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SALE OF GOODS CONTRACTS IN SAUDI ARABIA: ACCESSION TO THE CISG, THE CIVIL TRANSACTIONS ACT AND CONFLICT RULES***

This paper examines the implications of Saudi Arabia's accession to the UN Convention on Contracts for the International Sale of Goods (CISG) in August 2023. Saudi Arabia joined only Parts I and II, postponing a decision on Part III pending further analysis of its compatibility with Sharia law. Two months earlier, Saudi Arabia enacted the Civil Transactions Act (CTA), its first civil law codification, largely replacing Sharia in contractual and non-contractual obligations. However, the CTA lacks conflict rules, leaving Saudi Arabia without legislation on conflict-of-law rules for sale contracts. This paper explores Saudi Arabia's options for joining Part III of the CISG, the possibility of choosing foreign law or the entire CISG before Saudi courts or in arbitration, and compares the CISG with the CTA. It assesses the legal and practical challenges of harmonizing Saudi Arabia's new legal framework with international sales law.

Key words: CISG. – Saudi Arabia. – Civil Transactions Act. – Conflict Rules.

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1. INTRODUCTION

The main goal of this paper is to analyze the circumstances and implications of the accession of Saudi Arabia to the United Nations Convention on Contracts for the International Sale of Goods (CISG). The importance of a G20 state entering into the CISG is reason enough to conduct this analysis, however, the true motive for this paper is the complex and interesting legal situation created by joining the CISG. Saudi Arabia's legal system is Sharia-based. Saudi Arabia acceded only to Parts I and II of the CISG and not to the entire Convention, adopting almost simultaneously its first ever civil law codification, while still not accepting any conflict rules except in arbitration. This paper aims to shed light on these exciting developments, for potential foreign investors and their lawyers, who need to adjust their contracts, as well as for Saudi legal professionals and researchers, who are equally busy catching up with the fast pace of Saudi legislative evolution. Under different circumstances, the paper would aim to clearly identify the advantages and disadvantages for Saudi and foreign contractual partners when choosing the CISG over Saudi national law. However, the depth of such analysis is limited due to the fact that the application of the new Saudi Civil Transactions Act (CTA)¹ in practice has started only very recently, and judicial practice and research are still scarce. Saudi Arabia is the only state to join only parts I and II of the CISG, yet it has never been discussed to what extent and how the CISG can be effective when applied with such restrictions. Due to the given limitations, the paper aims to give a comprehensive overview of potential legal questions that may arise from Saudi Arabia's accession to the CISG, while an in-depth analysis will be conducted only for selected questions that the authors deem most important and appropriate.

2. SAUDI ARABIA'S ACCESSION TO PARTS I AND II OF THE CISG

On 3 August 2023 Saudi Arabia acceded to the UN Convention on Contracts for the International Sale of Goods and became the 96th party to the Convention, which entered into force in Saudi Arabia on 1 September 2024.² This development came as somewhat of a surprise, as so far Bahrain was the only Gulf Cooperation Council (GCC) member state to become party

¹ Royal Decree No. M/191, 18 June 2023.

² United Nations, 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 (last visited February 17, 2025).

to the Convention, furthermore, it is only the eighth state from the Arab world to do so, after Egypt, Syria, Iraq, Mauritania, Lebanon, Bahrain, and Palestine.³

The main reason for the slow and scarce accession of Arab states to the CISG is because of the potential incompatibility of the CISG with Sharia (Spagnolo, Bhatti 2023, 155), in particular with regards to the provisions of Articles 78 and 84 (1) CISG, providing for the charging of interest in case of late payment or refund of the price. That is why Saudi Arabia, at least for the time being, has joined only Parts I and II of the CISG, and not Part III where the said provisions on interest are found. Officially, Saudi Arabia is reviewing the compatibility of Part III of the CISG with Sharia and will later make its decision whether to join Part III.⁴ The final decision of Saudi Arabia to join or not to join Part III of the CISG may have a huge impact on other GCC, Arab and other states influence by Sharia law, should they consider joining CISG in the future.

For those readers who have not examined the CISG text in a while, just a quick reminder: Parts I and II cover only the first 24 articles of the CISG, regulating the CISG's applicability, general terms, and formation of contracts. Arguably, the heart of the CISG is found in Articles 25–89. Saudi Arabia became the first state in history to make a reservation regarding Article 92 (1) CISG and not join Part III of the Convention. In the past, there were cases involving Nordic states that under Article 92 CISG made reservations to Part II of the CISG, which regulates the formation of the contract. All of these reservations have since been withdrawn, and Part II applies in all Contracting States (Ferrari 2018, 214; Schmidt-Kessel 2016, 263). However, Part II does not carry the same weight as Part III of the CISG. Joining only Parts I and II does not render accession to the CISG meaningless, as we will show later in the paper. Let us first look at how it was possible that the text of the most successful substantive law convention in the world contains provision on interest.

³ Egypt on 1 January 1988, Syria on 1 January 1988, Iraq on 1 April 1991, Mauritania on 1 September 2000, Lebanon on 1 December 2009 and Bahrain on 1 October 2011 and Palestine 1 January 2019.

⁴ Resolution No. 3, Saudi Arabia's Accession to the United Nations Convention on Contracts for the International Sale of Goods (CISG), adopted 11 April 1980, Royal Decree No. M/196, 4 Dhu al-Hijjah 1444 AH (22 June 2023), Kingdom of Saudi Arabia. <https://ncar.gov.sa> (last visited February 17, 2025).

2.1. How Were Provisions on Interest Included in the CISG and Could They Have Been Avoided?

From the current perspective, a provision on interest in the CISG seems quite culturally insensitive. The CISG is the most important substantive law convention drafted by UNCITRAL that is intended to be joined by as many states as possible. However, the legislative history shows that provisions on interest could have been easily avoided, at least not in the case of Article 78. The predecessor of the CISG, the UNIDROIT Convention Relating to a Uniform Law on the International Sale of Goods (ULIS),⁵ contained provisions corresponding to Articles 78 and 84 CISG in its Articles 83 and 81, respectively. Therefore, the first draft of the CISG contained similar provisions (Bacher 2016, 1112, para. 4). Yet, the working group revising the first draft recommended removing the provision corresponding to today's Article 78, because there were a number of countries that set maximum rates for interest within their public policy, as well as countries that prohibit charging of any interest, and many developing countries especially opposed such provisions.⁶

The representative of Egypt participated actively in the discussion reminding the delegates that “certain countries and legal systems, whose religions forbade the payment of interest, attached special importance to the question under discussion. Those countries were often wealthy; some of them were oil-exporting countries; others consumed great quantities of goods from the developed countries. If they – and the major consumers among them in particular – were to be encouraged to adhere to the Convention, that instrument should not deal with the matter of interest in a manner unacceptable to them; [...] it would be advisable to provide for reservations which would permit any country, particularly those where the concept of interest was incompatible with their religion, to apply the relevant clauses in a different manner.” He further pointed out that he “was unaware of any refusal on the part of such countries to charge interest on loans or credit offered in international relations. It might be that another term was used, in which case it would be easy to add after the word ‘interests’ in the proposed provisions a phrase such as ‘or any other corresponding fee.’”⁷

⁵ Convention relating to a Uniform Law on the International Sale of Goods, The Hague, 1 July 1964.

⁶ Report of Committee of the Whole I relating to the draft Convention on the International Sale of Goods, A/32/17, 25–64, paras. 496–499.

⁷ UN Conference on CISG 1980, paras. 10 and 14.

The representative of Iraq also emphasized that “as the representative of Egypt had done, that certain Arab countries did not charge interest. His delegation would have preferred that there were no reference at all to interest in the Convention. If, however, a provision concerning that question had to be included it would be desirable, in order to make it possible for the countries which did not charge interest to accede to the Convention, to allow them expressly to enter a reservation to such a provision.”⁸

The representative of Canada supported the proposals of the Arab states: “referring to the comments of the representative of Iraq, he thought that two solutions might be envisaged: Arab countries concluding a contract with other countries not belonging to the same system might omit all references to interest; or else, application of the article relating to interest might be optional; countries would be free to accept or reject the provisions concerned at the time of accession to the Convention.”⁹

The representative from Yugoslavia emphasized the need to protect developing countries: “especially in the case of the developing countries, which were mainly purchasers of goods, which lacked financial resources, and which consequently found themselves frequently in arrears. She readily understood the position of those delegations which would prefer the Convention not to deal with interest.”¹⁰

In the end, regardless of the fact that many states opposed such provisions, they were simply outvoted and Article 78 was adopted. The discussion on Article 84 was linked to the work on Article 78 and eventually they were both adopted.¹¹ Without wanting to engage with hypotheticals too deeply, it is likely that today, with Saudi Arabia being member of G20¹² and with the significance of the GCC and the Arab states in the global economy, the outcome of the voting might be different. The voices of Egypt, Iraq and Canada, explaining the risk that states whose legal system is based on Sharia may not be willing to become of party because of two single provisions on interest, would likely raise more concern now than they did in 1980. Both proposals, the first one for a reservation option regarding Articles 78 and 84, as raised by Egypt, Iraq and Canada, and the second one to add the phrase

⁸ UN Conference on CISG 1980, para. 20.

