

Freedom of Contract, Party Autonomy and Its Limit Under Cisg

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ABSTRACT

The CISG is directly applicable in Contracting States or when conflict of laws refers to the laws of Contracting States. However, matters arising from international sales contracts such as validity of contracts or property matters are not governed by the CISG. For this reason, the parties should choose the national law which would govern the matters that are not regulated in the CISG. On the other hand, the parties have the autonomy to determine the provisions of a contract by deviating from or modifying the provisions of the CISG, which can be named as freedom of contract in the context of the CISG. In general, there are no limits on party autonomy under the CISG as a principle. The only limit to party autonomy under the CISG is Art. 12 of the CISG which grants Contracting States the right to require that contracts or modifications to contract be made in writing.

Anahtar Kelimeler

Freedom of contract, CISG, international sales contract, party autonomy, applicable law.

ÖZET

CİSG'de Sözleşme Özgürlüğü, İrade Muhtariyeti ve Sınırları

CİSG, sözleşmeye taraf olan devletlerde veya milletlerarası özel hukukun atıf yaptığı taraf devlette doğrudan uygulanır. Fakat CİSG uluslararası satım sözleşmesine ilişkin her soruna, sözleşimi mülkiyet veya geçerlilik gibi sorunlara ilişkin bir hüküm içermez. Bu nedenle taraflar CİSG'in kapsamadığı sorunlara uygulanacak ulusal hukuku seçmelidirler. Diğer yandan taraflar, CİSG bağlamında bir nevi sözleşme özgürlüğü olarak adlandırılabilen irade muhtariyetine sahiptir olduklarından CİSG hükümlerini değiştirerek veya uyarlayarak sözleşme hükümlerini belirlemeyebilirler. CİSG bağlamında irade muhtariyetine, ilke olarak sınırlama getirilmemiştir. CİSG bağlamında irade muhtariyetine tek sınırlama, sözleşmeye taraf devlete uluslararası satım sözleşmesinin veya değişikliğinin yazılı şekilde yapılmasını zorunlu kılmak için çekince koyma hakkı veren CİSG'nin 12. maddesidir.

Keywords

Sözleşme özgürlüğü, CİSG, uluslararası satım sözleşmesi, irade muhtariyeti, uygulanacak hukuk.

Introduction

Differences between legal systems increase the cost of transactions and unknown and vague issues¹. Decreasing the cost of transactions and unknown and vague issues need the harmonization of law-uniform law². The CISG (the United Nations Convention on Contracts for International Sale of Goods) is an important example of harmonization of laws³. Preamble of the CISG states that the States being 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. At present, there are 84 Contracting States to the Convention, including Turkey⁴, the USA, China and most European countries⁵.

Another way of bringing unknown and vague issues out of contract is to give party autonomy⁶. Party autonomy strengthens the predictability of legal terms and secures the expectations of the parties due to the fact that parties know their best interests and expectations that best suit for their will⁷. On the other hand, party autonomy does

1 Different legal system see OĞUZ, Arzu, **Karşılaştırmalı Hukuk**, Yetkin Yayınevi, Ankara 2003, p.109 et seq; SÖZER, Bülent, **Legal Environment of Business**, Beta Yayıncılık, İstanbul 2001, p.10 et seq. History and impact lex marcoria on nation laws system see OĞUZ, Arzu, "Hukuk Tarihi ve Karşılaştırmalı Hukuk Açısından Uluslararası Ticaret Hukuku", **Ankara Üniversitesi Hukuk Fakültesi Dergisi**, Y:2001, C:50, Sa:3, p.22 et seq (p.11-54); ERDEM, H. Ercüment, "Viyana Satım Antlaşması'na Genel Bakış ve Maddi Uygulama Alanı", **Yeni Türk Boçlar Kanunu ve CISG'e göre Satış Sözleşmeleri** (Editors Ş. ŞİPKA / A. C. YILDIRIM), On İki Levha Yayıncılık, İstanbul 2012, p.119 et seq, (p.117-156).

2 For further details, see OĞUZ, Arzu, "Sözleşme Hukuku Alanında Hukukun Birleştirilmesi", **Ankara Üniversitesi Hukuk Fakültesi Dergisi**, Y:2000, C:49, Sa:1-4, p.31 et seq, (p.31-65). Making uniform law is not only in the area of international transaction but also in the area of transaction in the federal state. For example Uniform Commercial Code in the United States of America. For further details, see ZIEGEL, Jacob S.: "Harmonization of Private Laws in Federal Systems of Government: Canada, the USA, and Australia", **Making Commercial Law Essay in Honour of Roy Goode**, (Editor Ross Cranston), Clarendon Press, Oxford 1997, p.131 et seq, (p.131-165).

3 But CISG does not answer whole of questions concerning international sale. According to ANDERSEN "The CISG is an example of how the difference can surface: it applies throughout most corners of the world, and given the differences which abound in many aspects of the different member states, it is not surprising that problems of uniformity surface."; see ANDERSEN, Camilla Baasch, Uniformity in The CISG in The First Decade of Its Application, **Foundations and Perspectives of International Trade Law**, (Editor Ian FLETCHER/Loukas MISTELIS/Marise CREMONA), Sweet and Maxwell, London 2001, p.290, (p.289-297); OĞUZ, Hukukun Birleştirilmesi, 2000, p.33.

4 CISG was adopted by the Turkey in 2010, entering into force on August 1, 2011. See Resmi Gazete of Turkey, Tarih: 07.04.2010, Sayı: 27545.

5 Available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited March 1st, 2016).

6 ŞANLI, Cemal, **Milletlerarası Ticari Tahkimde Esasa Uygulanacak Hukuk**, Banka ve Ticaret Hukuku Araştırma Enstitüsü Yayınları, Ankara 1986, p.114.

7 SCOLES, Eugene F./HAY, Peter/BORCHERS, Patrick J./SYMEONIDES, Symeon C., **Conflict of Laws**, West Publishing Company, Minnesota 2000, p.857. This flexibility facilitate the Convention to be accepted by States. See TOKER, Ali Gümrah, **Uluslararası Taşınır Mal Satımına İlişkin Birleşmiş Milletler Sözleşmesi'nin (Viyanaya Sözleşmesi) Uygulama Alanı**, Seçkin Yayınevi, Ankara 2005, p.120.

not endanger the uniformity of law⁸. Since contract terms only determine the relation of the parties, and the predictability of contract terms for third parties is not an issue in the contract law and the CISG. As a result, it can be argued that there is a close relationship between freedom of contract and boosting economic activities⁹.

The CISG gives party autonomy, just as UNIDROIT Principles of International Commercial Contract¹⁰ and Principles of European Contract Law¹¹. So one can conclude that party autonomy is a general principle in international law¹².

This article explains the party autonomy under the CISG. Firstly, it explains party autonomy as a general principle in the CISG. Secondly it discusses the party autonomy with regard to choosing and excluding the CISG as an applicable law for governing the sale contract. Lastly, it sheds light on the limits of party autonomy under the CISG.

I- The Party Autonomy as a General Principle in the CISG

Party autonomy in the conflict of laws means that parties may choose the applicable law which will govern the contract¹³. Same meaning involved in Art. 6 of the CISG. In this respect, Art. 6 states that "*the parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.*". According to plain meaning of this provision, parties may exclude the application of the Convention as a whole or in part, but not choose the law. However, the Convention is

8 ANDERSEN, 2001, p.293. More information about whether party autonomy is sufficient for uniform application of uniform law or not see OĞUZ, Hukukun Birleştirilmesi, 2000, p.34.

9 TEKİNAY/AKMAN/BURCUOĞLU/ALTOP, Tekinay Borçlar Hukuku, 7. Bası, Filiz Kitabevi, İstanbul 1993, p.362 et seq; SÖZER, **Legal Environment, 2001**, p.11. For further details about relationship between liberal economy and freedom of contract, passing from status to contract in the Middle Ages see ATAMER, Yeşim M., **Genel İşlem Şartlarının Denetlenmesi**, Beta Yayıncılık, İstanbul 1999, p.13 et seq. In the modern world, some colleagues criticizing the freedom of contract and some colleagues defend the freedom of contract. Debates and article on this issue see The Fall and Rise of Freedom of Contract, (Editor F. H. BUCKLEY), Duke University Press, Durham and London 1999.

