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Research Article

CISG-APPLICABILITY BEFORE NATIONAL JUDICIARY IN EGYPT, BAHRAIN, QATAR AND JORDAN

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ABSTRACT

Background: *The United Nations Convention on Contracts for the International Sale of Goods (the CISG or the Convention) may apply autonomously in Arab Contracting States, such as Egypt and Bahrain. The CISG may also be applied indirectly, i.e., by virtue of the rules of private international law, whether in Arab Contracting or non-Contracting States (e.g., Qatar and Jordan). This paper discusses both situations of the CISG application in Arab states at issue as well as how Arab courts address foreign law, including the CISG.*

Methods: *A desk research methodology, as well as legal analysis and comparison, is adopted to answer the research questions. The author scrutinises a range of documents varying from national and international legal texts to academic writings and court rulings. The author analyses the two approaches prevailing in Arab academic writings and court rulings regarding the application of the designated foreign law (including the CISG), i.e. whether as a fact or as a (foreign) law. The author also compares these two approaches to show the advantages and disadvantages of each one to define which of them better serves justice and the parties' interests.*

Results and Conclusions*: The author concludes that the legislature in all Arab jurisdictions at issue, as well as the judicature in Egypt, Bahrain and Qatar, should rethink their approach to handling foreign law. In particular, the CISG should be dealt with as a matter of law, not as a matter of fact. Courts should apply the Convention and establish its content ex officio.*

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1 INTRODUCTION

The 1980 United Nations Convention on Contracts for the International Sale of Goods (hereafter: the CISG or the Convention) is an important instrument governing international commercial contracts. To date, 97 States are party to this Convention, including eight Arab states (Egypt, Iraq, Syria, Lebanon, Bahrain, Mauritania, Palestine, and Saudi Arabia).[1]

The CISG, the cornerstone of border-crossing trade around the globe, provides a set of uniform rules for contracts on the international sale of goods. To materialise the CISG's ultimate end (i.e., unification of the sale of goods law), national courts shall interpret and apply the CISG's provisions in a uniform manner.

In general, Arab courts applied foreign law to contracts with foreign element(s). Yet, Arab courts rarely applied the CISG to such contracts. The reported cases show that only Egyptian courts dealt with the CISG on some occasions.[2] Courts in other Arab states (parties and non-parties to the CISG) may, however, be faced with the application of this Convention (when the national conflicts rule concerning contract refers to the law of a State party to the CISG).

This paper identifies when the CISG applies in some Arab Contracting (Egypt and Bahrain) and non-Contracting States (Qatar and Jordan). It also seeks to explain how courts in these jurisdictions treat foreign law, including the CISG. Do judges regard foreign law as a matter of fact or as a matter of law? Do they, by their own initiative, apply and establish the content of the designated foreign law, including the CISG? Or is the application thereof dependent upon the request of, and the submission of evidence by, the parties? Is it possible to challenge a judge's decision that wrongly applied foreign law?

This paper focuses on the treatment of foreign law (e.g., the CISG) by Egyptian, Bahraini, Qatari, and Jordanian courts only. Reference to the case law in other states will only be made when necessary. Egypt's conflict of laws rule on contracts (Article 19 of the Egyptian Civil Code) served as a model for many Arab states. Besides, Egypt is a representative example of the Arab states that are parties to the CISG, particularly because Egyptian courts have

1 United Nations Convention on Contracts for the International Sale of Goods (adoption 11 April 1980) (CISG) <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg> accessed 15 February 2024.

2 Available online at: *CISG Database* (Institute of International Commercial Law (IICL) 2024) <https://iicl.law.pace.edu/cisg/cisg> accessed 15 February 2024; *UNILEX on UNIDROIT Principles & CISG: International Case Law & Bibliography* <http://www.unilex.info> accessed 15 February 2024; *Arab and Foreign Court Rulings: Database* (EastLaws (IGLC) 2024) <https://www.eastlaws.com/data/ahkam/app> accessed 15 February 2024; *Court of Cassation of the Arab Republic of Egypt* <https://www.cc.gov.eg> accessed 15 February 2024; *Qarark: Your Decision System* (Jordan Bar Association 2024) <https://qarark.com> accessed 15 February 2024; *Encyclopedia of Qatari Judicial Rulings and Principles* (Supreme Judiciary Council 2024) <https://encyclop.sjc.gov.qa/portal1/Menu.aspx?gcc=1> accessed 15 February 2024.

already applied the CISG. This paper will demonstrate that Egyptian courts have made conflicting decisions concerning the CISG's application. On some occasions, the court applied the CISG *ex officio*; on others, the court declined the application of the CISG even when one of the parties pleaded its applicability.

Bahrain is another example of an Arab state party to the CISG. Although Bahraini courts have not yet applied the CISG, Bahrain boasts the newest, most developed conflict rules concerning contracts in the Arab world. Unlike Egyptian law, Bahrain's Law No. 6/2015 on Conflict of Laws in Civil and Commercial Matters with a Foreign Element[3] expressly entitles the parties to select "rules of law" as the governing law for their contract (Article 4).[4]

Qatar, like most other Arab states, is not a party to the CISG. Article 27 of the Qatari Civil Code resembles Article 19 of the Egyptian Civil Code.[5] Qatar's Court of Cassation generally aligns its rulings with those of Egypt. In all these jurisdictions, the applicable foreign law is dealt with as a fact; disputants must plead the applicability of foreign law and submit evidence on its provisions.

Jordan has not acceded to the CISG, either. Unlike the courts in Egypt, Bahrain, and Qatar, Jordanian courts treat the applicable foreign law as law, recognising its foreign character. The judge *ex officio* ascertains the content of this law. The author hopes Jordan and Qatar will follow Egypt (and other Arab CISG-Contracting States) by acceding to the Convention.

After stating the research methods (Part 2), this paper will address the applicability of the CISG in the aforementioned Arab jurisdictions (Part 3). Part 4 will discuss and evaluate the way in which the Egyptian, Bahraini, Qatari, and Jordanian courts treat foreign law in general. In Part 5, the focus will shift to how Egyptian courts have dealt with the CISG, as well as how the courts in Bahrain (a Contracting Arab State), Qatar, and Jordan (non-Contracting Arab States) should apply this Convention. Part 6 concludes with some remarks and recommendations.

3 Law of the Kingdom of Bahrain No. 6 of 2015 'On Conflict of Laws in Civil and Commercial Matters with a Foreign Element' (Bahrain Law No. 6/2015) <https://bahrainbusinesslaws.com/laws/Conflict-of-Laws-in-Civil-and-Commercial-Matters> accessed 15 February 2024.

4 In addition, unlike Egyptian law, Article 17(c) of the same Bahraini law expressly recognises *dépeçage* of contract.

5 Law of the State of Qatar No. 22 of 2004 'Regarding Promulgating the Civil Code' (Qatari Civil Code No. 22/2004) <https://www.almeezan.qa/LawPage.aspx?ID=2559&language=en> accessed 15 February 2024; Law of the Arab Republic of Egypt No. 131 of 1948 'Promulgating the Civil Code' (Egyptian Civil Code No. 131/1948) <https://www.ecolex.org/details/legislation/law-no-131-of-1948-promulgating-the-civil-code-lex-faoc212999/> accessed 15 February 2024.

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2 METHODOLOGY

A desk research methodology has been applied to the research topic. The legal analysis is used as well. The paper scrutinises a range of documents varying from national and international legal texts, academic writings and court rulings. It discusses and analyses the different stances taken by Arab courts and jurists regarding the application of the designated foreign law, including the CISG. In particular, the paper critically analyses the Egyptian court judgements applying the CISG. The comparative method is used to show the benefits and shortcomings of the two approaches to the treatment of the CISG, i.e. whether as a fact or as a (foreign) law. This method enabled the researcher to define which of these approaches better serves justice and the parties' interests.

3 CISG-APPLICABILITY IN ARAB STATES

Articles 1-6 of the CISG define the conditions for the Convention's substantive (material) and territorial (geographical) application. The CISG governs the formation of the international sale of goods contract and the rights and obligations of the parties arising therefrom.[6]

Under Article 1(1) of the CISG, the internationality of the contract should be realised when the buyer's place of business and the seller's place of business are in two different Contracting States.[7] It would not suffice if the parties have their places of business in two "different legal units of the same Contracting State".[8] The term place of business means "a permanent and regular (stable) place for the transacting of general business."[9] Article 1(2) of the CISG requires such fact to "appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract." Article 1(3) of the CISG clarifies that the nationality of the parties is irrelevant to the internationality of the contract, as is the "civil or commercial character of the parties or the contract".

However, the mere internationality of a sale of goods contract per se does not justify the application of the CISG. There must be a certain contact between such a contract and a State

6 CISG (n 1) art 4. Other aspects of such contracts, like validity of the contract are still governed by the domestic law applicable pursuant to the forum's conflicts rule.

7 ibid, art 10(b). In the absence of a place of business, reference shall be made to the related party's habitual residence.

8 Erik Jayme, 'Sphere of Application, Article 1' in C Massimo Bianca and Michael Joachim Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè 1987) 30.

9 Christophe Bernasconi, 'The Personal and Territorial Scope of the Vienna Convention on Contracts for the International Sale of Goods (Article 1)' (1999) 46(2) Netherlands International Law Review 145, doi.org/10.1017/S0165070X00002382.

Party to the Convention.[10] Article 1(1)(a) of the CISG defines two situations where the Convention applies territorially. The first, known as autonomous or direct application, occurs when both parties' places of business are situated in two different Contracting States. A State is considered a Contracting State, i.e., a Party to or Member of the CISG when it has ratified, approved, accepted or acceded to the Convention (Article 91 of the CISG).

In the second situation, the indirect one, the CISG applies when the buyer and the seller have their places of business in two different states, and the conflict of laws rule designates the law of a CISG-Contracting State as the applicable one (Article 1(1)(b)). This is because, when ratified, accepted, approved or acceded to by that State, the CISG became part of the law of that State.[11] It is of no importance here whether the buyer or the seller has their places of business in a State not party to the CISG.[12] But if both parties are based in the same state, the CISG will not apply even when the conflict of laws rule points to the law of a CISG-Contracting State.[13]

Courts in Egypt and Bahrain (States Parties to the CISG) may apply the Convention autonomously or indirectly.[14] These courts are treaty-bound[15] to apply the CISG to the contract whenever the buyer's place of business and the seller's place of business are in different Contracting States. Therefore, the forum should first check the applicability of the CISG to the given dispute. Once the requirements for the CISG application are satisfied,[16] the forum should apply this Convention automatically,[17] i.e., without recourse to national

10 ibid 148; Franco Ferrari, 'What Sources of Law for Contracts for the International Sale of Goods? Why One Has to Look Beyond the CISG' (2005) 25(3) International Review of Law and Economics 327, doi:10.1016/j.irle.2006.02.002; John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edn, Kluwer Law International 1999) 85.

