GIVEN A CONTRACT FOR THE SALE OF GOODS BETWEEN TWO BUSINESSES SITUATED IN DIFFERENT STATES, ONE AT LEAST OF WHICH IS A PARTY TO THE VIEANNA CONVENTION 1980 (CISG), WHAT, IF ANY, IS THE ROLE OF NATIONAL LAW?

The United Nations Convention on Contracts for the International Sale of Goods (CISG) signed in Vienna in 1980. The Convention came into life on 1 January 1988 and has been adopted 65 countries around the world.

The Convention incorporates rules as to formation of international contracts of the sale of goods. The Convention, after that, became a reference point for international commercial instruments such as Unditrot Principles of International Commercial Contracts or the European Contract Law. [1]

When the CISG implemented to the Contracting State as a uniform law, it displaces both State's domestic law and choice of law rules concerning the sale of goods.[2]

Many factors affect the success of an international convention. Some of them are related with the preparation of convention. For instance, numbers of parties have to reach a consensus in order to make rules. Furthermore, it may relate with the application of the Convention, such as Contracting States of the convention could interpret the measures in a different view and that affect to their application progress.

Under the CISG rules, some conditions have to be satisfied before the Convention applies. These relate to the nature of the contract, the internationality of the contract and the connection with one or more contracting state.[3]

According to Article 1 of the CISG is that, **"This Convention applies to contracts of sale of goods between parties whose place of business are in different states."** This Article determines that the

[1] R Goode, Commercial Law, Butterworths, 3rd Edition,2004,p. 915
[2] M Bridge, The International Sale of Goods Law and Practice, Oxford University Press, 1 st Edition, 1999,Chp. 2.01
[3] CISG Art. 1(1)

transaction must be a "contract for the international sale of goods" for the purpose of the Vienna Convention.

Under the purpose of the Vienna Convention, the transaction must be 'international'. Article 1 of the CISG determines whether the transaction is international or not. It provides that, **"between parties whose places of business are in different states."** If the parties` places of business are in a same state, it would not be internationality and only national law is applicable to this transaction.

Another condition is that the nature of the contract. The contract must be 'a contract for the sale of the goods'. The convention does not provide clear rules and definition of 'contract of sale of goods'. Article 30 of the Convention provides that, **'The Seller must deliver the goods, hand over any document relating to them, and transfer the property in the goods, as required by the contract and this convention'.** Article 53 also requires that,**' The Buyer must pay price for the goods and take delivery of them as required by the contract and this convention'**. However, it leaves some of the transaction out of the scope of the Convention, such as bailment, leases, and gifts.

Moreover, Article 2 of the Vienna convention does not apply to consumer sales, sales by auction, sales on execution, because these transactions are usually governed by national rules.

Not necessarily all the contracts for the international sale of goods will be governed by the Vienna Convention. It requires some relations between the transaction and the Contracting States. The transaction must be international and the contract for the sale of goods between the parties has to be situated in different states or at least one of the states has to be a party of the Vienna Convention in order to make the contract to be applicable to the Vienna Convention.

According to Article 1(1) of the Vienna Convention, which provides the basic rule of applicability of it; **"This Convention applies to contracts of sale of goods between parties whose places of business are in different States;**

a) when the state are contracting state; or

b) when the rules of private international law lead to the application of the law of a Contracting State."

Under Article 1(1) of the Convention, it looks clear that what kind of contracts will be governed by the Vienna Convention. However, there are some issues in which the question might arise regarding to the scope of the Convention.

Article 95 of the Vienna convention, which allows a Contracting State to declare that they will not be bound by Article 1(1)(b), defines the basic rule.

Furthermore, it is explained by the UNCITRAL commentary in paragraph 7. This paragraph states that, **'even if one or both of the parties to the contract have their places of business in a state which is not a contracting state, the convention is not applicable if the rules of private international law of the forum lead to the application of the law of a Contracting State'.**

By comparison with this situation, if the rules of private international law of the forum do not lead to the application of the law of a Contracting State or even if lead to the Contracting State which has made a declaration under Article 95 of the Vienna Convention, the national law of the forum country would be applicable to this contract regarding to the conflict of law rules of that non-Contracting State. The important thing is that different jurisdictions recognise different rules of private international law. However, it is mostly accepted by conflict rules, which points the law of the seller's place of business as an applicable law.