10 Article 1.1 of UNIDROIT Principles of International Commercial Contract states that "the parties are free to enter into a contract and to determine its content". For further details, see DAYINLARLI, Kemal, "Milletlerarası Ticari Sözleşmelere İlişkin UNIDROIT İlkeleri", **Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni**, Prof. Dr. Gülören TEKİNALP'E Armağan, Özel Sayı, Y:23, Sa:1-2, p.203-249; ORAK, Cem Çağatay, "Milletlerarası Ticari Tahkim Bakımından UNIDROIT İlkeleri", **Ankara Barosu Dergisi**, Y:2004, Sa:3, p.85-106. Comparison between UNIDROIT Principles of International Commercial Contract and CISG see GÜÇER, Sülün, "UNIDROIT Uluslararası Ticari Sözleşmelerin Genel İlkeleri", **BATİDER**, Y: 2005, C:23, Sa:2, p.152, (p.147-174).

11 Article 1.102 of Principles of European Contract Law states that "the parties may exclude the application of any of these Principles or derogate from or vary their effects except as otherwise provided in the Principles". For further details, see LANDO, Ole, "Eight Principles of European Contract Law", **Making Commercial Law Essay in Honour of Roy Goode**, (Editor Ross Cranston), Clarendon Press, Oxford 1997, (p.103-129); Comparison between UNIDROIT Principles of International Commercial Contract and Principles of European Contract Law see BONELL, Michael Joachim, "The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: a Comparison", **Making Commercial Law Essay in Honour of Roy Goode**, (Editor Ross Cranston), Clarendon Press, Oxford 1997, p.91 (p.91-101).

12 ŞANLI, Esasa Uygulanacak Hukuk, 1986, p.110.

13 SCOLES/HAY/BORCHERS/SYMEONIDES, 2000, p.858; ŞANLI, Esasa Uygulanacak Hukuk, 1986, p.103.

directly applied to the international sale which is defined in the CISG¹⁴. This means that another law (state law or international standard forms or terms-like incoterms, etc.)¹⁵ will be applicable to contract if the parties exclude the application of the Convention partly or completely. In other words, any state law may be applicable to contract instead of the CISG if the parties decide to exclude the application of the Convention partly or completely. This is a kind of choice of law. In addition, the parties can choose the CISG as applicable law¹⁶ in the event that it is not otherwise applicable to the contract.

Convention is not compulsory due to the fact that parties may derogate from its provisions. This means that parties have authority to determine the content of applicable law governing a contract by deviating from or modifying the provisions of the CISG¹⁷. By stating that provisions of the CISG are not mandatory, the parties' wills (contract provision) are treated above the CISG¹⁸. This is a main principle of the CISG, namely party autonomy. In other words, giving a role to the parties in the light of commercial practice and usage is the dominant theme of the Convention¹⁹. This principle is regarded in a number of provisions throughout the CISG. For example, "*except where the parties have agreed otherwise*" (Art. 35/2 of the CISG), "*unless otherwise agreed*" (Art. 9/2 of the CISG). As a result of this characteristics, the provisions of the CISG play a

14 See SCHLECHTRIEM, Peter/SCHWENZER, Ingeborg (Editörler Ingeborg SCHWENZER, and Pınar ÇAĞLAYAN AKSOY), **Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması (Viyana Satım Sözleşmesi) Şerhi**, 1.Bası, On İki Levha Yayıncılık, İstanbul 2015, p.161, pa.15; ZEYİN, Zafer, **Milletlerarası Mal Satım Sözleşmesi Hukuku-CISG**, 2.Bası, Seçkin Yayınevi, Ankara 2015, p.46; TARMAN, Zeynep Derya, **Viyana Satım Antlaşmasını Uygulamak veya Uygulamamak**, Beta Yayıncılık, İstanbul 2015, p.55; ŞANLI, Cemal/ESEN, Emre/ATAMAN-FİĞANMEŞE, İnci, **Milletlerarası Özel Hukuk**, 4.Bası, Vedat Kitapçılık, İstanbul 2015, p.293; GÖKYAYLA, Cemile Demir, **Milletlerarası Özel Hukukta Tek Satıcılık Sözleşmeleri**, 2.Bası, Vedat Kitapçılık, İstanbul 2013, p.433; ATAMER, Yeşim M., "Birleşmiş Milletler Satım Hukukunun Uluslararası Uygulama Alanı", İstanbul Barosu Dergisi, Y:1995, C:69, Sa:10-12, p.559, (p. 551-568); KANIŞLI, Erhan, **CISG Uyarınca Alıcının Yükümlülükleri ve Sözleşmeye Aykırılık Halinde Satıcının Hakları**, On İki Levha Yayıncılık, İstanbul 2013, p.15, p.17.

15 A very significant development is the increasing reliance on "soft law", nonbinding, informal, and discretionary standards in the unification of international commercial law. It will be recalled that soft law consists of "instruments that are not legally binding though they affect the conduct international commercial law. It will be recalled that soft law consists of "instruments that are not legally binding though they affect the conduct of international relations by states and may lead to the development of new international law" and are called "soft" because "they are not directly enforceable in domestic courts or international tribunals; see CUTLER, A. Claire, **Private Power and Global Authority**, Cambridge 2003, p.205.

16 FERRARI, Franco, "Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing", **Journal of Law and Commerce**, Y:1995, Sa:15, p.1-126; available at <http://www.cisg.law.pace.edu/cisg/text/franco6.html> (last visited March 1st, 2016).

17 TOKER, 2005, p.121.

18 ERDEM, Maddi Uygulama, 2012, p.127; ATAMER, Yeşim M., **Uluslararası Satım Sözleşmelerine İlişkin Birleşmiş Milletler Antlaşması (CISG) Uyarınca Satıcının Yükümlülükleri ve Sözleşmeye Aykırılığın Sonuçları**, Beta Yayıncılık, İstanbul 2005, p.57; DAYIOĞLU, Yavuz, **CISG Uygulamasında Sözleşme İhlali Halinde Alıcının Hakları ve Özellikle Alıcının Tazminat Talep Etme Hakkı**, On İki Levha Yayıncılık, İstanbul, 2011, p.16.

19 HONNOLD, John O., **Uniform Law for International Sales under the 1980 United Nations Convention**, 3rd ed., Kluwer Law International, Hague 1999, p.77; available at <http://www.cisg.law.pace.edu/cisg/biblio/ho6.html> (last visited March 1st, 2016); ERDEM, Maddi Uygulama, 2012, p.124 et seq.

supplementary role by providing answers to matters that parties have failed to solve in their contract²⁰.

The CISG contains not only procedural rules but also substantive rules of contract law such as rules of national contract law. If we look at the provisions of the CISG such as substantive law rules, Art. 6 of the CISG states that parties have freedom of contract²¹. In other words, freedom of contract in the substantive law of a state is almost party autonomy in the CISG²². The Convention does not restrict the freedom of sellers and buyers to determine the terms of their transactions. A few type of sales such as consumer purchases are excluded from the Convention in order to avoid any conflict between party autonomy and protective legislation such as consumer protective legislation. The CISG differs from modern legislation governing the sale of goods with regard to imposing no restrictions on the party autonomy except the rule in Art. 12 of the CISG²³.

Freedom of contract in national law means that individuals have the right to carry out economic activities without any undue interference from the sovereign power, to sign or not to sign any contract, to depart from the particular types of contracts, to make a contract without any form written or oral, to determine the provisions of a contract or to choose the counterparty²⁴. The CISG recognizes same freedom of contract. For example, Art. 11 of the CISG states "*a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form*", Art. 6 of the CISG grants parties the right to determine provisions of a contract, Art. 14 of the CISG and other articles give the right to choose counterparty and to sign or not to sign a contract.

Mandatory rules limit the freedom of contract in national laws. But in the sphere of international sale contracts, parties enjoy more autonomy than what they would

20 TARMAN, Uygulamak, **2015**, p.56; DAYIOĞLU, **2011**, p.16; KAYA, Cansu, **CISG (Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması) Gereğince Alıcının Satım Bedelini Ödeme Borcu**, On İki Levha Yayıncılık, İstanbul 2012, p.10; SÖZER, Legal Environment, **2001**, p.377.

