

## The UN Convention on Contracts for the International Sale of Goods – the CISG\*

Contract law in the South Pacific is based on custom.<sup>1</sup> Due to colonization the contract law of most Pacific Island countries is heavily influenced by English law. In most countries UK statutes were frozen in time at independence, ie reliance is still placed on the UK Sale of Goods Act 1893. Notable exceptions are Samoa, the Cook Islands and Fiji which have their own sale of goods acts.<sup>2</sup> The relationship between contract law and customary law is indeterminate.<sup>3</sup>

Given the uncertain state of domestic contract law in most Pacific Island countries, even inter island trade is fraught with uncertainty when it comes to the execution of a contract. Except for Fiji which ratified the CISG in June of last year, no other Pacific Island country has a specific statutory law dealing with the international sale of goods. This leaves Pacific Island businesses with great uncertainty when it comes to contracting globally.

On the other hand, there has never been a greater need for harmonization of international trade law than today. The start of the twenty-first century has witnessed an explosion in international trade and cross-border transactions. Improvements in communications and transport, and the reduction of many national trade barriers, have highlighted the need for a legal infrastructure that minimizes transaction costs and promotes certainty of outcome.

Harmonization of international trade law has significant implications for developing, as well as developed countries. As Nobel Laureate Douglass North states: norms and rules governing economic interactions are the most significant drivers of an economy's success or failure.<sup>4</sup> Removing barriers to trade facilitates economic participation by poorer nations in the world economy, and also facilitates participation by disempowered groups in those economies. For example, women may find greater opportunities to own property and accumulate capital if they are able to contribute to an international supply chain of goods and services, rather than be limited to participating in a closed, informal sector of a domestic economy.

Barriers arise because a multiplicity of domestic laws governing contracts, commercial law and trade law generally create the potential for uncertainty, transaction risks and additional costs. The challenge confronting national governments and the international trading community is to devise a system of laws that will support and standardize international best practice, whilst recognizing that there may also be national differences in certain areas that are not negotiable.

Would it not be great if a legal instrument existed that would minimize the misunderstandings that can arise when buying or selling goods overseas? Where one's contract partner speaks another language and is part of a different legal tradition? A law that clarifies whether an issue - that was really important for both parties during the contract negotiations but was accidentally left out in the written contract document- was actually part of the contract? A legal tool that aids the quest to improve the economy?

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\* Dr Petra Butler, Co-Director, Centre for Small States and Visiting Professor, Queen Mary University of London and Professor, Victoria University of Wellington. I would like to thank Clara Butler for her assistance in finalizing this paper. Any mistakes are entirely my own.

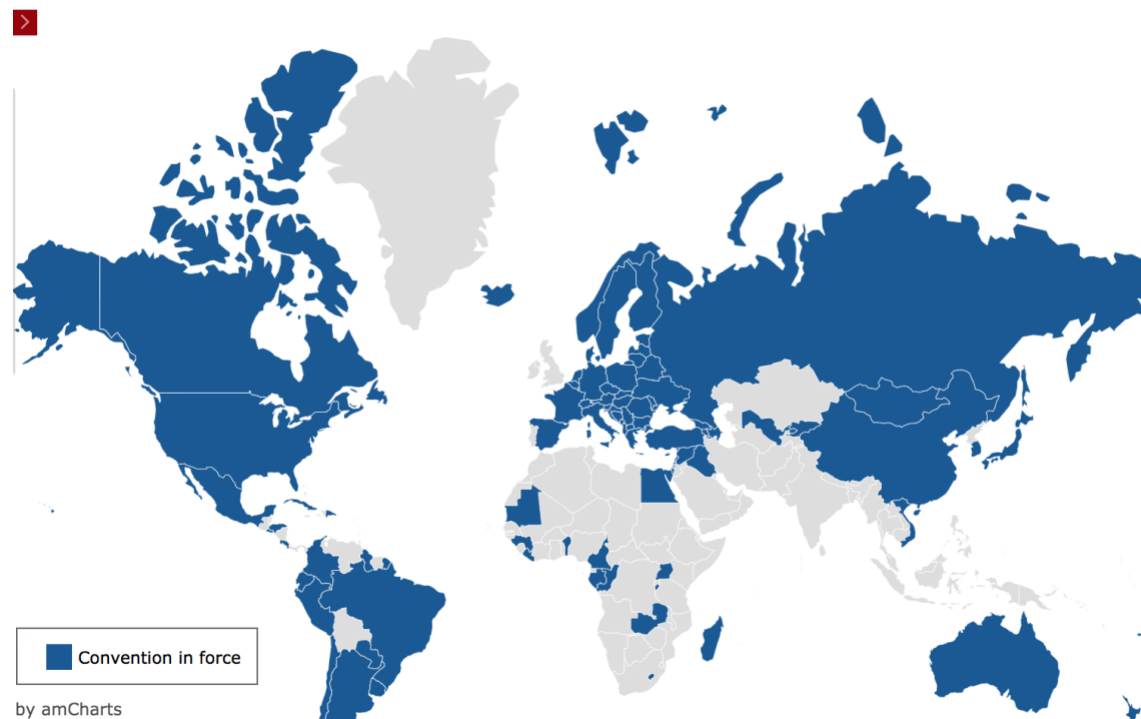
<sup>1</sup> Jennifer Corrin, *Contract Law in the South Pacific* (Cavendish Publishing Limited, London, 2001) at 16.

