

LAWS 4210

Commercial Law



International Sale of Goods
General Principles

Laws affecting contracts for the international sale of goods

- Parties may choose the law applicable to the contract
- International conventions where parties are members – United Nations Convention on contracts for the International Sale of Goods 1980 (CISG) enacted in NSW as *Sale of Goods (Vienna Convention) Act 1986* and in ACT as *Sale of Goods (Vienna Convention) Act 1987*
- A number of resources are available at the UNCITRAL web site
http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods.html
- Customs of particular trades or regions
- Domestic law including Sale of Goods legislation

Convention for the International Sale of Goods

- ❑ **Principles of both common and civil law systems were taken into account in drafting the CISG.**
- ❑ **However...**
- ❑ **it is intended to be a self-contained body of law which is to be interpreted without resort to common or civil law concepts.**

Convention for the International Sale of Goods

- ❑ **The CISG was developed by the United Nations Commission on International Trade Law.**
- ❑ **Its purpose is to overcome the 'choice of law' problems that have always occurred in relation to international sales contracts.**
- ❑ **"The uniform sales law movement had as its goal a uniform law dealing with the international sale of goods transactions...which would be applied by the courts and tribunals of individual nations. The ultimate issues of enforcement would not be touched by such a law, which would be administered on a case-by-case municipal basis."**

Moens G, Gillies P (eds.,) International Trade and Business: Law, Policy and Ethics, Cavendish Publishing Pty Limited, Sydney, 1998, p.1.

Convention for the International Sale of Goods

- ❑ **The fundamental benefit of a uniform sales regime is that both parties can easily establish their rights and obligations under their contract by consulting a set of legal rules which are, ideally, constructed without a bias towards any particular type of legal system, or any particular party and which is available in approved standard translations in the major languages.**

Moens & Gillies, pp.1-2.

Convention for the International Sale of Goods

- **Article 7 however, provides that if the contract cannot be interpreted according to these principles, a court or tribunal may refer to the legal principles that would otherwise apply under the operation of the rules of private international law.**
- **'This canon of construction is necessary, unless the Convention is, *de facto*, to become an extension of the forum's law. This risk is particularly obvious in the case of common law States, where the typical statute becomes *encrusted with judicial precedents* which are pivotal in resolving issues concerning the application of the statute.**

Moens & Gillies, p. 2.

Sphere of application: Article 1

□ **The CISG applies where:**

- **the contract is one for the sale of goods;**
- **the parties have their places of business in different States;**
- **the States are Contracting States – or the applicable law is that of a Contracting State;**
- **the issue in dispute is one of formation of the contract and/or obligations and rights of the parties**
- **the parties have not excluded its application**

Sphere of application

- ❑ For a list of the 94 contracting countries to the CISG go to the UNCITRAL website
- ❑ http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html
- ❑ The most recent contracting countries include: Democratic People's Republic of Korea (acceded: 27.03.2019; entry into force on 01.04.2020); Guatemala (acceded: 11.12.2019; entry into force on 01.01.2021); Portugal (acceded: 23.09.2020, entry into force: 01.10.2021).

Sphere of application

- There are certain contracts to which the CISG does not apply. These are set out in art.2:
 - sales of consumer goods
 - sale by auction
 - sales on execution or otherwise by authority of law
 - sales of stocks, shares, investment securities, negotiable instruments, money.
 - Sales of ships, hovercraft or aircraft.
 - Sales of electricity.

Sphere of application

□ **Article 3**

- (1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

- (2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

Sphere of application

- ❑ Not all contractual issues are dealt with by the CISG – it does not deal with pre-contractual issues such as misrepresentation, duress or undue influence.
- ❑ It also does not deal with issues of title, validity of the contract, liability for death or injury to a person
- ❑ See articles 4 and 5.

Sphere of application: Article 4

- This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
 - (a) the validity of the contract or of any of its provisions or of any usage;
 - (b) the effect which the contract may have on the property in the goods sold.

Sphere of application: 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.

Sphere of application

- *Playcorp Pty Ltd v Taiyo Kogyo Limited* [2003] VC 108
- The court took the view that both the domestic Sale of Goods legislation and the CISG might apply because the parties intended that the contract be governed by Australian law (conflicts rules)
- Nevertheless proceeded to apply Vic SGA legislation
 - In the particular case no relevant difference between the relevant provisions
 - The plaintiff relied on the Vic provisions
 - Although CISG is paramount in the event of inconsistency no inconsistency was alleged.

