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UNIFORMITY AND STANDARDIZED FLEXIBILITY UNDER THE CISG:

Options for Newly Acceding Contracting States Observing Islamic Law

Ulrich G. Schroeter

Table of Contents

Introduction 192
A. Global uniformity and local specificities in international commercial law 194
B. The CISG's provisions on interest as a possible accession hurdle 194
C. Approach of the CISG: "Standardized flexibility" 196
I. Reservations 197
A. Standardization of reservations in the CISG 197
B. Lack of a specific reservation regarding interest in the Sales Convention 199
C. The Article 92 CISG reservation and its (limited) exclusion effect 200
D. Article 95 CISG as a possible supplementary reservation 202
1. Supplementary use of Article 95 CISG reservation and policy considerations 202
2. Time for making an Article 95 CISG reservation 204
E. Uncertainties about the effect of an Article 92 CISG reservation regarding Part III 206
1. Standardization of reservation's substantial scope, Article 92(2) CISG 206
2. Matters that may (or may not) be governed by Part III: Examples 206
3. Uniformity in the Convention's application (Article 7(1) CISG) as decisive goal 208
II. Limits to the CISG's substantive scope 209
A. A source of flexibility 209
B. The interest rate as a question not settled by the CISG 210
III. Interpretative declarations 211
A. Admissibility of interpretative declarations under the CISG 212
B. Interpretative declaration regarding the interest rate determination

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in courts of States observing Islamic law? 213
1. Declarations about the CISG's compatibility with domestic law as sub-category 213
2. Admissibility under the CISG 213
3. Advantages of such an interpretative declaration.....214
C. Standardization of interpretative declarations 215
Conclusion.....215

Introduction

The United Nations Convention on Contracts for the International Sale of Goods (CISG), adopted in Vienna on 11 April 1980, has developed into one of the most successful uniform commercial law instruments of all times.[1] Having entered into force in 1988, it has today been ratified or acceded to by almost one hundred Contracting States worldwide, comprising States from all parts of the globe with widely varying economic, political, cultural and religious systems as well as stages of development. The Sales Convention's universal acceptability had from the outset been an important goal of its drafters, who enshrined in its Preamble "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".[2]

In spite of the impressive number of current CISG Contracting States, it can be asked why an approximately similar number among the world's States have not (or not yet) acceded to the Convention. The general legislative quality of the CISG's provisions and their neutral character are both widely accepted[3] and therefore arguably not the cause. For many States, other legislative priorities[4]

1. *See generally* John O. Honnold & Harry M. Flechtner, Honnold's Uniform Law for International Sales under the 1980 United Nations Convention ¶ 11 (5th ed. 2021); Herbert Kronke, *The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond*, 25 J.L. & Com. 451 (2005); Ulrich G. Schroeter, *Einleitung*, *in* Kommentar zum UN-Kaufrecht (CISG) [Commentary on the UN Convention on the International Sale of Goods (CISG)] ¶ 2 (Ulrich G. Schroeter ed., 8th ed. 2024).

2. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. ¶ 3, 59 [hereinafter CISG].

3. *See* Fashion Products, No. 11849 (2003), 31 Y.B. Com. Arb. 148 (2006); Fritz Enderlein & Dietrich Maskow, International Sales Law: United Nations Convention on Contracts for the International Sale of Goods – Convention on the Limitation Period in the International Sale of Goods, Introduction n. 2.8 (1992); Joseph Lookofsky, Understanding the CISG 2 (6th ed. 2022); Schroeter, *supra* note 1, ¶ 43.

4. *See* Ulrich G. Schroeter, *Gegenwart und Zukunft des Einheitskaufrechts*, 81 Rabels Zeitschrift für ausländisches und internationals Privatrecht [RabelsZ] 32, 39 (2017) (Ger.). *See generally* Johanna Hoekstra, *Political Barriers in the Ratification of International Commercial Law Conventions*, 26 Unif. L. Rev. 43, 46–49 (2021).

and/or a lack of technical or financial resources[5] have been suggested as the main reasons why a CISG ratification has not been attempted. At the same time, commentators have increasingly examined whether there are particular features of the CISG that may be deterring certain groups of States from joining the Convention. A group often addressed in this context are States observing Islamic law,[6] many of which have not yet acceded to the CISG.

Against this background, the Kingdom of Saudi Arabia's 2023 declaration of accession to the CISG was rightly viewed as a significant development, with the Convention subsequently entering into force for Saudi Arabia on 1 September 2024.[7] Although this welcome step made the Kingdom the 96th CISG Contracting State, it came with an important reservation: Saudi Arabia's accession was accompanied by a declaration authorized in Article 92(1) CISG, according to which "the Kingdom will not be bound by Part III" of the Convention.[8] This declaration is both the first Article 92 reservation regarding Part III of the CISG and the most far-reaching reservation ever made under the Convention because

5. *See* Luca Castellani, *Uniform Law and the Production and Circulation of Legal Models*, *in* Convergence and Divergence of Private Law in Asia 7, 20 (Gary Low ed. 2022).

6. *See generally* Mona Ahadi, *The Adoption of the CISG in Iran: Practical Difficulties in Implementing the CISG*, *in* Modernizing International Trade Law to Support Innovation and Sustainable Development (4-6 July 2017, Vienna) 339 (2017); Fatima Akaddaf, *Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?*, 13 Pace Int'l L. Rev. 1 (2001); Gary F. Bell, *New Challenges for the Uniformisation of Laws: How the CISG is challenged by "Asian values" and Islamic law*, *in* Towards Uniformity: The 2nd Annual MAA Schlechtriem CISG Conference 11, 14–15 (Ingeborg Schwenzer & Lisa Spagnolo eds., 2011); Jason Chuah, *Impact of Islamic Law on Commercial Sale Contracts – A Private International Law Dimension in Europe*, Eur. J. Com. Cont. L. 191, 203 (2010); Mazin Abdulhameed Dawood Hassan & Ahmad Azam Othman, *Rights of The Buyer Under The Sale of Goods in Shari'ah and International Trade Law: A Comparative Analysis*, 9(1) J. Contemp. Islamic L. 47 (2024); Sharifah Saeedah Syed Mohamed, *Shari'ah Compliant International Sale of Goods – Mere Possibility or Impending Reality?*, *in* Contemporary Issues and Development in the Global Halal Industry 471 (Siti Khadijah Ab. Manan et al. eds., 2016); Surya Oktaviandra, *Indonesia and its Reluctance to Ratify the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 8 Indon. L. Rev. 243 (2018); Jadranka Petrovic, *The Interplay of CISG Cultural, Legal, Historical and Religious Variances and Their Impact on the Treatment of the CISG*, 20 Vindobona J. Int'l Com. L. & Arb. 71, 92 (2016); Lisa Spagnolo & Maria Bhatti, *Conflicts of Interest Between Sharia and International Sale of Goods: Does CISG Interest Fit with Islamic Law?*, 49(1) Monash U. L. Rev. 151, 152 (2023); T.S. Twibell, *Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) Under Shari'a Law: Will Article 78 of the CISG be Enforced when the Forum is an Islamic State?*, 9 Int'l Legal Persp. 25 (1997).

7. Saudi Arabia deposited its instrument of accession to the Sales Convention with the Convention's depositary on 3 August 2023. In accordance with Article 99(2) CISG, the Convention entered into force for Saudi Arabia on 1 September 2024; *see* U.N. Secretary-General, Convention on Contracts for the International Sale of Goods, Depositary Notification, U.N. Doc. C.N.234.2023.TREATIES-X.10 (Aug. 15, 2023).

8. *See id.*

it restricts the application of the Convention's very core, namely its provisions on buyers' and sellers' rights and obligations (Articles 25–88 CISG). Saudi Arabia's current position towards the CISG therefore appears to be one of merely reserved acceptance.

The Kingdom's accession to the Sales Convention provides an opportunity to address in a more general manner the degree of flexibility that the Convention offers Contracting States to-be, and what legal instruments allow them to adjust the CISG's regime to their particular needs. In this context, it will also be assessed what precise effects an Article 92 CISG reservation regarding Part III has on the Convention's application and what challenges it may raise in commercial law practice.

A. Global uniformity and local specificities in international commercial law

The starting point of the analysis is the well-known basic purpose of uniform commercial law in general and of the CISG in particular: Creating a level legal playing field for cross-border trade through legal uniformity, thereby making international commercial exchanges easier for those buyers and sellers who conclude contracts with counterparties from many different States, and who now can apply the same uniform provisions no matter where a counterparty happens to be located. In this respect, the CISG is striving for global (worldwide) uniformity,[9] and is offering a modern sales law regime suitable for trade between and on all of the continents.

However, while the perfect international commercial law may be completely uniform, the world is not. Instead, various differences exist between different regions of the world and between different countries within the same region. Some of these differences are factual, others legal in nature; yet others are religious or cultural.[10] Most of these differences do not affect the law of international commercial sales transactions, because this field of law is of a largely technical character. But some of these differences do, and where this happens, international uniform law has to strike a balance between the general goal of uniformity and respect for local rules and values that a State may have a justified interest in preserving.