11 Bashayer Al-Mukhaizeem, 'Application of CISG in Kuwait' (2021) 35 Arab Law Quarterly 304 at 307, doi:10.1163/15730255-14030660; Bernasconi (n 9) 157; Marlene Wethmar-Lemmer, 'Applying the CISG via the rules of private international law: Articles 1(1)(b) and 95 of the CISG - Analysing CISG Advisory Council Opinion 15' (2016) 49(1) De Jure 65, doi:10.17159/2225-7160/2016/v49n1a4.

12 Joseph Lookofsky, 'The 1980 United Nations Convention on Contracts for the International Sale of Goods' in R Blanpain (gen ed), *The International Encyclopedia of Laws* (Kluwer Law International 1993) para 54; Peter Schlechtriem and Petra Butler, *UN Law on International Sales: The UN Convention on International Sale of Goods* (Springer-Verlag 2009) 14, doi:10.1007/978-3-540-49992-3.

13 Ferrari (n 10) 325.

14 Eunice Chiamaka Allen-Ngbale, 'Applicability of United Nations Convention on Contract for the International Sale of Goods (CISG) on Non-Contracting States' (2019) 9(6) International Journal of Scientific and Research Publications 758, doi:10.29322/IJSRP.9.06.2019.p90109; Pilar Perales Viscasillas, 'Applicable Law, the CISG, and the Future Convention on International Commercial Contracts' (2013) 58(4) Villanova Law Review 733; Schlechtriem and Butler (n 12) 14-5.

15 Mohamed Okasha Abdelaal, *Conflict of Laws: A Comparative Study* (Alexandria University Press 2002) 57; Bernasconi (n 9) 155; Lookofsky (n 12) paras 21, 53.

16 It should be noted that applicability of the Convention may be affected by the reservations lodged by states, see CISG (n 1) arts 92–98.

17 Bernasconi (n 9) 152; Viscasillas (n 14) 739.

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conflict rules concerning contracts.[18] Indeed, the CISG replaces the uncertainty associated with the otherwise applicable national law.[19] While the latter is normally unknown to at least one of the parties,[20] the former is neutral to both parties.[21]

Courts in Egypt and Bahrain may also apply the Convention indirectly, that is to say, when the conflict-of-laws rule refers to the law of a State Party to the CISG. On one hand, Article 1(1)(b) is part of the CISG, which is effective in Egypt and Bahrain. On the other, domestic courts must take seriously the mandate of their national conflicts rule and apply the law it designates; the court should apply the CISG as part of the law designated.

Since Qatar and Jordan are not parties to the CISG, their courts are not obligated to apply the Convention directly, making recourse to indirect application important. The CISG may apply if the forum's conflict-of-laws rule refers to the law of a Contracting State.

Although courts in Qatar and Jordan are not bound by Article 1(1)(b) of the CISG, they are bound to respect the national legislature's will, as expressed in the national conflicts rule.[22] Thus, to adjudicate the dispute, the courts should apply the law identified by their conflict-of-laws rules, including the CISG when relevant.[23]

In addition, Arab courts should apply the designated foreign law in the way in which the court, in the state of origin, would. Since the CISG is generally recognised as *lex specialis* in that state,[24] Arab courts should likewise regard it as such.

Egypt,[25] Bahrain,[26] Qatar[27] and Jordan[28] (as well as other Arab States) acknowledge party autonomy; the buyer and the seller are authorised to select the law governing the contract. Failing such a selection, the applicable law shall be determined objectively, typically based

18 Jayme (n 8) 28; Thomas Kadner Graziano, 'The CISG Before the Courts of Non-Contracting States? Take Foreign Sales Law as you Find it' (2011) 13 Yearbook of Private International Law 166, doi:10.1515/9783866539648.165; Lookofsky (n 12) paras 21, 53; UNCITRAL, HCCH and UNIDROIT, *Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts, with a Focus on Sales* (UN Publ 2021) 9.

19 Honnold (n 10) 35.

20 ibid; Bernasconi (n 9) 150.

21 Bernasconi (n 9) 160; Schlechtriem and Butler (n 12) 16.

22 Pavel Kalensky, *Trends of Private International Law* (Štefan Luby and Otto Kunz eds, Springer Dordrecht 1971) 282-3, doi:10.1007/978-94-011-9590-4.

23 Peter Winship, 'Private International Law and the UN Sales Convention' (1988) 21(3) Cornell International Law Journal 521-2.

24 Al-Mukhaizeem (n 11) 318; Bernasconi (n 9) 161; Winship (n 23) 521.

25 Egyptian Civil Code No. 131/1948 (n 5) art 19(1).

26 Bahrain Law No. 6/2015 (n 3) arts 4 and 17.

27 Qatari Civil Code No. 22/2004 (n 5) art 27(1).

28 Law of the Hashemite Kingdom of Jordan No. 43 of 1976 'Civil Code' (Jordan Civil Code No. 43/1976) art 20(1) <https://www.wipo.int/wipolex/en/text/227215> accessed 15 February 2024.

on the law of the parties' common domicile or the law of the place of contracting (the *lex loci contractus*).

Accordingly, a court in these jurisdictions may apply the CISG when the buyer and the seller select the application of the law of a CISG-Contracting State (e.g., the law of Bahrain, Egypt, Lebanon). As long as parties do not specifically select the national law of that State[29] (e.g., the Egyptian Trade Law 1999) or expressly exclude the application of the Convention (Article 6 of the CISG), such selection should include the application of this Convention.[30] The Egyptian Court of Cassation has affirmed that choosing the law of Egypt (a Contracting State) includes the CISG. Therefore, the court rejected a challenge to an arbitral award that applied the CISG, affirming that it is part of the Egyptian law chosen to govern the dispute.[31]

In addition, buyers and sellers may select "rules of law," such as the CISG.[32] Article 4 of the Bahrain Law No. 6/2015 acknowledges such selection, stating that "Parties may agree to choose the applicable law, and may agree to choose International Trade Law and its customs."

Other Arab States' conflict-of-laws do not include similar provisions. However, the same conclusion may be reached by the way of interpretation. Contrary to the choice by the court,[33] the conflict-of-laws rules in the aforementioned jurisdictions do not attribute the law selected by the parties to a particular State.[34] Under such a general framework, the term "law" should be given a wide connotation. The parties may choose a State law or a non-State law, meaning a certain set of "rules of law," like the Convention.[35]

In the absence of the parties' choice, whether express or implicit, the law of the parties' common domicile or the *lex loci contractus* may be the law of a CISG-Contracting State. Under these circumstances, Arab courts should apply the Convention as part of the law in

29 Allen-Ngbale (n 14) 756; Schlechtriem and Butler (n 12) 15.

30 Francesca Ragno, 'The CISG and the Choice of Law: Two Worlds Apart?' (2020) 38(1) Journal of Law and Commerce 250, doi:10.5195/jlc.2020.188; Viscasillas (n 14) 740.

31 *Al Musawi Trading & Building Materials Co v National Port Said Steel* Case No. 601/2008 (CRCICA, 4 January 2011) <https://jusmundi.com/en/document/decision/ar-al-musawi-trading-building-materials-co-v-national-port-said-steel-hkm-mhkm-stynf-lqhr-tuesday-4th-january-2011> accessed 20 February 2024.

32 UNCITRAL, HCCH and UNIDROIT (n 18) 30-1.

33 In the absence of a choice by the parties, the court will apply the law of the parties' common domicile or else the *lex loci contractus*.

34 For instance, Article 19(1) of the Egyptian Civil Code states that, 'Contractual Obligations shall subject to the law of the domicile when such domicile is common to the contracting parties and in the absence of a common domicile to the law of the place where the contract was concluded. These provisions are applicable unless the parties agree, or the circumstances indicate that it is intended to apply another law.'

35 For more details, see Al-Mukhaizeem (n 11) 309-10.

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that State.[36] Indeed, *vis-à-vis* national law, the CISG is the *lex specialis* governing international sales within that jurisdiction.[37]

4 TREATMENT OF APPLICABLE FOREIGN LAW BY NATIONAL JUDICIARY: IN GENERAL

There is significant controversy in legal literature and case law across the Arab States regarding the treatment of foreign law by national courts. A key question is whether courts should apply foreign law *ex officio*. More importantly, how should the content of such a law be established?[38]

Some argue that foreign law is a factual circumstance that must be pleaded and established by the parties involved. Others contend that it is a law that the judge, *ex officio*, has to ascertain, interpret and apply.[39]

4.1. Foreign Law is a Fact

Despite the opposite view prevailing in the legal doctrine in Egypt,[40] the Egyptian Court of Cassation clearly treats foreign law as a fact, making the disputants bound to plead the foreign law and provide the judge with evidence on its content. Once foreign law is pleaded and its content is established, the judge will evaluate the parties' submissions and apply foreign law accordingly.

36 Honnold (n 10) 36.

37 Schlechtriem and Butler (n 12) 17.

38 Jürgen Basedow, 'The Application of Foreign Law: Comparative Remarks on the Practical Side of Private International Law' in Jürgen Basedow and Knut B Pißler (eds), *Private International Law in Mainland China, Taiwan and Europe* (Mohr Siebeck 2014) 91.

39 For a detailed analysis of these opinions, see e.g., Ezz El-Din Abdallah, *Private International Law*, Pt 2: Conflict of Laws and International Court Jurisdiction (Egyptian General Commission for Books 1986) 572-93; Abdelaal (n 15) 341-63; Ghaleb Ali Al-Dawoudi, *Private International Law: Conflict of Laws, International Court Jurisdiction and enforcement of Foreign Judgments: A Comparative Study* (3rd eds, Dar Wael 2001) 159-62; Basedow (n 38) 86-8.

