvidt partene til en internasjonal kjøpskontrakt implisitt kan ekskludere anvendelsen av FN-konvensjonen av 11. april 1980 om kontrakter for internasjonale løsørekjøp ved å velge lovreglene til en kontraherende stat til å regulere deres kjøpsavtale.

CISG art. 6 gir partene rett til å ekskludere anvendelsen av konvensjonen, men definerer ikke i hvilke tilfeller eller på hvilken måte en slik eksklusjon kan gjennomføres. I tidligere avsagte dommer og voldgiftsdommer har muligheten til en implisitt eksklusjon av konvensjonen ikke blitt definitivt avklart, heller ikke rekkevidden av en slik eksklusjon. Det er særlig stor uenighet rundt muligheten til å ekskludere konvensjonen ved å velge et kontraherende lands rett, da CISG er del av dette lands rettsregler. Det særlige spørsmålet som oppstår er om partene implisitt kan ekskludere anvendelsen av CISG ved å velge et kontraherende lands rett, og om dette kan tolkes ut ifra handlinger eller praksis mellom partene. Dersom partene har ment å ekskludere konvensjonen, men ikke har gjort dette eksplisitt, samtidig med at de ikke har handlet eller prosedert med grunnlag i konvensjonen, er spørsmålet om domstolene bør overprøve partenes hensikt.

Masteroppgaven er avgrenset kun til de tilfeller der de kontraherende parter er individer eller juridiske personer tilhørende hver sin kontraherende stat, som inngår en avtale for internasjonale kjøp, hvor partene velger en kontraherende stats rett som bakgrunnsrett for kontrakten og der partenes hensikt var å ekskludere konvensjonen.

Masteroppgaven anvender den rettsdogmatiske metoden, ved å systematisk gjennomgå de tilgjengelige rettskildene ved en tolkning av CISG art. 6 i relasjon til art. 7, 8 og 9, i tillegg til den særlige juridiske metode som må anvendes i tolkningen av CISG som følge av tolkningsregelen i konvensjonens art. 7.

CISG art. 6 må på grunnlag av tolkningsregelen i art. 7 tolkes med særlig hensyn til konvensjonens internasjonale karakter, en enhetlig anvendelse og med hensyn til god tro blant forretningsfolk innenfor samme bransje. Der konvensjonen ikke gir noe klart svar, må konvensjonen tolkes i samsvar med konvensjonens generelle prinsipper, og kun i ytterste tilfelle etter de internasjonale privatrettslige regler.

Når partenes hensikt skal tolkes, må dette gjøres i henhold både til hva som var partenes subjektive og objektive intensjon, partenes handlinger samt hva som er vanlig praksis innenfor bransjen.

INTRODUCTION

International legal relationships are associated with more than one legal system. The commercial trade is ever growing, and the need for predictability, efficiency and equality in legal relationships become ever more important. The desire to find a harmonized regulation, led the international community to seek and create harmonized and uniform rules for the international commercial trade. In 1980 the United Nations Commission on the International Trade Law (UNICTRAL) drafted the United Nations Convention on Contracts for the International Sale of Goods[1] (hereby referred to as CISG or the Convention). Most CISG Contracting States have at least two sets of sales law rules. Domestic sales law applies in local transactions, while CISG is to be automatically applied in cases involving international sale of goods, cf. art. 1. What is governed by the Convention is determined by the Convention itself, cf. art. 4. Some might call attention to the fact that CISG is a noncomprehensive law, making it necessary to choose a national law to fill the gaps in the Convention, thereby making the choice of law a "double step problem" during the negotiations.[2] Yet some authors make a point out of the lack of an international supreme commercial court resolving the inconsistencies and conflicts in legal interpretations, due to legal ambiguities and conflicting legal interpretations produced by national courts.[3]

In a case where a Norwegian buyer and a French seller drafts a contract subject to German law, the parties may do so. Yet, when the parties choose German law as the governing law, the CISG will apply by default because CISG is part of German law.

CISG art. 6 allows the parties to a contract to "exclude the application of this Convention or, (…) derogate from or vary the effect of any of its provisions". CISG art. 6 is to be interpreted as an enactment of the party autonomy. The party autonomy is one of the most important conflict rules under private international law, which empowers the parties with the right to choose the governing law of their contract. Party autonomy rests on the consideration of predictability for the parties. Considering that the parties are the closest to determine what their needs are, regarding the governing law for the type of transaction intended, the party autonomy might suggest that an implicit exclusion based on the intent of the parties, even if not explicit, could be possible.[4]

Yet, the need for a uniform and harmonized application of the Convention, suggests that an exclusion of the Convention should not be regularly observed, and an exclusion should only take place where there are clear and good reasons. The objective of the Convention according to the preamble is to contribute to the removal of legal barriers in international trade. Regular exclusion of the Convention may cause the Convention to become ineffective. The express right to implicitly exclude the application of the Convention was eliminated from CISG art. 6, due to a fear that some courts might become too eager to exclude the application of the Convention as a whole, on insufficient grounds.[5] To avoid courts from resolving disputes on the basis of domestic law, an application of the Convention which

[1] (The United Nations Commission on International Trade Law (UNICTRAL) 1980)
[2] (Zhou 2014) (Cordero-Moss, International Commercial Contracts 2014, 71-74)
[3] (Zhou 2014) (Cordero-Moss, International Commercial Contracts 2014, 30, 72)
[4] (Boele-Woelki 2016) (Schroeter 2014)
[5] (Secretariat Commentary 2006)

solely allows for explicit exclusion, may cause the application of the Convention to be more uniform, and by that contribute to the removal of legal barriers in international trade.

The Convention therefore can be considered to contain two contrasting considerations; on the one hand, the Convention should be applied to all international contracts for the sale of goods to ensure a uniform, harmonized and efficient regulation of international commercial trade. On the other hand, the Convention is based on the principle of party autonomy, and the right to choose the governing law of the contract. The biggest issue is whether the court or tribunal should overrule the parties' wish to exclude the application of the Convention, based on a strict interpretation of the Convention.

It has therefore been debated whether the parties may exclude the application of the Convention implicitly.

A few court decisions have taken the lack of a precise provision in the Convention text, that the parties may implicitly exclude the Convention, as evidence for the Convention solely allowing explicit exclusion. Yet, in other court decisions, it is recognised that the parties may implicitly exclude the Convention, as long as the parties' intent is real and clear. Several courts have stated that for the Convention to be excluded, the agreement between the parties for exclusion has to be clear, unequivocal and affirmative.[6]

It is however even more debate regarding the parties' possibility to implicitly exclude the Convention, by choosing the law of a Contracting State as the governing law of the contract.[7]

Some arbitral awards and court decisions suggests that the choice of the law of a Contracting State may amount to an implicit exclusion of the Convention, at least when the parties have settled that the applicable law of a Contracting State is "exclusive". Nevertheless, most court decisions and arbitral awards do not consider a choice of the law of a Contracting State as the governing law, to amount to an implicit exclusion, because CISG is part of the national law of the Contracting State, except where the parties have made a particular reference to the domestic law of that Contracting State.[8]

Some arbitral awards and court decisions concludes that the parties may implicitly exclude the CISG by choosing the law of a Contracting State, while others do not. This may cause the application of the Convention to be less uniform and less predictable for contracting parties from Contracting States.

The literal interpretation of art. 6 does not give a clear answer to the question of whether the Convention may be implicitly excluded, by choosing the law of a Contracting State to govern the contract, although the Convention gives guidelines for the interpretation in articles 7 through 9. Article 7 concerns the rules on interpretation of the Convention, art. 8 considers the interpretation of the intent and conduct of the contracting parties. While art. 9 concerns the impact that usage and established practice has on the interpretation of the parties' contract and the Convention.

[6] (UNICTRAL 2016, 33)
[7] (UNICTRAL 2016, 34)
[8] (UNICTRAL 2016, 34)

The question that this dissertation seeks to answer is; may the parties to an international sale of goods contract, implicitly exclude the application of the United Nations Convention on Contracts for the International Sale of Goods, by choosing the law of a Contracting State to govern the contract, if neither of the parties have argued or practiced their rights based on the Convention, where the intent of the parties was to exclude the application of the Convention?

METHOD

In order to answer the research question regarding the interpretation of CISG art. 6 and implicit exclusion of the Convention, the method for interpretation will be established.

The legal dogmatic approach will be applied when studying the various effects that articles 7 through 9 has on the interpretation of art. 6 and implicit exclusion, considering both the black letter wording of the Convention text, the considerations behind the interpretation rules, jurisprudence and scholarly works concerning the interpretation. The legal dogmatic approach is used to systematically determine the current applicable law, subject to a fictious agreement, i.e. not based on a specific case.

Most practitioners are trained in domestic legal method. Nevertheless, when interpreting the Convention, the practitioners need to be conscious of the differences between the domestic and the international legal method specific to the interpretation of the Convention. The drafters of the CISG attempts to provide a specific method for the interpretation of the Convention in art. 7, by declaring in paragraph 1 that "regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith". Paragraph 2 of the Convention provides for mechanisms to fill gaps in the Convention, where the gaps are to be settled "in conformity with the general principles on which" the Convention is based, and only where no such general principles can be ascertained, the Convention is to be interpreted in accordance with the conflict rules determined by the applicable national law. Yet, this does not provide a clear method of interpretation. The legal method for interpreting the Convention therefore requires development under the exercising of the Convention.[9]

The Convention can nevertheless not be interpreted without considering the part it plays as an international treaty. The Convention text therefore needs to be interpreted following the general method of interpreting international treaties, codified in the Vienna Treaties Convention[10] art. 31-33, which states that the wording, context, purpose and legislative history have to be taken into account when interpreting CISG provisions. However, the application of this general interpretation method needs to be applied in a CISG context.[11]

The first step when interpreting the Convention is to consider the wording, or the black letter text, of the disputed term or provision. International treaties, such as CISG, are regularly the outcome of extended discussions and compromises, and the wording is therefore not always clear, and the interpretation and application of the wording itself is neither always clear. Considering that the Convention has six authentic texts, the interpreter needs to be careful when interpreting the Convention based on the wording. Yet, it is widely accepted that the English version can claim particular weight, because English was the working language under the preparation of CISG.[12] In this dissertation, the interpretations are based on the English text.

[9] (Magnus 2009, 33, 39-40)
[10] (Vienna Convention on the Law of Treaties 1969)
[11] (Magnus 2009, 52)
[12] (Magnus 2009, 53)

The second step is the contextual interpretation. This means that the provisions need not solely be interpreted based on the position of the provision in CISG, but also the international position of the entire Convention. The Convention must be interpreted based on international sets of rules, the legislative history, the purpose of the provisions and the relative weight of each of these elements.[13] However, this dissertation will not consider soft law, such as PECL[14], UPICC[15] et al.

The question of an implicit exclusion by choosing the law of a Contracting State to govern the contract, will be examined in relation to the rules of interpretation in CISG art. 7, 8 and 9, assuming that the parties intended to exclude the application of the Convention.

In this dissertation, when considering the "international character" of the Convention, the subject of the CISG as a treaty between nations for the promotion of a uniform law on international sale of goods, will be assessed together with the need for autonomous interpretation of the Convention, when settling a dispute concerning whether the parties to a contract for the sale of goods may implicitly exclude the application of the Convention subject to art. 6.

When considering the need for a "uniform application" of the Convention, CISG case law will be assessed. In 1993 UNICTRAL[16] established the CLOUT Database[17] to collect and make available court decisions and arbitral awards regarding the application of the CISG in national courts and arbitral tribunals. The Digest of CISG Case Law[18] was established in 2001, and its purpose was to summarize the decisions from national courts and arbitral tribunals, relating to the individual CISG provisions and issues. The Digest was published for the first time in 2004, and UNICTRAL periodically releases updates, the latest of which was published in 2016. Now there are many collections on CISG case law, among others the Pace database on the CISG.[19] Together with other sources, such as scholarly writings, the national application of the Convention is made available for practitioners, courts and arbitrators and the regard that is to be had to the "uniform application" is made more accessible.[20]

Nevertheless, an obstacle that may arise is that these collections are based on a form of volunteerism. Both the collection and the comments under many of these databases are issued by private parties and do not represent e.g. a supranational court, country or legal culture that gives guidance to the correct application of the Convention.[21] Another aspect of the volunteerism of the collections of CISG case law is that national courts and arbitral tribunals are not bound to collect and distribute national case law. Many cases regarding the application of the Convention are even settled out of court or by arbitration, which also limits the access to the interpretations and applications under the Convention.

