

CISG as a Governing Law to an Arbitration Agreement

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Abstract

Purpose – This paper studies whether the CISG is applicable to the arbitration agreement when the validity of the arbitration agreement becomes an issue. To make the study clear, it limits the cases assuming that the governing law of the main contract is the CISG and the arbitration agreement is inserted in the main contract as a clause. Also, this paper discusses only substantive and formal validity of the arbitration agreement because the CISG does not cover the questions of the parties' capacity and arbitrability of the dispute.

Design/methodology – This paper is based on scholarly writings and cases focusing on the principle of party autonomy, formation of contract and the doctrine of separability to discuss characteristic of arbitration agreement. In analyzing the cases, it concentrates on the facts and reasonings that show how the relative regulations and rules are interpreted and applied.

Findings – The findings of this paper are; regarding substantive validity of arbitration agreement, the courts and arbitral tribunals consider general principles of law for the contract and the governing law for the main contract. In relation to formal validity of arbitration agreement, the law at the seat of arbitration or the law of the enforcing country are considered as the governing law in preference to the CISG because of the recognition and enforcement issues.

Originality/value – This paper attempts to find the correlation between the CISG and the arbitration agreement. It studies scholars' writing and cases which have meaningful implication on this issue. By doing so, it can provide contracting parties and practitioners with some practical guidelines about the governing law for the arbitration agreement. Furthermore, it can help them to reduce unpredictability that they may confront regarding this issue in the future.

Keywords: Arbitration Agreement, Governing Law, The Doctrine of Separability, Party Autonomy

JEL Classifications: K12, K40

1. Introduction

Since the United Nations Convention on Contracts for the International Sale of Goods (hereinafter the CISG) was adopted in 1980 and entered into force in 1988, it has been evaluated as a successful unified international law for the sale of goods with over 94 contracting states.¹ There are numerous scholarly writings about interpretation and application of the CISG and a large number of cases are resolved by the CISG as a governing law applicable to merits of disputes in international commercial transactions. There is no doubt about status of the CISG because the statistics show that it is regularly chosen by arbitral tribunals as a substantive governing law.² A substantive governing law which applies to the merits of disputes is relatively clear to determine because it is closely related to a main contract. As a substantive governing law, the CISG is applicable when both parties' business

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places are located in contracting states unless they agreed otherwise;³ or when “the rules of private international law lead to the application of the law of a contracting state”;⁴ or when the parties expressly agreed on the CISG as a governing law.⁵ Another case is when the arbitral tribunals choose it because they believe that it is neutral to apply the CISG because it is outside any particular state’s judicial system.

When it comes to a governing law for an arbitration agreement, however, determination of governing law is not simple. In many cases, while contracting parties agree on a substantive governing law applicable to the contract itself, they usually do not do so for the arbitration agreement. In fact, it is quite rare for contracting parties to realize that they might need to agree on a governing law for their arbitration agreement, especially when it exists in their contract as one of clauses. Most parties believe that the governing law for their main contract will be applicable to their arbitration agreement, but their belief is not always right. The governing law for the main contract does not become the governing law for the arbitration agreement. The scope of these two laws are different and a different law from one of the main contract might be applicable to the arbitration agreement.

The governing law for an arbitration agreement becomes an issue when there is a dispute between parties regarding the validity of the arbitration agreement. The cases are as follows; whether parties agree to arbitrate (substantive validity of arbitration agreement); whether an arbitration agreement fulfills formal requirement (formal validity of arbitration agreement); whether the dispute is within the scope of arbitration agreement (arbitrability); whether the parties are capable of making an arbitration agreement (the capacity of the parties). In those cases, the arbitral tribunal must determine which law is applicable among the following laws; the law of the place of arbitration, the law of the place where the arbitral proceedings commence, the law of the place where the arbitral award is enforced, the law applicable to the main contract, or one specific international uniform law. Although determining the applicable law for the arbitration agreement is important and this issue has been discussed widely in both academic and practical area, there are no widely accepted rules for it yet.

Despite several possibilities for the governing laws applicable to the arbitration agreement, this paper studies the case where the governing law of the main contract is the CISG and the arbitration agreement is inserted in the main contract as a clause. The question for this paper is whether the CISG is applicable to the arbitration agreement when the validity of the arbitration agreement becomes an issue. As the CISG does not cover the questions of the

¹ Last visited in May, 2021.

https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status

² The leading CISG databases show that 25% out of published decisions are arbitral awards. Twenty-five percentage is not a big figure, but considering confidentiality of arbitration and most arbitral awards are not open publicly, the figure will be far higher. cf. Pace-CISG Database [www.cisg.laq.pace.edu], CLOUT [www.uncitral.org/uncitral/en/case_law.html]. L. Mistelis, in Kroll, L.Mistelis & P.Perales Viscasillas (Eds.), UN Convention on Contracts for the International Sale of Goods (CISG), c.h.Beck, Munich, 2011, Art.1, para.18;Schmidt-Adrendts, p.213.

³ CISG Article 1(1)(a).

