

THE APPLICATION IN THE CONTRACTING STATES OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

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SECTION 1 INTRODUCTION

1.1 The United Nations Convention on Contracts for the International Sale of Goods (the “CISG”) is one of the documents produced through the diplomatic efforts of the United Nations Commission on International Trade Law (“UNCITRAL”). The CISG attempts to bridge the gap between the different legal systems of the world, mainly between the civil law (French and German sub-traditions) and the common law (English and American sub-traditions), by creating a uniform law for the international sale of goods (preamble of the CISG). The CISG governs the formation of the contract of sale as well as the rights and obligations of the buyer and seller (including their remedies). It came into force on 1 January 1988 for those countries that were then parties to it.

1.2 What follows is a short introduction to the CISG drafted mainly to address the situation where the CISG applies and the parties to the contract have chosen national law of a Member State as the law that complements the CISG. I will first describe when the CISG does apply and when it does not apply in the Member States (Part 2). I will then show how the CISG, when it applies, takes precedence over Member States law (part 3). I will finally very briefly introduce the contents of the CISG both on the formation of the contract and on the rights and obligations of the parties (part 4). Just before concluding I will list a few places where one could find further information about the CISG (part 5).

1.3 A list of the 70 member states to the CISG as per today is appended to this paper. You will note that some important trade countries such as Great Britain and Ireland, yet also most of the African and Arabian countries including the UAR and Dubai are still missing on this list.

SECTION 2 WHEN DOES THE CISG APPLY?

Article 1(1)(a) of the CISG

2.1 The CISG provides for two ways in which it will become the law of the contract. First, through Article 1(1)(a), the CISG applies when both parties to the contract of sale have their places of business in different States that are both Contracting States. For example, if a company with its place of business in Germany sells to one with its place of business in the People's Republic of China (PRC), the CISG applies because both Germany and the PRC are Contracting States. Germany is bound by Article 1(1)(a). If however a French company (France being a Contracting State) enters into a contract of sale with an Indonesian company (Indonesia is not a Contracting State as of today), the CISG cannot apply through article 1(1)(a) since one of the parties has its place of business in a non-contracting state.

Article 1(1)(b) of the CISG is not Binding in each Contracting State

2.2 Even if one or both parties do not have their place of business in a contracting state the CISG might still apply "when the rules of private international law lead to the application of the law of a Contracting State" (article 1(1)(b)). For example if French and Indonesian parties choose French law as the law of the contract, the CISG would normally apply because France is a contracting state notwithstanding the fact that Indonesia is not a contracting state.

2.3 However, article 95 of the CISG states that "Any State may declare at the time of the deposit of its instrument of ratification ... that it will not be bound by [article 1(1)(b)]." If such a reservation is made, it means that in the case of a contract between a company domiciled in a contracting state that made a reservation in accordance with art. 95 and an Indonesian company e.g., the CISG will not apply. Therefore contracting states that made the reservation of art. 95 (like for instance Singapore) will be bound by the CISG only if both parties have their place of business in Contracting States (article 1(1)(a)).

The parties may Exclude the CISG and Choose National Law (German Civil Code or Commercial Code, French Code civil or Code de Commerce etc.)

2.4 Even if both parties are from contracting states they may still choose to be governed by Member States law to the exclusion of the CISG. Article 6 of the CISG allows the parties to exclude the application of the CISG in whole or in part. The parties could therefore draft a choice of law clause that chooses German law but excludes the CISG entirely.

SECTION 3 RELATIONSHIP BETWEEN CISG AND MEMBER STATES LAW

3.1 Assuming that the CISG applies through article 1(1)(a), that the parties have not excluded its application through article 6 and that they have chosen German or other Member States law to complement the CISG, what will be the relationship between the CISG and Member States law?

The CISG takes Precedence over German or other Member States Law

10.3.2 Article 7(2) CISG provides that "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law". Therefore when it applies, the CISG takes precedence over the national law. Therefore if both parties are from contracting states, the CISG will take prece-

dence over Member States law. But the CISG is also part of national law and if the parties want to exclude the application of the CISG they should do so explicitly (for example: “Legal relations existing in connection with this contract shall be governed by German substantive law, to the exclusion of the United Nations Convention on Contracts for the International Sale of Goods (CISG).”