21 SCHLECHTRIEM/SCHWENZER, **2015**, p.244, p.253; YILMAZ, **Süleyman, Sözleşmenin İhlalinde Alıcının Hakları**, Yetkin Yayınevi, Ankara 2013, p.79; SERT, Selin, **Viyana Satım Sözleşmesinde (CISG) İfa Engelleri ve Sonuçları**, Vedat Kitapçılık, İstanbul 2013, p.24.

22 For further details, see ŞANLI, **Esasa Uygulanacak Hukuk**, 1986, p.103.

23 ZIEGEL, Jacob S., **Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods**, University of Toronto July 1981, Art.6; available at <http://cisgw3.law.pace.edu/cisg/text/ziegel6.html> (last visited March 1st, 2016); ŞANLI, Cemal, **Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları**, 6.Bası, Beta Yayıncılık, İstanbul 2016, p.56; YILMAZ, **2013**, p.79.

24 For further details, see EREN, Fikret, **Borçlar Hukuku Genel Hükümler**, 19.Bası, Yetkin Yayınevi, Ankara 2015, p.16; OĞUZMAN, Kemal/ÖZ, M. Turgut, **Borçlar Hukuku**, Genel Hükümler, C:1, 13.Bası, Vedat Kitapçılık, İstanbul 2015, p.23 et seq; KILIÇOĞLU, Ahmet M., **Borçlar Hukuku Genel Hükümler**, Genişletilmiş 19.Bası, Turhan Kitapevi, Ankara 2015, p.79 et seq; KOCAYUSUFPAŞAOĞLU, Necip (KOCAYUSUFPAŞAOĞLU/HATEMİ/ SE-ROZAN/ARPACI), **Borçlar Hukuku Genel Bölüm**, C:1, 2010 Tarihli 5.Basidan Tıpkı 6.Bası, Filiz Kitabevi, İstanbul 2014, p.501 et seq; HATEMİ/GÖKYAYLA, **Borçlar Hukuku Genel Bölüm**, 3.Bası, Vedat Kitapçılık, İstanbul 2015, p.29 et seq; ANTALYA, Gökhan O., **Borçlar Hukuku Genel Hükümler**, C:1, Legal Yayıncılık, İstanbul 2015, p.73 et seq; TEKİNAY/AKMAN/BURCUOĞLU/ALTOP, 1993, p.362 et seq.

enjoy under their state law. Indeed, parties by choosing applicable law may prevent the application of the mandatory rules which would otherwise apply to the dispute unless the parties choose an applicable law. Moreover, they may submit their dispute to arbitration and define the rules of procedure of the court of arbitration. In addition, parties may agree that arbitrators pronounce their award and determine the case *ex aequo et bono* by disregarding any concrete legal order²⁵. And *ordre public* in international law is generally considered to be narrower in scope than public order in domestic law.

II- Choice or Exclusion of the CISG

In order to save costs of investigating foreign laws and to avoid increased legal uncertainty that may arise when applying an external law, parties to an international contract strive towards an application of their own law, even if that law is less suitable for the transaction in question. But both parties want to choose their own domestic law to apply to the contract²⁶. If both parties possess basically the same bargaining power, neither of them is likely to succeed in enforcing its own domestic law. In order to avoid this situation, parties may agree expressly or implicitly on the application of the CISG or of the law of a third state which has no particular connection to any of the parties.

The CISG is neutral law by nature. No party has a particular advantage when applying it; the parties are quasi on the same 'level playing field'. Moreover, the application of the CISG eliminates the question of prestige since neither party risks "losing face"²⁷. The costs for examining the content of the CISG are low, because it is very well-documented. Indeed, there are six equally authentic language versions of the CISG and an official commentary to the CISG by UNCITRAL, a lot of commentaries and handbooks. Moreover, case law referring to the Convention can be very easily accessed. All those factors minimize transaction costs. Another feature of the CISG is flexibility, which allows parties to modify or opt out of particular provisions of CISG or to even completely opt out of the CISG²⁸.

On the other hand, it is practically impossible for parties to individually negotiate every issue that may arise under a contract. In fact, parties will usually settle only the main elements of a contract. The essential elements of a contract in a contract for the sale or purchase of goods are the specification of the kind and quantity of the

25 RÉCZEI, László, "The Rules of the Convention Relating to Its Field of Application and to Its Interpretation", **Problems of Unification of International Sales Law**, Working papers submitted to the Colloquium of the International Association of Legal Science, Potsdam, August 1979, Oceana Publications, New York 1980, p.75, (p.53-103); available at <http://www.cisg.law.pace.edu/cisg/biblio/reczei2.html> (last visited March 1st, 2016).

26 ÖZSUNAY, Ergun, "1980 Tarihli Uluslararası Mal Satımı Sözleşmeleri Hakkında Viyana Antlaşması (CISG) ve Türk Teşebbüslerinin Taraf Olduğu Uluslararası Mal Satımı Sözleşmeleri Üzerindeki Yansımaları", **İstanbul Barosu Dergisi**, Y:2004, C:78, Sa:3, p.954, (p.906-959).

27 FOUNTOULAKIS, Christiana, "The Parties' Choice of Neutral Law in International Sales Contracts", **European Journal of Law Reform**, Y:2005, C:7, Sa:3/4, p.314, (p.303-329); available at <http://cisgw3.law.pace.edu/cisg/biblio/fountoulakis.html> (last visited March 1st, 2016).

28 FOUNTOULAKIS, 2005, p.317 et seq.

purchased goods, as well as their sales price²⁹. By including an incoterms or another international trade term to contract, parties may settle further aspects which do not directly affect the reciprocal terms of the contract, such as terms of delivery, insurance obligations, etc.³⁰. For this reason, it is important to know the law that applies to the contract. Because that law governs issues that are not expressly settled by the parties. Furthermore, making the right decision to exclude or to choose the applicable law which will govern the international sales contract is more important.

To understand how the choice or exclusion of law affects terms of contract, firstly one has to determine legal regime of the CISG in the national law of Contracting States. The CISG is automatically applicable to an international sale contract falling under the sphere of its application³¹. In other words, provisions of the CISG have supremacy over the rules of Contracting State regarding international sale contracts³². So the provisions of the CISG will apply instead of the rules of Contracting State before national courts of these States. But the rules of state have supremacy the rules of the CISG when they are in relation with *ordre public* or are directly applicable according to the rules of private international law. Unless such events occur, a judge should apply in the first place contract provisions which are not contrary to the mandatory rules of the CISG, secondly usages which parties agree, thirdly practices between parties, fourthly usages widely known in the international trade, fifthly the CISG rules, sixthly general principle of the CISG³³ and lastly states rules which applicable according to the rules of private international law. Therefore, it is not highly important to involve any clause to a contract in order to apply the rules of the CISG. But sometimes this may be important, for instance when the place of business of one or both parties are not in a Contracting State. Because the conflict of laws determines the law governing the contract, the CISG can be a part of state law or not.

Art.6 of the CISG does not state that parties may choose the CISG as applicable law. But this omission should not be interpreted as preventing parties from being entitled to choose the CISG as applicable law. This is evidenced by the fact that the proposal regarding the application of the Convention even where the preconditions for its application are not met, was rejected on the sole ground that an express provision was not necessary because of the already existing principle of party autonomy³⁴.

29 ZEYTİN, **2015**, p.101; SAĞLAM, İpek, **Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması Uyarınca Sözleşmenin Kurulması**, On İki Levha Yayıncılık, İstanbul 2013, p.18 et seq; ORAL, Tuğçe, **Viyana Satım Antlaşması'nda Sözleşmenin Kurulması**, Yetkin Yayınevi, Ankara 2014, p.29 et seq; SCHWENZER, Ingeborg/ MOHS, Florian, "Sözleşmenin Kurulması", **Milletlerarası Satım Hukuku**, (Editor Yeşim M. ATAMER), 2.Tıpkı Bası, On İki Levha Yayıncılık, İstanbul 2012, p.86, (p.83-104); VURAL, Belkis, "Formation of Contract According to the CISG", **Ankara Bar Review**, Year 2003, Volume 6, Issue 1, p.131, (p.125-151).

30 FOUNTOULAKIS, **2005**, p.303.

31 SERT, **2013**, p.24. See supra footnote 15.

32 ATAMER, Satıcının Yükümlülükleri, **2005**, p.88-89. Contrary opinion; the CISG and national statutory codes are equal, not superior; see. TOKER, **2005**, p.121.