B. The CISG's provisions on interest as a possible accession hurdle

Among the Sales Convention's uniform rules on contract formation and sales law, its provisions on interest have been identified as potentially conflicting

9. *See* Michael Joachim Bonell, *Article 7*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION ¶ 2.2.2 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987); ULRICH G. SCHROETER, INTERNATIONALES UN-KAUFRECHT [International UN Sales Law] ¶ 131 (7th ed. 2022).

10. *See* Ulrich G. Schroeter, *Does the 1980 Vienna Sales Convention Reflect Universal Values? The Use of the CISG as a Model for Law Reform and Regional Specificities*, 41 LOY. L.A. INT'L & COMP. L. REV. 1, 4–15 (2018).

with Islamic law.[11] The Convention contains merely two provisions dealing with interest: Buyers' and sellers' general entitlement to interest on any sum in arrears in Article 78 CISG,[12] and the more specific obligation of the seller to pay interest on the price that he has to refund to the buyer after a contract has been avoided (Article 84(1) CISG).[13] Commentators have opined that the obligations to pay interest imposed by the Sales Convention are the main reason why many Muslim-majority States have not acceded to the CISG,[14] although other features of the CISG[15] have also been mentioned in this context.

The present article expresses no opinion about the requirements of Islamic law regarding interest[16] and their compatibility with the Sales Convention. Instead, it focusses on the approach that the CISG takes in accommodating different viewpoints in different countries regarding local specificities in general and regarding legal obligations to pay interest in particular. And a look at the current list of CISG Contracting States indicates that the compatibility of Islamic law with the Sales Convention has not been assessed uniformly among the countries potentially concerned.

On the one hand, a number of States with an Islamic tradition have acceded to the CISG over the years. Among them are, in alphabetic order, Albania, Azerbaijan, Bahrain, Bosnia and Herzegovina, Egypt, Guinea, Iraq, Kyrgyzstan, Lebanon, Mauritania, Palestine, Syria, Turkey, Turkmenistan, and Uzbekistan. That Articles 78 and 84(1) CISG did not deter these States from adopting the Sales Convention has sometimes been explained by the influence that Western legal thought has had on their domestic legal systems.[17] At the same time, it has been pointed out that the Arab world's legal community continues to lack awareness of the CISG.[18]

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11. *See* Chuah, *supra* note 6; Mohamed, *supra* note 6, at 477; Petrovic, *supra* note 6; authors cited *infra* note 14.

12. Article 78 CISG reads: "If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74." CISG, *supra* note 2, art. 78.

13. Article 84(1) CISG reads: "If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid." CISG, *supra* note 2, art. 84(1).

14. *See* Ahadi, *supra* note 6, at 342; Bell, *supra* note 6, at 28; Oktaviandra, *supra* note 6, at 249; Spagnolo & Bhatti, *supra* note 6, at 152, 196–97; Twibell, *supra* note 6, at 86; *see also* Akaddaf, *supra* note 6, at 56–57.

15. Such as the buyer's duty to give notice of non-conformity to the seller, if strictly construed. *See* CISG, *supra* note 2, art. 39(1); *see also* Abdullah S. Alaoudh, *The Notice Requirement of Article 39 and Islamic Law: Developed vs. Developing Countries*, 26 Arab L. Q. 481, 492-98 (2012); discussing other issues Akaddaf, *supra* note 6, at 25–46; Bell, *supra* note 6, at 26–28.

16. *See* Ilias Bantekas et al., Islamic Contract Law ¶ 6.16–6.37 (2024).

17. *See* Fatima Akaddaf, *supra* note 6, at 56–57.

18. *See* Hossam A. El-Saghir, *The Interpretation of the CISG in the Arab World*, *in* CISG Methodology 355, 359 (André Janssen & Olaf Meyer eds., 2009).

On the other hand, a much larger group of States observing Islamic law has remained absent from the Sales Convention. This group includes, again in alphabetic order, Afghanistan, Algeria, Bangladesh, Brunei, Burkina Faso, Chad, the Comoros, Djibouti, Gambia, Indonesia, Iran, Jordan, Kazakhstan, Kuwait, Libya, Malaysia, the Maldives, Mali, Morocco, Niger, Oman, Qatar, Pakistan, Senegal, Sierra Leone, Somalia, Sudan, Tajikistan, Tunisia, the United Arab Emirates, and Yemen. Among the jurisdictions where the Sharia applies to some degree, the non-accession quota has occasionally been calculated as 81 percent,[19] and the Convention's party obligations to pay interest have been named as a major reason for such non-accessions.[20]

Also with regard to Saudi Arabia, doubts about the Sales Convention's compatibility with Islamic law were suggested as the cause of its CISG abstention.[21] With its accession in 2023, Saudi Arabia has now chosen a novel middle ground approach: While the Kingdom did thereby become a CISG Contracting State, its accompanying Article 92 CISG reservation regarding Part III of the Convention means that the Kingdom is nevertheless 'not bound' by Articles 78 and 84(1) CISG, given that these two interest-related provisions are located in Part III. At least at first sight, Saudi Arabia has thus avoided any conflict between its treaty obligations under the CISG and principles of Islamic law.

C. Approach of the CISG: "Standardized flexibility"

In attempting to strike a balance between global uniformity and breathing space for local specificities, the CISG generally offers its Contracting States what the present contribution refers to as 'standardized flexibility.' What does this mean?

Under the CISG—and the same is true for other more recent uniform law instruments—the compromise between the goal of a globally uniform commercial law on the one hand and the accommodation of local preferences on the other hand is marked by two essential characteristics, which in combination "standardize" the flexibility given to Contracting States. First, the questions of whether and where Contracting States can deviate from the uniform law text have been decided in the Convention itself and, therefore, are on the level of international law. It is, accordingly, not simply left to the government of each Contracting State to choose on the level of domestic law which provisions of the CISG it does not want to adopt when acceding to the Convention—instead, the available flexibility options have already been defined by the drafters of the CISG and thereby "standardized" for all current and future CISG Contracting States alike, in the style of a uniform "take it or leave it" menu. Second, the Convention itself also

19. *See* Spagnolo & Bhatti, *supra* note 6, at 154.
20. *See* Oktaviandra, *supra* note 6, at 249.
21. *See* Alaoudh, *supra* note 15, at 492; Twibell, *supra* note 6, at 86.

defines how Contracting States may use the flexibility options the CISG allows for, thereby also standardizing the content of authorized deviations.[22]

By contrast, some other (notably older) uniform commercial law Conventions do not 'standardize' the flexibility they grant in a similar manner, leading to a much more reduced uniformity than under the CISG. A greater and 'unstandardized' degree of flexibility is also, for example, offered by model laws, which leave it entirely to the domestic legislator to decide where and how it wants to deviate from the model law's text.

In the following, the CISG's "standardized flexibility" approach will be further demonstrated by addressing three legal features that operate (or may operate) as tools to implement "standardized flexibility" under the CISG: (1) reservations, (2) limits to the Convention's substantive scope, and, finally, (3) interpretative declarations. With regard to each feature, the assessment will proceed in two steps: first, the feature's role under the Convention will be outlined, and, second, the affect, or potential affect, of the feature on Contracting States observing Islamic law under the CISG will briefly be addressed, using Saudi Arabia's recent accession to the Convention as an example.

I. Reservations

The Sales Convention's first tool enabling standardized flexibility are the five reservations expressly authorized in Articles 92–96. By declaring one or more of these reservations, a Contracting State can "opt out" of certain provisions of the CISG by removing their applicability to sales contracts involving parties from the reservation State. Reservations are a classical feature of treaty law, used both in uniform commercial law conventions and in other types of treaties.

A. Standardization of reservations in the CISG

The CISG "standardizes" the flexibility offered through reservations by not only specifying the authorized reservations and the conditions under which they may be made, but also their precise effect upon the Convention's application.[23] Article 98 CISG safeguards this standardizing effect by stating that "[n]o reservations are permitted except those expressly authorized in this Convention."[24] The CISG thereby follows an approach differing from other conventions like, for example, the 1970 Hague Convention on the Taking of Evidence Abroad, which only states which of its provisions a State may in whole or in part exclude by

22. *See* Ulrich G. Schroeter, *Article 98 CISG: Restriction to Expressly Authorized Reservations*, *in* Commentary on the UN Convention on the International Sale of Goods (CISG) at ¶ 2 (Ingeborg Schwenzer & Ulrich G. Schroeter eds., 5th ed. 2022). For the general treaty law perspective, *see* Int'l L. Comm'n, Guide to Practice on Reservations to Treaties, U.N. Doc. A/CN.4/L.779, 3.1.4 (19 May 2011).