⁴ CISG Article 1(1)(b).

⁵ Actually, the data shows that the CISG is chosen by arbitral tribunals most as a substantive governing law for the contract for sales of goods in international commercial arbitration. The reasons are as follows; first, because the arbitral tribunals chose the CISG (57% out of the published cases), second, in accordance with conflict of laws (22%), third, because contracting parties chose it in their main contract (11%), and lastly, by applying general principles the CISG was selected (2%). The reason for the rest 8% was not discussed.

parties' capacity and arbitrability, this paper discusses only substantive and formal validity of the arbitration agreement.

In practice, when business people conclude their contract, they usually do not prepare the situation where a dispute arises in the future. They pay more attention to terms and conditions of the main contract. Once a dispute arises, however, they encounter many complicated and unexpected matters like how the dispute would be settled, what would be the governing law for the contract and so on. Furthermore, if there is an arbitration agreement irrespective of whether they originally intended or not, the situations get more complicated. The purpose of this study is to provide contracting parties and practitioners with some guidelines about governing laws for the arbitration agreement when there is no agreement on it between parties. It will study scholars' writings and cases which have meaningful implication. By doing so, it will help them to reduce unpredictability about the future that they have never thought to confront during their business.

2. Intention to Arbitrate

Arbitration is one of private dispute resolution systems excluding a national judicial system. It is based on a private contract relationship between parties. Under the principle of freedom of contract, parties can agree on whatever they wish including the way of settling a dispute unless it is against a law. Unlike other conditions, agreeing to arbitrate means more than what it says; existence of valid arbitration agreement means that the parties are prohibited to bring their case to the court, which means they cannot ask the court to solve their dispute even if they want to do so later. Therefore, the requirements for the valid arbitration agreement are stricter than any other conditions of sales contract; basically, there must be consent between parties and it should be clearly proved. The fact that the arbitration agreement exists does not prove that there is consent between the parties. Consent between the parties should be made conscientiously. In a case where there is unconscionability, either procedural or substantive, arbitration cannot commence.⁶ So, recognizing consent between the parties is crucial for determination of the valid arbitration agreement and which law is applicable to this issue is also important. As mentioned above in the Introduction, unlike the main contract for sales of goods, parties do not usually agree on a governing law separately for their arbitration clause inserted in their sales contract. Therefore, in this part, when the CISG is a governing law for the main contract, whether it is also applicable for determination of the parties' intention will be discussed.

2.1. The Principle of Party Autonomy

Parties can freely agree to arbitrate. Once there is a valid agreement, arbitration may commence and an award is rendered after arbitral proceedings without involvement of the judicial system. Freedom for the arbitration agreement comes out from the arbitral autonomy and it is based on the principle of private autonomy or the principle of party autonomy.⁷ In

⁶ "A Validity of Consumer Arbitration Agreement – Focusing on U.S. Cases", Eunok Park, *The International Commerce and Law Review*, Vol.77, 2018. 2, p.47.

⁷ "Arbitral Autonomy: The Concept and Scope", Kyung Han Sohn, *Sungkyunkwan Law Review*, Vol.24, No.3, 2012.09, p.6.

the past, when arbitration was denied and not approved as a proper dispute resolution system, parties' freedom to agree to arbitrate was not granted even though the principle of freedom to contract was fully recognized. The Volt case,⁸ however, approved the arbitral autonomy excluding a national judicial system. This case held that parties may agree on whatever they want in arbitration confirming the principle of freedom of contract. As a result, arbitration was finally approved as a proper contract between the parties.

The arbitral autonomy is different from the principle of party autonomy in international private law; while the freedom to agree on a governing law is denied in a judicial system, most arbitration laws allow parties to determinate a governing law in their arbitration agreement.⁹ This is one of advantages in international arbitration system and the CISG also approves the principle of party autonomy¹⁰ as a basic principle. Consequently, when contracting parties choose a specific governing law, the nominated law will be applicable. By doing so, they can apply the law which they are familiar with and secure legal certainty as well as predictability when a dispute arises.¹¹ When we discuss about the governing law for an arbitration agreement, the issues is related to validity of arbitration agreement (whether the arbitration agreement is concluded validly); that is to say, it is all about formation and effect of arbitration agreement¹² and the governing law for this determination becomes important. That is why the parties' intention is crucial upon determining its validity of arbitration agreement.

In practice, it is quite unusual for the contracting parties to agree on a governing law for their arbitration agreement separately from their main contract. In most cases, they agree on a governing law for their main contract as a substantive governing law, but not one for the arbitration agreement which is inserted as a clause in the main contract. As mentioned before, this paper will consider the case where the governing law for the main contract is the CISG. For the circumstances where the CISG is a governing law for the main contract, two cases can be considered; (i) the case where contracting parties intentionally agree to apply the CISG as a governing law in their main contract, (ii) the case where contracting parties for the sales of goods are from the contracting States to the CISG so that the CISG becomes a governing law according to Article 1(1)(a) of the CISG. For the second case, the parties should exclude the CISG expressly if they do not want it because most jurisdiction approve express exclusion only.¹³ In both cases, if contracting parties do not expressly agree not to apply the CISG to

⁸ *Volt Information Science, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 109 S. Ct. 1248 (1989). The Volt case said that what the parties agree in their arbitration agreement becomes rules and law for their own customized arbitration. "Cases and Materials-Arbitration Law and Practice" 6th ed. Thomas E. Carbonneau, American Casebook Series, West. p.196.