33 ATAMER, Satıcının Yükümlülükleri, **2005**, p.88-89.

34 FERRARI, Specific Topics, **1995**, p.1-126.

It is doubtful whether it is valid to choose the CISG as applicable law to contract before state courts under Turkish Law due to the fact that the CISG is not a state law³⁵. However, if the parties choose the rules of the CISG, these rules will apply as a part of contract by the way of incorporation, but not as an applicable law³⁶. On the other hand, the CISG departs from UNIDROIT Principles, PECL and *lex mercatoria*³⁷ by reason of the Convention.

It is advisable to choose a certain national law in addition to the CISG, since the CISG is not applicable to matters such as the validity of contracts or the effect on property³⁸. It should be noted that Art. 28 of the CISG refers to the phrase "*its own law*" and Art. 7 (2) refers to "*private international law*" in this respect.

Parties in Contracting States may also agree that their contract be governed by the provisions of the CISG despite the fact that it is not a sales contract falling under the Convention. That is why sale of ships, excluded from the applicability of the Convention under its Art. 2 (e), could be submitted to the CISG. It might be unclear whether the CISG applies in mixed contracts. Therefore, the parties can avoid problems by expressing the rules of the CISG as applicable to the whole contract³⁹.

The parties are entitled to exclude or to choose the Convention entirely or partially. This means parties are free to decide on the proper law of their contract: The Convention or any other law. The total or partial exclusion or choice of the Convention may also be

35 ŞANLI/ESEN/ATAMAN-FİĞANMEŞE, 2015, p.257; TARMAN, Uygulamak, 2015, p.68; TİRYAKİOĞLU, Bilgin, **Taşınır Mallara İlişkin Milletlerarası Unsurulu Satım Akitlerine Uygulanacak Hukuk**, Ankara Üniversitesi Hukuk Fakültesi Yayını, Yayın No:19, Ankara 1996, p.23-24, p.190; KANIŞLI, 2013, p.18. For similar opinion, see ÇELİKEL, Aysel/ERDEM, B. Bahadır, **Milletlerarası Özel Hukuk**, Beta Yayıncılık, İstanbul 2016, p.359. For further details, see ŞANLI, Cemal/EKŞİ, Nuray, **Uluslararası Ticaret Hukuku**, 5.Bası, Arıkan Yayınları, İstanbul 2006, 27, p.29; ŞANLI, Hazırlanması, 2016, p.57. Further details about *lex mercatoria* as valid choice of law see ÖZDEMİR, Didem, "Milletlerarası Ticarî Tahkimde Esasa Uygulanacak Hukuk Olarak *Lex Mercatoria*", **Gazi Üniversitesi Hukuk Fakültesi Dergisi**, Y:2003, C:7, Sa:1-2, p.114, (p.98-137). Also see TİRYAKİOĞLU, Bilgin, "11 Nisan 1980 Tarihli Milletlerarası Mal Satımlarına İlişkin Birleşmiş Milletler Sözleşmesi ve Sözleşmenin Milletlerarası Özel Hukuk Kuralları İle İlişkisi", **Ankara Üniversitesi Hukuk Fakültesi Dergisi**, Y:1989-1990, C:41, Sa:1-4, p.202, (p.191-205).

36 ŞANLI/ESEN/ATAMAN-FİĞANMEŞE, 2015, p.257; ULUSU, Ayşe Elif, **Milletlerarası Mal Satımına İlişkin BM Antlaşmasında Öngörülebilirlik İlkesi**, Beta Yayıncılık, İstanbul 2011, p.90-91; DAYIOĞLU, 2011, p.17; KANIŞLI, 2013, p.17-18.

37 *Lex mercatoria* is not a legal system or autonomous legal system, only group of rules which people agree on them; see OĞUZ, Uluslararası Ticaret, 2001, p.44.

38 ZEYTİN, 2015, p.69-70; TARMAN, Uygulamak, 2015, p.110, p.114; ÖZ, Turgut, **Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması (CISG) ile Türk Borçlar Kanunu'nun İlgili Hükümlerinin Kısa Karşılaştırması**, Vedat Kitapçılık, İstanbul 2016, p.12; TARMAN, Zeynep Derya, "Türk Satım Hukukunda Yeni Bir Dönem, Viyana Satım Antlaşması'nın Milletlerarası Satım Sözleşmelerine Etkisi", **12-14 Haziran (June) 2012 Tarihli İpek Yolu Canlanıyor: Türk-Çin Hukuk Zirvesi Sempozyumu**, (Editors A. Caner YENİDÜNYA / Mustafa ERKAN / Rayhan ASAT), İstanbul, Marmara Üniversitesi Hukuk Fakültesi, Ankara 2013, p.180, (p.169-186); available at <http://hukuk.marmara.edu.tr/yayinlar/sempozyum-yayinlari/ipek-yolu-canlaniyor-turk-cin-hukuk-zirvesi/> (last visited March 1st, 2016); SAĞLAM, p.7; STONE, Bradford, "Contracts For The International Sale Of Goods: The Convention And The Code", **Michigan State International Law Review**, Y:2015, Volume 23, Issue 3, p.756, p.757, (p.753-821).

39 TARMAN, Uygulamak, 2015, p.59.

made implicitly or expressly⁴⁰. The criteria for deciding whether the parties have implicitly excluded the application of the Convention, are to be found in the Convention itself rather than in a particular national law. This means that the contract provisions should be interpreted regarding Art.7 and 8 of the CISG in order to determine parties' intention on the applicable law that would govern their contract. Many legal writers have been suggested that it is necessary to read the CISG not through the lense of domestic law, but rather in an autonomous manner, regarding the international character of the treaty and the need to promote uniformity in its application⁴¹. All relevant circumstances of the case including the negotiations, any practices which parties have established between themselves, usages and any subsequent conduct of the parties, are taken into account to determine the intent of both parties. The courts are not only required to interpret the CISG "autonomously"⁴², but also they are obliged to take into account foreign case law due to the need to promote uniformity in the application of the Convention⁴³.

There must be a clear indication of the parties' intention to exclude the application of the Convention entirely or partially⁴⁴. Normally there is a clear indication of the parties' intention to exclude the application of the Convention whenever they have chosen the law of a non-Contracting State or agreed on contractual terms inconsistent with specific provisions of the Convention as applicable law to their contract⁴⁵. When parties agree to refer to the law of a Contracting State, this does not mean that parties have made an implied exclusion of the CISG⁴⁶. It means that this contract should be governed and interpreted in accordance with the rules of the law of a Contracting State. If the State which parties referred ratified the CISG, the CISG becomes a part of its national law⁴⁷ as a set of special rules for international sales, in addition to its traditional law

40 DAYIOĞLU, **2011**, p.17; SERT, **2013**, p.24.

41 For further details, see ÖZ, p.23 et seq; ATAMER, Satıcının Yükümlülükleri, **2005**, p.93; FERRARI, Franco, "Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt With", **Journal of Law and Commerce**, Spring 2001, p.225, (p.225-239); available at <http://www.cisg.law.pace.edu/cisg/biblio/ferrari6.html> (last visited March 1st, 2016).

42 FERRARI, Franco, "Uluslararası İċtihat Hukuku İş̇inde CISG'da Yorum ve Boşluk Doldurmaya İliş̇kin Meseleler", **Milletlerarası Satım Hukuku**, (Editor Yeş̇im M. ATAMER), 2. Tıpkı Bası, On İki Levha Yayıncılık, İstanbul 2012, p.40 et seq, (p.37-81); ZEYİN, **2015**, p.76 et seq; KAYA, **2012**, p.22.

43 SERT, **2013**, p.25.

44 For similar opinion, see WINSHIP, Peter, "The Scope of the Vienna Convention on International Sales Contracts", Parker School of Foreign & Comparative Law (Galston & Smit, eds.), **International Sales: The United Nations Convention on Contracts for the International Sale of Goods**, (Editors Nina M. Galston and Hans Smit), Matthew Bender, Ch.1, **Juris Publishing**, New York 1984, p.1:35-36, (p.1:1-1:53); available at <http://www.cisg.law.pace.edu/cisg/biblio/winship5.html> (last visited March 1st, 2016).

45 BONELL, Michael Joachim, **Bianca-Bonell Commentary on the International Sales Law**, Milan 1987, p.56; available at <http://www.cisg.law.pace.edu/cisg/biblio/bonell-bb6.html> (last visited March 1st, 2016).

