



An Analytical Study on Sphere of Application of United Nations Convention on Contract for International Sale of Goods 1980

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ABSTRACT

The United Nations Convention on Contracts for the International Sale of Goods-1980 contains 101 Articles. These Articles are divided into four parts. Part I covers Articles 1 to 13 that are embodied with the scope of application of the convention and the general provisions, including rules of interpretations. Part II covers Articles 14 to 24 which deal with the rules governing the formation of the contract for the International Sale of Goods. Part III contains Articles 25 to 88; these articles provide substantive rights and obligations that arise from the contract between buyer and seller. The rights and obligations contained in this Part III are the expressed outcome of the common intention of the international buyer and seller, and last Part IV of the convention covers Articles 89 to 101. The final clauses of the convention pertain to matters such as entry into force, the reservations, ratifications, declarations, denunciation, etc.

KEYWORDS : buyer, seller, member states,

Building a global society based on respect for the rule of law remains one of the principal missions of the UN Convention on Contracts for the International Sale of Goods-1980 (in short UNCISG-1980 and it further refers in this article as CISG). This Convention, adopted at a conference held in Vienna in the year 1980, is the work of more than 62 States and 8 international organizations, and has thus received wide spread support. CISG provides uniform text law for the international sale of goods. This Article gives a comprehensive overview of all its important features.

In the preamble of the CISG, it has been agreed and considered that the development of international trade on the basis of equality and mutual benefit is an important aspect in promoting friendly relations among States. No wonder, the adoption of uniform rules, which govern contracts for the international sale of goods and take into account the different social, economic and legal systems, would contribute to the removal of legal barriers in international trade and would promote the development of international commerce.

India does not have codified law on the subject of conflict of laws pertaining to contract for international sales and has not yet adopted the said convention.

SPHERE OF APPLICATION

Article 1: Basic Rules of applicability; internationality; relation to

Contracting State:

(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) 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.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

The aforesaid Article relates to the application of the convention, which means the Convention will apply only if the two basic requirements are met: (1) the sale must be international, i.e., the seller and the buyer must have their places of business in different States, and (2) the sale must have a prescribed relationship with one or more States that have adhered to the Convention. It does not deal with the nationality of the parties. Whilst applying CISG, the civil or commercial character of the parties does not fall within its range.

In the Furniture's Case No. 97¹ of UNCITRAL (CISG), the Italian seller of furniture sued the Swiss buyer for non-payment of the purchase price,

whereas the buyer had claimed that the furniture was defective, but, neither accepted the seller's offer to remedy any defects nor paid the purchase price.

The convention was applicable since the parties had their places of business in different Contracting States and the contract for the supply of goods to be manufactured or produced, which amounted to a sales contract, was involved.²

The Court of Switzerland ordered the buyer to pay the purchase price of the goods with interest at the statutory rate applicable under the Italian law.

Illustration:- assuming that seller has place of business in State 'A' (A Non-contracting State) and buyer a place of business in State 'B' (also a Non-contracting State). They enter into a contract in State 'C' (a Contracting State) and the seller breaches performance in State 'C'. Buyer brings an action in State 'B' whose law points to the laws of State 'C' as applying to the contract. Therefore, because State 'C' is a contracting party, and the transaction is international, CISG would apply.³

There is a possibility that the Convention could apply in situations where neither the seller nor the buyer had a place of business in a Contracting State was a cause of concern for some of the participants involved in its drafting. They feared that the choice of law rules might lead to the application of one State's Laws for the formation of a contract and to another State's Laws for its performance. This could mean that only parts of CISG must apply, when the Convention was meant to apply as a unified whole. As a consequence, the Convention's final provisions allow a ratifying State if it wishes, to declare that it will apply CISG when the buyer and seller are not from Contracting States.⁴

The rules on applicability of the Convention do not refer to the nationality of the Parties or to their civil or commercial character. Consequently, it was necessary to add in paragraph (3) that these factors are not to be taken into consideration in determining the application of this Convention.⁵

