

## **Applicability of the Convention on Contracts for International Sale and Goods (CISG).**

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**Abstract:** *The United Nations Convention on Contracts for the International Sale and Goods (CISG) is one of the documents produced through the diplomatic efforts of the United Nations Commission on International Trade Law (UNCITRAL) for uniform international trade. Now a day's CISG is a popular Convention. Within very short time, many states have rectified it. But still now, It is debateable that when CISG will be applicable. Many cases have filed about its applicability. In many cases, Judges are explained about its applicability. But still, we are confused about it. This article has tried to focus that, when the CISG will be applicable and when it will not be applicable. This article also attempts to highlights that, what is the requirement for application of CISG?*

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### **I. Applicability: The requirement of 'internationality':**

#### **1.1 An analysis of article 1:**

The CISG applies only to contracts of sale of goods between parties whose "place of business" is in "different Countries". Different countries means, two parties will attend a contract of sale of good from two countries. **For example**, A and B are two parties of a contract. A's business place is China and B's business is Canada. Goods will transfer from Taranto to Beijing. Here CISG will apply.

Business place means that place where the business is registered. According to article 10(a), if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstance known to or contemplated by the parties at the time before or at the conclusion of the contract. **For example**, seller has place of business in both state in E and F. Buyer has a place of business in state F. Suppose that the making and performance of the contract are more closely related to state F than to state E. As Seller's place of business is in state F (not in a foreign state), CISG does not apply.

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.

**ICC Arbitration Case No. 7531 of 1994.** In this case it was held that A Chinese seller, defendant, sold scaffold fittings to an Austrian buyer, plaintiff. The buyer claimed lack of conformity of the goods and declared the contract avoided. Subsequently, the buyer sold the goods and sued the seller for damages; as such goods had been sold only partially and at a lower price. The arbitral tribunal determined the CISG to be applicable to the contract in accordance with article 1(1) (a) CISG).

#### **Germany 25 June 1997 Appellate Court Karlsruhe (Surface protective film case :**

A German seller, defendant, delivered surface-protective film to an Austrian buyer, plaintiff, for use by the buyer's business partner. The buyer did not test the film, which had to be self-adhesive and removable. When the film was removed from polished high-grade steel products, it left residues of glue on the surface. Upon being so advised, the buyer notified the seller the next day. However, this notice was given 24 days after the film had been delivered. The buyer paid the expenses of removing the glue residue and brought a claim for reimbursement of these expenses against the seller.

The CISG was applicable under both articles 1(1) (a) and 1(1)(b) CISG.

## **II. Applicability: The requirement of “ relation of contracting state”:**

### **2.1 Direct and indirect application:**

According to the criterion set forth in Article 1 (l) (a), the CISG is "directly"<sup>1</sup> applicable when the parties have their places of business in different *Contracting States*,<sup>2</sup> and this is true even where the parties are unaware that the States where their places of business are located are Contracting States.<sup>3</sup> Thus, whenever this requirement is met and whenever the *lex fori* is the law of a Contracting State and the parties have not excluded the CISG, it will be applicable,<sup>4</sup> independently from a different solution provided for by the rules of private international law. On the contrary, where the parties have their places of business in different Contracting States, but the forum is one of a non-Contracting State and its rules of private international law lead to the application of either the law of the forum or the law of a non-Contracting State, the CISG will not be applicable *per se*.

The applicability of the CISG is, however, not necessarily excluded where the parties do not have their places of business in different Contracting States.<sup>5</sup> By virtue of what has been defined as a "classical solution,"<sup>6</sup> provided for by Article 1(l)(b) CISG,<sup>7</sup> the CISG can be applicable even where one or both parties do not have their places of business in Contracting States, provided that the rules of private international law lead to the application of the law of a Contracting State.<sup>8</sup> Consequently, where the *lex fori* is the law of a Contracting State in which the rules of private international law of sales contracts are based upon the 1980 EEC Convention on the Law Applicable to Contractual Obligations, as in the Netherlands and other European countries, the CISG will generally be applicable when the law either chosen by the parties or, absent choice of law, that having the closest connection with the contract, is the law of a Contracting State.<sup>9</sup>

