

The United Nations Convention on Contracts for the International Sale of Goods (CISG) and the UAE

CISG in a nutshell

- CISG is a *lex specialis* of the international sale of goods¹.
- It was adopted on 11th April 1980 and came into effect on 1st January 1988.²
- It is sometimes referred to as the Vienna Convention (but is not to be confused with other treaties signed in Vienna).³
- As of 26 September 2014, UNCITRAL reports that 83 States have adopted CISG⁴
- It has earned the description the "most successful international document so far" in unified international sales law⁵.
- That together with the high number of contracting states speaks volumes about the effectiveness of CISG as a law which harmonises the rules governing sales of goods globally.
- Uniformity of rules governing international sales of goods brings clarity to rights and obligations of contracting parties and hence to dispute resolution.

I would like to briefly address the significance of CISG in relation to the UAE and possible effects that it may have on sale of goods contracts that we draft here.

Scope: direct and indirect application

The sphere of application of CISG is dealt with by Articles 1-6 thereof.

Article 1 reads:

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

The application of CISG under the above-cited article takes two forms i.e. direct and indirect.

Direct application:

Direct application is dealt with by Article 1(1)(a) of CISG and relates exclusively to CISG contracting states.

In a contract for sale of goods where both parties are contracting states and have their places of business in different contracting states, CISG will apply without the need for a conflict-of-law analysis to ascertain the applicable law in the case, whether its application is or is not provided for in the contract and that the court in question will be obliged to apply it in such a case. This is known as direct application.

The exception is where application has been excluded pursuant to Article 6. Such an exception if made, would oust both direct and indirect application.

The following decisions are supportive of the above explanation on direct application⁶:

Decision No. 979 of 11.4.2006 of the Court of Cassation (Egypt) for judicial year 73:

“When a sale of goods made between a seller in a State ratifying CISG and a buyer in another State ratifying CISG, the rules of the Convention shall govern the formation of the sale contract and the rights and duties arising therefrom, regardless of the law applicable according to the conflict-of-laws rules of the forum”

Decision No. 2353/2007 of 8.4.2008 of the Court of Cassation (Jordan):

“Doctrine and jurisprudence agree that the international Conventions concluded by States take priority over the national laws of these States; these Conventions shall therefore apply even when their rules collide with national laws.”

Indirect application:

Direct application is truly the heart of the application of CISG since it governs contracting states. Indirect application is a mere extension of CISG to non-contracting states.

Perhaps the reason why CISG remains unfamiliar in the UAE is that the UAE is not a contracting state and therefore there is no direct application of the convention here.

This is where indirect application kicks in.

By virtue of Article 1(1)(b) whenever the law of the adjudicating forum is the law of a contracting state and the parties have not excluded CISG, it will be applicable keeping aside the rules of private international law.

Thus there will be no need for an exercise of choosing the applicable law in such a scenario. In practice, it will effectively become like direct application.

The above is independent of whether the parties have their places of business in “contracting” states or not (thus distinguishing it from direct application). The key factor is that the law of the forum is the law of a contracting state.

However the requirement of both parties having their places of business in “different” states remains applicable in both direct and indirect application (see article 1 CISG as cited above). This is because CISG deals exclusively with “international” sales of goods.

In this regard, the UNCITRAL website explanatory note states⁷:

“The CISG applies only to international transactions and avoids the recourse to rules of private international law for those contracts falling under its scope of application. International contracts falling outside the scope of application of the CISG, as well as contracts subject to a valid choice of other law, would not be affected by the CISG. Purely domestic sale contracts are not affected by the CISG and remain regulated by domestic law.”

Parties' choice:

It seems from the “Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods” (“the Note”) that the choice of the contracting parties may be a ground for the application of CISG independently of the conditions in Article 1.

If that case, any two parties (including where both have their places of business in non-contracting states) shall have the discretion to agree on an international sale of goods transaction on the basis of CISG irrespective of their place of business (given always that the places of business are different states for reasons aforementioned).

This differs from indirect application in that CISG is purposively chosen as opposed to the choice of the law of a contracting state.

The Note states:

“The Convention applies to contracts of sale of goods between parties whose places of business are in different States and either both of those States are Contracting States or the rules of private international law lead to the law of a Contracting State. A few States have availed themselves of the authorization in Article 95 to declare that they would apply the Convention only in the former and not in the latter of these two situations. As the Convention becomes more widely adopted, the practical significance of such a declaration will diminish. Finally, the Convention may also apply as the law applicable to the contract if so chosen by the parties.”

