
2022 Arbitration Webinars:
Practice Guidance with
New Faces,
Topic 5: International Trade
Arbitration

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Outline

Introduction on CISG

CISG - Application

CISG in APAC

- Vietnam
- Hong Kong

Why Choose CISG?

CISG and Arbitration

CISG – Practicalities



Introduction on CISG

- Abbreviation for the United Nations Convention on Contracts for the International Sale of Goods – a multilateral treaty also known as the **Vienna Convention**
- United Nations Commission on International Trade Law (**UNCITRAL**) developed CISG in 1968
 - Rooted in 2 earlier international sales treaties first developed in 1930 by the International Institute for the Unification of Private Law (UNIDROIT).
 - When neither convention gained widespread global support, UNCITRAL drew from the existing texts to develop the CISG text.
- Came into force on 1 January 1988
 - Took a long time to draft, many different stakeholders involved.
 - First draft of CISG submitted to the Conference on the International Sale of Goods held in Vienna in 1980.
- Initial ratification: 11 countries
 - Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, United States, Yugoslavia, Zambia



Introduction on CISG

- Aims to facilitate international trade
- Establishes a uniform framework for international commerce
 - Removal of legal barriers of trade among contracting states
 - Provision of uniform rules that govern most aspects of a commercial transaction
- Ratified by 95 countries as of 2022, represents more than two-thirds of the global economy
- Among the list are APAC's top economies such as China, Japan, Singapore, and the Republic of Korea



Introduction on CISG

- Most successful international document in unified international sales law
 - parties representing every geographical region, every stage of economic development and every major legal, social and economic system
- Written in plain English
 - Avoid words associated with specific domestic legal nuances
- Comes in 6 official languages of the United Nations
 - Arabic, Chinese, English, French, Russian, Spanish



CISG – Application

- The CISG governs the following aspects of an international sale of goods contract:
 - Contract formation – rights and obligations of the parties
 - Remedies for breach of contract
 - Passing of risk
 - Exemption from liability
- Applies only to contracts of **international sale of goods**
 - Contract of sale must be **international**
 - Defined as between parties whose places of businesses are in different States
 - Place of business generally means where the party usually trades or is located
 - Not necessarily the party's nationality
 - Purely local transactions are not within the scope of CISG



CISG – Application

- CISG does not apply to contracts for services alone
- It also does not apply to contracts:
 - For goods intended for personal, family or household use - *unless the seller neither knew nor ought to have known that the goods were bought for any such use at any time before or at the conclusion of the contract*
 - By auction
 - Executed or otherwise by authority of law
 - For stocks, shares, investment securities, negotiable instruments or money
 - For ships, vessels, hovercrafts, or aircrafts
 - For electricity



CISG – Application

- CISG is **automatically**:
 - Incorporated into the domestic laws of contracting states; and
 - Applicable to sales of goods between parties with place of business in contracting states
- Contracting parties can:
 - “Opt out” to exclude the CISG’s application to their transaction;
 - Expressly include the CISG as the governing law of their contracts; or
 - Modify the rules established by the CISG in their contract.



CISG in APAC

- The world has seen an impressive growth in Asian economies over the past decade
- A lot of these countries and regions are close trading partners to the “West”
- There is an increasing need for uniform or harmonized law in commercial matters
- The number of Asian contracting states are still limited, but we are seeing developments in case law
- The adoption of CISG by Hong Kong will greatly assist Hong Kong businesses in connecting with and smoothing any dispute resolution with their trading partners in the region and in a worldwide context



Recent Ratifications of the CISG in Asia

- 18 December 2015 – Vietnam (in force 1 January 2017)
- 1 Jan 2019 – State of Palestine
- 1 Apr 2020 – North Korea
- 1 Oct 2020 – Laos
 - Reserved Art. 95
- *Hong Kong (in force 1 December 2022)
- 1 Jun 2023 – Turkmenistan



CISG and Vietnam

- Conflict or non-conformity: **CISG prevails**

(1) Suspension of contract performance

- Vietnamese law: the party required to perform its obligation first has the right to suspend contract performance if the other party's ability to implement its obligation is severely impaired
- CISG: a party to may also suspend performance of its obligations if it becomes apparent that the other party will not perform the contract (Art. 71)

(2) Specific performance order

- Vietnamese law: allows the aggrieved party to apply for a specific order of either repair or replacement of the defective goods
- CISG: buyer can always request repair of goods (Art. 46(3)), delivery of substitute goods can only be requested if fundamental breach has occurred (Art. 46(2)).



