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Considering Ratification of CISG by Bangladesh: Should there be a Reservation to Article 1(1) (b)?

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Abstract:

International Commercial transactions observed astounding growth during the twentieth century. This was because of the development of market economy, expanded markets for finished goods and emerging new markets for raw materials from the developing countries. Available means of communication made reliable transactions for traders throughout the world. Advanced technology provided easier and faster transports worldwide. Alongside the growth of international commerce, problems began coming into view among the nations. Scholars and academics started thinking how to regulate international trade when individual states would enter into contracts that could be governed by different standards and usages. Realizing such needs, around 1930 the International Institute for the Unification of Private Law (UNIDROIT) under the support of the League of Nations started creating an international agreement that could harmonize the international sales law. Harmonization or unification was halted by the Second World War and the efforts did not begin until 1960s. A number of states held a Conference in the Hague, Netherlands in April 1964, which adopted two Conventions which were (a) the Convention relating to a Uniform Law on the Formation for International Contracts for the Sale of Goods (ULFC), consisting of thirteen articles and (b) Convention relating to Uniform Law on the International Sale of Goods (ULIS), consisting of fifteen articles. Only nine states ratified the two Conventions. Most of the states including the United States refused to ratify the Conventions. At this backdrop, the General Assembly of the United Nations established United Nations Commission of International Trade Law (UNCITRAL) in 1966. UNCITRAL was given a mandate to promote the improving harmonization and unification of the international trade law. Accordingly, it prepared a draft of the *United Nations Convention on Contracts for the International Sale of Goods (CISG)* which was adopted at a Conference in Vienna on April 10,

1980 and Eleven States ratified the CISG on 11 April, 1980. The CISG entered into force on January 1, 1988. As of today (October 2015), 83 states have ratified the CISG including major trading nations like US, Canada, Mexico, France, Italy, Germany, China, Australia, Singapore. Still Bangladesh has not ratified it, even though she has trading relations with all these states. If Bangladesh ratifies the CISG, the governing law for the sale of goods contracts with parties from those states would be the same, namely CISG. This will make the trading easy as there will be no bickering between the contracting parties with respect to the governing law. Both sides will be on the same footing. For this reason, the authors of this paper hold a view for the ratification of CISG by Bangladesh. Having taken that stand, the authors are concerned about one policy issue. That is, should Bangladesh accept CISG as the applicable law for a sale of goods contract made between her traders and any other traders from any other states or only those states that have ratified the convention. This is the subject matter of Article 1(1)(b) read with Article 95. This paper investigates this matter with a critical assessment of the legal implication of making vis-à-vis not making a reservation to Article 1(1)(b) and comes to conclusion that Bangladesh should make reservation to keep up the priority of domestic law in the transaction that involves a party from a state which is not the matter of the CISG.

Keywords: International sales; Ratification; convention; Act.

1. Introduction[1]:

In this article it will be considered that what will be consequences if Bangladesh ratifies CISG, if ratifies then whether Bangladesh should make reservation of Article 1(1)(b)[2] of the CISG. The draftsmen of CISG were agreed to reach an autonomous result regarding the application of CISG. But controversial issue arises in the Diploma conference in Vienna. The problem was related to the application of 1(1)(b) of CISG where the contracting parties can make reservation clause through the Article 95 of the CISG.

1.1 The First committee consideration:

The first committee was given duty to scrutinize the Article 1 by Diplomatic

[1] See Christophe Bernasconi "the Personal and territorial Scope of the Vienna Convention on Contracts for the International Sale of Goods (Article 1).
Website: http://www.cisg.law.pace.edu/cisg/biblio/bernasconi.html (accessed November 9, 2014)

[2] States that "This Convention applies to contracts of sale of goods between parties whose places of business are in different state: when the rules of private international law lead to the application of the law of a contracting state."

Conference. This first committee actually made substantial part of CISG that is Articles 1-88 of the convention. It started to think about the subject matter of Article 1 in the first meeting on 10th March 1980.The delegation of the Federal Republic of German was against inclusion of the Article 1(1)(b) in the convention because the main aim of the convention was to make unification of trade law between contracting parties of the convention. But if the Article 1(1)(b) is included in the Convention, then the private international law may make point out application of the domestic law of the other state, even that country is non-contracting state rather than the application of the convention. It will both create problem regarding interpretation and application of the foreign law and give an unknown result and mostly will defeat the main aim of the convention, i.e. unification of trade law within the world trade communities. Delegation of the former Czechoslovakia also was against the inclusion of the Article 1(1)(b) because it will create problem where the states have got separate legal systems to govern the trade contracts and will conflict with CISG.

However Bulgaria, Norway, France, Egypt, Hungary, Argentina and Australia stated that Article 1(1)(b) should be included and not should be deleted. They argued the following points:

- When there are disputes to interpret and application of law, then first priority should be given to convention rather than any separate legal system of any country.
- If this Article is not retained, then the Convention may not be applied to non-contracting states, the judges may apply the domestic law rather than Convention.
- Finally, it will increase the sphere of application of CISG through world trade communities and fulfil the main aim of CISG, i.e. the application will be as international character.

First Committee ensured that the Article 1(1)(b) will be retained because majority votes were in favour of retaining this Article. The draft of the Convention including this Article was placed at Plenary Conference on 4th April 1980 to facilitate the use of Private International Law in application and interpretation of the CISG.

The Czechoslovakian argued again against the retaining of Article 1(1)(b) at the Plenary Conference but The Plenary conference opposed their argument. On 7 April, 1980, Mister Kopac from the Czechoslovakian delegation proposed that contracting states should be allowed to consider so that they may not be bound by the Article 1(1) (b).This proposal was

successful and was adopted on 10th April 1980.Because of this, the Article 95[3] of CISG was introduced to facilitate the contracting states to declare reservation under this Article.

1.1.2 Basic purpose of Article 95:

We can take an example: A (seller) from Bangladesh sells goods to B (buyer) whose place of business is in Malaysia. We assume that Bangladesh has made reservation and dispute arises and then B sues A in the Bangladesh Court. As Malaysia has not ratified the CISG, so CISG will not be applied automatically according to Article 1(1)(a)[4] of CISG. Bangladesh has made reservation under Article 95 of CISG, so Article 1(1)(b) will not be applied. In this situation, Bangladesh will apply its domestic law of Sale of Goods Act 1930. The main purpose of the Article 95 reservation is to apply the domestic law of the forum where parties do not have place of business in different contracting states. The countries that have made the reservation are China, the Czech Republic, Slovakia, the United States and Singapore.

2. How to apply private international Law in contractual obligations[5]:

Private International Law is that part of the law of a country which deals with cases containing a foreign element[6].

This is the simplest definition of Private International Law. From this definition we can deduce two things[7]:

- Private International Law is the law of a country. In this sense it is not international law at all.[8]
- All cases of Private International Law involve a foreign element.

[3] States that "Any state may declare at the time of the deposit of its instrument of ratification, acceptance or accession that it will not be bound by the subparagraph (1)(b) of Article 1 of this Convention."
[4] States that "This Convention applies to contracts of sale of goods between parties whose places of business are in different state: when the states are contracting states."
[5] C.M.V. Clarkson and Jonathan Hill , The Conflict of Laws , 3rd Edn, Oxford University Press, UK,2006.Pg 170-206.
[6] Paras Diwan and Peeyushi Diwan , Private International Law, 4th Edn, Deep & Deep Publications, India, 1998, pg 35-52.
[7] Paras Diwan and Peeyushi Diwan , Private International Law, 4th Edn, Deep & Deep Publications, India, 1998, pg 35-52.
[8] Dr. Camilla Baasch Andersen, Francesco G. Mazzotta and Dr. Bruno Zeller, A Practitioner's Guide to the CISG, 1st Edn, Jurisnet LLC, USA, Pg15-16.

According to Dicey and morris:

> "*Private international law is that branch of law which consists of rules which do not directly determine the rights and liabilities of particular persons but which determines the limit of the jurisdiction to be exercised by the domestic courts and also the choice of the body of law, whether domestic law or the law of any foreign country by reference to which domestic courts are to determine different matters brought before them for decision."*[9]

For applying private international law, first we need to consider whether there is any foreign element, i.e. one or both parties may be foreign or the performance of the contract may be performed in foreign countries.

Thus, in respect of cases having foreign element, a domestic court may be called upon to determine the following three questions[10]:

- In what circumstance, the court will assume jurisdiction over cases having foreign elements;
- If the first question of the court's answer is in affirmative, then whether it will determine the case entirely under the domestic law, or will it apply the appropriate foreign law; and
- In what circumstances it will recognize a foreign judgment or when it will order the execution of a foreign decree.

