



Limitation and Exclusion Clauses in CISG Contracts





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CISG Advisory Council Opinion no. 16

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Six black-letter rules

Extensive commentary on each rule



CISG AC Opinion No. 16: Black-letter rules

Overview of black-letter rules

- Rule no. 1 Parties have autonomy to exclude the CISG.
- Rule no. 2 CISG is the law that governs the question of exclusion. There must be an agreement to exclude (Art. 6).
- Rule no. 3 The standard of intent for exclusion is that of clear intent.
- Rule no. 4 Specific examples where inferences of that clear might be drawn and examples where it should not be drawn.
- Rule no. 5 A failure to argue the CISG in proceedings, alone and in of itself, does not lead to an inference of a clear intent to exclude.
- Rule no. 6 Domestic principles of waiver do not determine the parties' intent to exclude the CISG.

Rule no. 2

The CISG governs the manner of exclusion. An agreement to exclude the CISG is governed by the rules on contract formation and modification in Arts 11, 14-24, 29 CISG.

Controversy: Which is the governing law to determine exclusion when such exclusion is determined at the time of contracting (*ex ante*)?

Minority view: PIL determine the governing law

Majority view: the CISG governs - *position that the Advisory Council adopted*

There must be an agreement to exclude under Art. 6; therefore CISG rules on contract formation and modification apply.

Exclusion after the contract formation (typically during proceedings) (*ex post*)

Consensus: the CISG is the governing law

Rule no. 3

The intent of the parties to exclude must be determined in accordance with Art. 8 CISG. Such intent should be clearly manifested, whether at the time of conclusion of the contract or at any time thereafter. This standard also applies to exclusions during legal proceedings.

Problem: disparity between standard applied for *ex ante* and *ex post* exclusions

Ex ante exclusions require high level of intent - i.e., a 'certain' or 'real' tangible intent rather than hypothetical one

Ex post exclusions: variable and very low standard - e.g., failure to plead or base arguments on CISG sufficient to infer intent of exclusion

Solution: a uniform standard of clear intent →

Standard: High level of intent required for exclusion



Test: such inference must be reasonably understood from their conduct under Art. 8.2

- Exclusions *should not be readily* inferred
- Art. 8.2. = Burden is on the parties to manifest the intent clearly.
- If the balance is even, there is no intent to exclude.



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Rule no. 4

Generally, a clear intent to exclude should *be inferred*, for example, from

- express exclusion of the CISG
- choice of the law of a non-Contracting State
- choice of an expressly specified domestic statute or code (*unless it is an enacting statute*)

A clear intent to exclude *should not be inferred* merely from, for example

- the choice of the law of a Contracting State
- choice of the law of a territorial unit of a Contracting State
- use of the wording "*purely domestic law*"

Rule no. 5

During legal proceedings an intent to exclude may not be inferred merely from failure of one or both parties to plead or present arguments based on the CISG. This applies irrespective of whether or not one or both parties are unaware of the CISG's applicability.

Inconsistent practice:

- courts ignoring Art. 6 CISG, applying the domestic procedural rules, *iura novit curia*, or domestic waiver principles
- view that *lex fori* determines the applicable law

Position of the CISG AC: Application of *lex fori* depends whether it is a contracting state



- the courts in **contracting states** have a duty to apply the CISG where it is the applicable law
- in **non-contracting states** *lex fori* determines the applicable law
- in **arbitration** the issue depends on the procedural law of the arbitration, the arbitration rules and the arbitration agreement

Rule no. 5 - further clarifications

Anomaly:

An agreement to modify the contract as to exclude the application of the CISG (Art. 29 CISG) requires low standard of intent

Position of the council:

The courts should apply uniform, single, standard of intent and assess inferences to modify with caution

An inference of an intent to exclude cannot be drawn from:

- failure of both parties argue, where one or more of them have pleaded it
- failure of both parties to plead and by one of them to argue it
- failure of both parties to plead and plead it

Reasoning:

Mutual lack of awareness of the parties on the applicability to exclude cannot lead to exclude

Ignorance should not be equated with intent

Different reasons for not arguing the CISG → more active role of the courts

Rule no. 6

Domestic principles of waiver should not be used to determine the parties' intent to exclude the CISG.

Contracting states: courts have an obligation to apply CISG

Domestic waiver is not displaced by CISG, but CISG still determines its own applicability and its own exclusion

Parties can exclude through an agreement to exclude, which is what the courts must determine



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