⁹ Kyung Han Sohn, op. cit., p.15

¹⁰ The principle of party autonomy means that parties can choose a governing law for formation and validity of contract either expressly or impliedly. Cf. "The Party's Autonomy Principle on the Choice of the Applicable Law to International Commercial Arbitral Awards", Seog-Ung O, Journal of Arbitration Study, Vol.17, No.1, The Korean Association of Arbitration Studies, 2007.03, p.120.

¹¹ Mun Hwa-kyung, "The Application of the CISG as the Substantive Law in International Commercial Arbitration", International Trade Law, No.112, Ministry of Justice, 2013.08, p.87

¹² As mentioned in the Introduction part, this paper will discuss validity of arbitration agreement separately in terms of contents (whether there is consent to arbitrate between parties) and form (whether an arbitration agreement is fulfilled formal requirement). The latter is not be discussed here. It will be done in the next chapter (Chapter III. Formality of Arbitration Agreement).

¹³ It works in the same way in Korea. So, if parties want to exclude the CISG, they should expressly state a certain law with its exact official name. Cf. Lee Hea-Min, "10 years after the United Nations Convention on International Sales of Goods (CISG) came into effect-the trends and implications on our cases", Supreme Court Law Review, Vol.61, 2015, pp.242-243.

their arbitration agreement, it may be interpreted that the parties' intention to apply the CISG to their main contract will extend to their arbitration agreement.¹⁴ By applying the principle of party autonomy, the parties' intention to apply the CISG for their main contract may conclude that the parties' consent to apply the CISG to their main contract expresses their intention to apply the same law to their arbitration agreement.¹⁵

In order to determine parties' intention and confirm the formation of arbitration agreement, it should be interpreted according to the general principle and rules for formation of contract. Since an arbitration agreement is also a kind of contracts, the governing law for an arbitration agreement should be determined by international private law rules.¹⁶ No matter how it leads to the CISG, once the CISG is applicable to the arbitration agreement in determining its validity, Article 8 (it is about interpretation of statements or other conduct of a party), 18 and 19 (they provide regulation about acceptance) of the CISG need to be interpreted.

2.2. Formation of Arbitration Agreement

Determining whether a valid arbitration agreement exists is a starting point for arbitration because arbitral tribunal's jurisdiction only comes from a valid arbitration agreement. The *Filanto v. Chilewich case*¹⁷ is one of outstanding U.S. cases for formation of contract and provides meaningful implications for this topic. Upon determining the validity of arbitration agreement, the court applied the CISG in confirming parties' intent. Its brief account is as follows.

The Chilewich's agent in London and a Soviet Import-Export Association (Raznoexport) concluded a contract. According to the contract, Chilewich, a New York export-import company, was to supply footwear to Raznoexport, so Chilewich contracted with Filanto, an Italian footwear manufacturer, to perform the contract between its agent and Raznoexport. The dispute was brought to the federal court for Southern District of New York by Filanto claiming Chilewich's breach of contract. Here, the first issue was existence of arbitration agreement; Filanto and Chilewich used the original contract between Chilewich's agent and Raznoexport and it contained the arbitration clause. Filanto, however, claimed that the arbitration clause was not part of their contract because they only accepted some provisions (like packing, shipment and acceptance) among those in the original contract. In the process of contract formation, several correspondences were exchanged. On March 13, 1990, Chilewich sent the Memorandum Agreement which expressly incorporated the terms and conditions of the Chilewich-Raznoexport contract, but Filanto did not reply like signing and returning the Memorandum at that time. After Chilewich opened a letter of credit in favor of Filanto (on May 7, 1990), however, Filanto returned the Memorandum with its signature and

¹⁴ See Na-Hee Han & Choong-Lyong Ha, "An Interpretation of the Formation of Arbitration Clause for International Sale of Goods", *Journal of Arbitration Study*, Vol.27, No.4, 2017.12, pp.96~97

¹⁵ When parties do not express the governing law for their arbitration agreement, their implied intention may be interpreted. There are two opinions; one is that the governing law for the main contract should be applied to their arbitration agreement, and the other is that the law of place of arbitration should be considered first. Cf. Lee Kang-Bin, "A Study on the Role of Party Autonomy in Commercial Arbitration", *Journal of Arbitration Study*, Vol.19, No.2, The Korean Association of Arbitration Studies, 2009, p.12.

¹⁶ Mun Hwa-kyung, "An Analysis of Interrelated Factors Affecting Jurisdiction in International Commercial Arbitration", *Justice*, Vol.136, Korean Society of Law, 2013, p.201.

