

## SECTION 1 INTRODUCTION TO THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (THE "CISG")

### *A. The CISG attempts to create uniform law for international sale of goods*

10.1.1 The United Nations Convention on Contracts for the International Sale of Goods is one of the documents produced through the diplomatic efforts of the United Nations Commission on International Trade Law ("UNCITRAL"). The CISG attempts to bridge the gap between the different legal systems of the world, mainly between the civil law (French and German sub-traditions) and the common law (English and American sub-traditions), by creating a uniform law for the international sale of goods (preamble of the CISG). The CISG governs the formation of the contract of sale as well as the rights and obligations of the buyer and seller (including their remedies). It came into force on 1 January 1988 for those countries that were then parties to it.

### *B. Singapore bound to the CISG at international law*

10.1.2 Singapore later became a party to the CISG and is now bound by it at international law. Singapore has also adopted an implementing statute that makes the CISG part of Singapore law -- the Sale of Goods (United Nations Convention) Act (Cap 283A, 1996 Rev Ed) ("Implementing Act"). The CISG came into force in and for Singapore on 1 March 1996. As of 24 August 2015, 83 States were parties to the CISG.

### *C. Scope of chapter*

10.1.3 What follows is a very short introduction to the CISG drafted mainly to address the situation where the CISG applies and the parties to the contract have chosen Singapore law as the law that complements the CISG. I will first describe when the CISG does apply and when it does not apply in Singapore (Part 2). I will then show how the CISG, when it applies, takes precedence over Singapore law (part 3). I will finally very briefly introduce the contents of the CISG both on the formation of the contract and on the rights and obligations of the parties (part 4). Just before concluding I will list a few places where one could find further information about the CISG (part 5).

## SECTION 2 APPLICATION OF THE CISG IN SINGAPORE

### *A. The CISG applies in Singapore when both parties have their places of business in different Contracting States*

10.2.1 The CISG provides for two ways in which it will become the law of the contract. First, through Article 1(1)(a), the CISG applies when both parties to the contract of sale have their places of business in different States that are both Contracting States. For example, if a company with its place of business in Singapore sells to one with its place of business in the People's Republic of China (PRC), the CISG applies because both Singapore and the PRC are Contracting States. Singapore is bound by Article 1(1)(a). If, however, a company with its place of business in Singapore enters into a contract of sale with an Indonesian company (Indonesia is not a Contracting State as of August 2015), the CISG cannot apply through article 1(1)(a) since one of the parties has its place of business in a non-contracting state.

### *B. Article 1(1)(b) of the CISG is not binding on Singapore*

(1) Article 1(1)(b) provides that the CISG also applies when the law of the contract is the law of a contracting state

10.2.2 Even if one or both parties do not have their place of business in a contracting state the CISG might still apply “when the rules of private international law lead to the application of the law of a Contracting State” (article 1(1)(b)). For example if French and Indonesian parties choose French law as the law of the contract, the CISG would normally apply because France is a contracting state notwithstanding the fact that Indonesia is not a contracting state.

*(2) However Singapore has made a reservation against being bound by article 1(1)(b)*

10.2.3 However, article 95 of the CISG states that “Any State may declare at the time of the deposit of its instrument of ratification ... that it will not be bound by [article 1(1)(b)].” Singapore has made such a reservation. This means that in the case of a contract between a Singapore company and an Indonesian company, the CISG will not apply even if the law of the contract is Singapore law and the CISG is part of Singapore law. Therefore Singapore will be bound by the CISG only if both parties have their place of business in Contracting States (article 1(1)(a)). Until Singapore withdraws this reservation it will be practically impossible to choose the CISG as the law of the contract by choosing Singapore law if one of the parties has its place of business in a Non-Contracting State. Parties should therefore avoid choosing Singapore law if they want the CISG to apply and one of them is from a non-contracting state.

*C. Contracting parties may exclude the CISG and choose Singapore domestic law*

10.2.4 Even if both parties are from contracting states they may still choose to be governed by Singapore law to the exclusion of the CISG. Article 6 of the CISG allows the parties to exclude the application of the CISG in whole or in part. The parties could therefore draft a choice of law clause that chooses Singapore law but excludes the CISG entirely.

## SECTION 3 RELATIONSHIP BETWEEN CISG AND SINGAPORE LAW

10.3.1 Assuming that the CISG applies through article 1(1)(a), that the parties have not excluded its application through article 6 and that they have chosen Singapore law to complement the CISG, what will be the relationship between the CISG and Singapore law?

