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The CISG as the Law Governing the Arbitration Agreement: A Step Too Far?

Abstract: The relationship between the United Nations Convention on Contracts for the International Sale of Goods (CISG) and arbitration agreements reveals a structural tension between uniform sales law and the doctrine of separability in international arbitration. While the CISG clearly governs the formation of international sales contracts, its possible extension to arbitration clauses embedded within such contracts remains controversial. The issue arises only in specific settings: where the substantive contract is governed by the CISG, where the parties have chosen the CISG or the law of a Contracting State, or where the Convention applies by virtue of Article 1 CISG. In such circumstances, courts and arbitral tribunals must determine whether the Convention governs only the sales contract or also aspects of the arbitration agreement.

The paper argues that this question cannot be answered by reference to separability alone. Although the arbitration agreement is autonomous from the underlying contract, that autonomy does not preclude the application of CISG rules to questions concerning the making of the clause. The decisive issue is whether the matter in dispute concerns formation or formal validity. The paper therefore distinguishes between, on the one hand, offer, acceptance, incorporation of standard terms, material alteration under Article 19, and interpretation under Articles 8 and 9 CISG, and, on the other hand, formal validity, arbitrability, and recognition or enforcement under the New York Convention and the *lex arbitri*.

Against that background, the paper examines the principal positions in the literature and defends a selective approach. It argues that the CISG may legitimately govern formation-related questions concerning arbitration clauses embedded in international sales contracts, including whether such clauses were proposed, accepted, incorporated, or interpreted as part of the parties' agreement. At the same time, the Convention should not be treated as a comprehensive regime for the arbitration agreement. Once the inquiry moves from assent to formal validity and arbitration-specific external controls, the CISG yields to the New York Convention, the law of the seat, and other applicable arbitration rules.

This conclusion is supported by the Convention's own structure, particularly Articles 14–24, 19, 8, and 9 CISG, as well as by case law addressing the formation and interpretation of arbitration clauses in international sales relationships. Properly confined in this way, the CISG can coexist coherently with arbitration law without undermining the autonomy of the arbitration agreement.

Keywords: CISG; arbitration agreement; formal validity; applicable law; contract formation.

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