¹⁷ *Filanto, S.p.A. v Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1241 (S.D.N.Y. 1992)

a cover letter stating that they would be bound only some provisions such as packing, shipment and acceptance (on August 7, 1990).

Against Filanto's claim as to the existence of arbitration agreement, Chilewich argued that the Memorandum Agreements which was sent on March 13, 1990 to Filanto was an offer and Filanto's acceptance was expressed by its act of accepting a letter of credit which was issued by Chilewich. So, Chilewich insisted that the contract was concluded between them and the arbitration clause inserted in the Memorandum Agreement was also valid.

The court found that because U.S.A and Italy are contracting states to the CISG, the CISG was applicable as a federal law by Article 1(1) (a) and mentioned two articles; the court used Article 8(3) to ascertain the parties' intent to conclude a contract and Article 81(1) of the CISG to make clear 'the severability principle.' By applying Article 8(3) to this transaction, the court believed that the contract was concluded without any doubt. The court specially emphasized that the severability of dispute resolution clauses should be understood as "severable"; it means that dispute resolution clauses are not separate from the main contract at the beginning and they are subject to the same rules just like those of contract formation. Dispute resolution clauses are severable when the validity of main contract becomes a matter of dispute, so they are not affected by its result. Consequently, arbitration clauses inserted in main contract agreements are not separate, but severable.¹⁸

The Epic-Centre v. La Palentina case also applied Article 18(1) and (3) of the CISG to confirm the existence of arbitration agreement; The claimant (buyer) sent a confirmation of sale which included an arbitration clause and the defendant (seller) sent a reply by a telefax which included a copy of the confirmation of sale. After the arbitral award was rendered, when the buyer sought recognition and enforcement of arbitral award, the seller claimed that there was no valid arbitration agreement. The Spanish Supreme Court held that the CISG governed this case and according to Article 18 (1) and (3), the contract was concluded validly because the seller replied to the buyer's confirmation without any modification to it and the acceptance was made by certain acts. Consequently, the arbitration agreement was included in the contract and the seller's claim for non-recognition was denied.

As to application of the CISG to an arbitration agreement, there are some questions about the scope of application. To what extent does the CISG, as a substantive law, govern in arbitration? ; is the CISG only applicable to an arbitration agreement when an international sale of goods is governed by the CISG? Or does it govern formation of arbitration agreement? Or is it also involved in enforcement and recognition of arbitral award? Lastly, does it regulate arbitral proceedings? Among these questions, one clear answer is that the CISG is applicable to only formation matter if the international sales of contract are subject to the CISG.¹⁹ A contract is concluded by an offer and an acceptance; one party can make an offer and the other party has chances to make objections to the original conditions. Unless these objections are material terms, the contract is concluded without a change. According to Article 19 (3) of the CISG, the provision for the settlement of disputes is one of material provisions of the contract, so if one party does not object to an arbitration agreement proposed by the other party, not only the main contract (contract for sales of goods) but also the arbitration

¹⁸ Dmytro V. Vorobey, "CISG and Arbitration Clauses: Issues of Intent and Validity", *Journal of Law & Commerce*, Vo.31 (2012-2013). p.141.

¹⁹ Most scholars who support this view also approve the freedom of formality based on Article 11 of the CISG. As to the formality of arbitration agreement, it will be discussed in the next chapter.

agreement are validly concluded.²⁰ In conclusion, the general rules in the CISG regarding formation of contracts are applicable only when the formation of an arbitration agreement included in sales contracts are issues such as whether there are offer and acceptance to conclude a contract expressing 'external consensus'.²¹

*Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb*²² is a recent case by the German Federal Court of Justice (BGH) regarding the issue of whether the CISG is applicable to the arbitration agreement. The German buyer and the Dutch seller concluded a contract for the sales of spices. As a reply to the buyer's order for 1,500kg of mace flowers, the seller sent a confirming letter referring to the general terms of Dutch Spice Association (NVS terms) and the NVS terms included a dispute resolution clause. Even though the seller referred to the NVS terms, he did not actually attach it to the confirmation letter and the buyer did not sign to the confirmation letter. When a dispute arose, the buyer brought the case to the German courts and the seller asserted existence of arbitration agreement in the NVS terms and objected against the Jurisdiction.

In assessing whether there was a valid arbitration agreement between the parties, rejecting the jurisdiction of the court, the court recognized the governing law. Although the NVS terms stated that the law of the Netherlands was a governing law expressly excluding the application of the CISG, the court applied the CISG as a governing law because both parties are from the CISG contracting states. The court held that the NVS terms were not considered as a part of the contract because, without attaching it, the mere reference to the NVS terms in the confirmation letter was not sufficient enough to express one's intention. Therefore, according to Article 8(2) and (3) of the CISG, the court held that there was no indication for a mutual agreement between the parties during the parties' negotiation, so the NVS terms did not constitute a component part of the contract.