CISG and Vietnam

(3) Damage compensation

- Vietnamese law: compensatory damages include the **actual and direct loss** suffered by the other party due to the breach and the direct profit the aggrieved party would have earned
- CISG: damages consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach – emphasis is on **foreseeability** of the loss (Articles 74, 75, and 76)

(4) Interest rate on refunded amount

- Vietnamese law: party to pay interest on the unpaid amount “corresponding to the late period”
- CISG: seller who refunds the price of the contract is bound to pay interest to buyer from the date on which the contract price was received by seller until the date of return to buyer (Art. 84(1))



CISG in Hong Kong

- Given China's status as a contracting state, there was significant academic debate as to whether Hong Kong is deemed a party to CISG
- For a long time, it remained uncertain as to whether the CISG applies in Hong Kong, in particular:
 - Whether the CISG applies when a party from Hong Kong is involved (under Article 1(1)(a))
 - New York State Dept. of Health v. Rusi Technology Co., Ltd (yes)
 - Logicom v. CCT Marketing Ltd. (no)
 - Whether the CISG applies when the rules of private international law of the forum lead to the application of Hong Kong law (under Article 1(1)(b))



CISG in Hong Kong

- The Sale of Goods (United Nations Convention) Ordinance (Cap.641) was enacted by the Hong Kong Legislative Council on 29 September 2021
- The Sale of Goods Ordinance seeks to implement the CISG in Hong Kong
- It is envisaged by the Hong Kong Department of Justice that the CISG Ordinance will come into force in around the third quarter of 2022
- Hong Kong courts will apply the CISG not only under Article 1(1)(a) but also under Article 1(1)(b)
 - This is different from Mainland China's application of the CISG (Article 95 CISG reservation not extended to Hong Kong)



CISG in Hong Kong

- The Ordinance's implementation is good news to Hong Kong businesses, especially helpful to small and medium-sized firms, the CISG will:
 - Protect local business from being subject to unfamiliar foreign laws when entering into cross-border sale of goods transactions
 - Provide them with an additional choice-of-law
- The CISG does not automatically apply to (domestic) transactions between Mainland Chinese and Hong Kong businesses
 - CISG has in past been applied to such transactions in arbitrations
 - Pending plans for mutual arrangement
- Hong Kong Government's consultation revealed general support for application of CISG
- 4 May 2022 (published 5 May), Mainland China declared to the CISG Depository that the CISG shall apply to Hong Kong (effective 1 December 2022)



CISG in Hong Kong

- Key benefits
 - Additional option for Hong Kong traders regarding the governing law of their sale of goods contracts with businesses in other CISG Contracting States, with local Hong Kong law used as residual law
 - Many major trading countries are CISG Contracting States, the application of CISG to Hong Kong has the potential to facilitate GDP and trade growth
- Cons
 - Changing the status quo of existing standard contracts and its associated costs in light of the CISG
 - Potential litigation costs to work out the problems within the CISG and at the interface of the CISG and Hong Kong law



Why choose the CISG?

- **Neutrality, Consistency, Stability and Certainty:**
 - Law familiar to all parties involved
 - CISG prevails over domestic law
 - Helps avoid complicated conflict of laws issues
- **Flexible application**
 - Provisions can be derogated or modified
- **Provides legal infrastructure to assist a government's drive to encourage economic expansion by providing companies and businessmen with a uniform international sales law with the countries they are investing in**