⁹ UN Conference on CISG 1980, para. 23.

¹⁰ UN Conference on CISG 1980, para. 11.

¹¹ UN Conference on CISG 1980, para. 44.

¹² G20. 2024. G20 Members. <https://g20.org/about-g20/g20-members/> (last visited December 26, 2024).

“or any other corresponding fee” after the word “interests” in the proposed provisions, as raised by Egypt, would have enabled states with Sharia-based law to more easily join the CISG (Spagnolo, Bhatti 2023, 155).

At the time of its adoption, there were already discussion whether Article 78 CISG would have significant practical importance as creditors would be better off recovering their damage under Article 74, except in rare cases where the damage would not be recoverable due to an impediment under Article 79 (Schlechtriem 1986, 99). However, the absence of importance predicted for this provision has been disproven in practice. Economic forces, including inflation, have caused sharp increases in interest rates and Article 78 poses a threat that encourages voluntary performance (Honnold, Flechtner 2009, 601). However, due to the many compromises that had to be made to adopt Article 78, especially the lack of a concrete interest rate or a mechanism to calculate it, the provision has caused great problems in practice (Atamer 2018, 1028, para. 3). The CISG Advisory Council tried to create a uniform interpretation by proposing that the interest rate be defined according to the law of the state where the creditor has its place of business (CISG Advisory Council 2013b, 3.36). However, this is exactly the solution that the states that opposed the adoption of Article 78 feared the most, as it creates further social imbalance between the states who will usually be the place of business of the creditor and the state of the debtor. The problems caused by the lack of details under Article 78 may be overcome by agreement of the parties. However, the question arises whether the adoption of Articles 78 and 84 (1) was worth the potential exclusion of Sharia states, if an agreement of parties overriding the CISG provisions is the only solution that would provide legal security. Finally, even an agreement of the parties may not provide final resolution, as some states have set maximum interest rates or the agreement may violate public policy of some states in other ways (Spagnolo, Bhatti 2023, 161), which could lead to non-enforceability of foreign judgments or arbitral awards, if they provide for a higher interest rate (Bacher 2016, 1124, para. 50).

The exclusion of one entire group of states with Sharia background from joining the CISG should not have been achieved because of Article 78 and 84 (1), which cause great problems in practice and where the divergence is such that a uniform rule is not acceptable to the CISG parties. Alternatively, a solution like Article 28, which allows common law states to avoid remedies not available under their own law, would have been acceptable to Sharia states with regards to Articles 78 and 84. While it may not seem pertinent to compare the importance of common law states and Sharia law states, it is difficult not to see a different treatment when comparing Article 28 CISG as a favor to common law states and Article 78 as a clear exclusion of Sharia law states.

2.2. Application of Parts I and II of the CISG in Saudi Arabia – Can It Work Without Part III?

For now, only Parts I and II, i.e., Articles 1–24 of the CISG, will be applicable in Saudi Arabia. As is widely known, apart from the extensive provisions on the applicability of the CISG in Articles 1–6, Articles 1–24 regulate solely the interpretation of the CISG, interpretation of parties' statements, trade usages, and contract formation. We may surmise that from a practical perspective that a Saudi judge would only apply the CISG to see whether a sales contract is validly concluded (Arts. 14–24 CISG), and possibly to interpret the contract (Art. 8 CISG) and to include trade usages (Art. 9 CISG), while questions of potential breach of contract and remedies would be resolved under Saudi domestic law. This kind of *dépeçage* for very closely related issues is certainly not desirable. For example, the parties' contractual obligations would be determined based on their intent and interpretation of the contract under Article 8 CISG, as well as the offer and acceptance under Articles 14–24, but a breach of these obligations would be determined under the CTA. This is certainly not how the CISG was designed. It would serve the goal of the CISG if Article 8 CISG remained applicable to interpret the parties' conduct to the extent possible, even if it is related to provisions of obligations contained in Part III of the CISG.

This can be best perceived in regard to the obligation to interpret the obligations of the parties in accordance with the good faith principle under Article 7 CISG. As is already well known, the CISG does not contain a general good faith principle typical for civil law and Sharia law states, but merely states that “[i]n the interpretation of this Convention, regard is to be had to (...) the observance of good faith in international trade.” This duty interpretation is understood to oblige courts to interpret the existing obligations of the parties, codified within the CISG, to perform their obligations in good faith, rather than to create additional obligations and duties based on the good faith principles (Honold, Flechtner 2009, 95). The observance of good faith in international trade (Art. 7 (1) CISG), may have two important areas of application in conjunction with Articles 1–24 CISG. One of them is primarily applied by civil law courts, requiring the party introducing standards terms to make them available to the other party by relying on good faith in international trade (Article 7 (1) CISG).¹³ The second important implication

¹³ See Schwenzer Hachem 2016b, 127. The CISG Advisory Council adopted a more differentiated approach to the duty of the offeree to make their standard terms available to the other party, but without relying on good faith in international trade (Art. 7 (1) CISG) (CISG Advisory Council 2013a). This may be a good example

of good faith application is to communicate to the offeror the modifications they made to their acceptance of the offer under Article 21 CISG (Honnold, Flechtner 2009, 95). However, the most important areas of application of the good faith provision under Article 7 (1) CISG are lost without the application of Part III of the CISG. These include: observing good faith when mitigating damages (Art. 77), prohibiting the abuse of rights when asking for specific performance (Art. 46 (1)), the principle of *venire contra factum proprium* when the obligee caused the impediment to obligor's performance (Art. 80), etc. (Perales Viscasillas 2018, 123, para. 27). Articles 1–24, which are currently in effect in Saudi Arabia, for the most part do not regulate any obligations of the parties and the duty to interpret them in good faith almost runs completely empty. When Nordic states made a reservation under Article 92 CISG to Part II of the CISG, which regulates the formation of the contract, this was less likely to cause practical problems in application, as the formation of contract in Part II can more easily be disconnected from Part I and III.

It is likely that there are many more and even more adequate examples of how Parts I–III of the CISG were meant to function together, and such systematic interpretation becomes lost when only Parts I and II of the CISG are applicable. An inevitable question is whether it is currently more advisable for the parties to exclude the application of the CISG to their contract, considering that they would otherwise face the application of two different legal regimes to certain core contractual issues. The main benefit of preserving the application of Parts I and II CISG (by not excluding the CISG explicitly) is to ensure the international validity of the contract, at least with regard to contract formation issues governed by the CISG. Also, as will be analyzed below, the Saudi CTA and Parts I and II of the CISG are quite compatible and their joint application should not cause any major contradictions, which will be apparent based on our analysis. However, it is inevitable that many parties would feel safer either by excluding the CISG entirely, or by incorporating Part III of the CISG into their contract, with the exception of Articles 78 and 84, to ensure that the CISG would become applicable in its entirety. This way of “substantive” choice of law by incorporating the CISG into the contract (Meškić 2012, 12),¹⁴ is also safer than a conflict rules choice of law of a foreign state that is a party to the

of extensive use of good faith, which is in line with civil law traditions but not elsewhere, as Art. 19 CISG merely regulates a reply to an offer that contains different terms and may amount to a counter-offer.

¹⁴ Substantive, as opposed to the conflict-rules, choice of law (German *materiellrechtliche* vs. *kollisionsrechtliche* Rechtswahl) is a way of incorporating the law fully or in part into the contract and thereby avoiding any prohibition that may exist in the domestic legal system *lex fori* and apply to such a choice of law.

CISG (Art. 1 (1)(b)), because Saudi Arabia does not have conflict rules except in arbitration, as will be elaborated further below. Therefore, it is possible that a choice of law would not be honored before courts (except in arbitration), while the incorporation of Part III into the contract would be honored as a contractual provision, not as foreign law. The disadvantage of such a method, in comparison to a standard choice of law clause, is that the contract would still be subject to national law and its mandatory law limitations, while a choice of foreign law, when validly executed, has the effect of avoiding any mandatory limitation of the *lex fori*, except for its overriding mandatory provisions (Meškić 2012, 12). The other option is to simply exclude the CISG expressly, until Saudi Arabia finds a way to join Part III without Articles 78 and 84.

2.3. What Are the Options for Saudi Arabia to Join Part III of the CISG?

The CISG does not allow reservations for specific articles of the convention.¹⁵ Instead, Articles 92–98 regulate possible declarations that allow a nation to vary the effects of the convention. Article 92 is of particular importance for Saudi Arabia, as it allows nations to declare that they will not be bound by Part II of the Convention (relating to contract formation) or Part III (relating to the rights and obligations of the seller and buyer, and the remedies and defenses available to them). As mentioned previously, Saudi Arabia has declared that it will not be bound by Part III of the CISG.

