Applicability of CISG To Kuwaiti Businesses

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Abstract

CISG applies to contracts of international sale of goods either directly (in contracting states) or indirectly (when the rules of conflict of laws of a non-contracting state lead to the application of the law of a contracting state). This article addresses the possibility of applying CISG in Kuwait indirectly. After defining what the indirect application of CISG exactly means, the article explains how the national courts or arbitral tribunals may apply CISG whether as the law chosen by the parties or as the law otherwise applicable.

This article also deals with the applicability of CISG in Kuwait as expression *of lex mercatoria* whether by national courts or arbitral tribunals. It discusses both the international arbitration practice and the court practice of other jurisdictions of the indirect application of CISG. The research concludes with the recommendation for Kuwait to accede to CISG.

I. Introduction:

The United Nations Convention on Contracts for International Sale of Good (hereinafter: Convention or CISG) was signed in Vienna in 1980 and became effective on January 1, 1988. The Convention is published in the UN six official languages (Arabic, Chinese, English, French, Russian and Spanish) and has been translated into many more.(1)

CISG applies to contracts for international sale of goods(2) between private businesses, excluding sales to consumers(3) and sales of services,(4) as well as sales of certain specified types of

(1) See the Arabic version of CISG at: http://www.uncitral.org/pdf/arabic/texts/sales/cisg/V1056999-CISG-a.pdf.

Besides, an Article-by-Article Commentary to CISG is already available in Arabic (see: Amin Dawwas, United Nations Convention on Contracts for the International Sale of Goods (1980) [CISG], in Light of Jurisprudence and Doctrine, Arab American University Jenin - Deanship of Scientific Research, 2013.) According to Bridge, such "commentaries … have the best prospects of commending themselves to courts and tribunals" (see Bridge, Michael G., An Overview of the CISG and an Introduction to the Debate about the Future Convention, (4) Villanova Law Review (2013), pp. 487-490, at 488, available online at: http://lawweb2009.law.villanova.edu/lawreview/wp-content/uploads/2013/07/VLR401.pdf).

(2) According to Articles 30, 53 CISG, the sale of goods governed by CISG is a contract "pursuant to which one party (the seller) is bound to deliver the goods and transfer the property in the goods sold and the other party (the buyer) is obliged to pay the price and accept the goods", see: UNCITRAL Digest of case law on the United Nations Convention on the International Sales of Goods - 2008 revision, p. 4, available at: http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf.

(3) Article 2(a) CISG, "The convention does not apply to sales … 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".

(4) Article 3 CISG says: "(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production. (2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services."

goods.[5] According to Article 4 CISG, 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",[6] such as the seller's obligation to "deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention",[7] and the buyer's obligation to "pay the price for the goods and take delivery of them as required by the contract and this Convention".[8]

CISG aims at providing "a neutral, uniform, harmonised sales law around the world"[9] to promote international commerce by removing legal barriers in sale of goods transactions between international businesses.[10] To date, 85 States have adopted the

(5) Article 2(b-f) CISG, "The convention does not apply to sales … by auction; … on execution or otherwise by authority of law; … of stocks, shares, investment securities, negotiable instruments or money; … of ships, vessels, hovercraft or aircraft; … or of electricity."

(6) It says further: "In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (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."

(7) Article 30 CISG.

(8) Article 52 CISG.

(9) Spagnolo, Lisa, The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers, 10 Melbourne Journal of International Law (2009), pp. 141-216, at 145, also available at: http://www.cisg.law.pace.edu/cisg/biblio/spagnolo2.html.

(10) According to the preamble of the convention, the States parties to the CISG are of the opinion "that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade".

CISG,[11] among them six Arab Countries including Egypt on January 1, 1988, Syria on January 1, 1988, Iraq on April 1, 1991, Mauritania on September 1, 2000, Lebanon on December 1, 2009 and Bahrain on October 1, 2014.

CISG defines its geographical and personal sphere of application. In principle, the Convention can apply to contracts for international sale of goods in two situations: a- the autonomous (direct) application by virtue of Article 1(1)(a) CISG, and b- the indirect application (classical solution[12] or conflictual method [13], i.e. according to the conflict-of-laws rules of the forum, pursuant to Article 1(1)(b) CISG.[14] In order to apply the Convention in the first situation,

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

(12) Borisova, Bojidara, Geographic Sphere of Aapplication of the United Nations Convention on Contracts for the International Sale of Goods, Pace essay submission (September 2002), available at: http://www.cisg.law.pace.edu/cisg/biblio/borisova.html. Ferrari, Franco, Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing, 15 Journal of Law and Commerce (1995), pp. 1-126, at 38, also available at: http://www.cisg.law.pace.edu/cisg/biblio/2ferrari.html.

(13) Bernasconi, Christopphe, The Personal and Territorial Scope of the Vienna Convention on Contracts for the International Sale of Goods (Article 1), 46 Netherlands International Law Review (1999), pp. 137-170, at 149, also available at: http://www.cisg.law.pace.edu/cisg/biblio/bernasconi.html.

14 () Article 1/1 CISG says: "This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State."

Article 1(1)(a) CISG lays down two main conditions: First, the contract for the sale of goods shall be international in nature, i.e. the places of business of the contracting parties are located in different States. Second, these two States shall be Contracting States.(15)

As Kuwait is not a Contracting State to CISG yet, the Convention will not apply directly in Kuwaiti by virtue of Article 1(1)(a) CISG.(16) Thus, the applicability of CISG to Kuwaiti businesses in Kuwait basically arises in the case of indirect application of the Convention(17) The aim of this research is to define how CISG may indirectly apply to Kuwaiti businesses by a Kuwaiti court or an arbitral tribunal. It will therefore tackle the conditions that have to be met in order to apply the CISG in Kuwait indirectly based on Article 1(1)(b) CISG, i.e. according to the (Kuwaiti) conflict-of-laws rules. Besides, this research will discuss the possibility of applying the CISG to Kuwaiti businesses as being a source of the lex mercatoria, i.e. the law of merchants.

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(15) A State is a Contracting one when it has ratified, approved, or accepted or acceded to the Convention. According to Article 99(2) CISG, however, the Convention enters into force only twelve months after a State has ratified, accepted, approved or acceded to the CISG. Article 93 (1) CISG also specifies that a Contracting State with different territorial units may declare that the Convention is to extend to all its territorial units or only to one or more of them.

(16) Cf. Bernasconi, ibid, p. 155, "Article 1(1)(a) is only mandatory for a court sitting in a State that has ratified the CISG."

(17) However, it should be noted that CISG can apply directly to Kuwaiti Businesses by other forums. For instance, if a Kuwaiti entity with its place of business in a CISG Contracting State (e.g. Bahrain, Egypt, Lebanon etc.) entered into a contract for the sale of goods with another entity with a place of business in another CISG Contracting State, the forum seeing the dispute will apply the Convention. In addition, CISG may apply to Kuwaiti businesses abroad indirectly, i.e. when the conflict-of-laws rule of the forum leads to the application of the law of a CISG Contracting State. Article 1(3) CISG says that the nationality of the contracting parties (or their civil or commercial character) is irrelevant whether when applying CISG directly (Article 1(1)(a) CISG) or indirectly (Article 1(1)(b) CISG). To put it in the words of Jayme, "[t]he Convention applies also to nationals of non-Contracting States who have their places of business within a Contracting State." See Jayme, Article 1, in: Bianca, C. M. / Bonell, M. J. eds., Commentary on the International Sales Law, Giuffrè: Milan (1987), p. 32.

II. Indirect Application of the CISG to Kuwaiti Businesses:

Disputes relating to international business relationships, e.g. contracts for international sale of goods, are decided typically either by domestic courts or by arbitral tribunals. After deciding on its jurisdiction over the international commercial dispute,(18) the Kuwaiti domestic court does not apply the Kuwaiti substantive law, at least in those cases where its conflict-of-laws rules lead it to a substantive law other than its own. Rather, the Kuwaiti court, by virtue of its conflict-of-laws rules shall then define which system of national law is to apply in determining the rights and obligations of the parties.

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(18)According to the 1980 Kuwaiti Code of Civil and Commercial Procedures (hereinafter: KCCCP), the Kuwaiti courts have jurisdiction over international civil and commercial relationships as follows:

1- Civil and commercial actions filed against Kuwaitis even if they have no domicile or place of residence in Kuwait, (Article 23).
2- Civil and commercial actions filed against a foreigner having a domicile or place of residence in Kuwait, except for cases involving real property located abroad, (Article 23)
3- Civil and commercial actions brought against a foreigner having no domicile or place of residence in Kuwait in the following cases: a- if he has an elected domicile in Kuwait, b- if the action is related to a movable or immovable thing located in Kuwait or to an obligation that arose, performed or was required to be performed therein or to a bankruptcy declared in Kuwait, c- if there are several defendants one of whom has a domicile, place of residence or an elected domicile in Kuwait, (Article 24).
4- Civil and commercial actions whose litigants expressly or implicitly consent to the jurisdiction of the Kuwaiti courts even if they do not fall under their jurisdiction pursuant to the rules of jurisdiction laid down in the present Law, (Article 26).
5- Interlocutory and initial matters and demands connected to the civil and commercial actions within the jurisdiction of Kuwaiti courts, (Article 27).
6- Disputes relating to enforcement procedures taken in Kuwait, (Article 27).
In all events, if the foreign defendant fails to appear in court and the court is not competent to review the action pursuant to the preceding Articles, the court shall declare its lack of competency ex officio, (Article 28).

Contrary to domestic courts, arbitral tribunals do not have permanent jurisdiction; they have ad hoc jurisdiction based solely on the parties' consent as given in their agreement. Unlike domestic courts, the arbitral tribunals have no forum.(19) With regard to the law applicable to the merits, therefore, the arbitral tribunal shall not apply the conflict-of-laws rules of the State in which arbitration take place.(20) Rather, the arbitral tribunal has a wide discretion in determining the law applicable.

As for the disputes arising from international commercial contracts, national courts usually apply their conflict-of-laws rules in order to define the applicable law. In situations relating to contracts for international sale of goods governed by CISG, however, the court – not only in Contracting States,(21) but also in Non-Contract-

(19) According to the ICC Court of Arbitration – Paris, "[i]t is commonly acknowledged that ‹the rules of private international law› referred to in Art. 1(1)(b) of the CISG are the conflict of law rules of the forum. However, an arbitrator, unlike a national judge, has no forum. It follows from this premise that arbitrators are not bound by the conflict of laws rules of a forum to choose the law applicable to the substance of the dispute. «The principle of party autonomy, according to which the parties may freely choose the law governing their relationship, is without doubt part of ‹the rules of private international law› referred to in Art. 1(1)(b) of the CISG". See Arbitral Award No. 11333 of 2002, http://www.unilex.info/case.cfm?id=1163.

(20) Id.

(21) Bell, Kevin, The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods, 8 Pace International Law Review (1996), pp. 237-258, at 247, also available at: http://www.cisg.law.pace.edu/cisg/biblio/bell.html: "For tribunals sitting in Contracting States, the purpose of sub. (l)(a) is to eliminate the need to go through a conflict of laws analysis, since under these circumstances the rules of private international law are irrelevant". Perales Viscasillas, Mª del Pilar, Applicable Law, The CISG, and The Future Convention on International Commercial Contracts, 58(4) Villanova Law Review (2013), pp. 733-760, at 739, available online at: http://lawweb2009.law.villanova.edu/lawreview/wp-content/uploads/2013/07/VLR415.pdf.

ing States [22] (like Kuwait) – should first of all find out whether the conditions of the CISG geographical application (stipulated in Ar-

(22) Réczei, László, The Rules of the Convention Relating to its Field of Application and to its Interpretation, in: Problems of Unification of International Sales Law, New York: Oceana (1980), pp. 53-103, at 66, also available at: http://www.cisg.law.pace.edu/cisg/biblio/reczei2.html, "[CISG] is applicable also in cases where neither the parties, nor the judge is in a contracting state, still in conformity with the conflict rule the law of a country has to be applied that has acceded to the Convention". Ziegel, Jacob, The Scope of the Convention: Reaching Out to Article One and Beyond, 25==Journal of Law and Commerce (2005-06), pp. 59-73, at 64, also available at: http://www.cisg.law.pace.edu/cisg/biblio/ziegel17.html, "Article 1(1)(b) plays a key role in expanding the scope of the CISG where the contracting parties are not located in different Convention states or one of them is not located in a Convention state". Lookofsky, Joseph, The 1980 United Nations Convention on Contracts for the International Sale of Goods, in J. Herbots editor & Blanpian, R. general editor, International Encyclopedia of Laws – Contracts, Suppl. 29 (December 2000), pp. 1-192, at 34, also available at: http://www.cisg.law.pace.edu/cisg/biblio/lookofsky.html, "Subparagraph (1)(b) of Article 1 becomes relevant when the subparagraph (1)(a) criterion is not met, i.e. when one or both parties to the contract do not reside in CICG Contracting State". Jayme, in: Bianca / Bonell, ibid, p. 31. Borisova, ibid. Winship, Peter The Scope of the Vienna Convention on International Sales Contracts, in: Galston/Smit ed., International Sales, New York: Matthew Bender (1984), ch. 1, pp. 1-53, at 1-31, also available at: http://www.cisg.law.pace.edu/cisg/biblio/winship5.html. Ferrari, Franco, PIL and CISG: Friends or Foes? in ŞIPKA/YILDIRIM (eds.) "Sales Contracts under the New Turkish Code =of Obligations and the CISG», XII Levha Publishing Co., Istanbul (2012), pp. 43-116, at 74-75, also available at: http://www.cisg.law.pace.edu/cisg/biblio/ferrari.html.

Contra Bridge, Michael G. Uniform and Harmonized Sales Law: Choice of Law Issues, in: James J. Fawcett, Jonathan M. Harris & Michael Bridge, International Sale of Goods in the Conflict of Laws, Oxford University Press (2005), pp. 908-988, at 963, also available at: http://www.oup.com/uk/catalogue/?ci=9780199244690, and at: http://www.cisg.law.pace.edu/cisg/biblio/bridge.pdf, "the private international law basis for the application of the Vienna Convention, in Article 1(1)(b), could and should also be seen as a domestic rule of the adopting state".

ticle 1 CISG) are met or not.[23] According to the UNCITRAL, "[a]lthough the Convention does not bind non-Contracting-States, it has been applied in courts of non-Contracting States where the forum's rules of private international law led to the law of a Contracting State". [24]

Once the CISG is applicable, it shall supersede the otherwise applicable national law:[25] CISG is a lex specialis that exclusive-

(23) Ferrari, Specific Topics of the CISG, ibid, p. 34, "whenever this requirement [i.e. the parties have their places of business in different Contracting States] is met and whenever the lex fori is the law of a Contracting State and the parties have not excluded the CISG, it will be applicable, independently from a different solution provided for by the rules of private international law". UNCITRAL Digest, ibid, p. 4: "Both the Convention and the private international law rules of a forum address international contracts. Before examining the Convention's substantive, international and territorial sphere of application, therefore, its relationship to private international law rules must be explored. According to case law, courts of Contracting States must determine whether the Convention applies before resorting to private international law." Decision of the Oberlandesgericht Frankfurt am Main (Germany), No. 13 U 51/93, dated 20.4.1994, available at: http://www.unilex.info/case.cfm?pid=1&do=case&id=47&step=FullText: "Das UN-Kaufrecht gilt sowohl in der Bundesrepublik Deutschland (seit 1. 1. 1991) als auch in der Schweiz (seit 1. 3. 1991 … und verdrängt, soweit es Geltung erheischt, nationales Recht, insbesondere auch die Vorschriften des internat. Privatrechts".

(24)UNCITRAL Digest, ibid, p. 6.