The specific rejection of a distinction between the civil or commercial character of the parties or of the contract should prevent any misapprehension by those who are accustomed to separate civil and commercial codes. The 1980 Convention is not of this character. True, the typical international transaction is commercial and, it is pertinent to note that Articles 2(a) and 5 specifically exclude most consumer type transactions. But the central point, emphasized by paragraph (3), is that the traditional classifications in some legal systems between civil and commercial parties and transactions are irrelevant in determining the applicability of the Convention.⁶

The term 'nationality' signifies the legal tie between individuals and their respective States; Oppenheim has very rightly stated that nationality of an individual is his quality of being a subject of a certain State.⁷ Nationality of a person is determined in accordance with the

rules of municipal law. The Permanent Court of International Justice declared in 1923 that in the present state of international law, questions of nationality are determined by domestic law, in principle, within this reserved domain.⁸

It states that such laws are required to be recognized by other States. The Convention, on certain questions relating to the conflict of national laws adopted by Hague Codification Conference of 1930, stated that while "It is for each State to determine under its own law who are its nationals." Such laws "shall be recognized by other States only in so far as it is consistent with international Conventions, international customs and the principles of law generally recognized with regard to nationality."

It implies that within the limitation of international law, a State is free to choose as to whom it may select and to whom it may reject as its nationals. The limitations were prescribed by international law not in the interest of the individuals but in the interest of other States. Nationality is the medium through which an individual can enjoy benefits from the international law.⁹

A State exercises its jurisdiction over its nationals; traveling or residing abroad, remain under its personal supremacy.¹⁰ The law found in the Constitution of India guarantees to every citizen the freedom of movement and residence throughout the country.¹¹

In the *Mavrommatis Case*, The Permanent Court of International Justice observed that "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through ordinary channels.¹² The right of protection extends to the property of the national as well.

In *Nieuwenhoven Viehandel GmbH vs. Diepeveen-DirksonBV*,¹³ it was held that the CISG applies to contracts of sale of goods between Parties whose places of business are in different States, when the rules of private international law lead to the application of the law of a Contracting State.¹⁴

Facts:- The seller, a German company, sued the buyer, a Dutch company, demanding payment of the purchase price for a consignment of live lambs sold and delivered to the buyer, along with interest. The buyer argued that the contract was avoided on the ground that the lambs were not ready to be slaughtered.

Following issues arose:- (i) Whether CISG was applicable at the time of conclusion of the contract.

(ii) If the answer to the above is in the affirmative, then whether the seller was entitled to the entire purchase price along with the interest calculated in accordance with applicability of CISG.

Held:- Both the above issues were answered in the affirmative and the Court of Netherlands found that CISG was applicable at the time of the conclusion of the contract.¹⁵ The Court awarded the full purchase price to the seller plus interest on the basis of application of CISG.

In *P.T. Van den Heuvel (Netherlands) vs. Santini Maglificio Sportivo di Santini P & C.S.A.S. (Italy)*,¹⁶ the scope of application of the CISG was adjudicated by the Court of Netherlands. The Court of Netherlands found that, pursuant to Dutch private international law, CISG was applicable as the law of Italy at the time of the conclusion of the contract.¹⁷ Further, The Court of Netherlands found that the defendant had defaulted in the payment of the purchase price, and had accordingly ordered the said defendant to pay the balance of the purchase price plus interest on the application of the CISG.¹⁸

Analyzing the situation in India vis a vis international contracts, it is evident that, neither does India have a codified law on the subject of conflict of laws nor has it adopted the convention. However, directly or indirectly parties incorporate international trade terms while making international contract for sale. The parties have to choose the applicable law at the time of conclusion of contract and if it is not decided, then the conflict of law will apply. In Indian laws the provisions of Indian Sale of Goods Act, 1930, Multimodal Transportation of Goods Act 1994 and the Indian Contract Act, 1872 applies.

Article 2: Exclusions from the Convention

This Convention does not apply to sales:

- (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
- (b) by auction;
- (c) on execution or otherwise by authority of law;
- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels, hovercraft or aircraft;
- (f) of electricity.

