Applicable Law, the CISG and the future Convention on International Commercial Contracts

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Swiss Proposal and a future instrument

– “(i) whether UNCITRAL can undertake an assessment of the operation of the 1980 Convention on Contracts for the International Sale of Goods and related UNCITRAL instruments in light of practical needs of international business parties today and tomorrow,

– (ii) to discuss whether further work both in these areas and in the broader context of general contract law is desirable and feasible on a global level to meet those needs”
What form the instrument should take?

– An issue which is usually related to the degree of compromise the States are willing to accept in regard to the substance of the instrument.

– **MODEL LAW**: opting in instrument for the States

– **SOFT LAW INSTRUMENT**: opting in instrument optional for the parties

– **INTERNATIONAL CONVENTION**
PLAN B FOR UNCITRAL

– An International Convention for distribution contracts

– Doubts about CISG application to Distribution Contracts and thus uncertainty for the parties in regard to the determination of the applicable law

– CISG rules are not fully apt to international distribution contracts
PARTY AUTONOMY IN CISG

– Art. 6 CISG: opting out
– What about opting in?
– “PRIVATE INTERNATIONAL LAW”: Art. 1.1.b) and 7.2 CISG.
– It is not an “autonomous” concept within CISG: PIL of the forum
RECOGNITION OF PARTY AUTONOMY IN THE NEW INSTRUMENT

- Draft Hague Principles on the Choice of Law in International Contracts as approved by the November 2012
- Similar purposes as to UPIC
FREEDOM OF CHOICE OF LAW

1. A contract is validly governed by this Convention if chosen by the parties as the law applicable to the contract either to the whole contract or only part of it.

2. The choice of law of a State that is part of this Convention implies also its application if the rest of the conditions for its applicability are met.

3. A choice of law of this Convention, any modification of a choice of law, or its exclusion, must be made expressly or appear clearly from the provisions of the contract or the circumstances.

4. A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties.

5. A choice of law does not refer to rules of private international law of the law chosen by the parties unless the parties expressly provide otherwise.
APPLICATION OF CISG: ART.1

(1) 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 (Indirect application)

–Art.95 CISG reservation
APPLICATION OF CISG by a Judge or an arbitrator


-Unpredictable method and artificial

-Arbitrator: not bound by Art.1.1.b)

Arbitrators does not have a “forum”

Different choices for applying conflict of laws systems: conflict of law rule the arbitrator considers more appropriate.
MODERN ARBITRATION LAWS/RULES

- Article 1.1b) superfluous

- Direct application of the Law
  
  - ICC ARBITRATION RULES (2012):
    
    In the absence of the agreement of the parties, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.
FUTURE CONVENTION

Absent a choice of law by the parties, this Convention applies to contracts 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 of the forum lead to the application of the law of a Contracting State; or

(c) when the rules of private international law considered to be applicable by the arbitrators lead to the application of the law of a Contracting State; or

(d) when the judge or the arbitral tribunal consider this Convention to be the appropriate applicable law.