

Presentation - 2/3 people group

International and European Sales Law

FIRST LESSON - 2 March 2023

The two main legal sources for the international sales of goods are the CISG and the PICC:

- The first one is the UN Convention for the International Sale of Goods (1980 CISG) - Also known as the Vienna Sales Convention or UN-sales law - The UN convention has wide application - negotiation, terms, performance/non-performance... Some aspects are not covered - such as property law - e.g., transfer of ownership - difficult to include since properties laws are different depending on the domestic/regional legal system.
- The second one refers to the Unidroit principles for international commercial contracts -> provide the parties a reference legal order - since the previous does not cover all the legal questions - we can refer to the Unidroit - the updated version is from 2016 (UPICC)

Other harmonisation projected to be discussed:

- Lando Principles or Principles of European Contract Law (2002, PECL) - academic principles of soft law developed by European scholars - useful to find common basis to communicate between different legal systems.
- The common European sales law - the most ambitious project at European level - create a common European sales law in 2011 but unsuccessful since some countries affirmed that the EU had no competence to harmonise to this extent. Then a few years later the Commission came up with the idea of harmonising law because of digitalisation and sale of digital devices and services.

All MSs' courts (part of the convention) interpret the CISG - nonetheless one of the main issues is the problem of fragmentation and different interpretation of the Convention.

Book

Huber Mullis - the CISG: a new textbook for students and practitioners

SECOND LESSON - 3 march 2023

Case: a Chinese company named Asaca is a producer of baby toys - it is selling its goods to an Italian supermarket.

In this case, which is the applicable law? The Jurisdiction? Is litigation possible?

National v international law v soft law (choice of law).

What if the place of delivery, the timing, the liability for accidents and so on is not included in the contract?

To solve all these issues we have to look at contract law.

While drafting the contract, the parties can negotiate and determine the applicable law - choice of law (forum) determining which national law applies to a contract.

In case of conflict can choose between litigation in court or alternative dispute resolution mechanisms (ADRM) - eBay provides for customers an alternative one (digitalised) also PayPal, airbnb...

Choice of jurisdiction - whether a party can choose or not and how

Transportation - costs and risks

Modalities of transportation - land, sea, air, mixed carriage.

Inclusion of Incoterms - parties usually agree on certain incoterms

Financial and trade

Especially in international payment methods

What are the risks for exporter and importer? Change of exchange rate?

National customs and taxes

Compliance with national (regional) product safety regulations - may not be explicitly regulated in the contract, but in case of litigation the court would have to decide (better to include standards of the good purchased) - which standard applies for non-conformity?

Enforceability of international judgments or arbitral awards

Soft factors - language used, cultural negotiations and/or value of contract

Risks in international transactions - especially in sales of goods

At least 5 different risks:

- Different quality or quantity of the goods
- Non conformity due to diverging national product safety standards
- Transfer of property regimes may differ

Risks in carriage:

- Delayed delivery of goods
- Loss of carriage
- Carrier's liability

Risks in insurance:

- Insurable interest
- Risks covered but who is insuring what?

Risks in payment

- Non-payment
- Part payment
- Late payment
- Problems with bank and not the debtors as such

Other legal risks

Continue

Globalisation and international trade

International business needs v legal reality

International or globalised trade v national or localised law

Unlike international trade which

Continue

Every international trade transaction is still rooted in domestic law of a specific country because of the law governing the contract

Via conflict of laws (private international law)

In the EU - Rome Regulation (except Denmark)

The Hague convention 2005 (?)

These domestic laws can differ significantly - common law v civil law

- But differences also within civil law jurisdictions
- Islamic law or other law traditions

Consequences due to legal diversity of trade law:

- Legal uncertainty (which aw will finally apply? / What does it say?)
- Language barriers increasing legal uncertainty
- High transaction costs for finding "best law" responses (best solution)

Solutions

- Harmonisation international commercial law -> e.g., Roman Law ius gentium and lex mercatoria in the middle age.
- Common Law (not meant as British legal system) - disappeared with the establishment of national CONTINUE

- No completely harmonised ICL but some efforts have been made especially referring to international sales law.
- In the last four decades there were big efforts to internationalise contract law by diverse international institutions with the aim of creating a simple and flexible model of set rules for international contractual transactions:
- Ultimate aim: increase legal certainty, decrease CONTINUE

Why is harmonisation of international commercial law so difficult?