<sup>2</sup> Mohammed L Ahmadu/Robert A Hughes, *Commercial Law and Practice in the South Pacific* (Cavendish, London, 2006) at 265

<sup>3</sup> Jennifer Corrin, *Contract Law in the South Pacific* (Cavendish Publishing Limited, London, 2001) at 16; Yana Gild "Contract Law Reform in the South Pacific" Victoria University, LLM Research paper 2013 <http://restrictedarchive.vuw.ac.nz/helicon.vuw.ac.nz/handle/123456789/8221> (last accessed 8 Feb 2018).

<sup>4</sup> Douglass C. North Institutions, Institutional change and Economic Performance (Cambridge University Press, Cambridge, 1990) at 55

There is such a legal instrument- the UN Convention on Contracts for the International Sale of Goods or the CISG. To convince you that I am not toying with you, ie keeping your hopes up only for you to be extremely disappointed, let me take the next ten minutes to highlight some of the CISG's features to demonstrate that the CISG represents the international community's most ambitious effort to promote efficiency and sustained growth of international trade. In particular, the CISG has amalgamated the best of civil law and common law doctrine to create a modern sale of goods law fit for today's global trade. To date, 89 countries have ratified the CISG,<sup>5</sup> and it is estimated that 80% of cross-border trade is conducted under the auspices of the CISG.



## I. CISG – Overview

The CISG is divided into four parts, each of which I will introduce in turn:

PART I – Sphere of Application and General Provisions.

PART II – Formation of the Contract.

PART III – Substantive Rules for the Sale of Goods. This part also contains rules on the avoidance of contract, the passing of risk, interest, and exemptions to liability.

PART IV – Final Provisions. This section contains the final public international law provisions.

### Part I – Sphere of Application and General Provisions

#### 1. *Sphere of Application*

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<sup>5</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html) (last accessed 1 Feb 2018)

Consider a sales contract between business parties A and B, which reside in different member states. Does the CISG apply to their contract? This is the question that Chapter 1 of Part I CISG concerns itself with. The answer to the question is a *prima facie* “yes”. The CISG applies to all sale of goods contracts between businesses of two member states. However, broadly speaking, there are three situations in which the CISG (either in its entirety or a portion of its provisions) would cease to apply.

- a. The CISG affirms and preserves the absolute autonomy of the parties to determine the content of their contract. Hence, the first situation in which the scope of the CISG can be limited is where the parties A and B themselves, expressly or impliedly, choose to derogate from some or all of the provisions (Article 6 CISG).
- b. Second, even if the parties chose the CISG as the appropriate law, the Convention itself may limit its applicability. For example, Article 2 CISG outlines certain types of sales contracts where the Convention would not apply (like sales contracts for ships, Article 2(e) CISG).
- c. Further to this, the CISG clarifies that its only concerns are the *formation* of the contract and the *obligations of the parties*. Any issues outside of these two areas, such as the validity of the contract, remain firmly outside the Convention’s scope (Article 4(a) CISG). Consequently, the liability of the seller for any death or personal injury caused by the goods is not covered by the CISG (Article 5 CISG).

## 2. *Interpretation*

The second chapter of Part I specifically deals with issues of interpretation, trade usages and other general provisions regarding contractual form. The general principles within the CISG regarding interpretation and trade usage may be enumerated as follows:

- a. Interpretation of the CISG: regard must be given to the international character, the need to promote uniformity in application of the Convention and the observance to good faith (Article 7(1) CISG). If courts or tribunals reverted to domestic law wherever general principles were unavailable then the aim of uniformity would erode. Therefore, over the years scholars, courts and tribunals have filled the gaps in the CISG with autonomous interpretation, evidencing that the CISG provides a flexible and responsive international sales contract regime.
- b. Interpretation of the parties’ conduct: Statements or conduct are to be interpreted according to the intention the other party known (or ought to have known) or, failing this, interpreted in relation to the reasonable businessperson in the shoes of the other party. In either case, and opposite to the common law parol evidence rule, to ascertain the intent of the party or that of the reasonable business person the negotiations and/or subsequent contractual conduct can be taken into account (Article 8). Parties may bind themselves by any practices they have either established between themselves (Article 9(1) CISG) or are widely known in the type of contract they have entered (Article 9(2) CISG).