Article 2 of the Convention contains types of sales that are excluded from the application of it, either because of the purpose of the sale (goods bought for personal, family or household use), the nature of the sale (sales by auction, on execution or otherwise by law) or the nature of the goods (stocks, shares, investment securities, negotiable instruments, money, ships, vessels, hovercraft, aircraft or electricity). In many States some or all of such sales are governed by special rules reflecting their special nature.¹⁹

For example, if a car is bought for personal use, the Convention will not be applicable. There are six specific categories of goods which are excluded from the application of this convention. Three categories are based on the nature of transaction and three on the kinds of the goods. The goods excluded according to the nature of transactions are (a) goods bought for personal, family or household use, (b) auction sales; and (c) sales on execution or otherwise by authority of law; and the goods which are excluded according to its kind as (d) stocks, shares, investment securities, negotiable instruments, or money; (e) ships, vessels, hovercraft, or aircraft; (f) electricity.

It is clearly specified in the text of the CISG that the goods bought for personal, family, or household, use are excluded for two reasons: (1) a double standard could arise if different rules govern sales by local shopkeepers to foreigners; (2) consumers are protected by many local laws, and that protection would be lost, if application of CISG is agreed at the time of conclusion of contract. If not, then the concept of "*lex domicilii*" applied, because, movable are governed by *lex domicilii*.

For example: The seller, a resident of State A and a computer retailer, receives an order for a computer from the buyer, a resident of State B. The order is for a powerful, expensive computer of the sort commonly bought for use in business firms. When a dispute about the sale arises, the seller relies on CISG. The buyer then offers evidence, that he had bought the computer for his personal use as a hobbyist. In this example, the seller should be able to show that, he neither knew nor ought to have known, that the computer was bought for personal use. The Convention would then apply otherwise not.

Auction sales, sales on execution, and sales otherwise by authority of laws are excluded because of the uniqueness of the transaction involved. Auction sales present problems in determining when the contract was formed. Execution and other kinds of forced sales do not involve the negotiation of terms by the parties. Special local laws govern these sales, and CISG does not disturb that arrangement.

Transactions in stocks, shares, investment, securities, negotiable instruments and money are excluded. Sales of ships, vessels, hovercrafts, and aircrafts and electricity are also excluded from the convention. All these are governed by a wide variety of local rules of contracting states.

However, a long list of other similar assets, such as (1) Patent Rights (2) Copy Rights (3) Trade Marks, are not excluded and these are governed by international sales convention.²⁰

Article 41 which runs as the seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

In the Case No. 213 of UNCITRAL (CISG)²¹ a German plaintiff (buyer) purchased from a Swiss defendant (seller) a used car for personal use. Accordingly, in the Court of Switzerland, it was held that the CISG was not applicable because the car was bought for personal use and not for commercial purpose.

In comparison with Indian Sale of Goods Act, Section 7(1) defines goods. Goods will include every kind of moveable property other than actionable claims and money.

Article 3: Goods to be manufactured; services:

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

It is pertinent to note that the Convention applies to mixed contracts unless "the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services." To avoid uncertainty, it would be best to understand the applicable Law and include a clause in the contract specifying the law that is to control the parties' relationship.²²

With regards to Para (1) of Article 3, it deals with the Convention's applicability to contracts for the supply of goods to be manufactured or produced; whereas Para (2) deals with sales contracts that include the supply of labor or other services. For instance, the owner in possession of unfinished textiles (gray goods) makes a contract with a finisher, providing that finisher with bleach, who then dyes the goods and return them to owner.²³ By virtue of Paragraph (1), this contract does not fall within the Convention.

Under Article 3, goods to be manufactured and services to be provided are treated as sale of goods. Provisions embodied in the said article are applicable over such types of contracts for sale of goods. Goods to be manufactured and services to be provided are also called as the mixed sale of goods.

A seller of goods often furnishes services when delivering a product to a buyer. For example, a restaurant provides both food and service. Manufacturers that offer contracts to produce goods are similarly providing both goods and services. The CISG takes upon mixed sales and services contracts- the restaurant example as sale of goods, unless the preponderant part of the obligations of the seller consists in the supply of labor or other services. One may assume that preponderant has its normal meaning of more than half; but whether the cost measures it, the sale price, or some other basis is something the Convention does not makes clear.

Contracts for goods to be manufactured are treated by CISG as sales unless the buyer undertakes to supply a substantial part of the materials. While substantial is probably less than half, how much less is unclear. The French language version of the Convention suggests a possible test, as the term says: there is "une partie essentielle."²⁴

Thus if the buyer provides the components essential to the manufacture of a product- regardless of their size or value- the Convention would not apply.