40 Shams El-Din Al-Wakeel, 'A Comparative Study in the Proof of the Foreign Law and the Control by the Supreme Court on its Interpretation' (1964) 12(1-2) Journal of Legal and Economic Research, Alexandria University 128-9, 'most of the Egyptian jurists argue that the foreign law retains its legal nature; in compliance with the national conflicts rules, the judge should apply it by his own motion. The judge should also ascertain the content of this law; the parties may assist the judge to do so.' See also, Abdallah (n 39) 587; Abdelaal (n 15) 355-6; Ahmed Al-Hawari, *Nutshell on the Emirati Private International Law* (University Book Shop, Ithraa Publ and Distribution 2015) 321, 369; Ahmed Abdel Karim Salameh, 'Conflict of Laws Rules in Qatari Civil Code (Articles 10-38): A Critical Comparative Study' (Qatari Civil Code in its First Decade, Conference Proceedings, College of Law Qatar University, 23-24 November 2014) 330-1.

For instance, the Egyptian Court of Cassation indicated that "relying on foreign law is just a material fact that the litigants must prove". Because the appellant did not submit the Czech Civil Code to the trial court, *inter alia*, this Court rejected the appellant's challenge.[41] According to the same Court, one should "respond to practical considerations with which the judge is not able to become familiar with the provisions of that law".[42]

In other words, according to the Egyptian Court of Cassation, foreign law is just a material fact that the judge is generally not supposed to know. Therefore, the judge is not obligated to apply foreign law *ex officio*; rather, the parties should invoke the applicable foreign law and establish its content. The parties may resort to all means to prove this law, including the submission and translation into Arabic of its provisions, the use of academic literature and judicial rulings made in the state of origin, or the use of oral and written expertise (e.g. academics and lawyers with enough experience and knowledge of foreign law).

In addition, the party basing its claims on foreign law should plead this law and prove its provisions before the Court of First Instance that adjudicates the dispute. As a mixed defence of law and fact, the question of the (non-) application of foreign law may not be raised by the Appellant for the first time before the Court of Cassation.[43]

However, if the judge is aware of the foreign law's content, or if such knowledge by the judge is presumed (e.g., in cases in which the law applicable is an international convention[44]), the foreign law shall be treated as a law; the judge should ascertain foreign law and establish its content.[45]

The Qatari Court of Cassation treats foreign law as a fact, too. In a dispute between a Qatari company and a Spanish company, the Court indicated that

> "Foreign law is just a material fact that one must substantiate. … To determine the extent to which the Appellee's [the Spanish company's] argument is correct, recourse should be had to Spanish law regulating companies. ... Because the appellee had not

41 Case No. 804 of judicial year 44 (Egyptian Court of Cassation, 7 April 1981) <https://ahmedazimelgamel.blogspot.com/2023/09/804-44-7-4-1981-32-1-201-1078.html> accessed 20 February 2024. In the same sense, see the following decisions of the Egyptian Court of Cassation: decision No. 541 for the judicial year 51, dated 23 December 1991; decision No. 49 for the judicial year 57, dated 25 July 1989; decision No. 27 for the judicial year 45, dated 20 January 1973; decision No. 216 for the judicial year 38, dated 17 May 1973; decision No. 8 for the judicial year 35, dated 26 July 1967. All available: *East Laws Network* <https://www.eastlaws.com> accessed 20 January 2024.

42 Case No. 2317 of judicial year 59 (Egyptian Court of Cassation, 8 February 1996) <https://www.eastlaws.com/data/ahkam/details/13666/50901/0/> accessed 20 January 2024.

43 Saif Al-Din Muhammad Al-Balaawi, 'The Foreign Law and its Applicability before National Judiciary: A Comparative Study' (2003) 7(1) Journal of Al-Aqsa University, Series Humanities 176, 191.

44 Case No. 2317 of judicial year 59 (n 42).

45 Case No. 9139 of judicial year 84 (Egyptian Court of Cassation, 22 June 2015) <https://www-eastlaws-com.qulib.idm.oclc.org/data/ahkam/details/373877/4286502/0/> accessed 26 May 2024.

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> provided an official copy of that law, the said argument had not been proved; … the challenge should be rejected."[46]

In Bahrain, Article 6(a) of Law No. 6/2015 expressly adopts this opinion with regard to civil and commercial matters, including international contracts.[47] Shaaban states:

> "The Bahraini legislature considers foreign law as a mere material fact, as the judge is not obligated to know its content. The legislature does not assign the judge any role in the search for the foreign law's content; it puts the whole task on the shoulders of the litigants."[48]

In addition, the Bahraini Court of Cassation adopted the same view long before the Bahrain Law No. 6/2015 was enacted. In a contractual dispute between two Pakistani individuals settled in 1994, the Court indicated that the Bahraini law did not then include a conflict-of-laws rule governing contracts with foreign elements. Relying on private international law principles, the Court decided to apply the selected law (in this case, Pakistani law). However, this Court expressly indicated that "because the litigants did not prove the foreign law, which is regarded as a fact, this law could not apply."[49] Instead, the Court applied Bahraini law.

Truly, unlike national law, judges are generally not presumed to have knowledge of foreign law. However, this is primarily a procedural issue and should not alter the character of foreign law.[50] Judges may acquire knowledge of foreign law either independently or with the assistance of the litigants involved in the case.[51]

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46 Case No. 133/2014 (Qatari Court of Cassation, 17 June 2014) <https://encyclop.sjc.gov.qa/portal1/Menu.aspx?gcc=1> accessed 20 January 2024. See also: Case No. 161/2015 (Qatari Court of Cassation, 9 June 2015) <https://encyclop.sjc.gov.qa/portal1/Menu.aspx?gcc=1> accessed 20 January 2024, 'The appellant had submitted two copies of the Canadian Labour and Public Service Pensions Acts, 1991, the appellee had not disputed their texts. These laws do not include a provision on the entitlement of the appellee to end-of-service gratuity; instead, they give the employee the right to a pension. Because the challenged judgment ruled that the appellee was entitled to end-of-service gratuity in application of the Qatari Labour Law, it had violated the law and erred in its application.' In the same sense, Case No. 137/2010 (Qatari Court of Cassation, 11 January 2011) <https://encyclop.sjc.gov.qa/portal1/Menu.aspx?gcc=1> accessed 20 January 2024.

47 Matters of personal status with foreign elements are governed by another law, namely the Bahrain Law No. 12/1971 on civil procedures. Some jurists argue that, under this law, the judge ascertains the applicable foreign law *ex officio*. However, the judiciary considers foreign law applicable to such matters as a factual circumstance that related disputant has to establish. Hosam Shaaban, 'The Treatment of Foreign Law before Bahrain Judge- Comparative Study in Light of the New Trends of Scholars and Judicial Decisions' (2017) 19 Journal of Sharia and Law, Al-Azhar University 205-6, doi:10.2139/ssrn.3419537.

48 ibid 222.

49 Case No. 143/1994 (Bahrain Court of Cassation, 4 December 1994). In the same sense, see the following decisions of the Bahrain Court of Cassation: decision No. 158/1994, dated 4 December 1994; decision No. 2/1994, dated 27 March 1994; decision No. 133/1995, dated 11 January 1996; and decision No. 286/2001, dated 24 June 2002. All available: *Arab and Foreign Court Rulings* <https://www.eastlaws.com/> accessed 20 January 2024.

50 Kalensky (n 22) 281; Shaaban (n 47) 218.

51 Al-Balaawi (n 43) 182; Shaaban (n 47) 218.

The treatment of foreign law as a fact finds its roots in the thesis of the French scholar Batiffol.[52] According to Shaaban, Batiffol argues that:

> "Any legal rule consists of two elements, the first element, the mental element, means the content of the rule, i.e., that the rule is abstract and general. The second element, the order and imperative one, means the binding force of the rule, which derives from the authority of the state in which the law is made. In this way, Batiffol believes that the foreign legal rule possesses these two elements in the state in which it is made; however, by crossing the borders and moving to another state, it still retains the first element, which is the content, but it loses the second element, which is the imperative one. Thus, the foreign legal rule loses its binding legal nature and turns into a mere material fact that the litigants must prove before the national judge."[53]

According to Kalensky,

> "Batiffol proceeds from the premise that foreign law is a heterogeneous element with respect to the *lex fori* and that the judge applies it as he would …. Although foreign law arises from the will of a legislator who exercises his jurisdiction which is similar to the jurisdiction of the domestic legislator, but this jurisdiction cannot be exercised on territory which is under the jurisdiction of the domestic legislator. … the results he reaches may be defined as meaning that foreign law is to be applied as any other factual circumstance."[54]

Batiffol's arguments suggest that "foreign law is not domestic law";[55] however, this does not in any way mean that foreign law is just a factual circumstance. The treatment of foreign law as a factual circumstance would require the judge to apply it in the same way as they would apply factual evidence in a case.[56] The author cannot approve this conclusion.[57] If foreign law were generally considered a fact, a party's inability to establish this law would result in the judge rejecting their requests - as is usually the case when the facts have not been established.[58]

However, Article 6(a) of Bahraini Law No. 6/2015 compels the judge to apply Bahraini law if the litigants do not request the application of or prove the content of foreign law. In Egypt

52 Henri Batiffol, *Aspects philosiphique du droit international privé* (Dalloz 2002).

53 Shaaban (n 47) 211.

54 Kalensky (n 22) 280.

55 ibid.

56 Al-Balaawi (n 43) 173.

57 See also, Wafa Mohammed Ashraf, 'Enforcement of Foreign Laws before the National Judge: A Comparative Study' (2017) 31(70) UAEU Law Journal 164-5.

58 Basem Mohamed Fathy Haroun, 'Proof of the Foreign Law before National Judiciary: A Jurisprudential, Judicial and Comparative Study in Accordance with the Rules Governing Evidence' (2015) 31 Journal of Jurisprudence and Law 88, doi:10.12816/0010925.

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and Qatar, the doctrinal and jurisprudential prevailing view argues the same.[59] The foreign law should, therefore, be regarded as a matter of law.

Treating foreign law as a factual circumstance complicates and increases the costs for disputants seeking to establish its content, whether that involves specific legislation, case law, or legal doctrine. This problem becomes more difficult and costlier if the designated law is in a language foreign to the party invoking it.[60] In such cases, the party, at their own expense, might recruit a foreign counsellor to establish the provisions of foreign law. Still, the burden of establishing the content of foreign law lies solely with the invoking party.

If foreign law were regarded as a factual circumstance in the case, each party might be inclined to submit only the foreign law's provisions that favour their own interests; this would result in the falsification of the foreign law.[61] Consequently, the court would definitely apply a different law than what was anticipated by the forum's conflict-of-laws rule.