(25) Rosett, Arthur, Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods, 45 Ohio State Law Journal (1984), pp. 265-305, at 273, also available at: Heinonline: "The strategy of the Convention is not to harmonize all commercial law, but only a particular subgroup of transactions, the international sale. Within that subgroup, unified international rules are supreme and displace national rules". Decision of the court of cassation, Egypt, No. 979 for judicial year 73, dated 11.4.2006, available at: http://cisgw3.law.pace.edu/cisg/text/060411e1arabic.pdf: "when a sale of goods made between a seller in a state ratifying CISG and a buyer in another state ratifying CISG, rules of the convention shall govern formation of the sale contract and rights and duties arising therefrom, regardless of the law applicable according to the conflict-of-laws rules of the forum". Decision of the Landgericht Heilbronn (Germany), No. 3 KFH O 653/93, dated 15.9.1997, available at: http://www.unilex.info/case.cfm?pid=1&do=case&id=439&step=FullText: "Das Einheitliche UN-Kaufrecht geht bei zwischenstaatlichen Geschäften. der europäischen Mitgliedsstaaten sowohl dem deutschen internationalen Privatrecht als auch dem nationalen Privatrecht (BGB) vor".

ly and comprehensively govern contracts for international sale of goods.(26) To opine otherwise, the main goal of the CISG, i.e. unification of the law of the sale of goods, will be overridden. But if the conditions stipulated by the CISG for its geographical application are not met, then the court has no choice but to apply the law re-

(26)Decision of the Tribunale di Pavia (Italy), dated 29.12.1999 (Clout case No. 380), available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V01/847/23/PDF/V0184723.pdf?OpenElement, "uniform substantive law prevails over the conflict of laws rules due to its speciality". Decision of the Handelsgericht Zürich (Switzerland), No. HG 930634, dated 30.11.1998, available at: http://www.unilex.info/case.cfm?pid=1&do=case&id=409&step=FullText: "Damit beansprucht das WKR umfassende Geltung, und es verdrängt daher auch die im erwähnten Haager Abkommen (und im IPRG) vorgesehene Sonderanknüpfung hinsichtlich der Untersuchungsmodalitäten …. Dies ergibt sich vor allem aus dem Gedanken, dass das WKR eine Vereinheitlichung des Sachrechts darstellt, welche als die tiefergreifende internationale Rechtsharmonisierung den Vorrang gegenüber der Vereinheitlichung des IPR bzw. dem innerstaatlichen IPR beansprucht". Decision of the Tribunale di Rimini (Italy), No. 3095, dated 26.11.2002, available at: http://cisgw3.law.pace.edu/cases/021126i3.html: "The provisions of the CISG have the character of specialty by definition, since they resolve the substantive issues "directly", avoiding the double-step approach (identification of applicable law and application thereof), which is needed when one resorts to the rules of private international law". Decision of the Tribunale di Vigevano (Italy), No. 405, dated 12.7.2000, available at: http://cisgw3.law.pace.edu/cases/000712i3.html: "Uniform substantive law is more specific per definitionem than the rules of private international law because the former settles "directly" the … question of applicable substantive law. It thus avoids the two-step process -- consisting first in the identification of the applicable law and then in its enforcement -- required by resort to private international law". Decision of the Oberster Gerichtshof (Austria), No. 6 Ob 311/99z, dated 9.3.2000, available at: http://www.unilex.info/case.cfm?id=474: "Das UN-K schafft selbst materielles Recht". Decision of the Cantone del Ticino, La seconda Camera civile del Tribunale d'appello Lugano (Switzerland), No. 12.19.00036, dated 8.6.1999, available at: http://cisgw3.law.pace.edu/cases/990608s1.html: "The Vienna Convention of 11 April 1980 (CISG) established a body of norms of substantive law that govern the sales of good between individuals established in different countries provided these countries are party to the CISG".

ferred to by its conflict-of-laws rules.(27) This would also be the case if the contracting parties opted out of the CISG application.(28)

Article 1(1)(b) CISG is directed to the domestic courts:(29) The reference to "the rules of private international law" means the application of the conflict-of-laws rules of the forum,(30) i.e. those of the national court seeing the dispute over a contract for international sale of goods. Conversely, the arbitral tribunal has no forum. (31) True, the place of arbitration determines the arbitration law applicable to arbitration. However, "this is not to be equivalent to the place of the forum in art. 1.1(b) CISG".(32)

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(27)Loewe, Roland, The Sphere of Application of the UN Sales Convention, X Pace International Law Review X (1998), pp. 79-88, also available at: http://www.cisg.law.pace.edu/cisg/biblio/Loewe.html: "If the Convention is not applicable because one party or both parties have their places of business outside the member states, national private law rules determine which law applies". See also: Ferrari, Specific Topics of the CISG, ibid, p. 34.

(28)According to Article 6 CISG, "[t]he parties may exclude the application of this Convention". See also Bridge, Uniform and Harmonized Sales Law, ibid, p. 925.

(29) Perales Viscasillas, ibid, p. 741.

(30) Perales Viscasillas, ibid, p. 747. See also Ferrari, PIL and CISG, ibid, p. 58. Lookofsky, ibid, p. 34. Schlechtriem, Peter, Requirements of Application and Sphere of Applicability of the CISG, Victoria University of Wellington Law Review (2005/4), pp. 781-794, at p. 783, also available at: http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem9.html. Bridge, Uniform and Harmonized Sales Law, ibid, pp. 919-920.

(31) Abdel-A'al, Okasha Mohammad, The Law Applicable to Merits of Commercial Arbitration and the Effect of Non-Compliance with it by Arbitral Tribunal (in Arabic), The United Arab Emirates University 16th Conference on (International Trading Arbitration), 28-30 April 2008, pp. 583-617, at 603, available at: http://slconf.uaeu.ac.ae/prev_conf/arabic_prev_conf2008.asp. Varady, Tibor / Barcelo, John J. / von Mehren, Arther T., International Commercial Arbitration, A Transnational Perspective, 5th ed. (American Casebook Series), WEST - a Thomson Reuters business, 2012, p. 681.

(32) Perales Viscasillas, ibid, p. 752.

Arbitral Award of the ICC Court of Arbitration – Paris, No. 11333 of 2002, at: http://www.unilex.info/case.cfm?id=1163, "It is commonly acknowledged that 'the rules of private international law' referred to in Art. 1(1)(b) of the CISG are the conflict of law rules of the forum. However, an arbitrator, unlike a national judge, has no forum. It follows from this premise that arbitrators are not bound by the conflict of laws rules of a forum to choose the law applicable to the substance of the dispute."

The arbitral tribunal will determine the law applicable to the merits according to the method stipulated by the law (or rules) of arbitration it has to respect. Generally, failing a choice by the parties of the law applicable to the merits, such a law of arbitration gives the arbitral tribunal a wide freedom to apply the conflict-of-laws rules it considers appropriate. This law or rules may also allow the arbitral tribunal to determine the law applicable directly, i.e. without recourse to any conflict-of-laws rules.

Under Article 1(1)(b) CISG, the Kuwaiti domestic courts and arbitral tribunals seeing disputes involving Kuwaiti businesses may therefore apply CISG indirectly: a- if the sale of goods contract at issue is international in character, and b- if the conflict-of-laws rules applicable refer to the law of a Contracting State.

II.A. Internationality of Sale of Goods Contract:

In order to apply CISG indirectly, the sale of goods contract shall be international, i.e. the places of business of parties are in different States. In addition, this fact shall be apparent for both parties no later than the time of the conclusion of the contract.

1- Meaning of Internationality Under CISG: Generally, the internationality of a legal relationship can be defined either by reference to party-related criteria or transaction-related criteria or both. The former, often referred to as legal criteria of internationality, includes domicile, residence, nationality or the like. The latter, also called economic criteria of internationality, refers to the performance of the transaction that transcends national boundaries.

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

Contracts for the International Sale of Goods".[33] However, CISG does not govern all contracts for international sale of goods.[34] Pursuant to Article 1 CISG, the Convention only applies to contracts between parties whose places of business are in different States. The places of business of seller and buyer themselves shall at the time of conclusion of the contract[35] be in different States; it does not therefore suffice that the places of business of their agents are in different States.[36]

Thus, "[Article 1 CISG] contains the basic jurisdictional statement of the Convention, laying down a single criterion of internationality: the seller and buyer must have their places of business in different States".[37] Once this subjective criterion[38] is realized, it does not matter whether or not either party has a liaison in the

(33) Rosett, ibid, p. 274.

(34) Winship, ibid, p. 1-26. Bernasconi, ibid, p. 144. Ferrari, PIL and CISG, ibid, p. 61.

(35) Siehr, in: Honsell (editor), Kommentar zum UN-Kaufrecht. Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf (CISG) [Commentary on the CISG article by article - in German], Berlin/Heidelberg/New York: Springer (1997), p. 48.

(36) Siehr, in: Honsell (editor), ibid, p. 48. Jayme, ibid, p. 30. Réczei, ibid, p. 67. Winship, ibid, p. 1-21.

(37) Bell, ibid, p. 244. See also: Schlechtriem, ibid, p. 782: "Article 1(1)(a) CISG requires only that the parties have their places of business in different contracting states". Rosett, ibid, p. 274, "application of the Convention shall depend on only one factor, the parties having places of business in different countries". Loewe, ibid, "the universality principle was replaced by the Article 1 para. 1(a); that is to say, by the application of the Convention only if the places of business of the parties are in two different member states". Ferrari, Specific Topics of the CISG, ibid, p. 23, "under the CISG the internationality of a contract depends merely on the parties having their places of business (or habitual residences) in different States".

(38)Borisova, ibid: "The drafters of the CISG decided to accept only the subjective element for description of that term, i.e., a sale of goods will be regarded as international if the contract is concluded between parties having their places of business in different States". See also: Herber, in: von Caemmerer / Schlechtriem (editors), Kommentar zum Einheitlichen UN-Kaufrecht - CISG - [Commentary on Uniform UN-Sales Law - in German], München: Beck, 2nd ed. (1995), p. 48. Jayme, in: Bianca / Bonell, ibid, p. 28.

State where the other party has his place of business,[39] or whether the essential factors of the sale of goods contract are connected to a Contracting or Non-Contracting State.[40]

By contrast, the international character is not realized when the parties have their places of business in one and the same State.[41] In such a case, it does not matter whether the parties have different nationalities,[42] or whether either party has another place of business in another State with which the contract has no strong connection.[43] Moreover, it does not suffice in this regard that the contract is concluded in one State and to be performed in another State.[44] In all such cases, the court will apply the State's domestic law applicable by its conflict-of-laws rules, even if this State is a CISG Contracting State.[45]

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

(40) Honnold, John O., Uniform Law for International Sales under the 1980 United Nations Convention, 3rd ed., Kluwer Law International (1999), p. 35. Bernasconi, ibid, p. 143.

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

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

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

(44) Herber, in: von Caemmerer / Schlechtriem (editors), ibid, p. 52. Ferrari, Specific Topics of the CISG, ibid, pp. 24-25. Decision of the Oberlandesgericht Köln, Germany, No. 2 U 23/91, dated 27.11.1991, available at: http://www.unilex.info/case.cfm?id=128.

(45) Ferrari, PIL and CISG, ibid, p. 62.

2- Meaning of Place of Business Under CISG: The concept of the "place of business" is not directly defined under CISG. However, because this concept is important for the understanding of internationality of the contract under CISG, it shall be examined in detail. Generally, the place of business "requires something more than temporary presence …. Neither having a hotel room or a rented office in a city nor engaging in sales transactions on repeated occasions in the nation appear to suffice".(46) "As a general rule it was accepted that the place of business is where the contracting party has its stable business organization. Consequently, this is the place where the company has its establishment of some duration with certain authorized powers".(47) "[It is] a permanent and regular place for the transaction of general business, not including a temporary place of sojourn during ad hoc negotiations. Neither a warehouse, the office of the seller's agent, nor a booth at a trade show would seem to qualify as a place of business".(48)

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

(46) Rosett, ibid, p. 279.

(47) Borisova, ibid.

(48) Bell, ibid, p. 245. See also Honnold, ibid, p. 33. Jayme, in: Bianca / Bonell, ibid, p. 30. Winship, ibid, p. 1-22. Bernasconi, ibid, p. 145.

3- Appearance of Internationality: "According to Article 1(2) CISG, the facts that involve the Convention should be available to the parties at the time of the conclusion of the contract."[49] Thus, the fact that the place of business of both parties are in different States shall be known or at least cannot be unknown by the parties at any time before or at the conclusion of the contract. This means that, if only one party proves his unawareness at the time of concluding the contract of the fact that the other's place of business is foreign, CISG will not apply.[50] It follows therefore that, though the contracting parties might not be conscious of the applicability or even existence of the CISG, the internationality of their sale of goods contract shall be apparent to both of them.[51]

Knowledge by the parties of the existence of their places of business in different States can be deduced from the contract itself or from any dealing between, or from information disclosed by, the parties. There shall be an objective element that represents the international character of the contract of sale of goods, such as: the foreign language used by the other party, the temporary sojourn of one party in the State where the other has his place of business, or the agreement by both parties to deliver the goods sold in a State other than the seller's States[52]. It is certainly irrelevant here, whether the parties know that the different States in which their places of business are located are Contracting or Non-Contracting

(49) Honnold, ibid, p. 30.

(50) Siehr, in: Honsell (editor), ibid, p. 54. Herber, in: von Caemmerer / Schlechtriem (editors), ibid, p. 57. Réczei, ibid, p. 67.

(51) Ferrari, Specific Topics of the CISG, ibid, pp. 31-32. Bridge, Uniform and Harmonized Sales Law, ibid, p. 924.

(52) Herber, in: von Caemmerer / Schlechtriem (editors), ibid, p. 57.

States,[53] or whether they know that the CISG governs their contract or it even exists.[54]

Thus, the CISG safeguards the reliance by both parties on the fact that their contract for sale of goods is national in nature;[55] the party claiming otherwise has to prove the international character of the contract.[56] The Convention will therefore only apply to contracts for sale of goods which prove to be apparently international in the meaning of Article 1 CISG.

Conversely, if the parties neither know nor ought to know that their places of business are in different States, they have no reason to know that their contract is international in the meaning of Article 1 CISG. The fact that the parties reside in different States (and thus the criterion necessary for the application of Article 1(1)(a) CISG) shall be disregarded, and consequently CISG shall not apply.[57]

(53) Siehr, in: Honsell (editor), ibid, pp. 53-54. Herber, in: von Caemmerer / Schlechtriem (editors), ibid, pp. 57, 87.

(54) Borisova, ibid.

(55) Borisova, ibid, "it is obvious that the contracting parties (when being both domestic) will be more certain when their relationship is regulated by a piece of legislation, as their «domestic» law, familiar to both of them". Cf. Jayme, in: Bianca / Bonell, ibid, p. 31. Ferrari, PIL and CISG, ibid, pp. 62-63.

(56) Bell, ibid, p. 246, "the burden of proof should rest with the party seeking to apply the Convention".
Contra: Ferrari, Specific Topics of the CISG, ibid, p. 33, "the party invoking the impossibility of recognizing the international character of the sales contract (and, thus, the inapplicability of the CISG), carries [the burden of proof]".

(57)Lookofsky, ibid, p. 36. Winship, ibid, p. 1-21. Bernasconi, ibid, pp. 147-148. Ferrari, PIL and CISG, ibid, p. 63.

II.B. (Kuwaiti) Conflict-of-Laws Rule Refers to a Contracting State's Law:

Once the international character of the sale of goods contract is realized, the CISG will apply in Kuwait if the conflict-of-laws rule,[58] applied by national courts or by arbitral tribunals, indicates operation of a Contracting State's national law.

1- Indirect Application of CISG by Kuwaiti Courts: According to Articles 23, 24 and 26 KCCCP, the Kuwaiti courts have jurisdiction over contracts for international sale of goods. In such a case, the Kuwaiti court defines the law applicable to the merits based on Article 59 of the Kuwaiti Law No. 5/1961 on Regulation of the Legal Relationships with Foreign Element (hereinafter: Kuwaiti Law No. 5/1961). This Article accepts the concept of party autonomy[59] which is actually universally recognized in domestic private international law codifications [60] and international arbitra-

(58) Conversely, "the general substantive applicable law would apply instead of the uniform one, if, according to the lexfori conflicts rules [e. g. Kuwaiti conflict-of-laws rules], the contracting parties' seats of business are not in two different Contracting States". See Conetti, Giorgio, Uniform Substantive and Conflicts Rules on the International Sale of Goods and Their Interaction, in Petar Sarcevic & Pau Volken eds., International Sale of Goods, Dubrovnik Lectures, Oceana (1986), Ch. 12, pp. 385-399, at 390, also available at: http://www.cisg.law.pace.edu/cisg/biblio/conetti.html.

(59) It says: "Contractual obligations are governed by the law of the domicile when such domicile is common to the contracting parties, and in the absence of a common domicile by the law of the place where the contract was concluded. These provisions are applicable unless the parties agree, or the circumstances indicate, that it is intended to apply another law". A similar provision is also stipulated by Article 19 of the Egyptian civil code, Article 20(1) of the Jordanian civil code, Article 20(1) of the Syrian civil code, Article 19(1) of the Emirati civil transactions law and Article 25(1) of the Palestinian civil law draft.