For example: If a Bangladeshi seller delivers goods to Nigerian buyer in Ghana as per contract, but disputes arise and the problem seems that the law of Bangladesh ,Nigeria and Ghana are different and questions arise, i.e. which law will be applied by the court. In this situation, the court will apply Bangladesh law according to Lex fori(choice of forum). Lex fori is one of the theories of characterization in Private International Law. Bartin stated two ways to deal with the characterization of Lex fori, they are:

- A court first has to decide which internal law of the country or place will be applied.
- Once the above requirement is fulfilled, then the court should apply the law of the other country or place as it is applied in that country or place. Furthermore, any

[9] Dicey and Morris, Conflict of Laws (8th ed.), p. *5;* See also, Graveson, Conflict of Laws (6th ed.), p. 41; Szaszy, Private International Law, (1964), p. 23

[10] Paras Diwan and Peeyushi Diwan , Private International Law, 4th Edn, Deep & Deep Publications, India, 1998, pg 35-52,40.

additional characterization which may be recommended by that country or place[11]. International contract law may be either governing law, i.e. common law is called "proper law" or statute law is called "applicable law". Parties are free to choose the applicable law, but in the absence of it, governing law will be the law of the country which has closed connection with the contract.

2.1 The proper law doctrine[12]:

There are three principles for governing the Proper law doctrine:

- Where the parties make express choice of law unless it is not bona fide, not illegal and not against public policy.
- There may be implied choice of law which can be determined by referring to the particular system of law which makes the contract.
- If both express and implied choices of law are absent, then the contract will be governed by "objective" proper law, i.e. it will be determined by closest and real connection in relation to transaction.

2.2 Harmonisation[13]:

The main aim of the choice of the law is to adopt uniformity of the law. When contractual dispute arises and more than one court of the different countries have jurisdiction to deal with the case, then the claimant will choose the most advantageous court to sue the defendant. However, Defendant can resolve this problem in many ways, they are:

- Because of the operation of a sophisticated framework of the jurisdiction rules, the claimant may be deprived of choice at the jurisdiction stage.
- Consideration can be taken to harmonise the law at the substantive level.

[11] Paras Diwan and Peeyushi Diwan , Private International Law, 4th Edn, Deep & Deep Publications, India, 1998, pg 76-77.
[12] C.M.V. Clarkson and Jonathan Hill , The Conflict of Laws , 3rd Edn, Oxford University Press, UK,2006.Pg 170-171.
[13] C.M.V. Clarkson and Jonathan Hill , The Conflict of Laws , 3rd Edn, Oxford University Press, UK,2006.Pg 171-172.

- Consideration can be taken to harmonise the choice of law rules.

2.3 Impact of Rome I Regulation

It can be noted that Bangladesh is not bound to follow Rome I Regulation or Rome Convention 1980 because Bangladesh is not the member of EU. But Rome I Regulation is standard, modern and up to date. Furthermore, we are taking the references of cases of different jurisdictions in scattered way and even those jurisdictions are following backdated British rule of Private International Law (i.e. India, Pakistan etc). If Bangladesh ratifies the CISG and for dealing with the complex part Article 1(1)(b) of CISG, we need to borrow or make reference to the modern Private International Law. I.e. Rome I Regulation or Rome Convention 1980 for dealing with any kind of International Contract disputes. On the other hand Bangladesh may pass a modern Private International Law for dealing with international contractual disputes by taking the consideration of Rome I Regulation or Rome Convention 1980 as model. In below, my discussion will be based on Rome I Regulation or Rome Convention 1980, which will provide as to why **Bangladesh needs a standard Private International Law, side by side CISG like Rome I Regulation or Rome Convention 1980 to deal with International Contractual disputes**. Without introducing modern and standard Private International Law along with modern CISG, it may be termed as "Cut and Shut Contractual Dispute Solution Process" like "Cut and Shut Car", which will be very risky for both buyers and sellers.

Article 1 Rome convention 1980 stated that subject to exceptions, this convention shall be applied to contractual obligation in any situation involving a choice between the laws of different countries.[14] Now, Article 1of the Rome I Regulation states that this regulation shall apply, in situations involving a conflict of laws, to contractual obligation in civil and commercial matters.[15]

Article 2[16] of the Rome convention 1980 could be applied whether or not it was the law of a contracting state. That is it might apply universally to all contracts regardless of nationality and connection of the disputes of the contracts in relation to any contracting countries. Currently,

[14] C.M.V. Clarkson and Jonathan Hill , The Conflict of Laws , 3rd Edn, Oxford University Press, UK,2006.Pg 173.
[15] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008R0593 (access on 3rd January,2015)
[16] States that "any law specified by this Convention shall be applied whether or not it is the law of a contracting state."

Article 2 of Rome I Regulation provides that this regulation shall be applied whether or not it is the law of member state[17]. As Bangladesh is not the member state of EU, this will not bind the Bangladesh court, but applicability/borrowing of Regulation by the Bangladesh courts are advisable. For examples,

- If contractual dispute arises between Iranian Company and Indian Company, Bangladesh Court may refer/borrow this Rome I Regulation to determine the governing law of the contract, but as Bangladesh is not the member of Rome I Regulation, so the Bangladesh court is not bound to apply Rome 1 Regulation, but it is advisable to refer Rome I Regulation in this matter.
- If Contractual dispute arises between Bangladesh Company and UK Company, then Bangladesh court may refer Rome I Regulation to resolve the contractual dispute. If the forum court is UK court, then they may refer the Rome I Regulation, however, technically the UK court will not be bound to apply the Rome I Regulation in this matter, but advisable to refer it for fair and justice by putting the both disputed parties in equal footing.
- If contractual dispute arises between US Company and Bangladesh company, then both US and Bangladesh Courts may apply either US or Bangladesh domestic law and as they are not the member of Rome I Regulation , so they are not bound to apply it, but advisable to make reference for putting the disputes parties in equal footing.
- If there a contractual dispute arises between two companies situated in Bangladesh, then the Bangladesh court will not refer Rome I Regulation, but the Bangladesh court will apply internal law to resolve this dispute.

2.4 Interpretation[18]:

Bangladesh court may interpret in the light of making reference to the Rome I Regulation or any law relating to international contractual disputes, then three factors need to be considered:

- Bangladesh court should interpret and apply the law/convention/regulation (both Rome

[17] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008R0593 (access on 3rd January,2015)

[18] C.M.V. Clarkson and Jonathan Hill , The Conflict of Laws , 3rd Edn, Oxford University Press, UK,2006.Pg 174.

I Regulation and previous Rome convention 1980) in international character and to achieve uniformity of law. Also it should consider the decisions of the other country's courts and other languages of the different court's decisions. One may argue that if the Bangladeshi Judge does not have knowledge of other language, then what will happen? The answer is that Bangladeshi judges should take help from experts on language interpreters to resolve this problem.

- Bangladesh court may consider the decision of UK courts, Indian Courts, Pakistan Courts and finally Bangladesh High Court and Appellate division.
- Bangladesh court can consider the official reports of Bangladesh Government and it should be updated. Also it can take consideration of other countries official reports, if it is accessible and relevant to interpretation of the law/convention, such as the Giuliano-Lagarde Report of UK.

2.5 Renvoi[19]:

Renvoi word came from the French word, which means "send back" or "to return unopened". The Doctrine of renvoi has no role in connection with the contract when interpreting in the light of Rome convention1980 and Rome I Regulation. Rome I Regulation provides that "when the application of the law of any country specified by this Regualtion means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this regulation"[20]. It is the matter of application of the law of a country in relation to choice of law, it means that, the forum court has to apply the rules of law of that country rather than the rules of private international law of that country[21]. For Example, if the Japanese law is applicable to the contract, then Japanese domestic law will be applied rather than the governing law according to the Japanese private International law.

As Bangladesh is not the member of EU or either the Rome convention1980 or Rome I Regulation, so Bangladesh is not bound by the convention and Regulation, renvoi may be applied. The problem may arise in relation to application of "law of a country". The law of a

[19] Paras Diwan and Peeyushi Diwan , Private International Law, 4th Edn, Deep & Deep Publications, India, 1998, pg 99-112.
[20] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008R0593 (access on 3rd January,2015)
[21] C.M.V. Clarkson and Jonathan Hill , The Conflict of Laws , 3rd Edn, Oxford University Press, UK,2006.Pg 175.

country means:

- Domestic law of that country, or
- The whole law of that country, i.e. including the rules of private international law. Sometimes the rules of the private international law either refer back to the law of the forum(a patent conflict of conflict rules involving a reference back to the forum), or refer forward to a third party(a patent conflict of conflict rules involving reference to a third party). Renvoi mainly deals with these two problems.