[13] (Magnus 2009, 54-58)
[14] (Commission on European Contract Law)
[15] (International Institute for the unification of Private Law)
[16] (United Nations)
[17] (United Nations Commission on International Trade Law)
[18] (United Nations Commision on International Trade Law)
[19] (Pace Law School Institute of International Commercial Law)
[20] (Lookofsky 2017, 33)
[21] (CISG Advisory Council)

Another obstacle that occur under CISG case law, is a language barrier. A lot of case law are drafted in foreign languages, which makes the materials inaccessible for the interpretation of the Convention both for practitioners in general and for this dissertation. There may therefore both be a lot of case law that is not accessible due to non-distribution, and further because of language barriers. This dissertation will therefore only take into account the available case law translated into English and presuppose a correct translation of both judgements and comments. Another prerequisite that needs to be taken, is where the case law is solely available as a summary or abstract, and the premise behind the judgement may not appear clearly. This dissertation has therefore mostly been based on whole translations of judgements, where the questions regarding the interpretation have been discussed.

The "observance of good faith" under art. 7 (1) will be considered on the foundation of international practice and in relation to CISG art. 8 and 9. However, "good faith" is also part of the general principles that the Convention should be interpreted in conformity with, in the case of gaps in the Convention. When considering possible gaps in the application of the Convention, both good faith and the principle of party autonomy will be assessed.

Where the general principles of the Convention do not give guidance to the application of the Convention, the rules of private international law may be applied to fill the gaps. The rules of private international law will determine which country's law will govern the dispute, and also to which extent the legal method of the governing law can be used to settle the dispute.

When considering whether the parties to an international contract for the sale of goods may implicitly exclude the Convention, when the parties have chosen the law of a Contracting State to govern their contract, the interpretation of art. 6 will further be discussed in relation to articles 8 and 9, where possible conduct and trade usages will be assessed and interpreted in relation to an implicit exclusion of the Convention.

The application of CISG art. 8 and 9 will be established pursuant to the black letter wording of the articles, comments in the Digest of CISG Case Law, other scholarly works, and jurisprudence. Usage under art. 9 will further be considered in relation to contract GAFTA[22] and INCOTERMS[23].

[22] (Grain and Feed Trade Association)
[23] (International Chamber of Commerce [ICC])

1. THE NEED FOR UNIFICATION OF LAW AND THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

The need for a convention to uniform the international sale of goods occur from the existence of different national legal systems and the differences that appear from conflict of laws. The private international law is a national system of law, which means that it depends on the forum which law will govern the choice of laws, and it will depend on the national private international law what domestic law will be applicable to the contract. The laws on international sale of goods was provided for by individual States and the application and results of a court or arbitration decision, would depend on the country where the action was brought. This led to the unfortunate practice of "forum shopping". "Forum shopping" is the practice where the parties choose to bring the case before the court or tribunal in the country with the most favourable substantive legal rules for their case. Forum shopping might lead a case to be heard in a forum with little affiliation to the case.[24]

As long as the rules on choice of law in the domestic private international laws are not harmonized, the parties to a contract may not know what rules, or even which countries rules, govern their contract, before the dispute has been brought before the court. It was for the sake of predictability a wish to make harmonized and uniform rules on the international sale of goods appeared.

The work toward a convention to uniform the international sale of goods, culminated in 1964 in two Hauge conventions. The Uniform Law for the International Sale of Goods (ULIS)[25] and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF)[26] were both conventions attempting to uniform international sales law. These conventions, however, were met with very little support. In 1966 the United Nations Commission on the International Trade Law (UNICTRAL) was established by the General Assembly. UNICTRAL was established as a result of the recognition that discrepancies in national law governing international sales, created obstacles in international trade, and they recognised the need for uniformity in this area.[27] In 1980 the United Nations Convention on Contracts for the International Sale of Goods[28] (CISG or the Convention) was drafted, and it is the first treaty regarding international sales law that won acceptance on a worldwide scale. As of 16th of March 2020, there are 93 parties to the CISG and 18 signatories[29], and it is therefore considered a success.

CISG is the culmination of a long-time effort to overcome contradictions between domestic rules on contracts for the sale of goods and the character of these contracts.[30] Yet, the Convention permits the parties to a contract for the international sale of goods to exclude

[24] (Enderlein and Maskow 1992, 7-8) (Cordero-Moss, Internasjonal privatrett på formuerettens område 2013, 20-22)
[25] (The International Institute for the Unification of Private Law (UNIDROIT) 1964)
[26] (The International Institute for the Unification of Private Law (UNIDROIT) 1964)
[27] (United Nations)
[28] (The United Nations Commission on International Trade Law (UNICTRAL) 1980)
[29] (United Nations 2020)
[30] (Enderlein and Maskow 1992, 7)

the application in art. 6. An exclusion in accordance with art. 6, is an enactment of the party autonomy. Nevertheless, an exclusion may cause the Convention to not fulfil its purpose of harmonization and unification, if it becomes custom to exclude the application. Unless there are good reasons behind an exclusion, this should not become the norm. The court or tribunal need to weigh the objective of harmonization and unification against the parties' right to choose the governing law of their contract.

CISG is a convention containing rules governing the relationships between contracting parties for the sale of goods, as well as instruments of international law which help to put them into force. The Convention regulates the *international* sale of goods, and it therefore leaves the domestic sales law untouched. By aiming for a standardization of rules, rather than a unification, the Convention aims to harmonize the rules and to maintain the internationality of the Convention. The use of the form of a convention, instead of uniform laws, underlines the special position the Convention enjoys in domestic law; the Convention is automatically applicable as long as it is part of the national law of a Contracting State. In the event of discrepancies between the Convention and the domestic text, the interpretation of the Convention should be pursuant to one of the authentic convention texts, rather than to a translation.[31] Many countries have however incorporated, at least parts of, the Convention in national law, and many domestic sales laws are based on the Convention text. This might cause the application of the Convention to become less uniform and harmonized, and the text in both the Convention and domestic law, therefore needs to be interpreted in accordance with the rules on interpretation set forth in CISG art. 7.

Even if the Convention is a standardization of rules, and part of national law due to ratification, it is necessary to apply national law in addition to the Convention because the Convention itself does not govern all issues that may arise from the contract, e.g. the validity of the contract.[32] What is governed by the Convention is determined by the Convention itself.

[31] (Enderlein and Maskow 1992, 11-12)
[32] (Enderlein and Maskow 1992, 12-13)

2. THE APPLICATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

The Convention applies automatically, if the parties have their relevant places of business in a Contracting State, or the rules of private international law lead to the application of the law of a Contracting State, cf. art. 1. An implicit exclusion of the Convention under CISG art. 6 will only have importance as long as the Convention is applicable and the issue arising out of the contract is governed by the Convention. The contract is also required to be concluded in accordance with the provisions of the Convention.

2.1. CISG scope of application

The CISG scope of application is determined in the treaty's Part I. The Convention only applies for contracts for "the sale of goods", cf. art. 1 (1), which is further elaborated in art. 2 and 3. The definition of "sale of goods" is restricted by art. 2 and 3, which exclude

> «(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
> (b) by auction;
> (c) on execution or otherwise by authority of law;
> (d) of stocks, shares, investment securities, negotiable instruments or money;
> (e) of ships, vessels, hovercraft or aircraft;
> (f) of electricity»[33]

and «contracts for services or for goods to be manufactured»[34].

A common interpretation of "sale of goods" is any transaction that concerns the transfer of legal rights of property in a moveable object.[35] There are some debate as to the understanding of a "moveable thing", yet in this dissertation it will be presupposed that the contracting goods are "moveable things", which can be defined as a "sale of goods".

Art. 1 (1) of the Convention further states that the Convention applies between parties "whose places of business are in different States". This is commonly interpreted as a requirement of "internationality", i.e. the contract for sale of goods must be connected to at least two different States[36].

CISG Art. 1 (1) a) states that the Convention applies when the parties to the contract are from different Contracting States. This means that for contracts for international sale of goods between parties from Contracting States, the CISG is to be applied automatically.

[33] Art. 2 subparagraph a) to f)
[34] Art. 3, (Enderlein and Maskow 1992, 26)
[35] (Lookofsky 2017, 17)
[36] (Cordero-Moss, International Commercial Contracts 2014, 3-5)

Yet, some Contracting States have made declarations or reservations upon ratification, acceptance, approval, accession or succession of the Convention, under Part IV of the Convention (art. 92-97). For the scope of this dissertation, problems arising from declarations or reservations under the Convention for the sake of the application of CISG art. 1 (1) a) will not be discussed.

According to Art. 1 (1) b) the Convention is also applicable when only one of the parties to the contract has its place of business in a Contracting State. This, however, only applies when the "rules of private international law lead to the application" of the CISG. The CISG might apply even when only one, or neither, of the contracting parties has its relevant place of business in a Contracting State, if the rules of private international law lead to the application of the law of a Contracting State.[37]

The rules of private international law are national, which means that it will depend on the domestic rules whether the Convention is applicable according to art. 1 (1) b) of the Convention. An example is the Norwegian Law on Sales § 5, cf. § 87, which states that the CISG is considered as part of national law, and sale of goods with an international character is to be interpreted and settled in accordance with the Convention. [38] This indicates that if the parties to a contract have chosen Norwegian law as the applicable law for their contract, the general rule is that the CISG governs the contract, even when one or more of the parties to the contract do not have their place of business in a Contracting State. However, this also implies that when the parties to a contract have not made a choice of law, the rules of international private law will determine both which states' law is to be applied, and by that if the Convention is applicable. If the court would find that Norwegian law is applicable as the governing law of the contract, the dispute must be settled in accordance with the Convention.

Article 1 (1) b) is interpreted as a barrier for the courts to resort to their own substantive law to resolve disputes arising out of a contract for the sale of goods which is international. The courts need to determine whether international uniform substantive rules, such as the CISG, apply before resorting to the national rules of private international law. [39]

A declaration under CISG art. 95 means that both parties to a contract for the sale of goods, has to have their place of business in different Contracting States, and the courts are not bound by art. 1 (1) b) if they are not. There are few countries who have made a declaration under art. 95.

For the sake of this dissertation I will however presuppose that the parties to the contract are not bound by an art. 95 declaration, and that the CISG is applicable to the contract.

2.2. Governed by the Convention

For a contract to be under the scope of CISG application, the issue arising out of the contract has to be governed by the Convention.

[37] (UNICTRAL 2016, 5)
[38] (Lov om kjøp [kjøpsloven] LOV-1988-05-13-27 1988)
[39] (UNICTRAL 2016, 4)

CISG Art. 4 (1) 1. sentence, states that the Convention governs "only the formation of the contract of sale" and "the rights and obligations of the seller and the buyer arising from such a contract". The Convention can be interpreted as only applicable when the contract is considered a "sale of goods" and where the contract must have already been concluded for the Convention to be applicable. Art. 4 (1) 2. sentence states that there are particularly two instances where the Convention is not applicable:

> "(a) the validity of the contract or of any of its provisions or of any usage;
> (b) the effect which the contract may have on the property in the goods sold."

According to Enderlein and Maskow (1992) the provisions should be broadly interpreted.[40] For questions regarding the contract's validity or the effect of the contract on property rights, the result cannot be found in the Convention, but needs to be settled according to the rules of private international law.

CISG art. 4 however, states that there are some exceptions, where the Convention "expressly" provides them. The Convention covers a few validity issues, e.g. art. 11, 12, 29 and 96.

CISG art. 5 specify that the Convention "does not apply to the liability of the seller for death or personal injury caused by the goods (…)". In questions arising from the contract regarding liability for death or personal injury, the question needs to be settled according to the rules of private international law.

When the issues arising out of the contract is not governed by the Convention, the parties must rely on the law governing the contract. When determining which law(s) that governs the contract, the parties must look to the rules of private international law.

For the sake of answering the research questions in this dissertation, it will be presupposed that the question arising from the contract is governed by the Convention.

2.3. Contract formation and modification

Contract formation and modification is both relevant to the conclusion of a contract for the sale of goods, and also to the exclusion of the CISG.