(60) Ferrari, Specific Topics of the CISG, ibid, p. 40. Falhout, Wafa Mazeed, The Legal System Applicable in the Framework of International Commercial Arbitration (in Arabic), The United Arab Emirates University 16th Conference on (International Trading Arbitration), 28-30 April 2008, pp. 551-581, at 564, available at: http://slconf.uaeu.ac.ae/prev_conf/arabic_prev_conf2008.asp.

tion instruments[61] Parties to the contract even in non-Contracting States can opt in CISG; that is to say, they can select the law of a Contracting State to apply to their contract. "This would mean that under article 1(1)(b) the CIAG as the applicable [Contracting State] law would govern the contract";[62] "the Convention applies automatically to the contract despite the fact that one party or both parties do not have their places of business within a Contracting State."[63]

Where the parties did not select the law applicable or where their selection is not valid, resort shall be made to the criteria set forth by the related conflict-of-laws rule of the forum to determine whether the Convention is applicable by virtue of Article 1(1)(b) CISG.[64] According to Article 59 of the Kuwaiti Law No. 5/1961 one shall, in such a case, resort to the law of the State in which both parties are domiciled, if any; and in the absence of such a law, one shall apply the law of the State in which the contract of sale of goods was concluded. If the State in which the contracting parties have their common domicile or else in which the contract was concluded is a Contracting State to the Convention, the Kuwaiti court should apply CISG as part of the national law of that State. When ratifying, approving, accepting or acceding to the Convention, this

(61) Busit, Obaid S., The Determination of Applicable Law in International Commercial Arbitration, The United Arab Emirates University 16th Conference on (International Trading Arbitration), 28-30 April 2008, pp. 199-242, at 200, available at: http://slconf.uaeu.ac.ae/prev_conf/arabic_prev_conf2008.asp.

(62) Schlechtriem, ibid, p. 785. Cf. Winship, ibid, p. 1-35. Busit, ibid, p. 219. Contra Bernasconi, ibid, p. 163. "where two parties, who have their places of business in non-Contracting States, choose the law of a Contracting State to govern their contractual relationship, … the parties' presumable intention seems to point to the domestic law rather than to the CISG, even if the latter may be better tailored to international sales transactions".

(63) Jayme, in: Bianca / Bonell, ibid, p. 32.

(64) UCITRAL Digest, ibid, p. 6.

State has replaced its domestic rules on sales by the more suitable rules of CISG.(65)

Schlechtriem makes it clear that Article 1(1)(b) CISG means "that parties in non-contracting states could be subject to the application of the CISG".(66) Under such circumstances, "the CISG will be applied for the reason that the Convention is part of the domestic law of each country that has ratified it and also it is the lex specialis in connection with international sale of goods".(67) According to Loewe, the authors of the Convention were of the opinion that CISG, and not the residual national law, should apply when the conflict-of-laws rules of the forum point to the law of a Contracting State and this for several reasons: "The Convention is published and known as well as the national sales law. The Convention is especially conceived for international affairs. For an exporter or importer, the Convention will be a set of rules which he is accustomed to use. No party should be confronted with unknown or difficult to discover rules of civil or commercial law. To place a foreigner in a worse situation because he knows the law less well than you is not acceptable".(68)

In fact, "it is often easier for the courts of a non-Contracting State [like Kuwait] to apply the Convention than to try to determine, understand and apply the rules of a foreign domestic law;

(65) Bernasconi, ibid, p. 161.

(66) Schlechtriem, ibid, p. 783.

(67) Borisova, ibid. See also Zeller, Bruno, The CISG – Getting off the Fence, 74(9) The Law Institute Journal, Victoria (2000), pp. 73-74, at 74, also available at: http://www.cisg.law.pace.edu/cisg/biblio/zeller4.html: "If a country accepts the CISG, that is ratifies the Convention, it becomes part of its own body of law. If a matter falls within the sphere of application of the CISG then the Convention must be applied". Spagnolo, ibid, p. 143.

(68) Loewe, ibid.

Cf. Lorenz & Partners, Vertragliche Vertragsgestaltung unter Berücksichtigung des Internationalen Privatrechts, Newsletter Nr. 116 (DE), December 2014, p. 9.

as there is a wealth of largely accessible information on the CISG, the judge sitting in a non-Contracting State has an easier access to useful information on the CISG than on almost any foreign substantive law."[69] There are many databases that provide information in English on the cases decided under CISG, such as CISG Database[70] and Unilex.[71] CISG Database also contains full text scholarly works on CISG. Many Arabic publications on CISG are also available, particularly the comprehensive Article-by-Article Commentary to CISG written by the present writer.[72]

Notably, where the Kuwaiti conflict-of-laws rule "leads to the application of the law of a Contracting Sate", whether as the law chosen by the parties or the law otherwise applicable, this "law" means only the substantive law of the Contracting State. It does not include the conflict-of-laws rules of the law applicable.[73] Article 72 of the Kuwaiti law No. 5/1961 clearly excludes renvoi. The Kuwaiti court, pursuant to Article 1(1)(b) CISG, must therefore apply the Convention as part of the substantive law of the Contracting State applicable.

(69) Bernasconi, ibid, p. 161.

(70) www.cisg.law.pace.edu.

(71) http://www.unilex.info.

(72) Amin Dawwas, United Nations Convention on Contracts for the International Sale of Goods (1980) [CISG], in Light of Jurisprudence and Doctrine, (in Arabic), Arab American University Jenin - Deanship of Scientific Research, 2013.

(73) Cf. El-Ahdab, Abdel Hamid & El-Ahdab, Jalal, Arbitration with the Arab Countries, 3rd revised and expanded ed., Walters Kluwer Law & Business, …, p. 139. El-Hajaya, Noor Hamad, The Law Applicable to the Dispute Under Arbitration (in Arabic), The United Arab Emirates University 16th Conference on (International Trading Arbitration), 28-30 April 2008, pp. 653-681, at 663, available at: http://slconf.uaeu.ac.ae/prev_conf/arabic_prev_conf2008.asp. El-Awwa, Mohammad Salim, The Law Applicable to Arbitration Disputes (in Arabic), 10 Journal of Arab Arbitration (September 2007), pp. 65-72, at 68.

In court practice of other jurisdictions, many decisions applied the Convention by virtue of Article 1(1)(b) CISG. For instance, in its decision No. 4 O 113/90, dated 14.08.1991, the Landgericht Baden-Baden (Germany) applied CISG as part of Italian law applicable under German private international law.(74) According to the Oberlandesgericht Hamburg (Germany), "The referral to German law leads to the applicability of the United Nations Convention on Contracts for

(74) The court says: "Das Rechtsverhältnis zwischen den Parteien beurteilt sich nach dem Wiener UN-Übereinkommen über Verträge über den internationalen Warenkauf vom 11.4.1990 …. Es ist in Italien seit 1.1.1988 in Kraft. Auf dessen Recht kommt es an, weil auf die Beziehungen der Parteien gem. Art. 28 Abs. 1, Abs. 2 EGBGB das italienische Recht Anwendung findet." See http://www.unilex.info/case.cfm?id=13.

Also, in its decision No. 4 C 549/90, dated 21.12.1990, the Amtsgericht Ludwigsburg (Germany) says: "The CISG applies to the present contractual relationship. Since the contract bears its closest connection to the country where the seller is domiciled, French substantive law applies according to Art. 28(1), (2)(1) EGBGB. There is no renvoi to German law. In any case, a renvoi would not be given consideration (cf. Art. 35(1) EGBGB). Pursuant to French law, the CISG applies to international contracts of sale since 1 January 1988 if contracts are governed by French law under the rules of private international law (Art. 1(1)(b) CISG). France acceded to the CISG already in 1982 and has not made use of a declaration not to be bound by Art. 1(1)(b) CISG". See the translation into English of this decision at: http://cisgw3.law.pace.edu/cases/901221g1.html.

For a similar conclusion, see decision of the Oberlandesgericht Frankfurt am Main (Germany) No. 9 U 81/94, dated 05.07.1995 at: http://www.unilex.info/case.cfm?id=169 (the appellate court confirmed the lower court's decision that the contract was governed by CISG, as the German private international law rules led to the application of the law of France, a contracting State (Art. 1(1) (b) CISG)); decision of the Amtsgericht Oldenburg in Holstein (Germany) No. 5 C 73/89, dated 24.04.1990 at: http://www.unilex.info/case.cfm?id=5 (the court held that the contract was governed by CISG, as the German private international law rules led to the application of the law of Italy, a contracting State (Art. 1(1)(b) CISG)); decision of the Landgericht Aachen (Germany) No. 41 O 198/89, dated 03.04.1990 at: http://www.unilex.info/case.cfm?id=24 (the court held that the contract was governed by CISG, as the German private international law rules led to application of the law of Italy, a contracting State (Art. 1(1)(b) CISG)); decision of the Oberlandesgericht Koblenz (Germany) No. 2 U 1795/89, dated 23.02.1990 at: http://www.unilex.info/case.cfm?id=22 (the court applied German private international law rules and held that Italian law and as such CISG, as the law of a contracting State (Art. 1(1)(b) CISG), was the applicable law); decision of the Landgericht Stuttgart (Germany) No. 3 KfH 0 97/89, dated 31.08.1991 at: http://www.unilex.info/case.cfm?id=1 (the court held that the contract was governed by CISG, as the German private international law rules led to the application of the law of Italy, a contracting State (Art. 1(1)(b) CISG)); and decision of the Landgericht München I (Germany) No. 17 HKO 3726/89, dated 03.07.1989 at: http://www.unilex.info/case.cfm?id=6 (the court held that the contract was governed by CISG, as the German private international law rules led to the application of the law of Italy, a contracting State (Art. 1(1)(b) CISG)).

the International Sale of Goods (CISG), even though Turkey is not contracting partner to the convention. It is sufficient that the Republic of Germany, for which the CISG came into force on the October 1st, 1991, is a contracting partner to the convention, and that it was a contracting partner to the convention at the time the contract in dispute was concluded. This leads to the application of Art. 1 para. 1(b) CISG, which concerns the applicability of the CISG onto the contract relations in dispute between the parties "when the rules of private international law lead to the application of the law of a contracting state." Pursuant to this clause, the CISG shall be applicable to contracts of sale of goods, even if under the rules of international private law the law of a contracting state is deemed applicable."(75)

Also, in its decision No. R.G. 1999/242, dated 08.03.2001, the Cour d'Appel, Mons (Belgium) concluded that the applicable law was to be determined according to the 1980 Rome Convention on the law applicable to contractual obligations. According to the criteria adopted in

(75) Oberlandesgericht Hamburg, decision No. 13 U 54/10, dated 15.07.2010, available at: http://cisgw3.law.pace.edu/cases/100715g1.html.

Likewise, in its decision No. VIII ZR 410/12, dated 28.05.2014, the Bundesgerichtshof (Germany) concludes that the referral in the contract to the German law does not mean the application of German domestic law. Because the parties places of business are in different States, the Convention shall apply pursuant to Article 1(1)(b) CISG. See http://www.globalsaleslaw.org/content/api/cisg/urteile/2513.pdf. Decision of the Landgericht Köln (Germany) No. 88 O 57/11, dated 29.05.2012: "The parties have validly subjected their contract to German law. The applicable law is determined pursuant to Regulation (EC) No. 593/2008 of the European Parliament and the Council. According to Art. 1 para. 1 Rome I the regulation is applicable to contractual obligations in civil and commercial matters which show a relation to the law of different states. The parties concluded a contract for work and material and are seated in different states. According to Art. 3 para. 1 Rome I, a contract is subject to the law chosen by the parties. The choice of law has to be explicit or unambiguously determinable from the circumstances of the case. The parties have explicitly agreed on the choice of German law including the CISG ". However, the court eventually applied the Convention by virtue of Article 1(1)(a). The Court concluded that: "The convention applies to sales contracts regarding goods between parties that are seated in different states when these states are contracting states to the CISG." See http://cisgw3.law.pace.edu/cases/120529g1.html.

Article 4(1) of that Convention, the sales contract is to be governed by the seller's law, i.e. French law, and, consequently, by CISG which is part of a contracting State's substantive law.(76) Similarly, in its decision

(76) The court says: "Considering that [Seller] is a French company, with its registered office in French territory, and the [Buyer] is a Belgian company with its registered office in Binche, the contract concluded between the parties, which is connected to several jurisdictions, is a contract for the international sale of goods. For the law applicable to this contract, one has to refer to the Rome Convention of 19 June 1983 on the Law Applicable to Contractual Obligations, which entered into force in Belgian territory on 1 April 1991; In the absence of a choice of law by the parties, paragraph 1 of Article 4. of the Rome Convention stipulates that the contract shall be governed by the law of the country with which it is most closely connected; this criterion is specified by reference to several presumptions; according to the stipulations in part 2 of Article 4, it is presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic at the time of conclusion of the contract has its registered office ...; the characteristic performance in a contract is the one for which payment is due; in case of a sales contract, the seller›s performance is characteristic; therefore French law is applicable to the contract in this case; one reaches the same solution applying the Hague Convention of 15 June 1995. Whereas, at the time of conclusion of this sale, the Vienna Convention of 11 April 1980 on Contracts for the International Sale of Goods was applicable in France due to its ratification by that State (Belgium had not yet ratified the Vienna Convention). When international private law leads to the application of the law of a Contracting State, the dispositions of the Vienna Convention apply, not those of the French Code Civil." See the translation into English of this decision at: http://cisgw3.law.pace.edu/cases/010308b1.html.

For a similar conclusion, see decision of the Rechtbank van Koophandel, Hasselt (Belgium) No. AR 2012/96, dated 09.10.1996 at: http://www.unilex.info/case.cfm?id=264 (the court held that the contract was governed by CISG, as the Belgian rules of private international law led to the application of the law of Italy, a contracting State (Art. =1(1)(b) CISG)); decision of the Rechtbank van Koophandel, Hasselt (Belgium) No. AR 1970/95, dated 08.11.1995 at: http://www.unilex.info/case.cfm?id=265 (the court held that the contract was governed by CISG, as the Belgian rules of private international law led to the application of the law of Italy, a contracting State (Art. 1(1)(b) CISG)); decision of the Rechtbank van Koophandel, Hasselt (Belgium), dated 18.10.1995 at: http://www.unilex.info/case.cfm?id=266 (the court held that the contract was governed by CISG, as the Belgian rules of private international law led to the application of the law of the Netherlands, a contracting State (Art. 1(1)(b) CISG)); decision of the Tribunal Commercial de Nivelles (Belgium) No. R.G. 1707/93, dated 19.09.1995 at: http://www.unilex.info/case.cfm?id=231 (the court held that the contract was governed by Swiss law, and consequently by CISG, as Switzerland is a contracting State); decision of the Tribunal de Commerce de Bruxelles, 7ème ch. (Belgium) No. R.G./1.205/93, dated 05.10.1994 at: http://www.unilex.info/case.cfm?id=176 (the court held that the contract was governed by CISG. Although Belgium had not yet ratified CISG, the Belgian private international law rules (in this case the Hague Convention of 15 June 1955 on the law applicable to international sale of goods) led to the application of the law of Italy, a contracting State (Art. 1(1)(b) CISG)); decision of the Rechtbank van Koophandel, Hasselt (Belgium) No. AR 3952/93, dated 16.10.1994 at: http://www.unilex.info/case.cfm?id=267 (the court held that the deliveries made after the entry into force of CISG in The Netherlands were governed by CISG, as the Belgian rules of private international law led to the application of the law of The Netherlands, a contracting State (Art. 1(1)(b) CISG), while only the deliveries made prior to that date were governed by the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods ULIS); decision of the Rechtbank van Koophandel, Hasselt (Belgium), No. AR 722/94, dated 23.02.1994 at: http://www.unilex.info/case.cfm?id=268 (the court held that the contract was governed by CISG. Although Belgium had not yet ratified CISG at the time of the conclusion of the contract, the Belgian rules of private international law led to the application of the law of Germany, a contracting State (Art. 1(1)(b) CISG)); and decision of the Tribunal de Commerce de Bruxelles, 11ème ch. (Belgium), No. R.G. 4.825/91, dated 13.11.1992 at: http://www.unilex.info/case.cfm?id=175 (Although Belgium had not yet ratified CISG, the Court held that CISG was applicable since the parties had expressly chosen the law of Italy, a contracting State (Art. 1(1)(b) CISG)).

No. 900336, dated 19.12.1991, the Arrondissementsrechtbank Roermond (Netherlands) held that the contract was governed by CISG, as the Dutch private international law rules led to the application of the law of Italy, a contracting State (Art. 1(1)(b) CISG).(77)

CISG has to be applied in such situations as a uniform law of sale of goods, not as a foreign law. It follows, therefore, that the court itself shall find out and apply the concerned CISG provisions;(78) its decision in this regard can be challenged before the court of cassation.

When applying the Convention pursuant to Article 1(1)(b) CISG, it does not matter whether the place of business of either party or both parties is located in a Contracting State or not.(79) It is also of no importance whether the law applicable is the law of an Arab Contracting State or the law of a non-Arab Contracting State. Moreover, the court in Kuwait shall apply CISG once its conflict-of-laws

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(77) See http://www.unilex.info/case.cfm?id=34.