2.6 Application law chosen by the parties[22]:

Article 3(1) of Rome convention 1980 provided that "A contract shall be governed by the law chosen by the parties. The choice must be **expressed** or **demonstrated with reasonable certainty** by the terms of the contract or the circumstances of the case. By their choice the parties can select the law application to the whole or a part only of the contract."

Article 3 of Rome I Regulation provides that "A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or closely demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract"[23].

Both the Articles are related to freedom of choice and consist of both subjective and objective tests.

2.6.1 Express choice[24]:

Express choice means when the parties specify by clause that if any dispute arises then which law will be governing law to solve that contractual disputes. Parties of international contract always should include clause which will determine which law will govern the contractual dispute solution; they can include a clause that the contract "shall be governed by the Bangladesh law" or "If any dispute arises regarding contractual disputes will be decided

[22] C.M.V. Clarkson and Jonathan Hill , The Conflict of Laws , 3rd Edn, Oxford University Press, UK,2006.Pg 176.
[23] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008R0593 (access on 3rd January,2015)
[24] C.M.V. Clarkson and Jonathan Hill , The Conflict of Laws , 3rd Edn, Oxford University Press, UK,2006.Pg 176-177.

according to the Bangladesh Law." It should be noted that non-state system of law (i.e. Sharia Law) does not cover by the Article 3[25] of Rome convention 1980. However, this decision was criticized by many Sharia Jurists[26].Now this is replaced by the Article 3 of the Rome I Regulation.[27]

Both the above Articles 3 are satisfied if a contract has been concluded based on one party's general terms, i.e. choice of law clause[28].A choice of law does not satisfy both Articles 3 in relation to the printed contract, if one party deletes choice of law clause before singing and other party sign it without noticing it[29].

If parties choose the choice of law expressly, then there is no problem to apply that law, such as if parties choose to apply Bangladesh Law, then Bangladesh law will be applied in relation to contractual disputes. However, when the parties choose the law indirectly, then it becomes difficult to identify the governing law. In this situation, court will consider the clause language, such as, from bill of lading it can be understood that which law relates to the principle place of business of carrier. Furthermore, if we consider the vessel, then we need to consider, which country's flag it's carrying, then that country's law will be governing law for charterparty in relation to contractual dispute solution. When the parties want to determine the applicable law indirectly, then the interpretation of the choice of clause in the question needs to be considered. If the applicable law cannot be determined with certainty, then the alleged choice of law is unenforceable[30].

In **Companie tunisienne de Navigation SA v Companie d'Armement Maritime SA**[31]- there was a contract made in Paris between A(a French company) and B (a Tunisian Company), for the carriage of a number of consignment of oil and it would take 12 voyages. There was a clause that the charterparty would be governed by the flag of the vessel carrying the goods. At the time of contract both the parties assumed that the A would use it's own ship and would fly French flag. After six voyages, the war broke out and A stated that the contract had been frustrated based on French law. But as A used different vessels with different flags, so

[25] Shamil Bank of Bahrain EC V Beximco Pharmaceuticals Ltd [2004] 1 WLR 1784.
[26] See Anowar Zahid and Hasani Mohd Ali "Shari'ah as a choice of law in international Islamic financial contracts Shamil bank of Bahrain case revisited."
[27] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008R0593 (access on 3rd January,2015)
[28] Iran Continental shelf Oil co V IRI International corp [2002] CLC 372
[29] Samcrete Egypt Engineers and contractors SAE v Land rover Exports Ltd [2002] CLC 533.
[30] See Sonatrach Petroleum Corp v Ferrell International Ltd [2002] 1 All ER (Comm) 627.
[31] [1971] AC 572

whether the clause in the contract had any effect. The House of Lords, some argued that the clause was ineffective and meaningless as parties did not make any express choice of law. But majority stated that the clause had effect and the governing law would be French law, even the parties' assumption at the time of making contract was incorrect.

2.6.2 Choice demonstrated with circumstances of the case:

A good international contract will always consist of clause relation to choice of law; it will be unusual if the parties do not determine the applicable law— the parties do not assume and agree that what will be applicable law at the time of making contract.

Article 3 of the Rome Convention 1980 stated that, the choice of the law need not be expressed but can be implied, i.e. demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.[32]

Article 3 of Rome I Regulation states the choice need to be certain and expressly but can be implied, i.e. from the circumstances of the case.

The burden of proof lies on the party who claims that the choice of law exists. If it is not satisfied with both Articles 3 of the both Rome Convention 1980 and Rome I Regulation, the court will must decide the case on the light of Articles 4 of both Rome Convention 1980 and Rome I Regulation.

2.6.2.1 Giuliano-Lagarde Report[33]:

Giuliano-Lagarde Report provides different examples of the implied choice of law, they are:

2.6.2.2 Dispute-resolution clause[34]:

Choice of jurisdiction does not mean the choice of law—that is, choice of Bangladesh forum does not mean that choice of Bangladesh law. There should have distinction between the question of forum (where the dispute will be resolved) from the question of the applicable law

[32] Notwithstanding the use of the word 'or' in art 3(1), an implied choice can be based on the combined effect of 'the terms of the contract' and 'the circumstances of the case': Aikens J in Marubeni Hong Kong and South China Ltd v Mongolian Government [2002] 2 ALL ER (Comm) 873 at 885.

[33] [33] C.M.V. Clarkson and Jonathan Hill , The Conflict of Laws , 3rd Edn, Oxford University Press, UK,2006.Pg177-185

[34] C.M.V. Clarkson and Jonathan Hill , The Conflict of Laws , 3rd Edn, Oxford University Press, UK,2006.Pg177-185

(which law governs the contract?).

The Giuliano-Lagarde Report states that although 'the choice of a particular forum may show in no uncertain manner that the parties intend the contract to be governed by the law of that forum….this must always be subject to the other terms of the contract and all the circumstances of the case.'[35] In practice, if the parties have agreed the forum of a particular country, then the court of that country will consider that parties have intended applicable law of that country as a governing law to their contract, even the contract does have close connection with other countries. For example: There was a contract made between A (Bangladesh seller) and B (Japanese Buyer) and choose the Bangladesh court for dispute resolution. So, if the dispute arises between A and B, then the forum court will be Bangladesh and Bangladesh law will be governing law for the contract, even the contract may have connection to Japanese country law or other forum law. Actually Bangladesh decides the cases based on common law doctrine rather than Rome convention. But it is advisable to refer Convention in the contractual disputes, because it may be standard, up to date and modern.

In **The Komninos S**[36] , Where a cargo belonging to P was shipped on a vessel owned by D. However, the cargo was damaged and P sued D for the damage due to the unseaworthiness of the vessel and D's negligence in the England court. It can be noted that parties or contract did not have connection to England; however the bill of lading was in English language and stated that dispute resolution forum would be 'British Court'.

D argued that bill of lading was governed by the Greeck law and P was time-barred to bring his claim based on Greek law. Leggatt J held that contract had close connection with Greece country, so that law might be governing law for the contract.[37]

P argued that there was clause which impliedly determined the choice of law of the parties as 'British Court' and based on that P's claim was not time-barred. The Court of appeal stated that:

- The choice of 'British courts' means choice of English courts.
- There was possible to determine that the parties intended to apply English law and there was no strong indication that the parties did not intend it.

[35] OJ 1980 C282/17.
[36] [1991] 1 LIoyd's Rep 370.
[37] [1990] 1 LIoyd's Rep 541.

Finally, the Court of Appeal concluded that English law would be governing law for the bill of lading. Same approach was followed in the case The Parouth[38]

However, a dispute-resolution clause is not conclusive. In **Compagnie tunisienne de Navigation SA v Compagnie d'Armement Maritime SA**[39], in this case, the charterparty stated about a clause in the contract where it was stated that if any dispute arises in future then it will be settled by the arbitrators in England. The dispute arises and the case came to House of Lords. It was observed by the House of Lords that:

- The parties and Contract had close connection with France and Tunisia (a former French territory which is based on French legal system).
- The negotiation of the contract was made in France in French language and France brokers
- The payment was made in French currency.
- Parties were one French company and other was Tunisian.
- Parties' obligations were taken place in Tunisia.

The House of Lords stated that, although the clause stated that the choice of law would be English Law, but the contract was mostly connected with the French Law, so the governing law for the contract would be French law.

In **Egon Oldendorff V Libera Corpn**[40], P (German company) sought leave to serve a writ on D (Japanese corporation) and P argued that the contract would be governed by English law impliedly. Except the clause the contract was not connected with the English law. However, Clarke J concluded that the governing law would be the English law and P was given leave to serve writ to D.