The Royal Decree ratifying the CISG by the Kingdom of Saudi Arabia contained a resolution delegating the Saudi Minister of Commerce to negotiate with other contracting parties of the CISG not to oblige Saudi Arabia under Articles 78 and 84 (1) CISG. As explained above, both of these articles are related to interest. Saudi Arabia determined that it would not be able to abide by its international obligation to honor the CISG if it accepted what is contained in Articles 78 and 84 (1). Saudi judges have been traditionally opposed to interest, deeming such enforcement to be contrary to the public policy of Saudi Arabia (Al-Sulaim 2021, 847–852).

The question of CISG compatibility with Sharia has already been discussed in comparative literature. The discussion has traditionally focused on the violation of Sharia by Article 78, as interest constitutes prohibited

¹⁵ CISG, Art. 98 (“No reservations are permitted except those expressly authorized in this Convention.”)

usury or *riba* (Akaddaf 2001, 46), while more comprehensive works also include the prohibition of speculation or *gharar* (CISG Advisory Council 2013b, 3.43). As Article 78 already leaves the applicable interest rate open, Schroeter suggests that whenever a party with its place of business in a Sharia state is involved, the interest rate should be zero (Schroeter 2018, 38). Interestingly enough, the CISG Advisory Council, in its Opinion No. 14, expresses the same view. Firstly, it declares that the interest rate would be calculated based on the law of the creditor's place of business. But the CISG Advisory Council acknowledges that the interest might be prohibited under the law of the creditor and in such case the interest rate would be zero (CISG Advisory Council 2013b, 3.36); the creditor may only request damages that are available under Article 74 CISG. Clearly, the CISG Advisory Council tries to find solutions for situations involving Sharia law states and this effort deserves support, however, the current analysis stops a bit short of a comprehensive approach. Firstly, from the perspective of Saudi courts, it would be difficult to apply the law of the creditor, as Saudi Arabia does not (yet) accept conflict rules, and a Saudi judge is very unlikely to follow such hidden conflict rule within Article 78 CISG.¹⁶ Secondly, should Saudi Arabia join Part III of the CISG, it would need to be made clear to the deciding body that even if the law of the creditor does provide for an interest rate, such judgement or arbitral award would not be enforceable in Saudi Arabia, at least in the part where interest has been awarded.

This section would be unfit to address the full status of interest in the Kingdom.¹⁷ The sensitivity of the issue also needs to be fully respected. Instead, the discussion on interest should be limited to the form of full retribution, compensation or unjust enrichment, a sign of *restitutio in integrum* (Song 2007, 722; Spagnolo, Bhatti 2023, 161–164). In other words, interest within the understanding in Saudi Arabia must be viewed as a method to receive full compensation to the injured party in a contractual relationship, something that the CTA (Art. 163) and the CISG afford (Djordjevic 2018, 958).¹⁸

Besides interest, one should also ask to what extent do other clauses of the CISG are compatible with Sharia. For example, Articles 71–73, entailing the suspension of performance of the obligation based on the prognosis

¹⁶ Further analysis of the lack of Saudi conflict rules and how it affects the application of the CISG is provided below.

¹⁷ Legal instruments that would allow for certain fees related to interest in Saudi Arabia or Sharia-based systems in general have been a hot topic in literature for quite a while, with regards to Islamic banking and contractual clauses, such as penalty clauses, liquidated damages, loss of profit, etc.

¹⁸ It is viewed that full compensation is a general principle of the CISG.

that the other party will not perform under Article 71, the anticipatory breach under Article 72, and the avoidance of contract for future installment based on the prognosis related to the performance of previous installments under Article 73, may pose some issues with the Sharia prohibition related to *gharar*, the general prohibition of matters whose consequences are speculative or excessively uncertain, e.g., gambling (Hallaq 2009, 255).¹⁹ The standard of prognosis whether in the future one party will not perform, and therefore the other party may suspend its performance or even avoid the contract, may just be to uncertain and violate the prohibition of *gharar*. The view that anticipatory breach, as available in common law systems is not compatible with *gharar*, has been expressed before (Adunola 2019, 11–18). The current standard (Art. 71) that after the conclusion of the contract “it becomes apparent” that the other party will not perform, in literature and practice requires a “high” or “substantial degree” of likelihood (Saidov 2018, 895, para. 19), but not “very high” probability or “one bordering on certainty” (Brunner, Berchtold 2019, 487, para. 19). While the threshold for Article 72 is slightly stricter, it is still not “almost certainly” (Brunner, Altenkirch 2019, 497, para. 5), but it should be “obvious to everybody” (Saidov 2018, 922, para. 7). Such speculative actions taken by parties based on prognosis would be scrutinized against the prohibition of *gharar* before the Saudi courts and more often than not may fail the test. This concern would largely be removed if the Saudi legislator passes the new Commercial Transaction Act without changes to the draft. Namely Article 92 of the draft Saudi Commercial Transaction Act states that if one of the parties fails to fulfill its obligation regarding periodic supplies, the other party is not allowed to terminate the contract unless the failure to perform would cause significant harm to it or undermine the confidence in the ability of the defaulting party to continue supplying subsequent items regularly (Almazayad 2024, 4557). Such a provision would clearly open the door to anticipatory breach in Saudi law. However, the example of the legislative procedure for CTA shows that there may be many changes to the initial draft, so the current text of the draft Commercial Transaction Act should not be taken as final. Rather, we may shift our focus to the fact that some provisions of the CTA do regulate situations typical of anticipatory breach, where the probability of future nonperformance of the other party is closer to certainty and has therefore been recognized as valid. This is for example the case under Article 176 CTA, which states that compensation will be due without notice to the debtor, if the performance of the obligation becomes impossible or fruitless due to an act by the debtor (Art. 176 (b)

¹⁹ *Gharar* means uncertainty as to “ontological possibilities, such as the very existence or inexistence of the thing contracted” (Hallaq 2009, 244).

CTA), or if the debtor states in writing that they will not perform their obligation (Art. 176 (e) CTA). Both of these situations would be typical for the anticipatory breach, with the remark that they both represent an example when there is very high level of probability that the other party will not perform (Almazayad 2024, 4555).

Several options exist for Saudi Arabia going forward. A potential interpretative declaration,²⁰ which would explain the very restrictive interpretation of interest in Saudi Arabia is one option, in which case Saudi Arabia could declare that interest which remains within the principle of *restitutio in integrum* may be based on certain contractual clauses. One alternative or even an additional option would be to limit the jurisdiction of Saudi courts in matters related to interest to certain courts, other than Sharia courts; this is what the Kingdom has done to resolve the issue of interest occurring in certain specialized areas of law.²¹ This also shows why such a general provision on interest under Article 78 CISG is much less acceptable than more specific instruments with a narrow scope of application. A potential interpretative declaration could help narrow down the permissible interpretation of the provision in Saudi Arabia. Further legislative steps to implement fees, such as assigning jurisdiction to specialized committees to rule on requests related to a permissible form of interest, could provide more legal security.

3. SAUDI ARABIA'S NEW CTA

The Saudi CTA aims to comprehensively regulate all matters related to contractual and noncontractual civil transactions. It regulates, *inter alia*, sources of personal obligations,²² modalities of obligations,²³ nominate

²⁰ For more information about the legal nature and procedure for issuing interpretative declarations see the United Nations 2011.

²¹ Saudi Arabia has established judicial committees, which resolve specialized issues, e.g., capital market, international customs, and financial disputes. These committees have specific jurisdiction. See for example the option of a specialized committee to issue a penalty of 10% (Art. 86 of the 2019 Government Tenders and Procurement Law), when a bidder violates contractual terms, including delayed performance.

²² This includes general theory for contracts, delicts and unjust enrichment, see Civil Transactions Act, Chapter 2.

²³ Including conditions on obligations, transfer of obligations, and extinguishment of obligations. See Civil Transaction Act, Chapter 3.

and innominate contracts,²⁴ and property rights.²⁵ The CTA is one of four legal instruments announced in the Specialized Legal Instruments Project (Saudi Press Agency 2021). The Specialized Legal Instruments Project is an initiative to split from the previous legal system, providing legal instruments that regulate legal relationships through legal norms. The announcement showcases a previous project intended to have the same impact. The “Glossary of Judicial Rules” was envisaged to be obligatory through judicial precedents that regulate legal matters through “judicial principles”.²⁶ However, the project was deemed “not fit for society and its ambitions,” and was consequently scrapped (Saudi Press Agency 2021).

It would be a mistake to suggest that the Saudi Arabian civil legal system did not *legally* exist at all before the introduction of the CTA. The CTA was issued subsequent to many laws and regulations in the Kingdom. Unlike many countries, who adopt a civil code before enacting more specialized laws and regulations, the Saudi CTA came after the enactment of more specialized laws and regulations. Before the CTA, laws on ancillary rights *in rem*,²⁷ employment contracts,²⁸ insurance,²⁹ and ownership of real estate units³⁰ were regulated before, for some examples long before, the CTA ever took effect. Even some legal principles of civil law were part of judicial practice before the CTA ever took effect (Diwan Al-Mazalim 2021, 124). Such a fact suggests that the CTA is not new in the realm of legal civil rules in Saudi.

