

# AVOIDANCE UNDER THE CISG AND ITS CHALLENGES UNDER INTERNATIONAL ORGANIZATIONS COMMERCIAL TRANSACTIONS

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## 1. INTRODUCTION

This paper was originally presented in a draft form at the CISG<sup>1</sup> 25th Anniversary Conference that took place in Vienna on 15-16 March 2005. This paper reflects only the personal views of the author, and not the views of the United Nations; however, it is the expectation of the author that this presentation may encourage scholars to dedicate more time to study the impact and application of multilateral conventions, such as the CISG, on private international transactions engaged in by international organizations. The author is under the impression, although maybe erroneous (such a study may have been engaged in the past), that this area has not been thoroughly explored by students or academia. International organizations around the world engage on a daily basis in private commercial transactions, entering into international contracts for the sale of goods with vendors. It is the belief of the author that a study such as the one proposed above will enrich and contribute to a better understanding of the international organizations' role within the community at large.

## 2. EXAMPLE OF INTERNATIONAL ORGANIZATIONS' COMMERCIAL TRANSACTIONS: THE UNITED NATIONS AND ITS PRIVILEGES AND IMMUNITIES AS AN INTERNATIONAL ORGANIZATION

International organizations enjoy certain privileges, immunities and exemptions under international law that directly impact the private commercial transactions entered into by the organization. These privileges

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\* Note: The views expressed in this paper are the personal views of the author, are not endorsed by the United Nations and do not necessarily reflect the views of the United Nations.

1. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18, Annex 1 (11 Apr. 1980) [hereinafter CISG].

and immunities aim at ensuring that the activities of the organization are not impaired by legal or financial impediments.

These organizations also enjoy legal capacity in order to enter into contracts for the provision of goods or services. In this paper, I will refer to the United Nations as an example of an international organization. The legal capacity of the United Nations emanates primarily from the UN Charter,<sup>2</sup> Article 104, “[t]he Organization shall enjoy in the territory of its Members such legal capacity as may be necessary for the exercise of its functions and fulfillment of its purposes.”<sup>3</sup> Also, in order to ensure that member states may not interfere in the fulfillment of the UN’s mandate by judicial means, Article 105(1) of the UN Charter establishes that “[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.”<sup>4</sup>

In the particular case of the United Nations, these provisions of the UN Charter should be read in conjunction with the relevant terms of the Convention on the Privileges and Immunities of the United Nations (P&I Convention).<sup>5</sup> Article I, Section 1 states that “[t]he United Nations shall possess juridical personality. It shall have the capacity: (a) to contract; (b) to acquire and dispose of immovable and movable property; [and] (c) to institute legal proceedings.”<sup>6</sup>

Also, Article II, Section 2 of the P&I Convention establishes that “[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process.”<sup>7</sup> These privileges and immunities may be waived by the UN, but the waiver shall not extend to any measure of execution (UN property cannot be foreclosed or garnished). Also, UN property is immune from search, requisition or confiscation.

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2. The United Nations Charter was signed on 26 June 1945 in San Francisco and came into force on 24 October 1945.

3. U.N. Charter art. 104.

4. U.N. Charter art. 105.

5. Convention on the Privileges and Immunities of the United Nations, 13 Feb. 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15.

6. *Id.* art. I, § 1.

7. *Id.* art. II, § 2.

### 3. RESOLUTION OF DISPUTE MECHANISMS OF ORGANIZATIONS WITHIN THE UNITED NATIONS SYSTEM

Within this context, the organizations that are part of the UN system still have to find ways to settle contractual disputes. In the particular case of the United Nations, this issue is covered by Article VIII, Section 29 of the P&I Convention: “The United Nations shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private . . . character to which the United Nations is a party.”<sup>8</sup> The organizations of the United Nations system have selected arbitration as the “appropriate” mode of settlement of disputes under UN commercial contracts.

This “dispute resolution” clause provides for conciliation or arbitration under UNCITRAL rules of procedure as the full and final resolution of a dispute. At the same time, the UN maintains its privileges and immunities which are still not waived in favor of the jurisdiction of a particular court, e.g. in order to enforce an arbitral award.

In this respect, Article 33(1) of the UNCITRAL Arbitration Rules<sup>9</sup> establishes that the arbitral tribunal is to apply “the law determined by the conflict of laws rules which it considers applicable.” In light of this, the author understands that strong arguments could be made in favor of the applicability of the CISG to UN commercial contracts. However, as will be explained in more detail in the following section, the silence of UN commercial contracts with respect to the application of the CISG could also give room for a different interpretation.<sup>10</sup>

### 4. SILENCE WITH RESPECT TO THE APPLICATION OF THE CISG

In general, commercial contracts of international organizations are silent with respect to the application of the CISG. However, in practice, the terms of the CISG have been used as a reference to solve contractual disputes between international organizations and sellers of goods.

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8. *Id.* art. VIII, § 29.

9. United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, G.A. Res. 31/98, 9th Sess., 99th plen. mtg. (Dec. 15, 1976).

10. It should be noted that when this point was raised during the March 2005 Conference, it generated an interesting discussion, which the author hopes will encourage legal experts to explore this issue further in the future.

Again, it could be argued that the fact that the UN has not expressly excluded the application of the CISG from its contractual arrangements leads to the conclusion that the Convention applies to UN international commercial transactions. However, the question why the CISG is not expressly mentioned in UN contractual arrangements is still an open one.

For example, international organizations' contracts for the purchase of goods or services usually refer specifically to INCOTERMS 2000<sup>11</sup> to determine certain rights and obligations of the buyer and seller. Again, the question of why these contracts make express reference to INCOTERMS and not to the CISG remains unanswered.