2.6.2.3 Standard forms[41]:

Sometimes Standard forms which are drafted based on particular law system determine impliedly the choice of law.

In **Amin Rasheed Shipping Corpn V Kuwait Insurance Co**[42], A Marine insurance

[38] [1982] 2 LIoyd's Rep 351.
[39] [1971] AC 572.
[40] [1995] 2 LIoyd's Rep 64.
[41] C.M.V. Clarkson and Jonathan Hill , The Conflict of Laws , 3rd Edn, Oxford University Press, UK,2006.Pg177-185

policy was issued in the Kuwait by the defendant (A kuwaiti insurance company) and the ship was owned by the plaintiff (A Liberian company) which dealt with business in Dubai. The marine policy was drafted according to the Marine Insurance Act 1906. The House of Lords stated that the governing law of the contract would be English law because:

- As the Marine insurance policy was drafted in the light of Marine Insurance Act 1906 and the contract could be interpreted only in English Law and it impliedly determined the parties' intention that the governing law of the contract would be English Law.
- At the time of making contract there was no Marine Insurance law in the Kuwait. Did it mean that if there was any Marine Insurance Law in Kuwait, then the House of Lords could give different judgment? The answer was that the House of Lords would observe that at the time of making contract whether there were any other issues which would obviously make House of Lords to give judgment that governing law of the contract would be governed by other law rather than English law.
- The contract did not include any clear indication that the parties had intended other law rather than English law.[43]

As this case was decided under the common law before drafting convention, so this decision can be taken by Bangladesh Court while interpreting the choice of law of a contract.

2.6.2.4 Previous course of dealing[44]:

If parties did previous course of dealing and in those contracts there were clauses expressly determined the choice of law, then if the court finds that it is obvious that parties have intended the pervious clause choice of law to be applied in current contract, then court may apply that. However, it will depend on the facts of the each case. The Court may not consider the Previous course of dealing, where it obvious that the court should not consider the previous course of dealing for determining the choice of law, because:

- Parties did not intend that in current contract,
- Parties include a new clause which determines a new choice of law to be applied rather than previous choice of law.

[42] [1984] AC 50.
[43] Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd [1999] ILPr 729.
[44] C.M.V. Clarkson and Jonathan Hill , The Conflict of Laws , 3rd Edn, Oxford University Press, UK,2006.Pg177-185

- Any other valid and good reasons need to be taken as consideration by the court.

2.6.2.5 Express choice of law in related transactions[45]:

When the contracts are related to each other (parties of the contract) then it will be assumed that parties have intended that particular law as governing law too. Giuliano-Lagarde Report stated that an implied choice of law can be determined from the contract if there is any express choice of law in relation to transaction between the same parties. For example, where a charterparty expressly makes a choice of law, then that law is applicable to the bill of lading too.[46]However, Governing law of Letter of Credit does not depend on the original transaction.[47]

2.6.2.6 Reference to particular rules[48]:

The Giuliano-Lagarde Report stated that 'references in a contract to specific articles of the French Civil Code may leave the court in no doubt that the parties have deliberately chosen French Law, although there is no expressly stated choice of law'.[49]

The choice of law and incorporation are two different things. When parties choose particular country's law, then it may not be advantageous to one party or other party. Court may take consideration of choice of law that is when the parties choose the law of a country at the time of trial rather than at the time of conclusion of the contract.[50] Parties may choose a particular country's law, but can incorporate the statutory provision of other country law. For example, applicable law for carriage of goods of a contract may be US Law, but it may contain clause with respect to the shipments from the port of Bangladesh, the all terms and provisions of Carriage of Goods by Sea Act 1925 will be applied to the contract.[51]

If provisions of the other country's law are incorporated with the choice of law of particular country in the contract, then the provisions of the other country's law have to

[45] C.M.V. Clarkson and Jonathan Hill , The Conflict of Laws , 3rd Edn, Oxford University Press, UK,2006.Pg177-185
[46] The Njegos [1936] P 90; the Freights Queen [1977] 2 LIoyd's Rep 140.
[47] See Attock Cement Co Ltd v Romanian Bank for foreign Trade [1989] 1 WLR 1147.
[48] C.M.V. Clarkson and Jonathan Hill , The Conflict of Laws , 3rd Edn, Oxford University Press, UK,2006.Pg181-182.
[49] OJ 1980 C282/17.
[50] R v International Trustee for Protection of Bondholders Akt [1937] AC 500.
[51] Stafford Allen & Sons Ltd v Pacific Steam Navigation Co [1956] 1 WLR 629.

interpret as same as other contractual terms are interpreted.[52] That means the interpretation may be done with foreign law and it may be international nature and that is why it has little similar to the Article 7 of CISG which provides that the interpretation of the CISG should be in international nature. In this situation the parties intended to apply the incorporation provision at the time of the making the contract unless there were any later amendment taken place.

2.6.2.7 Other considerations[53]:

The court should take consideration of other circumstances and terms of the contract when taking decision in relation to implied choice of law of the parties.

In **American Motorists Insurance Co v Cellstar Corporation**[54] , there was a contract of insurance between C (Illinois company) and D (Delaware company) run their business in Texas, question raised that whether the contract would be governed by English law or Texan law. In the contract there was a clause in relation to time bar of 12 months that is 'by the laws of the state in which such policy is issued'. From this wording it was argued that the parties strongly intended that Texan law would be governing law of the contract.

At common law, a contract or provisions of the contract are valid under the law of one country, whereas it may not be valid under the law of another country. So, the court should apply the law of the former country, because the parties intended that contract to be valid, not void. However, if subject matter of the contract is illegal in one country but legal in another country, then what approach the court will adopt? For example, A contract held in London between A (British Citizen) and B (Bangladesh) and subject matter was gambling. The dispute arises and has been brought in the Bangladesh court. Now whether Bangladesh court will state that the contract is not valid because subject matter of the contract is illegal under the domestic law of Bangladesh. If it does, then it will be unfair to parties, but if it states that the contract is valid, then it will be against morality and domestic law of Bangladesh. So, the solution is that parties should bring the suit in London rather than Bangladesh. On the other hand we cannot expect

[52] The Stolt Sydness [1997] 1 LIoyd's Rep 273.
[53] C.M.V. Clarkson and Jonathan Hill , The Conflict of Laws , 3rd Edn, Oxford University Press, UK,2006.Pg 182.
[54] [2003] ILPr 370.

non-Islamic judgment[55] from an Islamic country (i.e. Bangladesh, Malaysia and Saudi Arabia etc) in relation to immoral activities, such as, Legality of Gambling, Civil Partnerships, and prostitutions etc. So, the Parties should correctly choose their forum where the subject matter will not be illegal and immoral under the forum's law.

In **Re Missouri Steamship Co**[56] , there was a contract made in Massachusetts between Plaintiff (US citizen) and Defendant (English Ship Owner) to carry chattel from Boston to England. During voyage chattels were injured due to negligence of the crews of the ship. Plaintiff sued Defendant in English court. The defendant argued that there was clause which exempted them from such liability under the English Law. However, Massachusetts law does not give exemption to parties for such clause. Finally, court decided that governing law of the contract would be the English Law and Defendants were exempted from their liability based on the exempted clause. However, at common law, this kind of approach is not considered all time, the court may divert from this approach based on circumstances of the each case.[57]

Often problems arise regarding the validating law for the contract. A contract or a clause may be valid under one law but may be invalid under another law. In this situation its better to select the choice the law under which that contract or clause is valid under the Article 3(1).

2.6.3 The distinction between implied choice and no choice[58]:

It is often impossible to determine which law actually the parties have chosen without any express choice of law in the contract. It is advisable to look into the cases of Bangladesh courts, English Courts, Indian courts and finally Giuliano-Lagarde Report. However, the court can determine the choice of law impliedly.[59] Where parties did not expressly mention the choice of law, then court can take some significance factors as consideration, they are:

- Jurisdiction and dispute-resolution clause;
- Language and form of the contract ;

[55] See Anowar Zahid and Hasani Mohd Ali "Shari'ah as a choice of law in international Islamic financial contracts Shamil bank of Bahrain case revisited."
[56] (1889) 42 Ch D 321.
[57] Royal Exchange Assurance Corpn v Sjoforsakrings Aktiebolaget Vega [1902] 2 KB 384.
[58] C.M.V. Clarkson and Jonathan Hill , The Conflict of Laws , 3rd Edn, Oxford University Press, UK,2006.Pg183.
[59] See Cheshire and North, Private International Law (11th edn, 1987) p 461.