CISG art. 11 states that a "contract of sale need not be concluded in writing and is not subject to any other requirements as to form" and thus establishes the principle of freedom from form requirements. However, this must be seen in relation to art. 12, which gives the Contracting States the right to make a declaration under art. 96. The Convention's elimination of form requirements in art. 11, will not apply where one of the parties have their place of business in a State which has made a declaration under art. 96.[41]

[40] (Enderlein and Maskow 1992, 29)
[41] (UNICTRAL 2016, 71)

The principle of freedom from form requirements is both subject to the principle of party autonomy, where the parties' agreement may surpass the Convention text, and usages applicable pursuant to art. 9. This entails that where the parties either orally, in writing, implicitly or explicitly have agreed to certain form requirements, or the usage between the parties or international commercial trade practice requires a certain form, the parties may not eliminate these formal requirements, cf. art. 11.[42]

However, as far as the parties do not have their relevant place of business in a State which have made an art. 96-declaration, and the parties have not agreed to or there are no usage which instructs certain formal requirements, the conclusion of a contract under the Convention, does not need any formal form requirements.

Part II of the Convention regulates the formation of the contracts for the sale of goods, while Part III regulates the parties' rights and obligations. Lookofsky (2017) characterizes it as the «*substantive core of the Convention*»[43]. However, subject to art. 92, the Contracting State may declare that it is not bound by Part II of the Convention, and under art. 94 two or more Contracting States with the same or closely related legal rules concerning sales, may declare that the Convention shall not apply.[44]

Articles 14 to 17 deals with the offer, while articles 18-22 deal with the acceptance. Articles 23 and 24 address the time when the contract can be considered to be concluded, and when communication can be considered to have reached the addressee. Subject to art. 23, a contract is concluded when the acceptance of the offer becomes effective.[45]

Part II does however not govern the validity of the contract, as a result of the exceptions in art. 4. As long as the parties do not have their relevant places of business in a Contracting State which has made a declaration subject to art. 92, 94 or 96, the validity of a contract must be determined on the basis of the applicable law governing the contract subject to the rules of private international law.[46]

Subject to CISG art. 29 "a contract may be modified or terminated by the mere agreement of the parties". However, if the parties have agreed that any modifications or termination of the Convention needs to be in writing, paragraph 2 provides that the contract may not be modified or precluded in any other way, unless the other party has relied on a conduct that suggests that a modification or termination may be accomplished in another manner than by writing.[47]

For the sake of this dissertation, it will be presupposed that the contract has been concluded in accordance with Part II of the Convention.

[42] (UNICTRAL 2016, 71-72)
[43] (Lookofsky 2017, 49)
[44] (UNICTRAL 2016, 79)
[45] (UNICTRAL 2016, 79)
[46] (UNICTRAL 2016, 80)
[47] (UNICTRAL 2016, 123)

With regards to the exclusion of the Convention, an exclusion needs to be in accordance with the contract formation rules in CISG articles 11, 14-24 and 29.[48]

CISG articles 14-24 relates to the exclusion of the Convention *ex ante*, i.e. before the conclusion of the contract. For the Convention to be excluded before the conclusion of the contract, the parties' intent to exclude the application of the Convention needs to be "clear" and "real" at the moment of conclusion, i.e. at the time when the acceptance of the offer becomes effective, cf. art. 23.

Article 29 relates to the modification of the contract after the conclusion and applies therefore for the exclusion of the Convention *ex post*, i.e. after the conclusion of the contract. However, articles 14-24 will still be applicable when considering an exclusion of the Convention *ex post*, because an exclusion after the conclusion of the contract will need to modify the already existing contract.

Article 11 establishes the principle of freedom from form requirements, which suggests that the parties do not need to conclude their contract in writing. However, if the parties either have agreed to a form requirement, or one or both of the parties have their places of business in a Contracting State which has made an art. 96-declaration, the parties may only conclude, exclude and modify the contract in writing.

For the sake of this dissertation, the questions regarding the time of the exclusion of the Convention, whether this is *ex ante* or *ex post* will not be considered subject to articles 14-24 and 29. It will be presupposed that the parties are not bound by any requirements as to form subject to art. 96.

[48] (CISG Advisory Council Opinion 2014)

3. DEROGATION, VARIATION OR EXCLUSION OF THE CONVENTION

CISG art. 6 permits the parties to a contract to "exclude the application" of the Convention, or "derogate from or vary the effect of any of its provisions". However, the parties are not permitted to derogate or vary the effect of art. 12. Article 6 is considered a general principle for interpreting the Convention and is seen as a manifestation of the party autonomy.

The reasons given for derogating, varying or excluding the Convention are sometimes due to a lack of acceptance of the CISG by business parties, legal advisors, courts and tribunals. Some consider the CISG to be "foreign" law and therefore unfamiliar law, some calls attention to the fact that CISG is a noncomprehensive law, while others points to the uncertainty of the Convention due to vague legal wording and a lack of uniform interpretation.[49] However, CISG is also considered a neutral set of rules and the Convention is in fact part of the national laws of the Contracting States, and therefore a derogation, variation or exclusion of the Convention should not be regularly observed.

The general rule when resolving a conflict between the parties is to determine whether the Convention is applicable, yet the interpretation of art. 6 have in some cases resulted in a sort of reverse applicability review, as the court or tribunal has to determine whether the Convention has been excluded, derogated or been varied from, even if the Convention otherwise would be applicable, cf. art. 1.

An example is the *Movable Goods case* where the court states that only in the absence of any agreements between the parties, cf. CISG art. 6, the applicable law will be determined by the place of performance and the will of the parties, or in the absence of such will, from the provisions in art. 31 and 57 of the Convention.[50]

Further, in the *Bulletproof Vest case* the court states that only as far as there are no agreement to the contrary, the provisions of the CISG applies, because the fundamental principle of party autonomy is confirmed in art. 6. The court additionally states that the Convention does not contain any provisions of compulsory law.[51]

3.1. Derogate or vary the effect of the Convention

According to art. 6, the parties may derogate or vary the effect of the provisions in the Convention. However, there are limitations according to art. 12. Article 12 states that when one of the parties to the contract has its place of business in a State that has made a reservation under art. 96 of the Convention, the parties may not modify or terminate by agreement, nor offer, accept or provide any other indication of intent in any form other than in writing. It is also stated that parties may not derogate or vary the effect of art. 12. Article 96 allows the Contracting State to make a declaration according to the article, as long as the legislation of the Contracting State requires a sale of goods contract to be concluded in or evidenced by writing.

[49] (Schroeter 2014, 655-663)
[50] (Movable Goods case 2009)
[51] (Bulletproof vest case 2009)

Except for the express limitations in art. 12, the Convention does not expressly limit the parties' right to derogate from any of the provisions of the Convention. The parties may e.g. derogate form the "reasonable time" period for notice, cf. art. 39, by determining e.g. «*that notice must be given "within five working days from the delivery*"»[52] as in the *Trees case,* where the Dutch court stated that the parties pursuant to art. 6, may exclude the application of each of the provisions of the CISG, and the general conditions of the contract between the parties constitutes a deviation from articles 38 and 39.[53]

Even though art. 6 only expressly limits the parties' right to derogate or vary the effect of the Convention according to art. 12, some courts have stated that the parties may not derogate from art. 89-101, because of their mandatory character and their relevance between Contracting States rather than private parties.[54] According to the *Rabbit case* this also includes art. 28 of the Convention.[55]

3.2. Exclusion of the Convention

The exclusion of the application of the Convention, may be total or partial. This means that the parties may exclude the whole Convention, or only parts of it, e.g. by incorporating INCOTERMS[56] to their contract. This is possible even where the Convention otherwise would be applicable because of the incorporation in domestic law, according to the rules of private international law in the forum state. By allowing the parties to exclude the Convention, the drafters acknowledged that the Convention is of a non-mandatory nature, and that the party autonomy is a general principle.[57] Unlike for derogation or varying of the Conventions provisions, there are no express limitations for the exclusion of the Convention.

3.2.1. Explicit exclusion of the Convention

When the parties explicitly indicate the governing law, and also explicitly exclude the Convention, the contract will be governed by the rules of private international law of the chosen governing law. In the *Grain case* the Russian tribunal addressed the issues relating to the implementation of contract GAFTA[58] to the contract between the parties, which states that the provisions of the CISG shall not be applicable. The court finds that subject to CISG art. 6, the parties may exclude the application of the Convention. Because the parties had chosen contract GAFTA to govern their contract, the Russian Civil Code needed to be applied to the contract, and the application of the CISG was excluded.[59]

The parties, however, may also exclude the Convention without an indication of a governing law. The court or tribunal of the forum state, then has to identify the applicable law based on the rules of private international law, of the forum state. An example is the *Vegetable fats case* where the court stated that despite the fact that the CISG was otherwise applicable under art. 1 of the Convention, the parties had, notwithstanding an otherwise incomplete

[52] (UNICTRAL 2016, 33)
[53] (Trees case 2009)
[54] (UNICTRAL 2016, 33)
[55] (Rabbit case 2005)
[56] (International Chamber of Commerce [ICC])
[57] (UNICTRAL 2016, 33)
[58] (Grain and Feed Trade Association)
[59] (Grain case 2004)

choice of law clause, explicitly excluded the application of the «United Nations Convention on contracts in international trade in products», which despite an «*erroneous translation*» of the name of the Convention, needed to be understood as a reference to CISG.[60]

3.2.2. Implicit exclusion of the Convention

There are some disagreements whether the parties may exclude the application of the Convention implicitly. There have been a number of decisions where the implicit exclusion of the Convention has been discussed, and the reach and foundation of such an exclusion.

In case law, it is generally accepted that the parties may implicitly exclude the Convention subject to art. 6 due to the principle of party autonomy and as stated in the *Bulletproof vest case*, the Convention does not contain any provisions of compulsory law.[61] Yet, the required form for such an implicit exclusion is not settled, except that the parties' intent needs to be "real and clear".[62]

It is generally recognised that if the parties have chosen the law of a non-Contracting State, this amounts to an exclusion of the Convention. Also, if the parties clearly express that the CISG is not applicable, this is considered as an exclusion. However, if the parties have chosen the law of a Contracting State to govern their contract, can this be considered as an implicit exclusion?

In case law, the answer differs. In some cases, the courts and tribunals have settled that by choosing the law of a Contracting State to govern the contract, the parties have not excluded the Convention, but has restated that the Convention is applicable.[63] Others have stated that only if the parties accede that the law of a Contracting State "exclusively" governs the contract or the parties have made a particular reference to the domestic law of a Contracting State, this can be interpreted as an implicit exclusion.[64] Yet, this dissertation seeks to answer whether the parties may implicitly exclude the application of the Convention, by choosing the law of a Contracting State to govern the contract, evidenced by the inaction of the parties, in accordance with the Convention during the conclusion, exercising or during the litigation of the contract.

An example is if the choice of law clause states that: "This Agreement shall be governed by German law", it does not explicitly exclude the Convention, nor does it point toward the domestic law of the Contracting State and it does not state that the contract "exclusively" is governed by German law. Therefore, the black letter wording of the choice of law clause does not exclude the application of the Convention. Yet, the question is whether the actions by the parties may indicate that the parties intended to exclude the Convention?

If the parties, during the negotiations orally stated that the Convention is not applicable, or the parties during the exercising of the contract or under earlier disputes did not rely on any of the provisions of the Convention, or the parties during the settling of a dispute has not

[60] (Vegetable fats case 2009)
[61] (Bulletproof vest case 2009)
[62] (UNICTRAL 2016, 34)
[63] (Lookofsky 2017, 26)
[64] (UNICTRAL 2016, 34)

litigated based on the provisions of the Convention; can this be considered as an implicit exclusion of the Convention, even where the wording of the choice of law clause does not clearly state that the Convention is excluded? Should the court or tribunal overrule the intention of the parties, and thus the party autonomy, by insisting on the application of the Convention?