*A. The CISG takes precedence over Singapore law*

10.3.2 Article 7(2) of the CISG provides that “Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law”. Therefore when it applies, the CISG takes precedence over the Singapore law. This is confirmed by the Implementing Act which states at s 4 that “The provisions of the Convention shall prevail over any other law in force in Singapore to the extent of any inconsistency”. Therefore if both parties are from contracting states, the CISG will take precedence over Singapore law. The CISG is part of Singapore law and if the parties want to exclude the application of the CISG they should do so explicitly (for example: “this contract is governed by the law applicable in Singapore to the exclusion of the United Nations Convention on Contracts for the International Sale of Goods (CISG)”).

10.3.3 For example, the rule of the CISG that a contract is formed only when an acceptance is received by the offeror (article 18(2) CISG) will apply and take precedence over the rule of the common law in Singapore to the effect that in some circumstances the contract is formed when the acceptance is mailed rather than when it is received.

*B. Matters not explicitly settled in the CISG but governed by it will be settled in conformity with its general principles*

10.3.4 Matters not expressly settled in the CISG but which are generally governed by the CISG will be “settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law” (article 7(2) CISG). The CISG “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” (article 4 CISG). Therefore, for example if a matter regarding the formation of the contract is not expressly settled by the CISG, one should first look at the general principles of the CISG which take precedence over Singapore law. Only if no such principles can settle the issue can one have recourse to Singapore law.

#### *C. Singapore law residual law for matters not governed by the CISG*

10.3.5 Matters not settled by the CISG or its principles and matters not governed by the CISG (issues other than the formation of the contract and the rights and obligations of the parties) are to be settled ‘in conformity with the law applicable by virtue of the rules of private international law’ (article 7(2) CISG). The residual law will therefore be Singapore law when it is the law chosen by the parties or is otherwise the applicable law.

10.3.6 For example, the CISG does not govern “the effect which the contract may have on the property in the goods sold” (article 4(b)) and therefore does not govern the passing of title in the goods (though the CISG does govern the passing of risk at article 66 to 70). The Sale of Goods Act applicable in Singapore (Cap 393, 1999 Rev Ed) and the Singapore law generally will therefore govern the passing of title. The rights of third parties in the goods or against the buyer and seller are also not governed by the CISG (the CISG only provides a warranty by the seller against third-party claims, see articles 41 and 42). Singapore law will therefore fill in the gap.

#### *D. The CISG is not concerned with validity of contracts*

10.3.7 The CISG “is not concerned with the validity of the contract or of any of its provisions or of any usage” (article 4(a) CISG). Therefore a contract or the provisions of a contract that would be against public policy under Singapore law could be declared invalid even if the contract is also governed by the CISG.

#### *E. Incoterms prevail over the CISG*

10.3.8 When the parties use an Incoterm such as “CIF (Singapore) Incoterms 2010” to settle standard matters regarding delivery, shipping, insurance etc. there will be no conflict with the CISG. The Incoterm is integrated to the contract of sale either as part of that contract by reference (an explicit exclusion of the CISG, see article 6) or as a usage of trade (article 9(2)) and therefore it prevails over the CISG.

#### *F. Less clear whether other trade terms prevail over the CISG*

10.3.9 The situation is less clear however when the parties use a trade term (such as CIF) as understood in Singapore (or English) trade practices and law rather than an Incoterm. In my view, because they are chosen by the parties, such terms should be viewed as contractual terms (explicitly excluding the CISG to the extent of any incompatibility, article 6) or alternatively, as a usage of trade (article 9(2)) – which should prevail over the CISG. However since terms such as CIF are often interpreted to the point of being defined by binding court precedent rather than usage, one could argue that they are part of the common law of Singapore. The problem with describing a term, such as CIF, as part of Singapore law is that the CISG should prevail over Singapore law (see above) and therefore the provisions of the CISG on delivery, shipping, insurance etc. arguably should prevail over a CIF term as governed by Singapore law or English law. This interpretation is however counter-intuitive (the parties clearly intended the CIF term to prevail over the CISG) and in my view, the courts should hold that trade terms such as CIF, even when defined by Singapore court precedent, remain part of the contractually binding choices of the parties (article 6) or constitute usages of trade which are merely interpreted by the courts (article 9(2)). Either way, such terms, in my view, should take precedence over the CISG.