23. Ulrich G. Schroeter, *supra* note 22, at ¶ 2.

24. CISG, *supra* note 2, art. 98.

making a reservation, but does not specify how and with what consequences.[25] An even further-reaching example is the 1950 Convention on the Declaration of Death of Missing Persons, which allows any State to subject its accession to that Convention to reservations against any of its provisions and of any type, content and effect.[26]

Yet other conventions are simply silent about the issue of reservations. Among conventions unifying areas of commercial law, the 1955 Hague Convention on the law applicable to international sales of goods[27] or the 2005 Hague Convention on Choice of Court Agreements[28] are examples of such instruments. By neither expressly authorizing nor expressly excluding reservations, conventions of this type leave room for the application of the general treaty law default provision in Article 19(c) of the 1969 Vienna Convention on the Law of Treaties,[29] which allows States to formulate reservations unless the reservation "is incompatible with the object and purpose of the treaty"—a test that has proven notoriously vague in treaty practice.[30]

By instead standardizing the flexibility offered through its reservations in respect to each reservation's prerequisites and effects, the CISG considers that its provisions will in practice not be applied by government officials in a reservation State, but by commercial courts and arbitrators located somewhere around the world in dealing with international sales transactions. In order to achieve uniformity in the Convention's application even where reservations are involved, each reservation's effect has therefore been clearly specified in the Sales Convention's

25. *See* Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, art. 33(1), Mar. 18, 1970, 23 U.S.T. 2555 ("A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.").

26. *See* Convention on the Declaration of Death of Missing Persons, art. 19(1), April 6, 1950, 119 U.N.T.S. 99 ("Any State may subject its accession to the present Convention to reservations which may be formulated only at the time of accession.").

27. *See* Convention on the Law Applicable to International Sales of Goods, June 15, 1955, 510 U.N.T.S. 149.

28. *See* Convention on Choice of Court Agreements, June 30, 2005, HCCH, https://www.hcch.net/en/instruments/conventions/full-text/?cid=98.

29. Regarding the Convention on Choice of Court Agreements, *see* Trevor Hartley & Masato Dogauchi, Explanatory Report on the Hague Convention of 30 June 2005 on Choice of Court Agreements ¶ 318 (2005) ("The Convention does not contain any provision prohibiting reservations. This means that reservations are permitted, subject to the normal rules of customary international law (as reflected in Art. 2(1) d) and Art. 19 to 23 of the Vienna Convention on the Law of Treaties 1969)").

30. *See* Int'l L. Comm'n, *supra* note 22, guideline 3.1.5 cmt. (3) ("something of an enigma"); Alain Pellet, *1969 Vienna Convention – Article 19: Formulation of Reservations*, *in* The Vienna Conventions on the Law of Treaties: A Commentary ¶ 101 (Olivier Corten & Pierre Klein eds., 2011); Thomas Giegerich, *Treaties, Multilateral, Reservations to*, *in* Max Planck Encyclopedia of Public International Law ¶ 15 (Rüdiger Wolfrum ed. 2020); Malcolm Shaw, International Law 698 (8th ed. 2017).

text itself.[31] In doing so, the Sales Convention bars recourse to Article 19(c) of the 1969 Vienna Convention on the Law of Treaties: As Article 98 CISG is a provision in the sense of Article 19(b) of the 1969 Vienna Convention,[32] it pre-empts the application of Article 19(c) of the 1969 Vienna Convention to and under the Sales Convention.[33]

B. Lack of a specific reservation regarding interest in the Sales Convention

The CISG does not expressly authorize any reservation specifically on the matter of interest.[34] The desirability of such a reservation had occasionally been raised by delegates at the drafting stage of the Sales Convention:[35] during the discussion at the 1980 Vienna Diplomatic Conference of a draft of today's Article 78 CISG, delegate Shafik (Egypt) had stated that "[a]lthough it might be desirable to omit any reference to interest from the Convention, such a solution was hardly a realistic one, when what was involved was a well-established practice, but it would be advisable to provide for reservations which would permit any country, particularly those where the concept of interest was incompatible with their religion, to apply the relevant clauses in a different manner."[36] In a similar way, delegate Sami (Iraq) had pointed out that "certain Arab countries did not charge interest. His delegation would have preferred that there were no reference at all to interest in the Convention. If, however, a provision concerning that question had to be included it would desirable, in order to make it possible for the countries which did not charge interest to accede to the Convention, to allow them expressly to enter a reservation to such a provision."[37]

In spite of these statements by delegates, no formal proposal to authorize an interest-specific reservation was ever made, neither within the UNCITRAL

31. Schroeter, *supra* note 22, at ¶ 2.

32. *See* Enderlein & Maskow, *supra* note 3, at art. 98 n. 1; Schroeter, *supra* note 22, at ¶ 1; Ulrich G. Schroeter, *Reservations and the CISG: The Borderland of Uniform International Sales Law and Treaty Law after Thirty-Five Years*, 41 Brook. J. Int'l L. 203, 222 (2015).

33. *See* Schroeter, *supra* note 22, ¶ 5; Int'l L. Comm'n, *supra* note 22, guideline 3.1.4 cmt. (5) ("it goes without saying that when the content of a specified reservation is indeed indicated in the reservations clause itself, a reservation consistent with that provision is not subject to the test of compatibility with the object and purpose of the treaty").

34. *See* Spagnolo & Bhatti, *supra* note 6, at 195; Twibell, *supra* note 6, at 79.

35. For a summary of the discussions within UNCITRAL, *see* 8 Y.B. U. N. Comm'n on Int'l Trade L. 60, U.N. Doc. A/Cn.9/SER.A/1977 at n. 495 ("The discussions in respect of the place at which the interest should be calculated brought forth a number of proposals whose objective was the deletion of [draft] article 58 or the possibility of rendering it inoperative in relation to individual States, either by means of reservation or by means of declaration.").

36. United Nations Conference on Contracts for the International Sale of Goods, Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees, at 416 n. 10, U.N. Doc. A/CONF.97/19 (1991) [hereinafter Official Records].

37. *See id.*, at 418 n. 20.

Working Group nor during the 1980 Diplomatic Conference in Vienna. This in turn resulted in no express reservation of this kind eventually being included into the Convention's text. As Article 98 CISG makes clear, CISG Contracting States observing Islamic law are therefore barred from nevertheless declaring a reservation against the Convention's provisions on interest.[38] The wording of Article 98 CISG, notably its reference to reservations "expressly authorized" in the Convention, as well as this provision's purpose furthermore stand in the way of any unspoken authorization of an interest-specific reservation being read into the CISG by means of an excessively flexible 'interpretation'.[39]

C. The Article 92 CISG reservation and its (limited) exclusion effect

Upon its recent accession to the CISG, Saudi Arabia declared an Article 92 CISG reservation, stating that it will not be bound by Part III of the Convention.[40] The effect of such a reservation is standardized in Article 92(2) CISG. From this provision, it follows that Saudi Arabia "is not to be considered a Contracting State within Article 1(1) CISG in respect of matters governed by Part III," or Articles 25–88 CISG. Saudi Arabia is the first Contracting State in the history of the CISG to make this precise reservation, although Article 92 CISG reservations had been made before by the four Scandinavian (Nordic) States Denmark, Finland, Norway and Sweden, albeit with regard to Part II of the CISG (these reservations have since all been withdrawn in accordance with the procedure set forth in Article 97(4) CISG[41]).

From the experience made by the Scandinavian States, we have learned that the effect of Article 92 CISG reservations as standardized by Article 92(2) CISG can easily be misunderstood,[42] and that this effect is less far-reaching than is sometimes assumed. In particular, an Article 92 CISG reservation does not mean that the Part of the Convention it pertains to—in Saudi Arabia's case, Part III—can *never* apply to parties from or in courts of the reservation State, in spite of the State having declared that "it will not be bound by" this Part of the Convention (Article 92(1) CISG). The reason for this generally agreed result lies in the interaction between Article 92(2) CISG and Article 1(1) CISG referred to

38. This sometimes appears to be overlooked in legal writings; *see* Akaddaf, *supra* note 6, at 56; Chuah, *supra* note 6, at 203.

39. Ulrich G. Schroeter, *supra* note 22, at ¶ 3.

40. *See supra* Introduction.

41. *See* Jan Kleineman, *The New Nordic Approach to CISG Part II: Pragmatism Wins the Day?*, *in* The CISG Convention and Domestic Contract Law: Harmony, Cross-Inspiration, or Discord? 21 (Joseph Lookofsky & Mads Bryde Andersen eds., 2014); Joseph Lookofsky, *The CISG in Denmark and Danish Courts*, 80 Nordic J. Int'l L. 295, 302-03 (2011); Ulrich G. Schroeter, *Article 92 CISG: Reservation Regarding Part II or III*, *in* Commentary on the UN Convention on the International Sale of Goods (CISG) ¶ 9 (Ingeborg Schwenzer & Ulrich G. Schroeter eds., 5th ed. 2022).