In *Societe AMD Electronique vs. Societe Rosenberger Siam S.P.A.*,²⁵ the buyer lodged an appeal against the seller. In order to determine the place where the obligation to pay the price should be performed, pursuant to Article 5(1) of the Brussels Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments, the question before the Court of Appeal was whether CISG was applicable. The Court of France found that the disputed contract was not a sale within the meaning of CISG, which was not applicable when, as in the case in question; the party placing an order supplied "a substantial part of the materials necessary for such manufacture or production."

In Case No. 126 of UNCITRAL (CISG) the contract between the Hungarian plaintiff and the Swiss defendant provided for the sale of instru-

ments from the defendant to the plaintiff. The contract also provided that the plaintiff would be the exclusive distributor of those instruments in Hungary.

The issue was whether the CISG could be applied to that exclusive distribution part of the contract as well. It was held by the Court of Hungary that the CISG was not applicable to "exclusive distribution agreements."²⁶

In *Wind Mill Drives Case*²⁷ the Court of Switzerland held that distributorship agreements are framework agreements, and that the individual sales agreements entered into, under the umbrella of the distributorship agreement, fall within the scope of CISG.

The Court rejected the buyers' argument that the CISG was not applicable in the present case because the main contractual obligation of the seller had been the provision of services. The Court noted that neither the parties' agreement nor the seller's invoices for the individual deliveries contained stipulations regarding the supply of services.

In *Brushes and Brooms Case*²⁸ an Austrian company, which ordered brushes and brooms in the former Yugoslavia under the contract, had to provide the Yugoslav company with materials for the production of the goods ordered.

The Court of Austria found that the Convention was not applicable because the party ordering the goods supplied a substantial part of the materials necessary for the production of the goods. It is submitted that Article 3(1) and the obligation of the party furnishing the goods consisted mainly in the supply of labor and services.

In Case No. 122 of UNCITRAL (CISG) the court held that the CISG was not applicable, since the underlying contract was neither a contract for the sale of goods nor a contract for the production of goods. Noting that the sale of goods is characterized by the transfer of property in an object, the Court of Germany found that, although a report is fixed on a piece of paper, the main concern of the Parties is not the handing over of the paper but the transfer of the right to use the method / technique written down on such paper. Therefore, the Court of Germany held that the "agreement to prepare a market analysis" is not a sale of goods within the meaning of Article 1 or 3 of CISG.²⁹

It states that Article 3 distinguishes contracts for the international sale of goods from contracts for services in two respects. A contract for the supply of goods to be manufactured or produced is considered to be a sale unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for their manufacture or production. When the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services, the Convention does not apply.

Article 4: Issues covered and excluded; validity and the effect on property interest in the goods sold:

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold.

On examining the said Article it states that the Convention governs only the following: (1) the Formation of Contract and (2) the rights and obligations of the seller and the buyer arising from such a contract.

Several articles make it clear that the subject matter of the Convention is restricted to the formation of the contract and the rights and obligations of the buyer and seller arising from such a contract. In particular, the Convention is not concerned with the validity of the contract, the effect that the contract may have on the property in the goods sold or the liability of the seller for death or personal injury caused by the goods to any person.³⁰

A good point in Article 4 is that the Convention governs only the formation of contracts and the rights and obligations of seller and buyer arising from such contract. The contract of sale will be given further content by provisions that exclude specified issues, such as paragraph (a) and (b) of the present Article and following Article 5 (liability for death or personnel injury).

It is pertinent to note that contractual issues are excluded from the coverage of CISG. While adjudicating the disputes of international sale of goods courts adjudicate on a variety of issues ranging from determining if a contract should be enforced, or if a remedy should be granted when a contract is breached. The convention deals only with (1) the formation of the contract and (2) the remedies available to the buyer & seller.

It specifically excluded point in questions about (1) the legality of the contract, (2) the competency of the parties, (3) the rights of third parties, and (4) liability for death or personal injury.

