

Preparatory exam - the shower cabinets

S -> factory in Shanghai specialised in bathroom furnishing

Products are exported abroad

B operates several do-it-yourself stores in Italy - orders 200 "Monsoon" shower cabinets for 60,000 RMB using an electronic order form on S's website - confirmation of the transaction via mail + both agree that contract will be subject to Italian law.

Delivery -> goods delivered to B on 8th April 2022

Inspection on 5 of the 200 showers on 18th April 2022 -> destroying packages

B -> transparent plastic panelling does not comply with Italian law on breakage resistance - cannot be sold in Italy + sealant used is unusually porous and wears out.

B has to take care of many other matters - writes an email to S on 15th May 2022

B -> plastic panelling not permitted under Italian law + lower standard - resolution of the contract

S -> long time has passed + inspection and notice does not satisfy CISG requirements + Italian standards are different from Chinese ones

S demands B to è at under art. 53 CISG

## THE CISG

### The sphere of application of CISG - art. 1 CISG

Art. 1 - contracts must have international character - an essential criterion is the place of business of contracting parties in different states - art. 1(1) CISG.

**Direct application - art. 1(1)(a) CISG** -> it applies to contracts between parties whose places of business are in different contracting states - this is the most important way of applying CISG due to the high number of contracting states.

**Indirect application - art. 1(1)(b) CISG** -> in case PIL rules of the forum state leads to the application of law of a contracting state, the CISG is applicable.

E.g. the seller is resident in France - the buyer is resident in the UK (not party) - the buyer sues the seller in France for damages so France has jurisdiction - there is no direct application under art. 1(1)(a) CISG.

But art. 1(1)(b) provides for indirect application: the domestic jurisdiction, in this case art. 4(1)(a) EU Rome I Regulation establishes that "a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence" - in this case France, which is a party to the CISG -> therefore, CISG applies.

## The UNIDROIT principles

### PICC - sphere of application

These principles set forth general rules for international commercial contracts:

- (1) They shall be applied when the parties have agreed that their contract be governed by them.
- (2) They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.
- (3) They may be applied when the parties have not chosen any law to govern their contract.
- (4) They may be used to interpret or supplement international uniform law instruments.
- (5) They may be used to interpret or supplement domestic law.
- (6) They may serve as a model for national and international legislators.

## The legal scope of the CISG

The CISG does not regulate all the legal aspects that can be important in solving a sales law dispute.

Some aspects are expressly included -> art. 4(1) CISG regulates this issue defining the covered questions:

- 1) Formation of contracts
- 2) Rights and obligations of the seller and of the buyer arising from sales contract

It expressly excludes questions regarding -> validity of the contract, of its provision and of any usage (art. 4 s. 2), effects of the contract on ownership, death/personal injuries or consequential property damages.

How to fill all these external gaps of CISG?

- 1) The first solution would be the choice of law for areas not governed by the CISG: parties may decide to add a contractual provision such as: "outside the application of the CISG, the contractual relationship of the parties is governed by the non-uniform Swiss law (Swiss Law of Obligations".
  - Parties can decide to apply the PICC (UNIDROIT principles) - see later
- 2) the second solution: domestic law applicable via PIL rules - as mentioned in art. 7(2) CISG

## The sphere of application of the PICC (UNIDROIT principles)

These principles are to be applied when:

- The parties have agreed that their contract be governed by them
- The parties have agreed that their contract be governed by general principles of law, the lex Mercator is or the like.
- They may be applied when the parties have not chosen any law to govern their contract

Moreover they may be used to interpret/supplement international uniform law instruments, as well as to interpret/supplement domestic law. They may serve as a model for national and international legislations.

The application of PICC may be excluded by national law -> e.g., national consumer law.

The concept of "**commercial contract**" has been given a broad interpretation, nonetheless it **excludes**: buyer-to-consumer contracts (B2C) and consumer-to-consumer contracts (C2C) - national law provides for its exclusion most of the time.