42. *See* Joseph Lookofsky, *Alive and Well in Scandinavia: CISG Part II*, 18 J.L. & Com. 289, 291 (1999) (describing the legal effect of Article 92 CISG reservation as "dubious").

therein:[43] although Saudi Arabia's Article 92 CISG reservation does exclude the application of Part III in accordance with Article 1(1)(a) CISG, the same is not necessarily the result under Article 1(1)(b) CISG.

Let us take a simple example, namely a sales contract between a buyer from Saudi Arabia and a seller from Switzerland. If we first look at Article 1(1)(a) CISG, it is clear that the conditions of this provision are not fulfilled because Article 1(1)(a) CISG requires that both parties have their places of business in CISG Contracting States and Saudi Arabia, according to Article 92(2) CISG, is not to be considered a Contracting State in respect of matters governed by Part III. Accordingly, Part III of the CISG does not apply to this sales contract under Article 1(1)(a) CISG. This effect has been confirmed multiple times in case law concerning the Scandinavian States' Article 92 reservations regarding Part II[44] and is undisputed among commentators.[45]

But the outcome may well be different under Article 1(1)(b) CISG, the second ground for the Convention's applicability: According to Article 1(1)(b) CISG, the CISG also applies whenever the rules of private international law lead to the application of the law of a CISG Contracting State. In our example, the applicability of Part III therefore depends on which law the rules of private international law of the forum State point to: if these rules lead to the application of the law of Saudi Arabia, Part III again does not apply, because Article 92(2) CISG provides that Saudi Arabia is not to be considered a Contracting State in respect of Part III. But if the rules of private international law lead to the application of Swiss law—and this would be so, for example, if the case was heard in a Swiss court, because Switzerland's rules of private international law (namely Article 3(1) of the 1955 Hague Convention on the law applicable to international sales of goods[46]) generally point to the law of the

43. *See* Malcolm Evans, *Article 92*, *in* Commentary on the International Sales Law: The 1980 Vienna Sales Convention ¶ 2.3 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987); Lookofsky *supra* note 42, at 292; Schroeter, *supra* note 41, ¶ 3.

44. *See* Incorporation of Orgalime S2000, No. VS RS sklep III Ips 92/2014, CISG-online 5270, ¶¶ 12-13 (Supreme Court July 14, 2015) (Slovn.) (concerning the effect of the Swedish Article 92 reservation); Danish Chairs, No. 6 O 160/10, CISG-online 2292, ¶¶ 10-11 (Landgericht Lübeck Dec. 30, 2010) (Ger.) (concerning the effect of the Danish Article 92 reservation); Valero Marketing & Supply Company v. Greeni Oy, 373 F.Supp.2d 475, 480 (D.N.J. 2005) (concerning the effect of the Finnish Article 92 reservation); Fresh Salmon, No. 15 O 50/03, CISG-online 905, ¶ 22 (Landgericht Bielefeld Dec. 12, 2003) (Ger.) (concerning the effect of the Danish Article 92 reservation); Mitchell Aircraft Spares, Inc. v. European Aircraft Services AB, 23 F.Supp.2d 915, 918 (N.D. Ill. 1998) (concerning the effect of the Swedish Article 92 reservation); Swedish Goods, No. 12.G.75.693/1995/38, CISG-online 252 (Metropolitan Ct. Budapest May 21, 1996) (Hung.) (concerning the effect of the Swedish Article 92 reservation).

45. *See* Honnold & Flechtner, *supra* note 1, ¶ 650; Lookofsky *supra* note 42, at 293; Schroeter, *supra* note 41, ¶ 20.

46. *See* Convention on the Law Applicable to International Sales of Goods, *supra* note 27, at art. 3(1).

seller—then Part III of the CISG would apply to the contract in accordance with Article 1(1)(b) CISG, because Switzerland is a Contracting State with respect to Part III. This limited effect of Article 92 reservations was confirmed in case law concerning the Danish reservation regarding Part II[47] and is generally accepted among commentators.[48]

In essence, the limited exclusion effect of any Article 92 CISG reservation as standardized by Article 92(2) CISG therefore means that Part III of the Convention will still apply to sales contracts involving a party from an Article 92 CISG reservation State (like Saudi Arabia), including in the courts of a reservation State, in certain constellations governed by Article 1(1)(b) CISG. In terms of public international law, application of Part III of the Convention in such constellations is furthermore not merely a matter of discretion for the Article 92 CISG reservation State, but rather its treaty law obligation.[49]

D. Article 95 CISG as a possible supplementary reservation

The incompleteness of Article 92 CISG's exclusion effect could only be overcome by way of an additional reservation, namely the one authorized in Article 95 CISG,[50] which entirely excludes the reservation State's obligation to apply Article 1(1)(b) CISG.

1. Supplementary use of Article 95 CISG reservation and policy considerations

In practice under the Sales Convention, the interaction between the Article 92 CISG and the Article 95 CISG reservations could *inter alia* be witnessed in *Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB*, a case decided by a U.S. district court in 1998.[51] When addressing the formation of the contract between the U.S. buyer *Mitchell Aircraft Spares* and the Swedish

47. *See* Elinette Konfektion Trading ApS v. Elodie S.A., No. B-3691-97, CISG-online 486 (Østre Landsret April 23, 1998) (Den.).

48. *See* Evans, *supra* note 43, ¶ 2.4; Honnold & Flechtner, *supra* note 1, ¶ 650; Lookofsky, *supra* note 42, at 294–95; Ulrich Magnus, *The Scandinavian Reservation Under Art. 92 CISG*, 57 Scandinavian Stud. L. 195, 199 (2012); Schroeter, *supra* note 41, ¶ 25; Claude Witz, Vente Internationale de Marchandises: Conventions de Vienne et de New York – Contrat – Prescription [International Sale of Goods : Vienna and New York Conventions – Contract – Prescription] n. 531.12 (2d ed. 2023); Wolfgang Witz & Manuel Lorenz, *Artikel 92*, *in* International Einheitliches Kaufrecht: Praktiker-Kommentar und Vertragsgestaltung zum CISG [Internationally Uniform Purchase Law: Practitioner Comment and Contract Design on the CISG] ¶ 2 (Witz et al. eds., 2d ed. 2016).

49. *See* Franco Ferrari, *Universal and Regional Sales Law: Can They Coexist?*, 8 Unif. L. Rev. 177, 183 (2003); Lookofsky, *supra* note 42, at 295; Schroeter, *supra* note 41, ¶ 26; Witz & Lorenz, *supra* note 48.

50. Honnold & Flechtner, *supra* note 1, ¶ 650; Magnus, *supra* note 48; Schroeter, *supra* note 41, ¶ 22.

51. *See* Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB, 23 F.Supp.2d 915 (N.D. Ill. 1998).

seller *European Aircraft Service*, the court held that the contract formation provisions Part II of the CISG could not be applied in accordance with Article 1(1)(a) CISG because Sweden had made an Article 92 reservation with respect of Part II, which at that time was still in effect.[52] Given that the U.S. has made an Article 95 CISG reservation, the deciding court could not have recourse to Article 1(1)(b) CISG (which, as a result of the Article 95 CISG reservation, does not apply in U.S. courts); instead, it looked to the private international law of the forum (Illinois) and applied Illinois contract formation rules, because the parties had so agreed.[53]

While some of the Sales Convention's reservations (Articles 93, 94 and 96 CISG) can only be declared if certain substantive prerequisites—the Contracting State's multi-territorial constitutional structure (Article 93 CISG); the similarity of its domestic sales law rules to those of other States (Article 94 CISG); its domestic legislation requiring sales contracts to be concluded in writing (Article 96 CISG)—are fulfilled, Article 95 CISG names no such prerequisites; it may therefore be declared by any Contracting State which so desires and for any reason or purpose.[54] As a result of this flexible prerequisites design, a Contracting State could make an Article 95 declaration with the specific goal of supplementing its Article 92 CISG reservation, thereby effectively excluding any application of the Convention's Part to which its Article 92 CISG reservation pertains (in case of Saudi Arabia, Part III) in its courts via Article 1(1)(b) CISG. However, it must be noted that any Article 95 reservation, once made, not only affects Article 1(1)(b) CISG's application with respect to one specific Part of the Convention, but with respect to all of the Convention's Parts, so that the entire application of the Convention via Article 1(1)(b) CISG is thereby being restricted. This effect of Article 95 CISG as standardized by this provision's wording cannot be further narrowed down by a State using the reservation, given that Article 98 CISG also prohibits the making of merely partial reservations under the Sales Convention.[55] The

52. Sweden withdrew its Article 92 CISG reservation in 2012, with the withdrawal becoming effective in accordance with Article 97(4) CISG on 1 December 2012. *See* U.N. Secretary-General, Convention on Contracts for the International Sale of Goods, Depositary Notification, U.N. Doc. C.N.289.2012.TREATIES-X.10 (May 30, 2012).

53. *See* European Aircraft Service AB, 23 F.Supp.2d at 918.