Next, regarding the validity of arbitration agreement included in the NVS terms, the court held that it should be determined separately from the main contract (the doctrine of separability). In this case, as there was no expressly chosen governing law for the substantive validity of the arbitration agreement, the law of the place of arbitration became a governing law; the Netherlands was a place of arbitration, so the law of Netherlands would

²⁰ Janet Walker, "Agreeing to Disagree: Can we Just Have Words? CISG Article 11 and the Model Law Writing Requirement", *Journal of Law and Commerce*, Vol.25, 2005, p.163.

²¹ Robert Koch, "The CISG as the Law Applicable to Arbitration Agreements?", in Camilla B. Andersen & Ulrich G Schroeter eds. [Sharing International Commercial Law across National Boundaries], Simmons & Hill Publishing, 2008, p.271.

'External consensus' is one of the most important factors to be considered when existence of arbitration agreement is an issue. In *Lucky-Goldstar Int'l (H.K.) Ltd. V. Ng Moo Kee Eng'g Ltd.*, 2H.K.L.R. 73 (H.C. 1993), parties concluded a contract which included the arbitration clause stating, "in a third country, under the rule of a third country and in accordance with the rules of procedure of the International Commercial Arbitration Association." When a dispute arose, the plaintiff brought a case to the Hong Kong court claiming that the arbitration agreement was not valid because it referred to an unspecified third country, a non-existent organization or non-existence rules. The court, however, held that the arbitration agreement was valid because, even though the place of arbitration, arbitral institution and arbitral rules were not specified, the parties' intention to arbitrate was sufficiently indicated. This case did not apply the CISG to determine the validity of arbitration agreement, but it showed the clear attitude of the court regarding interpretation of parties' intention expressed in the arbitration agreement. Dmytro V. Vorobey, "CISG and Arbitration Clauses: Issues of Intent and Validity", *Journal of Law & Commerce*, Vol.31, 2012-2013, p.142.

²² *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 (<http://globalarbitrationnews.com/the-supreme-court-in-enka-v-chubb-on-the-law-applicable-to-the-arbitration-agreement-the-buck-stops-here/>)

be applicable. Here, the court recognized the CISG as the Dutch law for cross-border sales agreements; the domestic law of the Netherlands is only applicable for domestic transactions. In regardless of application of the CISG to the substantive validity of the arbitration agreement in this case, the court dismissed the seller's objection against the jurisdiction of the court because of the lack of formal requirements of the arbitration agreement.²³ This case is somehow different from the above cases in terms of the grounds for application; the CISG became the governing law not by parties' consent or by Article 1 of the CISG but by Article V(1)(a) of the New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

2.3. The Doctrine of Separability

Most states (jurisdictions) approve the doctrine of separability even though there are some differences in its interpretation and application.²⁴ In applying and interpreting the separability principle, there are two issues; first, when the main contract is invalid, does the arbitration agreement inserted in the main contract also become invalid? Second, when there is a governing law for the main contract, is it also applicable to the arbitration agreement inserted in the main contract? For the first issue, the answer is clear; the arbitration agreement is not affected by invalidity of the main contract. If the arbitration agreement which exists for the settlement of dispute between the parties is dependent on the main contract, it will cause another unpredictable dispute. So, as far as the first question is concerned, there is no argument on it. The second one is, however, an ongoing issue. Although the arbitration agreement can be separate from the main contract under the separability principle, it is a part of the main contract and there is no doubt that they have a close relationship.

Whether the arbitration agreement exists or not is a matter of consent and the arbitration agreement has contractual elements such as obligations generated from the agreement.²⁵ So, in this sense, the validity of arbitration agreement is determined by the general principles of contract law and the CISG is applicable for substantive formation of arbitration agreement.²⁶ Moreover, parties can agree on the governing law for the arbitration agreement and if there is no such express agreement on the governing law, it may be interpreted that they impliedly agree to apply the governing law for the main contract to their arbitration agreement.²⁷

Some scholars, however, object to this view claiming that most rights and obligations given by the arbitration agreement have procedural characters.²⁸ In the circumstance where the

²³ As this part discusses the application of the CISG to the substantive validity of arbitration agreement, the reasons for dismissal will not be discussed here. They will be dealt with in the next chapter (Chapter III. Formality of Arbitration Agreement).

²⁴ Restatement of U.S. Law of International Commercial Arbitration, No.4 (2015), §2-7 Separability of Arbitration.

²⁵ Whether the arbitration agreement is substantive or procedural one is still debatable. Cf. Morten M. Fogt, "The Interaction and Distinction Between The Sales and Arbitration Regimes-The CISG and Agreement or Binding Practice to Arbitrate", *American Review of International Arbitration*, Vol.26, 2015, pp.382-383.

²⁶ *Golden Valley Grape Juice & Wine, LLC v. Centrisys Corp.*, 2010 WL 347897.

²⁷ Sohn Kyung-Han, "Arbitral Autonomy: The Concept and Scope", *SungKyunKwan Law Review*, Vol.24, No.3, The Institute of Legal Studies. Vol.24, No.3, 2012, p.10.