According to the CISG Advisory Council Opinion No 16 «Exclusion of the CISG under Article 6» an implicit exclusion should not be inferred merely from the choice of the law of a Contracting State. They point toward the strict standard that some courts and tribunals apply for the determination of intent to exclude, and argues that a strict approach to the rules of intent to exclude would promote the uniform application of the Convention and cautions against the possibility that courts, in being too quick to find exclusions, renders the Convention ineffective. [65]

By a literal interpretation of the text in art. 6, the article does not settle whether the exclusion may be implicit, as the provision only states that the "parties may exclude the application" of the Convention. How such an exclusion may be effected, is not specified. However, the Convention gives guidance for the interpretation of the Convention and the parties conduct in articles 7, 8 and 9 of the Convention. Article 7 relates to the interpretation of the Convention itself, and art. 8 relates to the interpretation of the contracting parties conduct and intent. Article 9 describes how usages and established practices, between the parties and in international trade, impact the interpretation of the Convention.

Section 4 of this dissertation seeks to answer whether the interpretation rule in art. 7 gives guidance to the interpretation of art. 6 in relation to an implicit exclusion, based on a choice of law clause, settling that the law of a Contracting State governs the contract.

Section 5 of this dissertation will seek to answer whether the intent and actions of the parties subject to the contract may constitute an implicit exclusion of the Convention, cf. art. 8, and section 6 will examine whether the Convention may be implicitly excluded by trade usage or established practice between the parties, cf. art. 9.

[65] (CISG Advisory Council Opinion 2014)

4. IMPLICIT EXCLUSION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS BY CHOOSING THE LAW OF A CONTRACTING STATE TO GOVERN THE CONTRACT

By a literal interpretation of the text in art. 6, the article does not settle whether the exclusion may be implicit, as the provision only states that the "parties may exclude the application" of the Convention. The fact that the provision only states that the Convention may be excluded, could indicate that the Convention must be interpreted broadly, and by that also allow for an implicit exclusion, without setting any limits to how this implicit exclusion may be effected. Case law generally accepts that the parties may implicitly exclude the Convention. Yet, a choice of law clause settling that the law of a Contracting State is to govern the contract, must, pursuant to art. 7 (1), be interpreted in accordance with the "international character" of the Convention, and the need for "uniformity in its application. Also, the "observance of good faith in international trade" must be considered.

CISG art. 7 (2) states that questions concerning "matters governed by this Convention" which are "not expressly settled in it" are to be "settled in conformity with the general principles in which it is based" or "in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law".

4.1. The international character of the Convention

The Convention's "international character" points to the subject of the Convention; its applicability in international sales of goods between parties from different states. It is also seen as an instruction to national courts and arbitrators to «*steer clear of the "homeward trend"*»[66], i.e. interpreting the Convention on the basis of national custom for interpretation. The courts and arbitrators need to conclude from the context and function of the provisions and the Convention as a whole, when interpreting the meaning of rules and terms in the Convention.[67]

4.1.1. Autonomous interpretation

When the international character of the Convention is to be applied according to art. 7 (1), a number of courts and tribunals have established that this forbids the forum from interpreting the Convention on the basis of national law, i.e. the Convention is to be interpreted autonomously.[68]

A negative definition of "autonomous interpretation" is one that considers the CISG as an autonomous set of rules, which is independent from the concepts and meanings of the forum and is therefore considered to be linked to the principle of uniform application. However, the two principles have some differences. An autonomous interpretation can lead to different courts arriving at different conclusions regarding the interpretation, and by that, a non-uniform application. Since there are no supranational court to determine what the

[66] (Lookofsky 2017, 29)
[67] (Enderlein and Maskow 1992, 38)
[68] See (UNICTRAL 2016, 42) notes 5-20

correct interpretation should be, the autonomous interpretation may lead to a non-uniform application.[69]

In light of this, the question regarding what an autonomous interpretation of the Convention actually is, must depend on the objective of the interpretation, which might be seen as trying to find the "right" solution to a case. However, what can be considered as a right solution, could depend on the justifications and arguments of earlier court decisions. However, as there is no supranational court, each national court need to find the case law or scholarly writings that it considers the most persuasive, which again will depend on the quality of the decisions and scholarly writings, and the forums' own understanding of an autonomous interpretation.

Yet, if there are a great number of court decisions arriving at the same conclusions, this might constitute a strong presumption for the court arriving at the same conclusion regarding the case at hand.[70]

The general presumption in case law regarding implicit exclusion of the Convention, by choosing the law of a Contracting State to govern the contract, considers it a restatement of the applicability of the Convention, rather than an exclusion of the Convention.[71] Alternatively, the court or tribunal consider that since the CISG is part of domestic law, the choice of the law of that Contracting State leads to the application of the Convention. Yet another alternative explanation is that since CISG art. 1 (1) b) leads to the application of the Convention subject to the rules of private international law, the CISG is to be applied.

However, the justification for the need to *explicitly* exclude the Convention when choosing the law of a Contracting State to govern the contract, should not be that other courts have come to that same conclusion. The justification should be based on an autonomous interpretation of the Convention. If foreign court decisions are the basis for the interpretation, the justifications should be persuasive enough to stand on its "own two feet".

4.1.2. The flexibility of the Convention

Another aspect of the international character of the Convention is the flexibility that the Convention is based upon. For the CISG to be applied and followed, the interpretation of the Convention should be based on its flexible character, i.e. the developments that is happening in the world of international commercial law. This makes the autonomous interpretation even more important, as the application of the Convention would be too rigid if the national courts were not allowed to seek better and different solutions to disputes.[72]

When interpreting art. 6 in light of an autonomous interpretation of the Convention, cf. art. 7 (1), every dispute must be settled case-by-case. Each case must be judged independently, and if the court finds that the exclusion of the Convention cannot be clearly ascertained only by the words in, and the exercising of, the contract between the parties, only then should the court find that the Convention is applicable.

[69] (Gebauer n.d.)
[70] (Gebauer n.d.)
[71] (Lookofsky 2017, 26)
[72] (Gebauer n.d.)

4.1.3. Interpretation in accordance with the 1969 Vienna Convention

Another aspect of the internationality of the Convention, could be that interpretation of treaties and conventions in other aspects of international law, normally is interpreted according to the 1969 Vienna Convention on the Law of Treaties articles 31 to 33 on the interpretation of treaties. The Convention is considered as customary international law, and therefore can be considered as applicable for the interpretation.

The Vienna Convention art. 31 states that a treaty shall be interpreted with the "ordinary meaning" of the terms "in their context and in the light of its object and purpose".

The rule of ordinary meaning can be seen as an interpretation rule subject to customary international law. The ordinary meaning rule is a principle that states that when a word is not defined in the law, convention etc. the court or tribunal should construe the meaning of the word in accordance with its ordinary or natural meaning.[73]

In the context of CISG art. 6 the Convention does not define whether the Convention may be implicitly excluded by choosing the law of a Contracting State to govern the contract. Considering the wording of the article in relation to its object and purpose, which is a manifestation of the right to party autonomy and the fact that the Convention text does not exclude implicit exclusion on the basis of choosing the law of a Contracting State, an interpretation in accordance with the ordinary meaning rule could indicate that the Convention can be implicitly excluded in whichever way the parties choose.

The purpose of the Convention, according to the preamble, is to contribute to the removal of legal barriers in international trade by adopting uniform rules to govern contracts for the international sale of goods and establishing a new international economic order.

According to Enderlein and Maskow (1992) this can be construed as putting restraints on the liberty the parties possess, subject to art. 6, to exclude the application of the Convention.[74] The CISG was established due to the need for a uniform sales law, where the exclusion of the Convention might harm this goal. An implicit exclusion of the Convention based on a choice of law clause choosing the law of a Contracting State to govern the contract would further give the courts a possibility to exclude the Convention if it can be claimed that the parties "regularly" or "routinely" intend to exclude the application of the Convention by choosing the law of a Contracting State to govern the contract. The preamble therefore needs to be considered as a restriction on implicit exclusions in general, but especially when considering implicit exclusion based on the choice of the law of a Contracting State to govern the contract.

4.1.4. Legislative history

Yet another aspect of interpretation in accordance with the internationality of the Convention, is that the Convention as a whole, and each individual article, need to be read on the basis of its own legislative history. The history of the CISG is one based on

[73] (USLegal)
[74] (Enderlein and Maskow 1992, 18)

negotiations between states, which further implies that each article should be interpreted on the basis of the *travaux préparatoires* (preparatory work). However, the challenge regarding the preparatory work is that it is an abundance of it, and it is not concise regarding the interpretation of CISG art. 6.[75]

The CISG is in large based on ULF[76] art. 2 (1) and ULIS[77] art. 3.

ULF art. 2 (1) states that «*The provisions of the following Articles shall apply except to the extent that it appears from the preliminary negotiations, the offer, the reply, the practices which the parties have established between themselves or usage, that other rules apply.*»

ULIS art. 3 states that «*The parties to a contract of sales shall be free to exclude the application thereto of the present Law either entirely or partially. Such exclusion may be express or implied.*»

When considering the interpretation of CISG art. 6 in accordance with ULF and ULIS, an implicit exclusion of the Convention by choosing the law of a Contracting State to govern the contract, subject to the practice of the parties, is a reasonable interpretation.

On the other hand, considering the preparatory work for the Convention, the State Representatives negotiating the provisions of the Convention did not agree on the question regarding implicit exclusion, and it does not appear whether the question of implicit exclusion by choosing the law of a Contracting State to govern the contract, was examined in the Report of the 1977 UNCITRAL Committee of the Whole I relating to the draft Convention on the International Sale of Goods[78], the Secretariat Commentary on article 5 of the 1978 Draft, the Draft counterpart of CISG art. 6[79] or the 1980 Analysis of Comments and Proposals by Governments and International Organizations on the Draft Convention on Contracts for the International Sale of Goods, and on Draft Provisions Concerning Implementation, Reservations and Other Final Clauses, the Pre-Conference proposals by Governments and International Organizations[80].

In the 1977 Report the Committee relates that there was a proposal for the Convention only to be applicable if the parties to the contract explicitly made the Convention applicable to their contract. However, this proposal did not get enough support by the other representatives. Regarding implicit exclusions, the Committee relates that opposing views had been set forth, regarding the interpretation of the provision. The Committee holds that the Convention text did not need to be changed but emphasized that the Convention allows both for implicit and explicit exclusion, as long as it appears clearly that the parties wanted to exclude the application of the Convention.[81]

[75] (Pace Law School Institute of International Commercial Law 1999)
[76] (The Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF 1964)
[77] (The Uniform Law for the International Sale of Goods (ULIS) 1964)
[78] (UNICTRAL Committee of the Whole I 1977)
[79] (Secretariat Commentary on the 1978 Draft 1978)
[80] (Secretary-General 1980 Vienna Diplomatic Conference 1980)
[81] (UNICTRAL Committee of the Whole I 1977)

In the 1978 Secretariat Commentary the second sentence in ULIS art. 3, which expressly grants the parties the right to exclude the application of the Convention implicitly, was eliminated. This was due to some representatives being concerned that some courts might be too eager to exclude the application of the Convention as a whole, on insufficient grounds.[82] The Secretary Commentary is the closest counterpart to an Official Commentary on the provisions of the CISG, and the Commentary must therefore be considered as highly influential on the interpretation of the Convention.

Yet, the 1980 Analysis indicates that the negotiating representatives were still not in agreement regarding implicit exclusion of the Convention. Switzerland restated that the Convention should not be applied in a manner that practitioners are imposed rules they are not accustomed with, Canada proposed that the Convention should only be applicable if the parties "opt-in", and the United Kingdom suggested that the Convention should be amended so that the Convention can be implicitly excluded.[83]

When considering the strong opposing views that were set forth under the negotiations regarding implicit exclusions, the interpretation of CISG art. 6 in relation to the preparatory work does not give a definite answer to the question regarding implicit exclusion of the Convention by choosing the law of a Contracting State to govern the contract. However, the Convention is based on ULF and ULIS, which gives the parties the right to exclude the application implicitly. The reason behind the exclusion of the second sentence in ULIS art. 3 in CISG art. 6, a fear of exclusion on insufficient grounds, an autonomous interpretation in regards to the internationality of the Convention, gives a strong presumption toward implicit exclusion of the Convention by choosing the law of a Contracting State to govern the contract. Yet, the courts and tribunals cannot come to the conclusion based on their own national customs for interpretation, the circumstances around the conclusion of the contract must clearly demonstrate that the parties intended to implicitly exclude the Convention. However, a hypothetical intent to exclude the Convention must be considered as insufficient. Therefore, the parties' intent needs to be considered in relation to the exercising of the contract and during the negotiations and drafting of the contract, to identify whether the intent of the parties was to exclude the application of the Convention.