Different legal traditions  
Different legal language  
Different legal culture  
Political obstacles  
Religious beliefs  
CONTINUE

Who are the main players for unification and a harmonisation of ICL/ISL?

At regional level - the EU  
draft: Common European Sales Law - failed (issues of competence)  
- Consumer sales directive (1999 + 2019 new version)

UNCITRAL

- core legal body of the of the UN system of ICL field  
CONTINUE

Exam

CISG - discuss a case - only international contract and not European sales

Lesson 9 March 2023

Why is harmonisation of international commercial law so difficult?

In B2B contracts it is different - not so much harmonisation since common rules are established by the parties.

ICL players

At regional level one of the most powerful harmonising instrument was proposed by the EU Commission - Commission on European Sales Law (CESL, 2011 withdrawn in 2015)  
But implemented the Consumer Sales Directive (1999 + 2019)

The UNCITRAL (the commission at UN level - the UN core body for international commercial law in Vienna) - modernisation and harmonisation of international commercial law.  
6 groups -> ...

UNCITRAL activities:

- 1 International Commercial Arbitration
  - The New York Convention 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards
  - Model Law on International Commercial Arbitration

- 2 international Sale of Goods
  - Vienna Convention 1980

- 3 international Transport of Goods

Electronic Commerce  
- UNCITRAL Model Law on Electronic Commerce (1996)

Convention is hard law, while model law is soft law

UNIDROIT  
CONTINUE

Example

Italian judge has to decide an important international trade law dispute (litigation) - what are the things the judge has to take into account

1 Which procedural law to apply - the procedural law of the forum (lex forii) - Italian procedural law - it also determines which is the language of the procedure or jury system.

2 jurisdiction - the Italian judge has to question whether he can decide over the case? Each state has within its own territory unlimited jurisdiction (exceptions for immunity of diplomats, foreign states and IOs)

3 do I have to decide this case? (Must)

Must the case be decided by a court of a particular state?

National legislators decide in principle autonomously about own jurisdiction

In general, close connection of case to own territory

Continue

Which sources concerning international jurisdiction?

Conventions - Brussels I Recast Regulation (EU)

Subsidiary -> national legislation

International procedural law -> plaintiff and defendant

Basic rule - the domicile of the defendant

Art. 4 general rule

Special jurisdiction

Art. 7 - place of performance

Tort matters -> the place where the harmful event occurred

Exclusive jurisdiction on immovable property - where the property is located

Art. 25

Art. 29 - "first come, first served" -

5 - security for costs of law suit

Service of process abroad - delivery of writ, summons, or other legal documents.

The Hague Service Convention 1965

6 - Which substantial law applies?

Public international law rules -

Conflict of laws - which law applies to a certain situation

Private international law (same as conflict of laws)

Why should foreign law apply in national courts?

A friendly act but not only ...

CONTINUE

Aims of conflict of laws:

Not finding the qualitative best law, but rather finding the best territorial law  
General rule: closest connection-test  
Legal certainty -> predictable results is the most relevant point  
Every court should come to the same applicable law (in theory)  
How to get uniform interpretation?

Exceptions from application of foreign law in all Conflict of Laws foreseen -> result that would conflict with ordre public (public policy) of a state -> e.g. punitive damages awarded under US law: compensation + additional amount (e.g. triple damages - date of 1000x3) - compensation in Europe has a different purpose/approach.

10 March 2023

Which law to apply in order to determine the applicable law?  
Look whether we have international substantive uniform law: especially conventions, such as the CISG and also conventions regarding transportation.

Also uniform / regional conflict of laws

- In Europe -> Rome I and Rome II Regulation (contractual in Rome I- extra contractual such as tort law, unjust enrichment)
- culpa in contraendo: pre-contractual duties (Rome I or II?)
- Conventions -> The Hague Convention in particular

If those are absent, we use national law

2 scenario - application of foreign law

Judges usually don't know foreign law - especially Common Law and Civil Law countries - legal experts are asked to help to interpret the law.

