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CISG: SCOPE OF APPLICATION

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<u>RELEVANT CISG PROVISIONS</u>: CISG arts. 1-10, 89-101

I. GENERAL REMARKS

- When a dispute arises from a legal relationship that is linked to more than one jurisdictions, the adjudicatory authority has to determine which legal regime governs that relationship. This determination is made pursuant to the relevant rules of conflict-of-laws or private international law. Because these conflicts rules are always found in the laws of the forum, a change of the forum may lead to the application of different conflicts rules, and, as a result, to the application of different substantive legal norms for the very same dispute. This represents one of the aspects of the infamous "forum shopping."
- Legal unification has been suggested as the optimal solution to such legal impediments in international commerce. Uniform law instruments enshrine identical substantive or conflict-of-laws rules, which foster legal certainty and predictability in all participating jurisdictions.
- The international sale of goods contract—the predominant type of international commercial agreement—lies at the core of efforts for legal unification. Numerous instruments have been drafted and/or entered into force in order to harmonize the regulation of international sales transactions. For instance:
    - Convention on the Law Applicable to International Sales of Goods (The Hague, 1955);
    - UNIDROIT Convention relating to a Uniform Law on the International Sale of Goods (The Hague, 1964) (ULIS);
    - UNIDROIT Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (The Hague, 1964) (ULFC);
    - UN Convention on the Limitation Period in the International Sale of Goods (New York, 1974);
    - UN Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG);
    - Convention on the Law Applicable to Contracts for the International Sale of Goods (The Hague, 1986—not yet in force);
    - Draft Regulation for a Common European Sales Law (CESL).
- The most successful—at least in terms of number of ratifications—international uniform law instrument on international sale of goods contracts is the UN Convention on Contracts for the International Sale of Goods (Vienna, 1980), the renowned "CISG." Drafted under the auspices of UNCITRAL, the CISG has been ratified, accepted, approved, or acceded to by 89 states so far, including all major trade states, other than the United Kingdom and India. For a continuously updated list of all CISG contracting states and the relevant Reservations, see:

  https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en

- Eminent scholars have argued that more than 80% of all international sale of goods contracts fall within the regulatory scope of the Vienna Sales Convention. Whether these contracts are actually governed by the Convention or the latter is excluded altogether by virtue of CISG art. 6 is a different issue.
- The CISG comprises four Parts and 101 Articles.

II. CISG: METHOD OF APPLICATION

- Numerous approaches have been articulated in academic discourse with regard to the application of the CISG and of international uniform law instruments in general. These approaches range from the *primo loco* application of the CISG as international uniform law that is more specific and efficient compared to conflict-of-laws rules, to the classification of CISG art. 1(1) as a rule with unilateral conflict-of-laws effects that prevails over the generic conflicts rules of the forum, or even to the classification of the CISG as an overriding statute that is applicable irrespective of the law governing the sales contract.
- Independently of the approach adopted, it is hardly disputed that the applicability of the CISG should be explored before any "classic" conflict-of-laws enquiries, that is, before any examination of whether domestic or foreign law governs the issue in dispute.

III. CISG: SUBJECT MATTER

- The CISG governs the formation of the contract of sale and the rights and obligations of the Seller and the Buyer (CISG art. 4).
- Notwithstanding the lack of a list of definitions, for the purposes of the CISG, a "sale of goods contract" should be understood as that agreement whereby the Seller assumes the obligations to deliver conforming goods, to hand over all relevant documents, and to transfer the property in the goods to the Buyer, and the Buyer assumes the obligations to pay the agreed price and to receive the goods (CISG arts. 30, 35, 53).
- In like manner, there is no definition of "goods," thus, this term should be interpreted autonomously under CISG art. 7(1). Succinctly, a number of CISG provisions point to a double requirement of movability and tangibility, *i.e.* goods need to be movable and tangible objects.

- The CISG limits its regulatory scope by explicitly excluding a series of goods or types of contracts, which would otherwise fall within the autonomous definitions of "sale of goods" and "goods" respectively. Specifically, CISG art. 2 excludes sales:
  - **a.** of goods bought for personal, family or household use, 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 [*cf.* CISG art. 1(3)];
  - **b.** by auction (either public or private);
  - **c.** on execution or otherwise by authority of law;
  - **d.** of stocks, shares, investment securities, negotiable instruments or money (bills of lading and other similar documents, which incorporate property rights on movable goods, are not excluded from the Convention);
  - **e.** of ships, vessels, hovercraft or aircraft;
  - **f.** of electricity [*cf.* oil, coal, natural gas, etc. are governed by the CISG].
- In addition to sales contracts, it has been argued that the CISG covers also other similar transactions, such as barter contracts, preliminary agreements, framework agreements, etc.
- Furthermore, the Convention governs the sale of future goods, as well as mixed sales and services contracts:
  - **i.** **Sale of future goods**: A *qualitative* criterion should be used to determine whether the "essence" of the goods has been provided by the Seller or the Buyer. All contracts whereby the Buyer has provided the "substantial part of the materials necessary for [the] manufacture or production" fall outside the scope of the CISG (CISG art. 3(a)).
  - **ii.** **Mixed contracts**: A *quantitative* criterion should be used to determine the applicability of the Convention. The relevant enquiry should be whether the value of the labour or services offered by the Seller exceeds 50% of the price agreed in the sales contract (CISG art. 3(b)).