For a similar conclusion, see decision of the Arrondissementsrechtbank Dordrecht (Netherlands) No. 2762/1989, dated 21.11.1990 at: http://www.unilex.info/case.cfm?id=32 (The court held that CISG governed the contract, as the Dutch private international law rules led to the application of the law of France, a contracting State (Art. 1(1)(b) CISG)); decision of the Arrondissementsrechtbank Alkmaar (Netherlands) No. 350/1988, dated 08.02.1990 at: http://www.unilex.info/case.cfm?id=31 (the court held that as Dutch private international law rules led to the law of France, French law was applicable and 'according with rules of French private international law' CISG was applicable to the contract); and decision of the Arrondissementsrechtbank Alkmaar (Netherlands) No. 674/1989, dated 30.11.1989 at: http://cisgw3.law.pace.edu/cases/891130n1.html (This was a proceeding held to be governed by the law of a country in which the CISG was in effect at the time the contract was concluded (France). The court ruled that the CISG applies. This was pursuant to Article 1(1)(b).)

(78) Herber, in: von Caemmerer / Schlechtriem (editors), ibid, pp. 54-55. Decision of the court of cassation, Egypt, No. 979 for judicial year 73, dated 11.4.2006, available at: http://cisgw3.law.pace.edu/cisg/text/060411e1arabic.pdf: "the court shall by itself find out the legal rule applicable to the parties' relationship; the court shall give such relation the correct characterization even if neither party requested it to do so".

(79) Herber, in: von Caemmerer / Schlechtriem (editors), ibid, p. 53. Jayme, in: Bianca / Bonell, ibid, p. 32.

rules point to the law of a Contracting State, regardless of whether or not CISG is also applicable according to the private international law rules of that Contracting State.(80)

Under Article 95 CISG,(81) however, each State may declare that it will not be bound by Article 1(1)(b) CISG. Since Kuwait is not a Contracting State, and as such it does not use the reservation mentioned in Article 95 CISG, this reservation may not come to an application before a Kuwaiti court.

2- Indirect Application of CISG by Arbitral Tribunals: As for arbitration, Kuwait does not have legislation on international commercial arbitration coping with the international standards. Unlike Bahrain,(82) for example, Kuwait did not avail itself of the 1985 Unictral Model Arbitration Law. (Private) arbitration in Kuwait is governed by Articles 173-188 KCCCP.(83) In fact, KCCCP basically regulates the domestic arbitration. However, it is generally acknowledged that, in cases of international commercial arbitration, the parties may choose the law applicable to the merits. Otherwise,

(80) Cf. Siehr, in: Honsell (editor), ibid, p. 51.

(81) It says: "Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1) (b) of Article 1 of this Convention."

(82) Article 1 of the Bahraini Arbitration Law No. 9 /994 applies the 1985 Unictral Model Arbitration Law to the international commercial arbitration unless the parties select to subject it to another law. See the text of this law (in Arabic) at: http://www.aiadr.com/aiadr/subcat.asp?ID=181&Link=95.

(83) Also, Kuwait promulgated an enactment in 1995 titled 'Judicial Arbitration in Civil and Commercial Matters (Law No. 11/1995)'. See this law in 2 Y. B. Islamic and Middle E. L. (1995), at 557-561. An in-depth review of this law (by Osman, El-Fatih E.) can also be found in 2 Y. B. Islamic and Middle E. L. (1995), at 192-195. It should be mentioned, however, that this type of arbitration is limited to matters of Kuwaiti law not exceeding KD 500,000, with proceedings conducted in Arabic only.

the arbitral tribunal should define this law pursuant to Article 59 of the Kuwaiti Law No. 5/1961.(84)

The main institutional arbitration body in Kuwait is "the Commercial Arbitration Centre" of the Kuwait Chamber of Commerce and Industry. Besides, other specialized bodies, such as the Kuwait Lawyers Association and the Kuwait Society of Engineers, have established their own arbitration centers and rules.

The "Kuwait Commercial Arbitration Centre" (hereinafter: KCAC) was established in 2000. Article 7 of the KCAC's Commercial Reconciliation and Arbitration Regulations(85) applies the Uncitral Conciliation and Arbitration Rules in the absence of provisions in the KCAC's Regulations or in the KCCCP relating to a specific matter. As both the KCAC's Regulations and the KCCCP do not include an explicit provision on the law applicable to the merits, such a law should be defined pursuant to Article 35 of the 2010 UNCITRAL Arbitration Rules as amended in 2012. Accordingly, the law applicable to the substance of an international commercial arbitration dispute shall be "the rules of law designated by the parties" or else the law "the arbitral tribunal … determines to be appropriate", (Article 35(1)). "In all cases, the arbitral tribunal shall decide in ac-

(84) El-Ahdab & El-Ahdab, ibid, p. 327, "[i]n international arbitration, the Kuwaiti rules of conflict of laws shall determine the applicable law". Mshemesh, Jafar, Arbitration in Commercial, Civil and Administrative Contracts and Grounds for Setting Aside the Arbitral Tribunal and its Legal Effect, Zein El-Hoqouqiya, 2009, p. 182. Pepper, William F., Foreign Capital investment in Member States of the Gulf Cooperation Council, Considerations Issues and Concerns for Investor, Part I, 6 Arab L. Q. (1991), pp. 231-266, , at 263, also available at: Heinonline. El-Hawwari, Ahmed Mohammad, The Position of the Arab Legislations Regarding New Approaches in Arbitration with Concentration on the Position of the UAE Civil Procedures Code and the United Draft Law on Arbitration, The United Arab Emirates University 16th Conference on (International Trading Arbitration), 28-30 April 2008, pp. 619-652, at 630-631, available at: http://slconf.uaeu.ac.ae/prev_conf/arabic_prev_conf2008.asp.

(85) Available in Arabic at: http://www.kcac.org.kw/

cordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction." (Article 35(3)).

The Kuwait Lawyers Association set up its "Center of Arbitration". This center is empowered to settle (national and international) commercial disputes through arbitration or conciliation. As for international commercial arbitration, Article 20 of the Center's Bylaws gives the parties the freedom to select the law applicable to the merits.(86) Article 3 of this Center's Arbitral Rules requires the arbitral tribunal to settle all disputes with a foreign element according to the Uncitral Arbitration Rules unless the parties agree otherwise; in case of contradiction between these rules and the Center's rules, however, the latter prevails. As far as the (rules of) law applicable to the merits, Article 19 of the Center's Arbitral Rules explicitly provides in part: "1- The parties are free to select the rules of law the arbitral tribunal shall apply to the substance of the dispute. 2- If the parties did not agree to the rules of law, … the arbitral tribunal shall apply the rules of the Unictral Arbitration Law as amended by these Rules and in conformity with its provisions, provided that consideration shall be taken to the terms of the contract and related commercial practices and usages".

The Kuwaiti Engineers Association set up its own chamber of arbitration, i.e. "the Kuwait Chamber for Mediation and International Arbitration". It established special rules governing disputes in the construction industry and related activities, including sale of goods.

(86) It says: "The parties shall have the liberty of deciding the law, which the arbitrators shall apply to the issue in dispute. In case the parties do not stipulate the applicable law in the Contract or Arbitration Agreement, the arbitrators shall apply the law determined by the conflict-of-laws rules which they deem appropriate whether it is the law of the place where the contract was concluded, the law of the place where the contract is to performed, the law of the place where the contract must be performed or any other law subject to complying with the terms of the contract and international usages."

Article 27 of this Chamber Rules of Arbitration Procedure says: "(1) The arbitral tribunal shall apply to the subject matter of the dispute the law defined by the parties; failing such a definition, the members of the arbitral tribunal must apply the substantive rules of the law it deems most closely connected to the dispute. (2) The arbitral tribunal may decide over the dispute according to the contract terms, prevailing trade usages and the practices established between the parties."

Furthermore, Kuwait recognizes the GCC Commercial Arbitration Center based in Bahrain.(87) The GCC arbitration center is established to service commercial cases, including cases of all types of international commercial contracts,(88) whether involving nationals of the GCC or non-GCC countries.(89) Under Article 12 of the GCC Centre's Charter and Article 29 of its Arbitral Rules of Procedure, the law applicable to the merits shall be the law chosen by the parties or else the law having most relevance to the issue of

(87) The Charter of this Centre was adopted by leaders of the member-states of the GCC (i.e., Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates) in December 1993. Its Arbitral Rules of Procedure came into effect in 1994 and, in March 1995, the Centre began to accept references. By the Law No. 14/2002, dated 3.2.2002, Kuwait agreed to the construction of the GCC Commercial Arbitration Center and its Charter.

(88) According to Article 2 of the Charter, the Centre is empowered 'to examine commercial disputes between GCC nationals, or between them and others, whether they are natural or juristic persons, and commercial disputes arising from implementing the provisions of the GCC Unified Economic Agreement and the Resolutions issued for the implementation thereof if the two parties agree in a written contract or in a subsequent agreement on arbitration within the framework of this Centre.' See the text of this Charter and the Arbitral Rules of Procedure of the GCC Commercial Arbitration Center (in English) at: http://sites.gcc-sg.org/DLibrary/index-eng.php?action=ShowOne&BID=189.

(89) Article 2 of the GCC Centre's Charter. Kreindler, Richard H., An Overview of the Arbitration Rules of the Recently Established GCC Commercial Arbitration Centre, Bahrain, 12 Arab L. Q. 3 (1997), at 5.

the dispute pursuant to the conflict-of-laws rules deemed fit by the arbitral tribunal.(90)

Therefore, the parties are free to include in their contract such arbitration terms as they consider appropriate. Contracts involving Kuwaiti entities may include clauses referring disputes to arbitration under the KCAC, Kuwait Lawyers Association Center of Arbitration, or the Kuwait Chamber for Mediation and International Arbitration of Kuwait Engineers Association.

Kuwait is also a signatory to international conventions dealing with arbitration, such as the 1952 Arab League Convention on the Enforcement of Judgments and Awards,(91) the 1958 New

(90) Article 12 of the GCC Commercial Arbitration Centre's Charter says: "The parties shall have the liberty of deciding the law, which the arbitrators shall apply to the issue in dispute. In case the parties do not stipulate the applicable law in the Contract or Arbitration Agreement, the arbitrators shall apply the law determined by the rules of the conflict of laws which they deem appropriate whether it is the law of the place where the contract was made, the law of the place where it is to be performed, the law of the place where it must be implemented or any other law subject always to complying with the terms of the contract and rules and practices of international law."
Article 29 of GCC Centre's Arbitral Rules of Procedure says: "The Tribunal shall settle disputes in accordance with the following:
1. The contract concluded between the two parties as well as any subsequent agreement between them.
2. The law chosen by the parties.
3. The law having most relevance to the issue of the dispute in accordance with the rules of the conflict of laws deemed fit by the Tribunal.
4. Local and international business practices."
According to Kreindler, the latter provision "appears to impose … a priority list although one is not necessarily always needed or appropriate." (See Kreindler, ibid, p. 22) This provision, Kreindler continues, "is not entirely clear in its scope [of] application." (See Kreindler, ibid, p. 23). In the opinion of the present writer, however, this provision must be read together with the provision of Article 12 of the GCC Centre's Charter. Accordingly, the arbitral tribunal shall firstly apply the law chosen by the parties. Only in cases in which such a choice fails, the arbitral tribunal may apply the law having most relevance to the issue of the dispute in accordance with the rules of the conflict-of-laws it deems fit. In all events, the arbitral tribunal shall respect the terms of the contract and all related practices and usages.

(91) http://www.lasportal.org/wps/wcm/connect/7c1cf48049c3a8b89d6c9d526698d42c/legalnet-5-2.pdf?MOD=AJPERES.

York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,(92) and the 1965 Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.(93) Since there is no statutory requirement that the arbitration take place in Kuwait,(94) the parties may also refer disputes to arbitration under the International Chamber of Commerce (ICC), the GCC Commercial Arbitration Center or any other international or regional arbitral forum. Once the parties choose an institutional arbitration, such a choice resolves basic issues of the law applicable to the merits since these institutions have provisions on choice-of-law.(95)

In all events, the arbitral tribunal sitting in Kuwait may apply CISG to the disputes over contracts for international sale of goods. For instance, Article 27 of the Rules of Arbitration Procedure of "the Kuwait Chamber for Mediation and International Arbitration" allows the parties to define the law applicable to the substance of the dispute. If the parties choose the law of a CISG Contracting State (like Bahrain, Lebanon or Egypt) to govern their contract, the arbitral tribunal should apply CISG as part of this law. In particular, Article 7 of the KCAC's Commercial Reconciliation and Arbitration Regulations leads in this field to the application of Article 35 of the 2010 UNCITRAL Arbitration Rules under which the parties may even select "rules of law" to govern their contract. Similarly, Article 19(1) of the Arbitral Rules of the Kuwait Lawyers Association's Center of Arbitration empowers the parties to select the "rules of law" applicable to the merits. This term "rules of law" obviously allows the

(92) http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.
(93)https://eguides.cmslegal.com/pdf/arbitration_volume_II/CMS%20GtA_Vol%20II_1_3_Table%20of%20Ratifications.pdf.
(94) Pepper, ibid, p. 263. Cf. Huneidi, Isa A., Arbitration Under Kuwaiti Law, 4 Arab L. Q. (1989), pp. 20-24, at 21.
(95) Varady / Barcelo / von Mehren, ibid, p. 683.

parties to choose non-State law,[96] such as the CISG. The arbitral tribunal shall apply the law or rules of law chosen by the parties, regardless whether or not the arbitral tribunal considers it appropriate for the dispute in question.[97] If the parties are allowed to authorize decisions ex aequo et bono, i.e. based on equity and divorced from strict legal standards, and if they may incorporate as a contractual term virtually any rule they please, they should likewise be able to select any set of rules of law to apply to the merits.[98]

Also, the arbitral tribunal working under the GCC Arbitration Rules shall apply CISG to international sale of goods contracts when it is chosen by the parties whether explicitly (i.e. choice of the convention directly) or implicitly (i.e. choice of the law of a CISG Contracting State).[99] It is worth here mentioning that Article 28 of the Bahraini Arbitration Law No. 9 /994 (like Article 28 of the 1985 Uncitral Model Arbitration Law) allows the parties not only to choose a State law, but also "rules of law" to govern their international contract. Again, this term includes non-State law, e.g. CISG.

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(96) Cf. El-Ahdab & El-Ahdab, ibid, pp. 138, 195 & 286. Varady / Barcelo / von Mehren, ibid, p. 688. El-Hajaya, ibid, p. 664. El-Hawwari, ibid, p. 633. Abdel-A'al, ibid, pp. 586, 590. Falhout, ibid, p. 563. El-Awwa, ibid, p. 68. Omar, Nabil Ismaeel, Arbitration in International & National and Civil & Commercial Matters, Dar El-Jamia'a El-Haditha, 2011, pp. 265, 267, 269. Mshemesh, ibid, pp. 175, 181.

(97) Belohlavek, Alexander J., Law Applicable to the Merits of International Arbitration and Current Developments in European Private International Law: Conflict-of-Laws Rules and the Applicability of the Rome Convention, = =Rome I Regulation and Other EU Law Standards in International Arbitration, in Czeck Yearbook of International Law, Vol. I, Second Decade Ahead: Trading the Global Crisis, A. Belohlavek & N. Rozehnalova, eds., (Juris Publishing, Inc., 2010), pp. 25-46, at 30, available at SSRN: http://ssrn.com/abstract=1723715. El-Awwa, ibid, p. 69.

(98) Varady / Barcelo / von Mehren, ibid, p. 688.

(99) Cf. Winnick, Kyle, International Commercial Arbitration, Anticipatory Repudiation, and the Lex Mercatoria, 15 Cardozo J. Conflict Resolution (New York, NY) (2014), pp. 847-887, at 854, available online at: http://cardozojcr.com/wp-content/uploads/2014/04/Winnick.pdf.

In arbitration practice, tribunals were ready to apply CISG when parties chose the law of a Contracting State. For instance, the ICC Court of Arbitration, in its Arbitral Award No. 13111, found that Paragraph 1 of Article 24 of the contract concluded between Claimant and Respondent provides: "'The present Contract shall be governed by and constructed under the substantive law in force in France." Thus, the Court concluded that "France is a member state of the United Nations Convention on Contracts for the International Sale of Goods ('CISG') of 11 April 1980 (Decree No. 87 -- 1034 of 22 December 1987). The CISG applies to contracts of sale of goods between parties whose places of business are in different states, when these states are contracting states (Art. 1(1)(a)) or when the rules of private international law lead to the application of the law of a contracting state (Art. 1(1)(b) CISG)."(100)

(100) http://cisgw3.law.pace.edu/cases/13133i1.html.

