

CISG and Harmonization of Asian Contract Law

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Introduction

International trade and investment are commercial operations of critical importance for economic development that pose peculiar legal challenges. Cross-border transactions require the conclusion of several contracts (e.g., relating to sale of goods, transport, financing, dispute resolution), each of them with one or more foreign element; international investments demand a dedicated legal framework to ensure predictability of their various phases. The adoption of uniform commercial texts is commonly seen as the most effective method to ensure that modern, efficient and predictable legislation is enacted.

Recognizing such needs, the United Nations General Assembly has established in 1966 the United Nations Commission on International Trade Law (UNCITRAL), tasked with the goal to pursue the "progressive harmonization and unification of the law of international trade".¹ In taking such step, the General Assembly recognized that different legal provisions in the various jurisdictions constitute a major obstacle to international trade; it further affirmed that international trade is an important element in the promotion of friendly relations among countries, thus contributing to the achievement of peace and stability; and it stressed that developing countries would particularly benefit from "the betterment of conditions favoring the extensive development of international trade", including the widespread adoption of uniform trade law.

Since sale of goods contracts are widely recognized as the backbone of international trade, it is not surprising that attempts to prepare a uniform text for such contracts began already around 1930. After a stop due to Second World War, work restarted and led to the adoption of two treaties in 1964, the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF)² and the Uniform Law on the International Sale of Goods (ULIS).³ ULF and ULIS represent a significant intellectual effort; however, they did not attract broad participation from States due also to the fact that their drafting process had taken into account mostly Western European legal traditions. As the need for such text remained compelling, it was decided to assign the task to UNCITRAL in light of its universal composition ensuring a

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¹ United Nations, General Assembly Resolution 2205 (XXI) of 17 December 1966 ("Establishment of the United Nations Commission on International Trade Law").

² United Nations, *Treaty Series*, vol. 834, p. 169.

³ United Nations, *Treaty Series*, vol. 834, p. 107.

comprehensive and inclusive approach.

Thus, one major early achievement of UNCITRAL was the conclusion in 1980 of the United Nations Convention on Contracts for the International Sale of Goods ("CISG", or "the Convention"),⁴ preceded in 1974 by the Convention on the Limitation Period in the International Sale of Goods (the "Limitation Convention").⁵ The Limitation Convention was eventually amended in 1980 to align its provisions on the scope of application with those of the CISG, which it complements functionally.

The relevance of the CISG for international trade

The CISG provides a modern, uniform and fair regime for the settlement of disputes relating to the international sale of goods, introducing certainty in commercial exchanges and thus decreasing transaction costs. It is therefore considered one of the core treaties in international trade whose universal adoption is particularly desirable.⁶ The adoption of its provisions, which were specially tailored for cross-border exchanges, assists in more efficient contract management and may lead to a more equitable result in case of litigation.⁷

The CISG has currently 79 States parties,⁸ representing all legal traditions and levels of economic development. Those States include most major trading countries, accounting for more than two-thirds of global trade. In fact, the CISG is a key component of an enabling environment for international trade. Moreover, the CISG has an enabling effect on cross-border exchanges with respect to bilateral and regional free trade agreements.

Some remarkable features of the CISG

The CISG is a text conceived specifically for international trade. Its fundamental

⁴ United Nations, *Treaty Series*, vol. 1489, p. 3. Additional information on the CISG, including its updated status, is available on the UNCITRAL website at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html

⁵ United Nations, *Treaty Series*, vol. 1511, p. 3. Additional information on the Limitation Convention, including its updated status, is available on the UNCITRAL website at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_limitation_period.html

⁶ For an extensive list of arguments in support of India's accession to the CISG, see Kartikey Mahajan and Kanika Sanwal, *The Case for a Uniform Sales Law and CISG in India*, 20 *International Company and Commercial Law Review* 359 (2009), at 364-367. Similar arguments may be found, e.g., in: Emmanuel Laryea, *Why Ghana should implement certain international legal instruments relating to international sale of goods transactions*, 19 *African Journal of International and Comparative Law / Revue africaine de droit international et comparé* 1 (2011); Christian Nick, *The Case for Ireland's Accession to the UN Convention on Contracts for the International Sale of Goods*, 32 *Dublin University Law Journal* 346 (2010); Eunice Gichangi, *The United Nations Convention on Contracts for the International Sale of Goods: a case for ratification by Kenya*, 1 *Kenya Law Review* 305 (2007).

⁷ John Y. Gotanda, *Assessing Damages in International Commercial Arbitration: A Comparison with Investment Treaty Disputes*, *Investment Treaty Law: Current Issues* III 75 (British Institute of International & Comparative Law, 2009).