Case-law

- ✓ Italy, 11 January 2005, District Court Padova (*Ostroznik Savo v. La Faraona soc. coop. a.r.l.*), translation available at: http://cisgw3.law.pace.edu/cases/050111i3.html
- ✓ Germany, 3 December 1999, Appellate Court München (*Window production plant case*), translation available at: http://cisgw3.law.pace.edu/cases/991203g1.html
- ✓ Germany, 17 September 1993, Appellate Court Koblenz (*Computer chip case*), translation available at: http://cisgw3.law.pace.edu/cases/930917g1.html

IV. INTERNATIONALITY OF THE SALE OF GOODS CONTRACT

- In stark contrast to the "general internationality," which would be sufficient for the application of the "classic" conflict-of-laws rules, the CISG sets its own standard of "internationality." Thus, for the purposes of the Vienna Sales Convention, a sale of goods contract is "international," if the contracting parties maintain their respective place of business (or absent such place of business, their habitual residence) in different states (CISG arts. 1(1), 10).

  All other elements, such as the citizenship of the parties or the place of incorporation for legal entities are irrelevant (CISG art. 1(3)). By the same token, concentration of all other elements in a single jurisdiction are also irrelevant, so long as the parties maintain their respective place of business in different states.

- Although this diversity of the parties' places of business would be sufficient, it needs to be apparent to the contracting parties in light of objective elements, such as from the contract itself, prior dealings between the parties, and pertinent information disclosed at any time before or at the conclusion of the agreement (CISG art. 1(2)).

- In our familiar pattern, there is no definition of the concept "place of business" in the CISG. Therefore, the concept needs to be interpreted autonomously under CISG art. 7(1). In a nutshell, it has been held in both academic discourse and jurisprudence that, in this determination, the adjudicatory authority should examine among others: *i.* the stability of the business enterprise, *ii.* the organization and endurance of the business entity, and *iii.* the autonomy and competence of the entity to conclude sale of goods contracts.

- The "place of business" shall be determined on a case-by-case basis, the relevant point in time being the conclusion of the agreement. Subsequent change in the place of business of either party will not affect the "international" character of the agreement, albeit such change may have non-CISG effects, such as in reference to the international jurisdiction of the forum, the international service of documents, issues pertaining to further judicial assistance, etc.

- If more than one locations could qualify as "place of business," the place with the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract, shall be used for the application of the Convention (CISG art. 10(a)).

- Since subsidiary companies of a group constitute separate legal entities, they may have a different "place of business" from the parent company.

Case-law:

- ✓ Italy, 11 January 2005, District Court Padova (*Ostroznik Savo v. La Faraona soc. coop. a.r.l.*), translation available at: http://cisgw3.law.pace.edu/cases/050111i3.html
- ✓ United States, 27 July 2001, Federal District Court [California] (*Asante Technologies v. PMC-Sierra*), available at: http://cisgw3.law.pace.edu/cases/010727u1.html
- ✓ Italy, 12 July 2000, District Court Vigevano (*Rheinland Versicherungen v. Atlarex*), translation available at: http://cisgw3.law.pace.edu/cases/000712i3.html
- ✓ Germany, 28 February 2000, Appellate Court Stuttgart (*Floor tiles case*), translation available at: http://cisgw3.law.pace.edu/cases/000228g1.html

V. Applicability Requirements of the CISG

- In international litigation, the plain internationality of the sale of goods contract would not be sufficient to justify the application of the CISG. The contract needs also to be linked to a CISG contracting state, either directly through the subjective element of CISG art. 1(1)(a), *i.e.* both contracting parties maintain their respective place of business in a CISG contracting state, or indirectly through the objective element of CISG art. 1(1)(b), *i.e.* the private international law rules of the forum point to a CISG contracting state (*cf.* CISG art. 95).

