E. The principle of party autonomy in practice

- **The principle of party autonomy**
- **Some practical aspects of party autonomy**
  - (1) The battle of the forms (CISG's legal design : "last shot rule")
  - (2) Opting in of CISG by parties (of non-Contracting States)

E. The principle of party autonomy in practice

- **The principle of party autonomy**

Party autonomy: important principle in both CISG and arbitration

CISG : Art. 6 guarantees the parties autonomy by establishing that the parties can exclude the application of the CISG or modify any of its provisions. This gives the parties a great deal of freedom as to how they would like the CISG rules to govern their contractual relationship

Arbitration : Art. 1511 CPC : „The arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties or, where no such choice has been made, in accordance with the rules of law ir considers appropriate. In either case, the arbitral tribunal shall take trade usages into account."

E. The principle of party autonomy in practice

- **The principle of party autonomy**

  - Party autonomy used by arbitrators as an interpretive standard for filling contractual gaps

  - Filling of contractual gaps for matters not governed by the CISG (**external gaps** in the sense of **article 4**) in the absence of a choice of law

  - Filling of contractual gaps for matters governed by the CISG, but not expressly settled (**internal gaps** in the sense of **art. 7**)

E. The principle of party autonomy in practice

- **The principle of party autonomy**

Filling of contractual gaps for matters not governed by the CISG (external gaps in the sense of article 4) in the absence of a choice of law

According to **article 4 CISG**, the Convention is not concerned with the validity of the contract, its provision or usage and the effect, which the contact would have on the property in the goods sold.

- In this case **subsidiary national law applies**, which must be **interpretated by the light of the CISG**
- If the parties have **not chosen a subsidiary national law**, the question arises of **how the State Court or the arbitral tribunal will determine the applicable law.**

E. The principle of party autonomy in practice

- **The principle of party autonomy**

Filling of contractual gaps for matters not governed by the CISG (external gaps in the sense of article 4) in the absence of a choice of law

Article 1511 CPC focuses on **party autonomy in a triple way**:

- This provision entitles the arbitrator in the case the parties have not chosen the applicable law to their contractual relationship **to apply the rules of law they consider "appropriate"**
- This provision gives the arbitrator a great deal of flexibility (rules of law -> lex mercatoria and UNIDROIT principles)
- The tribunal will always **try to act in accordance with the explicit, implicit or presumed will of the parties** (e.g. trade usages)

E. The principle of party autonomy in practice

- **The principle of party autonomy**

  Filling of contractual gaps for matters governed by the CISG, but not expressly settled (**internal gaps** in the sense of art. 7)

  - Article 7 CISG deals with the issue of (internal) gaps in the contract regarding matters governed by the Convention, but not expressly settled by the latter
  - In this case, the gaps in the contract must be filled by referring to general principles of the Convention
  - In absence of these principles, national law must be applied (e.g., amount of the interest for default interests)

E. The principle of party autonomy in practice

- **Practical aspects of party autonomy**
  - (1) The battle of the forms : Last shot rule
  - (2) Opting in of CISG by parties established in non-Contracting States

E. The principle of party autonomy in practice

- **(1) The battle of the forms: definition**

The definition of the battles of the forms

- In international transactions, the situation can arise in which the **parties use standard form contracts containing conflicting general conditions**
- Each party will **try to impose their general conditions** in order to ensure their applicability

- The legal framework of the CISG regarding the battle of the forms can be found under **article 19**
  The first paragraph of article 19 CISG is based on the **mirror-image rule**.
- In order to conclude a contract, an offer and an acceptance must correspond in all aspects. When the latter contains additions or alterations it must be considered as a counter-offer and not an acceptance.
- **Article 19 (2) CISG** tries to soften the severity of the mirror-image rule by allowing additional or different terms when the offeree's communication was intended to be an acceptance, the terms of the acceptance do not materially alter the terms of the offer and the offeror does not orally object to the altered terms
- - However additional or different terms relations to the essential terms of general conditions (e.g.jurisdiction or arbitration clause) are considered to alter the terms of the offer materially (**art. 19 (3) CISG**)

E. The principle of party autonomy in practice

- **(1) The battle of the forms : legal conception**

  - **The last-shot rule as a complex legal conception**:

    - It can be a complex challenge for the courts to determine what the exact terms of the contract are (**art. 8 (2) CISG**)
    - Both scholars and case law consider **that article 19 (2) CISG incorporates the so-called « last-shot rule »**
    - According to this rule, the **terms contained in the last submitted form must be applied to the contract**
    - The last-shot rule is based on the idea that if **no valid objection** has been made within a reasonable period of time, **the party has tacitly accepted the terms**
    - Consequently, **the last person who sends its form** is in control of the terms of the contract and **wins the battle of the forms**

E. The principle of party autonomy in practice

- **(1) The battle of the forms**
  - **The last-shot rule as an out-dated solution**
    - This legal solution is not appropriate for modern and international business, since it can give rise to legal insecurity
    - Therefore, in practice, this solution not only shall be criticized, but both parties and arbitrators should try to avoid it
  - The knock-out rule as the modern legal conception : the contract is concluded even in the case of minor modifications in the acceptance of e.g. cout/arbitration clause, governing law clause.
  - Any diverging conditions e.g. cout/arbitration clause, governing law clause are recpectively knocked-out and shall be completed by the national applicable law.

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E. The principle of party autonomy in practice

(1) The battle of the forms : remedies to the "last-shot rule"

Implicit and explicit exclusion by parties:

- The parties can **expressly** exclude the application of the last-shot rule under article 6 CISG;
However, the **problem** can arise that parties fail to realize that the CISG is applicable to their contract;
Consequently, they often do not provide for the exclusion of the last-shot rule.
- The parties can **implicitly** waive the application of the last-shot rule. However, they must have an exclusive conduct.

