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THE "KNEE-JERK" EXCLUSION: WHY MALAYSIAN LAWYERS SHOULD STOP OPTING OUT OF THE CISG

by

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INTRODUCTION: THE STANDARD TEMPLATE TRAP

Malaysian advocates and solicitors often follow a standard process when drafting cross-border sale of goods agreements. Most firm templates for international supply contracts include a routine clause: "The United Nations Convention on Contracts for the International Sale of Goods is hereby expressly excluded." This provision is inserted as automatically as a force majeure or dispute resolution clause, reflecting what can be called the "Knee-Jerk" exclusion.

The primary driver of this practice is not a calculated legal strategy but a deep-seated preference for the familiar. In Malaysia, the Sale of Goods Act 1957 ('SOGA 1957') is the bedrock of commercial transactions. Having been trained in the nuances of "merchantable quality" and "fitness for purpose" under the Malaysian framework, many solicitors view the United Nations Convention on Contracts for the International Sale of Goods (CISG) as a foreign, unpredictable interloper. However, this exclusion is often performed without a rigorous cost-benefit analysis. The assumption that SOGA 1957 provides a safer or more certain harbour for Malaysian clients is increasingly detached from the realities of modern global trade.

For Malaysian clients involved in international commerce, the CISG offers a more modern, predictable, and equitable framework than the decades-old domestic law. Since key trading partners such as China, Singapore, and many European countries are Contracting States to the CISG, automatically excluding the Convention may disadvantage Malaysian clients. The Malaysian Bar should move beyond standard exclusions and recognise the CISG as a valuable tool for managing international risk.

THE "HOME COURT" ILLUSION AND THE ARTICLE 1(1)(b) TRAP

The Fallacy of Domestic Comfort

While Malaysian lawyers may prefer applying SOGA 1957, foreign counterparties often do not share this comfort. For example, insisting on applying Malaysian law in a sale between a Malaysian exporter and a German importer can be seen as seeking a tactical advantage, leading to negotiation deadlocks. As a result, parties may incur high legal costs and delays before addressing the core commercial terms.

Ironically, by insisting on SOGA 1957, Malaysian solicitors bind their clients to a statute based on the outdated English Sale of Goods Act 1893. While the United Kingdom has updated its sales laws, Malaysia continues to rely on this older framework. For modern Chinese or American counterparties, SOGA 1957 is as unfamiliar and unpredictable as their own domestic laws may seem to Malaysian lawyers.

The Invisible Application: Filanto and Article 1(1)(b)

One of the most significant misunderstandings in Malaysian practice relates to Malaysia's status. Malaysia is not yet a Contracting State to the CISG. Consequently, many solicitors assume the Convention is irrelevant to them. This is a dangerous misconception. Under Article 1(1)(b) of the CISG, the Convention applies when the rules of private international law lead to the application of the law of a Contracting State (Schwenzer, Hachem and Kee, 2012).

The case of *Filanto S.p.A. v. Chilewich International Corp.* (1992) illustrates this point. A United States ('U.S.') court applied the CISG to a dispute between an Italian seller and a U.S. buyer, emphasising that the CISG is the "law of the land" in Contracting States. For Malaysian solicitors, selecting "the laws of Singapore" or "the laws of China" as governing law means the CISG applies by default unless the contract specifically excludes it. The "Knee-Jerk" exclusion often fails due to a

misunderstanding of how the Convention interacts with the laws of neighbouring countries.

The Risk of the "Homeward Trend"

Practitioners should also be cautious of the "homeward trend", where national courts interpret the CISG using their own domestic law. The Argentine Court of Commercial Appeals (2007) demonstrated this risk by incorrectly applying domestic law instead of the CISG, believing the Convention lacked sufficient criteria for non-conformity. This approach was criticised for failing to recognise the Convention's autonomous nature (Janssen and Meyer, 2009). Excluding the CISG in favour of SOGA 1957 may result in foreign courts struggling with unfamiliar Malaysian statutes, creating less predictable outcomes than if the CISG were applied.