⁸ As of 20 August 2013.

underlying principle is freedom of contract: parties are free to vary its provisions or to opt out at will, as long as they can reach an agreement on how to do so.

Related to the principle of freedom of contract is that of freedom of form: the contract for sale of goods may be concluded in any form,⁹ unless the contracting State has lodged a declaration to the contrary. Such principle reflects prevailing global business practice. Both the principle of freedom of form and that of freedom of contract stem from the desire to enable the engagement of individuals in binding legal relations as they deem fit. Moreover, freedom of form has proven useful lately in facilitating legal recognition of electronic means, whose ubiquitous use is nowadays prevalent.

Another paramount consideration reflected in the CISG relates to the fact that cross-border trade typically involves more transaction costs than domestic one. Transport charges are the most evident but not the only component of those additional costs. Transaction costs further accrue in case of dispute. It was therefore deemed advisable to preserve the effects of the contract insofar as possible, and to favor curing any deficiency in performance rather than offering immediate contract termination. This approach explains why under the CISG the contract may be declared avoided only if a fundamental breach has occurred, and often after offering an additional opportunity to perform to the part in default. Fundamental breach of the contract is a breach that deprives one of the parties, in full or essentially, of its reasonable expectations:¹⁰ if a breach is not fundamental, other tools are at disposal to reestablish contractual balance, including compensation of damages.

Benefits arising from the adoption of the CISG

The adoption of the CISG increases the predictability of the law applicable to the contract for the international sale of goods, thus simplifying the resolution of disputes arising from those contracts. Therefore, the CISG may contribute to decrease the duration of litigation and to reduce associated costs, including judiciary workload.

a) The CISG avoids disputes on the choice of applicable law during contract negotiation

Parties to a contract usually prefer applying their own national law and choosing their domestic forum in case of litigation. The party economically more powerful may impose its choice. Alternatively, a compromise may be reached by choosing the law of a third country.

Moreover, contracts for sale of goods concluded with parties located in a developing country usually do not contain the choice of the domestic law of that

⁹ CISG article 11: "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses".

¹⁰ CISG art. 25: "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".

country as applicable law. This may happen for a number of reasons, ranging from the difficulty in accessing that law to the distribution of bargaining power. Hence, the law chosen will be the domestic law of the party located in the developed country or the law of a third (economically developed) State, such as that of the seat of arbitration. In both cases, the party located in the developing country is likely to have limited or no prior knowledge of that law.

In such cases, the cost of applying unfamiliar provisions can be significant. In particular, contractual management poses great challenges when the applicable rules are little known. This may lead to involuntary non-compliance and, in case of dispute, hinder the possibility of a settlement. The problems are magnified if limited access to qualified legal counseling is available, as is often the case for small and medium-sized enterprises.

The CISG is a uniform supranational text and, as such, it is neutral with respect to the domestic laws of the parties to the contract of sale. The duty of uniform interpretation (art. 7) further strengthens that neutral character and reinforces the confidence of commercial operators in its application. Hence, its use as applicable law helps avoiding discussions on the choice of the law of the contract. Moreover, the ability of the CISG to balance conflicting interests makes its provisions acceptable to all parties. In addition, information on the CISG's interpretation and application is readily available in several languages, and when the CISG is already in force in the States where the parties have their place of business, those parties are already familiar with its provisions. All of these elements concur to enable efficient contractual management and, if need be, dispute resolution.

b) The CISG simplifies the application of private international law rules

In other cases, the contract for sale of goods does not contain a choice of law. Companies located in developing countries and, in general, small and medium-sized enterprises usually cannot afford qualified legal counsel and therefore are more likely to neglect that choice.

Absent a choice, the court or the arbitral panel needs to identify the law applicable to the contract by virtue of the rules on conflict of laws. Such exercise is often complex and time-consuming. Moreover, it might lead to the application of different laws depending on the forum seized, due to the difference in private international law rules adopted in the various jurisdictions, thus affecting legal predictability.

The CISG applies directly to contracts concluded between parties with place of business in contracting States absent a different choice by those parties. This avoids recourse to rules of private international law to determine the law applicable to the contract, adding significantly to the certainty and predictability of international sales contracts and eliminating procedural disputes. Thus, dispute resolution may be quicker and more efficient.

Assessing the use of the CISG...

a) With respect to formal adoption

The CISG has been formally adopted by 79 States in 33 years. A few more States have completed internal procedures and the deposit of their instrument of accession is forthcoming. The CISG remains the second most adopted treaty in the field of international trade law, after the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the “New York Convention”).¹¹ In these terms alone, it is difficult to deny that the CISG is a success, and one that is becoming more evident as States join it at regular pace.