3.3 For example, the rule of the CISG that a contract is formed only when an acceptance is received by the offeror (article 18(2) CISG) will apply and take precedence over the rule of the Common Law Countries to the effect that in some circumstances the contract is formed when the acceptance is mailed rather than when it is received.

The Principles of the CISG

3.4 Matters not explicitly settled in the CISG but which are generally governed by the CISG will be “settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law” (article 7(2) CISG). These principles therefore also take precedence over Member States law in matters governed by the CISG (formation of contracts and rights and obligations of the parties).

Member States Law is the Residual Law for Matters not Governed by the CISG

3.5 Matters not settled by the CISG or its principles and matters not governed by the CISG (issues other than the formation of the contract and the rights and obligations of the parties) are to be settled “in conformity with the law applicable by virtue of the rules of private international law” (article 7(2) CISG). The residual law will therefore be national law when it is the law chosen by the parties or is otherwise the applicable law.

3.6 For example the CISG does not govern “the effect which the contract may have on the property in the goods sold” (article 4(b)) and therefore does not govern the passing of title in the goods (though the CISG does govern the passing of risk in articles 66 to 70). The German Civil Code (para. 929 “Bürgerliches Gesetzbuch”) and the German law generally will therefore govern the passing of title if the good is sold in Germany. The rights of third parties in the goods or against the buyer and seller are neither governed by the CISG (the CISG only provides a warranty by the seller against third-party claims, see articles 41 and 42). Member States law will therefore fill in the gap.

National Public order takes Precedence over the CISG

3.7 The CISG “is not concerned with the validity of the contract or of any of its provisions or of any usage” (article 4(a) CISG). Therefore a contract or the provisions of a contract that would be against public policy under Member States law could be declared invalid even if the contract is also governed by the CISG.

The CISG and Incoterms or the Common Law Terms

3.8 When the parties use an Incoterm such as “CIF Incoterms 2000” to settle standard matters regarding delivery, shipping, insurance etc. there will be no conflict with the CISG. The Incoterm is integrated to the contract of sale either as part of that contract by reference (an explicit exclusion of the CISG, see article 6) or as a usage of trade (article 9(2)) and therefore it prevails over the CISG.

3.9 In order to avoid any doubt and misunderstanding, terms and clauses such as “CIF” should always be denominated as “Incoterms 2000”.

SECTION 4 THE LAW LAID OUT BY THE CISG

Sphere of Application and General Provisions (art. 1 -13)

4.1 Part I of the CISG determines its sphere of application and introduces a few general provisions. We have already mentioned articles 1 (when the CISG applies), 4 (scope of CISG) and 6 (parties may exclude the CISG). This part also determines the kinds of sales that are not governed by the CISG (article 2) - the sale of ships and aircrafts for example – and distinguishes between contracts of sale and contracts for the manufacturing of goods or for the providing of services (article 3). It also states that the consequences of a death caused by the goods are not governed by the CISG (article 5).

4.2 In interpreting the CISG, one must take into account its international character and the need to promote uniformity and the observance of good faith (article 7(1)). The convention however does not explicitly provide for a duty to act in good faith as would be the case in civil law jurisdictions – it seems that good faith is limited to the interpretation of the CISG, and does not even extend to the interpretation of the contract of sale. The general provisions also determine a few other matters such as how statements are to be interpreted (article 8), the role of customs and practices (article 9) etc.

The Formation of the Contract

4.3 Article 14 defines what constitutes an offer and suggests that a price is required for an offer to be valid and therefore seems to require an agreement on a price for a contract to be valid. This is quite similar to what is the case under German Civil Law. Article 14 however may not be the final word on the matter as article 55 of the CISG states that when, somehow, a contract is validly formed without “expressly or implicitly fix[ing] or mak[ing] provision for determining the price”, the price would be the price generally charged for such goods. This has been an area of continuing debate and buyers and sellers would be well advised to fix the price or a way of determining the price in their contract to avoid what appear to be some inconsistencies in the CISG about the possibility of having a valid contract without a price being determined or determinable.

4.4 The CISG also contains other rules on offer (articles 15, 16 and 17) and acceptance (articles 18 and 19), on deadlines for acceptance (article 20, 21 and 22), on when the contract is formed (23 and 24) etc. It should be pointed out to common law lawyers that offers may not be revoked if the offeror has set a time period for its acceptance (“this offer is open for 10 days”) (see article 16). In such cases the offer cannot be revoked for the duration of the time period notwithstanding the fact that, under the common law one would hold that the offeree has not provided any consideration for the offer to be kept open – the CISG does not have a concept of consideration.