In its Arbitral Award No. 12460 of 2004, the ICC Court of Arbitration found that "an international sales contract contained a choice of law clause in favour of the "substantive law" ("droit matériel") of a country party to the CISG. The Arbitral Tribunal interpreted this generic reference to the substantive law of the country in question as an indication that the CISG was applicable in the case at hand."(101)

Failing a choice by the parties of the law applicable, the arbitral tribunal (whether sitting in Kuwait, Bahrain or in other GCC country)

(101) http://www.unilex.info/case.cfm?id=1433.

See also Arbitral Award of the ICC Court of Arbitration, No. 12173 of 2004, at: http://cisgw3.law.pace.edu/cases/0412173i1.html, "As there are no reasons to doubt the validity of the choice of law made in Sect. 36 of the Frame Contract, Swiss law and hence the CISG (Art. 1 lit. b CISG) apply". Arbitral Award of the ICC Court of Arbitration, No. 12097 of 2003, at: http://www.unilex.info/case.cfm?id=1434 "A sales contract entered into between a Finnish company and a French company was in its English version silent as to the applicable law, while its Russian version according to Claimant made reference to "legislation of Sweden and generally accepted standards of international trade". When a dispute arose, Claimant invoked the application of "Swedish substantive law" and Respondent argued in favour of the application of the CISG which was adopted in both Finland and France. The Sole Arbitrator, after pointing out that the CISG was also part of Swedish law …, announced that he would apply the CISG". Arbitral Award of the ICC Court of Arbitration, No. 11333 of 2002, at: http://www.unilex.info/case.cfm?id=1163, "the reference made to 'French law' in the Agreement leads to the application of the CISG, which is, since 1 January 1988, the French law of international sales of goods." Arbitral Award of the ICC Court of Arbitration, No. 10377 of 2002, at: http://cisgw3.law.pace.edu/cases/020377i1.html, "According to Art. I(l)(b) CISG, the CISG applies to contracts of sale of goods between parties whose place of business is in different States when the rules of private international law lead to the application of the law of the Contracting State. According to the Finnish rules of private international law, parties may enter into choice of law clauses. The parties in the case at hand have chosen to apply Finnish law. Finland is a Contracting State and thus the CISG would apply even without an express agreement of the parties." Arbitral Award of the ICC Court of Arbitration, No. 9771 of 2001, at: http://cisgw3.law.pace.edu/cases/019771i1.html, "Russian law should be applied. The 1980 UN Convention on Contracts for the International Sale of Goods is in force in Russia since 1 September 1991 ... Thus the 1980 UN Convention is to be applied". Arbitral Award of the ICC Court of Arbitration, No. 10329 of 2000, at: http://cisgw3.law.pace.edu/cases/000329i1.html, "the arbitrator is of the view that it is appropriate to apply the presumption formulated by one of the leading legal scholars: when the parties have designated Swiss law because one of them or their contractual relationships have a link with Switzerland, it may be assumed that the parties have made such a choice because they have considered that such link with Swiss law should prevail; if such is the case, Swiss substantive law on international sales contracts, i.e., the CISG, must apply. Such solution is in accordance with the well-spread opinion according to which the reference to the law of a Contracting State implies the application of the CISG."

may also apply CISG to contracts involving Kuwaiti businesses if it proves to be part of the law of the (Contracting) State in which the parties have their common domicile or of the (Contracting) State in which the contract is concluded (such as Bahrain).[102]This is actually the solution explicitly provided for in Article 59 of the Kuwaiti Law No. 5/1961.

Under Article 35 of the 2010 UNCITRAL Arbitration Rules applicable to the KCAC's arbitration, "the arbitral tribunal shall apply the law it determines to be appropriate." Under Article 27 of the Rules of Arbitration Procedure of the Kuwaiti Engineers Association, "the arbitral tribunal must apply the substantive rules of the law it deems most closely connected to the dispute." This rule authorizes the arbitral tribunal to directly select the law applicable, i.e. without using any conflict-of-laws rule. True, in such a given situation, "[t]here is no strict obligation on the Tribunal to apply the CISG and is entitled to prefer another rule of law which it "determines to be appropriate"".[103] Because CISG is the law most suitable to issues of international sale of goods contracts, however, the arbitral tribunal would likely apply it to the dispute arising from such a contract. CISG is, in fact, "a set of rules well known for contracting parties, providing highly specialized regulation for international sales contracts and also guaranteeing the equality between the contracting parties, giving them the possibility to choose the rules of the uniform law instead of the unknown and difficult to discover domestic rules of civil or commercial law."[104]

Article 19(2) of the Arbitral Rules of Kuwait Lawyers Association's Center of Arbitration requires the arbitral tribunal, failing a

(102) Cf. id.

(103) Decision of the High Court (Singapore), No. 2014] SGHC 220, dated 01.04.2014, at: http://globalarbitrationreview.com/cdn/files/gar/articles/_2014__SGHC_220.pdf

(104) Borisova, ibid.

choice of law by the parties, to apply the rules of the Unictral Arbitration Law, and thus the law determined by the conflict-of-laws rules it considers appropriate.(105) Pursuant to Article 12 of the GCC Centre's Charter and Article 29 of its Arbitral Rules of Procedure, the arbitral tribunal shall in such a case apply the law having most relevance to the issue of the dispute pursuant to the conflict-of-laws rules deemed fit by the arbitral tribunal. The arbitral tribunal may apply the Kuwaiti conflict-of-laws rule, i.e. Article 59 of the Kuwaiti Law No. 5/1961. Hence, the law applicable to the merits may be CISG as the law of the (Contracting) State in which the parties have their common domicile or the law of the (Contracting) State in which the contract is concluded.(106)

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(105) See Article 28(2) of the 1985 Unictral Model Arbitration Law.

(106) In its arbitral award No. 6/2003, dated January 16, 2005, the panel at Alexandria Center for International Arbitration applied CISG pursuant to Article 19 of the Egyptian Civil Code. The dispute arose between an Egyptian seller (claimant) and a Moroccan buyer (respondent) who concluded in July and August 2002 two contracts to sell semi-dry dates. The Egyptian seller claimed payment of outstanding contract losses as well as demurrages and storage fees incurred by claimant as a result of the breach by respondent of its contractual obligations in addition to expenses and attorney›s fees. Neither contract did stipulate the law applicable to the dispute between the parties. Whereas respondent did not participate to whatsoever form in the arbitral proceedings, claimant requested payment of the above said sum for breach of contract and argued the applicability of the CISG to the dispute. Pursuant to Article 33(1) of the arbitration rules of Alexandria Center for International Arbitration (according to which, the arbitral tribunal shall apply «the law determined by the conflict of laws rules which it considers applicable»), the panel applied the conflict-of-laws rules of the forum in order to define the law applicable to the dispute. Since both contracts between the parties were concluded in Alexandria, the panel decided to apply the Egyptian civil law. It also quoted, among others, Article 1 CISG (in full) and applied the convention since Egypt had acceded and became a Contracting State since January 1, 1988. According to the panel, "it must be clarified that the provisions of the Vienna Convention do not apply to the exclusion of national Egyptian law but in addition to it. However, since both tests coincide, it is worth mentioning that applying either, i.e., the Vienna Convention or the ECC, would not affect the decision on the principal issues in dispute". (See the presentation of this case at: http://cisgw3.law.pace.edu/cases/050116e1.html.)
Since Morocco is not a Contracting State, it seems that the panel applied the CISG pursuant to Article 1(1)(b) CISG. Pursuant to Article 19 of the Egyptian civil law, the panel applied the Egyptian law, i.e. the law of a Contracting State, since the disputed contracts were concluded in Egypt. Nevertheless, the panel did not apply CISG in replacement of the Egyptian national law; it rather applied CISG in addition to it. The present writer cannot agree with this conclusion. As the CISG is a lex specialis of international sale of goods, the panel ought to have applied it exclusively and comprehensively. The panel should have excluded the application of the Egyptian national law. It shall also be noted that the panel erred again in applying the Egyptian civil code. Even if the Egyptian national law were really applicable to the dispute, the panel should have applied the Egyptian commercial law, not the Egyptian civil law, since the former expressly cover commercial sales similar to the disputed contracts, (for more details see: El.Saghir, ibid).

The arbitral tribunal may also apply the conflict-of-laws rules of another (GCC) State. In fact, most GCC States has a similar rule to Article 59 of the Kuwaiti Law No. 5/1961 that defines the law applicable to international contracts.(107) Moreover, some GCC States has a specific conflict-of-laws rule to be applied by the arbitral tribunal in cases of international commercial arbitration. For example, Article 28 of the Bahraini Arbitration Law No. 9 for the year 1994 (like Article 28 of the 1985 Uncitral Model Arbitration Law) obliges the arbitral tribunal to apply the law pointed by the conflict-of-laws rules which it considers applicable.

III. Application of CISG to Kuwait Businesses as Lex Mercatoria:

The (new) lex mercatoria "is a supranational legal system consisting of international commercial usages and of principles and rules common to most nations."(108) It includes, inter alia, the CISG, the Unidroit Principles on International Commercial Contracts, the Principles of European Contract Law ("PECL") and Incoterms.(109) The lex mercatoria finds its subjective sphere of application in the field of contract, and particularly in contracts for international sale of

(107) For instance, see Article 19(1) of the Emirati civil transactions law and Article 27 of the Qatari civil law.

(108) Winnick, ibid, p. 847.

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

goods.(110) The lex mercatoria is generally described to be more neutral and more flexible than any particular national law.

CISG constitutes an essential part of the lex mercatoria.(111) In the Daewoo v. Farhat case, a seller from the Republic of Korea (claimant) and a buyer from Jordan (defendant) entered into a contract for the sale of clothing. The ICC Court of Arbitration, in its decision No. 1649 of 1990, concluded "that the application of the lex mercatoria would be tantamount to the application of the Vienna Convention, i.e., the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980", though CISG was not by its terms applicable to this contract.(112) In its arbitral award No. 8817 of December 1997, the ICC court of arbitration, pursuant to Article 13 (3) of the ICC Rules of Conciliation and Arbitration, decided to apply CISG and its general principles as perfectly suited to resolving the dispute between a Spanish and a Danish company over an agreement for the exclusive distribution and sale of food products.(113) In its arbitral award No. 5713 of 1989, the ICC court of arbitration, pursuant to Article 13(5) of the 1975 ICC arbitration rules, decided to take into account CISG as a source of prevailing trade usages.(114)

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(110) Davidson, ibid.

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

(112) See the presentation of this case at: http://cisgw3.law.pace.edu/cases/906149i1.html.

(113) See the full text of this Arbitral Award at: http://www.unilex.info/case.cfm?pid=1&do=case&id=398&step=FullText.

(114) See the presentation of this case at: http://www.cisg.law.pace.edu/cases/895713i1.html.

In the following, the present writer will show to which extent the CISG, as part of the lex mercatoria, may apply not only by arbitral tribunals, but also before national courts in Kuwait.

III.A. Application of CISG as Lex Mercatoria by Kuwaiti Courts

1- Choice of CISG by the Contracting Parties: National courts in most legal systems traditionally apply a law of a sovereign State to the cases involving a legal relationship with foreign element(s). They may therefore render the nomination of the lex mercatoria as the lex contractus particularly unstable. This might be the case with the Rome I Regulation (EU Regulation 593/2008) on the law applicable to contractual obligations which came into force on December 17, 2009(115). According to some doctrine, the contracting parties may not identify the lex mercatoria as the law of the contract (116)

(115) This regulation is published in (OJ no. L 177, p. 6 ff.) and also available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:EN:PDF.

(116) See the doctrine cited by: Wichard, von Johannes Christian, Die Anwendung der UNIDROIT-Prinzipien fuer internationale Handelsvertraege durch Schiedsgerichte und staatliche Gerichte, RabelsZ 60 (1996), pp.269-302, at 275. See also: Decision of the Tribunale Padova - Sez. Este (Italy), dated 11.01.2005 (Abstract), available at http://www.unilex.info/case.cfm?id=1005: "A reference by the parties to non-State rules of supranational or transnational character such as the lex mercatoria, the UNIDROIT Principles of International Commercial Contracts as well as the CISG when the Convention is not per se applicable cannot be considered a veritable choice-of-law clause by the parties …".

since Article 4 of the Rome I Regulation multiply refers to "the law of the Country".(117) Law here means residual national law only, i.e. the State-made law. The parties should therefore base their contract on the domestic law of one Sate. The selection by the parties of the CISG to be the law of the contract is not admitted; the CISG will rather incorporate in such a case into contractual terms and thus subject to mandatory rules in the domestic law applicable.(118)

In Ostroznik Savo v. La Faraona soc. coop. a r.l., decided on 11.01.2005, the Tribunale di Padova - Sez. Este (Italy) concluded that reference to the "laws and regulations of the International Chamber of Commerce" cannot amount to an implied exclusion of CISG.

(117) It clearly provides:

"1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows: (a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence; (b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence; (c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated; (d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country; (e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence; (f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence; (g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined; (h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.

2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected."

(118) Spagnolo, ibid, pp. 144-145.

According to the applicable conflict of law rules, parties are free to choose the governing law of their contract, but in so doing they must opt for a particular domestic law. A reference by the parties to non-State rules of supranational or transnational character such as the lex mercatoria, the UNIDROIT Principles of International Commercial Contracts as well as the CISG when the Convention is not per se applicable cannot be considered a veritable choice-of-law clause by the parties, but only amounts to an incorporation of such rules into the contract, with the consequence that they will bind the parties only to the extent that they do not conflict with the mandatory rules of the applicable domestic law. In the case at hand, however, even such incorporation into the contract must be excluded since the reference to the "laws and regulations of the International Chamber of Commerce of Paris, France" was clearly too vague as to permit a precise identification of any specific rule.(119)

(119) In this case, a Slovenian seller entered into a contract with an Italian buyer for the supply on a regular basis of rabbits with certain genetic qualities, raised by the seller using reproduction rabbits supplied by a third party. The contract contained inter alia a clause stating that the contract was to be governed by the "laws and regulations of the International Chamber of Commerce of Paris, France". Finding problems with the delivered animals, the buyer asked the seller to acquire the reproduction rabbits from a different company which however refused to supply the new type of rabbits to the seller on the ground that the hygienic conditions on the seller's farm were inadequate. Consequently, the seller stopped deliveries to the buyer, which declared the contract terminated. The seller brought an action asking for damages for breach of contract by the buyer. The court found that the contract was governed by CISG and in order to interpret its provisions, it referred to international case-law applying the Convention, which has to be taken into account according to its Art. 7(1), thereby ensuring an autonomous interpretation and uniform application of the said Convention. Though the contract at hand would be qualified under Italian domestic law as a contract for deliveries in installments at the buyer's requirement (so called "contratto di somministrazione"), it was to be included in the broad concept of "sale" under CISG. Moreover, CISG would be applicable according to its Art. 1(1)(a), having both parties their place of business in two different contracting States at the time of conclusion of the agreement. As to the merits of the case, the Court held that the termination of the contract by the buyer was justified. Indeed the seller's failure to continue to supply rabbits amounted to a fundamental breach which entitled the buyer to terminate the contract in accordance with Arts. 25 and 49(1)(b). It is true that according to Art. 49(1)(b) CISG the right to terminate presupposes that the non-performing party fails to deliver the goods within the additional period of time fixed by the aggrieved party or else declares that it will not deliver within that period, and that the buyer had not fixed such an additional period of time. However, the Court held that in the case at hand there was no need to fix such an additional period of time since all parties involved had known from the outset that the seller in the circumstances would not have been in a position to deliver the rabbits for several months. See http://www.unilex.info/case.cfm?id=1005.

By contrast, this is not necessarily the case under the conflict-of-laws rule in Kuwait. Article 59 of the Kuwaiti Law No. 5/1961 expressly provides that "… unless the parties agree, or the circumstances indicate, that it is intended to apply another law". Unlike the Rome I Regulation, the selection by the parties of the law applicable to their contract is not limited to a law of a Country. Hence, the parties might choose the lex mercatoria, including the CISG, as the lex contractus.(120) Such a conclusion is also supported by other jurisdictions. In its decision No. 8336, dated 16.12.1996, the Rechtbank van Koophandel, Kortrijk (Belgium) held that the contract concluded between a Belgian buyer and a French seller for the sale of cotton fabrics was governed by CISG because the parties at trial agreed on CISG as the applicable law.(121)

In addition, it is worthy here mentioning that "the developments in the area of the applicable law have been significant,"(122) e. g.

(120) Cf. Perales Viscasillas, ibid, p. 745. UCITRAL Digest, ibid, p. 6: "The Convention may be selected by the parties as the law applicable to the contract".