Besides, considering foreign law as a factual circumstance has significant practical implications, namely the possibility of challenging a decision where the judge has wrongly applied foreign law.[62] In Bahrain, since foreign law applicable to contracts is treated as a fact, the Court of Cassation may not review the application by the judge of the merits of this law. This Court controls the application of law only, not also facts.[63]

In Egypt, as stated earlier, contrary to the prevailing opinion in the legal doctrine, the Court of Cassation treats foreign law as a fact. Surprisingly, the same Court reviews the application by the judge of foreign law.[64] For example, this Court indicated that:

> "The judge is obliged to apply the designated foreign law, whether in the form of statutory texts or other sources; thus, the judge was correct when it applied the provisions of presumptive marriage ('*Mariage putatif*') to the fact of the case, considering the practice of tradition and judicial rulings under Byzantine law in this regard."[65]

The possibility of reviewing the application of the designated foreign law by the Egyptian Court of Cassation is welcomed. However, such an approach is inconsistent with the treatment of foreign law as a fact. The Court should clearly recognise foreign law as a law

59 ibid.
60 Basedow (n 38) 86.
61 Al-Wakeel (n 40) 88; Basedow (n 38) 92; Kalensky (n 22) 293.
62 Kalensky (n 22) 286; Shaaban (n 47) 228.
63 M Al-Soor, 'Status of Foreign Law before the National Judiciary: Jurisprudential and Judicial' (2016) 4(8) Azzaytuna University Journal of Legal Sciences 223; Shaaban (n 47) 228.
64 Al-Balaawi (n 43) 203.
65 Case No. 33 of judicial year 37 (Egyptian Court of Cassation, 12 April 1972) <https://www-eastlaws-com.qulib.idm.oclc.org/data/ahkam/details/4414/12310/0/> accessed 26 May 2024.

that must be interpreted and applied as a foreign one, i.e., based on the principles and concepts of this foreign law.

Moreover, viewing foreign law as a factual circumstance also ignores the binding force of the national conflict-of-laws rule concerning contracts. This rule compels judges to apply foreign law based on the national legislature's will[66] rather than the will of a foreign legislature.[67] Truly, for sovereignty considerations, the validity of foreign law is limited to the territory of the foreign state.[68] However, the national conflicts rule, which invites foreign law for application, validates foreign law within the national legal framework.[69] In effect, this rule restores the imperative element of foreign law, which may be diminished when crossing the borders.[70]

Thus, based on the imperative of the national conflict-of-laws rule, judges are not only obligated to ascertain the existence of foreign law but also apply it and adjudicate disputes pursuant to its provisions.[71]

In a dispute between two Iraqis over a labour contract executed in Jordan, the West Amman Court of First Instance, in its Appellate Capacity, found that the contract parties had selected the Iraqi law to govern their contract. The Court concluded that:

> "This chosen law should recover its imperative element lost by crossing the boundaries of the authority that made this law; this is so because the national conflicts rule has designated this law to be applied, i.e., as foreign legal rules. The judge of the Court of First Instance must act on his own initiative and apply foreign law."[72]

4.2. Foreign Law is a Matter of Law

The prevailing view in Arab legal doctrine acknowledges the foreign character of foreign law and, consequently, treats it as a law.[73] The author supports this view, too. Simply because the foreign law is applicable in accordance with the forum's conflicts rule, such law shall remain to be a foreign law. It should not be reduced to a mere fact in the case or incorporated into domestic law.

The judge is obligated to apply its conflict-of-laws rule concerning the contract and the law it designates. The national conflict-of-laws rule is neutral; it treats national law and

66 Al-Balaawi (n 43) 173.
67 Al-Wakeel (n 40) 78, 124; Ashraf (n 57) 164; Haroun (n 58) 91; Shaaban (n 47) 213-4.
68 Kalensky (n 22) 284, 292.
69 ibid 290.
70 Al-Wakeel (n 40) 78; Al-Soor (n 63) 224; Kalensky (n 22) 284.
71 Kalensky (n 22) 284-5.
72 Case No. 1842/2018 (West Amman Court of First Instance, 19 September 2018) <https://qarark.com/> accessed 20 January 2024.
73 Al-Dawoudi (n 39) 161; Al-Soor (n 63) 237; Ashraf (n 57) 169.

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foreign law equally.[74] Just as this rule directs the judge to apply domestic law when indicated, so the same rule forces the judge to apply foreign law when specified. The judge must adjudicate the dispute in accordance with the provisions of the applicable law, whether domestic law or foreign law.

If the applicable law is a foreign one, the judge is obliged to actively search for the content of that law.[75] Truly, Article 79 (1) of the 1988 Jordanian Civil Procedures Law, and its Supplements,[76] states that "In case of applying a foreign law, the Court shall have the right to ask the litigants to submit their documents supported with a sworn (notarised) translation." However, this text does not alter the position already taken by Jordanian courts. It merely allows the judge to seek the assistance of litigants to prove the content of foreign law by assigning them to submit the legal texts of the applicable foreign law on which they rely. Ultimately, the burden of the submission of foreign law and the establishment of its texts still lies with the judge.

Accordingly, the judge may not resort to national law simply because the party invoking the applicable foreign law has not presented proof of such law; rather, the judge must verify that the existence of this law cannot be established or its meaning cannot be determined. Like in Egypt, Qatar and Bahrain, the judge in Jordan generally applies the *lex fori* when the applicable foreign law is not ascertainable.

When applying the designated foreign law, the judge should do so in the same way as the foreign forum would,[77] considering the social environment in which this law was promulgated, constructed and applied.[78] In other words, the judge should consider the official interpretation of foreign law, its gap-filling means, its practical application and legal writing in the related state.[79] By adhering to these principles, the judge will respect the command of the national conflicts rule to apply foreign law to the disputed contract. The judge's decision to adjudicate the dispute may be challenged for the error in applying the foreign law.[80]

In addition, if the judge applies the designated foreign law in a manner, e.g., in accordance with the concepts of the judge's national law, it may lead to the distortion of the content of the foreign law.[81] This would result in the application of a (foreign) law that diverges from what was intended by the conflict-of-laws rule.

74 Kalensky (n 22) 284.
75 Al-Dawoudi (n 39) 161; Ashraf (n 57) 161; Haroun (n 58) 91; Shaaban (n 47) 227.
76 Law of the Hashemite Kingdom of Jordan No. 24 of 1988 'Civil Procedure Code' <https://www.moj.gov.jo/EchoBusV3.0/SystemAssets/565d97dd-9afd-4e38-b21e-8794eb4ece27.pdf> accessed 25 May 2024.
77 Ashraf (n 57) 170; Kalensky (n 22) 285.
78 *Pro,* Al-Balaawi (n 43) 167. *Contra,* Al-Dawoudi (n 39) 165-6, (the judge interprets foreign law according to the principles of interpretation applicable to national law).
79 Kalensky (n 22) 286; Shaaban (n 47) 225.
80 Al-Balaawi (n 43) 186; Al-Soor (n 63) 235.
81 Shaaban (n 47) 225.

The courts in Jordan hold this view, too. In the above-mentioned case, the West Amman Court of First Instance, in its Appellate Capacity, found that, although the parties had chosen Iraqi law to govern their contract:

> "The Court of First Instance, contrary to the conflicts rule of Article 20(1) of the Jordanian Civil Code, has applied to the claim of the plaintiff (the appellee) Article 46(a) of the Jordanian Labor Law and Article 821 of the Jordanian Civil Code. The Court of First Instance has withheld itself from the matter of the applicable law, namely the Iraqi Labor Law. Especially because this issue does not relate to public policy [in Jordan], the Court *ex officio* should apply the law selected by the contract parties."[82]

Concerning the contract dispute between a Kuwaiti party and a Jordanian party, the Jordanian Court of Cassation found that the Court of Appeals applied the Kuwaiti law. The Court of Cassation concluded that "the trial court is bound to apply to the facts of the case the law it considers proper, whether such law is the Jordanian law or a foreign one."[83]

In another dispute between a Jordanian individual and the Hong Kong and Shanghai Banking Corporation Limited (HSBC), the Jordanian Court of Cassation found that the parties had selected English law to govern their contractual relationship. The appellant argued that the trial court erred in applying this law since no party requested its application. The Court of Cassation refused the appellant's claim, affirming that the judge must apply the designated foreign law by their own initiative.[84]

In Bahrain, in conformity with the prevailing doctrinal opinion,[85] Article 6(c) of Bahrain Law No. 6/2015 obligates national judges to interpret and apply foreign law in the same manner as it is interpreted and applied by the courts in the state of origin.[86] However, contrary to the predominant jurisprudential view supported by the author, Article 6(c) compels the judge to do so only if the parties have submitted evidence on such interpretation and application, including court judgments and jurisprudence from the foreign state.[87]

"If no provisions were submitted, Bahraini law may be considered as the applicable law to the subject-matter of the dispute."[88] This indicates that the judge has the authority to determine the applicable law in such situations. The judge 'may' apply Bahraini law; the judge may also apply the designated foreign law *ex officio* if they are aware of its content.[89]

82 Case No. 1842/2018 (n 72).
83 Case No, 1137/1997 (Jordan Court of Cassation, 18 March 1997) <https://qarark.com/> accessed 20 January 2024.
84 Case No. 2279/2015 (Jordan Court of Cassation, 12 October 2015) <https://qarark.com/> accessed 20 January 2024.
85 Al-Hawari (n 40) 371.
86 Shaaban (n 47) 225.
87 Bahrain Law No. 6/2015 (n 3) art 6(c).
88 ibid, art 6(a).
89 Shaaban (n 47) 223-4.

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This scenario could occur, for instance, if the designated foreign law is the Egyptian (Civil) Law, which has served as a source of inspiration for Bahraini (Civil) Law.

