

Legal Harmonization or Conflict Thesis: Evaluating Legal Implications of Saudi Arabia's Accession to the CISG

Dissertation Introduction

The recent accession of the Kingdom of Saudi Arabia to the United Nations Convention on Contracts for the International Sale of Goods (CISG) is regarded as one of the key reforms within the broader agenda of the country's Vision 2030. Conflict of laws rules would allow the Saudi courts to apply the CISG in international sales contracts to the maximum extent possible (including Part III), but with the ability to deviate from its application when it conflicts with Sharia law and public policy. Consequently, the CTA "always applies before Saudi courts to sale of goods contracts, when Parts I or II of the CISG are not applicable". By virtue of this, the CTA fills all gaps left by the CISG in Saudi law. The lack of conflict rules explains why, under Art. 1(b) CISG, the CTA will apply to international sales contracts to the extent that they conflict with the provisions of Part I, II or III CISG. According to Meskic and Al-Eissa, any gaps left by the CISG would be filled by the Saudi CTA, for instance under Art. 7(2) CISG when a party raises an issue that is not regulated by the CISG. The fact that Saudi law is devoid of any conflict rules is even more surprising given that other Gulf States do have conflict rules.

The Status Between Litigation and Arbitration Becomes Disconnected Due to Differences in the Applicable Law

It is noteworthy that the situation is less complicated under arbitration than under litigation. According to Art. 38 of the Saudi Arbitration Law, the Saudi Center for Commercial Arbitration can apply the CISG to the extent that it does not violate Islamic Sharia law. Given that Saudi law also adheres to Sharia law, the SCCA can apply the CISG when it does not contradict Sharia law. At the same time, the kingdom adheres to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and therefore foreign arbitral awards are recognized and enforced in Saudi courts, provided, of course, that they do not conflict with Sharia law or public policy. Consequently, when it comes to arbitration, disputes can be resolved in accordance with CISG Part III without the need for additional reservations or declarations, provided, of course, that its application does not conflict with Sharia law. Thus, under Art. 38 of the Saudi Arbitration Law, international commercial disputes can be resolved according to the CISG. According to Meskic and Al-Eissa, this places arbitration in a clearly advantageous position over litigation for international commercial disputes. Consequently, it can be assumed that many commercial disputes will be resolved through arbitration rather than through protracted and complicated litigation proceedings in Saudi courts.

Challenges Regarding Sharia and Interest are Likely to Become Particularly Acute Under Art. 78 and 84(1) CISG

It may be premature to expect an immediate change in the status quo regarding the application of interest in Saudi Arabia. Sharia law strictly prohibits Riba, and Saudi judges are known to have declined to enforce awards that stipulate interest payable to a creditor. This sensitive issue was the reason why Saudi authorities decided to make a reservation under Art. 92 CISG. Meskic and Al-Eissa explain that when the CISG was being negotiated, the problem of harmonizing Sharia law with the CISG provisions on interest became acute. For instance, CISG Art. 78 concerns interest on overdue payments, whereas CISG Art. 84(1) stipulates that in case of price reduction upon resale, the reduced amount shall be refunded to the buyer with interest. According to the authors, this issue could potentially be resolved by making an interpretation of CISG Art. 78, according to which in case of a conflict with Islamic Sharia law, the interest rate would be zero per cent. The same approach could be applied to CISG Art. 84(1). Such a

solution would be acceptable when one of the parties to a sales contract has its place of business in a country that employs Sharia law. In this case, interest rate under CISG Art. 78 would be interpreted as zero, thus complying with Sharia principles. However, Meskic and Al-Eissa note that such an approach would not be compatible with Saudi law. According to the authors, 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". Specifically, Meskic and Al-Eissa note that "a comparison of the CTA with the CISG 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 CTA to the same contract". Indeed, the CTA contains provisions comparable to those found in Part I of the CISG, which deals with the general provisions of the CISG and the formation of contracts. Specifically, the CTA also recognizes the principle of good faith in contracts, which is consistent with Art. 7(1) CISG. At the same time, Meskic and Al-Eissa note that another advantage of the CTA concerns its compatibility with the substantive norms of the CISG. In this regard, the CTA contains a number of provisions that go beyond the mere CISG harmonization, for instance its rules on force majeure and hardship (Art. 97 CTA), which are comparable to CISG Art. 79 and 81. Notably, the CTA also contains mandatory rules that cannot be deviated from by the parties, including Art. 97(2)(3) CTA which prohibit the parties from waiving the right to renegotiate upon occurrence of a hardship event. Similar mandatory rules can be found in the CISG, for instance Art. 46 CISG concerning the abuse of rights. Part III of the CISG Contains Essential Rights and Obligations of the Parties as well as Remedies; This Has Resulted in the Problem of Disconnection between CISG Parts I, II and III As indicated above, Part III of the CISG, which deals with the rights and obligations of the parties as well as applicable remedies, was explicitly rejected by Saudi Arabia. Therefore, in accordance with the provisions of CISG Part I, Saudi courts will apply Parts I, II and III of the CISG to international sales contracts governed by the CISG. Thus, Saudi courts will apply the provisions of CISG Part I which deals with the general provisions and the formation of contracts, CISG Part II which interprets and supplements contracts, including the application of trade customs (Art. 9 CISG), but at the same time the interpretation of contracts and trade usages will be governed by Saudi law, specifically the CTA. According to Meskic and Al-Eissa, "This is certainly not how the CISG was designed".⁷⁸ CISG could have been easily avoided". Multiple Courses of Action Open to Saudi Arabia to Address the Current Legal Discrepancy Situation Exist There are several ways for Saudi Arabia to address the current situation and eliminate potential sources of conflict of laws. First, Saudi Arabia may repeal the reservation under Art. 92 CISG and adopt Part III of the CISG, possibly with an interpretative declaration concerning the application of CISG Art. 78 and 84(1) within Saudi law. Alternatively, Saudi Arabia may continue relying on the CTA as the law governing international sales contracts, but apply the CISG Part I and II to interpret the terms of contracts and apply the relevant trade customs. In this regard, Meskic and Al-Eissa note that the current Saudi approach "is certainly not optimal", but "at the same time it was achieved without any amendments and modifications to the CTA, which will certainly continue to function as the general law of obligations and contracts. According to Meskic and Al-Eissa, "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 possibility is supported by the fact that parties to an international sales contract can incorporate the substantive law of the CISG into their contract, thereby avoiding the possibility of a conflict of laws. However, this approach is limited by the fact that a contract governed by Saudi law will still be subject to mandatory rules and considerations of public policy (for instance, the prohibition of applying interest). According to Meskic and Al-Eissa, the incorporation method would allow for resolving potential difficulties with the application of the CISG, but not completely since the problem of the absence of conflict rules would remain. Consequently, the authors explain that the incorporation method is used "as a practical alternative to a direct choice of law by contract".⁸⁰ CISG).