- Any other maters relevant to the contract;
- All the above factors should be closely connected to a choice of law of the contract.
- Should not rely on unconvincing evidence to determine the intention of the parties to the choice of law of the contract.

So, in the absence of any express choice of law, the contract should be governed by the law of that country with which the contract is closely connected.

2.6.4 Splitting the application law[60]:

It often seems to be difficult when different parts of the contract may be subject to different laws. The convention states that parties can choose selected choice of law to be applied to whole or a part only of the contract. Problem arises when the contract have different legal systems as applicable law. It is always better to apply one legal system in the whole part of the contract. But if one legal system is applied in one part of the contract and for another part another legal system is applied, then the result which may come up will conflict with each other legal system and will not achieve the objectives of either law.

The convention permits to split the applicable law, but Giuliano-Lagarde stated that it is advisable to parties that they should choose the choice of different legal systems correctly to be applied in different parts of the contract without giving rise to any conflicts, uncertainty and vague result between different legal systems. If there is any situation that A's obligations will be governed by the Bangladesh law and B's obligation will be governed by the Chinese law, then the choice of law will be determined by the Article 4. However, the court can take consideration of any Convention (i.e. CISG) which has been ratified by the both countries then it will be advisable to apply that convention to contract dispute resolution unless there is any obvious reason not to do that.

2.6.5 Changing the applicable law[61]:

Question arises whether once parties made a contract and after that whether they can

[60] C.M.V. Clarkson and Jonathan Hill, The Conflict of Laws, 3rd Edn, Oxford University Press, UK,2006.Pg183-184.
[61] C.M.V. Clarkson and Jonathan Hill, The Conflict of Laws, 3rd Edn, Oxford University Press, UK,2006.Pg184-185.

change the applicable law?

Article 3(2) of the Rome Convention 1980 provides that any time the parties can change the applicable law even after making the contract where the choice of law was expressly or impliedly chosen by the parties and should not affect the right of the third parties.[62] Same approach was followed in Article 3(2) of Rome I Regulation and which states that if parties want to change the applicable law then they should make it expressly; however, courts are reluctant to accept that change.[63]

Where there is a clause that at the option of one of the parties, the contract can be governed by either A party's law or B party's law, then that contract is void.[64]

If the selection of proper law depends not only the unilateral choice of law but also an objectively ascertainable event, then the clause is valid. In **The Mariannina**[65] there was a clause that if arbitration in London becomes unenforceable then Greek law will be governed the contract and The Court of Appeal held that the clause is valid.

The Convention provides that the parties may choose the applicable law at any time. There is no obvious reason why the selection of one applicable law after some time it is not considered as valid. Because argument behind that is a contract can not be validated until choice of law has been decided.

2.7 Applicable law in the absence of choice[66]:

Article 4(1) of Rome Convention 1980 provided that if the parties did not make any choice of law expressly or impliedly, then it is needed to find out which law of the country is closely connected with the contract, then that law will be governing law of the contract.

Article 4(1) Rome I Regulation provides that when parties did not choose the law then governing law of contract shall be determined based on:

- Habitual residence of seller, service provider, franchise, distributor and the place where the auction take place.

[62] Art 3(2).
[63] The Aeolian [2001] 2 LIoyd's Rep 641.
[64] Armar shipping Co Ltd v Caisse Algerienne d'Assurance et de Reassurance [1981] 1 WLR 207; Sonatrach Petroleum Corp v Ferrell International Ltd [2002] 1 ALL ER (Comm) 627.
[65] [1983] 1 LIoyd's Rep 12. See also Bhatia shipping and Agencies PVT Ltd v Aclobex Metals Ltd [2005] 2 LIoyd's Rep 336.
[66] C.M.V. Clarkson and Jonathan Hill , The Conflict of Laws , 3rd Edn, Oxford University Press, UK,2006.Pg185-195.

Article 4(2)-(4) of Rome I Regulation provides that for governing law we also need to consider the characteristic performance and closely connected/ territorial connection to the law of any country.

2.7.1 The Characteristic performance[67]:

The concept of Characteristic performance actually originated from Swiss law.[68] The characteristic performer of a unilateral contract is obliged to perform the legal obligation of that contract. For example: in case of unilateral contract, if A promises that if anyone finds his lost passport and returns to him, then he/she will be rewarded. B finds it and returns it to A. Then A is the Characteristic performer and is obliged to pay the reward to B as an obligation under his contract.

In case of bilateral contract, if A pays money to B for delivery of goods or service, then B becomes Characteristic performer to perform his obligation by delivering the goods or service to the A.[69] So, in the case of sale of goods, the seller will be considered as characteristic performance and seller's law will be considered as governing law of the contract of sale of goods.[70]

In case of a contract where there are more than one performer of the contract, then the question arises who is the characteristic performer? Its answer is the performer who takes more responsibility of risk, that performer will be considered as characteristic performer.[71] Insurer will be the characteristic performer in case of insurance contract.[72]

The choice of law should be determined on the basis of the party who provides the goods or service rather than the party who pays for those. That is, the choice of law should be based on the seller's performance of the contract. When the seller sells to buyer in different countries, then considering the need given on 'mass bargaining, like mass production, brings

[67] C.M.V. Clarkson and Jonathan Hill , The Conflict of Laws , 3rd Edn, Oxford University Press, UK,2006.Pg186-187.
[68] D'Oliveria, "Characteristic Obligation" in the Draft EEC Obligation Convention; 91977) 25 Am J Comp L303.
[69] Giuliano-Lagarde Report, OJ 1980 C282/20.
[70] See William Grant & sons International Ltd v Marie Brizard Espana SA 1998 SC 536.
[71] D'Oliveira, ' "Characteristic Obligation" in the Draft EEC Obligation convention ' (1977) 25 Am J Comp L 303 at 314.
[72] Credit Lyonnais v New Hampshire Insurance Co [1997] 2 LIoyd's Rep 1; American Motorists Insurance Co v Cellstar Corporation [2003] ILPr 370.

down the cost and the price.'[73]

However there are some limitations of characteristic performance in relation to contract, they are:

- When the both parties perform the same type of obligation, then it becomes difficult to determine the characteristic performer.[74]
- Regarding complex contract (i.e. joint venture), it's difficult to apply the concept of characteristic performer.
- Sometimes seller may not be considered as characteristic performer. In the distributorship agreement (i.e. marketing the manufacturer's products) and a publisher contract (i.e. publisher prints, binds and markets the author's work) then the distributor and publisher are considered as characteristic performer because their deeds are the main economic purpose of the contract.[75]For example, A (manufacturer) makes contract with B (distributor) to distribute the goods into the whole parts of Bangladesh, in this case B does not have obligation to promote A's products. In this situation, A is the characteristic performer of the contract.[76] So, the determination of characteristic performer of the contracts depends on the performance obligations of the parties based on different situations.

Characteristic performer can be determined by various factors which are non-exhausted and depend on circumstances on each case,[77] for example:

- Characteristic performer's habitual residence.
- In case of corporated and incorporated, its central administration.
- If characteristic performer enters into the contract for trade or profession, then where the principle place of business is situated in a country unless terms of the contract states any other place in any other country to be considered as place of the business for the contract.

[73] Lando, 'The EEC convention on the Law application to Contractual Obligation' (1987) 24 CML Rev 159 at 202.
[74] See Apple Corps Ltd v Apple computer Inc [2004] ILPr 597.
[75] Lando, 'The EEC Conveniton on the Law Application to Contractual Obligations' (1987) 24 CML Rev 159 at 204.
[76] Print Concept GmbH v GEW (EC) Ltd [2002] CLC 352.
[77] http://www.jus.uio.no/lm/ec.applicable.law.contracts.1980/doc.html (accessed 6 December, 2014)

By considering that Bangladesh ratified CISG, then If Bangladeshi seller sells handicrafts to USA buyer, then the applicable law will be Bangladeshi law. In this case CISG may be applied as because both countries ratified the CISG. However, if the contract is between Malaysia and Bangladesh, then instead of CISG, the domestic law of Sale of Goods Act 1930(Here in after referred as SOGA 1930) of Bangladesh will be applied unless there is any contradiction. However, we can consider the characteristic performers by bank account, that is if the bank account is situated in Bangladesh, then that application law will be Bangladesh Law, that is for Contract law with USA generally CISG will be applied, whereas in case of Malaysia, Bangladesh SOGA 1930 will be applied unless there is any contradiction. If Bangladesh bank contracts to give the loan to foreign customer either by New York or Malaysia Bank branch, then generally for contract with the New York, the CISG will apply but in case of contract with Malaysia, the Malaysian law will be applicable law unless there is any contradiction.