## SECTION 4 THE LAW LAID OUT BY THE CISG

### A. General Provisions

#### (1) Sphere of application of the CISG

10.4.1 Part I of the CISG determines its sphere of application and introduces a few general provisions. We have already mentioned articles 1 (when the CISG applies), 4 (scope of CISG) and 6 (parties may exclude the CISG). This part also determines the kinds of sales that are not governed by the CISG (article 2) -- the sale of ships and aircrafts for example -- and distinguishes between contracts of sale and contracts for the manufacturing of goods or for the providing of services (article 3). It also states that the consequences of a death caused by the goods are not governed by the CISG (article 5).

#### (2) Interpretation of and under the CISG

10.4.2 In interpreting the CISG, one must take into account its international character and the need to promote uniformity and the observance of good faith (article 7(1)). An interpretation of the CISG that takes into account its international character and promotes uniformity would require the courts to look beyond Singapore for precedents in interpreting the CISG. An interpretation that promotes good faith is different from the introduction of a general duty to act in good faith. The convention does not explicitly provide for a duty to act in good faith as would be the case in civil law jurisdictions -- it seems that good faith is limited to the interpretation of the CISG, and does not even extend to the interpretation of the contract of sale itself. However some have argued that a duty to act in good faith is a general principle of the CISG (article 7(2) CISG). Two other articles deal with interpretation: article 8 explains how statements made by the parties (including the contract itself) are to be interpreted and article 9 explains when the parties are bound by usages and practices.

### B. Formation of contract

#### (1) Is an agreement on a price required for an offer to be valid?

10.4.3 Article 14 defines what constitutes an offer and suggests that a price is required for an offer to be valid and therefore seems to require an agreement on a price for a contract to be valid. This is very different from what would be the case under s. 8 of the Sale of Goods Act applicable in Singapore which states that "where the price is not determined..., the buyer must pay a reasonable price". Article 14 however may not be the final word on the matter as article 55 of the CISG states that when, somehow, a contract is validly formed without "expressly or implicitly fix[ing] or mak[ing] provision for determining the price", the price would be the price generally charged for such goods. This has been an area of continuing debate and buyers and sellers would be well advised to fix the price or a way of determining the price in their contract to avoid what appear to be some inconsistencies in the CISG about the possibility of having a valid contract without a price being determined or determinable.

#### (2) Other rules on formation of contract

10.4.4 The CISG also contains other rules on offer (articles 15, 16 and 17) and acceptance (articles 18 and 19), on deadlines for acceptance (article 20, 21 and 22), on when the contract is formed (23 and 24) etc. It should be pointed out to common law lawyers that offers may not be revoked if the offeror has set a time period for its acceptance ("this offer is open for 10 days") (see article 16). In such cases the offer cannot be revoked for the duration of the time period notwithstanding the fact that, under the common law one would hold that the offeree has not provided any consideration for the offer to be kept open -- the CISG does not have a concept of consideration.

### *C. Rights and obligations of parties*

#### *(1) Obligations of seller*

##### *(a) Seller obliged to deliver goods, hand over related documents and transfer property in goods*

10.4.5 The obligations of the sellers are stated in very general terms at article 30: he “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.” The transfer of property is not further mentioned – it is not governed by the CISG but the delivery and the legal warranties are further defined.

##### *(b) Place of delivery specified in the CISG, if it is not stated in contract*

10.4.6 Article 31 states that if the contract (or a term of trade or a custom) does not state where the goods are to be delivered, they will be delivered by being handed over to the first carrier if the contract involves the carriage of goods; if not, by being made available at the place of manufacturing if that place is known by the parties; and if not, then at the place of business of the seller.

##### *(c) Seller obliged in some cases to give notice of consignment of goods*

10.4.7 Article 32 defines the obligations of the seller, in some cases, to give notice of the consignment of the goods, to insure the goods or to help in securing insurance for the goods. These obligations are usually more precisely governed by the contract or terms of trade such as the Incoterms and therefore article 32 rarely applies. The seller must deliver the goods on the agreed date or during the agreed period, or in the absence of such a date, within a reasonable time (article 33). The buyer must also hand over all the relevant documents (article 34).