Case-law

- ✓ Italy, 11 December 2008, District Court Forli (*Mitias v. Solidea S.r.l.*), translation available at: http://cisgw3.law.pace.edu/cases/081211i3.html
- ✓ Italy, 12 July 2000, District Court Vigevano (*Rheinland Versicherungen v. Atlarex*), translation available at: http://cisgw3.law.pace.edu/cases/000712i3.html

VI. Temporal Scope of the CISG

- The CISG distinguishes the temporal scope of application of Parts I, III, and IV, from that of Part II:
  - **CISG Parts I, III, IV**: It is sufficient that the contract for the sale of goods be concluded *after* the CISG has entered into force in the countries, where the contracting parties maintain their places of business, or in the country of the applicable law. The offer need not be effected after that point in time.
  - **CISG Part II**: The offer, the acceptance, and, eventually, the conclusion of the international sale of goods must be effected *after* the CISG has entered into force in the countries, where the contracting parties maintain their places of business, or in the country of the applicable law.

VII. REGULATORY GAPS OF THE CISG & GAP-FILLING MECHANISM

- The CISG does not cover all issues arising from international sales transactions. It regulates only the formation of the contract, and the rights and obligations of the parties under the sales agreement (CISG art. 4).
- Conversely, with the caveat of special CISG provisions, the CISG explicitly excludes from its ambit:
  - **i.** The validity of the contract or of any of its provisions or of any usage (CISG art. 4(a)). It is widely held in legal theory that the concept "validity" encompasses issues pertaining to fraud, illegality, lack of consent, etc.;
  - **ii.** The effect, which the contract may have on the property in the goods sold (CISG art. 4(b));
  - **iii.** The liability of the seller for death or personal injury caused by the goods to any person (CISG art. 5).
- All issues falling outside the two categories delineated in CISG art. 4 and all issues explicitly excluded from the regulatory scope of the Convention by virtue of CISG arts. 4 and 5 shall be resolved pursuant to the relevant rules of the applicable law as this is determined by the conflict-of-laws rules of the forum.
- All issues covered by the CISG shall be resolved pursuant to the special rules of the Convention. Absent such provisions, the remaining gaps shall be filled in conformity with the general principles of the Convention (CISG art. 7(2)). Further, absent relevant principles, the adjudicatory authority will have no option but to fall back on the relevant substantive rules of the applicable law (CISG art. 7(2)).
- The Convention does not contain a list of its general principles. Legal scholarship and case-law, however, have delineated a handful of CISG principles. For instance: *pacta sunt servanda*, party autonomy, *favor negotii*, *non venire contra factum proprium*, freedom of formalities, reasonableness, principle of full compensation, etc.
- The lack of readily ascertainable general principles of the CISG has led to proposals for the use of the UNIDROIT Principles of International Commercial Contracts (UPICC) either as a necessary supplement to the CISG or as inspiration in identifying such CISG principles. Although the direct invocation of the UNIDROIT Principles would be in violation of CISG art. 7(2), the importance and usefulness of the UPICC in the context of CISG's application cannot be overstated.

VIII. OPTING-OUT OF THE CISG

- The greater part of the CISG comprises default rules, which may be excluded or derogated from by virtue of an agreement between the parties (CISG art. 6).

- The opt-out rule of CISG art. 6 is, frequently, materialized through the incorporation of standard contract terms or of the ICC INCOTERMS into the sale of goods contract. Such incorporations result, more often than not, in the amendment of the CISG rules—not in the *in toto* exclusion of the Convention.
- The derogation from or exclusion of the CISG rules could be either explicit or implicit but clear. Although the possibility of derogation or exclusion should be determined on a case-by-case basis, remarkable consistency in legal theory and case-law has been achieved with regard to two choice-of-law scenarios:
  - **i. Choice of the laws of a CISG contracting state**: Selecting the laws of a CISG contracting state would, usually, not amount to the exclusion of the CISG, because the latter forms integral part of the selected law—hence, there can be no incongruity between the CISG, which is applicable by default, and the selected law, which includes the very CISG. Under such scenarios, the non-uniform rules of the selected law shall fill the gaps of the Vienna Sales Convention by virtue of CISG art. 7(2). That said, the direct selection of the "internal" non-uniform rules of a CISG contracting state could be deemed an implicit exclusion of the CISG.
  - **ii. Choice of the laws of a CISG non-contracting state**: Selecting the laws of a CISG non-contracting state would, usually, amount to the implicit exclusion of the Convention.

IX. INTERPRETATION UNDER THE CISG

i. Interpretation of the CISG rules

- Pursuant to CISG art. 7(1), "[i]n the interpretation of *this Convention*, regard is to be had to [*i.*] its international character and [*ii.*] to the need to promote uniformity in its application and [*iii.*] the observance of good faith in international trade."
- The classic tools of interpretation should be used for the interpretation of the CISG:
  - **i. Literal interpretation**—Six equally authoritative languages (Arabic, Chinese, English, French, Russian, Spanish);
  - **ii. Historical interpretation**;
  - **iii. Purposive interpretation**;
  - **iv. Systematic interpretation**.