## Application of PICC:

The **Preamble** of the PICC states that: **(1) they shall be applied when the parties have agreed that their contract be governed by them.**

**Litigation**: EU law (art. 3(1) Rome I Regulation) and art. 41 Chinese PIL state that parties can only choose "law" - not soft law like PICC (= "rules of law").

**Arbitration** - if depends on the arbitration rules: often parties can choose "rules of law" (e.g., art. 21(1) ICC Arbitration Rules) - PICC are rules of law.

In litigation -> it is very difficult to choose PICC as applicable regime

In arbitration -> often possible to choose PICC as applicable regime

**Preamble (3) they may be applied when the parties have not chosen any law to govern their contract:**

Litigation -> If no choice of law has been made - judges will choose under EU PIL / Chinese PIL applicable law - excluding the possibility of PICC application

Arbitration -> "apply the rules of law which it determines to be appropriate" - e.g., art. 21(1)2 ICC Arbitration Rules - PICC application is possible.

Subject areas covered by PICC but not by CISG:

Agency ; validity; third-party rights; set-off; assignment of rights; transfer of obligations, assignment of contracts, limitation.

### **The interpretation of CISG - art. 7(1) CISG**

According to its preamble, PICC may be used to interpret or supplement international uniformed law instruments  
Random stuff

### **Interpretation and gap-filling - art. 7(2) CISG**

Internal gaps - art. 7(2) CISG refers to (1) questions concerning matters governed by CISG and (2) which are non expressly settled.

E.g., disgorgement damages (art. 74 CISG) or interest rate (art. 78 CISG).

How to operate internal gap-filling -> look at the general principles

The settlement must be carried out in conformity with (1) general principles, (2) on which it is based.

But, what are general principles? And how to detect/extract them?

- General principles can be "extracted" from the CISG itself - **internal solution**
- We can refer to soft law, especially PICC - **external solution(?)**

Internal gap-filling -> general principles (internal solution)

Some general principles are:

- good faith -> art. 7(1) CISG(?) or art. 1.7 PICC
- Duty to cooperate -> numerous provisions as art. 38, 39 CISG
- Party autonomy -> art. 6 CISG or art. 1.1 CISG
- Principles of full compensation -> art. 74 CISG or art. 7.4.2 PICC
- Pacta sunt servanda -> art. 1.3 PICC, not explicitly mentioned in the CISG but is a general concept.
- Protection of reasonable reliance
- Favor contractus

### **Internal gap-filling -> general principles (external solution)**

The second possible gate on how PICC could influence the CISG is using the PICC as an interpretation instrument.

The two main questions arising regarding art. 7(2) CISG are:

- 1) Do PICC reflect the general principles of law at all?
- 2) Is the CISG (provision) based on it?

Possible examples of internal gap-filling via PICC - if we allow PICC application for internal gap-filling / external solution:

- Interest rate -> gap in 78 CISG -> art. 7.4.9(2) PICC
- Writing in confirmation/confirmation letter -> gap in the CISG contract formation -> look at art. 2.1.12 PICC
- Inclusion of standard contract terms in general (e.g., surprising terms or battle of forms -> gap in the CISG contract formation -> look at art. 2.1.20 PICC et seq.
- Prohibition of contradictory behaviour (venire contra factum proprium) / estoppel -> gap in the CISG -> look at art. 1.8 PICC

Battle of forms ->

### **Solution 2 (internal gap-filling) -> domestic law via PIL**

In absence of a general principle in the CISG itself + no referral possible to to PICC to fill the gap, or the court/arbitral tribunal disallow the applicability of PICC for gap-filling in general, domestic law shall be applied.

The gap shall be filled in conformity with domestic law (1) applicable by virtue of rules of PIL (of the forum) or (2) choice of law by the parties for non-CISG part.

E.g., interest rate mentioned in art. 78 CISG -> calculated according to the lex fori.

### **External gaps - not covered by art. 7(2) CISG:**

They refer to legal issues that do not concern matters governed by the CISG - e.g., art. 4(b) the effects of the contract on property in the goods sold and art. 5 liability for death or personal injury caused by the goods to any person.