The Implementation of the Seller’s and the Buyer’s General Conditions of Sale/Purchase

4.5 The CISG does not provide any express regulation as to this issue, which means that this issue must be solved on the basis of articles 14 ff dealing with the formation of the contract. As a rule, the party using such conditions must make them known to the other party in each individual case, although the parties may of course agree to a different procedure such as to form certain conditions as the basis for all forthcoming

business transactions. The CISG does not indicate under which condition “knowledge” is met, in particular whether it is sufficient that the general conditions are deposited with a court or a chamber of commerce or that they are published in the internet. Also, the party using such conditions must make it clear to the other party that its general conditions shall be part of the contract which is usually done by an indication in the order respectively in the order confirmation, of the kind that “all business transactions including any future transactions shall be governed by the [included] general conditions”. Also, the general conditions should always be in the same language as the contractual language.

4.6 In many cases, both the seller and the buyer will refer to their individual general conditions. This “battle of forms” is being solved differently under the national laws, yet under the CISG, the solution must be taken from this law, in particular from article 19 CISG which suggests the “last-shot-rule”, meaning that the party which has last referred to its general conditions will “win the battle”. However, with hardly any court decisions at hand, this issue will remain open for the time being.

The Rights and Obligations of the Parties

Obligations of the Seller

4.7 The obligations of the sellers are stated in very general terms at article 30: he “must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.” The transfer of property is not further mentioned – it is not governed by the CISG but the delivery and the legal warranties are further defined.

4.8 Article 31 states that if the contract (or a term of trade or a custom) does not state where the goods are to be delivered, they will be delivered by being handed over to the first carrier if the contract involves the carriage of goods; if not, by being made available at the place of manufacturing if that place is known by the parties; and if not, then at the place of business of the seller.

4.9 Article 32 defines the obligations of the seller, in some cases, to give notice of the consignment of the goods, to insure the goods or to help in securing insurance for the goods. These obligations are usually more precisely governed by the contract or terms of trade such as the Incoterms and therefore article 32 rarely applies. The seller must deliver the goods on the agreed date or during the agreed period, or in the absence of such a date, within a reasonable time (article 33). The buyer must also hand over all the relevant documents (article 34).

4.10 The seller must also deliver goods that conform to the contract (a warranty of conformity, article 35). They must normally be fit for ordinary use, or for a particular purpose if that was made known to the seller and the buyer relied on the seller’s skill (this by the way is inspired by the English Sale of Goods Act), or must conform to samples. Interestingly the packaging of the goods is made into an issue of conformity – the goods are not conforming if they are not packed in a usual manner. The liability of the seller is for any lack of conformity at the time of the passing of the risks (article 36) (the CISG is not concerned with the passing of property/ownership). The seller must also guarantee that the goods are free from any right or claims by third parties (articles 41 and 42). The buyer must give notice within a reasonable time to exercise a recourse under these warranties and with respect to the warranty of conformity, must do so at the latest within two years (articles 39 and 43).

Obligations of the Buyer

4.11 In general terms, the buyer “must pay the price for the goods and take delivery of them as required by the contract and this Convention” (article 53). The CISG also determines the place (article 57) and time (article 58) of payment and notes that the payment is due without the seller having to request payment (article 59).

Remedies

4.12 The CISG distinguishes the remedies available to the buyer (articles 46-52) those available to the seller (articles 61-65) and those available to the seller and buyer (articles 71-78), a distinction that we will not closely adhere to in this presentation.

Suspension of Performance

4.13 The CISG adopts something close to the civil law exception (i.e. defence) for non-performance called in the civil law tradition the “exceptio non adimpleti contractus” – if you are not going to perform your obligation then I do not have to perform mine. Article 71 states that under some conditions “a party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations”.

Fixing an Additional Period of Time

4.14 The CISG describes as a remedy the fact that one of the parties “may fix an additional period of time of reasonable length for performance by the [the other party] of his obligations” (articles 47(1) and 63(1)) adopting to some extent the Nachfrist of German Law. The advantage of this remedy lies in the fact that if the other party has not performed at the end of the additional period, the aggrieved party is entitled to avoid the contract without having to prove that the breach is fundamental (articles 49(1)(b) and 64(1)(b)).