54. *See* Ulrich G. Schroeter, *Backbone or Backyard of the Convention? The CISG's Final Provisions*, *in* Sharing International Commercial Law Across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday 425, 432 (Camilla Baasch Andersen & Ulrich G. Schroeter eds., 2008).

55. *See* Franco Ferrari, *Artikel 1*, *in* Kommentar zum UN-Kaufrecht (CISG) [Commentary on the UN Convention on the International Sale of Goods (CISG)] ¶ 79 (Ulrich G. Schroeter ed., 8th ed. 2024); Peter Mankowski, *Artikel 95*, *in* Internationales Vertragsrecht: Rom I-VO, CISG, CMR, FactÜ – Kommentar [International Contract Law: Rome I-VO, CISG, CMR, FactÜ – Comment] ¶ 8 (Franco Ferrari et al. eds., 3d ed. 2018); Schroeter, *supra* note 22, ¶ 15; *but see* Roland Loewe, Internationales Kaufrecht

standardization of Article 95 CISG's effect means that this reservation's use by an Article 92 reservation State can never have a solely supplementary character merely complementing Article 92 CISG's limited exclusion effect, but will always affect Article 1(1)(b) CISG's applicability in its entirety. Article 95 CISG's standardized effect would therefore significantly exceed a desired supplementary purpose.

Against the background of this over-effect, the making of an Article 95 CISG reservation in order to supplement an Article 92 CISG reservation is not recommended. In addition, such a step is arguably unnecessary, because there are other (and, it is submitted, better) ways to achieve a desired flexibility, which will be further addressed below.

2. Time for making an Article 95 CISG reservation

It may first be useful to briefly address yet another feature of Article 95 CISG, namely the time at which such a reservation may be declared. According to the provision's wording, this reservation has also insofar been standardized in its content, and the Sales Convention's drafters decided that declarations under Article 95 CISG can only be made "at the time of the deposit of an instrument of ratification, acceptance, approval or accession." Article 95 CISG is thus clearly more restrictively framed than the reservations in Articles 94 and 96 CISG, which may be declared 'at any time'. But Article 95 CISG also slightly differs from Articles 92 and 93 CISG in that they authorize their reservations 'at the time of signature, ratification, acceptance, approval or accession', without referring to the respective instruments' deposit.

In practical terms, the admissible time for making an Article 95 reservation can become relevant should an Article 92 CISG reservation State want to avail itself of a supplementary Article 95 declaration, in spite of the contrary policy consideration outlined above.[56] Experience with past Article 92 CISG reservations indicates that the inherent limitation to this reservation's exclusion effect[57] is often initially overlooked, and only becomes apparent to government officials of Article 92 reservation States-to-be after the declared reservation has been discussed in detail by academic experts.[58] This scenario begs the question: can a State that has already deposited its instrument of ratification, acceptance,

[International Sales Law] 108 (1989); Ulrich Magnus, *Wiener UN-Kaufrecht (CISG)*, *in* Julius von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen [Julius Von Staudinger's Commentary on the Civil Code with Introductory Law and Subsidiary Laws] art. 98 ¶ 1 (2018).

56. *See supra* Part I.D.1.

57. *See supra* Part I.C.

58. For the experience with the Article 92 CISG reservations made by the Scandinavian States, *see* Lookofsky, *supra* note 42, at 299: " . . . this flickering and essentially fortuitous application of CISG Part II can hardly have been what Scandinavian legislators sought to achieve by their Article 92 declarations . . . ".

approval or accession (accompanied by an Article 92 CISG reservation) with the Sales Convention's depositary still "supplement" its Article 92 CISG declaration by an Article 95 CISG declaration, should it so desire?

At first sight, Article 95 CISG's wording with its unique reference to "the time of the deposit of" an instrument of accession does not seem to allow for this reservation to be made after that moment. However, a systematic interpretation of Article 95 CISG and the provision's drafting history both support a more flexible reading: Pursuant to the first sentence of Article 97(3) CISG, declarations of which the depositary receives formal notification before the CISG's entry into force in respect of the declaring State only take effect simultaneously with such entry into force. This provision covers any reservation under Articles 92–96 CISG that is declared at any time prior to the Convention's entry into force for the declaring State[59] and synchronizes the effect of such declarations with the entry into force,[60] which in turn only occurs once a twelve-month grace period from the instrument of ratification or accession's deposit has passed.[61] Against this background, it is difficult to see why a declaration under Article 95 CISG should be the only reservation that needs to be notified to the depositary together with the instrument of accession, while all other CISG reservations may be notified later. The drafting history of Article 95 CISG further supports the view that its reference to the "time of deposit" does not reflect a conscious policy decision, but is the mere result of a historical oversight. In contrast to the CISG's other reservations, whose wordings were proposed within UNCITRAL early on and then carefully vetted in the Second Committee at the 1980 Vienna Diplomatic Conference, Article 95 CISG was very much a last-minute addition to the Convention's draft text, proposed in the plenum on the Diplomatic Conference's last working day[62] and adopted without any in-depth scrutiny of its wording.[63] This left simply no time to align its text with that of the other CISG reservations,[64] as otherwise would likely have been done.

59. *See* Ulrich G. Schroeter, *Article 97 CISG: Formalities, Taking Effect and Withdrawals of Declarations*, *in* Commentary on the UN Convention on the International Sale of Goods (CISG) ¶ 17 (Ingeborg Schwenzer & Ulrich G. Schroeter eds., 5th ed. 2022).

60. *See id.* ¶ 18.

61. CISG, *supra* note 2, at art. 99(1)-(2).

62. *See* Ulrich G. Schroeter, *Applicability of UNCITRAL's Sales Convention of 1980 and its Limitation Convention of 1974/1980 via "Rules of Private International Law": Remarks on Occasion of Czechia's Declaration Withdrawals*, 22 Vindobona J. 14, 21-22 (2018).

63. *See* Schroeter, *supra* note 32, at 225-26; Ulrich G. Schroeter, *Article 95 CISG: Reservation Regarding Article 1(1)(b)*, *in* Commentary on the UN Convention on the International Sale of Goods (CISG) ¶ 12 (Ingeborg Schwenzer & Ulrich G. Schroeter eds., 5th ed. 2022).

64. A further drafting particularity concerns the moment of "signature" which is mentioned in Articles 92 and 93 CISG, but not in Article 95 CISG. Given that the Sales Convention was only open for signature until 30 September 1981, the point has lost any

In summary, it is therefore submitted that an Article 95 CISG reservation can still be declared by a newly-acceding State after its instrument of ratification, acceptance, approval or accession has been deposited, as long as the Convention has not yet entered into force for the State in accordance with Article 99(2) CISG. After the entry into force, an Article 95 CISG reservation ("supplementary" or other) can in any case no longer be made, and Contracting States which so desire are only left with the unattractive option of first denouncing the Convention pursuant to Article 101 CISG, and then re-acceding to it subject to a timely Article 95 CISG declaration.[65]

E. Uncertainties about the effect of an Article 92 CISG reservation regarding Part III

1. Standardization of reservation's substantial scope, Article 92(2) CISG

Apart from defining an Article 92 CISG reservation's general effect on the reserving State's Contracting State status under Article 1(1) CISG (as addressed above[66]), Article 92(2) CISG further specifies the substantial scope of such effect ("in respect of matters governed by the Part to which the declaration applies"). Given that Saudi Arabia is the first CISG Contracting State to have made an Article 92 CISG reservation regarding Part III, there is no practical experience of determining its precise effect. But it is apparent from the wording of Article 92(2) CISG that the provision is based on the unspoken assumption that all "matters" governed by the CISG can be neatly allocated to one specific Part of the Convention. While this may be true in the majority of cases, it is not necessarily always so.[67] Without attempting to be exhaustive, a number of potentially challenging constellations come to mind:

2. Matters that may (or may not) be governed by Part III: Examples

It already starts with the term "contract of sale" which appears in Article 1(1) and various other CISG provisions, but is not expressly defined in the Convention. Courts have therefore developed a "contract of sale" definition by referring to the seller's obligations as summarized in Article 30 CISG and the buyer's obligations as summarized in Article 53 CISG,[68] both of which are pro-

practical relevance, but it remains difficult to see why an Article 95 CISG reservation was not expressly authorized at the time of signature, while all other reservations were.

65. *See* Wilhelm-Albrecht Achilles, Kommentar zum UN-Kaufrechtsübereinkommen (CISG) [Commentary on the UN Convention for the International Sale of Goods (CISG)] art. 95 ¶ 1 (2d ed., 2019); Schroeter, *supra* note 63, ¶ 20.

66. *See supra* Part I.C.