SOGA 1957 VS. MODERN TRADE: THE PRACTICAL GAP

The Historical Dichotomy: Condition vs. Fundamental Breach

SOGA 1957 maintains the traditional English distinction between "conditions" and "warranties." Any breach of a condition, even if minor, allows the buyer to reject the goods and terminate the contract. This creates a technical means for parties to exit unfavourable deals when market conditions change.

In contrast, the CISG emphasises *favour contractus*, or keeping the contract in force. Under Article 25, a party may only terminate the contract for a "fundamental breach", defined as a breach that substantially deprives the other party of what they are entitled to expect (Huber and Mullis, 2007). This higher threshold discourages opportunistic contract terminations common under SOGA 1957.

The "Good Faith" Contrast: The Medicaments Case

A key difference is the concept of good faith. Malaysian law does not impose a general duty of good faith in contract performance. Although courts sometimes reference "fair dealing", the Contracts Act 1950 does not

require good faith as a core principle. This can disadvantage Malaysian exporters facing foreign buyers who seek to terminate contracts on technical grounds during market downturns.

The CISG adopts a different stance. Article 7(1) requires that the Convention be interpreted with regard to the "observance of good faith in international trade" (Janssen and Meyer, 2009). This serves as a safety net. In the *Medicaments* case, a Serbian tribunal used Article 7(1) to prevent inconsistent conduct by a party, applying the principle of *venire contra factum proprium*. For Malaysian solicitors, Article 7 offers strategic protection that SOGA 1957 does not provide.

THE "CERTAINTY" MYTH: WHY EXCLUSION INCREASES RISK

Many Malaysian practitioners claim they exclude the CISG to maintain "legal certainty". However, this confuses technical certainty with commercial certainty. Domestic laws such as the SOGA 1957 and the Contracts Act 1950 are rigid, allowing parties to exit contracts over minor technicalities. In international trade, this rigidity can increase risk rather than reduce it.

The Battle of Forms: *Golden Valley* and the *German Timber* Case

The "Battle of the Forms" provides the most salient example of this risk. Under Malaysian law, specifically section 7 of the Contracts Act 1950, an acceptance must be "absolute and unqualified". This is the "mirror image rule." If a Malaysian exporter sends a quotation and the foreign buyer responds with a purchase order containing slightly different terms (for example, a different dispute resolution venue), no contract is formed. The response is merely a counteroffer (Arjunan and Nabi Baksh, 2018).

Under Article 19 of the CISG, the approach is more pragmatic. A reply to an offer which purports to be an acceptance but contains additional or different terms that do not "materially alter" the terms of the offer constitutes an acceptance (DiMatteo, 2014). The U.S. case of *Golden Valley Grape Juice & Wine, LLC v. Centrisys Corp.* (2010) affirmed that

under Article 18(3), a party's conduct (such as paying for or shipping goods) can signify acceptance of the contract terms.

In the *German Timber* case, the German Federal Supreme Court held that if parties perform despite conflicting standard terms, the contract is formed on the agreed terms, and the CISG's default rules replace conflicting terms. This mechanism preserves the contract even with minor paperwork discrepancies. For Malaysian solicitors, the CISG offers commercial certainty by maintaining the contract, while the Contracts Act 1950 may result in a void agreement.

REMEDIES: THE PRICE REDUCTION POWER (ARTICLE 50)

A significant advantage of the CISG, absent from SOGA 1957, is the right to "Price Reduction". Article 50 allows a buyer to reduce the price proportionally if the goods do not conform to the contract (Schwenzer et al., 2012).

Under Malaysian law, buyers of non-conforming goods can only reject the goods or claim damages, which requires proving loss and may involve lengthy litigation. Article 50 of the CISG, however, provides a unilateral remedy: the buyer can reduce the price. This is exceptionally efficient in international trade, where returning goods is costly. By routinely excluding the CISG, Malaysian lawyers deny clients this effective remedy.

