CISG as Transnational Rules

Framework and Use in Practice

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CISG as Transnational Rules

Three Steps

Framework    Basic Concepts    Use in Practice
CISG as Transnational Rules

First Step

Framework

- Facts and Figures
- Basic Content
- Language and Style
The CISG has 78 Contracting States

WTO 2010: The nine largest export nations are Contracting States

Dec. 2011: 5 of 6 major trading partner of NZ are Contracting States

CISG is a treaty of public international law
  - Contracting States must apply it unrestrictedly
  - Different only if Convention itself makes an exception
CISG consists of four Parts

  - Arts 1 – 6: Autonomous determination of scope
    - States can influence scope only, where allowed by Convention
    - Interference by adjusting conflict of laws or procedural rules not possible
  - Arts 7 – 13: Interpretation of CISG, interpretation of declarations and contracts, practices and trade usages, form issues
  - In substance rules of general contract law
  - Previously two conventions: ULF and ULIS
  - CISG is progress in legal transnationalism
Framework

Basic Content

  - Includes
    - Making and taking of delivery
    - Conformity of the goods, examination and notice
    - Transfer of Risk
    - Remedies for breach of contract, including calculation of damages, exemption and unwinding of contract
  - Relationship to other international instruments
  - Reservations
  - Accession process
  - Temporal sphere of application
Framework

Language and Style

Policies:
- Preamble is drafted in the spirit of sociological and economic transnationalism
- New International Economic Order
- Promoting friendly relations among states through international trade
- Facilitating international trade by uniform rules

General approach:
- Clarity
- Autonomous terminology
  - Example: Avoidance v. Termination
Framework

Language and Style

Bridging Domestic Differences:

- Brief v detailed
  - Example: Art 35
    - Shorter than SGA or UCC, longer than traditional Civil Law rules
- General clauses v specificity
  - Example for general clause: Art 25
    - Only true general clause
  - Example for specificity: Art. 8
    - Clear pattern of interpretation process
    - Clarification regarding reference points for interpretation
- Moderate use of legal definitions
  - Examples: Arts 13, 25
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Second Step

Basic Concepts

Sphere of Application

Conformity of the Goods

Remedies
Basic Concepts

Sphere of Application

Contract for the sale of goods (Art 1(1))

- No definition, obligations of parties are exchange of goods and transfer of title against price
- Supplement: Art 3
  - Contracts for goods to be manufactured (Art 3(1))
    - Generally CISG, unless ordering party supplies substantial part of production materials
    - Variety of domestic solutions irrelevant, results predictable
  - Mixed contracts (Art 3(2))
    - Generally CISG, unless service element is preponderent part
    - Parallel application of different areas of law excluded, results predictable
Basic Concepts

Sphere of Application

- No hierarchy of obligations
  - Domestic distinctions of main and ancillary duties, irrelevant
  - Domestic distinctions of protective ancillary duties and performance related ancillary duties, irrelevant
Basic Concepts

Sphere of Application

Goods (Art 1(1))

- No definition: Broad understanding: Movable at time of delivery
  - Domestic definitions and exceptions irrelevant
    - *Res extra commercium*, irrelevant
    - Declaring items to not be "goods" because contract is undesired, irrelevant
  - Domestic policies protected under validity exception
    - Human organs, drugs, weapons, cultural objects etc
Basic Concepts

Conformity of Goods

Understanding of "conformity" (Art 35)

- Domestic distinctions irrelevant
  - Express and implied warranties, irrelevant
  - Conditions and warranties, irrelevant
  - Vice apparent and vice caché, irrelevant
  - Aliud and peius, irrelevant
  - Gravity of non-conformity, irrelevant
- What is relevant?
  - Intention of parties (Art 35(1))
    - Definition of quality and quantity in contract
  - Subjective / objective standard (Art 35(2)(b), (c))
    - Particular purpose goods will be used for, sample
Basic Concepts

Conformity of Goods

- Objective standard (Art 35(2)(a))
  - Ordinary use of goods
- Adequate packaging (Art 35(2)(d))
- Legal defects (Art 41, infringement of intellectual or industrial property rights (Art 42 distinguished)
- Examination (Art 38) and Notice (Arts 39, 43)
  - Always applicable
    - Exceptions in Arts 40, 44
Basic Concepts

Remedies

System

- Breach of Contract Approach
  - No separate regime for different types of breach
    - Abandonment of Roman impossibility, delay, improper performance
  - No distinction as to condition or warranty
  - Concept of "acceptance" unknown to CISG
- No legal hierarchy of remedies
  - Every remedy is potentially available for every breach
    - Whether typical sales or additional duty is breached, irrelevant
    - However, avoidance and substitute delivery require fundamental breach
Basic Concepts

Remedies

- Strict liability
  - Limitation of damages by foreseeability rule (Art 74 sentence 2)
  - Exemption in case of impediment (Art 79)
  - Exemption in case of contribution to breach by obligee (Art 80)
Basic Concepts

Remedies

Remedies

- Damages (Arts 45(1)(b), 61(1)(b))
- Specific performance (Arts 46(1), 62)
  - Buyer's claim for repair by seller (Art 46(3))
    - Mirrored by seller's right to repair (Art 48(1))
  - Buyer's claim for substitute goods (Art 46(3))
  - Seller's claim for payment and taking of delivery (Art 62)
  - Court not bound to enter into judgment for specific performance, unless it would do so under its own law in relation to comparable contracts
- Avoidance of contract (Arts 49(1), 64(1))
- Reduction of the purchase price (Art 50)
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Third Step

Use in Practice

- Neutrality
- Reduction of Costs
- Legal Certainty
Use in Practice

Neutrality

No homecourt advantage

• Language and style do not prefer one party over the other
• Concepts of the CISG do not prefer one legal background over the other
• CISG demands to be interpreted in light of international environment
  • Domestic policies excluded
• CISG is accessible to both parties in the same way
Use in Practice

Reduction of Costs

Cost reduction in contract negotiations

• List of issues to be negotiated is drastically reduced
  • Seller's position: No avoidance, at least high threshold, restricted time periods for buyer to rely on breach
  • Buyer's position: Immediate avoidance, at least right to repair, long time periods to rely on breach
  • In many instances compromise reached after long and costly negotiations corresponds to CISG
    • Avoidance is not excluded but high threshold, seller can evade avoidance by buyer through cure
    • Buyer by default entitled to repair of goods, vested with generally longer periods for notification than under domestic law
Use in Practice

Reduction of Costs

Cost reduction in disputes

- Accessibility
  - Materials in English
    - Court decisions and arbitral awards
    - Scholarly writings
  - Translations not necessary
- Easy for arbitrators to work with CISG
- Need for expert witnesses reduced
Legal certainty in advising clients

- About 3'000 court decisions and (published) arbitral awards
- Abundant number of scholarly writings
- Typical issues have been decided by courts
  - Choice of law of a Contracting State leads to CISG
  - Price range is sufficient for a valid offer
  - In first contact, client should send standard terms to other party
  - Conflict of standard terms is resolved by knock-out-rule
  - In sale of durable goods, typically four weeks for notice of non-conformity
  - No rescission based on mistake parallel to CISG-remedies for non-conformity
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Conclusion

CISG as transnational rules for sales contracts

Has a broad range of application, both regarding the contract as well as to its own public international law mechanisms

Is drafted in simple and neutral language

Provides for a simple, one-path-regime of contract, breach and remedies

Provides default solutions that otherwise often are only achieved after negotiations

Is neutral grounds for parties

Reduces costs in negotiations and disputes