

Choosing the International Sale of Goods Convention (CISG) as the Governing Law in International Commercial Arbitrations (Original Research)

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Extended Abstract

1. Introduction

International commercial arbitration has emerged as the preferred mechanism for resolving disputes in cross-border transactions due to its efficiency, neutrality, and flexibility. The United Nations Convention on Contracts for the International Sale of Goods (CISG) is a widely adopted treaty providing a uniform legal framework for international sales contracts. However, the role of the CISG in arbitration, particularly concerning the validity of arbitration agreements and its potential application as the governing law for substantive disputes, remains a subject for debate. Arbitration agreements, often embedded as clauses in international sales contracts, are fundamental to the arbitration process. The central question is whether the CISG can be applied to validate arbitration agreements and govern disputes, especially when parties have not explicitly chosen a governing law. This study examines the interplay between the CISG and arbitration agreements, addressing the broader question: To what extent can the CISG influence the determination of valid arbitration agreements and the resolution of substance of the disputes in arbitration?

2. Research Gap and Objective

Despite the CISG's centrality to international trade, its application in arbitration agreements has received limited scholarly attention. Existing

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research often focuses on the CISG's role in substantive contract law, overlooking its potential relevance to arbitration clauses and agreements. This gap proves to be significant, since many disputes in international trade arise under contracts governed by the CISG, and arbitration agreements are frequently included therein. This article seeks to bridge this gap by exploring the legal, doctrinal, and practical dimensions of applying the CISG to arbitration agreements. The objective is twofold: first, to analyze whether the CISG can validate arbitration agreements; second, to evaluate its role as the governing law in resolving disputes arising from such agreements.

3. Methodology

The research employs a descriptive-analytical methodology, combining doctrinal analysis with case studies and arbitral decisions. Primary sources such as the CISG, national arbitration laws, and arbitration rules are examined alongside secondary literature, including scholarly commentaries and tribunal awards. The analysis focuses on key provisions of the CISG—Articles 8, 9, and 11—and their relevance to arbitration agreements. Comparative analysis of tribunal practices, including ICC and CIETAC awards, is used to illustrate the CISG's practical application.

4. Key Findings

Validity of arbitration agreements under the CISG is supported by its emphasis on party autonomy and intent. Article 11 eliminates formal requirements for contracts, which can extend to unwritten arbitration agreements implied through conduct. Article 8 underscores the role of intent, evidenced by conduct, negotiations, and circumstances, in interpreting agreements, benefiting disputed arbitration clauses. Article 9 acknowledges customs or usages, supporting implied arbitration agreements where industry practices favor arbitration.

The separability doctrine maintains arbitration agreements' independence from the main contract but allows the CISG to influence such clauses. The doctrine of closest connection applies the CISG indirectly when chosen for the substantive contract. Separability ensures arbitration clauses remain unaffected by main contract issues, while the CISG provides interpretive guidance.

Arbitrators apply the CISG using direct or indirect methods. Indirect application arises via conflict-of-laws analysis, invoking Article 1(1)(b) when laws of a CISG State apply. Direct application is based on arbitrators' discretion, often favoring the CISG for its international alignment and trade relevance.

Arbitral awards such as *Filanto v. Chilewich* and CIETAC cases, which validate arbitration agreements through the CISG, show the practical relevance of the Convention in these instances. Critics highlight procedural limitations, yet tribunal decisions illustrate its adaptability to arbitration.

5. Contribution to the Field

This study contributes to the ongoing discourse on the CISG's relevance in arbitration by offering a nuanced analysis of its potential applications. It highlights the CISG's dual role as a substantive law framework and a source of interpretive principles for arbitration agreements. By bridging the gap between the CISG's substantive focus and the procedural nature of arbitration agreements, this research provides a novel perspective on their compatibility.

6. Implications and Applications

The findings of this study have several implications for legal theory, practice, and policy:

- **Legal Theory:** The research advances the understanding of the CISG's scope, emphasizing its adaptability to arbitration.
- **Arbitral Practice:** Arbitrators are encouraged to consider the CISG as a harmonizing framework, particularly in cases involving Arbitration Agreements.
- **Policy Recommendations:** Arbitration institutions should align their rules with the CISG to enhance consistency and predictability in dispute resolution.

7. Conclusion

Opinions regarding the applicability of the CISG to the formation and validity of arbitration agreements are divided. Some argue that the CISG, particularly its provisions on oral agreements and the lack of a need for a written requirement, can apply to arbitration agreements by invoking the governing law of the main contract and the principle of severability of arbitration clauses. Conversely, others emphasize the independence of arbitration clauses and the distinct governing law for arbitration agreements, asserting that the CISG applies exclusively to contracts for the sale of goods. The rationale for applying the CISG's provisions on the freedom of form to arbitration agreements is that parties may have agreed, orally, to resolve disputes through arbitration, but the lack of a written agreement could hinder its enforceability. While the prevailing view is that the CISG does not govern arbitration agreements, some arbitration awards have taken the contrary position. Ultimately, the CISG is not applicable to arbitration agreements, not due to the independence of arbitration clauses, but because its scope is limited to contracts for the sale of goods.

Regarding the law governing the substance of the dispute, arbitration tribunals, unlike national courts, are not obligated to enforce Article 1(1)(a) of the CISG. They typically select the CISG as the governing law using direct or indirect methods. The CISG may also be selected based on trade usages or as the "most appropriate law." Under the indirect method, arbitrators rely on conflict of laws rules to select the CISG under Articles 1(1)(a) or 1(1)(b).

Keywords

Independence of the Arbitration Clause, Method of Choosing the Governing Law, CISG, Governing Law, Authority of the Arbitrator, Commercial Arbitration

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