If we consider that Bangladesh bank issued a Letter of Credit to one of the Malaysian companies and it was confirmed by HSBC, which has branch office in Malaysia. Now, if dispute arises then which will be applicable law?. Though the principle Place of business of the seller is in Bangladesh, as HSBC bank confirmed the branch of Malaysian Bank, so the applicable law may be Malaysian Law. This may be situation where the applicable law may be diverted though seller have principle place of business in another country.[78]

2.7.2 Severance:

Sometimes one contract have different parts and which can be severed, then if one part of the contract is governed by the law of one country by the choice of the parties in the contract clause, however the other parts of the contract may be governed by the other country's law, which may determined by the Article 4 of the Convention.

3. When the Article 1(1)(b) of CISG need to consider?

Article 1(1) Provides that The CISG applies to contract of sale of goods between parties whose places of business are in different states:

[78] See Bank of Baroda v Vysya Bank [1994] 2 Lloyd's Rep 87. See Morse, 'Letters of credit and Rome convention' [1994] LMCLQ 560.

- Article 1(1)(a) provides when the states are contracting states; or
- Article 1(1)(b) provides that when the rules of private international law lead to the application of the law of a Contracting State.

If we consider Article 1 then we can observe that CISG will apply if both parties place of business is in two contracting states regardless of their nationality (Article 1(1)(B). For Example, A (Bangladeshi Seller) has place of business in USA and B (Indian Buyer) has place of business in Australia and if they make any contract for supply of goods from USA to Australia, then CISG will automatically apply unless there are other reasonable or valid reason to derive from application of CISG (i.e. Parties may expressly opt out the CISG application in the Contract by incorporating clause in the contract) according to the Article 1(1)(a) of CISG.

When the application of Article of 1(1)(a) of CISG fails then the Article 1(1)(b) of CISG needs to take consider, i.e. the forum determines application of the Law of the Contracting state of CISG. Forum means court or arbitral tribunal and difficult situation may arise when the forum is situated either in the contracting countries or non-contracting countries.[79]

3.1 Court of Contracting States including Article 95 Declaration[80]:

If a contracting country makes reservation of Article 95, the forum of that country does not take consideration of Article 1(1)(b) , but apply CISG where both parties are from the CISG contracting states. The US is not obliged to apply CISG if there is any contract between US and Bangladesh, because of the Article 95 Declaration and Bangladesh is not a CISG contracting country. Court of the Article 95 of CISG declaration states are bound to follow the declaration and avoid Article 1(1)(b) according to the Convention. But question is, to what extent the Court may be bound to avoid Article 1(1)(b), that is, not derive from the convention but deriving from the own choice of law. Now question is how the difficulties of Article 1(1)(b) can be solved, i.e. Example: considering that Bangladesh has not ratified the CISG, so when there will be any contract between Bangladesh and US, then obviously CISG will not apply because of Declaration of Article 95 of CISG and US Uniform Commercial Code (UCC) will apply. One may argue that why not Bangladesh incorporates Sale of Goods Act 1930 in the contract. But in

[79] Lisa Spagnolo, CISG Exclusion and Legal Efficiency, 1st Edn, Kluwer Law International,Netherlands,2014.Pg10-12.

[80] Lisa Spagnolo, CISG Exclusion and Legal Efficiency, 1st Edn, Kluwer Law International,Netherlands,2014.Pg12-14.

reality the US trader may not agree with it and argue that the SOGA 1930 is backdated and not perfect for international trade and better to consider their domestic law UCC, some may argue that it is a Legal argument between tiger vs Deer.

Example: If there is a contract between UK seller and US buyer, they may make contract based on British Sale of Goods Act 1979 instead of CISG application as UK has not ratified the CISG and US declared the Article 95 reservation. The both parties may agree on it, some may argue that it is a Legal argument between Tiger vs Tiger.

By analysing the two examples we can observe that a forum state can bypass the difficulties of Declaration of Article 95 by taking the choice of law of "Foreign Law", i.e. British Sale of Goods Act 1979. It can be noted that for the above discussion, the forum court will be the country which declare the 95 reservation and contracting country to CISG.

3.2 Court in contracting state excluding the Article 95 declaration[81]:

Problem arises when a contracting state's forum choice of law determines to apply the law of the declaring contracting state. In this regard the non-declaration state's forum may respect and not to apply the CISG, **but not bound to do that**. If the forum of non-declaration state respects the declaring contracting state, i.e. the non-declaring forum applies the substantial law of the declaring state instead of applying the substantial law of its own forum. Some may argue that it may discourage forum shopping and increase the tendency of respecting of the other country's law. Regarding forum shopping, when a country declares Article 95 of CISG and its indirect intention is to avoid the CISG application while dealing with the non-contracting states of CISG and apply its domestic law and sometimes it may bind other states' forum to respect it and interpret in light of declaring state's intention. Technically forum shopping is happening in narrow sense. Regarding respect to the declaring states' law, if we consider **Respect Vs Parties best interest**, the forum court of non-declaring state surely takes consideration of **"parties best interest"**, so the non-declaring state may avoid to respect the declaring state substantial law and apply non-declaring states' substantial law, i.e. **parties best interest** prevails over **respect** not vice-versa. The main purpose of the Article 1(1)(b) is to make wide application of CISG and to determine that whether the CISG will apply based on the private international law and it can be

[81] Lisa Spagnolo, CISG Exclusion and Legal Efficiency, 1st Edn, Kluwer Law International,Netherlands,2014.Pg14-19.

restricted by making reservation of Article 95 of CISG, while dealing with non-contracting states. When the CISG applies between two contracting parties according to the Article 1(1)(a), then the CISG is not treated as foreign law but domestic law of the both contracting states. But in case of application of 1(1)(b) CISG may be considered as foreign law for non-contracting state and domestic law for the contracting state. The forum of non-declaration state may not be bound to the decision of non application of Article 1(1)(b) of CISG which has been reserved by the Article 95 of another contracting state. However, the forum of the declaring state is not bound to apply the law of the non-declaring state law that is, Article 1(1)(b) and thus declaring forum's own law will be applicable rather than CISG.

3.3 Forum or Arbitration court of non-contracting states:

When the parties are from the two non-contracting states, then neither Article 1(1)(a) or Article 1(1)(b) are not applicable. The parties may choose expressly CISG provisions in the contract or make choice of law of a contracting state of the CISG by considering conflict of laws or private international law as described above as to how private international law will work. Same is applicable to the Alternative Dispute Resolution (ADR), i.e. Arbitration Court. However, the ultimate discretionary power will be in the hand of the court and Arbitral tribunal to decide whether it will be fair and justice, best interest of the parties to apply the CISG in the contract or other valid or reasonable ground to avoid the CISG application in the contract.

3.4 How forum will deal with the CISG application[82]:

Application of the CISG to the contract, where the parties doing business in non-contracting states governed by the laws of the contracting states.

Forum Location

		ARTICLE 95 RESERVING STATE	**ARTICLE 95 NON-RESERVING STATE**	**NON-CONTRACTING STATE**
Governing law	**ARTICLE 95 RESERVING STATE**	CISG will not apply but it's debatable	CISG may apply but debatable	CISG may apply but debatable.

[82] See website: http://www.ritsumei.ac.jp/acd/cg/law/lex/rlr29/AdamTanaka.pdf (accessed 10 October, 2015)

Governing law	**ARTICLE 95 NON-RESERVING STATE**	CISG may apply	CISG may apply	CISG may apply
Governing law	**NON-CONTRACTING STATE**	CISG may not apply	CISG may not apply	Generally, CISG is not applicable

4. Pros and Cons of making Article 95 reservation in relation to future ratification of CISG[83]:

In this part I will try to draw some arguments on advantages and disadvantages of making reservation under Article 95, that is, if Bangladesh ratifies CISG.