In Egypt, the Court of Cassation made it clear that when the applicable law is an international convention, the judge's knowledge thereof should be presumed. The judge should, therefore, establish the content of that convention on their own motion, even if neither party requests this action. In its decision No. 3317 concerning defective goods shipped by sea, the Egyptian Court of Cassation concluded that:

> "International Conventions have become an important source of maritime law and a way to unify its provisions at the international level; legal rules of these Conventions have become international norms known to maritime courts in many States. Egypt has acceded to the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (The Hague Rules) signed in Brussels on 25 August 1924, which became legislation in force in Egypt by Decree-Law of 31 January 1944. The Protocol to this Convention gave Contracting States the right to implement it either by giving it the force of law or by incorporating its provisions into their national legislation. It is well known for jurists and judges that England had incorporated the provisions of the Convention for Bills of Lading 1924 into its domestic legislation (the Carriage of Goods by Sea Act 1924), and because this Convention had become legislation in force in Egypt, the judge's awareness of the content of this law should be assumed. There is no way to place the onus of proving its content on the shoulders of the disputant who invokes it."[90]

This position is criticised, as the knowledge of the designated foreign law – whether an international convention or not – is a subjective issue that differs from judge to judge, potentially resulting in a conflict of rulings. Accordingly, Article 6(a) of Bahrain Law No. 6/2015 should be amended to clarify that the judge is obligated in all cases to ascertain and apply foreign law *ex officio*.[91] The Egyptian Court of Cassation is also advised to rethink its treatment of foreign law, including international conventions. Judges should be mandated to establish the content of foreign law on their own initiative in every situation.

5 TREATMENT OF THE CISG BY NATIONAL JUDICIARY: IN PARTICULAR

In Arab states under consideration, only Egyptian courts have applied the Convention. However, courts in other Arab states – whether Parties to the Convention, like Bahrain or non-Parties, like Qatar and Jordan – may encounter situations requiring the CISG application, particularly when national conflict-of-laws rules refer to the law of a

90 Case No. 3317 of judicial year 59 (Egypt Court of Cassation, 8 February 1996) <https://www.cc.gov.eg/judgment_single?id=111123454&&ja=26369> accessed 20 January 2024.

91 See also, Shaaban (n 47) 225-6.

CISG-Contracting State. Accordingly, this paper will examine how Egyptian courts have implemented the CISG and how courts in other Arab States under consideration should approach its application.

5.1. Treatment of the CISG by Courts in Arab Contracting States (Egypt and Bahrain)

In accordance with their public international law duty, courts in Egypt or Bahrain are obligated to apply the CISG by their own motion, whether directly or indirectly (Article 1(1) of the CISG). Courts in these jurisdictions should also respect the CISG's special nature as a uniform law.

Vis-à-vis the national legal texts, the provisions of the CISG are special ones, particularly as regards the way they are made. Under Articles 93 and 151 of the 2014 Egyptian Constitution and 37 and 121(a) of the Bahraini Constitution, international conventions hold the force of law. However, these provisions may not be altered by local laws; they may not be cancelled or amended except through the same procedures used for their adoption. This reflects the foreign character of uniform laws made at the international level in comparison to the local laws enacted by the national legislature.

In both Egypt and Bahrain, as stated above, the judge's knowledge of the applicable international convention is presumed. Therefore, the judge should establish the provisions of such convention *ex officio*. The judge should also interpret and apply uniform laws autonomously.

5.1.1. The Court ex Officio Applies the CISG

As stated earlier, if the buyer's place of business and the seller's place of business are situated in different Contracting States, the courts in Egypt or Bahrain must apply the Convention automatically, without recourse to conflict-of-laws rules. In such cases, the court should apply the CISG by its own motion,[92] even if neither litigant has explicitly requested the court to do so.

However, due to a lack of awareness of the CISG, Egyptian courts have made conflicting decisions in this regard. Whereas some courts have applied the CISG *ex officio*, others have refused to do so, even when the parties pleaded its applicability. In one case, an Australian seller (the Australian Wheat Board, AWB) and an Egyptian buyer (the General Company for Silos & Storage, SAE) disputed the conformity of the delivered white wheat. Although the CISG was applicable – given that the buyer and the seller operated from different Contracting States (Australia and Egypt) – the South Cairo Court of First Instance and the Cairo Court of Appeals failed to apply the CISG.[93] Instead, these Courts

92 Viscasillas (n 14) 739-40.

93 For presentation and analysis of this dispute, see Marwa AlSherif, 'The Application of the CISG by the Egyptian Courts: Egypt's Court of Cassation Case No. 2490 of Judicial Year 81, Rendered on 23 June 2020' (2021) 1 Journal of Law in the Middle East 129.

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settled the dispute based on Egyptian national law, thereby ignoring their public international law obligation to apply the Convention. This suggests that these courts are, with respect, unaware of the CISG.

As stated in the preceding part, Egyptian courts traditionally regard foreign law as a fact; the litigants should, therefore, plead this law and prove its content. Surprisingly, the South Cairo Court of First Instance (Case No. 1924 of 2003 – Commercial) did not respond to the AWB's request to apply the CISG provisions (Articles 38 and 39). On appeal, the Cairo Court of Appeals (Appeal No. 617 of Judicial Year No. 121) similarly failed to apply the CISG. It is clear, with respect, that both courts erred in ignoring the AWB's request to apply the CISG.

Egypt, like other Arab jurisdictions at issue, does not adhere to the principle of *stare decisis*. Nevertheless, lower courts in these jurisdictions generally resort to the rulings of higher courts for guidance. In this instance, both the South Cairo Court of First Instance and the Cairo Court of Appeals, without any justification, overlooked the above-mentioned guidance of the Egyptian Court of Cassation, which clearly states that when the applicable law is an international convention, the judge must apply it ex officio. Nor did these Courts acknowledge the automatic application of the CISG as the *lex specialis* governing the international sale of goods in Egypt. With respect, these courts should not have applied national (non-unified) Egyptian law. Rather, they were obligated to apply the CISG automatically, given that the places of business of both parties are situated in different Contracting States.

Upon the challenge by AWB before the Egyptian Court of Cassation, this Court revoked the ruling of the Court of Appeals and held the CISG as applicable. The Court reaffirmed that "the CISG was approved by the Presidential Decree No. 471/1982 and effective [in Egypt] as from 1 August 1988".

Without any reference to Article 1(1)(a) of the CISG, the Court automatically applied the Convention (e.g., Articles 31, 36, 38 and 39) to the dispute. Accordingly, the Court of Cassation reversed the challenged ruling and remanded the case to the Court of Appeals for reconsideration by a new panel.[94] By doing so, the Court fulfilled its treaty obligation to apply the Convention. The Court acknowledged this Convention as the *lex specialis* for international sales in Egypt; it gave the CISG priority over domestic (non-unified) law.

On another occasion, the Egyptian Court of Cassation *ex officio* applied the CISG, i.e., without a request by either party to do so.[95] In the dispute between a seller from Italy and a buyer from Egypt over the price of the sold marble, the South Cairo First Instance Court

94 Case No. 2490 of judicial year 81 (Egyptian Court of Cassation, 23 June 2020) <https://iicl.law.pace.edu/cisg/case/egypt-june-23-2020-court-cassation-australian-wheat-board-awb-v-general-company-silos> 20 January 2024.

95 Case No. 979 of judicial year 73 (Egyptian Court of Cassation, 11 April 2006) <https://iicl.law.pace.edu/cisg/case/egypt-april-11-2006-court-cassation> accessed 20 January 2024.

did not apply the CISG. The Cairo Court of Appeals affirmed the decision of the Court of First Instance. Indeed, both Courts applied Egyptian domestic (non-unified) law. Clearly, the two Courts ignored that both contract parties have their places of business in different Contracting States (Italy and Egypt). Based on Article 1(1)(a) of the CISG, the Courts, by their own motion, should apply the CISG automatically, i.e., without any recourse to conflict rules.

On 11 April 2006, the Court of Cassation, upon the challenge presented by the buyer, concluded that the Court of Appeals was mistaken in applying the Egyptian domestic (non-unified) law to the dispute. The Court of Cassation affirmed that the CISG is the applicable law and, therefore, referred the case to the Court of Appeals for reconsideration by a different panel. The Court made it very clear that:

> The court, upon its own initiative, should look for the governing legal rule and apply it to the relationship between the parties presented before them; the judge *ex officio* should give such relationships the correct characterisation, even if the parties did not ask the judge to do so.

Based on Article 1(1)(a) of the CISG, *inter alia*, the Court of Cassation continued to say that:

> When a sale of goods is concluded between a buyer in a State Party to the CISG and a seller in another State Party to the same Convention, the rules of this Convention shall apply to the conclusion of the contract as well as to the parties' rights and duties. One shall not consider the national [non-unified] law otherwise applicable pursuant to the forum's conflicts rule.

Obviously, because the requirements for the territorial application were met, the Court of Cassation implemented its treaty duty to apply the CISG. The Court also recognised the special nature of the CISG as the law of international sales in Egypt; it prioritised the CISG over domestic (non-unified) law.

As stated earlier, in Bahrain, both legislation and court rulings regard the designated foreign law as a fact. In accordance with their treaty duty, however, the Bahraini courts have a treaty obligation to apply the CISG automatically. When the parties involved in a sale of goods contract have their places of business in different Contracting States, the CISG should supersede the national (non-unified) law, including the Bahrain Law No. 6/2015 (with its conflict-of-laws rules on contracts). Therefore, the courts are required to apply the CISG ex officio.

Additionally, Bahrain courts (and other Arab states that are party to the CISG, such as Egypt) may apply the CISG indirectly. This occurs when the parties, e.g., under Article 4 of Bahrain Law No. 6/2015,[96] explicitly choose the CISG (or its "rules of law") as the law

96 Although other Arab states (parties to the CISG) do not expressly permit the parties to select 'rules of law' as the law governing their contract, the same conclusion had been reached under the general formula of their national conflict rules.

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governing their sale contract. In such cases, the court must also apply the CISG by its own initiative; otherwise, it would override the parties' autonomy.

Such courts may face the CISG's indirect application in other situations, i.e., when the chosen law, the law of the parties' common domicile or the *lex loci contractus* is the law of a State Party to the Convention. In such cases, Bahraini courts are obligated by the command of the national conflicts rule (as per Article 17 of Bahrain Law No. 6/2015) to apply the designated law of that State, including the CISG as part of it. Consequently, the court, *ex officio*, has to apply the CISG as the *lex specialis* of international sales in that State (whose law is applicable).