The CISG does not explicitly tell how to fill these gaps.

The logical solution would be either to apply domestic law by virtue of the rules of PIL (of the forum) or the agreed law according to the choice of law made by the parties for non-CISG part. Similar to the solution foreseen by art. 7(2) CISG in case (lack of general principles).

Some examples of external gaps are:

- Set-off (disputed)
- Misinterpretation
- Validity of contracts in general (and its terms)
- Limitations of claims
- Transfer of property
- Tort
- Agency
- Capacity

Use of PICC to fill external gaps of CISG -> according to PICC this seems to be possible since "It may supplement international uniform law instruments".

But how in practice?

Opt-in to PICC by the parties besides CISG litigation? EU and Chinese PIL foresee only choice of law - it can be different in arbitration.

Can PICC, as soft law, replace applicable domestic law without choice of law by the parties (via PIL rules)? In litigation it is not possible since PIL determines the applicable law. In arbitration only if the arbitration rules allow the applicability of rules of laws (like PICC) besides the applicable CISG (e.g., in case of direct application).

How does it work finding the applicable domestic law by virtue of PIL? No choice of law has been made by the parties and the gap is either internal not reflecting any general principle or external.

- Art. 4(1) Rome I Regulation -> in case no choice of law has been made by parties, the law governing the contract shall be the law of the country where the seller has his habitual residence.
- Similarly, art. 41(2) Chinese PIL Code -> if no choice of law has been made, the law of the habitual residence of the party whose performance of the obligation is most characteristic of the contract.

### **Formation of contracts - standard contract terms**

Formation of contract rules apply also for the inclusion of standard contract terms - CISG does not contain a particular provision on the inclusion of standard contract terms (PICC art. 2.1.19 - 2.1.22) - according to the gap-filling rules of art. 7(2) and art. 8 CISG:

Normally, standard contracts terms must be:

- (1) In the language of the negotiations / offeree's native language
- (2) In a written form - the reference to a website is sufficient? In an email written?
- (3) Supplied before or with the conclusion of the contract
- (4) Non-surprising - surprising terms don't become part of the contract (in PICC it is expressly settled in art. 2.1.20 PICC)
- (5) Not conflicting with particularly negotiated terms - if there is a conflict, particular negotiated terms prevail (expressly settled in PICC art. 2.1.21).

### **Conformity of goods and third party rights:**

Conformity of goods is covered by art. 35 ad 36 CISG

- Express terms - art. 35(1) CISG
- Implied terms - art. 35(2) CISG
- Exclusion of liability - art. 35(3) CISG
- Relevant time for conformity - art. 36 CISG
- Exclusion of liability for nonconformity

Third party rights - art. 41, 42 CISG

Questions of conformity or nonconformity are offering the core issue of international sales law disputes - almost all national and international laws (e.g., CISG) foresee particular provisions on this issue - except for the PICC and PECL.

The two ways goods can be in nonconformity with the contract:

- (1) Goods have material defects
- (2) Goods have immaterial/legal defects - infringing the rights of third parties

Define a nonconformity - examination and notification duties - legal remedies - seller's liability may be excluded.

### **Material and immaterial defects of goods**

- Material defects of the good - are covered by art. 35 CISG
- Immaterial defects of the good - are covered by art. 41 and 42 CISG (third party rights)

**Art. 35** is the legislative model worldwide - it has been copied by the EU Consumer Sales Directive 1999/44/EC and German law - this article has two layers:

- **Art. 35(1) CISG** refers to **express terms** (subjective) which are explicitly part of the contract, referring to:
  - quantity, quality, description and packaging.
- **Art. 35(2) CISG** refers to **implied terms** (objective) which are based on a more logical and practical approach:
  - fit for its ordinary purpose, fit for a particular purpose, sample or model, packaged or contained in a customary manner or in a manner adequate to preserve and protect the goods.

