



Boundary of “questions concerning matters governed by the CISG which are not expressly settled in it”

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Abstract

Article 7(2) of the CISG provides the gap filling guidelines for the interpretation of the provisions of the CISG. This provision also defines the boundary of the Convention by stating that questions concerning matters governed by the CISG 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. How to identify those questions concerning matters governed by the CISG which are not expressly settled in it? This paper answers this question where it identifies the boundary of “questions concerning matters governed by the CISG which are not expressly settled in it” by introducing “*Five Articles’ Test*” as a method for the same.

Keywords: *Five Articles’ Test*, method, CISG, boundary

Introduction

Article 7 paragraph (2) of the United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980 provides gap filling guidelines for interpretation of the provisions of the Convention. Gaps are obvious due to the nature of the CISG as a law. New circumstances may arise where the Convention might not have express provision to deal with such circumstances. Gaps in the Convention create challenges on the application of the CISG. Jurists may want to apply their local rule to fill those gaps which will hinder the application of the CISG. In order to avoid this kind of situation gap filling guidelines are the most essential rules for the interpretation of a unified international law like the CISG. Paragraph (2) states that “questions concerning matters governed by the CISG 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.”

This paragraph identifies the boundary of the questions which could be settled by applying gap filling guidelines. It is necessary to identify these matters properly for the proper application of the Convention. How to identify those questions concerning matters governed by the CISG which are not expressly settled in it? The answer of this question has been presented in this paper.

Boundary of “questions concerning matters governed by the CISG which are not expressly settled in it”

Article 7 paragraph (2) requires that questions concerning matters governed by the CISG 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. The boundary of the unsettled questions requires that these questions have to fall within the scope of the Convention. Matters which are not governed by the CISG could not be settled by applying gap

filling guidelines.

Drafters of the Convention pointed that paragraph (2) of Article 7 was incorporated intending to cover both questions not governed and governed but not settled by the CISG^[1]. It was emphasized by the legislators that this provision does not authorize extension of the scope of the CISG rather it is concerned with the approach to solve problems falling within the Convention^[2].

The text of paragraph (2) distinguishes between matters governed but not settled by the Convention and matters not so governed. Now question comes, “what are the matters that are governed by the CISG which are not expressly settled in it?” The answer of the question can be found by looking into five Articles of the CISG i.e. Article 1, Article 2, Article 3, Article 4, and Article 5 of the CISG. An interpreting court or tribunal can identify these matters by applying “*Five Articles’ Test*”.

Five Articles’ Test^[3]

Article 1

helps a court or tribunal to decide an issue whether a contract is governed by the CISG or not. Article 1 (1) of the CISG states that, “*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.*” This provision requires that the subject matter of the sale has to be goods and such sale has to be an international sale. Beside the condition that the sale of goods has to be international this provision requires that one of the two conditions to be fulfilled under sub paragraph (a) and (b) to decide whether a contract is governed by the CISG or not. According to Article 1(1) (a), a contract is governed by the Convention if such contract has been concluded between parties whose places of business belong to Contracting States of the CISG^[4]. It requires two conditions i.e. both the parties’ places of business have to be situated in Contracting