(121) In this case, the buyer gave notice of the non-conformity of the goods by telephone and sent back the goods to the seller about two months after delivery. In another month a notice by fax followed in which the buyer complained about the «bad quality» of the delivered goods. As the price remained unpaid, the assignee of the seller›s claim commenced an action to obtain payment of the price as well as damages and interest. The buyer counter-claimed asking for avoidance of the contract and damages.. In the Court›s opinion the buyer had lost the right to rely on a lack of conformity of the goods because it had not given notice of their non-conformity within a reasonable time after its discovery and had failed to specify the nature of the defects in compliance with Art. 39(1) CISG. As regards the time of notice, the Court found that even the first notice by telephone was late: a period of approximately two months after delivery was not reasonable, taking into account that the defects were easily noticeable and that in the trade concerned the goods are usually processed or sold quickly. With respect to the requirements for notice, the Court considered the buyer›s complaint of «bad quality» as a failure to specify the nature of the defects. The Court awarded the seller payment of the price as well as interest under Art. 78 CISG. As CISG does not specify the rate of interest payable, the Court, considering the circumstances of the case, decided to award interest at the Belgian statutory rate. Furthermore the Court, though observing that CISG does not require a formal request for payment, decided that under the circumstances of the case interest accrued from the date of the seller›s formal request for payment. See http://www.unilex.info/case.cfm?id=340.

(122) Perales Viscasillas, ibid, p. 741.

"recognition of the freedom of the parties to choose as the governing law of the contract not only the "law" but also the "rules of law""[123] The Kuwaiti court may benefit from the Draft Hague Principles on the Choice of Law in International Commercial Contracts[124] Under Article 2(1) of these Principles, "[a] contract is governed by the law chosen by the parties." Article 3 thereof clearly says: "The law chosen by the parties may be rules of law that are generally accepted on international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise." The term "rules of law" refers to non-State law[125] such as CISG.

This freedom of the parties to choose the law or "rules of law" to govern their contract is not dependent on the method of dispute resolution involved, whether before a domestic court or arbitral tribunal. In fact, Paragraph 4 of the Preamble of these Principles makes it clear that "[t]hey may be applied by courts and by arbitral tribunals."

Article 3 of the Principles recognizes that the forum State retains the prerogative to disallow the choice of "rules of law". As already pointed above, Article 59 of the Kuwaiti Law No. 5/1961 does not prohibit such a choice. Nor does any other law provision in Kuwait prevent the parties from choosing a non-State law to govern their

(123) Ibid, p. 743.

(124) See Preliminary Document No 6 – revised of July 2014 for the attention of the Council on General Affairs and Policy of the Conference, available at: http://www.hcch.net/upload/wop/gap2014pd06rev_en.pdf.

(125) Loken, Keith, A New Global Initiative on Contract Law in UNCITRAL: Right Project, Right Forum?, in: Norman J. Shachoy symposium: Assessing the CISG and Other International Endeavors to Unify International Contract Law: Has the Time Come for a New Global Initiative to Harmonize and Unify International Trade? Special journal issue, 58 Villanova Law Review (Villanova, Pa.) (2013), pp. 509-520, at 512, available on line at: http://lawweb2009.law.villanova.edu/lawreview/wp-content/uploads/2013/07/VLR403.pdf.

contract.(126) Needless to say, CISG satisfies the standard of Article 3 of the Principles: CISG entails "rules of law that are generally accepted on international … level as a neutral and balanced set of rules". Once the Kuwaiti court accepts the choice by the parties of CISG to govern their international sale of goods contract, it will recognize the best practice with respect to the party autonomy in choice of law in international contracts.

2- Application of CISG by the Court: Kuwaiti courts may also find it necessary to apply the CISG as part of the lex mercatoria in the following two cases. First, when the content of the foreign law applicable according to the conflict-of-laws rule of the forum cannot be defined: This would certainly be the case if it becomes impossible to ascertain the content of such law. In other cases, although ascertaining the content of the applicable foreign law is not per se impossible, such process may involve onerous costs and efforts and consume long time that exceeds the time limits of deciding on the case.

Under such conditions, the court may not dismiss the case; otherwise, the court would decline justice. Moreover, the court in the civil law countries, like Kuwait, may not impose upon the parties the duty to prove the applicable foreign law. Thus, the court has no other choice but to apply another law.

According to the predominant opinion, the court shall in such a case replace the foreign law with its own national law, i.e. the lex fori.(127) This opinion is questionable, however, especially when the

(126) In fact, Article 50 of the Kuwaiti Law No. 5/1961 says: "In civil and commercial matters with a foreign element, where the laws conflict, the law applicable shall be determined according to the following Articles." However, the formula of this provision, like the provision of Article 59 thereof, is general and absolute in nature. The colliding laws, at least one of them, may be a non-State law, i.e. the lex mercatoria. Also, the term "law applicable" is not necessarily limited to a State law. It may rather be a set of "rules of law".

(127) For more details, see: Dawwas, Amin, Conflict of Laws in Palestine – A Comparative Study (in Light of Jurisprudence), 2nd ed., (in Arabic), Shorok Press, 2014, pp. 302-304.

case does not have a clear connection with the forum. Therefore, according to the present writer, the court should apply CISG so long as its national law does not deprive it from doing so.(128) The reason standing behind this opinion is that CISG is a lex spisialis of sale of the goods that suits the needs of international trade much more than any domestic law.

This opinion is endorsed by the Unidroit Principles. These Principles, like CISG, are an essential part of the new lex mercatoria. According to the Preamble of the 1994 Unidroit Principles, these Principles "may provide a solution in an issue raised when it proves impossible to establish the relevant rule of the applicable law". However, the later versions of these Principles, namely the 2004 and 2010 versions, say in this regard that "[t]hey may be applied when the parties have not chosen any law to govern their contract."(129) This formula is broad enough to include not only cases in which the parties have not chosen any law to govern their contract, but also cases in which the content of the foreign law applicable cannot be defined whether it is applicable by virtue of the parties' choice or according to the other connecting factors of the conflict-of-laws rule of the forum.(130) Thus, if it proves impossible to establish the

(128) Cf. Article 37 of the Palestinian civil law draft that requires the court to do so; it clearly provides: "If the dispute relates to personal affairs, the Palestinian law shall apply when the foreign law applicable, or its content, cannot be determined. But if the dispute relates to financial transactions, the norms of private international law shall apply".
According to Jayme, "[u]niform law may not be applicable only by means of private international law. It has been suggested that uniform law supplies a subsidiary solution for cases in which the applicable foreign law cannot be ascertained ... The term <<private international law>> should be construed in a broad way. If a legal system contains procedural rules calling for the application of uniform law in cases where the applicable foreign law is not ascertainable, such rules fall within the scope of Article 1(1)(b)." See Jayme, in: Bianca / Bonell, ibid, p. 33.

(129) See the 2004 Unidroit Principles at: http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2004. See the 2010 Unidroit Principles at: http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010.

(130) For more details see Dawwas, Amin , "Sphere of Application of the Unidroit Principles 2004 to the International Commercial Contracts", (in Arabic), Journal of Law (Kuwait University), Vol. 32, No. 2 (2008), pp. 232-233.

relevant rule of the applicable law with regard to a certain issue or if the research involved would entail disproportionate efforts and / or costs, the Kuwaiti court may apply CISG (as well as the Unidroit Principles) as part of lex mercatoria to solve this issue.(131) Application of the CISG to a contract for international sale of goods in such a case would have the advantage of avoiding the application of a law (e.g. the lex fori) which will in most cases be familiar only to one of the parties.(132)

Second, when the foreign law applicable according to the conflict-of-laws rule collides with the public policy of the forum: According to the prevailing opinion amongst jurists, the law applicable here shall be the lex fori.(133) This opinion is expressly adopted by Article 73 of the Kuwaiti Law No. 5/1961.

This opinion is not convincing to the present writer since the dispute might in certain cases has a weak connection to the forum. In all events, the CISG might be the better law to govern disputes over contracts for international sale of goods than any national law. As an international convention, CISG would not collide with the public policy of the forum. Based on the same reasoning mentioned above, application of the CISG in such cases would avoid the application of a law (i.e. the lex fori) which will in most cases be familiar to one of the parties.

Needless to say, a Kuwaiti court may not do that unless Article 73 of the Kuwaiti law No. 5/1961 is changed. In this regard, Article 36 of the Palestinian civil law draft provides for the application of the private international law norms when the foreign law applicable

(131) Cf. Official Comment to 1994 Unidroit Principles, Preamble, No. 5, available at: http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-1994.

(132) Ibid. Bernasconi, ibid, p. 160.

(133) For more details, see: Dawwas, Amin, Conflict of Laws in Palestine – A Comparative Study (in Light of Jurisprudence), 2nd ed., (in Arabic), Shorok Press, 2014, pp. 341-343.

by virtue of the conflict-of-laws rule collides with the public policy in Palestine. This provision can serve as a model to the Kuwaiti law-maker for the reforming of Article73 of the Kuwaiti law No. 5/1961.

Also, CISG may be used as a basis for gap fillers when the otherwise applicable domestic law does not address the specific question.134 In a dispute involving an arbitration clause provided for the application of the Swiss law, the ICC Court of Arbitration – Zurich, in its Award dated 03.04.2009, used CISG and Unidroit Principles when deciding whether a "material breach" occurred, because this concept was not defined in Swiss domestic law. The Swiss Supreme Court upheld this Arbitral Award.(135)

(134) Gabriel, Henry Deeb, UNIDROIT Principles as a Source for Global Sales Law, 58(4) Villanova Law Review (2013), pp. 661-680, at 672, available online at: http://lawweb2009.law.villanova.edu/lawreview/wp-content/uploads/2013/07/VLR411.pdf. Winnick, ibid, p. 855. DiMatteo, ibid, p. 24.

(135) The Swiss Supreme Court says: "Das Schiedsgericht hat ausgehend von der Erwägung, dass der von den Parteien verwendete Begriff des "material breach" im traditionellen schweizerischen Vertragsrecht nicht verwendet werde, dafür gehalten, dass für dessen Auslegung die Umschreibung der wesentlichen Vertragsverletzung ("fundamental breach") nach Art. 25 WKR beigezogen werden könne, obwohl das Wiener Kaufrecht grundsätzlich nicht auf die Vereinbarung anwendbar sei und hat gleichzeitig auf Art. 7.3.1 der Unidroit Principles of International Commercial Contracts verwiesen. Es hat damit beurteilt, wie die Parteien als im internationalen Handelsverkehr tätige Unternehmen den von ihnen verwendeten Begriff verstanden bzw. verstehen durften. Das Schiedsgericht hat damit eine Vertragsauslegung nach Schweizer Recht vorgenommen und nicht entgegen der Rechtswahl der Parteien ausländisches Recht angewendet. Der Vorwurf, das Schiedsgericht habe die eindeutige Rechtswahl der Parteien missachtet und damit seine Zuständigkeit gemäss Art. 190 Abs. 2 lit. b IPRG überschritten bzw. unter Verletzung von Art. 190 Abs. 2 lit. c IPRG eine Frage entschieden, die ihm nicht unterbreitet worden sei, ist damit unbegründet." See decision of the Swiss Supreme Court No. 4A_240/2009, dated 16.12.2009, at: http://www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm.

Furthermore, the Kuwaiti courts may use the lex mercatoria, including CISG, to emphasize the interpretation of the relevant applicable (Kuwaiti) law.(136) Kuwaiti courts could benefit from the practice of other jurisdictions in this field.(137)

(136) Cf. Gabriel, ibid, p. 672.

(137) In its decision No. 2000 NZCA 350, dated 27.11.2000, the court of appeal in New Zealand found that a New Zealand corporation entered into a contract with a Japanese businessman, owner of all the shares of a business for planned development of a golf course in New Zealand, for the purchase of all these shares. The contract contained a clause according to which the payment of the last installment of the price was subject to the condition precedent that the purchaser obtains "all necessary authorizations or resource consents" for the development within a given period of time. The New Zealand corporation refused to pay the last installment on the ground that not all authorizations to which the contract clause referred had been obtained. The Japanese seller insisted on a literal interpretation of the contract clause and maintained that the condition precedent envisaged therein had been fulfilled. The Court admitted that a liberal interpretation, taking into account the parties' intention, the context of the clause and its commercial objective, would lead to a decision in favor of the New Zealand buyer. It also conceded that such a liberal interpretation would be in accordance with Article 8 of the United Nations Convention on International Contracts for the Sale of Goods (CISG), in force in New Zealand, as well as with Arts. 4.1 to 4.3 of the UNIDROIT Principles which it described as a "document which is in the nature of a restatement of the commercial contract law of the world [and which] refines and expands the principles contained in the United Nations Convention". However, while admitting that it would be desirable for the courts in New Zealand to bring the law in line with these international instruments, it ultimately opted for a literal interpretation of the contract clause on the ground that the Privy Council in London would not permit it to do otherwise, given that England had not yet adopted CISG and English common law was against liberal interpretations of contracts. See http://www.unilex.info/case.cfm?id=828.

Also, in the Manipulados del Papel y Cartón, SA vs. Sugem Europa, SL, decide by the Audiencia Provincial de Barcelona – Spain on 04.02.1997, the court found that two Spanish parties entered into a contract for the sale of glue. The seller, knowing the specific use for which the buyer needed the glue, expressly indicated the particular kind of glue to be sold to the buyer. After the glue proved inadequate for the purpose, the buyer brought an action against the seller alleging non-performance. The Court applied Spanish domestic law and observed that the seller, having known the specific use for the product sold, was at fault for not having fulfilled its contractual obligation to transfer goods fit for the use agreed or known to the seller; in deciding the issue the Court made an obiter reference to Art. 35(2) CISG, which although not applicable in the case at hand, was held to be an expression of the same principle. See http://www.unilex.info/case.cfm?id=894.

III.B. Application of the CISG as Lex Mercatoria by Arbitral Tribunals

Though the convention only applies – under Article 1 CISG - when the parties have their places of business in different Contracting States or when conflict-of-laws rules of the forum point to the law of a Contracting State, the contracting parties or arbitral tribunals can, however, give CISG provisions a broader reach.(138) CISG, as part of the lex mercatoria, may apply as the law chosen by the contracting parties or as the law selected by the arbitral tribunal itself.

1- Choice of CISG by the Contracting Parties: It is already said that the parties - under Article 182(2) KCCCP - may choose the law applicable to their contract. It is also acknowledged that the parties to the arbitration agreement may select the lex mercatoria,(139) e.g. CISG,(140) to govern their main contract. Also, Article 6 CISG itself explicitly acknowledges the principle of party autonomy. This provision authorizes the parties, inter alia, to opt-in the Convention even when the conditions for its geographical sphere of application under Article 1(1) CISG are not met.(141) Allowing the parties to choose the lex mercatoria as the law governing their contract is not essentially different from recognizing their freedom to select a na-

(138) Audit, ibid, p. 178.

(139) Cf. El-Hajaya, ibid, pp. 656, 666. El-Hawwari, ibid, p. 633. Falhout, ibid, p. 563. Omar, ibid, p. 269.

(140) Cf. Varady / Barcelo / von Mehren, ibid, p. 681, "the parties might wish their dispute to be decided in accordance with an international convention … that is not yet in force".

(141) Pro DiMatteo, ibid, p. 24, "Parties can … use the CISG as a compromise choice of law where the CISG would not be applicable".
Contra Perales Viscasillas, ibid, p. 740, "Article 6 of the CISG fails to recognize that the parties may opt into an international convention".

tional law that is not connected with the dispute – a freedom which is widely acknoledged.(142)

Thus, the arbitral tribunal shall apply CISG when it is expressly chosen by the parties to govern their contract for international sale of goods. For instance, ICC Court of Arbitration, in its Arbitral Award No. 14792, finds that: "As to the law applicable to the merits, each of the Contracts contains the following provision: 'The present Contract of sale and purchase of equipment and warranty service is interpreted according to the United Nation[s] Convention on the international sales of good[s] and for any matters not covered by such convention, it is interpreted by the legislation of Italy.' … the Tribunal thus concludes that the contractual relations between the parties are governed by the CISG and for any matters not covered by the CISG by Italian law."(143) In its Arbitral Award, No. 2319, dated 15.10.2002, the Netherlands Arbitration Institute concludes that "the parties agree on … the application of the Convention on International Sale of Goods concluded in Vienna on April 11, 1980 … to the respective contracts".(144)

Furthermore, arbitral tribunals applied CISG even in cases in which it was not so clear that the parties chose CISG. In its Arbitral Award, No. 8502, dated 00.11.1996, the ICC Court of Arbitration – Paris noticed that, the contract between a Vietnamese seller and a

(142) Varady / Barcelo / von Mehren, ibid, p. 687.