²⁴ See Art. 30 CTA.

²⁵ Civil Transaction Act, Part 3.

²⁶ The Glossary of Judicial Rules compiles several case laws and extracts some rules arising from these cases. It does exist today. See BOG n.d.

²⁷ The Civil Transactions Act does not regulate such matter, see Civil Transaction Act, Art. 719 (“Ancillary rights *in rem* shall be subject to the legal provisions related thereto.”); what is meant here is reference to two regulations, Registered Real Estate Mortgage Law (2012) Umm Al-Qura [Official Gazette] No. 4422 of 2012; and Law of Commercial Pledge (2018) Umm Al-Qura [Official Gazette] No. 4722 of 2018.

²⁸ Civil Transaction Act, Art. 479 (“An employment contract shall be subject to the legal provisions related thereto.”); Labor Law (2005) Umm Al-Qura [Official Gazette] No. 4068 of 2005.

²⁹ Civil Transaction Act, Art. 607 (“An insurance contract shall be subject to the legal provisions related thereto.”); insurance regulations are available on the Insurance Authority website: <https://www.ia.gov.sa/en/Regulations/systems.html> (last visited December 16, 2024).

³⁰ Civil Transaction Act, Art. 640 (“Ownership of real estate units shall be subject to the legal provisions related thereto.”); see Law of the Ownership, Subdivision, and Management of Real Estate Units (2020) Umm Al-Qura [Official Gazette] No. 4822 of 2020.

One may assume that this Saudi Arabia is subscribing to fully-fledged civil law system, but that conclusion may be haste. Foremost, the CTA cannot be interpreted and applied completely independently from Sharia. This becomes most obvious from the gap filling mechanism. Article 1 states that the CTA applies to all matters that are regulated by this law “in letter or in implication”. If a gap exists, the general Sharia principles provided for in the Concluding Provisions in Article 720 CTA shall apply. Article 720 lists forty-one (41) Sharia principles general rules that shall be used for gap filling. If these principles offer no solution, then the provisions derived from Sharia that are most consistent with this Law shall apply. Admittedly, the methodology of determining provisions “most consistent” with this law will be more clarified as more case law is published. This suggests that the Saudi legal system offers resort to these Sharia principles for the purpose of gap-filling. Another crucial (and less emphasized) legal revelation is the fact that the Judicial Principles issued by the Saudi Supreme Court are now grounds for annulling judgements. The Implementation Regulations for the Methods of Appeal against Judicial Decisions regulates that a violation of Judicial Principles issued by the Supreme Court constitutes a ground for appeal against any judgment.³¹ This provides an element of *stare decisis* in Saudi jurisprudence. In these respects, Saudi law is expected to develop differently from other purely civil law systems.

4. CONFLICT RULES IN SAUDI ARABIA AND WHAT IT MEANS FOR THE APPLICABILITY OF THE CISG AND THE SAUDI CTA

It is assumed that all countries accept the fundamental concept that national courts may apply foreign law when dealing with international transactions. However, this method of private international law is not universally adopted and as of present does not exist in Saudi Arabia. While some specific conflict rules in certain special areas of law do exist in the legal system of Saudi Arabia, there is no conflict rule that would allow a choice of law before the courts, which would impact how the CISG and the CTA are applied in practice. As a consequence of this notion, this section will briefly address potential advantages of arbitration over litigation in Saudi Arabia, at least in disputes involving international business transactions.

³¹ Implementation Regulations for Methods of Appeal Against Judgments, issued by Ministerial Decision No. 512, 5 Muharram 1445 AH (23 July 2023), Kingdom of Saudi Arabia.

4.1. The Lack of Regulation of Conflict Rules in Saudi Arabia

In Saudi Arabia there is still no private international law or a similar act that would regulate conflict rules (Makhlouf 2023). The other two traditional areas of private international law are regulated: international jurisdiction within Articles 24–30 of the Saudi Civil Procedure Law, and recognition and enforcement of foreign judgements in Article 11 of the Enforcement Law. If we look at the neighboring countries from the GCC with similar legal tradition, these states have adopted conflict rules either within a separate act on private international law, like in Kuwait (Aljarallah 2023)³² and Bahrain,³³ within the introductory part of their civil transactions acts, like in UAE³⁴ and Oman,³⁵ or the Civil Code like, in Qatar.³⁶

This does not mean that the Saudi law does not have any conflict rules; saying so would be too simplistic. It is true that the Saudi Basic Code (the most supreme law of the land) commands that all courts apply Sharia and laws issued by the legislature.³⁷ This article is copied verbatim in Article 1 of the Civil Procedure Law,³⁸ Law of the Judiciary,³⁹ and the Law of Procedure Before the Board of Grievances.⁴⁰ This clause may at first define Saudi Arabia as a country adopting an absolute unilateralist approach to conflict of laws (Hatzimihail 2021, 161).⁴¹ The unilateralist approach features the

³² Kuwaiti law regulating the legal relationships with foreign elements, Act No.5/1961, *Official Journal*, appendix No. 316 of the 27th of February 1961.

³³ Bahrain, Law No. (6) of 2015 On Conflict of Laws in Civil and Commercial Matters with a Foreign Element.

³⁴ Arts. 10–28 of the Civil Transactions Act of UAE, Federal Law No. (5) of 1985 concerning the issuance of the civil transactions law of the United Arab Emirates.

³⁵ Arts. 10–28 of the Civil Transactions Law of Oman, Royal Decree 27/2013.

³⁶ Arts. 10–38 of the Law No. (22) of 2004 Regarding Promulgating the Civil Code 22/2004 of Qatar.

³⁷ See Basic Law of Governance, Royal Order No. A/90, 27 Sha’ban 1412 AH (1 March 1992), Kingdom of Saudi Arabia, Art. 48 (“The courts shall apply to cases brought before them the provisions of Sharia, as indicated by the Quran and the Sunna as well as the laws not in conflict with the Quran and the Sunna enacted by the State.”).

³⁸ Law of Procedure Before Sharia Courts, Royal Decree No. M/1, 22 Muharram 1435 AH (25 November 2013), Kingdom of Saudi Arabia, Art.1.

³⁹ Law of the Judiciary, Royal Decree No. M/78, 19 Ramadan 1428 AH (1 October 2007), Kingdom of Saudi Arabia, Art. 11.

⁴⁰ Law of Procedure Before the Board of Grievances, Royal Decree No. M/3, 22 Muharram 1435 AH (25 November 2013), Kingdom of Saudi Arabia, Art. 1.

⁴¹ Absolute unilateralism is defined as the application of local laws regardless of foreign law applicable.

specification of the scope of applying your own law, without reference to further instances of foreign law applicable (Wolff 1950, 97–98). Clearly, many Saudi regulations contain unilateral conflict rules that specify the scope when the specific Saudi law may be applicable.⁴² While this is true, Saudi law has developed several multilateral conflict of law rules in the Commercial Papers Law⁴³ and Evidence Law,⁴⁴ in addition to Article 38 of the Arbitration Law. A choice of substantive law in contracts may also be possible under Article 46 CTA, where reference to standard terms may be interpreted to be tantamount to a substantive law applicable to a contract.⁴⁵ Saudi Arabia also has touted the idea of establishing an investment court,⁴⁶ which may arrive with dedicated multilateral conflict rules.⁴⁷

Most of the GCC states (Kuwait, Bahrain, UAE) followed the model of the conflict rules from the Egyptian Civil Code of 1949⁴⁸ which were themselves inspired by the Italian Civil Code of 1942 (Arts. 17–31)⁴⁹ and remained

⁴² See e.g. Personal Data Protection Law, Royal Decree No. M/19, 9 Safar 1443 AH (16 September 2021), Kingdom of Saudi Arabia, Art. 2 (“This Law shall apply to any form of processing of personal data relating to individuals that is carried out in the Kingdom as well as any form of processing of personal data relating to individuals residing in the Kingdom that is carried out by an entity outside the Kingdom.”); and Competition Law, Royal Decree No. M/75, 29 Jumada al-Thani 1440 AH (6 March 2019), Kingdom of Saudi Arabia, Art. 2 (1) (“1. Without prejudice to the provisions of other laws, the provisions of this Law shall apply to: a) all entities within the Kingdom; and b) practices taking place outside the Kingdom which have an adverse effect on fair competition within the Kingdom, in accordance with the provisions of this Law.”).

⁴³ Law of Commercial Papers, Royal Decree No. M/37, 11 Shawwal 1383 AH (25 February 1964), Kingdom of Saudi Arabia, Art. 7 (a conflict rule relating to the law applicable to the capacity of the drawer in a bill of exchange).

⁴⁴ Law of Evidence, Royal Decree No. M/43, 26 Jumada al-Awwal 1443 AH (30 December 2021), Kingdom of Saudi Arabia, Art. 6 (1) (relating to the agreement of the parties’ choice on rules of evidence).