4.2. The uniform application of the Convention

The Convention is to be interpreted in accordance with a uniform application according to the preamble and art. 7 (1), which indicates that each court and tribunal must look toward CISG case law from other Contracting States and by that attempting to make the application of the Convention more uniform.

The Convention is in effect in countries with differing social, economic and cultural backgrounds in addition to different legal systems, which may lead to different courts coming to different conclusions, based on their own domestic legal method. Therefore, the Convention needs to be interpreted in a uniform manner, and the goal of the Convention to remove barriers in international trade, suggests that the Convention is to be practiced with

[82] (Secretariat Commentary on the 1978 Draft 1978)
[83] (Secretary-General 1980 Vienna Diplomatic Conference 1980)

as little variation as possible, and that the provisions of the Convention should be applied similarly, regardless of what legal system the court or tribunal is part of.

The courts do not necessarily need to follow the international case law, if they consider it as incorrect or inapplicable to the case. Yet, the courts need to take similar cases into consideration. A difficulty that may arise in regard to a uniform application and the use of CISG case law, is that the CISG is practiced in approximately 50 different languages, and a lot of the case law is not available in a language that the court or tribunal natively understands.[84]

When interpreting CISG art. 6 in accordance with the requirement for uniformity, the question of implicit exclusion on the basis of the choice of the law of a Contracting State to govern the contract should be based on case law from other CISG Contracting States. Some earlier decisions state that an implicit exclusion of the Convention by choosing the law of a Contracting State should not be allowed, however, others grants the parties the right to exclude the Convention as long as the exclusion is clear, unequivocal and affirmative. Yet others, give the parties the right to exclude implicitly on the basis of the wording of the contract or the conduct of the parties. Since there is no supranational court to give guidance as to the right application and interpretation of the Convention provisions, the courts need to take into account practice from other CISG Contracting States, but it also needs to make a decision based on what it considers as the correct interpretation on a case-by-case basis.

4.3. The principle of good faith

The "observance of good faith" is one of the general principles of the Convention. The institution of good faith a question regarding the conduct of the parties and how that relates to the conduct that is normal among businessmen. The general principles' most important task is to fill perceived "gaps" in the Convention in relation to art. 7 (2) and by that evaluate the conduct of the parties to the contract.

The observance of good faith must be made in accordance with that which can be considered as normal among businessmen. Contrary to the concept of good faith in many civil law countries based on Germanic law, the principle is not one of fairness, but has been construed as one referring to the international character of the Convention and the need for uniformity. However, as seen above, these two principles do not necessarily coincide.

When observing good faith in international practice, the courts and tribunals must look toward the conduct and practice by the parties as stated in CISG art. 8 and 9, but the conduct and practice must be ones that reaffirm good faith in business practice. This can be seen as a requirement of not necessarily fairness, but equality in the business relationship. As part of the *lex mercatoria*, the principle of good faith is both a question of interpretation and one of conduct. It imposes a standard for behaviour for the contracting parties, and it instructs the courts and tribunals to look at the contractual relationship as a whole, based on the contract at hand and the trade sector.[85] This implies that the contract between the parties cannot be read without also considering the trade and customs the contract is

[84] (Andersen 1998)
[85] (Trans-Lex.org Law Research)

supposed to be operated under. A contract of sales can be considered as one of the most common types of contracts, but a contract will need adjustments in relation to the trade.

When interpreting CISG art. 6 in relation to the observance of good faith, the court must consider what the parties meant during the negotiations, and what can be considered as a reasonable interpretation according to the contract language. However, the courts also need to consider what is normal business practice in that specific trade.

In many international contracts the choice of law clause is part of the "boilerplate" clauses, which are standard terms of the contract. The agreement regarding the choice of law might either be reached by one of the parties demanding their national law to govern the contract or be reached by an attempt to find a neutral law to govern the contract. When the parties apply a neutral law or the law of the other contracting party, they might not necessarily have intimate knowledge of that law, and the fact that the CISG is part of that law, might not have crossed their minds. The parties might not have analysed the impact of the governing law in advance of the contract negotiations, which might lead to an incomplete choice of law clause.[86]

There are several decisions from CISG Contracting States where the parties only argue based on national law. The courts have in some cases nevertheless stated that even when the parties have not litigated based on CISG, the CISG is still part of national law, and is therefore applicable, since the parties have not made an explicit exclusion of the Convention and because the rules in art. 1 (1) b) states that the Convention is applicable pursuant to the rules of private international law. The question whether a choice of law clause choosing the law of a Contracting State to govern the contract can be seen as an implicit exclusion that can be considered as sufficient for an exclusion of the Convention, has in many cases been answered disapprovingly. However, considering that the parties might not have understood or intended that the Convention could be applicable, and especially considering that if the parties not even knew that their contract could be subject to CISG, an interpretation according to the observance of good faith, might indicate that the contract is subject to an implicit exclusion, and the courts might be careful in overrule the intent of the parties.

4.4. General principles of the Convention

The scope of art. 7 (2) is to permit courts or arbitrators to settle perceived "gaps" in the Convention. The article expressly states that this is only permitted when the matters are "governed" by the Convention. According to CISG Art. 4 (1) 1. sentence, the Convention governs "only the formation of the contract of sale" and "the rights and obligations of the seller and the buyer arising from such a contract". However, Enderlein and Maskow (1992) holds that the scope of application should be broadly interpreted, to give the Convention a relatively wide scope of application.[87]

"Gaps" in the Convention, or matters "not expressly settled in it" are «*questions the Convention governs but for which it does not expressly provide answers*»[88]. These gaps should be filled in conformity with the general principles of the Convention, and «*only where*

[86] (Cordero-Moss, International Commercial Contracts 2014, 136-137)
[87] (Enderlein and Maskow 1992, 39)
[88] (UNCITRAL 2008, 29)

no such general principles can be identified does article 7 (2) permit reference to the applicable national law»[89]. This implies that the courts are only permitted to use the rules of private international law where the Convention cannot settle the dispute, to ensure uniformity in the application of the Convention across states, courts and tribunals.

Examples of general principles are "estoppel", "privet of contract" and "burden of proof". All the general principles should, according to art. 7 (2), be used in settling a legal dispute when the matter is governed, but not expressly settled in the Convention.[90] Some courts also hold that general principles can be found in the UNIDROIT Principles of International Commercial Contracts[91].[92]

"Good faith" is one of the general principles of the Convention. A clear definition of "good faith" is argued upon, and also the limits of this general principle. Enderlein and Maskow (1992) states that «*Observance of the principle of good faith means to display such conduct as is normal among businessmen.*» However, they also state that «*observance of good faith does in no way necessarily include the establishment of material justice between the contracting parties*.»[93] This must be interpreted to not allowed the use of national principles of good faith to determine the application of good faith under the Convention, e.g. the difference between common law and civil law regimes in the question about fairness.[94] The Convention provides guidance to the interpretation of “good faith” in art. 7 (1), by stating that when interpreting the Convention, regard s to be had to the international character of the Convention and a uniform application .

Another general principle of the Convention is the "party autonomy". In the UNICTRAL Digest of Case Law (2016) the "party autonomy" is considered as «*one of the general principles upon which the Convention is based*».[95] This principle is manifested in art. 6 of the Convention.

The principle of party autonomy is the basis for the interpretation and application of CISG art. 6, as it gives the parties the right to choose the governing law of their contract. The principle is based on the conception that the parties are closest to knowing which State law is most appropriate both to the contract and to the interests of the parties. Different national laws have different advantages and disadvantages, e.g. the impact of the concept of fairness, the rules on force majeure or the rules on the statute of limitations. All these questions the parties are closer to assess according to their own preferences and what they need the contract to provide as to security and predictability, and therefore the court should be careful overruling the choices made by the parties.

Where the parties have not made an explicit exclusion, but for instance only have litigated based on national law, the intention of the parties must be regarded, to ascertain whether

[89] (UNCITRAL 2008, 29)
[90] (UNICTRAL 2016, 44-48)
[91] (International Institute for the unification of Private Law)
[92] (UNICTRAL 2016, 46)
[93] (Enderlein and Maskow 1992, 38)
[94] See (Powers 1999)
[95] (UNICTRAL 2016, 42)

the parties intended to exclude the Convention. It may be assumed that if the parties intended the Convention to be applicable, they would not have forgot or simply not litigated based on its provisions.

Nevertheless, since the Convention is part of national law, it should not be considered as adequate if the parties did not know about it. For the Convention to be implicitly excluded when the parties have not litigated that the Convention is applicable, the party autonomy must be interpreted on the basis of *bona fides*, i.e. in good faith. The standard of good faith in this regard, is one where a reasonable person is unaware of the legal consequences of its actions, or in this case unaware that the CISG is part of national law. The fact that the CISG is not as desirable after the dispute has arisen, cannot be considered a good enough reason to exclude the application.

In a dispute where the parties are not in agreement whether the Convention was implicitly excluded or not, and a strict interpretation of the wording of the contract does not provide answers, the court or tribunal must assess the circumstances around the negotiations, formation and performance of the contractual duties. If the parties never mentioned the application of CISG and have not based any of their earlier conduct on the Convention, the fact that CISG is part of national law, should not automatically entail that the parties did not intend to exclude it. The principle of party autonomy might be considered as more important than a fear of exclusion of the Convention on insufficient grounds, or that courts might become too home bound. The fact that CISG is more desirable for one of the parties after the conclusion of the contract, should not be interpreted as not an exclusion of an application of the Convention, where no other conduct under the contract has been in accordance with the Convention.

4.5. The rules of private international law

According to art. 7 (2) the rules of private international law are only applicable where gaps in the Convention cannot be filled by interpreting the Convention on the basis of the general principles. The rules of private international law can therefore only be used as a last resort. As the Convention does not give clear guidance as to the possibility of implicit exclusion when the parties have chosen the law of a Contracting State to govern the contract, the rules of private international law may give guidance.

The rules of private international law are applicable when determining matters concerning "private" law, and therefore only concerned with the legal relationships of private individuals and corporations, across different legal jurisdictions. The rules also govern the relationship between states and governments in their relation to individuals or corporations, while not acting in a governmental capacity. This excludes public international law, which are rules that govern the relationship between states and international organisations.[96]

When a legal relationship is only associated with one legal system, the domestic law usually applies. However, whenever the legal dispute is associated with more than one legal system, the rules of private international law applies. Cordes and Stenseng (1999) states that the function of private international law is to identify which of the legal systems concerned shall

[96] (Collier 2004, 5) (Drobnig, Hay and Rheinstein 2018)

be applied to resolve the specific private international law situation. Private international law normally refers only to one of the affected states jurisdictions where one can find the answer.[97] The judge or tribunal in the state where the dispute is raised, needs to determine whether their court is competent. When determining the competence of the court, the judge or tribunal uses the national rules for private international law. Every state has their own private international law rules, and the determination of competence is based on these national rules, which decide which states material law is applicable in the specific case. According to Cordes and Stenseng (1999) the goal is usually to find the law of the state to which the case has its strongest or closest connection. Characteristics of the rules of private international law is that they only point out the national law where the solution exists; they do not resolve the specific legal relationship.[98]

When the court is to determine the applicable law, the court is required to use the choice of law rules within the judicial discipline. The rules outline the considerations that must be regarded in the interpretation, where the goal is to create harmony and order. The purpose of the choice of law is, as far as possible, to prevent that the outcome of a specific case is determined by which country the dispute is heard in, and by that avoid so-called "forum shopping". The most common rules are *Lex fori* which means the State where the case is heard, or the law of the forum, *Lex loci* which is the law of the place where the activity or legal disposition was done, *Lex rei sitae* which is the law of the place where the object is situated, *Lex causea* is the law applicable to the case according to the choice of law rules, *Lex domicilii* is the law of the country of domicile and *the principle of closeness or the individualizing method* which states that the court must reach a discretionary decision based on which State law has the closest connection to the case.[99]

In international legal theory it is a general presumption that it is the law of the forum (*lex fori*) which decides whether the parties have the right to choose the governing law of the contract, and how extensive the right to choose is.[100]

Party autonomy is the main rule of choice of law in international private law in most States and gives the parties to a contract the right to choose which country's law is to govern the contract. The parties may choose the law of one of the parties' State, or they can choose the law of a State with no affiliation to either of the parties.