##### *(d) Seller obliged to deliver goods that conform to contract*

10.4.8 The seller must also deliver goods that conform to the contract (a warranty of conformity, article 35). They must normally be fit for ordinary use, or for a particular purpose if that was made known to the seller and the buyer relied on the seller's skill (this by the way is inspired by the English Sale of Goods Act), or must conform to samples. Interestingly the packaging of the goods is made into an issue of conformity – the goods are not conforming if they are not packed in a usual manner. The liability of the seller is for any lack of conformity at the time of the passing of the risks (article 36) (the CISG is not concerned with the passing of property/ownership). The seller must also guarantee that the goods are free from any right or claims by third parties (articles 41 and 42). The buyer must give notice within a reasonable time to exercise a recourse under these warranties and with respect to the warranty of conformity, must do so at the latest within two years (articles 39 and 43).

#### *(2) Obligations of Buyer*

10.4.9 In general terms, the buyer “must pay the price for the goods and take delivery of them as required by the contract and this Convention” (article 53). The CISG also determines the place (article 57) and time (article 58) of payment and notes that the payment is due without the seller having to request payment (article 59).

### *D. Remedies*

10.4.10 The CISG distinguishes the remedies available to the buyer (articles 46-52) those available to the seller (articles 61-65) and those available to the seller and buyer (articles 71-78), a distinction that we will not closely adhere to in this

*presentation.*

*(1) Party may suspend performance of obligations if other party will not perform a substantial part of his obligations*

10.4.11 It may not sound like a remedy to common law trained lawyers but the CISG adopts something close to the civil law exception (i.e. defence) for non-performance called in the civil law tradition the “exceptio non adimpleti contractus” – if you are not going to perform your obligation then I do not have to perform mine. Article 71 states that under some conditions “a party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations”.

*(2) An aggrieved party may fix additional period of time for performance of obligations*

10.4.12 Again in a way that would seem counter-intuitive to a common law lawyer, the CISG describes as a remedy the fact that one of the parties, without the consent of the other, “may fix an additional period of time of reasonable length for performance by the [other party] of his obligations” (articles 47(1) and 63(1)) adopting to some extent the Nachfrist of German Law or mise en demeure of French law. The advantage of this remedy lies in the fact that if the other party has not performed at the end of the additional period, the aggrieved party is entitled to avoid the contract without having to prove that the breach of the contract is fundamental (articles 49(1)(b) and 64(1)(b))

*(3) Specific performance*

*(a) Aggrieved party usually entitled to specific performance under civil law*

10.4.13 One of the differences between the common law and the civil law traditions is that in the common law an aggrieved party is usually not entitled to specific performance, an equitable remedy that is not granted as of right. In the civil law tradition the aggrieved party is usually entitled to specific performance, which may even include the right to have the goods repaired for example. It might well be that the aggrieved party in most cases will ask for damages rather than specific performance, and that in some instances, it might be impossible to grant specific performance, but in principle in civil law a party is entitled to the performance of what was promised.

*(b) The CISG does not bind courts to award specific performance more generously than under their own law*

10.4.14 The CISG reaches a compromise between the two traditions by first acknowledging that the parties will be entitled to specific performance (articles 46 and 62) but then stating that “a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention” (article 28). Therefore in common law jurisdictions, the courts will not grant specific performance more generously than they would under their own law. For example, in Singapore the court would not have to go beyond what is provided in section 52 of the Sale of Goods Act with respect to specific performance relating to specific or ascertained goods.

*(4) Avoidance*

10.4.15 It is here particularly important to remind the reader of the introductory nature of this short exposé on the CISG – the CISG rules on avoidance would require a much longer exposé.

*(a) Definition of “fundamental breach” in CISG different from common law*

10.4.16 Readers coming from the English-based common law tradition should be warned that the CISG is quite different from the common law when it comes to avoidance. In most cases, a “fundamental breach” is required for the contract to be

avoided under the CISG and avoidance will never depend on whether one has breached a condition or a warranty, as is still to some extent the case in the common law (s. 11(2) of the Sale of Goods Act but see also s. 15A which somewhat modifies the traditional approach). The fundamental breach under the CISG is never defined by whether a term of the contract was a condition or a warranty and is defined rather differently than the meaning given to the same terms in the common law. The CISG states that “a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result” (article 25).