67. Magnus, *supra* note 48, at 215.

68. Gardena House S.a.r.l. v. Timber Group UAB, No. 3K-3-85/2012, CISG-online 5111 (Supreme Court Mar. 9, 2012) (Lith.); Bowling Alleys, No. VIII ZR 410/12, CISG-online 2513, ¶ 13 (Supreme Court May 28, 2014) (Ger.); VÚB a.s. v. LITOZ s.r.o., No. 23

visions located in Part III of the Convention and therefore technically captured by Saudi Arabia's Article 92 CISG declaration. Does this mean that the "contract of sale" concept must be framed differently where an Article 92 reservation prevents Part III from applying, e.g. by looking to the term's definition under the gap-filling domestic law instead?

Another complex issue has been the necessary definiteness of the price in CISG offers and the admissibility of open price contracts under the Convention, which has generally been assessed by taking into account both Article 14(1) CISG (the opening provision of Part II) and Article 55 CISG (located in Part III).[69] Is it convincing to treat open price contracts in one way where, as in most cases, the entire Convention applies, but differently where an Article 92 CISG declaration encompasses Article 55 CISG (or, for that matter, Article 14(1) CISG)?

Yet another interpretative topic that CISG case law has addressed by referring to provisions in Part II (namely Article 19(3) CISG) as well as in Part III (Article 81(1) CISG) is the applicability of the Convention's contract formation rules to party agreements about forum selection clauses and arbitration clauses[70]—admittedly, the potential effect of an Article 92 CISG reservation would be less severe in this context, because both provisions appear to support the same interpretative outcome.

Last but not least, one can ask whether the important exercise of gap-filling by recourse to general principles underlying the Convention (Article 7(2) CISG) is affected by an Article 92 CISG reservation. Is such gap-filling always a "matter" governed by Article 7(2) CISG and therefore unaffected by Article 92

Cdo 427/2017-336, CISG-online 4867, ¶ 22 (Supreme Court Jan. 29, 2019) (Czech); Trading B.V. v. St. Paul N.V., No. HD 200.028.026, CISG-online 2179, ¶ 4.4.2 (Court of Appeals-Hertogenbosch Jan. 18, 2011) (Neth.); Kayoom GmbH v. […] B.V., No. 200.313.239, CISG-online 6819, ¶ 9 (Court of Appeals Gerechtshof Arnhem-Leeuwarden Feb. 6, 2024) (Neth.); Bridgestone/Firestone GmbH v. Weimar d.o.o., No. Pž-2047/03-8, CISG-online 3284 (High Commercial Court Dec.19, 2006) (Croat.); Construction Materials Case IV, No. App 91/04, CISG-online 965, ¶ 11 (Court of Appeals Jura Nov. 3, 2004) (Switz.); Olitalia s.r.l. v. Zintix Pty Ltd., No. 2691/2009, CISG-online 2585 (District Court Forlí March 6, 2012) (It.).

69. *See* Displays for Watches, No. JI11.036221-151531, CISG-online 2761, ¶ 47–50 (Court of Appeals Canton Vaud Feb. 29, 2016) (Switz.); Vincent Fortier, Le Prix dans la Convention de Vienne sur La Vente Internationale de Marchandises: Les Articles 14 et 55 [Price in the Vienna Convention on the International Sale of Goods: Articles 14 and 55], Journal du droit international [JDI] 381 (1990) (Fr.); Ulrich G. Schroeter, *Article 14 CISG: Offer (Including Incorporation of Standard Terms)*, *in* Commentary on the UN Convention on the International Sale of Goods (CISG) ¶¶ 96-98 with references to case law (Ingeborg Schwenzer & Ulrich G. Schroeter eds., 5th ed. 2022).

70. *See* Ground Mace, No. I ZR 245/19, CISG-online 5488, ¶ 38 (Supreme Court Nov. 26, 2020) (Ger.); Ulrich G. Schroeter, *Introduction to Articles 14–24 CISG: General Questions Regarding the Formation of the Contract*, *in* Commentary on the UN Convention on the International Sale of Goods (CISG) ¶ 53 (Ingeborg Schwenzer & Ulrich G. Schroeter eds., 5th ed. 2022).

CISG declarations (given that Article 7 CISG is located in Part I), or should the decisive point of reference be the CISG provision(s) that reflect the particular general principle underlying the Convention?[71] And, if the latter approach is adopted, does an Article 92 CISG reservation bar recourse to a general principle that is not only reflected in CISG provisions located in the Part concerned by the reservation, but also in provisions in other Parts of the Convention (as, for example, the prohibition of contradictory behavior *(venire contra factum proprium)*, a general principle underlying the Convention (Article 7(2) CISG) derived in case law from both Article 16(2) CISG (located in Part II) and to Article 29(2) CISG (located in Part III);[72] or the allocation of the burden of proof, based as a general principle on both Article 2(a) CISG (located in Part I) and Article 79(1) CISG (located in Part III)[73])?

3. Uniformity in the Convention's application (Article 7(1) CISG) as decisive goal

When dealing with such less-than-clearly allocated matters under CISG contracts involving a party from an Article 92 CISG reservation State, it is submitted that Article 7(1) CISG provides the decisive point of reference. Article 7(1) CISG and its central aim of an international uniform interpretation of the Convention remain unaffected by any Article 92 CISG reservation, irrespective of such reservation pertaining to Part II or Part III of the Convention. The goal of an internationally uniform construction of the CISG's provisions, which has convincingly been read as a treaty law obligation of all CISG Contracting States[74] (including those that have made a reservation under Article 92 CISG), militates in favor of an interpretation and application of all CISG provisions in line with existing persuasive precedents, even if such precedents were developed with reference to provisions in or general principles drawn from a Part of the Convention by which the Article 92 CISG reservation State is not "bound" (Article 92(1) CISG). If Article 92(2) CISG is read as proposed

71. In the latter sense, *see* Pascal Hachem, *Article 7 CISG: Interpretation of Convention and Gap-Filling*, *in* Commentary on the UN Convention on the International Sale of Goods (CISG) ¶¶ 33-34 (Ingeborg Schwenzer & Ulrich G. Schroeter eds., 5th ed. 2022).

72. *See* MITEC Automotive AG v. Ford Motor Company, No. 5 U 1042/12, CISG-online 2664, ¶ 54 (Court of Appeals Jena Dec. 8, 2015) (Ger.); Hachem, *supra* note 71, ¶ 33.

73. *See* Milk Powder, No. VIII ZR 304/00, CISG-online 651, ¶ 24 (Supreme Court Jan. 9, 2002) (Ger.); Hachem, *supra* note 71, ¶ 35.

74. *See* Michael G. Bridge, *Uniformity and Diversity in the Law of International Sale*, 15 Pace Int'l L. Rev. 55, 87 (2003); Harry M. Flechtner, *Recovering Attorneys' Fees as Damages Under the U.N. Sales Convention: The Role of Case Law in the New International Commercial Practice, with Comments on* Zapata Hermanos v. Hearthside Baking, 22 Nw. J. Int'l L. & Bus. 121, 125 (2002); Ulrich G. Schroeter, *Introduction to Articles 89–101 CISG: General Questions Regarding the Final Provisions*, *in* Commentary on the UN Convention on the International Sale of Goods (CISG) ¶ 8 (Ingeborg Schwenzer & Ulrich G. Schroeter eds., 5th ed. 2022).

here, an Article 92 reservation therefore results in the reservation State not being considered a Contracting State within Article 1(1) CISG in respect of matters *exclusively* governed by the Part of the Convention to which the declaration applies, while the Convention's rules about all other matters apply to parties from such reservation State in an internationally uniform manner (Article 7(1) CISG).

II. Limits to the CISG's substantive scope

A. A source of flexibility

In a maybe less obvious way, the Sales Convention furthermore achieves flexibility for its Contracting States through its limited substantive scope. As is well known, the CISG does not govern each and every legal question that may arise under international sales contracts, instead limiting its scope to a range of matters that were deemed most important in commercial practice, and leaving some further matters unaddressed.[75] Some commentators view the fact that certain matters are not governed by the Convention—often referred to as "gaps" in the CISG—rather critically, because the legal uniformity achieved is thereby not as all-encompassing as it could be.[76]

In respectful disagreement, it is submitted that the drafters of the CISG struck a wise balance by adopting uniform provisions on the issues where uniformity matters most in commercial practice, at the same time leaving other issues outside of the Convention's scope, which means that these issues are left to the domestic legislators to address. In doing so, the intentionally limited substantive scope of the CISG creates a useful flexibility, because the not uniformly governed issues can be addressed differently by the domestic legislators in different States.[77] This in turn allows domestic legislators to take into account differences in the factual or cultural circumstances or values in certain countries or regions, to preserve important local legal traditions, or to bring to bear policy considerations that may exist in some States, but not in others.[78]

By intentionally not governing certain issues, the Sales Convention also guarantees its flexibility over time, because it leaves issues that are particularly value-based to domestic laws to address, given that such values may predictably change and evolve over time.[79] For example, by stating in its Article 4(a)

75. *See* Schroeter, *supra* note 1, ¶ 48.