Before examining the effect of the national law under the relevant articles of the Vienna Convention, it is necessary to examine the direct application of the Vienna Convention for international sale of contracts

When the Contracting State applies to the uniform law for international sale transactions not only their own law applicable, but also it applies under the Article 1(1) (a) of the Vienna Convention to a private international law. It is clear that, application of the convention will be much more favourable to both parties than one party's domestic law.

According to Article 1[1] [a] of the CISG that, parties of the contract must have their business places in different Contracting States. That means, the parties not only must have their places of business in different states, but also they have to be Contracting States of the Vienna Convention.

In order to make an application to the CISG, parties must have their places of business in different Contracting States. However, it is not enough for the Convention to be applicable. According to article 100[1] of the Vienna Convention which provides that, **"This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph 1[a] or the Contracting State referred to in 1[b] of Article 1"**. As a result of this Article, when the contract concluded after the accession to the Convention is not sufficient to be applicable. Under this situation, the national law takes precedence over the international law.

It was also decided by the court under "**Kretscher Gmbh & Co. KG v Murator Enzo"** case. In this case, the court held that, "CISG did not apply as the contract has been concluded January 1, 1988 being the date Italy's ratification of the CISG …."[4]

Furthermore, if the requirements of article 1[1] [a] are met, it does not necessarily mean that, the CISG will apply. In some situations national law will be applicable to international contracts instead of applying to the Vienna Convention. Because the parties are free to choose the applicable law to their relationship. They can also exclude the application of the Vienna Convention either by expressly or by implicitly choosing a different applicable law to their contract. That means, the CISG recognises the principle of the party autonomy.[5]

According to Article 1[1] [a] of the Vienna Convention, "the states must be Contracting States." However, 1[1] [b] indicates that, "the Convention will be applicable, when the rules of private international law lead to the application of the law of a Contracting State." In this case, at least one

[4] 24 October 1988, Cass. Civ
[5] Art. 6 CISG

of the states is not a party to the Vienna Convention. As a result of this, Article 1[1] [b] makes the convention more difficult to apply.

For instance, a contract between two businesses situated in different states and one of them is not a party of the Vienna Convention. A dispute between the parties is brought before a forum sitting in non-Contracting State. The forum is not be bound to apply the Convention, because the state has not ratified the Convention. However, the forum may do so, if its conflict of law rules makes the law of contracting state applicable.

On the other hand, if the dispute between the parties is brought before a Contracting State, the Contracting State will not be bound by article 1[1] [a], because the parties are not both Contracting States. Under this situation, the Contracting State has to examine its rules of private international law to determine whether it is bound by article 1[1] [b] of the Convention or not. Accordingly, the CISG will be applicable under Article 1 [1] [b], when the rules of private international law of the country lead to the application of the law of a Contracting State. It could be either by choice of law by the parties or if there was no choice of law, it would be a law of country, which has the closest connection to the contract.

For instance, a sales contract between a French seller and German buyer[6] is concluded after the Convention entered into force in France. In this case the court decided to apply the CISG, because the parties have not chosen any law governing to their contract. According to case, Germany was not the party of the CISG at the time when the contract was concluded and applying German private international law rules that the CISG was applicable as part of the applicable law of France.

As I explained before, the CISG recognises the principle of the party autonomy. Article 6 of the CISG indicates that**, "The parties may exclude the application of this convention or, subject to article 12, derogate from, or vary the effect of any its provisions."**

In respect of Article 6 of the CISG, it is clear that, there is no conflict between Article 1 [1] [b] and the principle of the party autonomy in the sense of the choice of law. However, the Italian court

[6] Oberlandesgerricht Frankfurt a M; 5 U 261/ 90-13 June 1991- Uniform Law Review, 1991, I, 372

Tribunale Civile di Monze took an opposite view under **Nuova Fucinati S.P.A. v Fond Metal International A. B.** case[7]. A contract was concluded between an Italian seller and a Swedish buyer in February 1988. The Seller did not deliver the goods and breached the contract. The court decided that, "CISG could not have applied by virtue of Article 1 [1] [a] of the CISG, since at the time of conclusion of the contract, the convention had only entered into force in Italy and not in Sweden. The court also excluded the applicability of the convention by virtue of Article 1 [1] [b] of the CISG, notwithstanding the fact that the parties have chosen Italian law as the law governing to their contract." According to the court, Article 1 [1] [b] of the CISG operates only in the absence of a choice of the applicable law by the parties.