- The "need to promote uniformity" is realized with the so-called "autonomous" interpretation of the instrument's rules. The Convention should be interpreted in a uniform manner without recourse to familiar concepts of the *lex fori*.
- Scholarly writings, foreign case-law, and arbitral awards, are all of particular importance for the uniform interpretation and application of the Convention, because they may be used as persuasive authority for the legal synchronization of legal orders on the global level. Granted, the lack of a supra-national organ that would render authoritative judgments on the interpretation and application of the CISG uniform rules has resulted in significant divergences in the application of the Convention.
- Lastly, bearing in mind the promulgation of the CISG as a multilateral treaty, due consideration should, be paid to the relevant rules on interpretation enshrined in the Vienna Convention on the Law of Treaties, Vienna 1969—at least with regard to the public international law rules in CISG, Part IV.

Case-law

- ✓ Germany, 2 March 2005, Federal Supreme Court (*Frozen pork case*), translation available at: http://cisgw3.law.pace.edu/cases/050302g1.html
- ✓ United States, 21 May 2004, Federal District Court (*Chicago Prime Packers, Inc. v. Northam Food Trading Co., et al*), http://cisgw3.law.pace.edu/cases/040521u1.html
- ✓ Netherlands, 15 October 2002, Netherlands Arbitration Institute, Case No. 2319 (*Condensate crude oil mix case*), translation available at: http://cisgw3.law.pace.edu/cases/021015n1.html
- ✓ Italy, 12 July 2000, District Court Vigevano (*Rheinland Versicherungen v. Atlarex*), translation available at: http://cisgw3.law.pace.edu/cases/000712i3.html
- ✓ Germany, 24 March 1999, Supreme Court (*Vine wax case*), translation available at: http://cisgw3.law.pace.edu/cases/990324g1.html
- ✓ ICC Arbitration Case No. 8611 of 23 January 1997 (*Industrial equipment case*), available at: http://cisgw3.law.pace.edu/cases/978611i1.html
- ✓ Germany, 20 April 1994, Oberlandesgericht Frankfurt am Main, translation available at: http://www.unilex.info/case.cfm?id=47

ii. Interpretation of the acts and statements of the parties

- The CISG provides for a two-tier system of interpreting the statements or conduct of the parties:
  - **i.** The first step requires a subjective interpretation of party statements or conduct. The adjudicator shall find the true meaning of the statement or conduct, *i.e.* what the respective party truly meant, independently of the words used, so long as the counter-contracting party knew or could not have been unaware of her intent (CISG art. 8(1)).
  - **ii.** If the true meaning cannot be ascertained, the adjudicator shall fall back on the objective interpretation of the respective party's statements or conduct by referring to what an objective third party would have understood in the same circumstances (CISG art. 8(2)).

- For the determination of either the true meaning or the objective interpretation under CISG arts. 8(1) and 8(2), all circumstances relevant to the case must be considered, including pre-contractual negotiations, established practices between the parties, usages, and subsequent conduct of the contracting parties (CISG art. 8(3)).
- A "merger," "four corners," or an "entire agreement" clause would amount to an implicit derogation from the rule of CISG art. 8(3) by virtue of CISG art. 6.

Case-law

✓ United States, 29 June 1998, Federal Appellate Court [11th Circuit] (*MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino*), available at: http://cisgw3.law.pace.edu/cases/980629u1.html

X. TRADE USAGES & ESTABLISHED PRACTICES BETWEEN THE PARTIES

- CISG art. 9 acknowledges the importance of trade usages and established practices in international commerce.
- The CISG does not contain a definition of established practices, usages, or international trade usages, hence, all three concepts need to be interpreted "autonomously" (CISG art. 7(1)).
  - **Established practices**: Patterns in the conduct of business as identified from prior transactions concluded and successfully carried out by the parties.
  - **Usages**: Practically, there is no need for a definition under CISG art. 9(1), because, irrespective of the classification of the party agreement as usages, established practices, or special agreement, the effects will be identical under either CISG arts. 6 or 9(1).
  - **International trade usages**: This is codified or un-codified business conduct that is regularly observed in international trade on a global or regional—albeit still international—level and in general trade or in a particular industry.
- Established practices, usages, and international trade usages may pertain to either the formation of the sale of goods or to the rights and obligations of the parties under the international sales agreement.
- Pursuant to CISG art. 9(1), the contracting parties may incorporate as contractual terms into their sale of goods agreement any usages that they see fit. Such an agreement could be viewed as a derogation from certain rules of the CISG, perhaps, even as exclusion of the Convention in its entirety (*cf.* CISG art. 6).
- CISG art. 9 provides for a "presumption of incorporation," in that: *i.* established practices between the parties, and *ii.* usages, which the parties knew or ought to have known and which in international trade are widely known and regularly observed by parties to contracts of the type involved in the

particular trade concerned, form, without else, integral part of the international sale of goods agreement.

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