⁴⁵ CTA, Art. 46 (“If the contracting parties make in the contract an explicit or implicit reference to the provisions of a model document, to specific rules, or to any other document, the same shall be deemed part of the contract.”) Such agreements are be subject to Saudi mandatory provisions of law. The substantive choice of law is derived from the substantive law of Saudi Arabia. This depends on the view of party autonomy in conflict of laws: a priori or derivative. For specifications on these two views on party autonomy, see (Basedow 2015, 125–127).

⁴⁶ See Ministry of Investment 2021; Argaam 2024.

⁴⁷ This is also corroborated by Saudi Arabia’s choice to not use the declaration available in Art. 95 of the CISG, which allows the contracting state not to be bound to apply the CISG through the conflict of law rules of another state, see CISG, Arts. 1 (1)(b) and 95.

⁴⁸ Promulgated by Law No. 131 of 1948, amended up to Law No. 55 of 1970.

⁴⁹ Approved by the Italian Royal Decree No. 262 of 16 March 1942.

almost unchanged from the Italian Civil Code of 1865 (Eihawary 2013, 5). While the Italian legislator in the meantime modernized the conflict rules in the Italian Private International Law Act of 1995,⁵⁰ the GCC states drafted their conflict rules based on a model that is more than a century old.

The solutions provide for party autonomy, as a main principle, and alternatively for common habitual residence/domicile of the parties (Eihawary 2013, 24)⁵¹, and if there is none, for the place of contract conclusion (Basedow 2015, 119–121).⁵² While the primacy of party autonomy to freely choose the applicable law deserves praise, the subsidiary connecting factors are outdated and the criticism of such solutions is well known. It may be worth mentioning that, for example, in the case of online contracts with uncertain place of contract conclusion, if the parties did not choose the applicable law and they also do not have their habitual residence/domicile in the same country, the court may have trouble determining the place of contract conclusion. This leads to the undesirable result that despite having three subsidiary solutions in the conflict rule, it may become impossible to determine the applicable law, probably leading to the application of *lex fori*.

For Saudi Arabia, there is one important conclusion arising from the analysis of the conflict rules regulations in the GCC: Saudi Arabia should look for an updated model for its private international law, rather than follow solutions that worked well over a century ago in a different economic environment. Most prominently, in the area of contractual sale of goods, the EU Rome I Regulation⁵³ may serve as a good starting point and/or the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods.⁵⁴ Obviously, a full codification of private international law would need to go beyond that and have a modern general part, and regulate international jurisdiction, conflicts of laws and recognition and enforcement of foreign judgements, as a well-coordinated system of rules based on modern models, such as EU private international law regulations (Meškić 2022, 803) and more recent national codifications.

⁵⁰ Law No. 218 of 31 May 1995.

⁵¹ For example, Art. 17 of the Private International Law of Bahrain provides for habitual residence, while Art. 19 of the UAE Civil Transactions Act provides for domicile.

⁵² For party autonomy in the Middle-East, see Basedow 2015.

⁵³ Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ L 177*, 4.7.2008, 6–16.

⁵⁴ Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods.

Another point is yet to be made: Saudi Arabia does not have a codification of conflict rules yet, differently from other GCC countries. The authors strongly advocate the adoption of the conflict rules. There are many reasons for regulating conflict rules. One of them is quite obvious, as Saudi Arabia is one of the very few states in the world that does not have a codified system of private international law (Krüger 2017, 1613). One of the goals of the Saudi Vision 2030 is to use its geographic location to become an epicenter of the trade.⁵⁵ It is important to guarantee that business parties can choose the applicable law as they wish. Trade partners would expect that they have this option in Saudi Arabia, as it is available elsewhere; foreign investors may not want to submit their contracts to the application of Saudi law as they may feel it would give an advantage to the Saudi contract party, or they may not be familiar with Saudi legislation and would prefer to opt for a legislation that is closer to them. Currently, it is possible to choose foreign applicable law only in arbitration, based on Article 38 of the Saudi Arbitration Law.⁵⁶ The option to choose the applicable law in arbitration was introduced with the reform of Saudi Arbitration Law in 2012 (Alshubaiki, Meškić 2022), and in literature it has been called “a small sensation” (Bälz, Almousa 2013, 251). The choice of law under Article 38 of the Saudi Arbitration Law is “subject to Sharia and the public policy of the Kingdom”. Although this restriction does not exist in Article 28 of the UNCITRAL Model Law on International Commercial Arbitration, it was used as the model for the Saudi Arbitration Law, and in practice it should not be of great relevance. Public policy is a known reservation to the application of foreign law. It is clear that any violation of general principles of Sharia would be equivalent to a violation of public policy in the Kingdom and as such would be reason for both the annulment of the arbitral award under 50 (2) of the Saudi Arbitration Law, and nonenforcement under Article V (2) (b) of the New York Convention. Therefore, the public policy and Sharia reservation for the choice of law under Article 38 of the Saudi Arbitration Law has more of an explanatory character, rather than adding any additional restriction to the usual public policy reservation in annulment or enforcement proceedings. A Royal Order was issued explaining the meaning of “Sharia” to mean a narrow understanding of very fundamental principles of Sharia.⁵⁷ This narrow understanding has been reflected in literature (by an Enforcement

⁵⁵ Vision 2030. n.d.

⁵⁶ Royal Decree No. M/34, dated 16 April 2012.

⁵⁷ Royal Order Issued No. 7260 (2012), unpublished (21/03/1443H) (corr. to 2012).

Court (see Al-Khader 2016, 114) and court practice.⁵⁸ If the parties have not chosen the applicable substantive law in arbitration under Article 38 of the Saudi Arbitration law, the principle of closest connection applies.

4.2. Impact of the Lack of Conflict Rules on the Applicability of the CISG and the Saudi CTA

The lack of conflict rules in Saudi Arabia is of importance both for the CISG and for the Saudi CTA. Under Article 1 CISG, Saudi courts would not only apply CISG when the place of business of the parties are in different Contracting States (Art. 1 (a) CISG), but also when the Saudi private international law rules refer to the law of a Contracting State (Art. 1 (b) CISG). If the contracting parties have their place of business in different Contracting States to the CISG, Saudi courts will apply Part I and II of the CISG, as Saudi Arabia has only ratified these two parts at the present. However, if under Article 1 (b) CISG, Saudi conflict rules would refer to a law of a Contracting State that ratified the entire CISG (which is every other Contracting State other than Saudi Arabia), in that case Saudi courts could suddenly apply the entire CISG using a back door. This would potentially open the door to the application of interest (Arts. 78 and 84 CISG). However, there are no conflict rules in Saudi Arabia and therefore Article 1 (b) CISG cannot apply except in arbitration. Furthermore, in arbitration under Article 38 of the Saudi Arbitration law, the CISG could become applicable only to the extent that it does not violate Sharia, which means that Part III could become applicable, but Articles 78 and 84 CISG would not apply to the extent that they violate Sharia. Saudi Arabia could have made a declaration under Article 95 CISG that Article 1 (b) CISG will not apply to Saudi Arabia, but it did not. This means that any adoption of conflict rules in the future could potentially open the door to the application of Part III of the CISG under Article 1 (b) CISG. However, no judge in Saudi Arabia would approve a claim for interest under Articles 78 and 84 CISG. Simply, any future legislation on conflict rules would certainly provide for a public policy reservation, as this is common in comparative law. Even without such reservation, no judge in Saudi Arabia would grant

⁵⁸ Judgement No. 4151/1/G, 1 *BOG Reporter* of 1436H 139, 142 (1435H (corr. to 2014), Riyadh Administrative Court of Appeal); Judgement No. 26/D/TG 3/2, 1 *BOG Reporter* of 1434H 273, 328 (1433H (corr. to 2012), Jeddah Administrative Court of Appeal); Judgment No. 5190/2/S, 1 *BOG Reporter* of 1436H 147, 167 (1436H (corr. to 2015), Riyadh Administrative Court of Appeal); Judgement No. 117/16/2, 1 *BOG Reporter* of 1433H 215, 305; Judgement No. 5854/2/S, 1 *BOG Reporter* of 1438H 146, 149 (1437H (corr. to 2015), Administrative Court of Appeal).

interest that violates Sharia, as Sharia is part of the constitution of Saudi Arabia. Currently, the lack of conflict rule regulation leaves Article 1 (b) CISG without any scope of application before Saudi courts.

Furthermore, the lack of conflict rules simply means that the Saudi CTA always applies before Saudi courts to sale of goods contracts, when Parts I or II of the CISG are not applicable. This further means that any gap within the CISG under Article 7 (2) CISG, in absence of any gap filling CISG principles, will be filled by the Saudi CTA.

As a concluding remark to the conflict rules, it would be in line with the Saudi Vision 2030 to adopt conflict rules, as this has already been done by all other GCC states. On the other hand, the content of such conflict rules should not be taken from the GCC states, but from a more recent model, such as the EU Rome I Regulation, other EU Regulations, or more recent national codifications.