4.1 Advantages of making reservation under Article 95:

The advantages of making Article 95 reservation are:

- The main purpose of Article 95 reservation is to restrict the application of the CISG convention between the contracting and non-contracting states while dealing trade. For example: If Bangladesh seller makes contract with US buyer and the states that the contract will be based on US Law. Then US Uniform Commercial Code (UCC) will apply instead of CISG. Similarly, If Bangladesh ratifies CISG and makes Article 95 reservation, then if Bangladesh seller contracts with Malaysia and the choice of law is Bangladesh Law, then Bangladesh Sale of Goods of 1930 will apply instead of Convention. From my point of view Article 95 reservation is rough and tough decision for narrowing the application of CISG beyond the contracting states including the promotion and easy application of the declaration states domestic law.
- Traders will often choose law and jurisdiction that will benefit them equally and Article 6 of the CISG provides the freedom of choice to the parties, i.e. either to choose CISG or Exclude the CISG like "take or not".[84]
- To make sure that which contractual parties want to applies in the contract, i.e. CISG or

[83] See the website : https://www.agc.gov.sg/DATA/0/Docs/PublicationFiles/CISG_Article_95Report.pdf (accessed October 2015)

[84] See Gary F. Bell "Why Singapore should withdraw its reservation to the United Nations Convention on contracts for the International Sale of Goods (CISG)". Website: www.international.westlaw.com.ezplib.ukm.my/ (accessed 22 September,2015)

domestic Law. For Example, if Bangladesh ratifies the CISG and makes 95 Article reservation, then if Bangladesh seller makes contract with Malaysia, then if parties agree to apply Bangladesh domestic law to be applied in the contract. Then due to the reservation CISG will not apply though it may become domestic law of Bangladesh after ratification, however, Bangladesh Sale of Goods Act 1930 will apply. But in here I would like to add another point that the Malaysia also has Sale of Goods Act 1957, which is almost same to the Bangladesh Sale of Goods Act 1930. Then why not the Malaysia Sale of Goods will not be applied, if the forum is considered as Malaysia court.

- Though the Article 95 reservation should be made at the time of ratification of CISG by Bangladesh and can be withdrawn later if it does not provide fruitful result in future application in the international contract.
- If Bangladesh ratifies CISG and makes Article 95 reservation, then it will save displacing Bangladesh own domestic law than unknown law and will provide more adequate clarity. Article 1(1)(b) determines the law of the foreign law of non-Contracting state and convention does not displace that foreign law and application of the foreign law can be done instead of domestic law application. So, by making reserving Article 95, the domestic law application becomes secured, if CISG cannot be applied according to the Article 1(1)(a) of CISG.[85] If this happens, then the Bangladesh court may displace its' own domestic law and apply foreign law, when the other contracting party is unwilling to follow the same approach, then, this kind of tendency may be risky to some extent.
- If Bangladesh ratifies CISG and makes Article 95 reservation, even then Parties (i.e. Bangladesh trader VS Malaysia Trader) can exclude CISG according to Article 6[86] (i.e. it provides **freedom of choice** to the parties and Article 6 is made by taking consideration of the **best interest of the parties** while dealing the CISG) of CISG and can choose Bangladesh domestic Law, i.e. Sale of Goods Act 1930.

[85] See Gary F. Bell "Why Singapore should withdraw its reservation to the United Nations Convention on contracts for the International Sale of Goods (CISG)". Website: www.international.westlaw.com.ezplib.ukm.my/ (accessed 22 September,2015)

[86] Provides "Parties may exclude the application of this Convention or derogate from or vary the effect of nay of its provisions"

4.2 Disadvantages of making reservation under Article 95:

The disadvantages of making Article 95 reservation are:

- If Bangladesh ratifies the CISG, then there is no strong argument that Bangladesh should make reservation under Article 95 of CISG. Bangladesh need to understand that we are not trade frontlines like US that we can make Article 95 reservation and furthermore our domestic sale of goods law is not also modern like US UCC. Then, there will be difficult to use Bangladeshi Domestic law in the International contract and question arises in regard to use of the Bangladesh domestic law, i.e. to what extent it will be acceptable and suitable for the foreign buyers and using in International trade contract.
- If Bangladesh ratifies CISG and makes Article 95 Reservation. After ratifying CISG, the CISG becomes part of Bangladesh Domestic law. The foreign non-contracting party may not choose the Bangladesh law as applicable law. For example, if Bangladesh makes Article 95 Reservation , and Bangladesh trader makes contract with Malaysia trader and the decides the applicable law will be Bangladesh domestic law, then CISG will not apply and the Bangladesh Sale of Goods 1930 will apply. But if Bangladesh does not make Article 95 reservation, then by virtue of Article 1(1)(b) the non-contracting party may choose the domestic law (i.e. CISG) of the contracting state, i.e. the Malaysia can choose the domestic law of Bangladesh, that is CISG via private international law under Article 1(1)(b). It will be more appropriate if the Bangladesh and Malaysia Parties expressly mentioned that applicable law will be Bangladesh domestic law, i.e. CISG rather than Bangladeshi Sale of Goods Act 1930.
- If Bangladesh ratifies CISG and makes Article 95 Reservation, then it may give uncertainty in many aspects and the foreign trader may not choose the Bangladesh forum to resolve the dispute. Though the Bangladesh is not considered as hub for dispute resolution settlement, but may be in future it may, who knows? So Bangladesh should prepare for this from now like “sustainability project”, i.e. working for present suitability by considering future suitability of working properly.
- If Bangladesh ratifies CISG and Makes Article 95 Reservation, then traders (i.e. specially non contracting states traders) may not be interested to include CISG in their standard form contracts because the effect of CISG application will provide uncertain,

complex and difficult situation based on the place of business, i.e. whether the place of business is in contracting or non-contracting states. Finally the traders may exclude the application of CISG in their standard form contracts for better legal certainty.

- To promote the uniformity of CISG with developed countries including Asian countries, African countries, EU including ASEAN etc. Bangladesh should avoid making Article 95 reservation if Bangladesh ratifies CISG.
- By avoiding the Article 95 Reservation, the Bangladesh trade will be friendly and promoted and choosing the choice of law will be simple.
- By avoiding the Article 95 Reservation, the uniformity of CISG will promote and Bangladesh traders can make contract with both common law tradition (both English and American models) and civil Law tradition (both the French and German) including ASEAN traders and main aim of uniformity of the CISG application will be fulfilled. But Article 95 reservation may lead this scope of opportunity in narrow and will be disadvantageous for the Bangladesh traders.
- By avoiding the Article 95 Reservation, it will reduce the risk of conflict of laws issues which are not yet solved and boost the International trade by Bangladesh traders with flexibility and consideration will be done on the best interest of the parties and freedom of the choice (i.e. Article 6 of CISG).
- Bangladesh reservation may give confusion, difficulties to conflict of laws and encourage forum shopping and narrow the option of choice of the parties.[87]
- Bangladesh sellers may choose choice of law clause of a well organized law for their contract; it may be seller country's law, buyer countries or any other suitable law, i.e. CISG. So, if Article 95 reservation is not made, then the application of the CISG will be used between contracting states or contracting states with non-contracting states according to Article1(1)(a) and Article 1(1)(b) respectively. Thus by applying the CISG in this way, it will ensure sustainable reciprocity treaty between states.[88]

[87] See Gary F. Bell "Why Singapore should withdraw its reservation to the United Nations Convention on contracts for the International Sale of Goods (CISG)". Website: www.international.westlaw.com.ezplib.ukm.my/ (accessed 22 September,2015)
[88] See Gary F. Bell "Why Singapore should withdraw its reservation to the United Nations Convention on contracts for the International Sale of Goods (CISG)". Website: www.international.westlaw.com.ezplib.ukm.my/ (accessed 22 September,2015)

- From the above discussions, it can be observed that there is a way where the parties can avoid Article 95 reservation and get another better option to deal with international contract, even by avoiding CISG. Then, to make Article 95 reservation worthless in some extent and to uphold main purpose of uniformity of the CISG, Bangladesh should avoid Article 95 Reservation. It is better to focus on the **"Best interest of the parties"** while making international contract.

5. Impact of Article 95 on Article 1(1)(b):

Where there is contract between two contracting parties then CISG applies under Article 1(1)(a). However, if one of the parties is from the non-contracting country, then problem arises under Article 1(1)(b). When there is a contract between two countries and one of the countries is non-contracting country, then if the forum is in contracting country and if that country did not make any Article 95 reservation, then if the private international of the contracting country determines to apply the CISG(i.e., Article 1(1)(b), then CISG applies. However, if that country made Article 95 reservation, then that contracting country will apply their domestic law rather than considering Article 1(1)(b). It applies to arbitral tribunals too.[89]

6. Examples:

In the following Examples it will be considered that Bangladesh has ratified the CISG to understand the future consequences of ratification of CISG by Bangladesh.

- If Bangladesh trader makes a contract with the USA trader and the forum is USA and dispute arises between them, then what will happen?

If we consider that both Bangladesh and USA made Article 95 reservation, but as both are contracting countries to CISG, so CISG will apply according to Article 1(1)(a) of CISG unless parties expressly intend other law to apply to their contract.

- If Bangladesh trader makes contract with Malaysia trader and forum is in Bangladesh and Bangladesh made reservation Article 95 and dispute arises and governing law will be Bangladeshi law, then what will happen?