46 "A similar view was expressed at the Vienna Conference, when a large majority of delegations rejected a proposal that a provision in the contract that the contract shall be governed by the law of the particular State, shall be deemed sufficient to exclude the application of the Convention, even where the law of that State incorporates the provisions of the Convention"; see BONELL, Commentary, **1987**, p.56.

47 ZEYİN, **2015**, p.74; ŞANLI, Hazırlanması, **2016**, p.52-53; ULUSU, **2011**, p.86, p.88.

governing domestic sales. When the parties exclude the CISG and choose a Contracting State and have actual knowledge that the CISG is a part of national law, there is no clear indication of the parties' intention to exclude the application of the Convention⁴⁸.

The parties would normally indicate their intention at the beginning of their negotiations, or at least before the contract is concluded. Nonetheless, they may also decide this at a later stage, even after the initiation of a legal proceeding relating to their contract⁴⁹. Sometimes the buyer may exclude the CISG unilaterally, by declaring that the goods in question are bought for personal use according to Art. 2 (a) of the CISG⁵⁰.

1-Choice or Exclusion of CISG Expressly

Parties may choose or exclude the application of the CISG expressly⁵¹ by involving a clause such as *"This contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods notwithstanding that the rules of private international law might otherwise lead to the application of some other law."* or *"This contract shall not be governed by the United Nations Convention on Contracts for the International Sale of Goods notwithstanding that the rules of private international law might otherwise lead to its application as a part of national law."* to the contract. This is not necessary when both parties have their place of business in a Contracting State or where the rules of private international law lead to the sales law of a Contracting State. But this clause is important when parties' place of business is not in a Contracting State and where the rules of private international law do not lead to the sales law of a Contracting State. In other words, where the CISG does not apply by way of law, it should be chosen as a law governing an international sales contract.

It is possible to choose or to exclude the entire provisions of the CISG or some of its provision by involving a clause such as *"Turkish Law applies to matters arising from limitation of liability and passing risk, other matters are governed by the United Nations Convention on Contracts for the International Sale of Goods."* or *"The buyer must examine the goods, or have them examined, within 6 days."* to the contract⁵².

2-Choice or Exclusion of The CISG Implicitly

Although the CISG does not expressly refer to the possibility of implicit derogation, parties make implicitly a choice to apply or to exclude the CISG⁵³. In addition, Art.7 (2)

48 BONELL, Commentary, 1987, p.56-57; ZEYİN, 2015, p.74; TARMAN, Uygulamak, 2015, p.62.

49 BONELL, Commentary, 1987, p.58; TOKER, 2005, p.123.

50 FERRARI, Specific Topics, 1995, p.1-126.

51 See discussion supra footnote 39; Only choice of the CISG as applicable law to the sales contract is invalid for choice of applicable law at the conflict of law in Turkish Law by reason of fact that the CISG is not a state law; see TİRYAKİOĞLU, Viyana, 1996, p.23-24, p.190; GÖKYAYLA, 2013, p.440; ULUSU, 2011, p.90.

52 Art.38 (1) of CISG states that *"The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances."*

53 Secretariat Commentary, Art 5, No 2: "The second sentence of ULIS, article 3, providing that "such exclusion may be express or implied" has been eliminated lest the special reference to "implied" exclusion might

of the CISG refers to private international law as applicable law to matters which the Convention is not expressly settled or is not settled in conformity with the general principles on which the Convention is based. In this case, the conflict of laws may refer to the CISG as applicable law to contract.

The parties sometimes agree on the national law of a third state⁵⁴ which is irrelevant to parties of the contract, by reason of the political neutrality⁵⁵ of the state or neutrality of the law in relation to themselves. In this case, the parties may choose the applicable law by involving a clause in the contract such as *"This contract shall be governed by the Law of Switzerland"*⁵⁶.

If the state law is law of a Contracting State of the CISG, the CISG is generally accepted as applicable law over domestic law⁵⁷. This is because the CISG is a part of State law

encourage courts to conclude, on insufficient grounds, that the Convention had been wholly excluded."; available at <http://www.cisg-online.ch/index.cfm?pageID=644#Article.5>. (last visited March 1st, 2016). For further details TOKER, **2005**, p.125.

54 According to FOUNTOULAKIS, "There are some laws that are deemed particularly suitable for sales contracts because they are the law of a state that plays a dominant role in a certain trade area. For example, the law of New York is frequently chosen for specific finance transactions, and parties to ship charter agreements or raw material transactions often agree on English law because London is the leading market place for such contracts. A further popular example is the choice of English law in international contracts for the supply of cereals owing to the leading role of the London Corn Trade Association. However, the law of a dominant market place is not automatically the best law. From a civil law point of view, the problem is that the leading market places are mostly common law countries. This means that, unlike in civil law countries, the primary sources of law are not codes and legal statutes, but case law. This often makes it difficult for lawyers from civil law countries to find the relevant information, i.e., the status quo of how a legal issue is currently approached."; See FOUNTOULAKIS, **2005**, p.306.

55 States such as Switzerland have benefited from this. However, political neutrality of a legal system alone is not sufficient criterion in deciding on the right choice of law. The factors that should play a role are different ones. Parties have to look for neutrality of the law in relation to themselves, rather than for a politically neutral law; see FOUNTOULAKIS, **2005**, p.311.

56 This situation comes to before ICC International Court of Arbitration case no. 7565 of 1994: A Dutch seller, defendant, sold four cargoes of coke breeze to a US buyer, plaintiff. A contract between a seller from the Netherlands and a buyer from the U.S. expressly stated that it was subject to "the laws of Switzerland". At the time the contract was concluded the CISG, which was not then in effect in the Netherlands, was in effect in Switzerland as well as the United States. Seller advocated the application of Swiss domestic law, contending that "an express designation of a national law ... by the parties shall be construed as an express reference to the provisions of that law which would apply at the domestic level ... Such interpretations should particularly apply where ... parties have clearly made choice of a neutral law, i.e., the law of a country of which neither party is a national or resident." The tribunal disagreed, stating: "Swiss law, when applicable, consists of the Convention itself as of the date of its incorporation into Swiss law." "[T]he neutrality argument ... is satisfied [because] the Convention's objectives and contents are more than consistent with it..." "Finally, the parties have themselves referred to 'the laws of Switzerland' and not to 'Swiss law'. That defeats [seller's] contention that the clause should result only in an election of the provisions of the Swiss Code of Obligations, with the exclusion of any other Swiss legal provisions." The tribunal applied the law of Switzerland, the CISG, pursuant to Article 1(1)(b). Available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/947565i1.html> (March 1st, 2016). The Award in Turkish see WILL, Michael R., *Milletlerarası Mal Satım Hukuku ve Milletlerarası Tahkim*, (Trans. Bilge ÖZTAN), Turhan Kitabevi, Ankara 2002, p.26. There are opposite awards. More information see FERRARI, Tribunale di Vigevano, **2001**, p.225 et seq; TOKER, **2005**, p.129, footnote 476.

57 ÖZSUNAY, **2004**, p.955; ULUSU, **2011**, p.90. According to FERRARI, "The indication of the law of a Contracting State, if made without particular reference to the domestic law of that State, does not exclude the

and party's intent is not certain to exclude the CISG. In this case, the parties only agree with applying state law⁵⁸. Of course state law is still applicable to the issues that are not governed by the CISG itself, such as the validity issue.

If parties want to choose the law of a Contracting State without the CISG, they can do this by adding to the contract a clause such as *"This Contract shall be governed by and construed under the laws of the Switzerland, not including the 1980 United Nations Convention on Contracts for the International Sale of Goods."* or *"this contract shall be governed by the internal law of the Switzerland without regard to its rules on conflicts of law. The parties exclude the application of the 1980 United Nations Convention on Contracts for the International Sale of Goods if otherwise applicable"*.

The standard contract forms as incoterms⁵⁹ or an arbitration clause, the choice of a forum, etc., may be included in a contract by the parties⁶⁰. In such situations, as long as their contents are compatible with the rules of the Convention, the CISG is partly applicable to contract⁶¹. In other words, if standard contract forms are intended to merely regulate specific issues in contrast to the Convention, one can presume that parties do not want the CISG to govern the contract partially, especially for this part of contract.