It could be argued that if the UN expressly incorporated the Convention terms into its contracts, especially in relation to transactions with vendors from countries not participants to the Convention, the UN may be "legislating by contract," which means that the UN may be imposing CISG terms on a seller from a country not signatory to the Convention.

Also, in general, international organizations' contracts contain general and special terms and conditions that leave very little room for "gap filling" by instruments such as the CISG. This is probably the main reason why it has been argued in the past that these contracts are usually "boiler plate" type of contracts that leave very little room for negotiation by the seller. For example, it is very common to see in international organizations' contracts specific clauses referring to: delivery terms, date and place of delivery, packaging terms, warranties, rights and obligations of the parties, including specific remedies, and termination clauses. Also, the general terms and conditions of all organizations of the UN system contain a "force majeure" clause. One argument in favor of this trend could be that the special conditions under which certain UN commercial contracts need to be performed impose the need to present to the seller pre-printed clauses. Another argument could be made by saying that providing for all these situations within the body of the contract may prevent future disputes; however, the author understands that this argument could be easily disputed.

##### 5. THE CISG GAP-FILLING ROLE UNDER ARTICLES 81-88

As explained above, UN contracts do not refer to the laws of any country and actually do not expressly reflect either common law or civil law principles

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11. INCOTERMS 2000: ICC OFFICIAL RULES FOR THE INTERPRETATION OF TRADE TERMS (1999) (adopted by the International Chamber of Commerce in 2000).

(although an argument could be made that its provisions are closer to the common law tradition than the civil law). For example, UN conditions of contract do not specifically address the issue of breach and do not contain a clause that defines what would constitute a “fundamental breach” under the contract (certain UN purchase orders for highly strategic and essential goods may contain the text “time is of the essence”).

Now, trying to draw a parallel between UN contracts and the CISG, and in particular with respect to Sections V and VI of the Convention, Articles 86 and 87 of the CISG mirror text usually included under UN contracts. Interestingly enough, according to scholars’ discussions about these articles, these articles seem to be the ones that pose the least problems within these particular sections of the CISG.

To the contrary, the United Nations contracts expressly exclude the right of a vendor to recover interest from the UN for late payment.<sup>12</sup> Also, according to the UN Financial Regulations and Rules, the UN is constrained to “sell” property through a competitive auction and via the prior approval of a Board, which renders it very cumbersome to apply the provisions of Article 88 of the Convention to UN transactions.

Examples of UN termination clauses show that they do not exactly mirror the avoidance mechanisms provided for in the CISG, for example they may not contain an obligation for the UN to notify the seller of the claim; may not provide the seller with an additional period of time to perform; or they may not contain an obligation on the part of the UN to prove a “fundamental breach” in order to exercise its right to terminate or to “restitution” as per Articles 81 to 84 of the CISG. Also, in general, UN contracts contain a “liquidated damages” clause and in most cases require the vendor to provide a “performance bond” to guarantee performance. These examples may lead to the conclusion that even if the silence with respect to the application of the Convention allows it to be used to fill the gaps of UN commercial contracts, the fact that the majority of the UN clauses provide for courses of action different than those covered in the Convention shows that there is very little room for application of the Convention to UN contracts.<sup>13</sup>

It should also be noted that there are certain issues not generally covered in UN contracts. Unfortunately, those are also issues not covered by the Convention. For example, with respect to return or restitution of goods, the

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12. See CISG arts. 78, 84.

13. The author wishes to note that this argument generated interesting discussions during the March 2005 Conference.

Convention does not indicate who bears the risk and costs of returning items, whether the warranty term gets extended when replacement goods are sent by the seller, etc.

Specifically with respect to the application of Article 82 to UN commercial transactions, it is quite possible that the UN may be in a position to claim the “impossibility to make restitution of the goods” for the reasons covered in sections (a) to (c) with the exception of the case of “sale” of the goods. However, as scholars have well pointed out, the participation of third parties, agents, freight forwarders, and inspectors, may render this claim of “impossibility” harder to assert, since a claim that the acts of any of these “third parties” could be attributed as an “act or omission” of the UN may probably be sustained by the seller.

The concept of “accounting for benefits” may also be difficult to apply in the case of UN international commercial contracts. If the UN were constrained to accept some of the non-conforming goods (e.g. a vehicle) until a replacement was found, would that mean that in order to avoid the contract and to preserve its right, the UN might have to pay for the non-conforming goods that it was forced to accept in order to be able to return the other ones and preserve its right to claim damages? Due to the nature of the UN’s business, this course of action seems difficult to follow.

In general, again, due to these constraints, it could be argued that under UN contracts, avoidance with the effects of the Convention may not seem practical. It seems that due to the nature of the UN business, the UN may be compelled to resort to other remedies, such as accepting non-conforming goods with a reduction of the price and termination of the contract with a quasi *ex nunc* effect rather than claiming that a “fundamental breach” has occurred with the effects of Articles 81 and 82 of the Convention.

## 6. THE PATH AHEAD

As the CISG sphere of influence continues to grow, further jurisprudence has definitely enriched the Convention and reinforced the general principles of international commercial law in which it lies. Also, the general principles contained in the Convention prove to be useful in the everyday interpretation of international commercial contracts, such as “reasonableness,” “duty to remedy damages,” etc. It is also certain that UNCITRAL’s new Case Digest<sup>14</sup>

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14. UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, available at [http://www.uncitral.org/uncitral/en/case\\_law/digests/cisg.html](http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html).

constitutes an invaluable contribution to the enhancement of international commercial law and that further publicity should be given to this Digest in order to ensure that it is fully taken advantage of by parties to international commercial transactions, including international organizations. For these reasons, it is probably not redundant to say that all the contributors to the development of the Digest should be commended for the results obtained by the compilation of the Digest.