Express terms supersede implied terms - but the border between the two may be blurry - moreover art. 8 CISG (interpretation of parties' conduct) and art. 9 (usages and practices) can play an important role for nonconformity questions.

The burden of proof to prove nonconformity is on the buyer.

**Quantity** -> the seller must deliver the correct quantity: too few or too much is a nonconformity, with the consequence of art. 38, 39 CISG - some flexibility clauses may be added, e.g., "more or less", "about", "not less than".

Variations can be normal in certain trades - art. 9 CISG

**Quality** -> the seller must deliver the goods in contractual quality - the term should be given a wide interpretation - not restricted to the physical characteristics of the good, but also to the origins of the good or different quality - fair trade standards.

**Delivery of "aliud"** -> e.g., salt instead of sugar - goods that are totally different from the contractual description.

Is salt defective sugar?

- If yes, according to art. 35 CISG -> art. 38 and 39 CISG apply: duty to examine and notify
- If no, art. 35 does not apply (no art. 38, 39): the seller did not fulfil the obligation to deliver the good under art. 30 CISG at all

**Standards** -> art. 35(2)(a) -> normally seller's standards apply, unless seller knows or ought to know the relevant standards in the buyer's country (regularly exporting there)

**Packaging** - art. 35(2)(d) -> applies if the contract is silent on this issue.

The usual manner or they manner that is adequate to preserve and protect goods - it depends on usages and case circumstances. According to art. 36 CISG, inadequate packaging, can pass the risk to Byers damage/loss of the good and trigger the seller's liability - art. 35(2)(d) is applicable to all damages even after passing the risk.

**Exclusion of liability** - art. 35(3) CISG -> the seller is not liable for any lack of conformity if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

"Could not have been unaware" - refers at least to gross negligence or more probably to "blind eye" recklessness.

There is no pre-contractual duty to examine the goods before passing the risk - the burden of proof is on the seller.

Relevant time for conformity - art. 36(1) CISG: goods must comply with the contract at the time the risk passes from the seller to the buyer.

This relevant moment is either dealt with: by contract, by trade usage, or alternatively by art. 66-70 CISG. It is often decided by Incoterms 2010.

### **Applicability of the CISG**

is the CISG applicable?

- Art. 1(1)(a) CISG defines the applicability of the CISG to the contract in question - refers to the territorial scope of application.
- Art. 2 -> is the buyer a consumer? See the other grounds for non applicability -> if not, the CISG applies.
- Art. 3(1) -> the goods are to be produced? Is the supply paid by labour/services? If not, the CISG applies.

**Opt-out to the CISG** -> is there an opt-out clause? Is it valid? The fact that a choice of forum has been made, does not entail that a valid opt-out is present.

E.g., mentioning the applicability of Italian law to the case does not opt-out from the applicability of the CISG since Italy is a contracting party to the convention.

**Is there a contract?** -> three constitutive elements of the contract: (a) offer + (b) acceptance + (c) intention to be legally bound + match offer-acceptance (mirror image rule) CONTINUE

### **The offer - art. 14(1) CISG**

Addressed to specific persons + sufficiently definite and indicates the intention of the offer or to be bound in case of acceptance - definite: indicates the good, quantity and price. E.g., advertisement, public display of goods and websites do not constitute an offer - they are instead an invitation to treat.

**Intention** - must be made clear in the offer phase

### **The acceptance of the offer - art. 18(1) CISG**

Acceptance takes shape of: statement or form of assent by the offeree (silence does not amount to acceptance)

**Art. 18(3)** -> acceptance by performing an action: dispatch of the good, payment of the price.

### **Termination of the contract**

When is termination of the contract allowed?

Art. 45(1)(a) - lists the articles providing for the termination of the contract:

**Art. 49(1)(a)** -> refers to a fundamental breach of contract by the seller or (b) after the additional period of time in case of non-delivery + **art. 80.**

Defective product -> is the defect a fundamental breach or a nonconformity?

