



Newsletter No. 102 (EN)

**Advantages of applying the United Nations
Convention on Contracts for the International
Sale of Goods (CISG) in General Terms and
Conditions**

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I. Introduction

There are still practitioners advising their clients to exclude the applicability of the United Nations Convention on Contracts for the International Sale of Goods (**CISG**) in contracts and general terms and conditions.

However, more and more experts – including those in the U.S. – avail themselves of the legal framework that the CISG provides. This newsletter summarises the main advantages of CISG and will address issues that must be kept in mind when drafting general terms and conditions under the regime of the CISG.

II. Benefits of the CISG as the law governing contracts

1) CISG ratified by almost all major trade nations

More than 95% of the world trade is being carried out between nations that have acceded the CISG. As of March 2020, 93 nations have ratified the CISG [including North Korea], among them all major economic powers (with the exception of Great Britain, Thailand, India and Hong Kong). The increasing confidence in the efficiency of the CISG is underpinned by the accession of Japan effective 1 August 2009 – the biggest global player which hitherto abstained from signing and ratifying the Convention.

2) CISG is “local law” and [generally] applies by default

If both parties to the contract are CISG member states, the rules of the CISG are directly enforceable (Art. 1(1)(a)), as they have been incorporated into the local law of the contracting member states. Therefore, without having been agreed upon by parties of CISG member-states, the CISG will be the applicable law governing cross border trade between contracting states. This does not only generate trust and confidence between the parties to the contract, but also helps to avoid a considerable amount of time and money arising often from lengthy negotiations about the applicable law.

Alternatively, if only one party to the contract is from a CISG state, the CISG still might apply by way of indirect application pursuant to Art. 1(1)(b) if the rules of private international law point to the law of a CISG state.

However, Art. 95 CISG allows member states to declare, at the time of ratification, not to be bound by Art. 1(1)(b) and thus restricting the CISG’s applicability to Art. 1(1)(a).

China, for example, has made such a reservation under Art. 95. Therefore, while the CISG is generally applicable by virtue of Art. 1(1)(a) if the contracting partner is from a CISG member state, Chinese courts will apply Chinese national law (excluding the CISG) if a Chinese party concludes a contract with a party from a non-CISG member state and the private international law leads to the application of Chinese law.

3) CISG as role model for the local law of obligations

The rules of the unified sales law comprise world-wide acclaimed standards for international sales transactions. They were specifically devised for international commercial trade, taking into account the universal customs and practices of the member states. This is why the rules are generally regarded as striking a fair balance between the interests of the parties. The world-wide recognition of the rules is further reflected by their impact on the legislation of nation states as well as on international unification attempts such as the Principles of International Commercial Contracts (PICC) or the Principles of European Contract Law (PECL). The CISG has served as model for the reform of law of obligations in countries stretching from Estonia to China, most notably the reform of the law of obligations in Germany of 2002. Thus, over the past three decades since the CISG has come into existence, it has established itself as a “*lingua franca*“, not only for the sale of goods law, but also for the entire law of obligation.

4) CISG is clear and transparent

The individual rules are easily accessible not only for lawyers but also for businessmen. In comparison to the German Civil Code for instance, the CISG has a much clearer and more transparent outline. In particular, the system of remedies available to one party in case the other party is in default follows the same basic pattern for both the seller and the purchaser. Furthermore, the Convention does not distinguish between various types of default, with some minor exceptions (e.g. Art. 50, 65 CISG).

5) CISG means consistent terminology across borders

The consistent terminology across the

jurisdictions facilitates a consistent interpretation of the Convention by courts of different countries. Over the time it has not only evolved an impressive body of scholarly work but also an extensive set of case law, accessible via digital databases and mostly translated into the English language. Chinese courts alone account for many hundreds of cases.

Although there is no precedent on an international level, national courts frequently revert to court judgments from other countries, and the CISG has as a consequence evolved into a matter of law which is highly sophisticated and predictable.