4.3. Advantages of Arbitration Over Litigation in Cross-Border Disputes in Saudi Arabia

The current lack of conflict rules also provides great advantage to the choice of arbitration as a dispute resolution mechanism over litigation in Saudi Arabia, as parties may only choose the applicable law in arbitration. Furthermore, under Article 11 of the Saudi Enforcement law, Saudi courts will not enforce foreign judgements, if a Saudi court would have had jurisdiction in the case, had it been brought before Saudi courts. When analyzing the Saudi provision on international jurisdiction (Art. 24–30 of the Saudi Civil Procedure Law), Saudi courts have jurisdiction whenever a Saudi national is the defendant (even if they do not have domicile or residence in Saudi; Article 24 of the Saudi Civil Procedure Law). The Saudi Supreme Court has also expressly prohibited choice of court agreements in favor of foreign courts.⁵⁹ This means in any given situation, if a foreign party or a Saudi national initiate a procedure against a Saudi national in a foreign state – the judgement would not be recognized in Saudi Arabia. But even if a Saudi brings a claim against a foreign national in a foreign state, such a judgement would not be recognized in Saudi Arabia if the foreign national has residence in Saudi Arabia (Art. 25 of the Civil Procedure Law), or the obligation was initiated or is enforceable in Saudi Arabia, or concerns bankruptcy

⁵⁹ Judgment No. 422596, Supreme Court of Saudi Arabia, Fifth Circuit, 9 Ramadan 1442 AH (21 April 2021).

declared or property in Saudi Arabia (Art. 26 of the Civil Procedure Law). Simply, Saudi courts have a wide international jurisdiction under Saudi Civil Procedure Law and in all of these cases foreign rulings would not be recognized. Furthermore, reciprocity is required under Article 11 of the Enforcement Law, and according to the implementing regulation of the Enforcement Law, the burden of proving the satisfaction of the reciprocity treatment requirement lies with the party requesting enforcement.⁶⁰ This may significantly lower the chances of enforcement of a foreign judgement, even in the few situations in which Saudi courts do not have jurisdiction.

At the same time, the New York Convention applies for foreign arbitration awards. This means that Article 11 of the Enforcement Law does not apply to arbitral awards, as international treaties have priority, as stated in that very same Article. Statistics published by the Saudi Center for Commercial Arbitration in 2023 show that since the Saudi Arbitration Act was adopted in 2012, there have been approximately 35,000 applications for enforcement with an aggregate value of enforced arbitral awards of just over USD 6.16 billion (MacPherson, Balfaqeeh 2023, 244). Also, about 92% of the motions to annul the arbitral awards were denied by courts.⁶¹

Currently, without conflict rules available in litigation and with the restrictive legislation on recognition of foreign judgements, arbitration is clearly more advantageous for foreign investors. Should litigation be preferred by the foreign business partner in any case, it would be wise to simply bring the claim to Saudi Arabia, unless a foreign judgment could be enforced elsewhere.

5. COMPARISON BETWEEN THE SAUDI CTA AND THE CISG

The CTA performs the function of a “general private law of the land” on contractual and noncontractual obligations. It is an important and significant piece of legislation that contextualizes all contracts and the temperament with which they will be viewed and interpreted, but also noncontractual relations, certain property regulations, etc. On the other hand, the CISG has a different function. It is an instrument that attempts to unify international sales law. The CTA, therefore, differs in function from other specialized

⁶⁰ Art. 11 (6) of the Implementing regulations of the Enforcement Law.

⁶¹ Art. 11 (6) of the Implementing regulations of the Enforcement Law.

legislations, like the CISG. The paradigm with which we look at the CTA and the CISG are distinct. So what service does reviewing these two laws provide?

The CTA also governs specialized matters, such as nominal contracts, one of which is the sales contracts. Articles 307–360 CTA regulate sales contracts. Therefore, both legal instruments constitute significant regulations of sales contracts in the Saudi legal system. One obvious purpose of a comparative analysis is to help the parties choose between the CTA and the CISG. Initially, the CISG will apply with its superseding effect as an international convention (Brunner, Maier, Stacher 2019, 25),⁶² but only with regards to matters governed by Parts I and II of the CISG. This means that the comparison may show how well Part I and I of the CISG work together with the CTA. However, due to the dispositive character of the CISG, parties drafting the contract could, based on Article 6 CISG, make the choice to expressly or implicitly exclude the entire CISG or part of it accordingly. The comparison will serve a better educated choice between the CISG and the CTA. Finally, such a comparative analysis will serve an epistemological purpose. The CISG is well known and researched; the understanding of how the solutions under the CTA compare to the CISG helps foreign legal systems to understand Saudi law. These purposes justify the comparison.

5.1. Goods

The CISG does not define goods, but goods are understood very broadly; according to case law, CISG “goods” typically are items that are, at the moment of delivery, “moveable and tangible”.⁶³

Art 22 (1) CTA defines movable goods as anything that is not an immovable. Under Article 22 (2) CTA, movable property shall be deemed immovable by destination if the owner of such property places it in a real property owned thereby for the purpose of serving or utilizing the real property on a permanent basis, even if it is not permanently attached thereto.

⁶² Basic Law of Governance, Art. 81 (“The application of this Law shall not prejudice treaties and agreements with states and international organizations and agencies to which the Kingdom of Saudi Arabia is party.”)

⁶³ See Cour d’appel de Grenoble (France) 26 April 1995, *Marques Roque v. Manin Reviere* (Second hand portable warehouse shed), CISG-Online 154 (Pace). See Kantonsgericht des Kantons Zug (Switzerland) 21 October 1999 (*PVC and other synthetic materials*), CISG-Online 491 (Pace); for further references, see Mistelis 2018, para. 37.

The CISG and the CTA follow different understandings, since for the CISG it is decisive whether the goods are movable at the time of delivery, regardless of whether they will (permanently or not) become attachable to land. This is the dominant view in the literature and is also reflected in case law, for example in the case of a turnkey contract of sale of an entire production plant.⁶⁴ Under the CTA, however, if such a movable good becomes part of an immovable, even if it is not permanently attached to it, it is no longer considered a good.

The most important conclusion is that the national understanding of movable against immovable property, does not impact the applicability of the CISG. In accordance with Article 7(1) CISG, goods are to be interpreted autonomously, regarding the international character of the CISG and the need to promote uniformity in its application. When deciding whether the CISG applies to goods in Saudi Arabia, Article 22 CTA will not be taken into consideration, but rather the understanding of goods within the CISG itself.

5.2. Formation

When it comes to the form of the contract, the freedom of form envisaged by Article 11 CISG is fully embedded in Article 33 (2) CTA, which states that intent may be expressed verbally, in writing, by a discernible sign, or by exchange, and it may be expressed explicitly or implicitly, unless otherwise required by legal provisions, agreement, or the nature of the dealing. Furthermore, under Article 10 of the Saudi Electronic Transactions Act⁶⁵ offer and acceptance concluded by electronic means shall be deemed valid and enforceable.

On the other hand, there are slight differences in the regulation of the offer and the acceptance. Under Article 34 (1) CTA, the display of goods and services and the indication of their prices is deemed an offer, unless proven otherwise. An advertisement indicating prices is not deemed an offer, unless evidence exists that it is intended as an offer (Art. 34 (2) CTA). While the CTA and the CISG do both consider an advertisement to be an invitation to make an offer, under Article 14 (2) CISG it is clarified that CISG is stricter with its requirement that the offer needs to be addressed to one or more

⁶⁴ Swiss Federal Supreme Court, Switzerland, 16 July 2012 – 4A_753/2011, CISG-online, case 2371; Schwenger, Hachem 2016a, para. 22, 71; Brunner, Feit 2019, 39, para. 4.

⁶⁵ Royal Decree No. M/18, 26 March 2007.

persons, as otherwise it is not be considered an offer. While the display of goods and services with price indication is an offer under Article 34 (1) CTA, it is not an offer under Article 14 (2) CISG, unless it is addressed to one or more specific persons. Article 34 (1) CTA opens the door to have a binding offer even to the general public as a rule, as is also the case with Article 1114 of the French Civil Code (AlSamara 2024, 48). This is opposite to Article 14 (2) CISG, which considers offers to the public only to be an invitation to make an offer. However, in practice there is a significant overlap between the two provisions. Namely, under the CISG, an offer to the public displaying the intention to be bound, such as the display of the remaining stock or time-limit for answers, would also be a valid offer (Schroeter 2016, 287; Ferrari 2018, 229), similarly to Article 34 (1) CTA. When an offer sets a time limit for acceptance, it is a binding offer and may not be revoked before the time limit expires, both under Article 35 CTA and under Article 16 (2)(a) CISG.

Silence does not mean acceptance unless there is evidence to the contrary, under Article 18 CISG and also under Article 37 (1) CTA. Both codifications name previous practice between the parties as an example when silence may amount to an acceptance (Art. 18 (3) CISG and Art. 37 (2) CTA). Agreement on essential terms is sufficient to be a valid acceptance (Art. 42 CTA). Disagreement on nonessential terms may be postponed, or decided later by the court, unless parties make the contract conclusion conditional upon such an agreement (Art. 42 CTA). There is no indication in the law of what such *essentialia negotii* may be, contrary to Article 19 (3) CISG, which attempts to list “material” terms that are considered to alter the offer materially, and thereby constitute a counter-offer and not acceptance.