See art. 25 CISG

**Art. 35 CISG - non-conformity of the good**

- **Art. 35(1)** -> **express terms** of the contract: on quality, quantity, description and packaging.
- **Art. 35(2)** -> **implied terms**: (a) good fit for the ordinary purpose, (b) fit for a particular purpose, (c) same as sample/model presented, (d) packaged in usual manner/adequate for preservation.

Express terms of contract of course supersede implied terms - the border between the two can be blurry.

The **burden of proof** for nonconformity -> the buyer has to prove that the good does not legally conform to what was expected.

**Examination** of the good -> the buyer has the duty to examine and to notify the seller alleged nonconformities - qualitative and quantitative elements must be taken into account.

**Quality** -> this term shall be given wide interpretation - not just limited to the physical characteristics of the good:

- E.g., the fact that the good comes from a other country/area than the one agreed.
- E.g., the good delivered are of similar or even higher quality than the one agreed upon.
- Fair trade standards -> all the physical characteristics are the same but the conditions under which the good is produced are different.

Issue -> which is the standard of obligation binding upon the seller? To reach a certain quality or to do his best?

**"Defective goods"** -> when a different good is delivered: e.g., salt instead of sugar.

Arts. 35, 38 and 39 CISG apply -> duty on the buyer to **examine** the good and to **inform** the seller within a reasonable period of time - otherwise the buyer loses all his rights.

In case of aliud pro alio sale those conditions do not apply -> remedies are still possible even if the buyer is not notifying the nonconformity of the good nor any breach of the contract.

**Implied terms** -> art. 35(2) CISG on the conformity of the good and its fitness for ordinarily purpose (public law standards).

E.g., the good could be practically used, it is not materially defective, but some safety standards (national/regional) apply - it cannot be sold or maybe even legally used in the buyer's own market because of the different safety standards between the market of the seller and the one of the buyer. E.g., Chinese toys sold in Europe need to comply with EU safety regulations, although they may comply with Chinese safety standards.

Which safety standard applies in case of no express mention in the contract?

Normally the **seller's standards apply** - unless the seller knows, or ought to have known the relevant standards in the buyer's country - that would be a case of nonconformity.

### **Buyer's duties:**

- **Art. 38 CISG - Examination** -> the good must be examined, or cause to be examined, within a period as short as it is practicable in that circumstances.
- **(3)** If the goods are **redirected/redispached** without a resonance opportunity for examination, examination may be deferred until after the goods have arrived at the new destination.

**The examination period** -> for non-perishable goods, the rule of thumb in civil law countries set a period of 14 days (longer in common law countries).

When has the buyer complied with the examination? The buyer must use an examination method which is suitable to the purpose of detecting nay defect of the goods, taking into consideration that some goods may be destroyed/damaged when opening the packaging.

- **Art. 39 CISG - Notification** -> the buyer loses the right to rely on lack of conformity if he does not give notice to the seller: (a) precisely specifying the lack of conformity, (b) within a reasonable period of time after he has discovered/ought to have discovered it - civil law countries set a period of 1 month (more for common law countries).
- 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.

The notification period -> the rule of thumb is 1 month and the quality of the notification must be as specific as for the seller to be capable of understating the nature of the alleged lack of conformity.

**Non-compliance -> Art. 35 CISG** establishes that, in case the buyer does not comply with the aforementioned requirements of examination and notification, he loses all remedies arising from non-conformity.

Some exceptions are provided by arts. 40-44 CISG - usually not given:

- Seller knew or should have known of lack of conformity and did not disclose this to buyer
- Reasonable excuse, compromise character

### **Termination of the contract VS "defective" good**

Termination of the contract is allowed under art. 45(1)(a) - which refers to art. 49(1)(a) and art. 81 CISG.

Art. 49(1) CISG -> the buyer may declare the contract avoided if:

- (a) if the failure by the seller amounts to a fundamental breach of contract as defined by art. 25 CISG: the breach is fundamental if it results in depriving the other party of what he is entered to expect under the contract.
- (b) in case of non-delivery after the additional period of time fixed by the buyer

Art. 81 CISG - effects of avoidance

- (1) avoidance of the contract releases both parties from their obligations
- (2) restitution, if so established by the contract.