Art. 1(1) CISG provides for two possibilities both of which have as a first prerequisite that the places of business are in different states:

a. (i) places of business in different states and (ii) the states are contracting States – Art. 1(1)(a) CISG – **direct application**

Or

b. (i) places of business in different (not necessarily contracting) states and (ii) The rules of private international law lead to the application of the law of a contracting state – Art. 1(1) (b) CISG – **Indirect application.**

**2.2 Meaning of contracting state** is an express choice of the law of a ‘Contracting state’ should be interpreted not as a reference to domestic sales law, but as a reference to CISG, which is part of law of that state. ICC, International Court of Arbitration Case No. 7565 (1994), this is a dispute between a Dutch seller and a US buyer. The parties have expressly made the contract subject to “the law of Switzerland”, a contracting state. ICA interpreted the laws of Switzerland as the national law of Switzerland including CISG as international sales law. The contract was held to be governed by CISG.

## **III. Exclusions from the applicability of the Convention:**

### **3.1 Exclusion as to type of sale:**

According to article 2, the exclusions are of three types: those based on the purpose for which the goods were purchased, those based on the type of transaction and those based on the kinds of goods sold. A particular sale is outside the scope of this Convention if the goods are bought for "personal, family or household use". However, if the goods were purchased by an individual for a commercial purpose, the sale would be governed by this Convention. Thus, for example, the following situations are within the Convention: the purchase of a camera by a professional photographer for use in his business; the purchase of soap or other toiletries by a business for the personal use of the employees; the purchase of a single automobile by a dealer for resale. If the goods were purchased for personal, family or household use, this Convention does not apply

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<sup>1</sup> For the evaluation of the criterion laid down in Article 1(1)(a) in terms of leading to the "direct" -- or "immediate" -- application of the CISG, *see, e.g.,* Ferrari, *supra* note 100, at 13; Ulrich Magnus, *Zum räumlich-internationalen Anwendungsbereich des UN-Kaufrechts und zur Mängelrüge*, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 390, 390 (1993); Reinhart, *supra* note 139, at 13

<sup>2</sup> For identical affirmations, *see* Herber, *supra* note 120, at 52; Kindler, *supra* note 133, at 777; Reczei, *supra* note 125, at 518; Siehr, *supra* note 145, at 591-593

<sup>3</sup> This was true under the Hague Conventions as well; in this respect, *see, e.g.,* the case decision rendered by the OLG Frankfurt, February 9, 1979, *reprinted in* Schlechtriem & Magnus, *supra* note 168, 110-111.

<sup>4</sup> For this conclusion, *see also* Magnus, *supra* note 156, at 43-44.

<sup>5</sup> For this statement, *see also* Ferrari, *supra* note 159, at 35-36.

<sup>6</sup> For this definition, *see* Giuseppe Cassoni, *La compravendita nelle convenzioni e nel diritto internazionale privato*, RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 429, 434 (1982).

<sup>7</sup> For the text of this paragraph, *see supra* note 206.

<sup>8</sup> For this statement, *see also* Carbone, *supra* note 32, at 71-73; Herber & Czerwenka, *supra* note 43, at 19; Siehr, *supra* note 145, at 592-593.

<sup>9</sup> For this conclusion, *see also* Ferrari, *supra* note 159, at 36-37.

"unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use." The seller might have no reason to know that the goods were purchased for such use if the quantity of goods purchased, the address to which they were to be sent or other aspects of the transaction were those not normal in a consumer sale. This information must be available to the seller at least by the time of the conclusion of the contract so that he can know whether his rights and obligations in respect of the sale are those under this Convention or those under the applicable national law.

Subparagraph (b) of this article excludes sales by auction from the scope of this Convention. Sales by auction are often subject to special rules under the applicable national law and it was considered desirable that they remain subject to those rules even though the successful bidder was from a different State.