76. *See* Yehya Badr, *Going Hybrid: How Hybrid Choice of Law Clauses Can Save the CISG*, 41 J.L. & Com. 73, 80–89 (2022); Gilles Cuniberti, *Is the CISG Benefiting Anybody?*, 39 Vand. J. Transnat'l L. 1511, 1544–46 (2006); Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 Yale J. Int'l L. 1, 7 (1993); Oktaviandra, *supra* note 6, at 249.

77. *See* Schroeter, *supra* note 1, ¶ 48.

78. *See* Schroeter, *supra* note 10, at 28–29.

79. *See* Schroeter, *supra* note 1, ¶ 112.

that "this Convention [. . .] is not concerned with the validity of the contract or of any of its provisions or of any usage", the CISG leaves room for validity standards to change. This is sensible, because a transaction for the sale of certain types of goods may have been considered illegal in the 1980s but may be viewed as legal today. Similarly, a certain contract term that is regarded as acceptable today may potentially be viewed as grossly unfair and invalid thirty years into the future. Assessments by domestic legislators can appropriately take care of such developments by adjusting domestic laws accordingly, but it would be much more difficult to modify the text of an international convention that, as the CISG, is in force in almost one hundred States all over the world.[80]

B. The interest rate as a question not settled by the CISG

For States observing Islamic law, the arguably crucial limitation of the Sales Convention's substantive scope concerns its obligations to pay interest. While Articles 78 and Article 84(1) CISG impose an obligation on parties to pay interest on sums in arrears,[81] the Convention intentionally leaves the rate of interest open. The determination of the interest rate is therefore a so-called "gap." According to the majority view among courts and scholars, the applicable interest rate constitutes an "internal gap" to be filled by recourse to domestic law.[82] By contrast, a minority view, including the CISG Advisory Council,[83] wants to fill the gap by application of general principles underlying the Convention itself.[84]

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80. For more information, *see* Ulrich G. Schroeter, *The 1980 Vienna Sales Convention (CISG) as Standard Setter for or Obstacle to International Commercial Law Unification*, *in* The Elgar Companion to UNCITRAL 296, 323 (Rishi Gulati et al. eds., 2023).

81. *See supra* Introduction Part B.

82. *See* Frozen Meat Case for Egypt, No. 4C.179/1998, CISG-online 413, ¶ 19 (Supreme Court Oct. 28, 1998) (Switz.); VÚB a.s. v. LITOZ s.r.o., No. 23 Cdo 427/2017-336, CISG-online 4867, ¶¶ 47–48 (Supreme Court Jan. 29, 2019) (Czech); Coke Fuel, No. V CSK 63/08, CISG-online 3985, ¶ 30 (Supreme Court Oct. 9, 2008) (Pol.); Equipment & Measuring Instruments for Dams, No. 37698, CISG-online 5122, ¶ 43, (Court of Appeals Dec. 12, 2012) (Lux.); Chuah, *supra* note 6, at 203; Enderlein & Maskow, *supra* note 3, at art. 78 n. 2.2; Morten M. Fogt, Choices, Limits and Consequences of Harmonisation of Commercial Law: The Circle of Law Harmonisation 229-30 (2023); Magnus, *supra* note 55, at art. 78 ¶ 12; Barry Nicholas, *Article 78*, *in* Commentary on the International Sales Law: The 1980 Vienna Sales Convention ¶ 2.1 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987).

83. Yeşim M. Atamer, *CISG-AC Opinion No. 14, Interest under Article 78 CISG*, *in* The CISG Advisory Council Opinions 321 (Michael Bridge, Ulrich G. Schroeter & Ingeborg Schwenzer eds., 2d ed. 2021).

84. *See* Klaus Bacher, *Article 78 CISG: Obligation to Pay Interest*, *in* Commentary on the UN Convention on the International Sale of Goods (CISG) at ¶ 47 (Ingeborg Schwenzer & Ulrich G. Schroeter eds., 5th ed. 2022); Honnold & Flechtner, *supra* note 1, ¶ 557; Spagnolo & Bhatti, *supra* note 6, at 162.

I continue to believe that the majority view has it right.[85] By keeping the interest rate out of the Convention's substantive scope, the drafters of the CISG have given national legislators sufficient flexibility to fix their respective interest rate at 0 percent and remain fully compliant with the CISG[86] (it may be worth remembering that during a phase not too long ago, certain interest rates within the European Union were even negative![87]). When read in this way, the CISG's approach to interest provides flexibility not only to accommodate different commercial interest environments, but also different approaches to interest in general.

III. Interpretative declarations

The third and last legal instrument to be addressed in the context of "standardized flexibility" under the CISG are so-called interpretative declarations. Interpretative declarations are not mentioned anywhere in the CISG; instead, they are an instrument of general treaty law. A standard textbook on treaty law and practice defines an interpretative declaration as a unilateral declaration, however phrased or named, made by a State whereby that State purports to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions.[88]

In past practice under the CISG, the use of interpretative declarations has been rare, but it has occurred. Germany made an interpretative declaration regarding Article 1(1)(b) CISG[89] that still stands today, and Hungary had

85. *See generally* Schroeter, *supra* note 9, ¶ 874.

86. *See* Schroeter, *supra* note 10, at 38; Schroeter, *supra* note 9, ¶ 874.

87. For the interpretation of contractual interest clauses in a negative interest scenario (under English law) *see* State of Netherlands v. Deutsche Bank AG, [2019] EWCA Civ 771 (U.K.).

88. Anthony Aust, Modern Treaty Law and Practice 115 (3d ed. 2013); *see also* Int'l L. Comm'n, *supra* note 22, guideline 1.2.

89. *See* U.N. Secretary-General, Convention on Contracts for the International Sale of Goods, Depositary Notification, U.N. Doc. C.N.365.1989.TREATIES-3, at 1 (Mar. 16, 1990) (reporting the German declaration, reading "[t]he Government of the Federal Republic of Germany holds the view that Parties to the Convention that have made a declaration under article 95 of the Convention are not considered Contracting States within the meaning of subparagraph (a) (b) of article 1 of the Convention. Accordingly, there is no obligation to apply – and the Federal Republic of Germany assumes no obligation to apply – this provision when the rules of private international law lead to the application of the law of a Party that has made a declaration to the effect that it will not be bound by subparagraph (1) (b) of article 1 of the Convention. Subject to this observation the Government of the Federal Republic of Germany makes no declaration under article 95 of the Convention.").

initially made a declaration of this type regarding Article 90 CISG,[90] which it more recently has formally withdrawn.[91]

A. Admissibility of interpretative declarations under the CISG

The admissibility of interpretative declarations under the CISG is not free from doubt. The views among commentators vary widely, ranging from opinions that such declarations are generally allowed because they are accepted under general treaty law,[92] to others believing that no interpretative declarations are at all allowed under the CISG.[93]

According to a preferable view residing in the middle of the spectrum, interpretative declarations are admissible under the CISG subject to two conditions.[94] First, they must indeed intend to "clarify the meaning" of a CISG provision (as interpretative declarations do) and not to exclude or modify the legal effect of certain CISG provisions. In the latter cases, the declaration is in truth a so-called "hidden" or "concealed" reservation, and it therefore falls foul of Article 98 CISG. And, second, the interpretative declaration must not undermine Article 7(1) CISG, which obliges courts and governments of all Contracting States to aim for an internationally uniform interpretation of the Convention. When viewed in this way, one could say that the CISG partially standardizes the flexibility that may be exercised through interpretative declarations by standardizing the manner in which interpretative declarations may not be used.

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90. *See* U.N. Secretary-General, Convention on Contracts for the International Sale of Goods, Depositary Notification, U.N. Doc. C.N.193.1983.TREATIES-1, at 1 (Aug. 4, 1983) (reporting the Hungarian declaration, reading "[Hungary] considers the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance/GCD CMEA, 1968/1973, version of 1979/ to be subject to the provisions of article 90 of the Convention;…").

91. *See* U.N. Secretary-General, Convention on Contracts for the International Sale of Goods, Depositary Notification, U.N. Doc. C.N.378.2015.TREATIES-X.10 (July 6, 2015). On the withdrawal *see* Ulrich G. Schroeter, *The Withdrawal of Hungary's Declarations Under the CISG – Law and Policy*, 15 Internationales Handelsrecht [IHR] 210 (2015) (Ger.).

92. *See* Magnus, *supra* note 55, at art. 98 ¶ 1; Peter Mankowski, *Artikel 98*, *in* Internationales Vertragsrecht: Rom I-VO, CISG, CMR, FactÜ – Kommentar [International Contract Law: Rome I-VO, CISG, CMR, FactÜ – Comment] ¶¶ 2-3 (Franco Ferrari et al. eds., 3d ed. 2018).