Non-conformity - legal remedies

## Example and how to solve problem questions

Swiss seller A and Chinese buyer B want to conclude a sales contract (goods: leather). A sends an offer to B saying that his standard contract terms apply (which he attaches to the offer). His standard contract terms contain the following provision: „The goods can differ in colour. Colour differences are no non-conformities." B (who only reads A's offer but not his standard contract terms) accepts A's offer but indicates that only his standard contract terms apply (which he attaches to the acceptance).

Provision 3 of B's standard contract terms reads as follows: „The goods must have exactly the quality laid down in the contract. Every deviation from it is a nonconformity." A (who only reads the acceptance but not B's standard contract terms) delivers the leather to B but the colour is different from what has been laid down in the contract. B claims damages. With success?

Swiss seller A and Chinese buyer B - sales contract on leather

Swiss standard contract terms -> good can differ in colour - not a non-conformity.

Chinese standard contract terms -> the good must have exactly the quality laid down in the contract - deviation = non-conformity

Is there a contract? Yes

Is the CISG applicable?

According to art. 1 it applies

The contract is effective according to art. 14 and ff. on formation of contract

Are the standard contract terms surprising?

- If yes, they are not part of the contract
- In this case they are not really surprising

B v A claiming damages under arts. 45(1) and 74 ff. CISG

The main issues here is the battle of forms:

- In case interpreted as an external gap -> the problem is not governed by the CISG -> resort to PIL which will indicate the domestic law to be applied
- In case interpreted as an internal gap under art. 7(2) CISG - the problem would be governed by the CISG itself.
- Is there a contract? Yes - two parties and defined agreement for the exchange of good for money accepted by the parties
- Is it an international sales contract? Yes, the parties's residence are in two different countries
- Is the good tangible and covered by the CISG? Yes
- Exceptions or opt-out? Are they valid?
- Is the CISG applicable? Yes, state are parties -> direct application
- Formation of contract - art. 14
  - Intention to be bound has been shown by both parties
  - A made an offer - B replies to the offer - A accepts the offer by conduct sending the products (Art. 18 CISG)
  - The contract is established
- Are the standard contract terms surprising in this case?
  - If yes -> not part of the contract
  - In this case not surprising -> part of the contract
- Battle of forms -> which of the two contracts prevails?
  - Is this an external gap? -> PIL -> domestic law (rarely)
  - Is this an external gap? Art. 7(2) CISG -> general principles and gap-filling under 2.1.22 PICC (knock out rule)

Remedies - specific performance - price reduction, replacement of the good -> does not destroy

Destroy the claim of the seller of the purchase price -> termination of contract - right of the buyer to avoid the contract

Others obligations of the seller

Art. 30

Art. 6

Delivery - art. 31-33 CISG

Time and place of delivery are of fundamental relevance

When the seller has complied with the duties at agreed time and place - he is no longer responsible for the goods (pass of risk)

Practice terms of delivery are often regulated by incoterms

Art. 33 - delivery of goods

(a) Determinable or fixed date

(b) Within a certain of time

(c) In reasonable time -> what factors affect reasonableness: purpose of the good

Early delivery - delivered before the time: buyer can refuse or accept

Obligation of the seller to hand over documents - if the parties have not agreed on incoterms, the CISG applies - art. 34 - usages and practices under art. 9

Depends on the contract first - then practices and usages (art. 9) and principle of good faith.

Common documents:

Bill of lading, consignment bills, warrant, export licence...

Art. 30 - transfer of property

Art. 4 - the CISG does not regulate transfer of property -> external gap -> refer to domestic law via PIL.

Incoterms - international commercial terms

11 terms of shipment and delivery by the International Chamber of Commerce

Parties must have opted in to the Incoterms

E-category ->

F-category ->

C-category ->

D-terms ->