Thus it is clear that “parties’ choice” is treated separately from direct and indirect application.

This notion is supported by the following extract from the UNCITRAL website⁸:

“Moreover, the CISG may apply to a contract for international sale of goods when the rules of private international law point at the law of a Contracting State as the applicable one, or by virtue of the choice of the contractual parties, regardless of whether their places of business are located in a Contracting State.”

It is also supported by:

The award of the Netherlands Arbitration Institute, No. 2319 of 15.10.2002:

“The Convention may be selected by the parties as the law applicable to the contract.”

All these matters reveal scope for application by choice of parties of non-contracting states.

Finally the CISG, as part of the *lex mercatoria*, may apply as the law chosen by the contracting parties or as the law selected by the arbitral tribunal itself.¹⁰ The (new) *lex mercatoria* includes, inter alia, the CISG, the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law (“PECL”) and Incoterms.¹¹

Look out for:

1. **Parties to the contract selecting the law of a contracting state:**
 - This will lead to application even though it may have never been expected.
 - Application may ensue even though the parties may both have their places of business in the UAE and the contract may be set to be performed in the UAE.
 - Hence, with regards to making a choice-of-law decision for a contract, it is important to note the names of the 83 contracting states and to note the names of the states that have made an Article 95 declaration (which has the effect of ousting the application of 1(1)(b)). A legal advisor with these details in mind will be able to advise his client on the potential involvement of CISG in the contract.

2. UAE contracts to be performed in a contracting state where a choice of law has either not been made or is invalid:

- In such a situation, “recourse must be had to the criteria set forth by the conflict-of-laws rules of the forum to determine whether the Convention is applicable by virtue of Article 1(1)(b) CISG.”¹²
- It is possible that CISG is applied to such a contract on the basis of a close connection such as the proximity of the contract to the contracting state.
- Article 19(1) of the Egyptian Civil Code states that in such a case recourse must be had to the law of the contracting state in which both parties are domiciled, if any, and in the absence of such a law, to the law of the contracting state in which the contract of sale of goods was concluded. Under Article 62 of the Tunisian private international law code, in such a case recourse shall be had to the law of the (Contracting) State to which the contract is most closely connected.¹³

3. Whether the other party to the contract (i.e. other than the UAE party advised) has its place of business in a contracting state:

- This may be a close enough connection for the application of CISG but will probably have to be supported by some other linking factor such as location of party assets, performance of contract etc. In such a case CISG may be of concern to counsel for a party whose place of business is the UAE.

It appears that if UAE courts are faced with instances such as the above involving indirect application, they “...must apply the CISG if the law applicable according to the forum’s conflict-of-laws rule is the law of a Contracting State; otherwise, they would defeat the objective of achieving uniform application of this international sales law.”¹⁴

Conclusion:

As far as advising UAE parties is concerned it is the indirect application of the CISG that is relevant since the UAE is not a CISG contracting state.

Practitioners will need to keep in check the names of the contracting states as the choice of the law of a contracting state or choice of it as a judicial forum in “governing law and jurisdiction” clauses may trigger CISG application.

They will also need to develop knowledge of the GCC case law on the subject in order to judge judicial temperament towards CISG in the Arab world especially with regards to treatment of the conflict-of-law scenario in Article 1(1)(b).

The other factor that practitioners need to be aware of is that CISG may be selected by any two parties from two different states (contracting or non-contracting) as the law applicable to an international sale of goods contract according to the UNCITRAL digest and the explanatory notes to the CISG itself as mentioned hereinabove.

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Endnotes

1. The Applicability of the CISG to the Arab World - Amin Dawwas/ Yousef Shandi - (see conclusion)
2. http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html
3. http://en.wikipedia.org/wiki/United_Nations_Convention_on_Contracts_for_the_International_Sale_of_Goods#cite_note-autogenerated1-1
4. <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>
5. http://en.wikipedia.org/wiki/United_Nations_Convention_on_Contracts_for_the_International_Sale_of_Goods#cite_note-autogenerated1-1
6. The Applicability of the CISG to the Arab World (both decisions are mentioned in footnote 8).
7. http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html
8. http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html
9. The Applicability of the CISG to the Arab World - footnote 48
10. The Applicability of the CISG to the Arab World
11. The Applicability of the CISG to the Arab World - footnote 70
12. The Applicability of the CISG to the Arab World - footnote 50
13. The Applicability of the CISG to the Arab World - footnotes 51 to 53
14. The Applicability of the CISG to the Arab World