Specific Performance

4.13 One of the differences between the common law and the civil law traditions is that in the common law an aggrieved party is usually not entitled to specific performance, an equitable remedy that is not granted as of right. In the civil law tradition the aggrieved party is usually entitled to specific performance, which may even include the right to have the goods repaired for example. It might well be that the aggrieved party in most cases will ask for damages rather than specific performance, and that in some instances, it might be impossible to grant specific performance, but in principle in civil law the party is entitled to the performance of what was promised.

4.14 The CISG reaches a compromise between the two traditions by first acknowledging that the parties will be entitled to specific performance (articles 46 and 62) but then stating that “a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention” (article 28). Therefore in common law jurisdictions, the courts will not grant specific performance more generously than they would under their own law.

Avoidance

4.15 It is here particularly important to remind the reader of the introductory nature of this short exposé on the CISG – the CISG rules on avoidance would require a much longer exposé.

4.16 The CISG is quite different from the common law when it comes to avoidance. In most cases, a “fundamental breach” is required for the contract to be avoided under the CISG and avoidance will never depend on whether one has breached a condition or a warranty, as is still to some extent the case in the common law (s. 11(2) of

the Sale of Goods Act but see also s. 15A which somewhat modifies the traditional approach). The fundamental breach under the CISG is never defined by whether a term of the contract was a condition or a warranty and is defined rather differently than the meaning given to the same terms in the common law. The CISG states that “a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result” (article 25).

4.17 When the breach is fundamental, the parties are entitled to avoidance (article 49(1) and 64(1)). Avoidance can also be declared in some cases of anticipatory fundamental breach (article 72) and some other instances (for example articles 49(1)(b) and 64(1)(b)). The effects of the avoidance are also detailed (articles 81-84).

Damages

4.18 In the CISG, the right to damages is dealt familiar to common law though it will not be very unfamiliar to civil law either – the differences between the two traditions are not fundamental when it comes to damages. Article 74 provides that “Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.”

Reduction in Price

4.19 Rather than damages, the buyer may ask for a reduction in price when the goods are not conforming. This remedy is inspired by the *actio quanti minoris* of the civil law tradition. Article 50 provides that “if the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.”

Other Provisions

4.20 There are many other provisions of the CISG which for lack of space will not be mentioned in detail. These other provisions include:

- Passing of the risks (when not governed by the contract, a trade term or an Incoterm) (articles 66-70)
- Interest on damages (article 78)
- Exemptions of liability (articles 79-80)
- Duty to preserve the goods (articles 85-88)

SECTION 5 WHERE TO FIND OUT MORE ON THE CISG

5.1 By far the best place to find more information in English on the CISG is at the web site maintained by Pace University Law School (<http://www.cisg.law.pace.edu>). The site is an exceptional source of information includ-

ing the text of the CISG in English and other official and unofficial versions, commentaries in articles and books on the convention many available online, summaries and often full text of cases from around the world interpreting the CISG (many in translation).

5.2 The most comprehensive introductory books about the convention are:

- Peter Schlechtriem (ed.), Geoffrey Thomas (translator), Commentary on the UN Convention on the International Sale of Goods (CISG), 2d ed. (Oxford ; New York : Clarendon Press, 1998)
- John Honnold, Uniform law for international sales under the 1980 United Nations convention, 3rd ed., (Cambridge, MA: Kluwer Law International, 1999)
- Peter Huber / Alistair Mullis, The CISG – A new textbook for students and practitioners (sellier. European Law Publishers, 2007)

5.3 Germany (and German authors) and the CISG:

- Hans-Jörg Stadler, Internationale Lieferverträge. UN-Kaufrecht – CISG, 3. Aufl., 2007
- Peter Schlechtriem, Ingeborg Schwenzer, Klaus Bacher, Kommentar zum Einheitlichen UN - Kaufrecht – CISG, 4. Aufl., 2004
- Christoph Brunner, UN-Kaufrecht – CISG, Stämpfli 2004
- Schlechtriem, Internationales UN-Kaufrecht, 2. Aufl., 2003

SECTION 6 CONCLUSION

It is hoped that this short introduction to the CISG will be of use to lawyers and businesspersons in need of a quick overview of the CISG and of its application in the national context. I must however remind the reader that there is much more to say on the CISG, and it is my hope that this short overview will only be used as a first step in any research on the CISG.

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