## 3. *Form*

Most importantly, there are no strict requirements as to contractual form and the contract can be concluded by any means (Article 11) including e-commerce.<sup>6</sup>

## Part II – Formation of the Contract

Whether there is a contract or not is the main inquiry within Part II. These provisions relate to the offer (Articles 14-17 CISG), the acceptance (Articles 18-22 CISG) and the conclusion of the

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<sup>6</sup> See Petra Butler, “Is the CISG ready for the 21st Century? CISG and Electronic Commerce” in Atamer/Butler/Schwenzer (eds) *CISG & Arbitration: Current Issues* (Eleven International Publishing, Den Haag, 2013) at 145.

contract. The treatment of the question whether an offer can be revoked is a great example how the drafters of the CISG have found a compromise between civil and common law: an offer can be revoked as long as the revocation takes place before the offeree accepts the offer.

However, the CISG makes no reference to the incorporation of standard business terms which are of course of major practical importance. The treatment of standard terms in CISG contracts is another great example of how adaptable the CISG is to modern business needs. General opinion, ie courts, tribunals and academia have closed this gap in the CISG and are using the “know out rule” to determine the applicability of standard terms.<sup>7</sup>

### **Part III – Substantive Rules for the Sale of Goods**

Once a contract has been established, Part III sets out the scope and extent of the rights and obligations of the buyer and seller. The CISG is extensive with respect to remedies in that it offers both specific performance (Articles 46, 28 CISG) and damages (Articles 74 et seq CISG) to the aggrieved party. In addition, the CISG also allows the buyer the remedy of price reduction should the goods not conform to the contract. The availability of civil law remedies, such as specific performance and price reduction, alongside the common law remedy of damages which can all equally be invoked by the obligee is again an example of the CISG successful attempt to combine civil and common law concepts.

The core principle of the CISG is to keep the business relationship alive as long as possible. Therefore, requirements is put into place that makes avoiding a contract difficult. The breach of contract has to be fundamental (Article 49(1)(a) CISG). Fundamental breach is defined in Article 25 CISG as a substantial deprivation of what one party has expected from the contract.

In accordance with the CISG’s core principle of keeping the relationship a mutually beneficial one as long as possible, parties have a general duty to mitigate any damages (Article 77).

The CISG acknowledges that in cases of force majeure or hardship the offeror is exempt from performing his or her obligation (Article 79 CISG).

### **Part IV – Final Provisions**

The final provisions relate to certain matters of public international law and will rarely be of interest to either party to the transaction.

In summary, predictable legal frameworks are paramount for generating inclusive, sustainable and equitable development, economic growth and employment, generating investment and facilitating entrepreneurship. The CISG is an important piece of legislation promoting development and economic growth.

## **II. Availability of Sources**

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<sup>7</sup> CISG Advisory Council Opinion No 13 (2013) <http://www.cisg.law.pace.edu/cisg/CISG-AC-op13.html> (last accessed 8 Feb 2018); Ferrari n Kröll/Mistelis/Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods* (2<sup>nd</sup> ed, Beck/Hart, Munich, 2018) Art 19 para 14; Schroeter in Schwenger (ed) *Schlechtriem & Schwenger Commentary on the UN Convention on the International Sale of Goods (CISG)* (4<sup>th</sup> ed, OUP, Oxford, 2016) Art 19 para 2

One of the great advantages of the CISG is that judgments, arbitral awards and academic literature are freely available on the internet. Since there is no highest court for CISG cases, judgments, arbitral awards and importantly academic writing have equal precedent value. In addition, the CISG Advisory Council, a private initiative which aims at promoting a uniform interpretation of the CISG, issues opinions on pertinent questions that arise in the application of the CISG.

Case Law on UNCITRAL Texts (CLOUT) [http://www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html)  
CISG Advisory Council <http://www.cisgac.com/>  
CISG-online <http://www.cisg-online.ch/>  
Pace University, CISG database <http://iicl.law.pace.edu/cisg/cisg>  
UNCITRAL Digest on Case Law to the CISG  
[http://www.uncitral.org/pdf/english/clout/CISG\\_Digest\\_2016.pdf](http://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf)

### **III. Advantages of the CISG**

- Creates a modern international sale of goods law which is flexible to adapt to the challenges of today's trade
- Combines the best of civil law and common law doctrine regarding international sale of goods law
- Text, judgments, arbitral awards and academic literature are freely available on the internet (most sources are in English)
- No reporting requirements!