In Germany and in most civil law countries foreign law is treated as "law" - "the judge has to know the law" - judge not obliged to know the facts of the case, but just what is presented to the knowledge of the court (iura novit curia)

Common law - foreign law treated as "fact" - parties have to prove content of foreign law (e.g., parties have to point out relevant precedents) - assumption that foreign law is the same as common law.

3 ways how judges determine the content of foreign law  
CONTINUE

Advocate

Most of the time more than one court have jurisdiction  
Domicile

Prescription period

Torpedo - negative declaratory action in Italy

A vs B - B vs A ->

Are my evidences permitted under each national evidence law? - e.g., problems with the American Statute of Frauds: exclusion of proof by witnesses for particular kind of contracts (danger of fraud is high).

Would my witnesses travel to another country?

Different costs of law suits -> in the USA much higher

How to minimise financial risks - contingency fees

Enforceability of judgments

16 May 2023

Volkswagen - pollution issue - how can a consumer claim that the producer is liable? The contract is only between the consumer and the seller - under contract law you have more rights than under tort law.

Board of directors knew about the manipulation - special action in tort law arising from malice.

Issues to consider

- 1) inclusion of a jurisdiction clause (and if yes in which court)?
- 2) Arbitration or mediation clause (ADR)
- 3) Choice of law clause (might be restrictions)

CISG

- 1928 - Ernst Rabel submitted his idea to the International Institute for the Unification of Private Law (UNIDROIT)
- 1935 first draft
- 1939 second draft - not developed because of WWII
- 1964 The Hague Convention I + II - only 9 ms initially
- The UNCITRAL was appointed to draft a new convention
- 1980 the UNCITRAL passed the CISG also called the Vienna Sales Convention
- 1988 - entered into force with 6 official languages

The CISG - focussed strictly on international business transaction (business to business relation and not business to consumer for example)

- no consumer welfarism
- Pure market individualism - party is autonomous in deciding how to draft the contract - what's into the CISG can be deviated (rights and obligations can be shaped differently)

By 2022 - 95 states - except UK and Ireland all industrialised countries are members.

Covers about 80/90% of the worldwide trade.

CISG - 4 parts:

- 1) sphere of application and general provisions - art. 1-13
- 2) Formation of the contract - 14-24
- 3) Substantive rules - 25-88 for sales contract itself
- 4) Final provision - 89-101

Art. 66-70 - passing of a risk (thunderstorm destroys the good - but seller still obliged to comply with the delivery)

LESSON 17 May 2023

PICC - the UNIDROIT principles - latest version in 2016

Restatement of the law - law commission in the US

The preamble

Aims of the UNIDROIT principles:

- 1) Are not mandatory law (opposed to the CISG) - shall apply when parties have to agree so
- 2) May be applied when the parties have agreed that their contract be governed by general principles of law or lex mercatoria (customs)
- 3) May be applied when the parties have not chosen any law to govern their contract
- 4) May be used to interpret or supplement international uniform law principles - at the time of the drafting the CISG was already in force - in case of incompleteness, to fill the gap, resort to the UNIDROIT.
- 5) May be used to interpret and supplement domestic law
- 6) May serve as a model for national and international legislators

The structure of the UNIDROIT principles

Where does the CISG apply?

Art. 1 of the CISG - para 1 - CISG regulates sales contracts without expressly defining them - there no legal definition within the CISG

So what's a sales contract? A delivery of goods and money

Art. 30 CISG - The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

Sales contracts are:

- Contracts proving for delivery directly from supplier to buyer's customer ("third-party-deal")
- Contracts for delivery by instalment ("apportioned contracts")

Sales contracts are not:

- Contracts for the exchange of products ("barter contracts")
- Hire-purchase contracts
- Framework agreements like franchise contracts
- Service contract - art. 3(2) CISG
- Labour contracts - art. CISG

Other related contracts (art. 3 CISG)

Contracts for supply of goods to be manufactured / produced (art. 3(1) CISG):

- Rule: governed by CISG
- Exception if the party who orders the good supplies substantial part of materials
- Issues - what does it mean "substantial part"? Unclear whether based on the material or the value and on which percentage: majority over 50% of the material or value provided by the commissioner.