If the parties choose the law of a non-Contracting State or agree on contractual terms inconsistent with specific provisions of the CISG, then the CISG is not applicable implicitly⁶². The use of general conditions or of standard form contracts is certainly an element from which one could infer the intention of the parties in favor of the domestic law instead of the CISG to govern their contract. Furthermore, other circumstances should also be taken into account, such as the parties' actual knowledge of the existence of the CISG as a part of state law, the use of the same general conditions or standard forms in previous transactions, and the choice of a forum situated in a non-Contracting State⁶³.

Convention's application, as recently confirmed by several German court decisions [OLG Köln 22 February 1994; OLG Koblenz 17 September 1993; OLG Düsseldorf 8 January 1993]. And this is true even where the law of a Contracting reservatory State is chosen as the applicable law"; see FERRARI, Specific Topics, **1995**, footnote 629 and around.

58 SCHLECHTRIEM, Peter, "Requirements of Application and Sphere of Applicability of the CISG", **Victoria University of Wellington Law Review**, Y:2005, Sa:4, (p.781-794); Available at <http://www.cisg.law.pace.edu/cisg/text/e-text-06.html> (last visited March 1st, 2016); TOKER, **2005**, p.126-127.

59 More information about incoterms and incorporation, see EKŞİ, Nuray, "Kanunlar İhtilafı Alanında Incorporation", **Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni**, Prof. Dr. Ayşel ÇELİKEL'E Armağan, Special Ed., Y:2002, Sa:1-2, p.263, (p.263-291); ŞANLI/ESEN/ATAMAN-FİGANMEŞE, **2015**, p.257; ÇELİKEL/ERDEM, **2016**, p.358.

60 Like this clause is named "repair-or-replace" clause by Joseph Lookofsky; see LOOKOFSKY, Joseph, The 1980 United Nations Convention on Contracts for the International Sale of Goods, **International Encyclopaedia of Laws - Contracts**, (Editors J. Herbots / R. Blanpain), Suppl. 29 (December 2000), p.48, (p.1-192); available at <http://www.cisg.law.pace.edu/cisg/biblio/loo6.html> (last visited March 1st, 2016); see FERRARI, Specific Topics, 1995, footnote 641 and around.

61 TARMAN, Uygulamak, **2015**, p.66.

62 See FERRARI, Specific Topics, **1995**, footnote 643 an around.

63 BONELL, Commentary, **1987**, p.56-57.

3- Application of The CISG Before Turkish Courts

Turkey is a Contracting State of the CISG. In addition, the law chosen by parties is generally applicable law to a sales contract under Turkish Private International Law (Art.24 of MÖHUK). In the absence of a choice on applicable law by parties, the law of the state which has the closest connection to the contract applies. This means that applicable law to a contract at the time of conclusion of that contract is the law of the state where the habitual residence of the party who performs the characteristic performance is located or law of the state where the place of business of the party who performs the characteristic performance for the contract in the course of commercial or professional activities is located. In the absence of place of business, applicable law to a contract is the law of the state where party domicile is located instead of the place of business of party. If the party has more than one place of business, the law of place of business is considered as the law of state where the place of business which has the closest connection with contract in question is located. At the absence of a choice about the applicable law by parties, applicable law to international sales contract under Art. 24 of MÖHUK is principally the law of the state where the place of business of seller is located for the contract which is concluded in the course of commercial or professional activities regarding the sphere of the CISG⁶⁴. In this context, the CISG applies as follows:

For example, a Turkish seller sells textile goods to a British buyer. Turkey is a Contracting State of the CISG but the United Kingdom is a non-Contracting State of the CISG. The CISG is not applicable law to contract due to the fact that one of the parties are a non-Contracting States in the case. But if the parties choose the CISG as the governing law for their contract, the CISG will be applicable to such contract. Because the CISG and Turkish Private International Law (Art.24 of MÖHUK) states that applicable law to a sale contract is the law that has been chosen by the parties⁶⁵.

If the parties have not chosen any applicable law to their sales contract, the applicable law to the sales contract will be determined under Art.1(1)(b) of the CISG which states that "*when the rules of private international law lead to the application of the law of a Contracting State.*". So applicable law to the sales contract will be determined under Art.24 of MÖHUK as private international law of Turkey before Turkish courts⁶⁶. The characteristic performance of the sales contract is performance of the seller under Art.24 of MÖHUK. In addition, the place of business of seller is in Turkey. Therefore, the applicable law to the sales contract will be the CISG.

Otherwise if a Turkish trader is a buyer who buys textile goods from the United Kingdom which is a non-Contracting State of the CISG and Turkey is a Contracting State of the CISG, the CISG will not be applicable to contract under Art.24 of MÖHUK before Turkish courts since the characteristic performance of the sales contract is

64 Further details see ŞANLI/ESEN/ATAMAN-FİGANMEŞE, **2015**, p.246 et seq; ÇELİKEL/ERDEM, **2016**, p.337 et seq; GÜNGÖR, Gülin, "Contractual Obligations: The New Turkish Law On Private International Law And International Civil Procedure", **Ankara Law Review**, Y:2008, C:5, Sa:1, p.1 et seq, (p.1-21).

65 ULUSU, **2011**, p.89-90; ZEYİN, **2015**, p.54.

66 ULUSU, **2011**, p.88-89.

performance of the seller under Art.24 of MÖHUK and the place of business of seller is located in a non-Contracting State.

Furthermore, if business place of buyer is in Turkey and the business place of seller is in the USA which is a Contracting State of the CISG with reservation under Art. 95 of the CISG which states that *"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."*, the CISG is applicable to international sales contract between seller in Turkey and buyer in USA due to fact that the states of both parties are Contracting States of the CISG. The USA's reservation about Art. 95 of the CISG does not affect the application of the CISG to the contract in this in case⁶⁷.

If the business place of a seller is located in the USA which is a Contracting State of the CISG with reservation Art. 95 of the CISG, the business place of a buyer is in the United Kingdom which is a non-Contracting State of the CISG, and forum is Turkish court. Regarding exclusion of Art.1 (1)(b) of the CISG by the USA and the absence of two Contracting State, Turkish court will determine the applicable law under Art. 24 of MÖHUK⁶⁸. The characteristic performance of the sales contract is performance of the seller under Art. 24 of MÖHUK and the USA Law is the law of state where the business place of seller is located. So the USA Law as domestic law of the USA with the CISG may apply to this contract⁶⁹. But if the forum is an USA court, this court determines the applicable law according to the conflict of laws of the USA disregarding the Art. 1 (b) of the CISG. In this case, the USA courts may apply the CISG as own domestic law or not⁷⁰.

67 ZEYTİN, **2015**, p.53; SCHLECHTRIEM/SCHWENZER, **2015**, p.179.

68 ZEYTİN, **2015**, p.54.

69 For contrary opinion see "There is a dispute in another line of cases, as well: *quid iuris* where the forum is located in a Contracting non-reservatory State the rules of private international law of which lead to the applicability of the law of a Contracting reservatory State? According to some authors, the CISG should not be applicable in this line of cases, because the reservatory State would not apply the CISG. Consequently, ". . . in the situation where State A has not taken the reservation under Article 95 and State B has done so, and where the parties have their places of business in State B and in non-Contracting State C, consistency would appear to require that a court in State A should, if it finds the law of State B to be applicable, select the domestic law of that State as the law governing the contract rather than the Convention." The preferable view, however, seems to be to the contrary, not only because generally a reservation of the kind at hand made by one State cannot bind another State, but also because, from the point of view of the Contracting (forum) State, all the applicability's preconditions laid down in Article I(l)(b) are met. And this view is preferable despite some German court decisions [LG Hamburg 26 September 1990; OLG Frankfurt 13 June 1991; OLG Frankfurt 17 September 1991] which have applied the domestic rather than the Uniform Sales Law in cases where the rules of private international law lead to the law of a reservatory State"; see FERRARI, *Specific Topics*, **1995**, p.45-46. See also HERGÜNER, Ümit, *Applicability Of The U. N. Convention On Contracts For The International Sale Of Goods To Sales Contracts Concluded By Turkish Companies And Their Affiliates Abroad*, **Murat Sarıca Armağanı**, Aybay Yayınları, Danıştay Kütüphanesi, İstanbul 1988, p.98, (p.95-100); SCHLECHTRIEM/SCHWENZER, **2015**, p.180.