If the court were to treat the CISG as merely a fact that must be established by the parties, the court would infringe its treaty obligation to apply the Convention, particularly Article 1(1)(b) of the CISG, which – under Articles 37 and 121(a) of the Bahraini Constitution – holds the same force as national law. In fact, the text of the CISG, as well as scholarly writings and case law, is more easily accessible than national (non-unified) foreign law.[97]

While Egyptian and Bahraini courts have yet to apply the CISG indirectly, non-Arab jurisdictions have successfully done so. For instance, in a dispute over the conformity of tinned cucumbers delivered by a Turkish seller (Türkiye being a non-Contracting State to the CISG)[98] to a German buyer (Germany being a CISG-Contracting State since 1 January 1991),[99] the *Oberlandesgericht Düsseldorf* [Court of Appeal] in Germany ruled that the buyer and seller had selected the German law to govern their contract. The court concluded that because Germany was a CISG-Contracting State, this contract was governed by the Convention by virtue of Article 1(1)(b) of the CISG. This Convention is part of the German law governing the international sale of goods. To put it in the words of the Court, "*CISG als innerstaatliches deutsches Recht*", i.e., the Convention is the German international law.[100] Such a practice should encourage Arab courts to apply the Convention when the conflicts rule refers to the law of a CISG-Contracting State.

5.1.2. The Court Shall Respect the Special Nature of the CISG

Whether the court in Egypt or Bahrain applied the CISG automatically or by virtue of the conflicts rule, the court should respect the special nature of this international Convention. The indirect CISG application makes no difference whether the designated law is the law of the forum or the law of another State Party to the CISG. In all events, the court is treaty obligated to apply the CISG as a sales uniform law.

97 Bernasconi (n 9) 161; Honnold (n 10) 39; Schlechtriem and Butler (n 12) 16.

98 The CISG entered into force in Türkiye on 1 August 2011. See, Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG) <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status> accessed 15 February 2024.

99 ibid.

100 Case No. 17 U 82/92 (Oberlandesgericht Düsseldorf, 8 January 1993) <http://www.unilex.info/cisg/case/17> accessed 20 January 2024.

To materialise the ultimate CISG's goal of unification, Article 7(1) of the CISG obliges the court to consider this Convention's international character, the need to promote uniform application and good faith in international trade. This suggests the court's reference to academic writings on CISG[101] as well as to the arbitral awards and court rulings made in other jurisdictions.[102]

In the above-cited white wheat case, the Egyptian Court of Cassation referred to the CISG-case law made in other jurisdictions to define the "reasonable time" for notice of non-conformity. The Court concluded that:

> The comparative courts' rulings applying the CISG interpret "reasonable time" as per Article 39(1) of the CISG to start at any time after the day of the goods delivery or the detection of the defect. It may be 24 hours, some days, weeks, or months that may not, in any case, exceed the period of two years.[103]

In the marble case, the Egyptian Court of Cassation referred, *inter alia*, to Articles 1(1)(a) (material and territorial sphere of CISG-application), 4(a) (contractual questions covered and those excluded from CISG application) and 7(1) CISG (purposes guiding CISG interpretation) to justify the CISG application to the dispute. It indicated that:

> Rules of good faith require the CISG application to the formation of the sale of goods contract made between a buyer in a State Party to CISG and a seller in another State Party to CISG and the rights and duties arising therefrom.[104]

In addition, in the indirect application situation, the courts in Egypt or Bahrain should respect the mandate of Article 1(1)(b) of the CISG and apply the law designated by their national conflicts rule. When the Egyptian or Bahraini conflicts rule refers to the law of a CISG-Contracting State, this reference acts as a directive to apply that law. Consequently, as part of that law, the court is obligated to apply the CISG in the same way that the forum in the state of origin would.

To fulfil its treaty obligations, the court in the state of origin must respect the special nature of the CISG and apply its provisions autonomously,[105] recognising it as a uniform law for international sales. Similarly, the courts in Egypt or Bahrain, when their conflict-of-laws rule refer to the law of a CISG-Contracting State, should follow the same approach.

Under Article 6 of Bahrain Law No. 6/2015, the court should acknowledge the foreign character of the designated foreign law, provided the parties submit the principles of interpretation and application of that law. However, if the Bahraini court limits itself to considering the CISG only when the parties establish its content, it risks applying a law

101 Viscasillas (n 14) 746.
102 UNCITRAL, HCCH and UNIDROIT (n 18) 31-2; Allen-Ngbale (n 14) 756.
103 Case No. 2490 of judicial year 81 (n 94).
104 Case No. 979 of judicial year 73 (n 95).
105 Allen-Ngbale (n 14) 756.

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that differs from the one anticipated by the buyer and seller or the one designated by the national conflict-of-laws rule.[106] This could lead to the court infringing its treaty duty to apply the CISG.

Therefore, when the CISG is applicable, the Bahraini court should, by its own motion, ascertain the content of the CISG, along with any related case law and legal doctrine. Furthermore, the court should interpret and apply the CISG autonomously.

Article 95 of the CISG allows States when ratifying, accepting, approving or acceding to the CISG, to declare that they will not be bound by Article 1(1)(b). If a CISG-Contracting State, whose law is applicable, has declared such reservation (as with China or the U.S.),[107] the courts of this Reservation State will not apply the CISG.[108] Instead, they will apply the designated domestic (non-unified) law.[109] For instance, the U.S. District Court, Eastern District of Kentucky, Central Division, refused to apply the CISG pursuant to the conflicts rule because the U.S. declared a reservation to Article 1(1)(b) in accordance with Article 95.[110] On the other hand, if the conflicts rule in the Reservation State points to the application of the law of a non-Reservation State, the court should apply the CISG.[111]

The question is more debatable in non-Reservation States like Egypt and Bahrain. If the law applicable before such courts is a law of the Reservation State, should they apply the CISG or the national law of that State? Needless to say, if one of the parties is seated in a non-Reservation State and the other in a Reservation State, the CISG will directly apply by virtue of Article 1(1)(a). The question becomes crucial when one of the parties (the seller or the buyer) is seated in a third, non-Contracting State.[112] According to an opinion,

> "in the situation where State A has not taken the reservation under Article 95 and State B has done so, and where the parties have their places of business in State B and in non-Contracting State C, … a court in State A should, if it finds the law of

106 Abdelaal (n 15) 379-80.

107 Status (n 98).

108 Honnold (n 10) 38; Lookofsky (n 12) paras 55, 331. *Jing Zhong Zi Di* No. 208 (Supreme People's Court of the People's Republic of China, 20 July 1999) <https://iicl.law.pace.edu/cisg/case/china-july-20-1999-supreme-peoples-court-zheng-hong-li-ltd-hong-kong-v-jill-bert-ltd-swiss> accessed 20 January 2024.

109 Honnold (n 10) 38-9; Lookofsky (n 12) paras 55, 331; Ferrari (n 10) 327. It should however be noted that, according to the CISG-AC Opinion No. 15, the declaration under Article 95 CISG only removes the Reservation State's treaty obligation to apply Article 1(1)(b) CISG; it does not prevent the courts in this State from applying the Convention indirectly by virtue of conflicts rules. See, CISG Advisory Council Opinion No. 15: Reservations under Articles 95 and 96 CISG (adopted 21 and 22 October 2013) 3.7 <https://cisgac.com/opinions/cisgac-opinion-no-15> accessed 20 January 2024.

110 *Princesse D'Isenbourg et CIE Ltd v Kinder Caviar, Inc and Kinder Caviar, Inc v United Airlines, Inc* No. 3: 09-29-DCR (US District Court, Eastern District of Kentucky, Central Division, 22 February 2011) <http://www.unilex.info/cisg/case/1558> accessed 20 January 2024.

111 Bernasconi (n 9) 166.

112 Honnold (n 10) 39.

> State B to be applicable, select the domestic law of that State as the law governing the contract rather than the Convention."[113]

In the same sense, Schlectriem and Butler argue that:

> "The decision of a national legislature in a "reservation member state" has to be respected even if it is a foreign court whose private international law rules lead to the law of a reservation member state."[114]

Likewise, Bernasconi argues that:

> "A State's decision to file a reservation under Article 95 cannot simply be ignored by other member States; such declarations must be respected within their true limits. The real effect of an Article 95 reservation is comparable to that of a switch-signal, indicating which set of substantive rules within the designated *lex causae* is applicable."[115]

According to the author, however, since Egypt and Bahrain have not excluded the indirect application of the CISG, the courts in such jurisdictions are treaty-bound to apply Article 1(1)(b) of the CISG.[116] When the court's conflicts rule designates the law of a Reservation Contracting State (e.g., the U.S. law), whether, in accordance with the subjective or objective choice, the court should apply the CISG.[117]

Under Article 95 of the CISG, a Reservation State is still a Contracting State. According to the CISG-AC Opinion No. 15, comparing the formula of Article 95 with that of Articles 92, 93 and 94 of the CISG suggests that a Reservation State under the latter provisions becomes a non-Contracting State. In contrast, a Reservation State under the former provision remains a Contracting State for purposes of Article 1(1) of the CISG.[118] Thus, the court in Egypt or Bahrain should apply the Convention as part of the law of the Reservation State referred to by the forum's conflict-of-laws rule.[119]

A fortiori, this principle should apply when the contract parties – under Article 4 Bahrain Law – directly choose the CISG to govern the contract. Though courts in Egypt and Bahrain have yet to apply the CISG as the law chosen by the parties, other forums did. For example, in a dispute between a Dutch seller and an English buyer over the conformity of

113 Malcolm Evans, 'Comments on Article 95 CISG [Final Provisions: Declaration as to Art 1(1)(b)]' in C Massimo Bianca and Michael Joachim Bonell, Commentary on the International Sales Law: The 1980 Vienna Sales Convention (Giuffrè 1987) 657.

114 Schlechtriem and Butler (n 12) 17.

115 Bernasconi (n 9) 168.

116 Honnold (n 10) 40.

117 *Contra,* Winship (n 23) 524-5.