In *Printing Paper Case*, an Italian seller, plaintiff, sued a Swiss buyer, defendant, for payment of the purchase price for printing paper. The buyer alleged that it was not the proper party, since it had acted as agent for a Bulgarian company. Although both parties pleaded Italian Law, the Court of Switzerland held that the CISG was applicable to the case. However, as the convention contains no rules on agency agreements, the Court applied Swiss law, pursuant to the Swiss conflict of law rules.³¹

In *Air Filters Case*, the Court held that the CISG was not applicable to the standard form of contract, as it had been concluded on the basis of an error. As such, the Court of Switzerland determined that the contract was governed by Swiss law in accordance with the private international law provisions.³²

The validity of a contract of international sale of goods is not defined by the CISG. But the law found in the decisions of courts as in the *Yatch case*, wherein the Dutch seller, plaintiff, sold a Yatch to a German company. Under the contract, the seller retained the title to the Yatch (retention of title). The Yatch was subsequently transferred to the defendant, a silent partner of the German company, and when the German company was declared bankrupt, the parties disputed the validity of the retention of title clause. The Court of Germany held that the CISG did not apply to the validity of retention of title clause.³³

Retention of title : Sale constitutes transfer of right, title and interest. When the seller retains the title and the buyer agrees to such a retention, it is understood that the buyer has only limited rights / interest in the said property i.e. only with respect to usage. Eventually, it is one who owns the title who can transfer the property validly.

It refers that the domestic laws vary greatly in determining when a contract is illegal and when it is void or voidable because one or both of the parties are incompetent. Contraband goods, for example, cannot be legally sold. However, what is contraband in one country may not be in another: for example, alcohol, drugs, pornography, religious tracts, political tracts, and so on. In such a case the State law will take precedence. If the state law is not given precedence then it will defeat the purpose of its existence. Similarly, the extent to which a contract can be avoided because it was fraudulently obtained varies greatly. And domestic rules on insanity, infancy, and other contractual disabilities are equally diverse.

The drafters of the Convention recognized that the sensitive issues of legality and competency reflect the morals and social values of particular cultures to avoid a disagreement that might have jeopardized the adoption of CISG; these questions were left for settlement by domestic law.

Article 5: Exclusion of liability for death or personal injury:

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

It is pertinent to note that this Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person. The strong protection is given by this Convention to the international sale of goods. However, domestic rules provide reme-

dies for non-commercial issues such as liability of the seller for death or personal injury caused by the goods to any person. Similarly, the death or personal injury by the goods does not fall under the ambit of the Indian sale of goods Act, 1930. It also does not cover product liability, though merchantability of goods is ensured. Merchantability is necessary in order to make Sellers accountable and ensure quality.

The German buyer of fresh cucumbers appealed against the decision of the court of first instance, which ordered the German buyer to pay to the Turkish seller the balance of the price due under the contract. The court of first instance had dismissed the application of the buyer for a reduction of the price of the goods for non-conformity with contract specifications on the ground that the buyer had inspected the goods at the place where it is sold in Turkey and had found them to be in good order.

The Appellate Court found that the parties, during the oral hearing before the court of the first instance, had agreed to submit their dispute to German law, and held that CISG was applicable as part of German law. The judgment of the court of first instance was upheld on the ground that the buyer lost the right to rely on non-conformity of goods and to reduce the price proportionally, since it gave notice of the non-conformity only when the goods arrived in Germany, i.e., seven days after the buyer had the opportunity to examine them at the place of delivery in Turkey Arts. 38, 39 (1) and 50 of CISG.³⁴

It is quoted by Ray August that equally diverse domestic laws apply to the matters of third party claims and the liability of a seller for death or personal injury. Again, to avoid the possibility of the dead-lock in the drafting of the Convention, the drafters left them out.³⁵

It is relevant to note that the product liability differs among the various countries. For instance, the product liability differs among the fifty states of the United States, where this development has been unusually active. No attempt is made to catalogue the various species of product liability. To understand the relationship between the Convention and the domestic law, it is sufficient to consider the extreme application of this doctrine.³⁶

CONCLUSION

It is concluded that the convention is in fact needs to sign by India and henceforth required to ratify so that in commercial matters it is easy to interpret issues as per convention. Law interpreters finding difficulties whilst they interpret the international contracts for sale by applying domestic laws.