70 According to FERRARI, but where the forum is located in a reservatory State the rules of private international law of which lead to the applicability of the law of a Contracting State (whether independently reservatory or not), the CISG will not apply. The courts of reservatory States do not have to apply the CISG by virtue of Article I(l)(b). But even the courts of a reservatory State should apply the CISG, of course not by virtue of Article I(l)(b), but as part of the law of the Contracting State to which the State conflict of law rules lead; see FERRARI, *Specific Topics*, **1995**, p.45.

If the business place of a seller is in the United Kingdom which is a non-Contracting State of the CISG and business place of buyer is in the USA which is a Contracting State of the CISG with reservation Art. 1 (b) of the CISG and forum is Turkish courts. Regarding the exclusion of Art. 1 (1)(b) of the CISG by the USA and absence of two Contracting State, Turkish court will determine the applicable law under Art. 24 of MÖHUK. The characteristic performance of the sales contract is performance of the seller under Art.24 of MÖHUK and the United Kingdom is state law of the business place of seller. So the CISG is not applicable law to sales contract.

If the business place of a seller is in the USA which is Contracting State of the CISG with reservation Art. 1 (b) of the CISG and business place of a buyer is in the United Kingdom which is non-Contracting State of the CISG, Turkish court will determine the applicable law under Art. 24 of MÖHUK. The characteristic performance of the sales contract is performance of the seller under Art. 24 of MÖHUK and the USA is state law of the business place of seller. So domestic law of the USA will be applicable to sales contract by reason of the country's reservation Art. 1 (b) of the CISG⁷¹.

III-Limits of Party Autonomy under the CISG: Limited Written Requirement

The CISG embodies a vigorous affirmation of the principle of party autonomy as mentioned above⁷². As a result of party autonomy, Art. 11 of CISG protects the freedom of form⁷³, which is a dimension of freedom of contract, by stating that a contract of sale need not be concluded in or evidenced by writing and not subject to any other formal requirement.

In general, there are no limits on party autonomy under the CISG. The Diplomatic Conference in Vienna for the CISG rejected a suggestion with relatively little debate that the principle of party autonomy should be limited by a principle of good faith⁷⁴. However, the Conference adopted Art. 12 of the CISG which only limits party autonomy

71 ÇELİKEL/ERDEM, 2016, p.366.

72 See supra footnote 19.

73 Convention adopted a concept well-known in continental European law: the theory of consensualism. According to this theory contracts are not subject to any specific formal requirements. The parties are entirely free to determine the form of their contract of sale. The theory of consensualism has also been widely adopted in international commercial practice, and by various international interstate or professional organizations and associations in their formulations of general conditions for sales contracts. Among them are the general conditions elaborated by the U.N. Economic Commission for Europe; see RAJSKI, Jerzi, Article 11, **Bianca-Bonelli Commentary on the International Sales Law**, Milan 1987, p.122, (p.121-124); available at <http://www.cisg.law.pace.edu/cisg/biblio/rajski-bb11.html> (last visited March 1st, 2016). According to CISG Advisory Council, the parol evidence rule has not been incorporated into the CISG and the plain meaning rule does not apply under the CISG. See CISG Advisory Council Opinion No 3 (1), Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, 23 October 2004. Rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA; available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op3.html> (last visited March 1st, 2016). Also see ERDEM, Ercüment, "Milletlerarası Mal Satım Sözleşmeleri Hakkında Birleşmiş Milletler Sözleşmesi (Viyana Satım Sözleşmesi)", BATİDER, Y:1992, C:16, Sa:3, p.65, (p.25-142).

74 The conference had more difficulty with the question of whether parties to a transaction excluded by Articles 2 or 3 may agree to have the convention govern their transaction. Debate on whether any article which is mandatory see WINSHIP, 1984, p.1-33.

under the CISG⁷⁵. Art. 12 of the CISG states that *"Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article."* The phrase *"The parties may not derogate from or vary the effect of this article"* in this provision reflects the strong desire that Art. 12 of the CISG is mandatory rule.

Article 12 of the CISG aims at accommodating the special demands of those States whose legal systems impose the written form for contracts of international sales for purposes of validity, evidence and administrative control (see Art. 14 of the Fundamentals of Civil Legislation of the ex-USSR⁷⁶). The law of the ex-U.S.S.R. imposed strict formal requirements for making foreign trade contracts. U.S.S.R. insisted on that the written form is imposed on contracts of international sale. Art. 12 is added to the Convention in order to satisfy these States that wanted to preserve such requirements⁷⁷. Formal requirements were inconsistent with modern commercial practice, particularly in view of speed and informality that characterize many transactions in a market economy.

Art. 12 of the CISG refers to any provision of Art. 11, Art. 29 or Part II of the Convention that allow a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing. This means that negotiation, formation, modification and termination of contract must be made in writing and also a contract is evidenced only by writing. Therefore, it does not encompass all notices or indications of intentions required or permitted under the Convention, such as notices which are concerned with fixing different time-limitations (according to Art. 47 or 63 of the CISG), specifying the nature of the lack of conformity of the goods (according to Art. 39 of the CISG) or concerning reduction of the price (according to Art. 50 of the CISG)⁷⁸. Also Art. 12 of the CISG does not encompass usages and practices because of their hallmark.

75 RAJSKI, **1987**, p.121-124; SÖZER, *Legal Environment*, 2001, p.388; TOKER, **2005**, p.122.

76 The procedure for signing foreign trade transactions with Soviet organizations was determined by a special Decree of the USSR Council of Ministers of February 14, 1978, No. 122; see RAJSKI, **1987**, p.126.

77 Many contracts for the international sale of goods are concluded by modern means of communication which do not always involve a written form of contract. Where States require that such contracts be in writing for purposes of administrative control, such as foreign exchange or import and export regulations, a writing might nevertheless be required. Even in such cases, however, the contract itself would be enforceable between the parties without such formalities. On the other hand, some States consider the requirement that contracts for the international sale of goods be in writing to be a matter of important public policy even in the context of the relation between the parties. See SONO, Kazuaki, "Formation of International Contracts under the Vienna Convention: A Shift above the Comparative Law", **International Sale of Goods: Dubrovnik Lectures**, (Editors Petar SARCEVIC / Paul VOLKEN), Ch.4, Oceana Publications, New York 1986, p.130, (p-111-131); available at <http://www.cisg.law.pace.edu/cisg/biblio/sono2.html> (last visited March 1st, 2016).

78 RAJSKI, **1987**, p.126; TOKER, **2005**, p.122.

Art. 12 of the CISG applies to sales contract where one of the parties' place of business is located in a Contracting State which has made a declaration under Art. 96 of this Convention. The declaration can only be made by a state whose legislation requires contract of sale to be concluded in or evidenced by writing⁷⁹. When the reservation is made by the state and one of parties' place of business is in a reservation state, the forum court must determine the applicable law to form of contract according to its private international law⁸⁰.

Written form requires a wet signature in the contract in order to provide clear evidence concerning the authentication of the parties. According to Art. 13 of the CISG written form includes telegram and telex. But the CISG does not include any provision whether e-mail, fax and EDI⁸¹ messages which are not only printed out, but also do not carry signature constitute writing⁸². The CISG-Advisory Council have an opinion that

79 The following States have made declarations under Articles 12 and 96: Argentina, Belarus, Chile, China, Estonia, Hungary, Latvia, Lithuania, Paraguay, Russian Federation, Ukraine.