118 CISG Advisory Council Opinion No. 15 (n 109) para 3.12. See also, Allen-Ngbale (n 14) 758; Wethmar-Lemmer (n 11) 69.

119 Al-Mukhaizeem (n 11) 307.

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500,000 strawberry plants, the *Rechtbank Oost-Brabant* in the Netherlands found that the parties had agreed to apply the CISG. Therefore, the court held the CISG applicable by virtue of its Article 1(1)(b).[120]

According to Wethmar-Lemmer,

> "Article 1(1)(b) only requires reference to the rules of private international law of the forum to determine whether the CISG applies per se but does not rely on the rules of private international law to determine the extent to which the CISG should be applied. The rules of private international law, thus, only serve as a 'trigger' for the application of the CISG, but article 1(1)(b) 'remains the controlling provision' for the sphere of application for forums situated in non-reservation Contracting States. One then regards article 1(1)(b) as requiring the CISG to be applied '*ipso juri*' by non-reservation Contracting States."[121]

The CISG-AC Opinion No. 15 supports this conclusion, albeit with a different justification. According to this AC Opinion, the prevailing view in legal literature – that the forum should apply the designated law in the same manner as the court in the state of origin – should not be approved if it leads to the application of designated domestic (non-unified) law over the CISG.[122] The CISG-AC Opinion No. 15 further says that:

> "It is, therefore, 'this Convention' which the judge in a Contracting State has to apply when its forum's rules of private international law lead to the application of the law of a Contracting State, and *not* 'the law of a Contracting State' (that may or may not have made a declaration under Article 95). The contrary opinion instead reads the partial phrase 'lead to the application of the law of a Contracting State' as calling for the application of that state's law, thereby confusing cause and effect under Article 1(1)(b). It should, therefore, not be followed."[123]

The author supports the conclusion of this CISG-AC Opinion No. 15 but not its reasoning. The forum in a CISG-Contracting State, such as Egypt or Bahrain, is treaty obligated to apply the CISG, including Article 1(1)(b). If the conflicts rule in Egypt or Bahrain point to the application of the law of a Contracting State, and if this State is a Reservation State, the CISG (and not the national law of that State) should apply.

120 *Rechtbank Oost-Brabant* No. C/01/322578 / HA ZA 17-428 (Rechtbank Oost-Brabant, 28 February 2018) <http://www.unilex.info/cisg/case/2162> accessed 20 January 2024. See also, *Ispat Unimetal, SA v Trenzas y Cables de Acero PSC, SL* No. 62/2004 (Audiencia Provincial de Cantabria, 5 February 2004) <http://www.unilex.info/cisg/case/1126> accessed 20 January 2024; Case No. 1 U 69/92 (Oberlandesgericht Saarbrücken, 13 January 1993) <http://www.unilex.info/cisg/case/180> accessed 20 January 2024.

121 Wethmar-Lemmer (n 11) 70-1.

122 CISG Advisory Council Opinion No. 15 (n 109) para 3.16.

123 ibid.

The courts in Egypt and Bahrain have not yet applied the CISG indirectly. However, other forums have done so. For example, in a dispute between a German party (Germany being a CISG-Contracting State) and a Turkish party (Türkiye, at the time, was a non-Contracting State), the *Oberlandesgericht* [Court of Appeal] Hamburg in Germany ruled that since Germany had not made a reservation under Article 95, Article 1 (1)(b) remained applicable. Therefore, the Court applied the Convention as part of the German law designated by the German conflicts rule.[124]

In addition, the forum must consider the mandate of its conflicts rule. Because this rule directs the court to apply the law of a Reservation Contracting State, the court must apply this law and, particularly, the CISG as part of it. The CISG forms the *lex specialis* of international sales in that Reservation Contracting State.[125]

5.2. Treatment of the CISG by Courts in Arab non-Contracting States (Qatar and Jordan)

Because Qatar and Jordan have not acceded to the CISG yet, the courts in these jurisdictions are not obligated to apply the Convention automatically.[126] To determine the law applicable to contracts, including international sales of goods, these courts must apply the national conflicts rule (i.e., Article 27(1) of the Qatari Civil Code and Article 20(1) of the Jordanian Civil Code, respectively). Therefore, the court may apply the CISG indirectly when the law chosen by the buyer and the seller, the law of their common domicile or the *lex loci contractus*, is the law of a CISG-Contracting State. This would also be the case when the buyer and the seller select the CISG or "rules of law" to govern the contract.[127]

These Arab courts have not yet applied the CISG indirectly. Nevertheless, in a dispute between a Turkish company (seller) and a Jordanian Company (buyer) over the price of delivered furniture, the seller pleaded the applicability of the CISG. Because the

124 Case No. 13 U 54/10 (Oberlandesgericht Hamburg (Court of Appeal Hamburg) Germany, 15 July 2010) <https://iicl.law.pace.edu/cisg/case/germany-july-15-2010-oberlandesgericht-court-appeal-german-case-citations-do-not-identify> accessed 20 January 2024.

125 Bernasconi (n 9) 156; Kadner Graziano (n 18) 176.

126 Allen-Ngbale (n 14) 756; Bernasconi (n 9) 169.

127 In addition, the courts in Arab States not Parties to the CISG (like, Jordan and Qatar) may directly apply this Convention as *lex mercatoria*, i.e., without recourse to conflicts rules. Instead of applying the *lex fori* in cases in which the applicable foreign law is not ascertainable, the court could apply the CISG. See, Al-Mukhaizeem (n 11) 313, 321-2; Jayme (n 8) 33. Besides, unless prohibited by an express legal text (e.g., Article 38 of the Qatari Civil Code), such courts could apply the CISG in cases in which the foreign law applicable to sales contracts is colliding with the forum's public order. The application of the CISG, the sales uniform law, would avoid the application of the *lex fori*, the law generally applicable in such situations. The *lex fori* might have a weak connection to the forum; it is also normally familiar to one of the parties only. See, Amin Dawwas, 'Applicability of CISG to Kuwaiti Businesses' (2014) 2(7) Kuwait International Law School Journal 74-5. A detailed discussion of these issues exceeds the scope of the present paper; they need a separate study.

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buyer did not fulfil its obligation to pay the whole price, the seller filed a lawsuit before the Amman Court of First Instance. This Court ruled in favour of the seller.[128] The buyer appealed this ruling before the Amman Court of Appeals, arguing, *inter alia*, that the Amman Court of First Instance wrongly excluded the applicability of the related international conventions, including the CISG (Articles 25, 26 and 36). The Court of Appeals refused this argument by saying that:

> "The appellant [buyer] did not clearly specify the violations of those conventions which the Court of First Instance had committed; only with such specification, the Court of Appeals could control the alleged violations."[129]

In his challenge before the Court of Cassation, the buyer reclaimed that "the Court erred in its conclusion because the sale was made pursuant to international conventions concerning international sales, in particular the text of Article 25 of the Vienne Convention." The Court of Cassation rejected the challenge because, among other things,

> The plaintiff's [the seller's] resort to the judiciary to claim its right to the rest of the price of the goods purchased by the defendant [the buyer] is not contrary to international conventions.[130]

In this case, where the buyer and the seller are based in different states – Jordan and Turkey – the application of the CISG in Jordan can only occur indirectly due to Jordan's status as a non-Contracting State. This means the CISG could apply if Jodan's conflicts rule designated the law of a CISG-Contracting State, such as Turkey.

However, since the courts ruled the dispute based on Jordanian law without considering the applicability of the CISG by virtue of its Article 1(1)(b), they did not err in their decision. Given that the applicable law in this case was Jordanian law, and Jordan is a non-Contracting State to the CISG, the courts were correct in not applying the Convention.

The Court of Cassation rightly concluded that the seller's claim for the price did not violate international conventions, including the CISG. However, the ground upon which the Court of Appeals refused to apply the CISG is questionable. If the buyer had explicitly raised the infringement of the CISG, would the Court of Appeals have controlled such a violation, given that the conditions of the CISG application were not met?

Under such conditions, the Court could apply the CISG as part of the *lex mercatoria*; the Court could also refer to provisions of international conventions to affirm the consistency of Jordanian law with these conventions. However, the Court could not apply the CISG as

128 Case No.2101/2018 (Amman Court of First Instance, 28 July 2020) <https://qarark.com/> accessed 20 January 2024.

129 Case No. 531/2021 (Amman Court of Appeals, 19 September 2021) <https://qarark.com/> accessed 20 January 2024.

130 Case No. 6325 (Jordan Court of Cassation, 20 January 2022) <https://qarark.com/> accessed 20 January 2024.

the law governing the sale because the national conflicts rule designated the law of Jordan, a non-contracting State.

Courts in other non-Arab jurisdictions have applied the CISG indirectly. For instance, in a dispute between a Belgian and an Italian over a sale of clothes, a Belgian court ruled that the CISG was applicable. However, Belgium had not yet ratified the CISG (this Convention became effective in Belgium on 1 November 1997).[131] On 13 November 1992, the *Tribunal de Commerce de Bruxelles, 11ème ch.* the buyer and the seller had expressly selected Italian law (the CISG became effective in Italy on 1 January 1988).[132] Therefore, the court applied the Convention (as part of the selected Italian law) based on Article 1(1)(b) of the CISG.[133]

In another dispute between a Belgian buyer and a Dutch seller over a sale of fashion goods, another Belgian court applied the CISG indirectly prior to its implementation in Belgium. On 1 March 1995, the *Rechtbank van Koophandel, Hasselt* ruled that the sale was subject to the CISG. The court indicated that this could be attributed to either the standard terms used by the seller, including a choice of law clause to the benefit of the Dutch law (the CISG became effective in the Netherlands on 1 January 1992)[134] or because the Belgian conflicts rule referred to the application of Dutch law.[135]

Such practice should encourage courts in Qatar and Jordan (and in all other Arab States that have not yet acceded to the CISG) to apply the Convention indirectly. If the law chosen by the buyer and the seller, expressly or implicitly, the law of their common domicile or else the *lex loci contractus* is the law of a State Party to the CISG, the court should apply the CISG, so long as the requirements for the CISG's substantive application are met (Articles 1-6).[136] *A fortiori*, the court should do so when the buyer and the seller choose the CISG (or "rules of law") to govern the contract.

As stated earlier, the author does not approve the approach of Qatari courts that regards foreign law as a fact to be established by litigants. Qatari courts should proactively apply the conflict-of-laws rule and the law it points at. When this law pertains to a state that is a CISG-Contracting State, the Qatari court should apply the CISG as part of that law. Furthermore, the court, *ex officio*, should ascertain the content of this Convention. The provisions of the CISG, as well as the related jurisprudence and academic writings, are more easily accessible than the designated national (non-unified) law.

131 Status (n 98).

132 ibid.

133 *Maglificio Dalmine slr v SC Covires* No. RG 4.825/91 (Tribunal de Commerce de Bruxelles, 13 November 1992) <http://www.unilex.info/cisg/case/175> accessed 20 January 2024.

134 Status (n 98).

135 *JPS BVBA v Kabri Mode BV* No. AR 3641/94 (Rechtbank van Koophandel, Hasselt, 20 January 1995) <http://www.unilex.info/cisg/case/269> accessed 20 January 2024.