Contracts for supply of labour / other services (art. 3(2) CISG)

- Rule: CISG is not applicable if
- Respondent part of the of seller's obligation consists in supply of labour or other services
- Reasoning: labour and service contracts should not be governed by CISG

CONTINUE

Definition of "Goods" (art. 1(1) CISG) - no definition of goods-> in English terminology we refer to moveable and tangible goods: plants, animals, works of art, liquid gases.

Not goods: sale of rights (e.g., licenses) + contracts for the sale of immovable property (M&A) + know-how (e.g., patents)

Issue - sales of software (e.g., apps, downloads) - general software (right to use it) or specific one sold to a company.

Right to use is immaterial vs physical acquisition

So generally the CISG is not applicable - is it changing?

Sphere of application - internationality of the Sales Contracts (art. 1 CISG)

Art. 1 - the contract must have international character

Essential criterion: place of business of contracting parties in different states (art. 1(1) CISG):

(a) when the States are Contracting States -

Or indirect application

(b) when the rules of private international law lead to the application of the law of a Contracting State - France has ratified the CISG, England not -> can we apply the CISG? The seller is resident in France, the buyer resident in England - buyer sees the seller in France for damages (France has jurisdiction)

According to art. 1(1)(a) CISG - no direct application

But art. 1(1)(b) - Rome I regulation would apply - art. 4(1)(a) the country where the seller has his habitual residence - in this case it leads for the applicability of French law and therefore to the applicability of CISG.

Nationality of the parties is without relevance (art. 1(3) CISG)

May a court of a non-member state (e.g., UK court) apply the CISG under art. 1 - not via the CISG but through the choice of forum ??? CONTINUE

Opting-out of art. 1(1)(b) CISG for member states is possible (reservation) - according to art 95 CISG

Important reservations: china, Czech Republic, Singapore, Slovakia, and USA

Further subjective requirement for the application of CISG: the place of the business must be apparent to the parties (stated in the contract) - art. 1(2) CISG.

The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

The most import exception are international consumer contracts (art. 2(a) CISG - b2c and c2c contracts - the buyer has generally more rights since it is not in an advantaged position (vulnerable) against companies.

Other exceptions:

Sales by auction - hard to realise if it is an international contract and a b2b contract.

Internet auctions (e.g. eBay) - no real auctions

Sales of stocks, shares, investment securities, negotiable instruments or money

Sales of ships, vessels, hovercraft or aircraft

Sales of electricity

Last slide - see photo

LESSON 23 March 2023

Servicification of contracts

Internationalist if sales contract (art. 1 CISG)

Art. 1 CISG: contract must have international character

Essential criterion

Seller is italian - buyer is in England

No direct application is possible since the UK is not part of the Vienna convention (italy is) - indirectly? -> what is the applicable law according to PIL? The Rome I regulation is applicable also under UK law - the seller is in italy so Italian law applies + italy is part of the Vienna sales convention - so CISG apply. REVIEW

Some countries has made reservations to some articles

Consumers - why law applies? Not the CISG - one protection instrument are replacement, repair, termination of contract... in case the good does not conform to the one expected.

Exclude liability - increase the price, use an insurance, try to include in the contract the defects of the used car - issue of conformity of the contract can be bypassed in this way.

The non-conformity must be presenter at the time of the delivery - when it is already visible there's no problem to prove it.

In some times it is difficult to prove - the burden of prove is reversed: in the first 6 months it is presumed that the non conformity was present at the time of the delivery, after one year reversed to the consumer. (Exception for perishable goods).

Art. 2(a) -> CISG does not apply to international consumer contracts - if the buyer is a company, but then is going to use the good for personal use (as a consumer) but the seller could have not known, the CISG still applies.