(143) http://cisgw3.law.pace.edu/cases/14792i1.html.
See also Arbitral Award of the ICC Court of Arbitration, No. 11849 of 2003, at: http://www.unilex.info/case.cfm?id=1160: "Notwithstanding the fact that the agreement was a long-term contract for distribution of goods and, as such, was not in principle covered by CISG, the Arbitral Tribunal found that CISG was applicable in the case at hand by virtue of a clause in the agreement which read: "The Arbitrator shall apply the 1980 UN Convention on the International sale of Goods for what is not expressly or implicitly provided for under the contract"." See also: Arbitral Award of the ICC Court of Arbitration – Paris, No. 9083, dated 00.08.1999, available at: http://www.unilex.info/case.cfm?id=465. Arbitral Award of the ICC Court of Arbitration – Paris, No. 11333 of 2002, available at: http://www.unilex.info/case.cfm?id=1163.

(144) Available at: http://www.unilex.info/case.cfm?pid=1&do=case&id=836&step=FullText.

Dutch buyer (acting through a French company as its agent) for the supply of rice did not contain a choice of law clause, but did provide for the application of the Incoterms 1990 (with respect to the price) and of the Uniform Customs and Practice for Documentary Credits (UCP) 500 (with respect to force majeure). In the Arbitral Tribunal's view, the reference to both the Incoterms and the UCP indicated the parties' intent that their contract be governed by trade usages and generally accepted principles of international trade. It therefore decided to apply, with respect to the issues not regulated by either Incoterms or the UCP, the CISG and the UNIDROIT Principles, as evidencing admitted practices under international trade law.(145)

In its Arbitral Award No. 9474, dated 00.02.1999, the ICC Court of Arbitration found that the arbitration clause provided that the arbitral tribunal was to decide "fairly". At the beginning of proceedings the parties accepted the arbitral tribunal's proposal to apply "the general standards and rules of international contracts". The arbitral

(145) Thus, with respect to the determination of the amount of damages, the Arbitral Tribunal referred to both Art. 76 CISG and Art. 7.4.6 of the UNIDROIT Principles in order to award claimant the difference between the contract price and the market price at the place of delivery and at the time the contract was terminated, plus interest. The Tribunal did not award the compound interest stating that the granting of compound interest is not a universally recognised principle in international trade. See http://www.unilex.info/case.cfm?id=395.

tribunal applied, inter alia, CISG as it embodies universal principles applicable in international contracts.(146)

According to Article 35 of the 2010 UNCITRAL Arbitration Rules applicable to the KCAC's arbitration, the parties may with no doubt select "rules of law" to govern their contract. This is also the case under Article 19(1) of the Arbitral Rules of Kuwait Lawyers Association's Center of Arbitration. The parties may select not only a State law, but also a non-State law to be applicable to the contract; the parties may apply the lex mercatoria to their contract. Thus, CISG,

(146) In this case, Claimant, the National Bank of Country X, entered into a contract with Defendant for the printing of bank notes. After Defendant had made a first delivery of bank notes which did not meet the quality standards set out in the contract, the Parties entered into a new agreement ("executory agreement") according to which Defendant would at its own expense manufacture another batch of bank notes on the understanding that if these notes met the contractual specifications, Claimant would place a new order for the bank notes it required. According to Claimant Defendant again failed to deliver satisfactory bank notes while Defendant insisted on getting the new order as stipulated in the second agreement. Claimant first of all claimed that the second agreement was to be considered null and void because of a fraudulent non-disclosure by Defendant of circumstances which should have been disclosed, namely that Mister X, a former employee of Claimant, who promoted the agreement, was actually paid by Defendant. In any case Claimant requested damages for faulty performance of the said agreement. The arbitration clause provided that the Arbitral Tribunal was to decide "fairly" and at the beginning of proceedings the Parties accepted the Arbitral Tribunal's proposal to apply "the general standards and rules of international contracts". The Arbitral Tribunal held that the U.N. Convention on Contracts for the International Sale of Goods (CISG) embodies universal principles applicable in international contracts. However, also in view of the fact that the second so-called executory agreement concluded between the parties was not any longer a mere sales contract but involved components of a settlement agreement, it decided to apply together with CISG "other recent documents that express the general standards and rules of commercial law" such as the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law. As to the merits of the case the Arbitral Tribunal rejected the Claimant's argument that the agreement was null and void because of fraud by Defendant arguing that it had not been sufficiently proved that Claimant had entered into the agreement with Defendant only because of Mister X's intervention who after all was at that time no longer Claimant's employee, and to this effect expressly referred to Articles 3.5 and 3.8 of the UNIDROIT Principles and to Article 4.107 of the Principles of European Contract Law. On the other hand, the Arbitral Tribunal upheld Claimant's request for damages: in rejecting Defendant's objection that Claimant had not given prompt notice of the defects of the goods and had therefore been prevented from terminating the contract, the Arbitral Tribunal expressly referred not only to Article 7.3.2 of the UNIDROIT Principles according to which notice of termination must be given "within a reasonable time", but also to Art. 40 CISG according to which a seller is not entitled to rely on a late notice of defects by buyer if it knew or ought to have known the defects itself. See http://www.unilex.info/case.cfm?id=716.

as part of lex mercatoria, may be selected by the parties as the law governing the contract.

Lex mercatoria may also be chosen by the parties implicitly when they agree to settle their dispute amicably.(147) In Kuwait there are two types of (private) arbitration: ordinary arbitration (i.e arbitration in law) and arbitration in equity (i.e. ex aequo et bono or amiable composition.(148) According to Article 182(2) KCCCP, "[t]he arbitrator's award shall be based on the rules of law, unless the arbitrator is entrusted with the mission of arbitrator in equity (amiable composition), in which case he is not bound by such rules except when they relate to public policy". Whereas the arbitral tribunal, in ordinary arbitration, is bound to determine the dispute in conformity of substantive law, it is not required to apply rules of law when working as amiable compositeur.(149) Rather, the arbitral tribunal may in the latter case apply rules of the lex mercatoria, including the CISG, when it considers fair and justice. To put it in the words of Audit, "[i]f arbitrators are not bound to apply a given domestic law, they might look to the Convention for guidance, especially when they are empowered to rule in equity as amiables compositeurs."(150)

In the ICC Court of Arbitration Final Award of March 28, 1984, in Case No. 3267, involving a dispute between a Mexican construction company and a Belgian enterprise, the amiables compositeurs used the lex mercatoria as an index of the fairness of the decision they reached using their equitable powers.(151) In its arbitral award

(147) Cf. DiMatteo, Larry A., Soft Law and the Principle of Fair and Equitable Decision Making in International Contract Arbitration, 1(2) The Chinese Journal of Comparative Law (2013), pp. 1-35, at 24, available at: http://cisgw3.law.pace.edu/cisg/biblio/dimatteo7.pdf. Abdel-A'al, ibid, p. 592.

(148) Pepper, ibid, p. 263.

(149) Pepper, ibid, p. 263.

(150) Audit, ibid, p. 178.

(151)Cited in: Davidson, ibid, fn 43 and the companying text.

No 19/1990, dated April 13, 1991, the Cairo Chamber of Commerce and Industry applied the CISG.(152) A seller from an Asian Country (claimant) and a buyer from an African Country (respondent) concluded a contract for the sale of a determined amount of grain. A dispute arose when the goods, arrived at their place of destination, were examined by a local agency and found infected with insects. According to the contract, "any dispute arising out of the implementation of the previous condition and specifications which may be confirmed shall be settled in accordance with the provisions and terms of international contracts in practice in foreign commercial transactions for the sale of such commodities. Arbitration shall be conducted in Cairo according to the UNCITRAL Arbitration Rules." The Arbitral Tribunal held that the buyer had to sustain the expenses necessary for the disinfestations of the infected goods. In reaching this conclusion, it pointed out that the parties had concluded an international C & F contract of sale, where the risk is transferred to the buyer at the time of shipping and where it is the buyer who has to prove that the defects of the goods already existed at that moment. In doing so the Arbitral Tribunal referred to Article 36 CISG(153). As the choice of law clause which expressly authorized the Arbitral Tribunal to settle the dispute "in accordance with the provisions and terms of international contracts in practice in foreign commercial transactions for the sale of such commodi-

(152) See the presentation of this case at: http://cisgw3.law.pace.edu/cases/910413e1.html. A full English text of this arbitral award is available at: http://www.unilex.info/case.cfm?pid=1&do=case&id=426&step=FullText.

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

ties" implies – according to the present writer - reference to the lex mercatoria, the Arbitral Tribunal applied the CISG (Article 36).

Likewise, in cases in which a (State) law is chosen by the parties to govern their contract, the arbitral tribunal may refer to the lex mercatoria, including CISG, to interpret provisions of the law applicable. In its Arbitral Award No. 8908, dated 00.12.1998, the ICC Court of Arbitration – Milan, when deciding the merits of the case, referred, in addition to the relevant provisions of the Italian Civil Code, to provisions contained in CISG and the UNIDROIT Principles, defining both as "normative texts that can be considered helpful in their interpretation of all contracts of an international nature".(154)

(154) In this case, an Italian manufacturer entered into a number of contracts with a Liechtenstein distributor for the supply of pipes. After the first deliveries a dispute arose between the parties each accusing the other of having breached their obligations under the contract. The parties finally entered into a settlement agreement, but soon thereafter they began arguing about the proper fulfillment of this agreement. The Arbitral Tribunal held that, while the individual sales contracts concluded under the distribution contract were governed by the CISG, the settlement agreement was governed by Italian law. However, when deciding the merits of the case, the Arbitral Tribunal repeatedly referred, in addition to the relevant provisions of the Italian Civil Code, to provisions contained in CISG and the UNIDROIT Principles, defining both as «normative texts that can be considered helpful in ther interpretation of all contracts of an international nature». In finding that a modified acceptance amounts to a counter-offer which the original offeror may accept by not objecting to the varying terms contained in the acceptance (in the case at hand, the offeror did not object to the offeree›s omission in its reply of the reference to a bank guarantee as contained in the original offer) and by starting performance of its own obligations (in the case at hand, the offeror began production of the pipes), the Arbitral Tribunal referred to Art.19(1) and (2) CISG, confirmed by Art. 2.11. of the UNIDROIT Principles. Finally, the Arbitral Tribunal addressed the question of the applicable rate of interest. It first pointed out that Art. 78 [CISG] does not lay down the criteria for calculating the interest and that international case law presents a wide range of possibilities in this respect. Then it stated that amongst the criteria adopted in various judgments, the most appropriate appears to be that of the rates generally applied in international trade for the contractual currency … In concrete terms, since the contractual currency is the dollar and the parties are European, the applicable rate is the 3-month LIBOR on the dollar, increased by one percentage point, with effect from the due date not respected up until full payment has been made. The solution substantially corresponded to the one provided for in Art. 7.4.9 (2) of the UNIDROIT Principles, though this provision was not expressly referred to by the Arbitral Tribunal. The Arbitral Tribunal did not award the capitalization of interest, since this is not provided for by the CISG and does not constitute an international trade usage. See http://www.unilex.info/case.cfm?id=401.

2- Application of CISG by the Arbitral Tribunal: The arbitral tribunal, by its own,[155] may apply to the contract disputed the lex mercatoria in addition to the law controlling the contract,[156] whether chosen by the contracting parties or otherwise applicable.[157] Article 27(2) of the Kuwait Chamber Rules of Arbitration Procedure says: "The arbitral tribunal may decide over the dispute according to … the prevailing trade usages …". According to Article 35 of the 2010 UNCITRAL Arbitration Rules applicable to the KCAC's arbitration, "the arbitral tribunal shall take into account any usage of trade applicable to the transaction". Article 19 (2) of the Arbitral Rules of Kuwait Lawyers Association's Center of Arbitration requires the arbitral tribunal to take into consideration "commercial practices and usages". Article 12 of the GCC Centre's Charter and Article 29 of its Arbitral Rules of Procedure give the arbitral tribunal the power to apply to the merits "the local and international business usages".[158] In fact, Article 29 of the GCC Arbitral Rules of Procedure goes a step forward: It equates this source with other sources that the arbitral tribunal has to consider when determining the dispute,[159] i.e. contract terms, the law chosen by the parties, and the law having most relevance to the issue of the dispute in accordance with the rules of the conflict of laws deemed fit by the Tribunal. The arbitral tribunal might obviously apply the CISG provisions in so far as they reflect trade usages.[160]

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(155) Mshemesh, ibid, p. 183.

(156)Falhout, ibid, p. 572. Abdel-Wahab, Mohammad Salah-Eddin, The Determination of Law Applicable to Arbitration Agreement in the Comparative Private International Law, 3 Journal of Arab Arbitration (October 2000), pp. 13-35, at 32. Omar, ibid, pp. 273-274.

(157) Mshemesh, ibid, p. 183.

(158) Similarly, Article 28(4) of the Bahraini arbitration law No. 9 for the year 1994 says: "".

(159) Falhout, ibid, p. 572, (Article 29 of the GCC Arbitral Rules of Procedure considers "the local and international business usages" an essential source for determining the dispute).

(160) Cf. Busit, ibid, p. 227.

In arbitration practice, it is evident that "the almost universal recognition of the CISG as a suitable set of rules to govern international sale of goods contracts between traders with different legal systems had led some arbitral tribunals to consider the application of the CISG as trade usages".(161) In its Arbitral Award No. 5713/1989, the ICC Court of Arbitration - Paris, found that, as the contract contained no choice of law clause, it determined the applicable law in accordance with Art. 13(3) ICC Rules, and found that the law of the country of the seller was the proper law governing the contract. According to Art. 13(5) ICC Rules the court was required to take account of the relevant trade usages. The court found: '[that] there is no better source to determine the prevailing trade usages than the terms of the United Nations Convention on the International Sale of Goods of 11 April 1980, usually called the 'Vienna Convention'. This is so even though neither the [country of the Buyer] nor the [country of the Seller] are parties to that Convention.'(162)

(161) Perales Viscasillas, ibid, p. 755.

(162) In this case, a seller and a buyer concluded in 1979 three contracts for the sale of goods. As agreed, the buyer paid, upon presentation of the shipping documents, 90% of the price with the balance to be paid later. The goods of the second contract did not conform with the contract specifications. After treating the goods in order to make them more saleable, at considerable expense, the buyer sold the goods to third parties. The seller commenced arbitration proceedings claiming the balance of the purchase price (10%) remaining due under each of the contracts. The buyer counterclaimed alleging that the seller›s claim should be set off against its direct losses, financial costs and lost profit and interest. The court held that CISG reflected the generally recognized trade usages regarding the matter of non-conformity of the goods in international sales. Referring to Art. 38(1) CISG, the court found that the buyer had examined the goods within as short a time as practicable, in this case before shipment, and had given notice of the lack of conformity to the seller within a reasonable time (8 days after publication of the expert›s report of the examination) (Art. 39(1) CISG). Further the court held that the seller was not entitled to rely on the provisions of Arts. 38 and 39 CISG as it knew or it could not have been unaware of the lack of conformity and did not disclose the lack of conformity to the buyer (Art. 40 CISG). The court awarded the seller the full amount claimed and set it off against part of the counterclaim of the buyer. See http://www.unilex.info/case.cfm?id=16.

In 1976 the Islamic Republic of Iran and a US company entered into a contract according to which the latter was to provide electronic communications equipment and related services for a military program. The contract was subject to the laws of Iran and United States. Iran did not pay a substantial part of the price for the work performed by the seller. In order to mitigate its damages, the seller sold to third parties the equipment not yet delivered after notifying Iran of its intention to do so. The Tribunal, after establishing that the seller had the right to sell the undelivered equipment in mitigation of its damages under the laws governing the contract, stated that such a right was 'consistent with recognized international law of commercial contracts', which the Tribunal considered to be reflected by Art. 88 CISG. The Tribunal found that in the case at hand the conditions of Art. 88(1) CISG were satisfied: i.e. there was unreasonable delay by the buyer in paying the price, without the buyer giving satisfactory assurances that payment would be forthcoming, and the seller gave reasonable notice of its intention to sell with two letters to which the buyer never responded. Moreover, the Tribunal stated that the seller was entitled to deduct from the proceeds of the sale of the goods to third parties its reasonable expenses in carrying out the sales, including costs for the completion and modification of the equipment (Art. 88(3) CISG).(163)

(163) See the Arbitral Award of the Iran-United States Claims Tribunal. No. 370 (429-370-1), dated 28.07.1989 at: http://www.unilex.info/case.cfm?id=38.