Party autonomy in private international law, is not the same as freedom of contract. Party autonomy is a choice of law rule. The purpose of the rule is to designate the governing law to the contract. Freedom of contract can be seen as part of the party autonomy, but it solely allows the parties to enter into contracts and to determine their content, within the preceptive rules of the governing law. The rules on party autonomy therefore has a larger impact than the freedom of contract.[101]

[97] (Cordes and Stenseng 1999, 23)
[98] (Cordes and Stenseng 1999, 25)
[99] (Cordes and Stenseng 1999, 51-55)
[100] (Cordes and Stenseng 1999, 282)
[101] (Cordero-Moss, Internasjonal privatrett på formuerettens område 2013, 199-200) (Trans-Lex.org)

The extent of the parties right to choose the law governing the contract is subject to the domestic law applicable to the contract, and this right can vary from state to state. In English law, the parties are allowed to choose another States law even for domestic contracts[102] and under the Hague Convention of 1955, the foreign law can be chosen as long as there are any foreign elements to the contract[103]. How the chosen law may be demonstrated may also vary, e.g. in Norwegian law the choice of law must either be made explicit or appear clearly from the provisions of the contract[104], while under the Rome I Regulation, it is sufficient that the choice of law is clearly demonstrated by the circumstances of the case[105].[106]

The legislative justification for party autonomy can be seen as a reflection of predictability, equality and expediency. In international contracts, the party autonomy entails a level playing field, because the parties may choose which States' domestic law is the most appropriate for the contract and the parties. The courts will apply the choice of law made by the parties as far as it is allowed under the rules of private international law of the forum.

It may be considered more predictable for the parties applying the chosen law, on the contrary to the courts deciding which State law governs the contract, as they may arrive at a different conclusion than what the parties intended. However, the party autonomy does have some limitations, e.g. if the legal relationship is related to real estate, as this normally will be governed by the domestic laws in the related State.[107]

The party autonomy can also be seen as founded on the reasonable expectations of the parties' economic adaptability or their wish to apply a neutral law. [108] The parties may choose a particular law either because it is neutral between the parties, i.e. it is not the domestic law of either of the parties, or because it is particularly well developed for the type of transaction intended, i.e. if domestic law gives the parties a longer statute of limitations.

If one concludes that the question regarding implicit exclusion of the Convention is not governed by the Convention, the rules of private international law of the forum and the chosen applicable law may provide guidance. What the parties have agreed along with which State or tribunal where the case is settled, will be determinative.

Interim summary

If the Convention text in art. 6 is interpreted broadly, it might suggest that the parties may exclude the application of the Convention as they see fit. However, this broad interpretation is limited pursuant to the purpose of the Convention, cf. the preamble, which aims at the adoption of uniform rules to govern contracts for the international sale of goods. This aim might be harmed by the parties' exclusion of the Convention.

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[102] (Vita Food Products Inc v. Unus Shipping Co 1939)
[103] (Convention on the Law Applicable to International Sales of Goods [1955 Hague Convention]) art. 2
[104] (Lov om mellomfolkeleg-privatrettslege reglar for lausøyrekjøp [kjøpslovvalgsloven] LOV-1964-04-03-1 1964) § 3
[105] (The law applicable to contractual obligations [Rome I] 2008) art. 3.1
[106] (Cordero-Moss, International Commercial Contracts 2014, 136)
[107] (Cordes and Stenseng 1999, 283)
[108] (Boele-Woelki 2016)

Yet, when considering whether the choice of a Contracting States law to govern the contract can amount to an implicit exclusion, the courts or tribunals need to interpret CISG art. 6 in accordance with art. 7.

An autonomous interpretation of the Convention suggests that the court or tribunal settles the dispute based on a case-by-case approach, where the intent and conduct of the parties should prevail. Yet, a uniform application entails that the court or tribunal has to take case law from other Contracting States into consideration and try to adopt a practice with as little variation as possible, while still interpreting the Convention autonomously and flexible. The court or tribunal therefore needs to look toward an interpretation in accordance with the 1969 Vienna Convention, the legislative history, and also interpret the Convention on the basis of good faith. The object and purpose of art. 6 is to confirm the general principle of party autonomy, which is also one of the principles that substantiates the principle of "good faith" among businessmen.

If the Convention contains gaps, i.e. questions which it does not provide answers, these gaps need to be filled in conformity with the general principles of the Convention, e.g. the principle of good faith and party autonomy. Only where the Convention cannot be interpreted to provide answers, the rules on private international law may govern the question.

CISG art. 6 grants the parties the right to exclude the application of the Convention, when the intent of exclusion is "real and clear". If the parties have chosen the law of a Contracting State to govern their contract, case law suggests that the Convention may not be considered as implicitly excluded, unless the parties have stated that the contract is "exclusively" governed by the law of a Contracting State, or the choice of law-clause has made a particular reference to the domestic law of a Contracting State.

An interpretation of art. 6 subject to art. 7 does not in itself provide answers to the question of whether the parties may implicitly exclude the application of the Convention by choosing the law of a Contracting State to govern their contract. The intent of the parties is the determinative factor.

If the intent of the parties is to exclude the application of the Convention, this intent should be considered, due to the general principle of party autonomy. The intent and conduct of the parties therefore need to be examined subject to art. 8 and 9. This dissertation will therefore further examine the choice of the law of a Contracting State as an implicit exclusion subject to art. 8 and 9.

5. IMPLICIT EXCLUSION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS BY INTENT OR CONDUCT

The fact that some arbitral awards and court decisions comes to the conclusion that the parties may implicitly exclude the CISG by choosing the law of a Contracting State, while others does not, makes the application of the Convention less uniform and less predictable for contracting parties from Contracting States.

The *Boiler case*[109] shows this quite good, where different courts from the same jurisdiction comes to different conclusions. The Court of First Instance came to the conclusion that the CISG was not applicable to the contract.

The Court of Appeal concluded that the Convention was applicable. It concluded on the fact that CISG is the applicable law according to art. 1 (1) a) and that the CISG is part of Austrian law, and even if the parties litigated solely on the basis of the national Austrian law, the court based their conclusion on the fact that the parties had not alleged explicit exclusion of the CISG. The Court of Appeal considered that an explicit exclusion could not be derived from the choice of law clause.

The Supreme Court, however, concluded that the CISG was not applicable to the contract. According to the choice of law clause in the contract between the parties, all claims were subject «exclusively to Austrian law, except the rules on the conflict of laws, and the CISG». The Supreme Court grounds their conclusion on the incorrect use of commas and the fact that neither of the parties had relied on the provisions of the Convention.

The Supreme Court held that the parties may exclude the Convention, subject to art. 6, and that this could be achieved «tacitly», where the decisive criteria were whether the parties relied on the non-uniform law of a State.

The Supreme Court judgement can be interpreted as an approval of implicit or "tacit" exclusion of the Convention as a whole, as long as this may be interpreted from the actions and intent of the parties. Even without the courts explicit use of art. 8 of the Convention, the reasoning points towards an interpretation of the contract based on the intent of the parties at the time of the conclusion of the contract. The judgement may however not be seen as an "open invitation" to implicitly exclude the Convention, as the court makes it clear that this normally may only be done by «*determining the substantive law»* or choose *«the law of a Contracting State insofar it differs from the law of the national law of another Contracting State*.»[110]

To make the application of the Convention more uniform and predictable, the Convention must be interpreted in accordance with the interpretation rules in art. 7. As stated in the interim summary above, this interpretation needs to be supported by the rules in art. 8 and 9 to decide whether an implicit exclusion of the Convention can be deduced from a choice of

[109] (Boiler case 2009)
[110] (Boiler case 2009)

law clause stating that the law of a Contracting State is to govern the contract, because the intent of the parties will be the determinative factor.

According to the *Magnesium case* the interpretation of the Convention in accordance with art. 8 and 9, can be summarized as a three-step process, where one has to start with a subjective analysis subject to the declaration of a party, then an objective analysis of the usages of international trade involved in the particular trade concerned, and lastly one needs to complete this system by using the common techniques of reasoning that arise from common sense.[111]

Article 8 (1) of the Convention specify that "statements made by and other conduct of the party" are to be interpreted "according to his intent where the other party knew or could not have been unaware what that intent was".

The statement and conduct of the parties must according to art. 8 be interpreted according to their subjective intent. According to Enderlein and Mascow (1992) «*It is the intent of the party undertaking the legal act which is decisive.*»[112] However, the subjective intent must be clear for the other party, which gives the interpretation rule an objective criterion. The subjective intent must be manifested in some fashion for the other party to know or be aware of the intent.[113] Pursuant to paragraph 3 of the article, in determining the intent of the party "due consideration is to be given to all relevant circumstances of the case", including "the negotiations", "any practices" between the parties, "usages" and "any subsequent conduct of the parties".

According to the *Fruits and vegetables case* art. 8 (1) provides that the content of a contract primarily is determined by a «*subjective interpretation which takes into account the corresponding actual intent of the parties*», by interpreting the exact wording and context of the contract. The court states that «*any previous negotiations and subsequent conduct of the parties may indicate how they have actually understood their respective declarations of intent. Additionally, the actual intent can be construed on the basis of the parties' interests, the purpose of the contract and the objective circumstances at the time of the conclusion of the contract*», cf. art. 8 (3).[114]

Article 8 (2) of the Convention is to be applied where the parties' subjective intent cannot be established. According to the 2nd paragraph, the statements and conduct of the parties 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".

According to Enderlein and Mascow (1992) the criterion of a reasonable person combines both subjective elements, a person of the same type as the other party, and objective

[111] (Magnesium case 1995)
[112] (Enderlein and Maskow 1992, 42)
[113] (UNICTRAL 2016, 54)
[114] (Fruits and vegetables case 2008)

elements, the situation where the conduct of a reasonable person can be identified.[115] This has been characterized as a «*reasonable interpretation*».[116]

In the *Fruits and vegetables case* the court states that where an actual intent cannot be proven, art. 8 (2) provides that a presumptive intent may be determined, by interpreting the declarations of the parties in accordance with the reasonable meaning in the light of «*wording, context and the principle of good faith*», while considering all relevant circumstances of the case, including «*the negotiations, any practice which the parties have established between themselves, usages and any subsequent conduct of the parties, as well as the interests of either party and the purpose and systematic context of the contract*».[117]

Considering the same choice of law clause as exemplified earlier, which states that "This Agreement shall be governed by German law", it does not explicitly exclude the Convention. If the parties nevertheless have never relied on the provisions of the Convention, i.e. the parties have intended to exclude the application of the Convention, and the parties have not litigated based on the provisions of the Convention, may the parties' intent exclude the application of the Convention implicitly? Or, should the court or tribunal overrule the intention of the parties, and thus the party autonomy, by insisting on the application of the Convention?

5.1. The subjective intent of the parties

Under CISG art. 8 (1) the statements and conduct of the parties are to be interpreted according to the parties' intent. The intent is to be interpreted as a subjective criterion, i.e. the actual or real intent of the parties. This intent can either be expressed *ex ante* (prior to conclusion of the contract) or *ex post* (after the conclusion of the contract).

The importance of the intent of the parties is especially clear when considering that the purpose of a contract is to settle the rights and obligations between the parties. The contract is to be interpreted and applied by the parties, and only when a dispute occurs, are the courts to determine the content of the contract.[118] When considering the purpose of the contract clauses, an interpretation in accordance with the intent of the parties seems obvious. However, to actually prove an intent is more difficult. The article thus states that the intent must in some way be manifested so that the other party may act in accordance with the intent of the other party. The parties must have the opportunity to predict their own rights and obligations in relation to the contract. The rules on interpretation in art. 8 (1) can therefore be considered as based on the principle of predictability for the parties. This principle becomes even more important considering there are no supranational courts to determine the interpretation and application of the Convention, and thereby the extent of the parties' intent when interpreting the provisions of a contract.

To exclude the application of the Convention implicitly by choosing the law of a Contracting State to govern the contract, the real intent of the parties must either be manifested in an agreement between the parties, explicitly or implicitly, or the other party must have known

[115] (Enderlein and Maskow 1992, 44)
[116] (UNICTRAL 2016, 55)
[117] (Fruits and vegetables case 2008)
[118] (Eörsi 1984)

or been aware of such an intent. Pursuant to art. 8 (3) the intent of the parties is to be determined according to all the relevant circumstances of the case, including the negotiations, practice between the parties, usages and the conduct by the parties. According to the *Fruits and vegetables case*[119] the exact wording chosen by the parties, the context as well as the parties' interests, the purpose of the contract and the objective circumstances at the time of the conclusion of the contract, are important in determining the subjective intent of the parties.