6) CISG allows flexibility

At the same time the CISG allows a flexible application where needed, having regard to the pertaining trade practice and all circumstances involved. It must be conceded that both uniformity and predictability of law are to some extent impaired by the use of such terms as “reasonable time” in respect to periods or “fundamental breach” as a prerequisite for the rescission of a contract. On the other side, a world-wide unification of law through a set of rigid rules and time periods would inevitably have to disregard national, regional or local customs, which deserve due consideration when issuing a judgment.

7) CISG and General Terms and Conditions

Another advantage of the applicability of the CISG is that its regime also determines whether general terms and conditions were successfully included into the contract, thus the user of general terms and conditions will not have to consider this question from the perspective of the respective law of each place he conducts business in. It is true that in order for general terms and conditions to be included, the CISG imposes strict-

er criteria than some national laws, e.g. German civil law. It is not sufficient to merely refer to general terms and conditions which can be downloaded on the user's website. Instead, the general terms and conditions must on a case-by-case basis be provided to the other party which then has to explicitly agree to their inclusion.

However, this fact must not be seen as a deterrent from agreeing upon CISG. First of all, as the CISG does not distinguish between the individual contract and general terms and conditions, it facilitates the handling of legal issues regarding the formation of a contract. At the same time, the applicability of the CISG prevents the other party from invoking national laws that might set still higher standards for the inclusion of general terms and conditions. All of the above enhance the certainty of law. Apart from that, when German Private International Law is applicable, the stricter rules of CISG will govern the question of whether the general terms and conditions were included into the contract even if the applicability of the CISG has been explicitly excluded in those general terms and conditions.

In some cases, the CISG even allows a more flexible handling of legal matters within the context of general terms and conditions than the national laws. For example, the CISG allows the limitation of liability when a guarantee has been given, whereas German national law is quite strict regarding the limitation of liability in general terms and conditions – even if no consumer is involved (cf., for example, § 444 of the German Civil Code which does not permit any alterations if a guarantee has been given). German law does generally not allow a limitation of liability for essential contractual obligations in general terms and conditions. Thus, the parties' liability for simple negligence cannot be excluded in

general terms and conditions when it comes to essential contractual obligations. While this rather approach has been criticised as being too restrictive in (international) business transactions, from an economical point of view it seems fair that a contractual party cannot escape liability for essential contractual duties. However, in the end, parties might favour the application of the CISG as it allows more flexibility and options for the implementation of a contractual liability regime.

III. Guidance

Despite all virtues of the CISG as the law governing the contract, one has to ensure that the rules are specifically tailored to your company's needs by adjusting the general terms and conditions accordingly. We generally suggest that separate general terms and conditions should be used for purchase contracts on the one hand and sales contracts on the other hand. As the rules of the CISG are not compulsory, it should be very carefully considered in which respects the suggestions of the CISG are to be amended. There are also some pitfalls to which special attention needs to be paid to as shown in the following example:

Article 43 CISG

(1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

Pursuant to the CISG the purchaser might by way of negligence lose his rights arising from a defect in title. In order to eliminate this incalculable risk,



we therefore suggest this provision to be excluded in general terms and conditions for purchase. The seller on the other hand has an interest to specify the time frame within which the purchaser shall inform the seller of any defects that come to the attention of the purchaser.

Purchaser:

Article 43 of the United Nations Convention on Contracts for the International Sale of Goods is excluded. Seller shall be liable for defects in title regardless of whether Purchaser gives Seller notice specifying the nature of the right or claim of a third party.

Seller:

Purchaser shall lose the right to rely on a breach of Articles 41 and 42 if it does not

give notice to Seller specifying the nature of the right or claim of the third party no later than ... [time period] ... from the date when Purchaser became aware or ought to have become aware of the right or claim.

Furthermore, the CISG does not constitute a comprehensive body of law but needs to be complemented. This can also largely be covered by general terms and conditions. In particular, it is important to clearly lay down the order of precedence between the individual contract, general terms and conditions, CISG, conflict of laws, and national law.