5.3. Contract Interpretation

Contract interpretation is regulated somewhat differently under the CTA compared to the CISG. Article 104 CTA firstly determines that clear contractual provisions are not subject to interpretation (Art. 104 (1) CTA), while contractual provisions that are subject to interpretation interpreted in accordance with the common will of the parties (Art. 104 (2) CTA). The exclusion of clear provisions from judicial interpretation is in line with the model in Article 1192 of the French Civil Code which aims to avoid the risk of judicial distortion of party autonomy (AlSamara 2024, 132).

When searching for the common will of the parties, a mix of subjective and objective methods of interpretation is used. Namely, under Article 104 (2) CTA, the mutual intent of the contracting parties must be met rather than relying solely on the literal meaning of the text; the interpretation takes into

consideration custom, the circumstances of the contract, the nature of the dealing, the nature of previous dealings between the contracting parties, the status of the contracting parties, and the expected level of trust between them. All of the contract terms must be consistent and must not contradict each other. Finally, under Article 104 (3) CTA, the *contra proferentem* rule applies in adhesion contracts, and in case of doubt provisions are interpreted in favor of the debtor, which corresponds to Article 1190 of the French Civil Code. The CTA here varies from how Saudi courts have interpreted conduct of the parties in the past. Following Sharia, the Saudi courts initially applied the subjective intention as the primary and only criterion for contract interpretation (Ministry of Justice 2018, 33). This became a judicial principle that subsequent courts must respect.⁶⁶ The CTA amended this test and promotes a general clause for interpretation. Furthermore, Article 104 CTA does not directly address noncontractual conduct or statements, such as offer, acceptance, notification, or withdrawal. Here, Article 720 CTA could potentially come into play. Under Article 720 CTA, Rule 2, in contracts effect is given to intention and meaning, not to form. This primary focus on intention is in line with the previously explained Sharia principle of contract interpretation. The relationship between Articles 104 and 720 CTA is not entirely clear. Under Article 720 CTA, the rules set forth in this Article are applied in a manner not inconsistent with legal provisions, subject to their respective nature, conditions, and exceptions. Article 720 CTA does not have the purpose to replace, but rather supplement Article 104 CTA. As both provisions clearly refer to the interpretation of contracts, it may be understood that Article 720 Rule 2 further emphasizes the importance of the parties' intent. Under Article 104 CTA, it is already required to reach outside of the contract to take into account all relevant circumstances, especially to consider the mutual trust between the parties, their status, and previous dealings. When interpreted together with Article 720 CTA, such circumstances may be used to establish the mutual intent of the parties.

The interpretation rules under the CISG are quite different from the ones provided by the Saudi CTA. Article 8 CISG does not exclude clear contractual provisions from interpretation and establishes a clear hierarchy in favor of the subjective method of interpretation (Art. 8 (1) CISG), whereas the objective understanding of a third reasonable person (Art. 8 (2) CISG) is applied only when the subjective interpretation is not applicable (Brunner, Feit 2019, 39). Finally, for both the subjective and objective interpretation,

⁶⁶ Saudi courts are subject to observing the judicial principles issued by the Saudi Supreme Court, see Implementation Regulations for the Ways to Annul Judgements, Art. 40 (2023), *Umm Al-Qura* [Official Gazette] Issue 4993 year 101.

the negotiations and subsequent conduct under Article 8 (3) CISG are taken into consideration, which clearly opens the door to reach far outside of the contract to establish the common intent of the parties (CISG Advisory Council 2004). Unlike Article 104 (3) CTA, the CISG does not provide *contra proferentem* rule of interpretation.

5.4. Content Control Over Standard Terms

A topic that has gained a lot of attention in the past several decades, especially with the adoption of EU Council Directive 93/13/EEC⁶⁷ with the large case law of the EU Court of Justice, is the court supervision of unfair terms contained in not-individually negotiated agreements. While Article 2.1.20 of the UNIDROIT Principles of International Commercial Contracts (UNIDROIT 2016) provides for content control over surprising terms in standard contracts, there is no corresponding provision in the CISG. Only Article 19 CISG addresses some of the issues related to valid inclusion of standard terms in contracts.⁶⁸ On the other hand, the Saudi CTA does regulate both the inclusion and the fairness control, at least for contracts of adhesion.⁶⁹ For the contracts of adhesion to be validly accepted an “acknowledgment of the offeror’s non-negotiable conditions” is sufficient. Under Article 96 CTA, if a contract of adhesion contains arbitrary conditions, the court may amend such conditions or exempt the adhering party therefrom, as required by equity. Parties cannot derogate from Article 96 CTA, as any such agreement to the contrary is deemed null and void. Both provisions on the contract of adhesion are taken literally from the Egyptian Civil Code (Arts. 100 and 149). What kind of “acknowledgment” is required under Article 40 CISG, and which provisions are considered to be “arbitrary” under Article 96 CTA will remain to be seen in the further development of theory and practice. Moreover, the CTA regulates terms in which one party has abused its rights

⁶⁷ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ L* 95, 21.4.1993.

⁶⁸ The courts and the CISG Advisory Council attempted to fill the gaps related to the inclusion of standard terms in contracts, but not with regards to their content as this is not governed by the CISG (CISG Advisory Council 2013a).

⁶⁹ While Bälz and Fawzy (2024, 5) do recognize the control over adhesion contracts regulated in the Saudi Civil Transaction Act, they conclude that the provision only applies to consumer contracts. However, it is not possible to understand from where they draw this conclusion. While it is true that adhesion contracts are often concluded by consumers, they are also very present in B2B contracts, and the CTA does not restrict the application of its Articles 40 and 96 just to consumer contracts, but rather it also applies to B2B contracts.

under the contract. Under Article 29 CTA, a party would be deemed to be abusing its rights if “the right is exercised only to harm others, the benefit of exercising the right is substantially disproportionate to the harm it causes to others, [or] if the right is exercised unlawfully or for other than the intended purpose.” Such articles may also form a basis for terminating a contract in which one party has abused its rights through any of the three circumstances above. The notion of abuse of rights is slightly broad and may be explored only before the courts.

5.5. Nonperformance and Remedies

The idea of a unified concept of contractual breaches has been heralded by the late Ernst Rebel (Kleinschmidt 2018, 1076). The CISG’s unified concept of nonconformity and remedies may be the most valuable part of the CISG and it has impacted later legal instruments (Basedow 2005). The CISG does not have specific rules on partial performance, nonperformance, and defective performance; they are all united in Article 35 as general nonperformance. However, they are currently not applicable in Saudi Arabia as Saudi Arabia has acceded to Part III. The Saudi CTA does not have a unified concept of nonconformity, as established in Article 35 CISG. Consequently, it does not provide for a unified set of remedies, but the remedies depend on the type of nonconformity. For example, if there is a third party right to the sold goods, the buyer may request for the return of the paid price, i.e., the value of the fruits that the buyer is required to reimburse the party claiming ownership, i.e., expenses incurred for the buyer, which will not be compensated by the party claiming ownership, i.e., luxurious expenses if the seller acted in bad faith, and compensation for any harm for establishing ownership (Art. 335 CTA).

The most general provision on nonconformity in sale may be found in Article 338 CTA, obliging the seller to warrant that the sold item is “free from any redhibitory defect that would diminish its value or render it unfit for its intended use contrary to what is specified in the contract or what can be perceived according to its nature or its particular use.” Article 339 CTA releases the seller from any warranty for defects, if the defect was known to the buyer, the defect is accepted by usage, or if the defect happened after delivery. The provision does encompass the contractual agreement on the characteristics of the goods, the ordinary use and the particular use, similarly to Article 35 CISG, but without a clear hierarchy and additional requirements as set in Article 35 CISG. Like the CISG, the CTA does not provide, at least not

initially, a “materiality” condition for nonconformity of breaches. Of course, the CISG does require a fundamental breach for the use of certain remedies, as will be elaborated below.

In case of a defect, the buyer has the right to choose between termination or retaining the sold item and ask for the price difference, which is the difference between the sale price of the item with and without the defect (Art. 338 (2) CTA). The seller may avoid the price reduction by providing substitution (Art. 338 (2) CTA). Additionally, the buyer has the right to compensation for any harm they incur (Art. 338 (3) CTA).