Presumption of the exclusion of the last shot rules as a business standard:

- We can consider that according to a **widely spread business standard and/or trade usages the parties would have preferred the last-shot rule not to be applied to the contract** (art. 6, 7, 8 CISG);
State judges are hesitant to presume the parties' common will to exclude its application;
Therefore, in case of doubt, **they prefer following the safe path** of what is **exactly stipulated** in the contract and applying the last-shot rule instead of the presumed will of the parties.
- In comparison with State judges, the **arbitrator have much more flexibility and margin of appreciation** (idea of art. 1511 CPC).

E. The principle of party autonomy in practice

- **(2) Opting in the CISG**

  - The possibility of *opting in* the CISG by parties established in non-Contracting States

  - No dot confuse:

    - PRINCIPLE of *Opting out*: according to article 6 CISG, the parties have the freedom to exclude the application of the CISG

    - EXCEPTION of *Opting in*: the parties (established in not-Contracting States) have the possibility to apply the CISG, even if the legal conditions of Art. 1 are not fulfilled

E. The principle of party autonomy in practice

- **(2) Opting in the CISG**

  - The different scope of the contractual clause

    - Before a State court

      - The clause will only have limited effectiveness
      - The CISG will not be applicable as the general law of the international sales of goods, because the contract is not within the scope of the CISG
      - Therefore, the national law of the State that would be considered as applicable (under the PIL rules / Rome I) will govern the contract as the « *lex contractus* »

E. The principle of party autonomy in practice

- **(2) Opting in the CISG**

  - The different scope of the contractual clause

    - Before a State court

      - Only in the case the « *lex contractus* » allows derogations from the general provisions of the national applicable law, the State court will take the provisions of the CISG into account
      - Consequently, the CISG can only be applicable if the national applicable law (« *lex contractus* ») leaves certain matters to the discretion of the parties
      - In this case, CISG can be compared to soft law

E. The principle of party autonomy in practice

- **(2) Opting in the CISG**

  - The different scope of the contractual clause

    - ➢ Before an arbitral tribunal

      - The arbitrator (Art. 1511 French CPC) will give a great importance to the choice of law (« rules of law ») made by the parties

      - The arbitrator will consider CISG (opted in) as the *lex contractus*, i.e. the substantive law of the contractual relationship

E. The principle of party autonomy in practice

- **(2) Opting in the CISG**

  - The different scope of the contractual clause

    - Before an arbitral tribunal

      - The arbitrator will take national law only into account, if the parties have stipulated that it must be applied as subsidiarily applicable law or to fill in gaps not covered by the provisions of the contract

      - The arbitrator will also take intro consideration the “rules of law” (law includes soft law!) which it considers appropriate (better-law approach) as well as trade usages (Art. 1511 French CPC)



Practical case n°1

I. FACTS

A Chinese company ordered a vessel from a German company that shall be delivered in the port of Hamburg (Germany).

II. QUESTION

Is the CISG applicable to the contract?



Guiding questions n°1

- **Territorial scope**
  - **Art. 1(1)(a) CISG** : Where is the place of business of the parties ?
  - **Art. 1(1)(b) CISG** : Are there rules that lead to the application of the law of a contracting state ?

- **Material scope**
  - **Art. 2 CISG :** Do the goods fall under any exclusion?

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Practical case n°2

I. FACTS

An Austrian department store is selling products to a consumer domiciled in Slovakia.

II. QUESTION

Is the CISG applicable to the contract?

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Guiding questions n°2

- **Territorial scope**
  - **Art. 1(1)(a) CISG** : Where is the place of business of the parties ?
  - **Art. 1(1)(b) CISG** : Are there rules that lead to the application of the law of a contracting state ?
- **Material scope**
  - **Art. 2(a) CISG** : Is this a sale of goods to a consumer for personal use?



Practical case n°3

I. FACTS

A Colombian company ordered an aircraft from a Greek company that shall be delivered in Greece.

II. QUESTION

Is the CISG applicable to the contract?



Guiding questions n°3

- **Territorial scope**
  - **Art. 1(1)(a) CISG** : Where is the place of business of the parties ?
  - **Art. 1(1)(b) CISG** : Are there rules that lead to the application of the law of a contracting state ?

- **Material scope**
  - **Art. 2(e) CISG :** Do the goods fall under any exclusion?

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Practical case n°4

I. FACTS

A German purchaser orders a machine and provides a Turkish seller with the technical schemes and plans on the basis of which the machine shall be manufactured.

II. QUESTION

Is the CISG applicable to the contract?



Guiding questions n°4

- **Territorial scope**
  - **Art. 1(1)(a) CISG :** Where are the places of business of the parties?
  - **Art. 1(1)(b) CISG :** Are there rules that lead to the application of the law of a contracting state?

- **Material scope**
  - **Art. 3(1) CISG :** Is this a contract for the sale of goods or mainly a contract for services/labor?
  - Does the buyer undertake to supply a substantial part of the materials necessary for the manufacture or production?



Practical case n°5

I. FACTS

A company established in the USA is selling products to a Mexican company. The contract does not contain any clause of choice of the law.

II. QUESTION

Is the CISG applicable to the contract?

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Guiding questions n°5

- **Territorial scope**
  - **Art. 1(1)(a) CISG :** Where are the places of business of the parties?
  - **Art. 1(1)(b) CISG :** Are there rules that lead to the application of the law of a contracting state?

- **Opting-in vs. Opting out**
  - Is the CISG applicable without a choice-of-law rule ?
  - **Art. 6** : Can the CISG be excluded by the parties ?