²⁸ Morten M. Fogt, "The Interaction and Distinction Between The Sales and Arbitration Regimes-The CISG and Agreement or Binding Practice to Arbitrate", *American Review of International Arbitration*, Vol.26, 2015, pp.382-383.

arbitration agreement is inserted in the main contract as one of clauses and the CISG is a governing law for the main contract, if there is no express agreement between the parties regarding the governing law for the arbitration agreement, the arbitral tribunal may determine the governing law in accordance with rules of international private laws. Judges and scholars who are taking this opinion believe that the arbitration agreement is independent and separable from the main contract so that the governing laws for the arbitration agreement and the main contract should not be considered to be connected. As discussed before, in *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* case, the court applied New York Convention in determining the governing law to the arbitration agreement and according to Article II(2) of New York Convention, the law of the place of arbitration became the governing law.²⁹

The doctrine of separability is regulated in Article 16 (1) of the Model Law (UNCITRAL Model Law on International Commercial Arbitration)³⁰ and most national arbitration laws have comparable provisions. This principle implies that the different law from the main contract may be applicable to the arbitration agreement.³¹ Even when the arbitration agreement is inserted in the main contract as a clause, the court does not always extend the effect of the governing law for the main contract to the arbitration agreement.³² The fact that the arbitration agreement is not automatically governed by the law of the main contract becomes clearer under article 1 through 3 of the CISG. They regulate the scope of application in details and it is definitely limited to contracts for sales of goods. Consequently, it may be odd to apply the CISG to the arbitration agreement, which is not about sales of goods and separable from the main sales contract.³³

3. Formality of Arbitration Agreement

A valid arbitration agreement is inevitable for not only commencement of arbitration proceedings but also enforcement or recognition of arbitral awards. The validity of arbitration agreement should be confirmed in two ways, substantive and formal validity. In this part, the formal validity will be discussed. The New York Convention and most national laws including the Model Law regulate the formal validity requirements; they require an

²⁹ *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38

³⁰ Article 16(1): "... an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

³¹ Stefan Kroll, "Selected Problems concerning the CISG's Scope of Application", *Journal of Law and Commerce*, Vol.25, 2005. 06, p.45.

³² *XL Insurance Ltd v. Owens Corning*, (2000) 2 Lloyd's Rep.500 (Q.B.) (U.K.)

³³ When the parties do not agree on the governing law to their arbitration agreement, in determining the governing law to the arbitration agreement, Rober Koch discusses it by dividing the cases into two. First, in the case where the arbitration agreement is inserted in the main contract as a clause, the governing law to the main contract is applicable to the arbitration agreement if the arbitration agreement is included in the course of offer-acceptance process and the main contract is concluded validly. Second, when the arbitration agreement is not included in the main contract, if a dispute arise after the main contract is concluded, the governing law to the arbitration agreement is determined by either the parties' agreement or rules of international private laws. Cf. Robert Koch, "The CISG as the Law Applicable to Arbitration Agreements?", p.282 in Camilla B. Andersen &Ulrich G Schroeter eds., *Sharing International Commercial Law across National Boundaries*, Simmons & Hill Publishing, 2008, pp.267-286.

agreement in writing. The New York Convention limits the scope of agreement in writing by providing a list of examples in Article II (2), such as an arbitral clause inserted in a contract or a separate arbitration agreement signed by the parties. This provision does not correspond to modern commercial practices, which approve informal contracts, but the New York Convention also provides a way of escaping rigid formal validity requirements in Article VII.³⁴

Reflecting modern commercial practice, the Model Law (2006) becomes less strict in formal validity requirements for the arbitration agreement by providing two options in Article 7 and allows the States to choose whatever they prefer when adopting it; option I requires an arbitration agreement in writing, but “in writing” requirement is fulfilled as long as its contents are recorded in any form. Option II does not require any formal requirement at all. As a result, when the law of the Model Law Country is a governing law to the arbitration agreement, recognition or enforcement of arbitral award under the New York Convention will not confront any difficulty; Article VII of the New York Convention allows the law of the Model Law Country to be applicable and “in writing” requirement is satisfied as long as the parties sufficiently prove that they agree to arbitrate.³⁵ Moreover, in a case of an oral agreement, some courts may allow a witness testimony if it is necessary to prove that there is sufficient record for consent between the parties.³⁶

Regardless of the form of the main contract, either a written or an oral contract, when a dispute is submitted to arbitration the arbitral tribunal needs to determine the formal validity of arbitration agreement. If the contracting parties agree on the governing law for the arbitration agreement, the arbitral tribunal determine the formal validity of arbitration agreement by applying the agreed law. This is simple and clear. In a case where the arbitration agreement forms a part of the main contract as one of clauses, however, the governing law for the arbitration agreement becomes an issue. The following laws can be considered as a governing law; the law of main contract, the law of seat of arbitration, the law of the enforcing or recognizing country. As to the applicable law for determination of formal validity of arbitration agreement, in practice, the governing law for the main contract is deemed to be a governing law for the arbitration agreement inserted in the main contract, unless the contracting parties agreed otherwise.³⁷ Therefore, if the contracting parties agree on the CISG as an applicable law for their main contract, or the CISG becomes the governing law for their main contract according to Article 1(1) of the CISG, the CISG will be the governing law for the arbitration agreement. Here, the question is whether the CISG can be applicable for determination of the formal validity of arbitration agreement.