Subparagraph (c) of this article excludes sales on judicial or administrative execution or otherwise by authority of law, because such sales are normally governed by special rules in the State under whose authority the execution sale is made. Furthermore, such sales do not constitute a significant part of international trade and may, therefore, safely be regarded as purely domestic transactions. This article also excludes sales of stocks, shares, investment securities, negotiable instruments or money. Such transactions present problems that are different from the usual international sale of goods and, in some legal systems such commercial paper is not considered to be "goods". Without the exclusion of the sales of such paper, there might have been significant differences in the application of this Convention. This article does not exclude documentary sales of goods from the scope of this Convention even though, in some legal systems, such sales may be characterized as sales of commercial paper. It excludes from the scope of the Convention all sales of ships, vessels, [*hovercraft*] and aircraft. It also excludes sales of electricity from the scope of this Convention on the ground that in many legal systems electricity is not considered to be goods and, in any case, international sales of electricity present unique problems that are different from those presented by the usual international sale of goods.

### **3.2 Exclusion as to type of contract:**

Article 3 deals with two different situations in which the contract includes some act in addition to the supply of goods. This article provides that the sale of goods to be manufactured or produced by the seller to the buyer's order is as much subject to the provisions of this Convention as the sale of ready-made goods. However, the concluding phrase in this paragraph "unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production," is designed to exclude from the scope of this Convention those contracts under which the buyer undertakes to supply the seller (the manufacturer) with a substantial part of the necessary materials from which the goods are to be manufactured or produced. Since such contracts are more akin to contracts for the supply of services or labour than to contracts for sale of goods, they are excluded from the scope of this Convention.

### **3.3 Exclusion as to issues:**

Article 4 limits the scope of the Convention, unless elsewhere expressly provided in the Convention, to governing the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from a contract of sale. Although there are no provisions in this Convention which expressly govern the validity of the contract or of any usage, some provisions may provide a rule which would contradict the rules on validity of contracts in a national legal system. In case of conflict the rule in this Convention would apply. The only article in which the possibility of such a conflict is apparent is article 10, which provides that a contract of sale of goods need not be concluded in or by writing and is not subject to any other requirements as to form. In some legal systems the requirement of a writing for certain contracts of sale of goods is considered to be a matter relating to the validity of the contract. It may be noted that pursuant to article 11 and article (X), a Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may make a declaration that, inter alia, article 10 shall not apply where any party has his place of business in a Contracting State which has made such a declaration. Subparagraph (b) makes it clear that the Convention does not govern the passing of property in the goods sold. In some legal systems property passes at the time of the conclusion of the contract. In other legal systems property passes at some later time such as the time at which the goods are delivered to the buyer. It was not regarded possible to unify the rule on this point nor was it regarded necessary to do so since rules are provided by this Convention for several questions linked, at least in certain legal systems, to the passing of property; the obligation of the seller to transfer the goods free from any right or claim of a third person<sup>10</sup>; the obligation of the buyer to pay the price<sup>11</sup>; the passing of the risk of loss or damage to the goods;<sup>12</sup> the obligation to preserve the goods.<sup>13</sup>

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<sup>10</sup> Articles 39 and 40 [*draft counterpart of CISG articles 41 and 42*].

<sup>11</sup> Article 49 [*draft counterpart of CISG article 53*].

<sup>12</sup> Articles 78 to 82 [*draft counterpart of CISG articles 66 to 70*].

<sup>13</sup> Articles 74 and 77 [*draft counterpart of CISG articles 85 to 88*].

### **3.4 Exclusion in respect of liability for death or personal injury:**

“This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person”. The reason is that the CISG should not compete with national rules on product liability.

### **3.5 Exclusion or derogation by the parties:**

According to article 5, this convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person. The reason is that the CISG should not compete with national rules on product liability. The non-mandatory character of the Convention is explicitly stated in article 5 [*draft counterpart of CISG article 6*]. The parties may exclude its application entirely by choosing a law other than this Convention to govern their contract. They may also exclude its application in part or derogate from or vary the effect of any of its provisions by adopting provisions in their contract providing solutions different from those in the Convention.

## **IV. Conclusion**

Since by now the major exporting countries are mostly contracting states, the rules of the Convention are of utmost relevance in international sales transactions. Even if the importing buyer has its place of business in a non-contracting state, in most cases the rules of private international law will lead to the application of the Convention (Art.1(1)(b) CISG). Subject to the reservations provided for in Art. 92 et seq. CISG, almost all transactions therefore fall within the realm of the Convention. Seen from the importer's side, the Convention will not be applied only if the seller has his place of business in a non-contracting state and in the absence of an expressed or implicit choice of the law of a contracting state.

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