Furthermore, **Maglificio Damine S. L. R. v S. C. Covires** case[8] identified that, "when the contracting parties choose the law applicable to their contractual relationship in the sense of the principle of party autonomy and also this is the law of the Contracting State, the CISG will be applied, because the Convention is part of the domestic law of each country which has been signed by them."

According to this case, the contract made between a Belgium buyer and an Italian producer. At the time of the contract was concluded, Belgium was not a party of the Convention. As a result of dispute between the parties, the Belgium court decided to apply the CISG, because CISG was applicable since the parties had expressly chosen the law of Italy, a contracting state.[9]

On the other hand, when the choice of law is absent and also one of the parties of the contract is not a Contracting State of the Vienna Convention, some issues need to be identified to determine the applicable law. In such cases, the usual way to determine the applicable is that the principle of the closest relationship to the contract. That means the law of the country to which the contract is most closely connected will govern the contract.

[7] R. G. 4267/88 14 January 1993.
[8] R. G. 4. 825/ 91 13 November 1992
[9] Art. 1 [1] [b] CISG

According to **Tuzzi Trend Tex Fahion Gmbh v W. J. M. Keijer- Somer** case[10], the contract was between a German seller and a Dutch buyer. At the time of the contract was concluded Netherlands was not a party of the CISG. The parties had not chosen any law to govern the dispute between them under this contract. However, it was decided by the court to apply the law of Germany, which was the seller's place of business. The CISG applied to this transaction[11]. The rules of private international law lead to the application of the law of a Contracting State, which was Germany, because the seller was the characteristic performance of the contract.

It is sometimes possible for courts to be faced with ambiguous contracts. The contracts include language to the following effect: 'This contract is to be governed by the law of [e.g.] State X'. If State X has adhered to the convention, this question arises; did the parties intend to invoke the CISG, or the internal domestic law of State X?[12]

Under that kind of situation, most of the courts` decisions have followed to invoke the CISG. According to **Smith B. V. v Jean Quetard** case[13], a Dutch seller delivered apple trees to French buyer. The French buyer did not pay the price of the goods. And the seller took an action asking for payments. The seller's claim was containing a choice of law in favour of Dutch law. As a result of this, the court decided that; 'it was not necessary to determine whether the choice of law clause was valid since, in any case, the contract was governed by the CISG (Art. 1 [1] [a] and [b] of the CISG respectively). In particular, the court pointed that, the Dutch law led to the application of the CISG, to the law of a Contracting State.

Another example was taken by the decision of arbitration.[14] The dispute was between a German buyer and a Syrian seller. Under this case, the contract referred to French law. It was held that, as the parties have chosen French law, and under the French law the contract was to be considered an international sale, so the contract was governed by the CISG which was the 'international sales law of France', a contracting state. However, under this case, the court found that, the CISG does not

[10] H 93 2900 5 October 1994
[11] Art. 1 [1] [b] CISG
[12] J. O. Honnold, Uniform Law for International Sales under the 1980 United Nation Convention, 3rd EDT. [1999], Chap.1-77
[13] 94/ 0670- 07.06.1995
[14] ICC- Paris, 6653/ 1993

determine who has to prove the non-conformity of the goods. It was decided according to French domestic law.

Furthermore, according to ambiguous contracts between parties, a few court decisions have followed to apply to the domestic sales law. For instance, Under **Societa X v Societa Y** case[15], a contract was between an Italian seller and a Japanese buyer. The contract contained clause under which the contract was to be 'governed exclusively by Italian law'. According to Arbitration Tribunal, 'the CISG did not apply to the contract, either because Japan had not yet ratified the CISG or because the contract itself had been made subject exclusively to the Italian law.' In the view of the tribunal, 'the choice of Italian law by the parties amounted to an implicit exclusion of the CISG'[16]

It is necessary to express the situation of undisclosed principle or agent under the Article 1 [1] [b] of the CISG. According to Frits Enderlein[17]; 'A condition for this situation is that the applicability of the CISG in the case of a sales contract between an agent and a third party is derived from the status of the principal and third party and, therefore, does not apply, if foreign capacity of the principal in the sense of the rule is not obvious to the third party.' In respect of the Continental European Laws, which would also presume that, 'the sales contract between the agent and the third party is valid and judge by their status whether the CISG is the applicable law.'