When considering a situation similar to the one in the *Boiler case*[120] where neither of the parties have litigated using the Convention, the subjective intent of the parties under both the drafting and exercising of the contract, suggests that the parties have intended to exclude the application of the Convention. In the *Boiler case,* the court considered the contract subject to a wrongful punctuation, which in addition to the actions of the parties caused an implicit exclusion of the Convention. The contract refers to the Convention, while a subsequent literal interpretation of the wording and the intention behind the punctuation in the provision, was decisive in determining that the Convention was excluded.

On the one hand, if neither of the parties to a contract have relied on the provisions of the CISG, and the parties never mention the Convention during negotiations or during the exercising of the contract, the intent of the parties can be assumed to have been; to exclude the application of the Convention. In some cases, this entails that the courts should exercise discretion when overruling the intent of the parties. The principle of predictability suggest that the intent of the parties should prevail over the possible negative effect of an implicit exclusion of the Convention.

On the other hand, when taking into account the interpretation rule of uniformity in art. 7, assuming that the court or tribunal after examining foreign jurisprudence, holds that an implicit exclusion cannot be based on the subjective intent by the parties, this might cause the application of the Convention to be more uniform, and by that more predictable for more contracts, in different Contracting States.

Assuming that the parties to a contract have chosen the law of a Contracting State to govern the contract, a challenge may occur if one of the parties argue that the Convention is not applicable as a result of an implicit exclusion, while the other maintains that the Convention is applicable, because there have been no explicit exclusion.

The intent of the parties needs to be determined considering both what the other party may have known or could not have been unaware of, considering all the relevant circumstances of the case.

Considering a situation where the parties have chosen the governing law of a Contracting State, e.g. German law, while not mentioning the Convention during the negotiations, either because German law was considered a neutral law, i.e. not the domestic law of either of the parties, or German law was chosen due to its suitability to the contract, the non-explicit exclusion of the Convention may yield different results.

[119] (Fruits and vegetables case 2008)
[120] (Boiler case 2009)

If German law was chosen due to its neutrality, the parties should have investigated the possible implications of the choice of law. When electing a neutral law, the parties should be bound by all aspects of the chosen law. If neutrality is the key point, the Convention should be applied, even if one of the parties was unaware, at the time of conclusion. This as a result of CISG being part of German law.

On the other hand, if the parties have chosen German law, e.g. because the domestic German Law on Sales is especially suitable to the contract, the issue is whether the parties to the contract was a) in agreement that German law was especially suitable to the contract and thus the Convention should not be applicable, or b) that the intent of one of the parties was to exclude the application of the Convention due to the suitability of German law, and the other party knew or could not have been unaware of this intent.

If the parties discussed the domestic German Law on Sales during the negotiations, and how the provisions of this law were to be applicable to the contract contrary to CISG, this could be assumed as an intent to implicitly exclude the Convention, which both parties should have been aware of. If the parties continue to solely apply domestic German law to the exercising of the contract, the conduct and practice between the parties may be interpreted as an implicit exclusion of the Convention. Moreover, the court should exercise discretion in regard to overruling the intent of the parties, even if one of the parties during a dispute finds the terms in the CISG more favourable.

Yet, since CISG art. 6 gives the parties the right to exclude the application, an exclusion of the Convention could be accomplished, by stating that domestic German Law on Sales exclusively governs the contract. An implicit exclusion of the Convention, when a literal interpretation of the choice of law clause causes the Convention to be applicable, may be considered as undesirable, due to the aim of the Convention; a uniform and harmonized sales law for the parties from Contracting States. This could make the application of the Convention less uniform, and the aim of the Convention might not be fulfilled.

5.2. The objective intent of the parties

According to CISG art. 8 (2) when the court cannot establish the subjective intent of the parties, the court is to interpret the statements and conduct of the parties in accordance with the understanding of a reasonable person under the same circumstances. This has been characterized as an objective interpretation of the intent of the parties, i.e. a presumptive or normative intent.[121]

As under art. 8 (1), the understanding of the reasonable person is to be interpreted with consideration to all the relevant circumstances of the case, including the negotiations, practice between the parties, usages and the conduct of the parties, cf. art. 8 (3). The interpretation of the declarations made by the parties should be interpreted according to their reasonable meaning in the light of the wording, context, the interests of the parties and the principle of good faith, cf. the *Fruits and vegetables case*[122].

[121] (UNICTRAL 2016, 55)
[122] (Fruits and vegetables case 2008)

The interpretation of the intent of the parties may yield different results, either because neither of the parties have litigated subject to the Convention, or the parties are not in agreement whether the Convention is excluded.

The decisive criteria would be dependent on what the parties actually agreed upon during the formation of the contract, or what the parties practiced during the exercising of the contract. If the wording of the contract does not mention the applicability of CISG, when choosing the law of a Contracting State to govern the contract, a literal interpretation may suggest that the Convention is not excluded. However, if the context around the conclusion of the provision on the choice of law suggests that the parties selected the domestic law because of some special circumstances or some special interests of the parties surrounding the domestic law, this could suggest that the parties during the negotiations intended only the domestic law to be applicable, and by that excluding the Convention implicitly, e.g. where the domestic law is especially favourable to contracts in that specific sector.

Interim summary

A broad interpretation of the Convention text in art. 6 needs to be limited by applying the purpose of the Convention. Nevertheless, art. 6 is a manifestation of the party autonomy, which expressly allows the parties to choose the law they consider most favourable to their contract.

When considering an implicit exclusion of the Convention by choosing the law of a Contracting State to govern the contract, art. 7 does not provide definite answers. Considering the choice of law clause in relation to art. 8 and the intent of the parties, which can either be subjectively or objectively proven, could indicate that the choice made by the parties should prevail where the parties intended to exclude the application of the Convention. The principle of predictability, which states that the parties ought to be able to predict the governing law of their contract, supports such a conclusion. However, the court or tribunal need to examine all the relevant factors subject to art. 8 (3), to determine what the actual intent by the parties was both *ex ante* and *ex post*. Yet, a hypothetical intent to exclude the Convention, cannot lead to an implicit exclusion of the application of the Convention.

The implicit exclusion of the Convention by choosing the law of a Contracting State to govern the contract needs to be settled based on a case-by-case approach. The specific situation behind the choice made by the parties needs to be examined, where the reasons behind the choice of law clause will be determinative for whether the Convention can be considered as implicitly excluded. If the parties have chosen the law based on its specific suitability for the contract, this should prevail. On the other hand, a simple negligence to research the governing law, cannot be considered as an implicit exclusion.

6. IMPLICIT EXCLUSION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS BY TRADE USAGE OR ESTABLISHED PRACTICE BETWEEN THE PARTIES

According to art. 9 (1) of the Convention the parties are bound by "any usage to which they have agreed" and "by any practices which they have established between themselves".

The Convention does not define what characterizes "usage". "Usage" may be defined as a customary way of doing something, and in the scope of art. 9 (1) this is interpreted by some courts as a customary way of doing business «*which must be observed in at least one branch of industry*»[123] which the parties are bound by through agreement. This agreement may be explicit, and according to the court in the *Wood case*, the agreement may further be implicit.[124] Additionally, the term "usage" should be interpreted autonomous from domestic legal systems.[125]

What constitutes as a "practice" between the parties may be defined as a customary performance, and Lookofsky (2017) states that practice under the contract covers situations where the parties have established a certain conduct under prior contracts.[126] Practice may however also be established during the performance of the current contract, cf. the *Calzados Magnanni v. Shoes General International case*.[127] A practice can thus be defined as an act that the parties can expect to be followed in a similar way in similar circumstances.[128]

The important factor under art. 9 (1) is whether the parties have actually agreed or established any practice or usage during the performance of the prior or current contract.

Article 9 (2) of the Convention states that "the parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known" and "which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned". This can be considered a «*concept of fictious agreement*», i.e. if the parties have not otherwise expressly excluded the usage, then trade usages apply to the contract and between the parties.[129]

The article also states that the parties must have known or ought to have known about the usage. The usage must be widely known or be regularly observed in international trade. In court practice this has been described as requiring that the usage either is local or international, but it still requires that the parties «*either have places of business in the geographical area where the usage is established or continuously transact business within*

[123] (Tantalum case 2005)
[124] (Wood case 2000)
[125] (Bout 1998)
[126] (Lookofsky 2017, 45)
[127] (Calzados Magnanni v. Shoes General International case 1999)
[128] (Bout 1998)
[129] (Enderlein and Maskow 1992, 47) (UNICTRAL 2016, 64)

that area for a considerable period.»[130] The criterion that the usage must be "widely known" in international trade, is according to Enderlein and Maskow (1992) the most relevant. The usage must be widely known in at least the relevant business circles where the parties have their place of business, or where they conduct business over a considerable period of time; this also applies to sales contract of the respective kind.[131]

The usage the article refers to, is considered to prevail over conflicting provisions of the Convention, according to the *Wood case*, because it is fictitiously agreed and it is assumed that the parties would have wanted to be bound by the usages, if they had been aware of them. This can be seen as highlighting the fact that the party autonomy is the primary source of rights and obligations between the parties under the Convention.[132]

6.1. The practices the parties have established between themselves

According to art. 9 (1) of the Convention, the parties are bound by practices which they have established between themselves. This means that if the parties during the exercising of the contract have established some kind of practice between themselves regarding the exercising of the contract, this should be taken into consideration when interpreting the contract. For a practice to be established and amount to a binding practice under art. 9 (1), the conduct must have been regularly observed between the parties, with a certain duration and frequency.[133]

If the parties have been in a contracting relationship over time, and they have never argued a dispute or other disagreements under the Convention, the conduct under prior contracts might indicate that the parties have intended to implicitly exclude the Convention. Considering that art. 6 of the Convention is considered a manifestation of the general principle of party autonomy, which gives the parties the right to choose the governing law of their contract, an application of the principle in art. 9 (1) might suggest that an implicit exclusion of the Convention might be achieved through practice between the parties. However, this assumes that there have been a number of disagreements where the applicability of the Convention may have been invoked, and where the rules under the Convention are different from the ones in the domestic law governing the contract.

The rationale behind art. 9 of the Convention, can be considered to invoke the principle of predictability. If the parties have never relied on the Convention in the exercising of their contract, a court interfering with the practice between the parties, might lead to unpredictable results for the contracting parties.

On the other hand, considering that the Convention is to be applied uniformly, a general rule that an exclusion of the Convention may not be implicitly excluded without a clear wording in the contract that excludes the Convention if the parties have chosen the law of a Contracting State, may cause the application of the Convention to be more predictable on the surface.

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[130] (UNICTRAL 2016, 64-65) (Wood case 2000)
[131] (Enderlein and Maskow 1992, 47)
[132] (UNICTRAL 2016, 64)
[133] (UNICTRAL 2016, 64) and (CLOUT case 360 / Pizza cartons case 2000)

However, for the Convention to be implicitly excluded on the basis of practice between the parties, it requires to be proven based on the actual established practice that can be proven to have taken place during the performance of a prior or current contract.

If the parties are not in agreement whether the Convention has been implicitly excluded based on practice, the actual practice between the parties must be established. If the parties have never raised the question regarding the applicability of the Convention, this should not entail that the Convention is excluded. However, if the parties' earlier practice shows that the parties intended to exclude the Convention, this practice should be taken into account.

When considering an implicit exclusion under art. 6 in relation to art. 9 (1), an implicit agreement between the parties to exclude the application of the Convention, based on the practice between the parties, has to be proven to have taken place during the performance of a prior or current contract. If there is no proof that the parties have implicitly excluded the application of the Convention during earlier disputes, the Convention cannot be considered as implicitly excluded. However, if the parties during earlier disagreements have based their arguments solely on domestic law, this might indicate that the parties intended to exclude the application of the Convention. The earlier practice between the parties may illustrate this intent. Furthermore, if the parties, during an earlier dispute, raised the question of the applicability of the Convention, and the parties during that disagreement, still solely relied on domestic law to resolve the matter, provides further indication toward an agreement to exclude the Convention.