CISG is automatically applicable - without any conscious expression of will by the parties, even if the parties do not know the CISG at all  
Art. 6 CISG allows parties, according to the principle of party autonomy, to exclude application (so-called opt-out) - exclusion can be implied or expressed - issue on this Majority of case law - even an express choice of law of a specific domestic law of a contracting state (e.g., Chinese law only) does not include a valid (implied) exclusion of CISG.  
Very often legal practitioners underestimate the high threshold of CISG exclusion  
SEE SLIDES

How often is the CISG - less and less

If the legal advisor excludes CISG (and make domestic law applicable) without a good legal reasoning:

- Liability case for legal advisor (at least in case of exporting companies) - if the CISG applies, party autonomy has high value - it is also more exporter-friendly than domestic law.

Art. 6 - parties are generally also free to vary effect of any provision of CISG (party autonomy)

Parties can also generally agree on CISG application outside its stated sphere of application (so-called opt-in)

- Art. 3(1) 1 EU Rome I Regulation: a contract shall be governed by the law chosen by the parties
- Art. 41 Chinese PIL: the parties may by agreement choose the law applicable to their contract
- Choose also the language if the CISG version

Some limits to opt-in:

- You cannot circumvent mandatory national law - e.g., consumer protection law of public policy aspects
- National PIL rules are regularly disallowing this technique - art. 6 Rome I Reg: (consumer=his residence if a passive consumer - online sales)

Checklist

- If it is a sales contract - art. 1 and 3
- Does it involve a good? - art. 1
- The contract must be international - art. 1
- Check exceptions - art. 2
- Check complete or partial opt-out of CISG - art. 6

The legal scope of CISG

The CISG does not regulate all legal aspects that can be important in solving a sales law dispute - it has gaps

Expressly included - art. 4 CISG

Expressly excluded from the CISG are - validity of the contract / of its provisions / of any usage (art. 4 s. 2)

Such as for illegal goods, coercion, if the parties have no legal power, unfairness, immorality

Doctrine of mistake - possible to avoid a contract liability (buyer)

Seller's mistake -> e.g., lower quality of the good (not accepted)

SLIDES

Expressly excluded:

Effect that contract has on ownership in goods sold (art. 4 s.2 lit. b CISG - property law excluded)

Rationale? Seller's liability for death or personal injury caused by goods to any person (art. 5

CISG) - damages for death or personal injury are excluded

Property damages - are included (consequential property damage) - art. 64 CISG

Implicitly excluded - art. 4(2) CISG "in particular" so some are not listed:

- Procedural questions (lex fori)
- Prescription / limitation
- Public law issues
- Set-off (disputed)
- Assignment of claims

- Capacity (minors, agents...)
  - Misrepresentation / pre-contractual liability - e.g. health insurance contract
- SLIDE

Reimbursement of legal costs (art. 4 CISG v 74 CISG)

LESSON 24 March 2023

No class next week

Read paper on moodle

How to fill the gaps (external) of the CISG?

1 - choice of law governing the CISG

CONT

The UNIDROIT principles - may be used as gap-filling

PICC - UNIDROIT principles

They shall be applied when the parties have agreed that their contract be governed by them - not that simple:

E.g., for litigation between the EU and China art. 3(1) Rome I Reg and art. 41 Chinese PIL - parties can only choose law - cannot choose soft law (such as PICC) - "rules of law"

In case of arbitration, it depends on arbitration rules - often parties can choose "rules of law" (e.g. art. 21(1) contract arbitration rules).

Preamble n° 2

PICC may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like

Lesson 13 April 2023

The issue of gap-filling - art. 7(2) CISG -

As a first step we have to distinguish interpretation and gap-filling

Then distinguish between internal and external gaps

Internal - something that is not expressly regulated by the CISG, but still governed by it

External - things that are not governed by the CISG at all (e.g. standard contract terms - pre formulated general terms and conditions agreed by the parties)

Surprising standard contract terms - is governed by the CISG (not questioning its validity)

Internal gap - not expressly settled by CISG but still governed by it - art. 7(2) applies

Disgorgement damages -> art. 74 CISG - even not expressly mentioned

Interest rate and its calculation -> art. 78 CISG

How to solve internal gaps

1) refer to general principles on which the CISG is based

What are these general principles and how do we detect and extract them from precise rules?