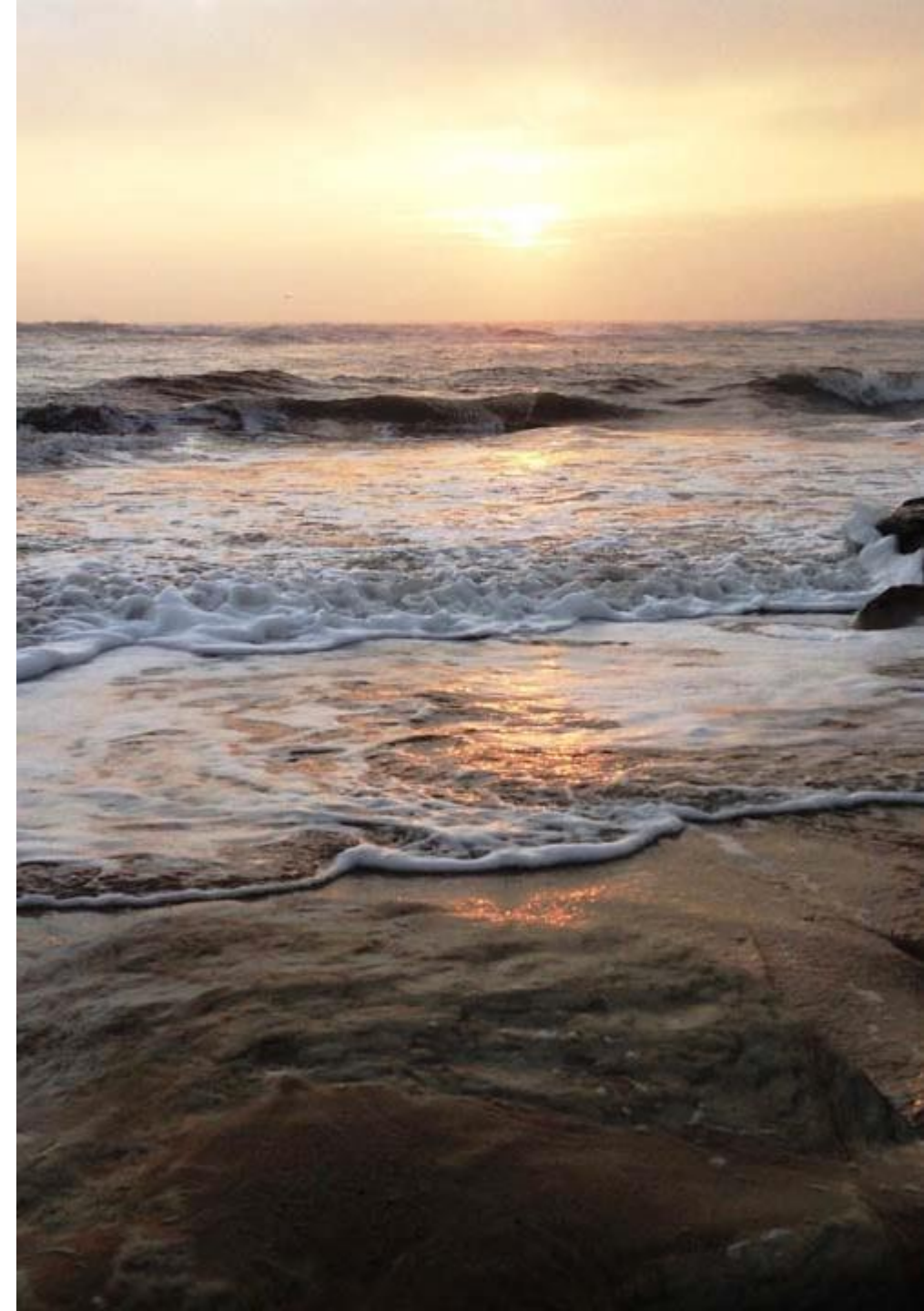
Why choose the CISG?

- More trade and shipping related arbitrations could be resolved according to the CISG
- Enhancement of local lawyers' competence in handling and managing CISG related disputes
- For countries along the Belt & Road:
 - Greater potential to serve as a dispute resolution hub for members of the Belt and Road Initiative



CISG and Arbitration

- Disputes in relation to international trade are often resolved by means of arbitration
- Applicability of CISG in an arbitration:
 - Express reference to the CISG
 - Express reference to a law of a contracting state
 - Determined by the Arbitral Tribunal as appropriate rules of law
- Procedural aspect of arbitration
 - Application to arbitration agreements (conclusion, interpretation)
- Substantive aspect of the arbitration
 - Merits of the dispute itself
- For avoidance of doubt, parties wish for potential arbitration to be governed by the CISG must expressly include their preference in their arbitration agreement



CISG and Arbitration

- CISG as substantive law:
 - Although the arbitral tribunals are not obliged to apply the CISG on the basis of international law, the CISG is applied due to the parties' choice-of-law or alternatively as suitable law with the closest connection to the dispute
- CISG as applicable law to arbitration agreement:
 - Article 19(3) (dispute resolution clauses as material alteration of the offer) and Article 81(1) CISG (continuation of the arbitration clause in spite of the avoidance of the main contract) clearly state that dispute resolution clauses are not excluded from the CISG's application
 - Formal validity of arbitration agreement is governed by applicable law to the seat, CISG is thus not applicable
 - However, CISG can be applied to all questions of substantive validity of the arbitration, its interpretation and remedies available upon a breach



Expectations for legal counsels and arbitrators for arbitrations governed by the CISG

- CISG applies automatically between sale of goods contracts between Contracting States unless expressly opted out
- Drafting to exclude CISG: language that specifically rules out the its application
 - "the laws of Hong Kong, excluding the application of the CISG"
- Arbitrators
 - Bound by parties' agreement
 - If the parties have chosen the law of a Contracting State to govern substantive issues of the dispute, the arbitrators should apply the CISG as an implicit choice of law
 - Failing in applying the CISG, one could challenge the award for excess of power



Thank you

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