Several decisions presented in 2016 UNICTRAL Digest on Case law, states that the practices between the parties are binding under art. 9 of the Convention, relating to the performance of the contract.[134] However, implicit exclusion based on practice may be hard to prove. Several courts have stated that the party alleging that the practice between the parties amounts to a binding practice, has the burden of proof.[135]

When considering the practice between the parties as a rule for interpretation, the most difficult task is to prove a practice, which has a duration and frequency that shows the Convention in practice, was implicitly excluded between the parties. It may be assumed that there will be few examples of the parties, in practice, establishing a conduct that indicates an implicit exclusion.

6.2. The usages to which the parties have agreed, knew or ought to have known of

According to art. 9 (1) of the Convention, the parties are bound by the usages to which they have agreed. This means that when the parties have during the negotiations of the sales contract agreed to a usage, this should be taken into consideration when interpreting the contract. In art. 9 (2) it is stated that usage that the parties knew or ought to have known, which is widely known in international trade and is widely known in the contracts of the type involved in the particular trade concerned, are considered to have been made impliedly applicable to the contract.

[134] See (UNICTRAL 2016, 63-64) for examples of case law
[135] (UNICTRAL 2016, 64)

As a result of the contract being at the top of the hierarchy in the interpretation of the Convention, the usage agreed between the parties should be considered when interpreting the Convention.

According to the *Wood case* it is not necessary that the parties explicitly agree to usage under art. 9 (1), and this might indicate that, when considering art. 9 in relation to art. 8 and the parties intent, the Convention may be implicitly excluded if the usage between the parties suggests that the parties intended the Convention to be excluded by choosing the governing law of a Contracting State.

The questions that may arise regarding an agreed or impliedly applicable usage, is where the parties to a contract have chosen the law of a Contracting State as the governing law of the contract, while either incorporating provisions from standard contracts, such as contract GAFTA[136] or INCOTERMS[137], which exclude the application of the Convention, either totally or partially, or where it is customary in the specific trade to apply such standard contracts, and thus excluding the application of the Convention.

In the *Fiberglass composite materials case* the tribunal assumes that the Convention may be implicitly partially excluded, on the basis of established practices, between the parties or in international trade. The tribunal states that practices established between the parties may either exclude the application of CISG art. 30, subject to art. 8, if this practice is agreed or established between the parties, or subject to art. 9, if the usage is widely recognised and regularly observed in international trade, and the INCOTERMS are relevant to the contract. The tribunal also states that the INCOTERMS in any regard are considered as rules of interpretation.[138]

6.2.1. Total implicit exclusion of the Convention

An example of usage is within the trade of grains, where it is estimated that 80 % of the contracts for the shipping of grains is based on the GAFTA standard forms of contracts.[139] According to art. 29 (1) b) of General Contract for Shipment of Feeding stuffs nr. 1/2020 the CISG is not applicable[140]. Considering that so much of the grain industry applies the standard contracts of GAFTA, an inclusion of the GAFTA standard form of contract can be considered as an implicit exclusion in accordance with normal conduct among businessmen within that trade sector.

Even where the parties have not explicitly included the standard forms of contract, if the parties have been doing business for some period of time, and have acted as if the standard forms have been incorporated, this might indicate that the parties meant to substitute the CISG with the GAFTA standard form of contract and by that exclude the Convention. According to the *Wood case*[141] the assumption that the parties would have wanted to be

[136] (Grain and Feed Trade Association)
[137] (International Chamber of Commerce [ICC])
[138] (Fiberglass composite materials case 2009)
[139] (Grain and Feed Trade Association)
[140] (Grain and Feed Trade Association 2020)
[141] (CISG Case Presentation 2000)

bound by the usage within their trade sector, indicates that an intended inclusion of the contract GAFTA can be considered as an implicit exclusion of the Convention which is in harmony with the general principle of party autonomy in CISG art. 6.

On the other hand, the possibility to exclude the Convention based on the GAFTA standard forms of contracts is not unanimously agreed in case law.

In the *Grain case*[142] the court stated that an inclusion of the Contract GAFTA in the contract between the parties was to be considered as an exclusion of the Convention, because the parties had chosen that terms and conditions of the contract should be determined on the basis of the contract GAFTA, unless it contradicted the provisions in the contract between the parties. Art. 25 of the Contract GAFTA 78 provides that the CISG should not be applicable to the contract, and hence the court in the *Grain case* stated that in accordance with the Contract GAFTA 78 provision, the CISG was excluded.

However, in CLOUT case 1405, a contract between a Swiss buyer and Ukrainian seller, which specified that Ukrainian law was to govern the contract, but also incorporated contract GAFTA 200, which exclude the application of the CISG, the tribunal stated that without an explicit exclusion of the Convention, an incorporation of Contract GAFTA 200 was not enough to exclude the application of the Convention, since it was not considered as sufficiently express and clear.[143]

Considering that there are no supranational court to determine which of these interpretations should prevail, the intent of the parties in relation to contract GAFTA provisions excluding the application of the Convention, needs to be determined on the basis of a case-by-case approach in the spirit of an autonomous interpretation. However, when considering the parties' need for predictability, the intent of the parties should prevail. Because the CLOUT case is an abstract and the exact rationale by the tribunal is not easily accessible, it may be difficult to determine whether the intention of the parties was adequately assessed. Regardless, if it may be proven that the parties meant to exclude the application of the Convention by including contract GAFTA provisions to their contract or it can be assumed that the parties wanted to be bound by the usage within the trade sector as indicated by contract GAFTA, it can be argued that this should prevail over a fear of an implicit exclusion of the CISG.

6.2.2. Partial implicit exclusion of the Convention

When the parties have chosen to incorporate the INCOTERMS to their contract, or the parties have acted in accordance with the INCOTERMS, the case law suggests that this can be considered as a partial exclusion of the Convention, and the parties do not need to further explicitly exclude the Convention. In the *Fiberglass case*[144] the tribunal states that the obligations under CISG art. 30 are dispositive provisions, which may be excluded by the practice between the parties or with reference to INCOTERMS, in accordance with CISG art. 6, 8 and 9.

[142] (Grain case 2004)
[143] (Case Law on UNCITRAL Texts (CLOUT) 2012)
[144] (Fiberglass composite materials case 2009)

However, INCOTERMS may only partially exclude the Convention. The Convention cannot be considered as implicitly totally excluded because of the incorporation of INCOTERMS. The INCOTERMS are risk-rules which applies for contracts of sales involving carriage of goods and can therefore only exclude the applicability of the Convention regarding the passing of risk, cf. CISG art. 66-70.[145]

Interim summary

A broad interpretation of the Convention text in art. 6 needs to be limited by applying the purpose of the Convention, while still applying the general principle of party autonomy, manifested in art. 6, which gives the parties the right to choose the law they see as most suitable to their contract.

An interpretation of art. 6 and implicit exclusions due to a choice of law clause stating that the law of a Contracting State shall govern the contract, in accordance with art. 7 does not provide a definite answer. Considering the choice of law clause in relation to art. 9 (1) and the practice established between the parties, this practice must be proven to have taken place during the performance of a prior or current contract.

The biggest difficulty that may arise when considering an implicit exclusion of the Convention based on the established practice between the parties is to actually prove that the parties have excluded the application of the Convention by practice. The parties must have been part of several disputes where the question regarding an exclusion of the Convention has been raised, while not settling the dispute in accordance with the Convention. These disputes must have been regularly observed with a certain duration and frequency. It is assumed that such a practice is highly unlikely to have a duration and frequency as required, to establish that the parties intended to implicitly exclude the Convention.

An interpretation of art. 6 and implicit exclusions based on a choice of law clause choosing the law of a Contacting State to govern the contract, subject to art. 9 (2), must be separated into two questions, one regarding total implicit exclusions and one regarding partial implicit exclusions.

Regarding total implicit exclusions of the Convention when the parties have chosen the law of a Contracting State to govern their contract, but are also in a trade where it is customary to exclude the Convention, e.g. in the trade of grains subject to GAFTA standard forms of contract, the question needs to be determined on the basis of a case-by-case approach, where the intent of the parties, subject to art. 8, needs to be determined in accordance with an assumption that the parties wanted to be bound by the usage within the specific trade sector.

Incorporation of INCOTERMS or a practice in accordance with INCOTERMS, can be considered as a partial implicit exclusion of the Convention because the INCOTERMS only applies for a specific kind of questions under the Convention.

[145] (Lookofsky 2017, 107, 109)

CONCLUSION

As a result of the constant internationalisation of the commercial trade, the need for a predictable, efficient and equal international commercial law becomes ever-growing. Yet, many questions regarding implicit exclusion of United Nations Convention on Contracts for the International Sale of Goods has not been settled.

The question this dissertation seeks to answer is whether the parties may implicitly exclude the Convention by choosing the law of a Contracting State as the governing law of the contract, by interpreting art. 6 in relation to articles 7, 8 and 9.

When considering the articles, the questions that emerge under art. 7, is how the Convention is to be interpreted, while articles 8 and 9 relates to a contract, under which the parties have not litigated, relied or acted in accordance with the Convention, and whether this can be interpreted as an implicit exclusion of the Convention.

Article 6 is a manifestation of the general principle of party autonomy, which allows the parties to choose the governing law of their contract, based on their own evaluations of which law is the best to govern their contract. However, how the parties may accomplish to implicitly exclude the Convention, is up for debate and the case law is unclear, both as to what constitutes an implicit exclusion of the Convention, and also whether the intent of the parties should have impact on an implicit exclusion of the Convention.

While interpreting the Convention, subject to the rules for interpretation in art. 7, it becomes clear that the aims behind the Convention are somewhat conflicting. The regard that is to be had to the internationality, and by that the autonomous interpretation of the Convention, and the uniform application, might lead to conflicting results. This makes it important to decide each case with a case-by-case approach, where only the persuasiveness of earlier decisions should be decisive. However, it also implies that the courts and tribunals should look toward case law of other Contracting States, to try and find uniform applications, and subsequently make the Convention more desirable for the parties by making it more predictable. There may be many reasons why the parties choose to exclude the Convention, one of them being the problem of inconsistencies and conflicts in legal interpretations.

In relation to an implicit exclusion by the parties when they have chosen the law of a Contracting State to govern their contract, the black letter wording in art. 6 does not give a clear answer. However, the object and purpose of the article, the party autonomy, indicates that the parties should be allowed to implicitly exclude the Convention.

The legislative history of the Convention does neither provide clear guidance, as a result of the preparatory work being conflicting, due to extended discussions and compromises, where strong opposing views were set forth. However, when considering that the Convention is based on ULIS and ULF, which gave the parties the right to implicitly exclude the Conventions, then the parties should also be allowed to implicitly exclude the CISG. A fear of a “homeward trend”, or exclusions based on insufficient grounds, should not lead to a total disregard for the parties' autonomy or intent to exclude the Convention.

According to art. 7, the Convention should be interpreted based on the general principles of the Convention, such as good faith and party autonomy.

Party autonomy is the general principle behind art. 6, and also one of the generally recognised principles of private international law, which is to be applied if the Convention does not provide answers for the dispute. Good faith is one of the general principles of the Convention and refers to the normal practice between businessmen in that specific trade.

According to the principle of party autonomy and that of good faith, the intention of the parties should prevail, because the parties are the closest to decide which laws are the most appropriate and advantageous to their contract. To determine whether the parties intended to exclude the Convention, the courts and tribunals needs to assess the circumstances around the negotiations, formation and performance of the contractual duties. When considering the intent of the parties, the court or tribunal must therefore consider both the subjective and objective intent of the parties, subject to art. 8. They also need to take into account the predictability aspect of the Convention, which implies that the practice established between the parties and usage within the trade needs to be taken into account.

If the parties have not argued using the Convention, it might indicate that the parties did not intend the Convention to be applicable, and subsequently, a choice of the governing law of a Contracting State, could be interpreted as an implicit exclusion of the Convention. This is especially true if the parties have not acted in accordance with the Convention during the exercising of the contract, and usage within the trade, points toward an exclusion of the Convention.

The decisive criteria should therefore rest on what the parties actually agreed during the formation of the contract, and what the parties practiced during the exercising of the contract. Accordingly, the courts and tribunals would need to use a case-by-case approach and try to arrive at a uniform application of the Convention, where the individual interests and circumstances of each case should prevail.

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