As I explained before, the CISG applies to the contracts for the sale of goods between businesses situated in different states. According to Article 1 [1] [a] of the CISG, the Convention applies when the states are both 'Contracting States`, and according to Article 1 [1] [b], it applies when the rules of private international law lead to the application of the law of a Contracting State. However, there is a controversial discussion under Article 1 [1] [b] of the CISG. The situation leads to the declaration for the contracting states under Article 95 of the Vienna Convention.

According to Article 95 of the CISG, **'Any state may declare at the time of the deposit of its instrument of ratification, approval or accession that it will not be bound by subparagraph 1**

[15] Ad Hoc Arbitral Tribunal- 19/04/1994
[16] Art. 6 CISG
[17] International Sales Law- Oceane Publications, 1992, pace 31.

[b] of article 1 of this convention.' China, the Czech Republic, Singapore, Slovakia, and the United States have made declaration accordingly.

There are two possible interpretations of the reservation; the first one could be that a court in a Contracting State that has taken the reservation can never apply the convention rules in this context[18]; and the second is that the reservation simply refers to cases where the law of such a contracting state is identified as the applicable law of the contract.[19]

For instance, a seller in the United State sells to a buyer in State X, a non- Contracting State such as United Kingdom. Article 95 means that, according to this example, the United State court is not bound to apply the convention rules even if the relevant rules of private international law lead to the application of the US law.[20] Under this situation, if the conflict of law rules determine to the seller's law as an applicable law, the United State court would apply to domestic law.

Furthermore, the reservation of Article 95 of the CISG will not affect Article 1 [1] [a] of the CISG. According to that, if both parties have their places of businesses in different Contracting States even if they are reservation states, their international sales contracts will be governed by the CISG.

Finally, where the law chosen by the parties is the law of a reservatory Contracting State under Article 95 of the CISG, it will not be bound by Article 1 [1] [b] of the CISG and its domestic law will be applicable rather than the Convention rules. However, where Article 1 [1] [a] of the CISG does not apply and where a reservation under Article 95 of the CISG precludes the application of Article 1 [1] [b] of the CISG, the Convention rules will not apply at all, unless the parties incorporate them by an express or at least evident reference.[21]

[18] P. Winship- The Scope of the Vienna Convention on International Sale Contracts- page 535
[19] C. Saf, A Study of the Interplay between the Conventions Governing International Contracts of Sale, Queen Mary and Westfiled College, September 1999.
[20] J. Lookofsky, The 1980 United Nations Convention on Contracts for international Sale of Goods, article 95.
[21] C. Saf, A Study of the Interplay between the Conventions Governing International Contracts of Sale, Queen Mary and Westfiled College, September 1999.

To sum up, the Vienna Convention has been ratified by many important trading countries, except some countries such as United Kingdom and Japan, around the world. The Convention is quite important, because it introduces a uniform regime on international contracts for sale of goods.

The importance of the Vienna Convention comes with its Article 1 [1] [b] .The provision expressly applies the recourse of the private international law.

In respect to Article 1 [1] [b] of the CISG, under some circumstances the role of the national law to the Vienna Convention cannot be avoidable. The article distributes legal issues between domestic sales law and the uniform international sales law.

Moreover, it is also possible to have conflicts between CISG and national law. For instance, if there is a gap in CISG, it is easy to fill in it with national law.

In my opinion, it would be a mistake not to realize the role of the national law upon the Vienna Convention. It can be said for the Vienna Convention that it is the achievement of the United Nations. Whether the Vienna Convention has been introduced as a uniform sales law for international transactions or not, the parties under the international sale transaction are free to choose an applicable law to their contract and moreover, the national law also may affect the applicability of the CISG. Such as, the conflict of law rules of the forum state may refer to the CISG as an applicable law regarding to the contract between parties.

Ramazan Zorlu *LL,M*
Attorney at Law