In this situation as Malaysia is non-contracting state, so according to Article 1(1)(a),

[89] Dr. Camilla Baasch Andersen, Francesco G. Mazzotta and Dr. Bruno Zeller, A Practitioner's Guide to the CISG, 1st Edn, Jurisnet LLC, USA, Pg15-17.

CISG will not apply. Again CISG will not apply under Article 1(1)(b) as because Bangladesh made Article 95 reservation. As the forum is Bangladesh court, then Bangladesh may apply Domestic Law of Sale of Goods Act 1930 rather than CISG.

- If Bangladesh trader makes contract with Malaysia trader and forum is in Malaysia and Bangladesh made reservation Article 95 and dispute arises, then what will happen?

Malaysian court will first look on the choice of law clause, that is whether the parties intended CISG to apply or not. As the Bangladesh made reservation Article 95, so the Domestic law of Sale of Goods Act 1930 will apply to the contract. However, the Malaysian Court can respect the Reservation under Article 95 of CISG by Bangladesh, but not bound by that. Furthermore, if the Bangladesh does not make reservation under Article 95, then the Malaysian court can state that either CISG or Malaysian or Bangladeshi Sale of Goods may be applied in the contract, but it will depend and vary basing on the circumstances of each case. In practical, Malaysian court may prefer to Malaysian Sale of Goods Act 1957 rather than unknown and foreign laws, i.e. CISG and Bangladesh Sale of Goods Act 1930.

- If Bangladesh Trader makes contract with the Malaysian trader and the forum court is New Zealand and Bangladesh makes Article 95 Reservation and applicable law will be Bangladesh law, then if dispute arises, then what will happen?

In this situation, the CISG will not apply according to the Article 1(1)(a) because the Malaysia is a non-contracting state of CISG. But question arises, then whether CISG may apply under Article 1(1)(b) whereas Bangladesh made Article 95 reservation? In this regard New Zealand court is not bound to follow Article 1(1)(b) because of the Article 95 of CISG Reservation. But if we consider the Article 95 of the CISG, then we will observe that New Zealand had not made Article 95 reservation and can follow the Article 1(1)(b). Furthermore, the Article 95 of CISG does not say that New Zealand should not consider Bangladesh as non-contracting state in relation to the article 1(1)(b) of CISG. So, even though the New Zealand court may respect the declaration of Article 95 Reservation but based on the circumstances, wording of the contract, intention of the parties and finally for the best interest of the parties, the New-Zealand court may give decision that CISG will apply in the contract unless there are other valid and reasonable ground not to consider it, which from point of my view is fair and just for the parties. This kind of situation may provide difficulties, complexities, unsatisfactory, uncomfortable decisions and may promote forum shopping.

However, if the forum court is Bangladesh, then CISG will not apply because of Article 95 reservation and not satisfying the conditions of 1(1)(a) of CISG and Bangladesh domestic law will apply, i.e. Bangladesh Sale of Goods Act 1930. Question arises whether the Bangladesh Sale of Goods Act 1930 can be a replacement of any International sale of goods Convention (i.e. CISG)? The answer is "NO". Even it is used in the International contract, and then it may be termed as "Cut and Shut International Contract" like "Cut and Shut Car" which is risky for both the contracting parties.

7. How to solve the problem of Reservation Article 95:

Sometimes problem arises when choice of law is referred to the "German Law" for international sale contract, then the CISG will be used, because CISG became part of German domestic law for international sale contract. On the other hand, by only referring the "American Law" does not mean that choice of law has referred to application of CISG in the International sale contract, because both CISG and UCC are parts of US domestic law, so it's better to draft choice of law clause by specifying which law is to be followed, i.e. CISG or UCC?[90]

To overcome the above situations, we can add a clause in the contract that **"whatsoever the forum of the law, the applicable law will be X country's law/CISG regardless of reservation made under Article 95 by any country unless the parties agree in other means"**

However, we know that court can decide whatever it seems reasonable to it, so court can reverse this clause and can decide in different way basing on the interest of Justice, fair and just, reasonableness.

8. How to withdraw from the reservation?

Once Bangladesh makes Article 95 Reservation, then if it wants to withdraw it, then it can withdraw the reservation through two ways: by Legal Process and by Public Education.

8.1 Legal Process:

If Bangladesh ratifies CISG and after some days, if Bangladesh wants to withdraw the reservation under Article 95 of CISG, then Article 97(4) needs to take consideration, it states

[90] See Dr Camilla B. Andersen "Recent removals of reservations under the international sales law-winds of change heralding a greater unity of the CISG". Website: http://www.wastlaw.co.uk (accessed 2014)

that Bangladesh may withdraw its declaration at any time by providing a formal written notice to depositary (i.e. Secretary –General of the United Nations according to the Article 89 of the CISG). The withdrawal will be effective on the first day of the month following the ending of 6 calendars months after the date of the receipt of the notification by the Secretary-general of the United Nations.

8.2 Public Education:

The word public education means public should be educated or provided awareness for the consequences of the withdrawal of the reservation. The definition public may include government officers and person relates to trade dealing, Bangladesh traders, and Bangladesh lawyers, representatives or head of the different trade organizations of Bangladesh etc, i.e. included but not limited to.

If Bangladesh ratifies CISG and after some year if it desires to withdraw its Article 95 reservation, then Bangladesh Government should educate the public, i.e. the consequences of the withdrawal of the reservation. When the governing law for the contract is chosen Bangladesh Law and if Bangladesh has ratified CISG and Sale of Goods Act 1930 are also there as side by side, then the public of Bangladesh should be educated the consequences of dealing with these laws after the withdrawal of the reservation, i.e. when and how to apply these to contracts and try to find it out from the Clause "governing law will be Bangladesh Law", i.e. governing law actually indicates which law, i.e. CISG or SOGA 1930 will apply? Bangladesh traders can take advice from the Legal experts (i.e. Lawyers) regarding this changing consequence.

9. Conclusion:

9.1 In favour of Reservation under Article 95 of CISG by Bangladesh:

Until now only 5 countries made reservation under Article 95, so one can argue that Bangladesh should not make any reservation, because most of the countries did not make any reservation. However, as to decide any case we need expert lawyers and judges, so if we ratify CISG, then the judges and lawyers will become experts both in CISG and Sale of Goods Act 1903.So, if we make reservation under Article 95, then Bangladesh will get advantages, that the lawyers and Judges do not need to familiar with foreign law which may be unfamiliar to them and they only need to expert in CISG and Sale of Goods Act 1930. If Bangladesh ratifies the CISG and when the contract is made between Bangladesh and USA, then CISG will apply. One

the other hand, if contract is made between Bangladesh and Malaysia, if Bangladesh made reservation under 95, so the Sale of Goods Act 1930 of Bangladesh may apply unless forum deviated from that with reasonable cause or for interest of justice.

If Bangladesh ratifies the CISG and wants to make reservation and then at the time of ratification, the Bangladesh should make declare reservation under the Article 95, because **after ratification of CISG**, Bangladesh will not allow to make reservation under Article 95 of CISG, which states that "any state may declare **at the time of the** deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph 1(b) of Article 1 of this convention". After ratification and reservation, the Bangladesh government should take a **"Pilot Experiment"** for a reasonable time, within this time, Bangladesh may draft a new modern and standard contract law for the international trade[91] and experiment should be done within that reasonable period. After that reasonable period, Bangladesh should decide whether to continue with reservation with or continue with new modern and standard contract law for international trade along with CISG. So **"Pilot Experiment"** will play a vital role for deciding whether or not to continue with reservation.

9.2 In favour of Non-Reservation under Article 95 of CISG by Bangladesh:

If Bangladesh ratifies CISG and makes no reservation under Article 95 by Bangladesh, then it will provide autonomy of the parties in relation to choice of law and will allow Bangladesh traders to use standard form contract without excluding the CISG. Bangladesh courts will provide freedom of choice to the parties (i.e. Article 6) and interpret basing on good faith, international character and finally promote uniformity of CISG according to the Article 7 of CISG.

9.3 Reservation vs. Non-Reservation under Article 95 of CSIG by Bangladesh:

After getting the result of **"Pilot Experiment"** and based on **"the balance of probability"** between the above two situations (i.e. 9.1 and 9.2), Legislatures of the Bangladesh should decide whether they should make reservation to Article 1(1)(b) of the CISG or not?

[91] See Gary F. Bell "Why Singapore should withdraw its reservation to the United Nations Convention on contracts for the International Sale of Goods (CISG)". Website: www.international.westlaw.com.ezplib.ukm.my/ (accessed 22 September,2015)