The CISG does not deal with formal requirements for the arbitration agreement. The CISG is a unified law for contracts for sales of goods. With interpretation of Article 1-3 of the CISG, it becomes clear that the CISG does not intend to regulate the formal requirements of the arbitration agreement. If the arbitration agreement is concluded after a dispute has been arisen as a separate and independent contract from the main contract, the CISG will be rarely

³⁴ Nina Tepes, “The More Favorable Right Provision of Art. VII of the New York Convention and Its Application to the Form of the Arbitration Agreement”, CROATIA Arbitration Year Book, Vol.12, 2005, p.126.

³⁵ Peter Kucherepa, “Reviewing Trends and Proposals to Recognize Oral Agreements to Arbitrate in International Arbitration Law, American Review of International Arbitration, Vol.16, 2005, p.416.

³⁶ H. Small Limited v. Goldroyce Garment Ltd. [1994], 2 H.K.L.R. p.526 (H.C.).

³⁷ Leonardo Graffi, “The Applicable to the Validity of the Arbitration Agreement: A Practitioner’s View”, in Conflict of Laws in International Arbitration 19, Franco Ferrari & Stefan Kroll eds., 2011. p.36.

applicable even when the CISG is a governing law for the main contract. As the main contract and the arbitration agreement are separate and independent contracts, there is no need to discuss whether the governing law for the main contract is applicable to the arbitration agreement.³⁸

On the contrary, in a case where the arbitration agreement is included in the main sales contract and the governing law for the main contract is the CISG, the CISG may be extended for application and interpretation of the arbitration agreement.³⁹ The CISG mainly governs formation and performance of contracts for sales of goods. As to the formation of contracts, the CISG concerns more about the process of how the contract is concluded by mechanics of offer and acceptance. It is more related to the substantive validity of arbitration agreement discussed before. As for the formality of the contract, however, there is only one provision, Article 11. In applying Article 11 of the CISG, it says that “a contract of sale need not be concluded in or evidenced by writing and is not subject to any requirement as to form”. It seems that the CISG does not regulate any formal requirement for contracts approving even oral contracts, but it also provides an escape. For the States that require certain forms for contracts, the CISG allows them to avoid Article 11. Article 12 of the CISG states that the Contracting States may require a written agreement for their contract by making declaration for Article 11 under Article 96 of the CISG. Originally, Article 12 was drafted for states which have socialist legal systems making these countries to ratify the CISG, but it seems to bring an effect that it would not cause any difficulty in applying the CISG for determination on the formal validity of arbitration agreement.⁴⁰

What about the case where the CISG becomes the governing law for the main contract by the agreement of the parties and declaration of Article 96 is not made? In this case, if the arbitration agreement is included in the main contract and there is no separate agreement on the governing law for the arbitration agreement, is the CISG applicable to the arbitration agreement? Without declaration for Article 96, Article 11 is applicable to determine formal validity and it does not regulate any formal requirement. It means when the contracting parties conclude an oral contract for the sale of goods and it includes the arbitration agreement as a clause, the formal validity of the main contract is not threatened under the CISG. The issue here is, however, the validity of the oral arbitration agreement. Even though the CISG, as a governing law for the main contract, is applicable to the arbitration agreement by being extended from the main contract, there is a doubt in the formal validity of the oral arbitration agreement because it is yet too much advanced to accept an oral arbitration agreement valid. Even though the assent to the offer can be indicated by performing act under Article 18(3) of the CISG, most jurisdictions require clear manifestation of consent for a valid arbitration agreement.⁴¹ Under the CISG, the contract for sales of goods can be concluded

³⁸ In a case where the arbitration agreement is not included in the main contract because it is concluded after the dispute has arisen, other national laws would be a governing law to the arbitration agreement and ‘a writing requirement’ is widely accepted irrespective of the form of the main contract. Therefore, the CISG does not need to be considered as a governing law. Cf. Kroll, S “Selected Problems Concerning the CISG’S Scope of Application”, *Journal of Law and Commerce*, Vol.25, 2005/06. p.42.

³⁹ According to Article 19(3) and 82(1) of the CISG, the arbitration agreement which is inserted in the main contract governed by the CISG is subject to the CISG. Cf. Janet Walker, *op. cit.*, p.163.

⁴⁰ Robert Koch, “The CISG as the Law Applicable to Arbitration Agreements?”, in Camilla B. Andersen & Ulrich G Schroeter eds., *Sharing International Commercial Law across National Boundaries*, Simmons & Hill Publishing, 2008, p.272.

