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Celebrating the 40th Anniversary of the CISG:

CISG as a Tool for Global Trade

- Theory and Practice

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CISG Challenges of the 2020s

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Germany/Switzerland

Overview

- Introduction
- CISG and the digital world
- CISG and service obligations
- Conclusion

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Introduction

- Brief history of the CISG
- Many substantive problems not sufficiently discussed
- Common law – civil law divide
- Digital problems not yet existant
- CISG as a sales convention

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CISG and the Digital World

- Communication: e-commerce
- Smart contracts
- Sale of software
- Smart goods
- Sale of data

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E-commerce

- Several UNCITRAL texts
- 1996 Model Law on Electronic Commerce (adopted in 72 States, 151 jurisdictions)
- 2005 UN Convention on the Use of Electronic Communication in International Contracts (12 member States)
- Technology neutrality, non-discrimination, functional equivalence
- Supplement CISG – same results under CISG

E-commerce

- Art. 13 CISG ‘telegram’ and ‘telex’
- CISG Advisory Council opinion # 1 (2003): Electronic communications under the CISG
- ‘Writing’ including electronic communication retrievable in perceivable form
- Dispatching and reaching of offer/acceptance
- Website offers
- Incorporation of standard terms – CISG Advisory Council opinion #13 (2013)

Smart Contracts

- Automation of contracts
- ‘Digital, computable contracts where the performance and enforcement of contractual conditions occur automatically, without the need for human intervention’
- Predecessor: vending machine
- Intent of parties translated into programming code

Sale of Software

- Software as 'goods'

No definition of goods

Not restricted to 'tangible goods'

- Software transactions as 'sales'

Distinction standard v. customised software: not relevant – Art. 3(1) CISG

Art. 30 CISG: permanent/temporary right of use?

Licensing or sale? Form or substance?

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Sale of Smart Goods

- Many goods today contain software
- Sale of goods or software?
- Permanent right of use → CISG
- Liability of manufacturer for failure of software?
- Art. 79 CISG: no exemption in case of supplier

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Sale of Data

- Data can be subject matter of contract of sale
- Art. 3(1) CISG: 'buyer' provides raw data that are processed
- Delivery of data → CISG
- Conformity under Art. 35 CISG
- Conformity under Art. 41, 42 CISG
- Remedies

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CISG and Service Obligations

- CISG applicable to mixed contracts if delivery is preponderant part (Art. 3(2) CISG)
- Economic view of distinction between sales and services
- Rise in prevalence of service contracts in international trade

Why does the CISG exclude service contracts?

- Historical development *Rabel, Recht des Warenkaufs* (1936)
- ULIS 1964
- Vienna Conference 1980: Czech proposal rejected
- Jeopardising universal adoption
- Distinction deeply entrenched in domestic laws

Distributorship Agreements etc.

- Distributorship, dealership, agency, franchise contracts highly controversial under the CISG
- Distinguish framework contract v. individual supply orders
- Supply orders clearly covered by CISG
- Framework contract containing additional obligations

Distributorship Agreements etc.

- Majority view: framework contract not covered by CISG
- Exception: where framework contract contains all specificities for sale of goods
- Practical example: case of hardship
- Similar problems call for similar solutions

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Is the CISG suitable to govern service contracts?

- Mixed contracts ARE governed (Art. 3(2) CISG)
- Requirements to establish liability: non-performance, delay, non-conformity, third party intellectual property rights, examination and notice
- Remedies: specific performance, avoidance, damages, exemption, reduction of price, services as long-term contracts
- Framework contract: at least Art. 3(2) CISG
- Recommendation: opting in

Conclusion

- Again: recall history of CISG almost 100 years
- Adaptation to changing world
- Flexibility of the CISG
- Proactive comparative interpretation
- Otherwise domestic laws fill the gaps



**Thank you very much
for your attention!**

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