93. *See* James Fawcett et al., International Sale of Goods in the Conflict of Laws ¶ 16.135 (2005); Małgorzata Pohl-Michałek, *Various Perspectives Regarding the Effects of the United Nations Convention on Contracts for the International Sale of Goods*, 62 Forum Prawnicze [FP] 40, 48 (2020) (Pol.); *see also* Franco Ferrari, *Short Notes on the Impact of the Article 95 Reservation on the Occasion of* Prime Start Ltd. v. Maher Forest Products Ltd. et al., 6 Internationales Handelsrecht [IHR] 248, 251 (2006) (Ger.).

94. *See* Schroeter, *supra* note 74, ¶ 89.

B. Interpretative declaration regarding the interest rate determination in courts of States observing Islamic law?

1. Declarations about the CISG's compatibility with domestic law as sub-category

Be that as it may, it is submitted that a sub-category of interpretative declarations in any case deserves a special treatment. I am referring to interpretative declarations that are not indicating the declaring State's preferred interpretation of a treaty provision, but are rather addressing the compatibility of treaty provisions with the respective State's domestic legal order, notably its fundamental rules or principles.[95] While interpretative declarations of this sub-type are not infrequently found in general treaty practice,[96] they have until now not been used under the CISG.

When assessing their current and future position under the CISG, governments of States observing Islamic law could consider making an interpretative declaration, in which they could declare—for example—that in applying the Convention, questions concerning the interest rate under Articles 78 and 84(1) of the Convention are to be settled in a manner that does not conflict with the Islamic Sharia.

2. Admissibility under the CISG

In my opinion, an interpretative declaration of this type should be viewed as admissible under the CISG, because it does not aim at a particular construction of Articles 78 and 84(1) of the CISG—provisions which, as described earlier,[97] leave the interest rate entirely open—but at enabling the implementation of the Convention into the declaring State's domestic legal order, which the CISG generally leaves to each Contracting State.[98] In addition, the use of an interpretative declaration in this context would decisively differ from reservations made in the past under other Conventions which referred to "the norms of Islamic law"[99] or the "principles of Islamic Sharia"[100], and which had occasionally been criti-

95. *See* Schroeter, *supra* note 74, ¶¶ 90–92.

96. *See* Aust, *supra* note 88, at 115.

97. *See supra* Part II.B.

98. *See* Schroeter, *supra* note 74, ¶ 92.

99. *See* U.N. Secretary-General, Convention on the Elimination of All Forms of Discrimination Against Women, Depositary Notification, U.N. Doc. C.N.925.2000. TREATIES-8 (Oct. 10, 2000) (reporting the reservation made by Saudi Arabia upon ratification of the Convention, stating "[i]n case of contradiction between any term of the Convention and the norms of Islamic Law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.").

100. *See* U.N. Secretary-General, Convention on the Elimination of All Forms of Discrimination Against Women, Depositary Notification, U.N. Doc. C.N. 251.1993. TREATIES-5, at 3 (Oct. 26, 1993) (reporting the reservation initially made by the Maldives when acceding to the Convention, stating "[t]he Government of the Republic of Maldives

cized or objected to by other States because of their undefined character,[101] or for not clearly specifying the provisions of the respective Convention to which they applied and the extent of the derogation therefrom.[102] An interpretative declaration of the type discussed here would be different in two respects. First, it could clearly specify the provisions of the CISG to which it would relate, namely Articles 78 and 84(1). And, second, it would not derogate from these provisions at all (as a reservation would), because it would merely clarify the manner in which the necessary gap-filling will be conducted in the courts of the declaring State.

3. Advantages of such an interpretative declaration

Apart from the treaty law aspects just described, it appears important to also consider two practical advantages for the CISG's uniform application that an interpretative declaration would offer. First, such a declaration could be much more narrowly designed than an Article 92 reservation which by necessity excludes the entire Part III (i.e. Articles 25–88 CISG), and this narrower design would serve uniformity. Second, a declaration would provide clarity and predictability for private parties from other Contracting States when considering transactions with parties from a declaring State. With good reason, such clarity is generally regarded as an advantage in commercial practice.

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will comply with the provisions of the Convention, except those which the Government may consider contradictory to the principles of the Islamic Sharia upon which the laws and traditions of the Maldives is founded." (the reservation was later amended)); *see also* U.N. Secretary-General, Convention on the Elimination of All Forms of Discrimination Against Women, Depositary Notification, U.N. Doc. C.N.546.2001.TREATIES-6 (June 5, 2001) (reporting the reservation made by Mauritania when acceding to the Convention, stating that Mauritania "have approved and do approve it in each and every one of its parts which are not contrary to Islamic Sharia and are in accordance with our Constitution.").

101. *See* U.N. Secretary-General, Convention on the Elimination of All Forms of Discrimination Against Women, Depositary Notification, U.N. Doc. C.N.405.1994. TREATIES-9, at 1-2 (Mar. 30, 1995) (reporting Germany's objection to the reservation made by the Maldives upon accession of the Convention, stating "the unlimited and undefined character of the said reservations create serious doubts about the commitment of the reserving state to fulfil its obligations under the Convention."); *see also* U.N. Secretary-General, Convention on the Elimination of All Forms of Discrimination Against Women, Depositary Notification, U.N. Doc. C.N.834.2001.TREATIES-11, at 1 (Aug. 30, 2001) (reporting Denmark's objection to the reservation made by Saudi Arabia upon ratification of the Convention, stating "the general reservation with reference to the provisions of Islamic law are of unlimited scope and undefined character.").

102. *See* U.N. Secretary-General, Convention on the Elimination of All Forms of Discrimination Against Women, Depositary Notification, U.N. Doc. C.N.1442.2001. TREATIES-22, at 1 (Dec. 14, 2001) (reporting the United Kingdom's objection to the reservation made by Mauritania upon accession of the Convention, stating " a reservation to a Convention which consists of a general reference to national law without specifying its contents does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention.").

C. Standardization of interpretative declarations

Finally, as far as the standardization aspect is concerned in case of interpretative declarations, their admissibility is partially standardized by the CISG itself, as explained earlier.[103] In contrast, their standardized effect does not follow from the CISG, but from general treaty law. To that end, it is recognized that an interpretative declaration made by one Contracting State is not binding on any other States;[104] this is true even if the other State never reacted thereto, because public international law knowns of no duty to object to interpretative declarations.[105] Insofar, an interpretative declaration's effects are therefore less far-reaching than those of an Article 92 CISG reservation which has to be observed by all other Contracting States.[106] However, a mere interpretative declaration may nevertheless provide a sufficient assurance to the government of a declaring State that its courts will not be under any obligation to apply the CISG in a manner that would be in conflict with Islamic law. The instrument would therefore be fit for its flexibility-related purpose.

Conclusion

The present article has tried to demonstrate that the CISG offers "standardized flexibility" to States observing Islamic law in general, and to the recently acceded Kingdom of Saudi Arabia in particular, in a number of different ways. On one hand, the standardization of flexibility under the Sales Convention results in any authorized Article 92 CISG reservation regarding Part III extending to 64 of the Convention's 101 provisions, but nevertheless not completely excluding the applicability of its interest-related provisions in Articles 78 and 84(1).[107] On the other hand, the CISG—at least in the opinion outlined here—grants any State full flexibility in fixing the interest rate to be applied to CISG transactions where the gap-filling law is the respective State's domestic law, with such flexibility including the possibility to exclude any interest, being the equivalent to an interest rate of 0 percent.[108] The CISG furthermore allows any Contracting State observing Islamic law to make an interpretative declaration in case it so desires, and to thereby make clear that it will not fill the Convention's interest-rate gap in any manner that would conflict with Islamic law.[109]

103. *See supra* Part III.A.

104. *See* Int'l L. Comm'n, *supra* note 22, guideline 1.2 cmt. (3), guideline 2.9.8 cmt. (7), guideline 4.7.1 cmt. (1); D. M. McRae, *The Legal Effect of Interpretative Declarations*, 49 Brit.Y.B. Int'l L. 155, 168-69 (1978); *see also* Christian Walter, *Article 19*, *in* Vienna Convention on the Law of Treaties: A Commentary ¶ 3 (Oliver Dörr & Kirsten Schmalenbach eds., 2d ed. 2018).

105. *See* McRae, *supra* note 104, at 169.

106. *See* Schroeter, *supra* note 41, ¶¶ 19, 23, 26.

107. *See supra* Part I.

108. *See supra* Part II.

109. *See supra* Part III.

Finally, it should be said that the Convention is also guaranteeing flexibility for newly acceding Contracting States in a temporal sense, in allowing them to adjust their position over time. As Article 97(4) CISG authorizes States to "at any time" withdraw a reservation that they have initially declared, it allows States to—in a manner of speaking—"test drive" the Convention, and to possibly opt for a full application of the CISG without reservation at a later point in time.[110] In practice, under the CISG, States have on occasion also formally withdrawn interpretative declarations they had initially made. Standardized flexibility options therefore remain even after a State's accession to the Sales Convention, and one can hope that they will be exercised in favor of extending the uniformity in its application.

110. *See* Schroeter, *supra* note 62, at 32–33; Schroeter, *supra* note 32, at 229.