However, a more accurate analysis may highlight further interesting trends. State parties to the CISG are mostly in the Northern Hemisphere and in Latin America, but the CISG has so far received only limited acceptance in Africa and Asia.¹² This is particularly unfortunate given that, as a result, the benefits arising from the CISG are not available to merchants in many developing countries.

Recent accessions to the CISG are particularly significant: Brazil, Japan and Turkey are among the newcomers. Those States are major traders and regional hubs. An imitation effect on smaller countries is likely to happen.

In order to support that trend, it is imperative that the importance of the CISG is fully acknowledged. This importance is not limited to predictability of commercial law and the smooth functioning of trade mechanisms to foster economic development, but it extends to good governance and the rule of law. International actors, especially aid donors, should assist in bridging capacity and awareness gaps that prevent broader CISG adoption.

b) With respect to actual use

One frequent remark on the relevance of the CISG relates to its actual use. Indeed, it is often said that practitioners advise their clients to opt out of the CISG as a default choice. This practice has created a perception by commentators that the CISG is a remarkable piece of legal theory with limited practical impact.

However, this hearsay evidence is not substantiated by actual figures, which actually indicate a change in the actual use trend with a prevalence of “opting in” in

¹¹ United Nations, *Treaty Series*, vol. 330, p. 38.

¹² Indeed, all major trading countries in the Northern Hemisphere are already a party to the CISG, with the exception of the United Kingdom, where the discussion over the accession to the CISG is well documented: S. Moss, *Why the United Kingdom Has Not Ratified the CISG*, in 25 *Journal of Law and Commerce* 483 (2005-2006); A. Mullis, *Twenty-Five Years On – The United Kingdom, Damages and the Vienna Sales Convention*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2007, p. 35; R.S. Borges, *The United Kingdom and the UN Convention on Contracts for the International Sale of Goods (CISG): to Ratify or Not to Ratify?*, in 14 *Journal of International Maritime Law* 331 (2008).

certain jurisdictions, such as China.¹³

Moreover, and most importantly, comments on the opting out rate miss the central issue: opting out does not take place against the CISG provisions, but in accordance with those provisions. In other words, the guiding principle of the CISG is party autonomy: the CISG has no hegemonic ambition. If parties believe that they can find a more efficient contractual framework for their transaction, the CISG encourages them to do so. Of course, if parties – or, better, their counsels – decide to opt out without proper case analysis, they shall face the consequences of an inefficient choice.¹⁴

c) As a source of inspiration for other legislative projects

Recently, academic (and not only) discussions on the CISG have been revived by the introduction by the European Commission of a Proposal for a Common European Sales Law (CESL).¹⁵ The importance of the CESL outside the European Union should not be underestimated: in fact, the CESL, in its current draft, could apply also to commercial transactions involving small- and medium-sized enterprises not based in the European Union.¹⁶

While many issues could be discussed with respect to the interaction between CISG and CESL, one point that seems relevant is that the basic structure of the CESL owes much to the CISG. It is indeed clear that there is a lineage between the two that runs through a number of other legislative texts, such as the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law and the Draft Common Frame of Reference.¹⁷ Those texts are well-known to academics, but their impact on legal practice is limited when not altogether excluded by their nature. They have in common that they significantly build on the CISG, though that intellectual debt goes sometimes under-acknowledged.

These are mostly European endeavors, but since Europe has historically inspired several important legal models, such experiments are followed closely and give rise to

¹³ Lisa Spagnolo, Green Eggs and Ham: The CISG, Path Dependence, and the Behavioural Economics of Lawyers' Choices of Law in International Sales Contracts, 6 *Journal of Private International Law* 417 (2010). On opting out in the US, see Harry M. Flechtner, Changing the Opt-Out Tradition in the United States. U. of Pittsburgh Legal Studies Research Paper Series No. 2010-10.

¹⁴ Lisa Spagnolo, The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers, 10 *Melbourne Journal of International Law* (2009) 141-216; Schroeter, Ulrich G., To Exclude, to Ignore, or to Use? Empirical Evidence on Courts', Parties' and Counsels' Approach to the CISG (With Some Remarks on Professional Liability) (to be published in Larry di Matteo, GLOBAL CHALLENGE OF INTERNATIONAL SALES LAW, forthcoming OUP 2013; available at SSRN: <http://ssrn.com/abstract=1981742> or <http://dx.doi.org/10.2139/ssrn.1981742>).

¹⁵ Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels 11.10.2011 COM (2011) 635 final.