Sphere of application

- ❑ *Italian Imported Foods Pty Ltd v Pucci Srl* [2006] NSWSC 1060.
- ❑ The NSW Sup Ct disallowed the appellant (plaintiff) to depart from the case which it had run at trial and present a case which relied on the Sale of Goods (Vienna Convention) Act.
- ❑ Compare *Societe Sacovini v SARL Les Fils de Henri Ramel* (<http://cisgw3.law.pace.edu/cases/960123f1.html>) (See Mo, J *International Commercial Law*, 4th edn, LexisNexis Butterworths, Sydney, 2009 p 80.)

General Provisions

□ **Article 8**

- (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
- (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
- (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

General Provisions

- **The intention of the parties is dealt with under art.8: primarily the approach is a *subjective* one but under art.8(2) an *objective approach* may also be relevant.**
- **Art.8(3) makes no reference to anything similar to the *parol evidence rule* in common law.**

General Provisions

□ **Article 9**

- (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
- (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

General Provisions

- Under art.9, reference may be had to trade usage and customs in interpreting the contract. Art.9(2) sets out a *rebuttable presumption* that the parties have, by implication, made their contract, or its formation, subject to a usage of which they were or ought to have been aware AND which is widely known to and regularly applied by parties to the type of contract in question.

General Provisions

- There is no requirement under the CISG that contracts be in writing, but it does permit States to apply such requirements as stipulated under domestic law. This is provided for through the declaratory procedure set out in arts. 11, 12 and 96.

Formation of the contract

- ❑ The formation of the contract – the elements of offer and acceptance are dealt with in Part II of the CISG.
- ❑ An offer must be sufficiently definite and must indicate an intention to be bound if it is accepted: art.14.
- ❑ A statement or other conduct by the offeree indicating assent to the offer is an acceptance according to art.18(1).
- ❑ Acceptance is effective the moment it is communicated to the offeror: art.18(2)
- ❑ There is no requirement as to *consideration* under the CISG

Formation of the contract

- By reading arts. 1 & 100 together, even if the Convention is applicable under the relevant conflict of laws rules of a country, it is also necessary that the country, whose law becomes the governing law of the contract by the application of conflicts rules, is also a member of the Convention at the time of the contract.

Formation of the contract

- Arts. 1 – 10 are relevant in determining the parties' places of business. These provisions set out a series of rules for ascertaining whether the parties to a contract have their places of business in different countries.

Formation of the contract

- ❑ **The operation of Art. 1 is illustrated in an arbitration case of the International Court of Arbitration, ICC, in 1993 (Case No. 6653). (Available from: <http://cisgw3.law.pace.edu/cases/936653i1.html>)**
In this case, the tribunal found that the Convention applied for a number of reasons, including:
- ❑ **The Convention was part of French law;**
- ❑ **The parties were from two countries;**
- ❑ **The sale was international;**
- ❑ **The goods were not the excluded goods under art.2 of the Convention;**
- ❑ **The sale was not the excluded sale under art. 2 of the Convention; and**
- ❑ **The issues in dispute were governed by the provisions of the Convention.**

Sphere of application

- ❑ **There are certain restrictions on the application of the Convention.**
- ❑ **A contract of service will not be subject to the application of the Convention: see, eg., the case *Oberlandesgericht Köln* 19 U 282/93 (<http://cisgw3.law.pace.edu/cases/940826g1.html>)**
- ❑ **The parties may modify or exclude the application of the Convention by the operation of arts. 6, 12, 92 and 94 – 96.**

Sphere of application

- **Art. 6 is the most important provision:**
- **“The parties may exclude the application of this Convention or, subject to art. 12, derogate from or vary the effect of any of its provisions.”**

Sphere of application

- **Under art. 12, the provisions dealing with the formation of a contract under the Convention (arts. 11, 29 and Part II) will not apply to a contract where a party has its place of business in a Contracting State that has made reservations under art. 96, to these provisions.**

Sphere of application

- ❑ **Art. 12 ensures that the intention of the Contracting States when adopting the Convention is fully respected.**
- ❑ **A reservation has the effect of excluding partially or entirely from domestic application, that part of the Convention in relation to which the reservation has been made.**