Extract them from the CISG or refer to soft law (UNIDROIT principles)

General principles:

- e.g. good faith - deriving from art. 7(1) CISG
- duty to cooperate

**1. Ettore Calvo**

13 April 2023 at 15:16:56

(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.  
 (2) In determining whether a term is of such a character regard shall be had to its content, language and presentation.

**2. Ettore Calvo**

13 April 2023 at 15:16:14

In case of conflict between a standard term and a term which is not a standard term the latter prevails.

- Art. 38 and art. 39 CISG - concerning non-conformity of the good sold by the seller to the buyer
- Under art 38 - obligation 1) buyer has to examine the good and; obligation 2) in case the examination finds out the minor quality of the good, the buyer has to notify the seller the inefficiency of the good - in case the buyer does not examine nor notify the defect, he loses his right.

Party autonomy

- derives mainly from art. 6 CISG
- PICC: art. 1.1. PICC

Principle of full compensation:

- derives from art. 74 CISG
- PICC art. 7.4.2

Slides

Principle of reasonable reliance

- derives from numerous provisions - e.g. art. 35 CISG
- Art 35(1) - refers to explicit statements in the contract
- Art. 35(2) - if you have not excellently agreed: standard general quality of the good used for its purpose.

Favor contractus - favour the existing contract to termination - art. 25 CISG: the breach of contract must be a "fundamental breach of contract"

Second option as gap-filling -> use the PICC principles (unidroit) - but two conditions set by art. 7(2) CISG ????

Slides

Interest rate - see slides

Writing in confirmation/confirmation letter - one party usually sends a confirmation letter, if the other party does not explicitly say something, this shall not be considered part of the contract - internal gap in the CISG since it is not explicitly mentioned - unidroit principles have a provision on that - see art. 2.1.12 PICC: If a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract contains additional or different terms, such terms become part of the contract, unless they materially alter the contract or the recipient, without undue delay, objects to the discrepancy.

Inclusion of standard contract terms - see previous

1 2

Battle of forms - contraction between contracts terms of the seller and the buyer - not explicitly regulated by the CISG, but still an inertia gap, see art. 1.2.20 and 21 PICC

Solution 2 (internal gap-filling) -&gt; domestic law via PIL

It comes into play only in the absence of a general principle - neither general principle in CISG itself nor referral to PICC possible since no relevant PICC provisions

SLIDES

External gaps - not governed by art. 7(2) CISG:

Legal issues concerning the validity of the contract not affect of the contract on property law, nor liability of the seller for death nor personal injuries  
 See art. 4 s. 2 CISG and art. 5 CISG

How to fill them? Usually fill with domestic law - rules of the forum or the agreed national law for parties not covered by the CISG in the contract.

Use of PICC to fill external gaps of CISG?

According to the PICC preamble this seems to be possible

Question: How does this work in practice?

The unidroit principles are not "law" - so some domestic systems do not enable its application

Recovery of legal fees (especially attorney's fees)

- background of the problem - the American rules (no loser pays it all)

- Conflict art. 4 CISG / American rule v art. 74 CISG

Is it an internal or an external gap?

If we think it is a matter of procedural law - external gap - the procedural law is the lex fori

Slides

Lesson 14 April 2023

Formation of contract mechanism

Art. 14 - 24 CISG

What do we need in order to have a bidding contract?

- 1) offer
- 2) Acceptance
- 3) Intention to be legally bound
- 4) "Match" offer-acceptance (=mirror image rule)

The CISG does not require any specific form of contract - may be concluded orally

Difference between communication and consideration

Problem of offer - acceptance mechanism

- hard to identify an offer and an acceptance

- Hard to determine the exact time and place of contract conclusion, e.g. long term negotiations or electronic data interchange and online-purchases (e-commerce).

Issue of mutual legitimate expectations - do they have to be taken into account before the conclusion of the contract? E.g. advertisement showing concrete description of the product, which then turns to be different from your expectation.

Are these expectations part of the contract?