Firstly, it is noteworthy that Article 338 CTA gives the buyer the right to choose between the remedies (Bälz, Fawzy 2024, 10). As such, Saudi law on sales does not have a hierarchy of remedies.⁷⁰ This is in stark contrast to the CISG, which prioritizes repair, price reduction and damages as the milder remedies, while primarily requiring a fundamental breach of contract for the remedies of avoidance (Art. 49 (1) CISG) and substitution (Art. 46 (2) CISG). However, the choice of remedies under Article 338 CTA also does not come without further requirements. The CTA chapter on sales contracts needs to be read together with the general part of the CTA. Article 107 CTA provides that the right to terminate the contract may be denied by a judge, if the unperformed part is insignificant compared to the obligation. For example, in cases of delay of performance or partial nonperformance it would be within the discretion of the judge whether termination or a specific performance with compensation would be granted (AlSamara 2024, 137). This may differ only if the parties agree on a termination clause in their contract (Art. 108 CTA).

Secondly, there does not seem to be a right to demand repair. This would be highly unusual, as in many instances this would be the mildest remedy for the seller, and sometimes even preferred by the buyer. However, the right to repair may be found in a rather unusual place – within the request for compensation. The Saudi legislator established the principle for noncontractual damages under Article 136 CTA, stating that the compensation shall restore the aggrieved party to their original position or the position they would have been in had the harm not occurred. When looking at Article 139 CTA, based on the circumstances and the petition of the aggrieved party, the court may order that compensation be paid in the form of a similar property or that the situation be restored to its original condition. This clearly includes repair of things that are damaged

⁷⁰ This, for example, is in line with the Principles of European Contract Law and opposite to German law (Schmidt-Kessel 2011, 193).

by a (noncontractual) harmful act (AlSamara 2024, 204). Finally, the Saudi legislator decided that repair instead or as a part of compensation can also be rewarded for contractual damages, as Article 180 CTA states that Articles 136–139 CTA also apply to contractual compensation, unless otherwise agreed. Another significant requirement for contractual compensation may be found in Article 180 CTA, which states that if the obligation arises from the contract, the debtor who has not committed any act of fraud or gross negligence will be liable only for compensating the harm that could have been anticipated at the time of contracting. The provision was obviously based on Articles 1231–1233 of the French Civil Code. The limitation of damages to what could have been anticipated at the time of contracting follows the same goal as the foreseeability requirement (Art. 74 CISG).

Thirdly, the connection between contractual and noncontractual damages established by Article 180 CTA is highly welcome. The CTA clearly distinguishes between contractual and noncontractual damages. Contractual damages are somewhat left unregulated and are only mentioned as a remedy for breach of contract (Art. 107 CTA) or a consequence of a termination of the contract (Art. 111 CTA). On the other hand, noncontractual damages are highly developed in Articles 118–143 CTA. Although the general provision on liability for damages (Art. 120 CTA), with its wording “[a]ny fault causing harm to a third party shall entail liability for compensation,” sets valid requirements that could be used to establish contractual liability, as the provision only applies to noncontractual liability and there is no corresponding provision on contractual liability that would clarify causation, fault or similar requirements for contractual damages. Considering that under Article 180 CTA, Article 137 CTA also applies to contractual damages, the aggrieved party has a duty to mitigate damages, although not stated as expressly as in Article 77 CISG and probably also not to the same extent. Namely, under Article 137 CTA, a loss shall be deemed a natural result of the harmful act if the aggrieved party is unable to avoid such harm by exercising the level of care a reasonable person would exercise under similar circumstances. Another welcome consequence of Article 137 CTA is that the aggrieved party is explicitly entitled to the loss of profit. In the past, Saudi courts were reluctant to award loss of profits due to the prohibition of speculative transactions under Sharia law, in particular due to the prohibition of *gharar* (Bälz, Fawzy 2024, 7), and therefore a compensation of future or uncertain damages caused problems. It is still expected that claims for loss of profit will be subject to the strict burden of proof borne by the requesting party.

5.6. Notice and Time Period

Similarly to the CISG, the CTA does not state a concrete number of days, neither for the inspection of goods, nor for the notice of defects. The period for inspection is “as soon as possible in a manner that is typical in such dealing” (Art. 340 CTA), which is comparable to “within as short a period as is practicable in the circumstances” (Art. 38 CISG). Obviously, under the CISG there is a rich jurisprudence on what “as short as practicable” means, while under the CTA, as a rather recent act, such jurisprudence is yet to be established. After the inspection, the buyer notifies the seller of such defect “within reasonable time”, which is identical to Article 39 CISG. The difference between the two acts lies in the hidden defects that cannot be discovered by reasonable inspection. Namely, in case of such hidden defects, the buyer needs to notify the seller as soon as they discover the defect under Article 340 (2) CTA, whereas under Article 39 CISG, the buyer still has a reasonable time. It remains to be seen if under Article 340 CTA the reasonable time for notice in case of defects that are discoverable by an ordinary inspection, and the time period “as soon as” the defect is discovered for hidden defects, will be interpreted in practice to mean different amounts of time. Finally, there is an objective time period set in both the CISG and the CTA for claims based on defects that were not discoverable by a reasonable inspection. Under Article 344 CTA, a claim for warranty against defects may not be heard upon the lapse of 180 days from the day of delivery of the sold item, unless the seller’s warranty extends beyond such a period. The six-months period is significantly shorter than the two years granted by Article 39 CISG.

5.7. Findings on the Comparison Between the CISG and the Saudi CTA

The primary purpose of the comparison conducted here is to shed light on the new civil law provisions in Saudi Arabia by comparing them to the widely known provisions of the CISG. The Saudi CTA bears no big surprises, which is an accomplishment in itself, as one of the primary goals for the new CTA was to provide legal security. Considering the rather drastic shift from Sharia law to almost comprehensive regulation of civil transactions, it seems to be a good strategy to rely heavily on the legal texts of the Egyptian and French Civil Code, which have significant practice. Whether the CISG or the CTA is more buyer- or seller-friendly is difficult to estimate based on this limited analysis, since, for example, the CTA does provide a choice of remedies (although under additional conditions), whereas the CISG provides a longer time period for notification of defects. At the same time, the

comparison did not reveal any obvious contradictions between the solutions in the CTA and the CISG that would make it impossible to apply Parts I and II of the CISG together with the rest of the provisions of the CTA to the same contract. At the current situation, it would be highly advisable to regulate matters in greater detail in the contract to avoid any possible obstacles for the true intent of the parties to be practiced in cross-border sales contracts.

6. CONCLUSION

Saudi Arabia joining the CISG is an important milestone for both Saudi Arabia and the success of the CISG. Saudi Arabia is the only G20 member with a Sharia-based legal system and may serve as an inspiration to other Sharia-based states. The discussion on the Sharia-compatibility of the CISG, which has been reopened by Saudi Arabia, may have a great impact on other Sharia-based states should they consider joining the CISG in the future. In literature and even in the CISG Advisory Council Opinion No. 14 there seems to be a culturally sensible understanding that the interest rate under Articles 78 and 84 CISG should be zero, when involving a creditor with a place of business in a Sharia-based state. However, such a result is anything but obvious from the formulation of Articles 78 and 84 CISG, and it is not realistic to expect that the courts would reach such a conclusion. Furthermore, this does not resolve the issue that simply any decision involving a party with a place of business in Saudi Arabia, whether on the creditor or the debtor side, would not be recognized by Saudi courts if it includes interest. The discussion on the interpretation of interest in Sharia-based states is highly sensitive; it is subject to very detailed and numerous interpretations by Sharia scholars and as such must be approached with great caution. One of the possible ways forward could be an interpretative declaration by Saudi Arabia on a very narrow interpretation of Articles 78 and 84 CISG that may be applied in Saudi Arabia, linked to a legislative act that gives jurisdiction to a specialized committee to decide disputes that may arise from these provisions. In such cases it would require further examination if the provisions of Articles 71–73 CISG would also demand an interpretative declaration, due to their potential violation of *gharar*. At the same time, the Saudi CTA is a highly welcome gap-filling mechanism not only under Article 7 (2) CISG, but also as a replacement for Part III of the CISG. The solutions provided in the CTA seem quite compatible with Parts I and II of the CISG and may also be linked to the established theory and jurisprudence under the French and Egyptian Civil Code, which served as models for the CTA. For parties who wish to apply the CISG in its entirety to enjoy the benefits of a well-established and neutral international legislative framework, the only way is to include the

provisions of Part III of the CISG into their contract, without Articles 78 and 84. Obviously, copy-pasting of provisions would not amount to a choice of law, as it is anyway currently unavailable, but rather the Saudi CTA would remain applicable to the contract. Such an option should work fine, as most provisions on sales contracts in the CTA are dispositive in nature. On the contrary, if the parties wish to exclude the CISG, the CTA provides a moderate legislative framework, while Sharia remains applicable for gap-filing. In litigation judges might interpret the CTA in light of Sharia, as this was the applicable law for decades. Until Saudi Arabia adopts a system of conflict rules applicable before the courts, not only can Article 1 (b) CISG not be applied, but arbitration will also have a clear advantage over litigation for resolution of international commercial disputes. Overall, the topic of Saudi Arabia joining the CISG requires more research and publication, primarily on the compatibility of other provisions of the CISG with Sharia – not only Articles 78 and 84 CISG – as well as the similarities and differences between the CISG and the CTA, as both could not be comprehensively addressed in this paper.

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