136 Kadner Graziano (n 18) 176.

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Jordanian courts treat foreign law as valid, applying the conflicts rule and the law to which this rule points on their own initiative. Therefore, if the law applicable to the contract is from a CISG-Contracting State, the court should apply this Convention as part of that law.[137] Within that State whose law is applicable, the CISG includes a uniform law specifically made to govern international sales. Compared to the national (non-unified) law, the CISG is considered the *lex specialis* of international sales in that State. The CISG supersedes national (non-unified) law.

Under Article 27(1) and Article 20(1) of the Qatari and Jordanian civil codes, respectively, the law selected by the parties may be a soft law. Thus, if the parties select the CISG or "rules of law" to govern the contract, courts in Qatar or Jordan should apply the CICG as *lex mercatoria*.

Courts in Qatar or Jordan should apply the designated law in the way a court in the state of origin would apply it.[138] This so-called "origin-conform application" is a natural consequence of following the command of the forum's conflicts rule.[139] The court of the (CISG-Contracting) State, whose law is applicable, should respect its treaty obligation and give the CISG preference over its domestic sales law.[140] This court would consider the autonomous character of the CISG as a uniform law independent of the domestic (non-unified) law.[141] The court in Qatar or Jordan should do the same, too, particularly because Article 7(1) of the CISG compels an autonomous application of the CISG. Besides, the CISG is more easily accessible than domestic (non-unified) law.[142]

However, if the applicable state has made a reservation under Article 95 of the CISG to exclude its indirect application, the courts in Qatar or Jordan, whose conflicts rule designates the law of a Reservation State, should not apply the Convention.[143] In this case, Article 1(1)(b) of the CISG is not part of the court's law as it is located in a state that has not acceded to the CISG.[144] Consequently, the court should consider the command of its national conflicts rule; it should apply the designated foreign law in the manner the court in the foreign state would apply. Like the courts in the foreign state, the courts in Qatar or Jordan would then apply the domestic (non-unified) sales law of the Reservation State.[145]

In practice, the *Oberlandesgericht Düsseldorf* [Court of Appeal] in Germany found that the CISG was not effective when the disputed contract was made. Based on the national conflicts rule, the Court concluded that the U.S. law (namely, the law of Indiana) is

137 ibid; Al-Mukhaizeem (n 11) 312.
138 Wethmar-Lemmer (n 11) 69; Schlechtriem and Butler (n 12) 14.
139 Wethmar-Lemmer (n 11) 69.
140 Kadner Graziano (n 18) 177.
141 Viscasillas (n 14) 746.
142 Schlechtriem and Butler (n 12) 16.
143 Al-Mukhaizeem (n 11) 312; Bernasconi (n 9) 168-9; Kadner Graziano (n 18) 177.
144 Allen-Ngbale (n 14) 758.
145 CISG Advisory Council Opinion No. 15 (n 109) para 3.18.

applicable. Because the CISG was in effect in Indiana since 1 January 1988, the Court ruled that the CISG was applicable.[146] Obviously, the Court did not consider the reservation made by the U.S. under Article 95 of the CISG. The Court was not treaty-bound to apply Article 1(1)(b) of the CISG because Germany was not yet a Party to this Convention. The Court should have applied the designated Indiana law in the same way a court in Indiana would have, namely the American law (excluding the CISG).

Similarly, in a dispute regarding a contract made between an American party and a Japanese party, the *Tokyo Chiho Saibansho* [District Court] in Japan (a non-contracting State to the CISG) found that the applicable law was the CISG as part of the U.S. law, as designated by Japanese conflict-of-laws rule. The court ignored the U.S. reservation under Article 95 of the CISG and applied the Convention to the disputed contract.[147] However, the Court should have applied the national (non-unified) U.S. law (not the CISG) since U.S. courts – due to the Article 95 reservation that excludes the indirect CISG application of the CISG – would not apply the Convention under such conditions.

6 CONCLUSIONS

It is worth highlighting several key findings and recommendations. With the exception of Bahrain, the legislatures in the Arab states under consideration have not expressly settled the issue of how foreign law, including the CISG, should be treated by national courts. The Bahraini legislature regards foreign law applicable to contracts as a fact. Similarly, the courts in Bahrain, Egypt, and Qatar treat foreign law as a fact. Accordingly, judges are generally not bound to apply this law by their own motion; instead, the litigants should insert its application and establish the existence of its provisions.

Because foreign law is treated as a fact in these jurisdictions, the Court of Cassation should not review a decision on the ground that the court of merits wrongly applied foreign law. In reality, this is the case in Bahrain and Qatar. In Egypt, in contrast, the Court of Cassation surprisingly controls the application of foreign law by the judge of merits, thereby confusing cause and effect. To avoid such a strange result, the Egyptian Court of Cassation should clearly treat foreign law as law.

The Jordanian Court of Cassation regards foreign law as a matter of law; it also acknowledges the foreign nature of this law. Accordingly, judges of merits are required to apply foreign law on their own initiative, just as a foreign judge would apply it. Otherwise, their ruling adjudicating the dispute may be challenged on the grounds of incorrect legal

146 Case No. 17 U 73/93 (Oberlandesgericht Düsseldorf, 2 July 1993) <http://www.unilex.info/cisg/case/26> accessed 20 January 2024.

147 Case No. 1997-wa-19662 (Tokyo Chiho Saibansho, 19 March 1998) <https://iicl.law.pace.edu/cisg/case/japan-march-19-1998-tokyo-chiho-saibansho-district-court-nippon-systemware-kabushikigaisha> accessed 20 January 2024.

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application. The Court of Cassation cannot refuse challenges based on the basis that the litigants did not plead the applicability of foreign law.

As for the CISG, in particular, the Egyptian Court of Cassation (in the marble case) applied this Convention *ex officio*. This approach is welcomed. This ruling will hopefully guide lower courts in Egypt (and possibly in other Arab states) to apply the CISG, when applicable, by their own initiative. Although Egypt, along with Bahrain, Qatar and Jordan, does not adopt the principle of *stare decisis*, lower courts in these jurisdictions generally follow the guidance of the Supreme Court. In addition, since the civil codes in many Arab states (such as Bahrain, Qatar and Jordan) are influenced by the Egyptian one, the courts in these jurisdictions generally follow the guidance of the Egyptian Court of Cassation.

The author advises the legislature in all Arab jurisdictions at issue, as well as the judicature in Egypt, Bahrain and Qatar, to reconsider their method of dealing with foreign law, including the CISG. The CISG, as the law governing international sales, should be regarded as a legitimate law. Courts should apply the CISG *ex officio*, even if the litigants do not ask the court to do so. The court's decision to apply the CISG should be subject to review by the Court of Cassation.

The treatment of foreign law (including the CISG) as a fact makes it very difficult and costly for the litigants to establish its provisions, particularly when those provisions are in a foreign language. Besides, each party is likely to only be interested in proving the provisions that favour their own interests; this could result in the falsification of the foreign law. Consequently, courts may end up applying a law that differs from the one that should applied by virtue of the imperative contained in the national conflicts rule. In addition, since both Egypt and Bahrain are parties to the CISG, their courts would infringe their international duty to apply this Convention.

The courts of merits in Egypt, Bahrain and Qatar should adopt the Jordanian courts' approach concerning the treatment of foreign law, including the CISG. These courts must respect the foreign character of foreign law; they should apply this law in accordance with the principles of its interpretation and application prevailing in the state of origin. As for the CISG, in particular, Arab courts should treat this Convention, when applicable, as the *lex specialis* of international sales in the relevant state. Just as the Egyptian Court of Cassation did in the case of defective goods shipped by sea, other Arab courts should respect the CISG as a uniform law. Failing to do so would mean not adhering to their national conflict-of-laws rule, which mandates the application of the designated foreign law, including the CISG.

In addition, the treatment of the CISG as a fact would jeopardise the main purpose of the CISG, i.e., the unification of the sales law. As a result, courts in Arab CISG-Contracting States, such as Egypt and Bahrain, would infringe their treaty duty to apply the Convention.

The author strongly recommends that Arab non-Contracting States to the CISG, such as Qatar and Jordan, accede to this Convention. To broaden the scope of the territorial application of the CISG, these states should refrain from making a reservation under Article 95 of the CISG, which excludes its indirect application. This would encourage non-Arab parties to engage in sale contracts with Arab parties. Such a move would facilitate international trade and provide legal certainty to both contract parties.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЗАСТОСУВАННЯ CISG В НАЦІОНАЛЬНИХ СУДОВИХ ОРГАНАХ ЄГИПТУ, БАХРЕЙНУ, КАТАРУ ТА ЙОРДАНІЇ

Амін Давас

АНОТАЦІЯ

Вступ. *Конвенція ООН про договори міжнародної купівлі-продажу товарів (CISG або Конвенція) може застосовуватися автономно в арабських договірних державах, таких як Єгипет і Бахрейн. CISG також може застосовуватися опосередковано, тобто з огляду на норми міжнародного приватного права, як в арабських договірних державах, так і в тих, що не є договірними (наприклад, Катар і Йорданія). У цій статті обговорюються обидві ситуації застосування Конвенції в арабських державах, а також те, як арабські суди розглядають іноземне законодавство, зокрема CISG.*

Методи. *Для того, щоб досягти мети дослідження, було використано методологію кабінетного дослідження, а також юридичний аналіз і порівняння. Автор ретельно вивчає низку документів, починаючи від національних і міжнародних юридичних текстів до наукових праць і судових рішень. Аналізує два підходи, які переважають в арабських наукових працях і судових рішеннях щодо застосування зазначеного іноземного права (зокрема CISG), тобто як факту чи як (іноземного) права. Автор також порівнює ці два підходи, щоб показати переваги та недоліки кожного з них, щоб визначити, який із них більше сприяє здійсненню правосуддя та відповідає інтересам сторін.*

Результати та висновки. *Автор робить висновок, що законодавча влада в усіх зазначених арабських юрисдикціях, а також судова влада в Єгипті, Бахрейні та Катарі повинні переглянути свій підхід до розгляду іноземного права. Зокрема, CISG слід розглядати як предмет права, а не як факт. Суди повинні застосовувати Конвенцію та встановлювати її зміст ex officio.*

Ключові слова: *CISG, арабське право, колізійні норми, автономія волі сторін, купівля-продаж товарів.*