No mention in the CISG

Under European consumer law - there's a provision on reasonable expectations

Art. 14(1) s. 2 CISG

When is proposal sufficiently definite if it indicates:

(a) a good

(b) Expressly or implicitly fixes the quantity of the good or makes a provision for determining the quantity of the good to be delivered

Price needs to be sufficiently definite (fixed and determined at the time the contract has to be concluded) according to art. 14 CISG, while art. 55 CISG establishes that the contract may be concluded even if the price is not yet fixed by the parties - there must be some mechanisms to then determine the price.

Offers to the public?

In art. 14 - proposal to several specific persons we do have a valid offer

Offer made to unspecified persons - it is just an invitation to treat (invitatio ad offerendum) - art. 14(2) CISG.

E.g., shop window with displayed products

- offer must reach the offeree to be effective (arts. 15(1) CISG, ART. 2.1.3(1) PICC

- Problem: when do statements (offer, acceptance (art. 18(2)1 CISG, other declaration of intention) "reach" other party?
- revocation - art 16(1) CISG SEE SLIDES

Exception - revocation of an offer is not possible when an offer indicates that it is irrevocable (e.g. by stating a fixed time for acceptance) or if it was SLIDES

Slides

Acceptance - art. 18 CISG: A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance. Silence alone does not lead to conclusion of contract (art. 18(1) s. 2 CISG - but still remember art. 9 CISG on usage and practice that may overrule the previous one.

Acceptance by conduct - art. 18(3)

Exception - art. 19(2), (3) CISG - if acceptance does not materially alter terms of offer = contract concluded in accordance with modified acceptance  
Exception to mirror-image rule  
However SLIDES

Late acceptance - art. 21 CISG  
SLIDES

Second exception in art. 21(2) CISG

Open question - art. 24 CISG

Claim for damages - art. 45(1)(b), 74 ff. CISG

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 pay under art. 53 CISG

Is the CISG applicable?

- Yes it is applicable

Territorial scope of application - art. 1(1)(a) CISG - direct application

Art. 2 - buyer is not a consumer (wants to resell the good)

art. 3(1) - does the good need to be still produced

Art. 6 - opt out from CISG - not valid since it is part of German law - just mentioning Italian/German law does not exclude the application of the CISG

The website is not an offer - it is an invitation to treat art. 14(2) - the offer is done by B using electronic order form (art. 14(1)(1) - acceptance of S with email (art. 18(1) CISG).

Termination of contract by B - possible according to art. 45(1)(a) - refers to art. 49(1)(a) - art. 81 avoidance of the contract releases both parties from their obligations under the contract.

There must be an avoidance declaration

Breach of contract? - define which are the obligations of the seller? Which of these breached?

Contractual obligation - delivery of goods conforming with the contract (art. 30, art. 35(1), (2) CISG)

the goods do not conform with the German statutory requirements relating to the breaches resistance, is this nonconformity under art. 35(2)(a) CISG?

Defective sealant - case of nonconformity

Art. 49 - right of avoidance: not just a breach, but a fundamental breach of contract

Is this also a fundamental breach under art. 25 CISG - referring to the defective sealant - yes since the product cannot be sold nor used like that.

Loss of right to rely on a lack of conformity under art. 38, 39(1) CISG? He used 10 days (14 allowed) - he opened enough boxes to show nonconformity - notification within a month, but you have to clearly specify what is the lack of conformity - buyer did not comply with the right to notify and the result is that B loses all his rights and S has still the claim against the buyer for the purchase price under art. 53 CISG.

Lesson 21 April 2023

General remarks: nonconformity of goods (and third party rights)

Question of conformity (or nonconformity) is very often the core issue of international law disputes

Why is necessary that legal systems have special provisions on nonconformity at all?

1) to define more precisely what construes a nonconformity (increasing legal security) - art. 35 CISG

- 2) Some remedies are limited to cases of nonconformity only (e.g. price reduction in art. 50 CISG).

Good not being delivered or buyer does not pay the price at all - breach of contract  
Late performance - delivered too late or delayed payment  
While, non-conformity refers to the quality of the good - not as expected

3) often important an examination and notification duties on the buyer in a case of nonconformity (see art. 38, 39 CISG) - in case of lack of examination and notification, the buyer loses his rights.