DELIVERY, EXAMINATION, AND NOTICE: THE DUTY TO INSPECT

SOGA 1957 does not specify procedures for examining goods or notifying defects, relying instead on the common law concept of "reasonable time". This lack of clarity often results in prolonged disputes over whether a buyer has accepted goods and lost the right to reject them.

The CISG provides a much more transparent, more structured framework. Article 38 requires the buyer to examine the goods "within as short a period as is practicable". Article 39 then provides that the buyer loses the right to rely on a lack of conformity if they do not give notice to the seller

specifying the nature of the lack of conformity within a reasonable time after they have discovered it or ought to have discovered it. Importantly, there is a hard two-year cut-off for such notices (Huber and Mullis, 2007).

For Malaysian sellers, the CISG provides better protection against foreign buyers who claim defects months after delivery to avoid payment. Article 39's strict notice requirements serve as a statute of repose, which SOGA 1957 lacks.

INTERPRETATION AND THE PAROL EVIDENCE RULE

Malaysian law is governed by the rigid "Parol Evidence Rule" found in sections 91 and 92 of the Evidence Act 1950. This generally prevents a party from bringing in extrinsic evidence (such as prior negotiations or emails) to contradict or vary the terms of a written contract (Arjunan and Nabi Baksh, 2018).

The CISG, however, rejects this formalistic approach. Under Article 8, for the purposes of determining the intent of a party, due consideration is to be given to all relevant circumstances of the case, including the negotiations, any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties. In the context of international trade, where contracts are often formed through a series of emails and informal communications, the CISG's approach is far more likely to reflect the actual "commercial intent" of the parties than the "four corners" rule applied in Malaysia.

STRATEGIC OPTING-IN: THE "HYBRID" APPROACH

The prevailing Malaysian practice of total exclusion is an all-or-nothing approach. In reality, the CISG is flexible. Article 6 allows parties to exclude the Convention or, subject to Article 12, modify any of its provisions.

Rather than a "Knee-Jerk" exclusion, Malaysian lawyers should consider a "Carve-Out" strategy. For example, solicitors could use the CISG's rules

on contract formation to avoid the mirror image rule, while opting for Malaysian law on remedies or limitation periods.

By excluding the CISG entirely, Malaysian practitioners forgo a modern set of international rules. A skilled solicitor should advise clients on which CISG provisions are advantageous and which may be varied. This approach requires moving beyond simply deleting the Convention.

PROFESSIONAL DUTY AND THE MALPRACTICE RISK

As the global legal community moves toward harmonisation, the "Knee-Jerk" exclusion may eventually be viewed as a breach of a lawyer's professional duty of care. Professor Ulrich Schroeter has pointed out that since the CISG is the "law of the land" in over 95 countries, representing the vast majority of global trade, a lawyer who routinely excludes it without understanding its provisions may be failing to provide the most advantageous terms for their client (DiMatteo, 2014).

If a Malaysian client loses out on a CISG-specific remedy, such as Article 50's price reduction, because their lawyer excluded the Convention by default, the solicitor may face a negligence claim. The defence of "this is how we've always done it" is becoming less acceptable in a globalised legal environment.

CONCLUSION: A CALL FOR PROFESSIONAL EVOLUTION

The routine exclusion of the CISG in Malaysian practice often reflects professional inertia. It serves as a protective measure to remain within familiar legal boundaries, rather than actively seeking the best terms for clients.

As Malaysia increases its integration with global trade hubs, primarily through agreements like the CPTPP and RCEP, the "Knee-Jerk" exclusion is becoming a liability. Clients litigating under outdated provisions of SOGA 1957 or the Contracts Act 1950 may be disadvantaged compared to those using the CISG.

Understanding the CISG is now a competitive necessity for the Malaysian Bar. Lawyers have a duty to secure the most advantageous and commercially sensible terms for their clients. In international sales, this often means adopting the CISG. Malaysian law firms should move beyond boilerplate exclusions and engage with this leading commercial treaty.

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