

WEBINAR

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HONG KONG BUSINESSES AND THE CISG: The 'Must Knows' from International Court Practice



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Hong Kong Businesses and the CISG: The ‘Must Knows’ from International Court Practice

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Overview

- I. Introductory remarks
- II. Current uncertainty in foreign commercial court practice regarding Hong Kong's status under the CISG
- III. Practically important features of the CISG
 1. Parties' right to exclude application of the CISG; drafting and interpretation of choice of law clauses
 2. Inclusion of standard terms by reference under the CISG
 3. Buyer's duty to inspect the goods and notify the seller, Arts. 38, 39 CISG
 4. High threshold for contract avoidance (termination)

Current uncertainty in foreign commercial court practice regarding Hong Kong's status under the CISG (1)

Art. 1 CISG

- (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
- (a) when the States are Contracting States; or
 - (b) when the rules of private international law lead to the application of the law of a Contracting State.
- (2) [...]

Current uncertainty in foreign commercial court practice regarding Hong Kong's status under the CISG (2)

Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)

State	Notes	Signature	Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)	Entry into force
Albania			13/05/2009(*)	01/06/2010
Argentina	(a)		19/07/1983(*)	01/01/1988

Chile	(a)	11/04/1980	07/02/1990	01/03/1991
China	(b)	30/09/1981	11/12/1986(†)	01/01/1988
Colombia			10/07/2001(*)	01/08/2002

(b) This State declared that it would not be bound by paragraph 1 (b) of article 1.

Interpretation of the CISG: Basics

Art. 7 CISG

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) [...]

- international character and uniform interpretation: (foreign) CISG case law as persuasive precedent
 - good faith only in interpretation of CISG (not as party duty)
- practical tools:
 - databases collecting CISG case law; e.g.:
 - Albert H. Kritzer database (<http://www.iicl.law.pace.edu/cisg/cisg>)
 - CISG-online (www.cisg-online.org)
 - CISG Advisory Council Opinions (www.cisgac.com)

Parties' right to exclude application of the CISG; drafting and interpretation of choice of law clauses

Art. 6 CISG

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

- Art. 6 CISG allows for exclusion (or modification) of the CISG by agreement between both parties, i.e.: exclusion by contract
 - unilateral exclusion insufficient
- but: exclusion clauses must be clearly drafted
 - must „evince a clear intent to opt out of the CISG“
 - unqualified choice of the law of a CISG Contracting State (e.g. „This contract is governed by Chinese law“) is not an exclusion of the CISG – very common drafting mistake

Asante Technologies, Inc. v. PMC-Sierra, Inc.

U.S. Dist. Ct. N.D. Cal., 30 July 2001, CISG-online 616

Although selection of a particular choice of law, such as «the California Commercial Code» or the «Uniform Commercial Code» *could* amount to implied exclusion of the CISG, the choice of law clauses at issue here do not evince a clear intent to opt out of the CISG. For example, Defendant's choice of applicable law adopts the law of British Columbia, and it is undisputed that the CISG *is* the law of British Columbia. ([...]) Furthermore, even Plaintiff's choice of applicable law generally adopts the «laws of» the State of California, and California is bound by the Supremacy Clause to the treaties of the United States. U.S. Const. art. VI, cl. 2 ([...]) Thus, under general California law, the CISG is applicable to contracts where the contracting parties are from different countries that have adopted the CISG.

In the absence of clear language indicating that both contracting parties intended to opt out of the CISG, and in view of Defendant's Terms and Conditions which would apply the CISG, the Court rejects Plaintiff's contention that the choice of law provisions preclude the applicability of the CISG.

Inclusion of standard terms by reference under the CISG

- uniform standards for inclusion emerging in international case law
 - leading case: „Machinery case“ of German Supreme Court
- essentially **two requirements**: party who wants to include its standard terms by reference into CISG contract must
 - refer to the standard terms in its offer
 - **make text** of standard terms **reasonably available to the other party** before the contract is formed
 - sufficient: sending e.g. by e-mail attachment; if terms had been sent in the past
 - insufficient: sending standard terms after contract formation (e.g. on invoices); mere reference to website; offer to make terms available upon request

«*Machinery case*»

German Supreme Court, 31 January 2001, CISG-online 617

It is unanimously required that the recipient of a contract offer that is supposed to be based on general terms and conditions have the possibility to become aware of them in a reasonable manner ([...]).

