

 Nutshell Series

International Sales Law—CISG

in a
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FRANCO FERRARI
MARCO TORSELLO

4TH EDITION

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**INTERNATIONAL
SALES LAW—CISG
IN A NUTSHELL®**

FOURTH EDITION

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860 Blue Gentian Road, Suite 350
Eagan, MN 55121
1-877-888-1330

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Published in the United States of America

ISBN: 979-8-89209-662-1

PREFACE

The United Nations Convention on Contracts for the International Sale of Goods (hereinafter: "CISG") provides a set of uniform rules applicable to international contracts for the sale of goods. It is currently the law of international sales in nearly 100 States, including most of the American, European, and Asian States. It therefore seems correct to state, as commentators have done, that the CISG is the most relevant piece of legislation governing international commercial relationships. The main goal pursued by the drafters of the CISG was to favor international trade by creating a "common bridge" between different jurisdictions. The basic assumption, as spelled out in the Preamble of the CISG, was that "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 promote the development of international trade." To the drafters of the CISG, the CISG's benefits stem from the considerable reduction of uncertainty and unpredictability as to the rules applicable to the transaction, brought about by the unification of law. In turn, the reduction of uncertainty and unpredictability reduces the costs and risks involved in any international transaction.

The success and relevance of the CISG, however, are not undisputed. Critics and sceptics raise doubts

regarding the benefit of having a uniform law for international sales and often argue that the CISG provides rules which business operators and national courts are not familiar with. Thus, according to these commentators, the CISG's rules lead to an increase of the costs that business operators must bear, including the learning costs, *i.e.*, the costs associated with having to become acquainted with the rules applicable to the transactions they are involved in. In fact, not only do operators have to be aware of the contents of purely domestic sales law, but they also need to become familiar with the rules laid out in the CISG. Furthermore, it is argued that because the CISG rules have to be applied by national courts, the CISG creates uncertainty rather than eliminating it by reason of it being applied differently by the courts of different countries.

In these authors' view, there is some merit to the criticism levelled against the CISG. However, the analysis of both the characteristic features of the CISG and the existing case law applying its substantive rules support the conclusion that the CISG's application should be favored and promoted in the general interest of international trade.

To assess the role that the CISG may play for business operators, it is important to point to two of the CISG's most salient features, namely that it applies only to contracts for the sale goods that are international and that it is dispositive in nature, meaning that the parties may exclude the CISG or derogate from most of its provisions. The combination of these two features is of great importance, in that it

ensures that the existence of the CISG does not take anything away from the positive effects of the co-existence of a plurality of legislative sources of law, among which business operators are free to choose the rules that best suit their needs. Indeed, on the one hand, the fact that the CISG only applies to contracts for the international sale of goods implies that it does not displace domestic laws, which will remain in place and will apply at least to domestic sales. On the other hand, the fact that the CISG is a dispositive uniform substantive law instrument allows parties to exclude the application of the CISG and to choose a national law as the law applicable to their transaction. Therefore, the combination of the CISG's applicability only to international contracts coupled with the possibility to exclude its application allows one to assert that the CISG does not prevent a fruitful regulatory competition among legal systems under which each jurisdiction has incentives to offer the most efficient rules for sales contracts. The CISG is one among many competitors; business operators are free to choose the rules applicable to their international sales transactions, with a range of options offered to them that includes, *inter alia*, the CISG.

Moreover, the CISG is beneficial to business operators willing to operate internationally as it reduces the transaction costs caused by the differences in the domestic laws of different legal systems. Indeed, to the extent that business operators have strong enough a negotiating power to impose the choice of their domestic law, these business operators are clearly indifferent to the

existence and the applicability of the CISG. They will continue to impose their choice of law and exclude the application of any alternative law, including the CISG. In practice, however, it is highly unlikely that many business operators will find themselves in the position just described. Business operators in the global market conclude a multitude of contracts, some of which are governed by their domestic law while other ones will be governed by foreign law. In practice, this may lead to these operators finding themselves subject to different domestic laws in part unknown to them. Hence, on the assumption that the business operator needs to invest time and resources to become knowledgeable of the basic rules applicable to each transaction to which the operator is a party, it is apparent that the expansion of the business to multiple jurisdictions causes the need for resources to be multiplied by the number of jurisdictions involved. In light of this, it is undisputable that the application of the CISG may be beneficial, in that it reduces transaction costs. Indeed, in the model under consideration, if the CISG were to apply to all contracts with counterparties from foreign jurisdictions, it could be the only additional piece of legislation dealing with sales contracts that a business operator would be required to become familiar with.

There is, of course, at least one fundamental prerequisite that must be met in order for the model described above to work, namely that the uniform law be applied uniformly, *i.e.*, that the uniformity aimed at be a uniformity in action and not only in the books. Indeed, in order to create uniformity, it is

insufficient to create and enact uniform law instruments, such as the CISG. This is because these instruments can still be interpreted and, thus, applied differently by the courts of different jurisdictions. To reduce the risk of divergent interpretations of one and the same text, that text must also be interpreted uniformly, because, as stated by Viscount Simonds on behalf of what was then the House of Lords in *Scruttons Ltd. v. Midland Silicones Ltd.* (1962 A.C. 446, 471), “it would be deplorable if the nations should, after protracted negotiations, reach agreement [. . .] and that their several courts should then disagree as to the meaning of what they appeared to agree upon.”

The courts applying the CISG are thus urged to take an active role in fostering the uniform application of the CISG, in full compliance with the mandate laid out explicitly in Article 7(1) CISG. Pursuant to this provision, in interpreting the CISG regard is to be had to the CISG’s “international character” and to the need to promote “uniformity in its application”. Uniformity represents the ultimate goal of the CISG and its interpretation. This goal can only be reached if the interpreter disregards preconceived notions of the domestic law the interpreter is trained in. While this is a prerequisite, it is not sufficient to reach the aforementioned goal. Having regard to the need to promote uniformity in the CISG’s application also requires that courts of one contracting State to the CISG have regard to what courts of other contracting States have done.

This book takes the aforementioned mandate into account and provides the reader with a handy tool for approaching the CISG's rules from a truly international and uniform perspective. It analyzes the international sales law as laid down by the CISG in a comprehensive and a clear manner. And it does so without using the law of any specific legal system as the starting point, as evidenced by the case law cited, which is taken from very many jurisdictions.

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November 2024

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