

CISG

2023: Year in Review in a Nutshell

Implicit Opt-out & *Ex Officio* Application of the CISG

One of the notable issues addressed by courts in 2023 pertained to the *implicit* derogation from the application of the CISG. Notably, U.S. and French courts ruled on the matter. U.S. courts interpreted it as an *implicit* opt-out of the CISG when parties had not pleaded the CISG, especially during the initial phases of the proceedings, including the summary judgment phase. Similarly, French courts held that the parties had *implicitly* opted-out of the CISG when they relied on the provisions of domestic law rather than the CISG. *[see examples;*

<https://iicl.law.pace.edu/cisg/case/france-february-7-2023-international-commercial-chamber-paris-court-appeal-ccip-ca-0/>; <https://iicl.law.pace.edu/cisg/case/france-mart-14-2023-cour-dappel-court-appeals-jymident-sas-v-ileri-lojistik-hizmetleri/>; <https://iicl.law.pace.edu/cisg/case/united-states-october-6-2023-district-court-mke-v-kutlay-kaya-et-al/>; <https://iicl.law.pace.edu/cisg/case/united-states-september-30-2023-district-court-ningbo-s-chande-imp-exp-co-ltd-v-allied/> Meanwhile, a

[German appellate court](#) applied the CISG -for the first time during appellate proceedings, and stated that the parties were presumably not aware of its application during lower court proceedings, since they both agreed to its application once it had been pointed out.

A related matter is the *ex officio* application of the CISG. The Dutch attorney's general (procurator general's) office of the Supreme Court [*Parket bij de Hoge Raad*] addressed the *ex officio* application of the CISG in a resolution in December 2022. The [Supreme Court](#) [*Hoge Raad*] confirmed the advisory view in early 2023 by stating that, the CISG could not be applied *ex officio* at the appellate level when it was not a ground for appeal. On the other hand, another [Dutch appellate court](#) [*Gerechtshof*] held that *ex officio* application could be possible.

Attorneys' Fees as an Element of Damage (CISG Art. 74)

One of the most controversial issues, especially in scholarly writings, is the [Zapata](#) judgment on attorneys' fees. In *Zapata*, Judge Posner differentiated between the CISG and attorneys' fees;

attorneys' fees were subject to *lex fori* as a matter of procedure, while substantive matters were subject to the CISG. Even though courts have followed the *Zapata* judgment, in 2023, a U.S. [district court reversed](#) *Zapata* and held that attorneys' fees were recoverable under the CISG. In a [separate judgment](#), the court further substantiated the calculation of attorneys' fees and held that rather than state law, federal law would apply to determine whether the fees were reasonable. *[see commentary <https://www.lexisnexis.co.uk/legal/news/international-contract-applicable-law-minnesota-district-court-rules-on-the-cisg-attorneys-fees/>]*

CISG, Dispute Resolution Clauses, Formation of Contract, and the EU Brussels I (recast) Regulation

One of the matters addressed by courts in the European Union is the extent to which the CISG applies together with EU legislation, primarily the EU Brussels I (recast) Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (“Brussels Regulation”). In many cases, courts have applied the CISG to determine the place of performance for jurisdictional purposes under the Brussels Regulation. However, the matter is rather intricate when the incorporation of the “choice of law” and/ or “dispute resolution” clauses come into play. Despite an earlier Supreme Court [*Hoge Raad*] decision, Dutch courts have held different views on whether to apply the CISG to analyze the formation of contract and inclusion of standard terms when the dispute is also governed by other EU instruments. A Dutch court has once again analyzed this issue in a [2023 judgment](#) to determine jurisdiction. The standard terms included a dispute resolution/ jurisdiction clause. However, instead of applying the CISG’s formation of contract provisions for analyzing the inclusion of the standard terms, the court relied exclusively on the Brussels Regulation. Also worth noting, in 2021, a Dutch court had stated that EU law “trumped” the CISG.

Although not a member of the EU, given the importance of uniform application, a 2023 U.S. court decision may shed some light to the matter. In the [Smith v. Karl Kruse](#) case, the court differentiated between formation of contract and the interpretation of contract provisions. The court applied the CISG formation of contract provisions to determine whether the standard terms had been incorporated into the contract. Finding that the standard terms had been incorporated,

the court held that the CISG had been excluded under the standard terms. Thus, the court applied local state law for interpreting contract provisions, including jurisdiction. The analysis of the court is explanatory, clear, and worth being cited by other CISG jurisdictions, including European jurisdictions.

Worth Noting...

- A matter frequently analyzed in international sales contracts is whether **non- conformity with “local laws” constitute a fundamental breach** within the meaning attributed under the CISG. Although there are a few decisions to the contrary, courts have primarily held that as per the “reasonability standard” sellers do not have to be aware of local laws. Thus, if local requirements have not been communicated to the seller, non- conformity to them does not constitute a fundamental breach. This was the case in the [2023 Dutch court](#) decision.
- A [Dutch court](#) noted that WhatsApp communications may be used to evidence termination of the contract (CISG Art. 29(1)).
- A [French court](#) applied the CISG between the seller and French end- users (*action directe*).
- The [Turkish highest court of appeal](#) [*Yargıtay*] ruled on the non- conformity of goods and noted that the lower courts had failed to properly analyze some parts of the issue in light of the CISG (Art 40).
- A [U.S. circuit court](#) analyzed the *functus officio* doctrine and its exceptions. As such, the court held that there was no **manifest disregard of law** by the arbitrator in a decision rendered under the auspices of AAA/ ICDR concerning the application of the CISG. The district court had previously ordered a reasoned award for clarification of the application of the relevant provisions of the CISG.
- A *pro se* applicant filed a lawsuit for financial harm against notable defendants, including President Biden, for the “deliberate indifference to the CISG” and, the [U.S. district court](#) dismissed it as “incomprehensible”. The *pro se* applicant had previously petitioned for a *writ of certiorari*; the *writ of certiorari* was dismissed by the Supreme Court earlier in 2023.

- In 2023, **Saudi Arabia** and **Rwanda** officially became [CISG contracting states](#). In accordance with its provisions, CISG will become applicable to these states later in 2024.