In other situations, the arbitral tribunal may by its own apply the lex mercatoria when the parties failed to select the law applicable(164) The courts in Civil Law countries are not reluctant to enforce an arbitral award rendered according to the lex mercatoria.(165) In its arbitral award No. 50, dated 3.10.1995, the Cairo Regional Centre for International Commercial Arbitration (CRCICA) applied international trade usages to the dispute; it concluded that "the contracting party may not be given an absolute freedom to delay the performance of his obligation regardless of the nature of transaction, type of the goods, trade usages, particularly international trade usages, and legitimate interest of the other party".(166)

In particular, the arbitral tribunal can apply CISG as expression of the lex mercatoria.(167) For instance, Article 35(1) of the 2010 UNCITRAL Arbitration Rules applicable to the KCAC's arbitration says that, failing a choice by the parties of the law or rules of law applicable, this law shall be the one "the arbitral tribunal … determines to be appropriate". Likewise, Article 27(1) of the Kuwait Chamber Rules of Arbitration Procedure requires the arbitral tribunal to apply to the dispute, in the absence of a law chosen by the parties, "the substantive rules of the law it deems most closely connected to the dispute." Also, Article 29(3) of the GCC Centre's Arbitral Rules of Procedure, as read together with Article 12 of the GCC Centre's Charter, obliges the arbitral tribunal to settle the dispute in such a case pursuant to "the law having most relevance to the issue of the dispute in accordance with the rules of the conflict of rules

(164) El-Hawwari, ibid, p. 633. Omar, ibid, p. 272.
(165) Busit, ibid, p. 232.
(166)See this arbitral award at: http://www.eastlaws.com/Tahkeem/Tahkeem_View.aspx.
(167) Cf. Gabriel, ibid, p. 672.

deemed fit by the Tribunal". Accordingly, the arbitral tribunal has a broad discretion power in determining the law or the rules of law applicable.(168) The arbitral tribunal might apply CISG if "the arbitral tribunal … determines to be appropriate", as "the substantive rules of the law it deems most closely connected to the dispute", or as "the law having most relevance to the issue of the dispute", i.e. the most suitable law to govern disputes arising from contracts for international sale of goods.

The arbitration practice shows that CISG was applied by tribunals as part of the lex mercatoria. According to DiMatteo, the arbitral tribunals inherently favor CISG for many reasons. First, the drafters of CISG represented the all major legal systems of the world. Second, its rules provide a fair balance between seller and buyer rights. Third, CISG provides a source of neutral, non-State rules enabling arbitrators to accomplish their goal to render fair and reasonable awards.(169)

(168) Cf. El-Hajaya, ibid, p. 675. El-Awwa, ibid, p. 70.

Contra El-Ahdab & El-Ahdab, ibid, p. 139, "[f]ailing an agreement by the parties on the law applicable to the dispute, the arbitrators choose the applicable law …. The arbitrators cannot apply the "rules of law" but must apply the text of a determined law." Mshemesh, ibid, pp. 179-180.

(169) DiMatteo, ibid, p. 35.

In its Arbitral Award No. 7331/1994, the ICC Court of Arbitration – Paris, based on Art. 13(3) ICC Rules, held that the contract was governed by general principles of international commercial practice and accepted trade usages, and as such, by CISG, which reflects those principles and usages.(170)

(170) In 1989 a Yugoslav seller and an Italian buyer concluded a contract for the sale of cow hides. The contract provided that the buyer would give the seller notice of the lack of conformity of the goods within one month of their arrival, together with an expert statement. Upon their arrival in Italy the goods were examined by the expert, who apparently found them defective. The buyer failed to give notice thereof to the seller. Subsequently the parties held a meeting in Moscow, also attended by the Russian supplier of the seller. The parties agreed that the buyer would immediately pay part of the price due, while the remaining amount would be paid 30 days later. In the meantime the Russian supplier should inspect the goods in Italy and possibly pay the buyer›s debt. The Russian supplier failed to proceed with the agreed examination. The buyer then informed the seller that, due to the Russian supplier›s omission, it was released from the obligation to pay the remaining part of the price: in its opinion the Moscow agreement amounted to a true novation of the original obligation to pay, by virtue of which the Russian supplier assumed the debt, releasing the buyer. Finally the buyer sold the allegedly non-conforming goods. Pursuant to Article 13(3) ICC Rules, the arbitral tribunal applied CISG as reflection of general principles of international commercial practice and accepted trade usages. Moreover CISG was applicable as the parties had their places of business in Contracting States (Art. 1(1)(a) CISG). The Tribunal noted that as CISG is silent with regards to novation, this question is to be solved in compliance with the relevant principles and rules common to the domestic laws related to the dispute. A novation, in fact, differs from a mere modification of the contract, dealt with in Art. 29 CISG: while Art. 29 CISG, in stating that a contract may be modified by mere agreement of the parties, replaces the common law rule requiring new consideration for a modification agreement to be binding, the doctrine of novation demands proof of the 'animus novandi' of the parties. In order to ascertain whether the parties actually had an 'animus novandi', the Tribunal applied Art. 8 CISG, noting that it reflects rules of interpretation generally accepted. In the Tribunal's opinion, notwithstanding its literal wording, Art. 8 CISG can be applied to cases when negotiations result in the simultaneous signature of a writing by the parties. The Tribunal, taking into consideration the wording of the Moscow agreement and all relevant surrounding circumstances as required by Art. 8(3) CISG, held that the parties did not intend to novate their relationship releasing the buyer from its obligations under the original contract. As to the matter of lack of conformity of the goods, the Arbitral Tribunal stated that the buyer had lost its right to rely on a lack of conformity, since it had not given notice of the defects within the contractual period (Art. 39 CISG); moreover, since the defective nature of the goods was easy to discover, the contractual notice period was reasonable. The buyer could not either rely on Art. 44 CISG, since it had not provided evidence of having a reasonable excuse for its failure to give timely notice. The Tribunal thus decided in favor of the seller, who was also awarded interest. As CISG does not determine the rate of interest, the arbitral tribunal applied the interest effective for commercial matters in the creditor's country. See http://www.unilex.info/case.cfm?id=140.

Also, in the Arbitral Award of the ICC Court of Arbitration – Paris, No. 8817, dated 00.12.1997 that concerned an agreement for the exclusive distribution and sale of food products between a Spanish and a Danish company, the arbitral tribunal noticed that contract did not contain a choice of law clause. As a dispute arose between the parties, the arbitral tribunal, pursuant to Article 13(3) of the ICC Rules of Conciliation and Arbitration, decided to apply the provisions of the 1980 United Nations Convention on Contracts for the International Sale of Goods and its general principles, now contained in the UNIDROIT Principles of International Commercial Contracts, [as] perfectly suited to resolving the dispute.(171)

Again, when the arbitral tribunal applies CISG to the merits, it shall take into consideration trade usages by virtue of Article 9 CISG. "Trade usage, of course, is a key element of the lex mercatoria".(172)

(171) Hence, the arbitral tribunal referred to Art. 9(1) CISG, confirmed by Art. 1.8 of the UNIDROIT Principles, relating to the binding character of the parties› established practices, and to Art. 77 CISG, confirmed by Art. 7.4.8 of the UNIDROIT Principles, embodying the principles under which a party suffering harm must take steps to mitigate it. See http://www.unilex.info/case.cfm?id=398.

(172) Winnick, ibid, p. 861.

IV. Conclusion:

Although Kuwait is not a Contracting Party to CISG, this Convention can apply in Kuwait to contracts for international sale of goods. Under Article 1(1)(b) CISG, if the conflict-of-laws rule applicable leads to the application of a CISG Contracting State's law, the court or arbitral tribunal shall apply the Convention as part of that law.

Besides, the Kuwaiti courts should apply CISG as expression of the lex mercatoria. Once the parties select CISG as the law applicable to their contract, the court should recognize such a selection in order to cope with the significant development in the field of the applicable law. It is already accepted that the parties can choose either a State law or rules of law to govern their contract.

The Kuwaiti courts may also apply CISG when the content of the foreign law applicable cannot be ascertained or when the application of this law would collide with public policy in Kuwait. In order to make things clearer, however, the Kuwait law-maker should do some reforms, including the adjustment of Article 73 of the Law No. 5/1961.

The arbitral tribunal sitting in Kuwait should apply CISG, too. As a set of rules most suitable to govern contracts for international sale of goods, CISG shall apply as an expression of lex mercatoria, whether it is selected by the contracting parties or the arbitral tribunal itself. Finally, for this reason, Kuwait is advised to accede to CISG. This would allow not only the indirect application of the Convention in Kuwait (Article 1(1)(b) CISG), but also its direct application (Article 1(1)(a) CISG).

References

- Abdel-A'al, Okasha Mohammad, The Law Applicable to the Merits of Commercial Arbitration and the Effect of Non-Compliance with it by Arbitral Tribunal (in Arabic), The United Arab Emirates University 16th Conference on (International Trading Arbitration), 28-30 April 2008, pp. 583-617, available at: http://slconf.uaeu.ac.ae/prev_conf/arabic_prev_conf2008.asp.

- El-Ahdab, Abdel Hamid & El-Ahdab, Jalal, Arbitration with the Arab Countries, 3rd revised and expanded ed., Walters Kluwer Law & Business,

- Audit, Bernard, The Vienna Sales Convention and the Lex Mercatoria, in: Lex Mercatoria and Arbitration, Thomas E. Carbonneau ed., rev. ed. [reprint of a chapter of the 1990 edition of this text], (Juris Publishing 1998), pp. 173-194, at 175, also available at: http://www.cisg.law.pace.edu/cisg/biblio/audit.html.

- El-Awwa, Mohammad Salim, The Law Applicable to Arbitration Disputes (in Arabic), 10 Journal of Arab Arbitration (September 2007), pp. 65-72.

- Bell, Kevin, The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods, 8 Pace International Law Review (1996), pp. 237-258, also available at: http://www.cisg.law.pace.edu/cisg/biblio/bell.html.

- Bernasconi, Christopphe, The Personal and Territorial Scope of the Vienna Convention on Contracts for the International Sale of Goods (Article 1), 46 Netherlands International Law Review (1999), pp. 137-170, also available at: http://www.cisg.law.pace.edu/cisg/biblio/bernasconi.html.

- Borisova, Bojidara, Geographic Sphere of Application of the United Nations Convention on Contracts for the International Sale of Goods, Pace essay submission (September 2002), available at: http://www.cisg.law.pace.edu/cisg/biblio/borisova.html.

- Bridge, Michael G. Uniform and Harmonized Sales Law: Choice of Law Issues, in: James J. Fawcett, Jonathan M. Harris & Michael Bridge, International Sale of Goods in the Conflict of Laws, Oxford University Press (2005), pp. 908-988, also available at: http://www.oup.com/uk/catalogue/?ci=9780199244690, and at: http://www.cisg.law.pace.edu/cisg/biblio/bridge.pdf.

- Busit, Obaid S., The Determination of Applicable Law in International Commercial Arbitration, The United Arab Emirates University 16th Conference on (International Trading Arbitration), 28-30 April 2008, pp. 199-242, available at: http://slconf.uaeu.ac.ae/prev_conf/arabic_prev_conf2008.asp.

- Davidson, Matthew T., The Lex Mercatoria in Transnational Arbitration: An Analytical Survey of the 2001 Kluwer International Arbitration Database, available at: http://www.cisg.law.pace.edu/cisg/biblio/davidson.html.

- Falhout, Wafa Mazeed, The Legal System Applicable in the Framework of International Commercial Arbitration (in Arabic), The United Arab Emirates University 16th Conference on (International Trading Arbitration), 28-30 April 2008, pp. 551-581, available at: http://slconf.uaeu.ac.ae/prev_conf/arabic_prev_conf2008.asp.

- Ferrari, Franco, Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing, 15 Journal of Law and Commerce (1995), pp. 1-126, also available at: http://www.cisg.law.pace.edu/cisg/biblio/2ferrari.html.

- Ferrari, Franco, PIL and CISG: Friends or Foes? in ŞIPKA/ YILDIRIM (eds.) “Sales Contracts under the New Turkish Code of Obligations and the CISG”, XII Levha Publishing Co., Istanbul (2012), pp. 43-116, also available at: http://www.cisg.law.pace.edu/cisg/biblio/ferrari.html.

- Gabriel, Henry Deeb, UNIDROIT Principles as a Source for Global Sales Law, 58(4) Villanova Law Review (2013), pp. 661-680, available online at: http://lawweb2009.law.villanova.edu/lawreview/wp-content/uploads/2013/07/VLR411.pdf.

- El-Hajaya, Noor Hamad, The Law Applicable to the Dispute Under Arbitration (in Arabic), The United Arab Emirates University 16th Conference on (International Trading Arbitration), 28-30 April 2008, pp. 653-681, available at: http://slconf.uaeu.ac.ae/prev_conf/arabic_prev_conf2008.asp.

- El-Hawwari, Ahmed Mohammad, The Position of the Arab Legislations Regarding New Approaches in Arbitration with Concentration on the Position of the UAE Civil Procedures Code and the United Draft Law on Arbitration (in Arabic), The United Arab Emirates University 16th Conference on (International Trading Arbitration), 28-30 April 2008, pp. 619-652, available at: http://slconf.uaeu.ac.ae/prev_conf/arabic_prev_conf2008.asp.

- Herber, in: von Caemmerer / Schlechtriem (editors), Kommentar zum Einheitlichen UN-Kaufrecht - CISG - [Commentary on Uniform UN-Sales Law - in German], München: Beck, 2nd ed. (1995).

- Honnold, John O., Uniform Law for International Sales under the 1980 United Nations Convention, 3rd ed., Kluwer Law International (1999).

- Jayme, Article 1, in: Bianca, C. M. / Bonell, M. J. eds., Commentary on the International Sales Law, Giuffrè: Milan (1987).

- Kreindler, Richard H., An Overview of the Arbitration Rules of the Recently Established GCC Commercial Arbitration Centre, Bahrain, 12 Arab L. Q. (1997), also available at: Heinonline.

- Loewe, Roland, The Sphere of Application of the UN Sales Convention, X Pace International Law Review X (1998), pp. 79-88, also available at: http://www.cisg.law.pace.edu/cisg/biblio/Loewe.html.

- Lookofsky, Joseph, The 1980 United Nations Convention on Contracts for the International Sale of Goods, in J. Herbots editor & Blanpian, R. general editor, International Encyclopedia of Laws – Contracts, Suppl. 29 (December 2000), pp. 1-192, also available at: http://www.cisg.law.pace.edu/cisg/biblio/lookofsky.html.

- Mshemesh, Jafar, Arbitration in Commercial, Civil and Administrative Contracts and Grounds for Setting Aside the Arbitral Tribunal and its Legal Effect, Zein El-Hoqouqiya, 2009.

- Omar, Nabil Ismaeel, Arbitration in International & National and Civil & Commercial Matters, Dar El-Jamia'a El-Haditha, 2011.

- Pepper, William F., Foreign Capital investment in Member States of the Gulf Cooperation Council, Considerations Issues and Concerns for Investor, Part I, 6 Arab L. Q. (1991), pp. 231-266, also available at: Heinonline.

- Perales Viscasillas, Mª del Pilar, Applicable Law, The CISG, and The Future Convention on International Commercial Contracts, 58(4) Villanova Law Review (2013), pp. 733-760, at 739, available online at: http://lawweb2009.law.villanova.edu/lawreview/wp-content/uploads/2013/07/VLR415.pdf.

- Réczei, László, The Rules of the Convention Relating to its Field of Application and to its Interpretation, in: Problems of Unification of International Sales Law, New York: Oceana (1980), pp. 53-103, also available at: http://www.cisg.law.pace.edu/cisg/biblio/reczei2.html.

- Rosett, Arthur, Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods, 45 Ohio State Law Journal (1984), pp. 265-305, at 273, also available at: Heinonline

- Schlechtriem, Peter, Requirements of Application and Sphere of Applicability of the CISG, Victoria University of Wellington Law Review (2005/4), pp. 781-794, at p. 782, also available at: http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem9.html.

- Siehr, in: Honsell (editor), Kommentar zum UN-Kaufrecht. Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf (CISG) [Commentary on the CISG article by article - in German], Berlin/Heidelberg/New York: Springer (1997).

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

- Varady, Tibor / Barcelo, John J. / von Mehren, Arther T., International Commercial Arbitration, A Transnational Perspective, 5th ed. (American Casebook Series), WEST - a Thomson Reuters business, 2012.

- Winnick, Kyle, International Commercial Arbitration, Anticipatory Repudiation, and the Lex Mercatoria, 15 Cardozo J. Conflict Resolution (New York, NY) (2014), pp. 847-887, available online at: http://cardozojcr.com/wp-content/uploads/2014/04/Winnick.pdf.

- Winship, Peter, The Scope of the Vienna Convention on International Sales Contracts, in: Galston/Smit ed., International Sales, New York: Matthew Bender (1984), ch. 1, pp. 1-53, also available at: http://www.cisg.law.pace.edu/cisg/biblio/winship5.html.