An effective inclusion of general terms and conditions thus first requires that the intention of the offeror that he wants to include his terms and conditions into the contract be apparent to the recipient of the offer. In addition, as the Court of Appeal correctly assumed, the CISG requires the user of general terms and conditions to transmit the text or make it available to the other party in another way...

Buyer's duty to inspect the goods after delivery, Art. 38 CISG

Art. 38 CISG

- (1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.
- (2) [...]

- duty of buyer to inspect the goods after delivery
 - purpose: to discover non-conformities in due course
 - triggers beginning of notification period, Art. 39(1) CISG
- detail of examination, time: depends on circumstances
 - notably: type of goods
 - examination may be postponed if goods are transported/redispached, Art. 38(2), (3) CISG

Buyer's duty to notify seller “within a reasonable time”, Art. 39(1) CISG (1)

Art. 39 CISG

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) [...]

- duty of buyer to notify seller of non-conformity of goods
 - purposes: speedy execution of commercial transactions; information (protection) of seller
- content of notice: „specifying the nature“ of non-conformity
 - vague statements insufficient
 - strict case law in some jurisdictions (Germany)

Buyer's duty to notify seller “within a reasonable time”, Art. 39(1) CISG (2)

- „within a reasonable time“:
 - reasonability depends on circumstances (notably type of goods)
 - some (very) strict older case law (Germany, Switzerland)
 - today: the „noble month“ as fall-back assumption
- very harsh consequences of missing (or late) notification:
 - Art. 39(1) CISG: „The buyer loses the right to rely on a lack of conformity of the goods if ...”
 - **buyer loses *all* his remedies (!)**
 - very advantageous for sellers – very risky for unaware buyers
 - exception (but rare): if reasonable excuse, Art. 44 CISG
- for buyers: contractual derogation (Art. 6 CISG) advisable

Two-year cut-off period, Art. 39(2) CISG

Art. 39 CISG

(1) [...]

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

- relevant in cases in which notification duty under Art. 39(1) CISG was never triggered, because buyer did not and could not discover the defect („hidden“ defects)
- due to Art. 39(2) CISG, buyer **loses all remedies two years after goods were handed over**
 - cut-off rule of Art. 39(2) CISG applies concurrently with limitation period (under domestic law)

High threshold for contract avoidance (termination) (1)

Art. 49 CISG [Buyer's right to avoid the contract]

(1) The buyer may declare the contract avoided:

- (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a **fundamental breach of contract**; or
- (b) in **case of non-delivery**, if the seller does not deliver the goods within the **additional period of time** fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

Art. 25 CISG [Definition of “fundamental breach of contract”]

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party **as substantially to deprive him** of what he is **entitled to expect under the contract**, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

High threshold for contract avoidance (termination) (2)

- under the CISG, avoidance of the contract is generally a remedy of last resort (*ultima ratio*)
 - background: costs and risks of post-avoidance retransportation of goods over long distances; goal to keep deal alive
- avoidance only in case of a **fundamental breach** of contract, Arts. 49(1)(a) and 25 CISG
 - fundamentality, Art. 25 CISG: expectation of non-breaching party „under the contract“ decisive
 - e.g. strict delivery dates; exact technical specifications
 - documentary sales: strict compliance
 - where contractual provision is missing – rule of thumb: if buyer is still able to use non-conforming goods supplied by seller, the breach will not be fundamental under the CISG

High threshold for contract avoidance (termination) (3)

- special rule for cases of **non-delivery**: avoidance **also** possible if ***Nachfrist*** has expired, Art. 49(1)(b) CISG
 - *Nachfrist* = additional period of time fixed by buyer, Art. 47

Exemption from obligation to pay damages in case of impediment beyond a party's control, Art. 79 CISG

Art. 79 CISG

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) – (4) [...]

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

- impediment beyond a party's control, Art. 79(1) CISG
 - only if unforeseeable; only if it cannot be reasonably overcome
- consequences: exemption from obligation to pay damages
 - but: no automatic discharge of contract (different from frustration)
 - (only) other party can declare contract avoided if fundamental breach



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Thank you for your attention.

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