4) often exclusion of the seller's liability if the buyer knows or ought to know about the nonconformity - art. 35(3) and 42(2)(a).

CISG

Material defects of goods -> art. 35

Art. 35 has to layers:

1) art. 35(1) CISG - subjective layer/express terms

- quality
- Quantity
- Description
- Packaging

2) art. 35(2) CISG - objectives layer/IMPLIED terms

- Fit for ordinary purpose
- Fit for a particular purpose
- Sample or model
- Packaged or contained in a customary manner ...

Express terms supersede implied terms - but the border may be blurry - what has been expressly said or implicitly?

The buyer has to prove nonconformity

Art. 35 para 1 - the seller must deliver the correct quantity (not just quality) - the buyer has to examine and to notify to the seller - some clauses can give some flexibility.

The term quality should be given a wide interpretation

Not restarted to physical characteristics of the good

- E.g. the fact that the good does not come from the agreed country of origin
- E.g. good delivered are of similar but different quality or even of a higher quality

Violation of fair trade standards - hot topic - the physical characteristics are the same but the environment in which it is produced is different

Obligation of the seller - reach a certain quality or do his best?

A different good is delivered - salt instead of sugar

If salt is "defective" sugar - art. 35 applies -> art. 38, 39 CISG -> and the buyer has to examine the good and to inform the seller - otherwise no remedies

If some "aliud" those articles do not apply - so remedies even if not notifying and breach of contract.

Implied terms - art. 35(2) conformity of goods and fitness for ordinary purpose (public law standards)

The good can be used - but there are certain safety standards - which standards are important?

The one of the seller or the one of the buyer, which is reselling within his own market.

Normally the seller's standards apply - unless the seller knows or ought to have know the relevant standards in the buyer's country that's a case of non-conformity

Delivery of conforming goods - art. 35 CISG:

Art. 38 -> The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

Art. 39 -> notification to the seller:

- 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) 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 examination period

When does it start? When the seller factually hands over the good - after it has arrived at the destination - for redispached goods see art. 38(3) CISG.

Length of examination period

First the buyer must examine the goods within a short period as is practicable in the circumstances - perishable goods or not

Rule of thumb for length examination period for non-perishable goods - 2 weeks in european countries

In common law countries - longer period

When has the buyer complied with the examination? 1000 boxes delivered - how many of these must be examined? Some goods may be destroyed when you open the box  
The buyer must use an examination method which is suitable

Beginning of notification period

Buyer must notify the seller within a reasonable time

The length of the notification period - rule of thumb is 1 month

Quality of notification - art 39(1) 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.

Legal consequence in case of violation: buyers loses all remedies arising from non-conformity (art. 35 CISG).

Exceptions in art. 40 CISG and 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 SEE SLIDES

Checklist

- If it is a sales contract -art. 1 and 3
- Does it involve a good? - art. 1
- The contract must be international - art. 1
- Check exceptions - art. 2
- Check complete or partial opt-out of CISG - art. 6

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Articles CISG and PICC

Art. 1 - application of the Convention

Art. 2 - Convention does not apply

Art. 3 - goods to be manufactured / funded by buyer

Art. 4 - validity of the contract not questioned - effect on the property

Art. 5 - death and personal injuries

Art. 6 - derogation from the Convention

Art. 7(2) - internal gaps

Art. 8(3) - usages and practices

Art. 9 - previous usages and practices between the parties

Art. 14 - formation of the contract - proposal

Art. 15 - offer

Art. 18 - acceptance

Art. 25 - fundamental breach of contract

Art. 30 - seller must deliver the good

Art. 35 - non-conformities - express and implied terms

Art. 36 - lack of conformity

Art. 38 - duty to examine

Art. 39 - duty to notify

Art. 40 - exclusion from 38 and 39

Art. 45 - remedies

Art. 46 - remedies

Art. 49 - avoidance of the contract

Art. 50 - reduction of the price - see

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Art. 51 - the contract may be avoided if the breach is a fundamental breach of contract



Art. 66-70

Art. 74 - damages

Art. 78 - interest

Art. 80 - omission

Art. 81 - effects of avoidance

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