¹⁶ The CESL could apply also to transactions of non-EU commercial entities with consumers based in the European Union. In this case, however, national or EU law already applies.

¹⁷ Hein Kötz, Contract Law in Europe and the United States: Legal Unification in the Civil Law and Common Law, 27 *The Tulane European and Civil Law Forum* 1 (2012).

imitators. The most remarkable in Asia is the private project aimed at preparing the Principles of Asian Contract Law (PACL).¹⁸ It is, of course, exclusively to Asians to decide whether regional specificity requires dedicated texts on contract law. However, if such endeavor is undertaken, the recommendation to carefully consider existing global standards in doing so and to ensure that regional legislation would smoothly interact with that at the national and the global levels does not seem inappropriate.

Finally, the CISG remains a powerful source of inspiration also for national law reform. This was the case in the People's Republic of China and seems to be the case as well in the ongoing reform of the Japanese Civil Code.

In this respect, it should again be noted that the lack of legal resources might prevent States from fully considering the legacy of the CISG in their legislative reform efforts. Indeed, currently there is widespread awareness of the importance of modern legislation to enable commercial exchanges. However, that awareness usually focuses on dispute resolution: thus, for instance, countries that intend to open up their economy to foreign trade are usually advised – and rightly so – to become a party to the New York Convention. They are not yet recommended to become a party to the CISG in order not only to take advantage from all the benefits listed above but also to build local capacity in the field of contract law, which eventually can be useful also for domestic law reform. This is a perspective that clearly needs to be included in the prevailing discourse.

The CISG in South East Asia: status and perspectives

South East Asian States are an integral part of East Asian supply chains, which span from Japan to Australia. Those supply chains are structured and constantly fine-tuned to maximize profits: their efficient management is a priority, and diversity of applicable laws may create uncertainty in the applicable legal framework, thus increasing transaction costs. The fact that East Asian commercial law is eclectic, having been influenced by European models of common and civil law, and, in the civil law, as vastly different as are the French and the German legal systems, by US common law, by local sources and by Islamic law further increases the challenges in identifying the applicable law and ascertaining its content.

Moreover, East Asia has not chosen to pursue close regional economic integration, along the lines, for instance, of the European Union. Rather, it seems oriented towards a looser harmonization model under which free trade agreements are complemented by an enabling legal environment built on the voluntary adoption of global uniform texts by States.¹⁹ In other words, East Asian States seem to hesitate in transferring legislative competence to a supranational entity.

¹⁸ Shiyuan Han, Principles of Asian Contract Law: An Endeavor of Regional Harmonization of Contract Law in East Asia, 58 *Villanova Law Review* 589 (2013).

¹⁹ Thus, the States members to the North American Free Trade Agreement (NAFTA) and to the Dominican Republic – Central America Free Trade Agreement (CAFTA-DR) have de facto adopted certain UNCITRAL texts, such as the New York Convention or the CISG, as their common law for international trade.

The Association of Southeast Asian Nations (ASEAN) probably represents the most advanced experiment in economic integration in the region; however, its reach has not yet directly covered the law of international business transactions. Harmonization and, sometimes, unification is therefore pursued through the adoption of uniform global standards.

In the field of international sale of goods, ASEAN has adopted the important ASEAN Trade in Goods Act (ATIGA), which needs to be paired with the CISG in order to effectively facilitate regional exchanges.²⁰ In fact, the two treaties are complementary, as they deal, respectively, with private law and public law aspects of that trade. Moreover, the accession to the CISG by all major East Asian trading nations outside ASEAN²¹ provides a significant example and incentive to ASEAN Member Nations.

It seems therefore likely that Singapore will not remain alone in ASEAN as a State party to the CISG for much longer. Vietnam has taken the lead in that respect since, after thorough consideration and a public consultation process, the Prime Minister has in January 2013 made a decision to move in that direction. Thailand might follow soon given the interest expressed in that country, and positive signs towards CISG adoption may be seen in Indonesia and the Philippines, too. Hopefully, once the movement towards accession reaches a critical mass, it will involve all ASEAN member nations, thus providing a major contribution to the establishment of a global sales law.

²⁰ Bruno Zeller, Facilitating Regional Economic Integration: ASEAN, ATIGA, and the CISG, in Ingeborg Schwenzer and Lisa Spagnolo (eds.), TOWARDS UNIFORMITY: THE 2ND ANNUAL MAA SCHLECHTRIEM CISG CONFERENCE, The Hague, 2011, 255-267.

²¹ With reference to East Asian supply chains, as defined above, these nations include Australia, China, Japan, New Zealand and the Republic of Korea.