80 "There are two school on the effect of an Article 96 reservation: the minority, which argues that the true effect is the preservation of the formal requirements of the declaring Contracting State, because the Convention should respect the underlying purposes of such legislation, e.g. protection against claims unsupported by a written agreement. However, where there are two competing sets of formal requirements, it is not clear whether only one should be applied exclusively, or both cumulatively. The majority, on the other hand, argues that the issue should be solved under the conflict rules of the *lex fori*, because these formal requirements would otherwise not only be made internationally applicable mandatory law, but they would also exclude the conflict rules of the other Contracting States. Ziegel, who belongs to neither of the schools, suggests that "obviously ... a writing will be required", but is not sure of which law should be complied with, and therefore concludes that such a reservation is better avoided. Arguably, the majority view is the more appropriate one, since it better respects the sovereignty of both declaring and non-declaring Contracting States". For more information see *SAF, Carolina, A Study of the Interplay between the Conventions Governing International Contracts of Sale*, Thesis, Queen Mary and Westfield College, London 1999; available at <http://www.cisg.law.pace.edu/cisg/biblio/saf.html> (last visited March 1st, 2016). Contrary opinion see: "Example 12A. Seller (S), in State S, claims that S and Buyer (B), in State B agreed on a sale of a tractor by S to B. The agreement was not embodied in a writing. State B requires a signed writing, and has made a declaration under Articles 12 and 96 rejecting Article 11, supra, that dispenses with such formalities. State S does not require a writing or other formalities. The above basic, but incomplete, facts need to be considered in different situations.", "Even though conflicts rules point to State S, which does not require a writing, this writer now (contrary to his earlier opinion) suggests that State S should dismiss S's suit—the same result as in Case A. This about-face results from this combination: (1) "any party" could refer to the application of Article 12 to both parties to the transaction, and (2) the acceptance by the Convention of the need, felt by some States, for protection against claims unsupported by a written agreement."; see HONNOLD, John O., "Declaration by Contracting State Preserving Its Domestic Requirements as to Form", **Uniform Law for International Sales under the 1980 United Nations Convention**, 3rd ed., Hague 1999, p.140, (p.138-140); available at <http://www.cisg.law.pace.edu/cisg/biblio/ho12.html> (last visited March 1st, 2016).

81 EDI: Electronic Data Interchange.

82 For further details, see EISELEN, Siegfried, "Electronic Commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980", **EDI Law Review**, Y:1999, C:6, (p.21-46); available at <http://www.cisg.law.pace.edu/cisg/biblio/eiselen1.html> (last visited March 1st, 2016); SÖZER, Bülent, **Elektronik Sözleşmeler**, Beta Yayıncılık, İstanbul 2002, p.104 et seq; FALCIOĞLU, Mete Özgür, **Türk Hukukunda Elektronik Satım Sözleşmesi ve Kuruluşu**, Yetkin Yayınevi, Ankara 2004, p.120; KAPLAN, Yavuz, "1980 Tarihli Birleşmiş Milletler Viyana Sözleşmesi Çerçevesinde İnternet Ortamında Bilgisayar Programı Satış Sözleşmesi", **Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni**, Prof. Dr. Ergin NÖMER'e Armağan, Özel Sayı, Y: 2002, Sa:2, p.325, (p.325-356).

*“the term “writing” in CISG also includes any electronic communication retrievable in perceivable form.”*⁸³.

On the other hand, if a Contracting State does not invoke the reservation provision and one of parties' place of business in this State, freedom of form for contract according to Art. 1(l)(b) and 11 of the CISG prevails. If the conflict of laws points to a reservation state, the domestic law of that state prevails in the terms of form of contract. Furthermore, there can be a limit within the state law which is the domestic law of forum. This is a matter that is not subject to a debate under the CISG.

Effect of a declaration under Art. 96 of the CISG in connection with Art. 12 of the CISG can be explained with an example in this context. A Turkish buyer enters into a contract with a Chinese seller by phoning in order to buy an electronic equipment. Turkey with no reservation and China which declared reservation of 96 of the CISG are two Contracting States of the CISG. The parties agree that written contract is not necessary. The CISG is applicable to the contract but Art. 12 and 96 of the CISG require written form for contract. The parties choose the CISG as a law governing the contract. But the parties do not derogate Art. 12 of and 96 of the CISG which require written form for contract. Applicable law governing the sales contract is ascertained under Art. 24 of MÖHUK as private international law of Turkey by Turkish courts. The characteristic performance of the sales contract is performance of the seller under Art. 24 of MÖHUK. The place of seller's performance is in China which is a Contracting State of the CISG, so Chinese law with the CISG is applicable law to contract. But the CISG applies to contract with regard to Art. 12 of the CISG before Turkish courts. In other words, Turkish courts take into account the written form requirement for the sales contract. If a Turkish seller enters into a contract with a Chinese buyer on the phone in order to sell an electronic equipment. Turkish court may decide under conflict of laws of Turkey⁸⁴. The place of seller's performance is in Turkey, so Turkish law with the CISG will be applicable law to this contract. Turkish law as an applicable domestic law does not require written form for contract. If forum is a Chinese court, Chinese court may consider the written form requirement for sales contract.

Conclusion

The CISG contains not only procedural rules but also substantive rules of contract law such as rules of national contract law. If we look the provisions of the CISG from the

83 If the writing requirement however is interpreted widely as suggested above, then there will be no implications for the use of these modern applications in the conclusion, modification and termination of international sales contracts. If the suggested wide interpretation is not followed, then the implication will be that international sales contracts cannot be concluded by these means and that other forms of writing need to be employed; see CISG-AC Opinion No 1, Electronic Communications under CISG, 15 August 2003. Rapporteur: Professor Christina Ramberg, Gothenburg, Sweden; available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op1.html> (last visited March 1st, 2016).

84 Also see SCHLECHTRIEM, Peter/SCHMIDT-KESSEL, Martin, **Commentary on the UN Convention on the International Sale of Goods (CISG)**, (Editor SCHWENZER, Ingeborg), Third Edition, Oxford University Press, New York 2010, p.215.

perspective of substantive law rules, Art. 6 of the CISG states that the parties have freedom of contract. Freedom of contract in national law means that individuals have the right to carry out economic activities without any undue interference from the sovereign power, to sign or not to sign any contract, to depart from the particular types of contracts, to draft a contract without subjecting it to any form written or oral, to bargain and determine the terms of their agreement, and to choose the counterparty. The CISG recognizes the same freedom of contract to parties in the same way as national contract law does.

Party autonomy in the conflict of laws means that parties may choose the applicable law which would govern their contract. And also the parties have autonomy to determine the provisions of a contract by deviating from or modifying the provisions of the CISG. The Convention does not restrict the freedom of sellers and buyers to determine the terms of their transactions, except Art. 12 of the CISG. The CISG differs from modern legislation governing the sale of goods with regard to imposing no restrictions on the party autonomy.

The CISG is directly applicable law in a Contracting State or when conflict of laws refers to the law of a Contracting State. Also the parties may choose or exclude the application of the CISG implicitly or expressly, totally or partially. But matters arising from international sales contract such as validity of contracts or property matters are not governed by CISG. So parties should choose a national law to apply the contract in addition to the rules in the CISG.

In general, there is no limit to party autonomy under the CISG. The only limit to party autonomy under the CISG is Art. 12 of the CISG which is mandatory. Art.12 of the CISG applies to sales contract where place of business of one party is located in a Contracting State which has made a declaration under Art. 96 of this Convention.

Art.12 of the CISG states that negotiation, formation, modification and termination of contract must be made in writing and also a contract is evidenced only by writing. Therefore, it does not encompass all notices or indications of intentions required or permitted under the Convention.

Art.12 of the CISG applies to sales contract where one of the parties' place of business is located in a Contracting State which has made a declaration under Art. 96 of this Convention. The declaration can only be made by a state whose legislation requires contract of sale to be concluded in or evidenced by writing. When the reservation is made by the state and where one of parties' place of business is in a reservation state, the forum court must determine applicable law to the form of contract according to its private international law. On the other hand, when a Contracting State which did not invoke the reservation provision and where one parties' place of business in this State, freedom of form for contract according to Arts. 1(I)(b) and 11 of the CISG prevails. If the conflict of laws point to a reservation state, the domestic law of that state prevails for form of contract.

Written form requires a wet signature in the contract in order to provide clear evidence concerning the authentication of the parties. According to Art. 13 of the CISG written form includes telegram and telex. But the CISG does not include any provision

whether e-mail, fax and EDI messages which are not only printed out, but also do not carry signature constitute writing.

On the other hand, there is a limit within the state law which is the domestic law of forum. This is a matter that is not subject to a debate under the CISG.

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ABBREVIATIONS

Art.	: Article
BATİDER	: Banka ve Ticaret Hukuku Dergisi
C.	: Cilt (Volume)
Ch.	: Chapter
CISG	: United Nations Convention on Contracts for International Sale of Goods, 1980
Ed.	: Edition
EDI	: Electronic Data Interchange
MÖHUK.	: Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun
p.	: Page
pa.	: Paragraf (Paragraph)
PECL	: Principle of European Contract Law
Sa.	: Sayı (Issue)
Trans.	: Translator
UNIDROIT	: Institut Internationale pour L'unification du Droit Prive
UNCITRAL	: United Nations Commission on International Trade Law
USA	: United States of America
USSR	: Union of Soviet Socialist Republics
Y.	: Yıl (Year)