#### (b) Parties entitled to avoidance upon fundamental breach

10.4.17 When the breach is fundamental, the parties are entitled to avoidance (article 49(1) and 64(1)). Avoidance can also be declared in some cases of anticipatory fundamental breach (article 72) and some other instances (for example articles 49(1)(b) and 64(1)(b)). The effects of the avoidance are also detailed (articles 81-84).

#### (5) Damages dealt with in similar manner to common law

10.4.18 In the CISG, the right to damages is dealt in a manner that will be familiar to common law lawyers though it will not be very unfamiliar to civil law lawyers either – the differences between the two traditions are not fundamental when it comes to damages. Article 74 provides that “Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.”

#### (6) Buyer entitled to ask for reduction in price when goods are not conforming

10.4.19 Rather than damages, the buyer may ask for a reduction in price when the goods are not conforming. This remedy is inspired by the *actio quanti minoris* of the civil law tradition and therefore might be unfamiliar to common law lawyers. Article 50 provides that “if the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.”

### E. Other provisions

10.4.20 There are many other provisions of the CISG which for lack of space will not be mentioned in detail. These other provisions include:

- passing of the risks (when not governed by the contract, a trade term or an Incoterm) (articles 66-70);
- interest on damages (article 78);
- exemptions of liability (articles 79-80); and
- duty to preserve the goods (articles 85-88).

## SECTION 5 SINGAPORE CASES ON THE CISG

10.5.1 The reader will have noticed that no Singapore court decisions were cited above. There are in fact only three court cases that mentioned the CISG but none that in fact applied it. In one instance, the CISG was mentioned in a general discussion on formation of contract under Singapore law (*Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] SGHC 71 at

para. 100). In another, the Court of Appeal mentioned article 8(3) CISG in a more general discussion of the extrinsic evidence one could look at in interpreting a contract (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] SGCA 27 at para. 62). In a third case the Court held that the decision of an arbitrator to the effect that the CISG did not apply to a particular dispute was not reviewable by the Court (*Quarella SpA v Scelta Marble Australia Pty Ltd* [2012] SGHC 166). In none of these three cases was the CISG directly applicable.

## SECTION 6 ADDITIONAL RESOURCES

10.6.1 By far the best place to find more information on the CISG is at the web site maintained by Pace University Law School. The site is an amazing source of information including the text of the CISG in English and other official and unofficial versions, commentaries in articles and books on the convention many available online, summaries and often full text of cases from around the world interpreting the CISG (many in translation).

10.6.2 The most comprehensive introductory books about the convention are:

- Ingeborg Schwenzer (ed.), Schlechtriem & Schwenzer: *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd ed. (Oxford ; New York : Oxford University Press, 2010);
- Stefan Kröll, Loukas Mistelis, Pilar Perales Viscasillas (ed.), *UN Convention on Contracts for the International Sale of Goods (CISG)* (München: C.H. Beck ; Oxford ; Portland, OR: Hart, 2011);
- Ingeborg Schwenzer, Pascal Hachem, and Christopher Kee, *Global Sales and Contract Law* (Oxford: Oxford University Press, 2012); and
- John Honnold and Harry M. Flechtner, *Uniform law for international sales under the 1980 United Nations convention*, 4th rev. ed., (Cambridge, MA: Kluwer Law International, 2009).

10.6.3 Singapore (and Singaporean authors) and the CISG:

- 1995. The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980): Should Singapore ratify? Singapore Academy of Law, Law Reform Committee [Report of Sub-Committee on Commercial Law: C.L.A. Cheng, Chairman] (1995) 30 p;
- Penna, L.R. ed., *Current Developments in International Transfers of Goods and Services* (6th Singapore Conference on International Business Law, September 1992) (Singapore: Butterworths Asia, 1994);
- Warren Khoo, [comments on some articles] in: Bianca-Bonell *Commentary on the International Sales Law* (Giuffrè: Milan, 1987);
- Sim, Disa, *The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods*, (2002-2003) *Review of the Convention on Contracts for the International Sale of Goods* 19-92; and
- Gary F. Bell, "Why Singapore Should Withdraw Its Reservation to the United Nations Convention on Contracts for the International Sale of Goods (CISG)" (2005) 9 SYBIL 1–19.

## SECTION 7 CONCLUSION

10.7.1 It is hoped that this short introduction to the CISG will be of use to lawyers and businesspersons in need of a quick overview of the CISG and of its application in the Singapore context. I must however remind the reader that there is much more to say on the CISG, and it is my hope that this short overview will only be used as a first step in any research on the CISG.