⁴¹ Dmytro V. Vorobey, “CISG and Arbitration Clauses: Issues of Intent and Validity”, *Journal of Law & Commerce*, Vol.31, 2012, p.138.

without any exchange of documents between the parties and obligations may be performed by the parties. For the arbitration agreement, however, it is not common for most jurisdictions to approve the arbitration agreement which is concluded without any exchange of documents.⁴² By the doctrine of separability, the arbitration agreement may survive when the main contract becomes invalid unlike other conditions, but in an oral contract, the result may appear the other way around; when other conditions in the contract are valid the arbitration agreement becomes invalid.⁴³

The formal validity of the arbitration agreement becomes more important at the stage of recognition or enforcement of arbitral awards. Under Article II of the New York Convention, the arbitration agreement must be in writing. The reason for the writing requirement in the arbitration agreement is to make sure the parties' intentions; whether both contracting parties actually agree to arbitrate. In spite of the rigid formal requirement for the arbitration agreement, New York Convention also provides an escape for the countries which approve informal arbitration agreements by Article VII.⁴⁴ Article VII gives the parties a chance to rely on more favorable laws or treaties of the country where the arbitral award is recognized or enforced. So, if the laws of the country where enforcement is sought are more liberal than those of the New York Convention, and for example, if the law of the enforcing country is the CISG, the writing requirement in Article II cannot deprive the winning party of a right to enforce the arbitral award.⁴⁵ On the contrary, there are some scholars who argue that Article II should be applied more strictly and would prohibit the winning party from seeking enforcement with the arbitral award rendered under the informal arbitration agreement.⁴⁶

At the stage of recognition or enforcement, both the law of the seat of arbitration and the law of enforcing country are important. When the award has been set aside by the law of where the award was made, the recognition or enforcement of the arbitral award may be refused under Article V(1)(e). Also, when recognizing or enforcing the arbitral award is against the public policy of enforcing country, the arbitral award may be also refused under Article V(2)(b). If the law of the seat of arbitration does require certain formality for the arbitration agreement, the arbitral award rendered based on the informal arbitration agreement may be set aside. The result will be same when the arbitral award is brought to the enforcing country if the law of enforcing country does not allow the informal arbitration agreement. Consequently, several laws come into play for determination of formal validity of the arbitration and the result is rather complicated and unpredictable.

4. Conclusion

Determining the governing law for the international commercial arbitration agreement is not simple in theory and practice especially when the arbitration agreement is included as a

⁴² In *Frey v. Cuccaro e Figli*, the court held that when the confirmation of sale was not signed and returned, the arbitration agreement inserted in that document was not valid and enforceable even if the *lex loci* did not require its written form. Cf. *Frey v. Cuccaro e Figli*, (Ct. App. Napoli 1976) in *The Year Book of Commercial Arbitration*, Vol.1, p.193.

⁴³ Janet Walker, *op. cit.*, p.155.

⁴⁴ Dmytro V. Vorobey, "CISG and Arbitration Clauses: Issues of Intent and Validity", *Journal of Law & Commerce*, Vol.31, 2012, p.151.

⁴⁵ Nina Tepes, *op. cit.*, p.126.

⁴⁶ Janet Walker, *op. cit.*, p.162.

clause in the main contract.⁴⁷ The governing law for the arbitration agreement becomes important when there is controversy on its validity, and in the context of international commercial arbitration, several laws may appear if there is explicitly or impliedly no agreement on it between the contracting parties. First of all, the arbitral tribunal may consider general principles of law for the contract and the governing law for their main contract. In this process, the CISG may be determined as a governing law for the arbitration agreement in spite of the doctrine of separability. In this case, the scope of application is limited to the formation of arbitration agreement because the CISG regulates only the formation of contracts and both contracting parties' right and obligation for performance of contracts. In governing the formation of arbitration agreement, again, it is limited again to its substantive validity focusing on the process of formation-whether there is consensus between the contracting parties. So, when the governing law of the main contract is the CISG, most courts and arbitral tribunal apply the CISG to determine whether the arbitration agreement, as a clause in the main contract, is concluded validly by applying 'the offer-acceptance regulations' in the CISG. Adding to it, they also consider the parties' intention of submitting their future dispute to arbitration by applying Article 8 of the CISG.

When the formal validity of the arbitration agreement is an issue, the governing law for the arbitration agreement becomes more complicated. Since the formal validity is related to recognition and enforcement of arbitral award at the end, the law at the seat of arbitration and the law of the enforcing country should be also considered. Since the New York Convention and most national arbitration laws recognize 'writing' requirement, application of Article 11 of the CISG may cause risk for non-recognition and non-enforcement of arbitral awards. The freedom from form requirement under Article 11 should be applied and interpreted within the scope of the process of an agreement to arbitrate. In order for the arbitral award to be enforced, non-unified national arbitration laws such as the law at the seat of arbitration or the law of the enforcing country should be applied in preference to the CISG as a special law.

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⁴⁷ In a case of a separate and independent arbitration agreement concluded after the dispute arises, although it is not a common case, its governing law would be agreed between the contracting parties.

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