States and places of business have to be in different Contracting States. If a contract concluded between parties who belong to different Contracting States but their places of business are not in different Contracting States then such contract is not governed by the CISG. Article 1 (3) of the CISG clearly states that nationality of the parties not need to take into consideration while determining the application of this Convention ^[5]. This means only the places of business of the parties have to be in different Contracting States. This also means that if a contract has been concluded between parties who belong to same State but their places of business are in different Contracting States then such contract is governed by the CISG. For example, the District Court of Michalovce in 2010 applied Article 1 (1) to decide whether the contract under dispute governed by the CISG or not ^[6]. The seller D. who has a registered office in Czech Republic filled a case against the Buyer A. & G. who has its registered office in Slovak Republic. The court, with reference to the evidence gathered, determined that the commercial relationship between the parties has to be qualified under the UN Convention on Contracts for the International Sale of Goods, since the buyer has its registered office and therefore also the place of business in the Slovak Republic as a member state of the Convention. According to Article 1(1) (b), a contract is governed by the CISG if such contract has been concluded between parties whose places of business are in different States and the rules of private international law lead to the application of the law of a Contracting State. This means one of the parties may be from non-Contracting State. If a contract has been concluded between parties where one party is belong to a Contracting State and another belong to a non-Contracting State and the rules of private international law points to the law of non-Contracting State then such contract is not governed by the CISG. If a contract has been concluded between parties where one party is belong to a Contracting State and another belong to a non-Contracting State and the rules of private international law points to the law of Contracting State then such contract is governed by the CISG. Simply, this provision is applicable where parties do not decide the applicable law under their contract terms, and the adjudicating court or tribunal decides applicable law by applying the rules of conflict of laws where it points to the law of a party who is from a Contracting State of the CISG. In the Mineral Water case ^[7], a claimant from Serbia (seller) filed a case against a respondent from Macedonia (buyer) in the Foreign Trade Court attached to the Serbian Chamber of Commerce 19 October 2009. Contracting parties agreed to resolve all the problems arising from the Contract in an amicable manner, by mutual agreement; if the amicable resolution is not possible Parties recognize the jurisdiction of the Foreign Trade Court of Arbitration attached to the Chamber of Commerce of Serbia and Montenegro and the Commercial Court in Leskovac. According to this agreed term the seller had chosen arbitration as the way to settle this dispute by filing the Statement of Claim to the Court. The Court found that the Parties have not agreed upon the applicable material law. The sole arbitrator considered that in this case it is most appropriate to apply the conflict-of-laws rule of Serbia as the seat of the case. The rule prescribes that, in a case where the parties did not choose the applicable law such case will be determined by the law of the seat of the party who provides characteristic performance. The court decided in this case the seat of the

seller is Serbia where it is a Contracting State of the CISG. Thus, according to Article 1(1) (b) of the CISG, the case was governed by the Convention.

The CISG is an international law which governs contract for sale of goods and rights and obligations arising out of such contract ^[8]. The CISG enclosed the issue of internationality of a contract with just one condition in Article 1 of the Convention. The condition is that the seller and the buyer must have their places of business in different States. If this condition is filled the internationality is established for the applicability of the CISG. According to Article 1 of the CISG *“this Convention applies to contracts of sale of goods between parties whose places of business are in different States”*.

Article 1 specifies that no other condition is needed to be applied to test the internationality of a contract under the CISG. If there is more than one place of business, the application depends on the place of business in a Contracting State with the closest connection to the contract and its performance, Art. 10. If there is no place of business, the habitual residence of the party must be in a Contracting State. In other words, the only international requirement is place of business or habitual residence in two different Contracting States. It provides that the nationality of neither the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention. According to this, the place of signing the contract, the place of delivery, residence of the parties is not considered to test the internationality of the contract. Only the places of business of the buyer and the seller are to be in two different states ^[9]. or alternatively, their habitual residence (Article 10(b)) - in different Contracting States.

Article 2

Helps a court or tribunal to decide the issue whether a sale is governed by the CISG or not. This provision contains a list of the types of sales that are excluded from the Convention either because of the purpose of the sale, or the nature of the sale or due to the nature of the goods. This provision states that the CISG also does not apply to sales of stocks, shares, investment securities, negotiable instruments or money, ships, vessels, hovercraft or aircraft, electricity ^[10]. For example, if a contract concluded between parties to sale ships whose places of business are in different Contracting States then such contract is not governed by the CISG. Article 2 also states that sales of goods by auction, on execution or otherwise by authority of law are not governed by the CISG ^[11]. Sales of goods bought for personal, family or household use are also not governed by the CISG according to this Article ^[12].

Article 3

Helps a court or tribunal to decide an issue whether a contracts which involves supply of goods is governed by the CISG or not. It says contracts for the supply of goods to be manufactured or produced are has to be considered as sales and such contract is governed by the CISG ^[13]. If the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production then such contract is not governed by the Convention ^[14]. According to Article 3 a contract of supply of goods is also not governed by the CISG in which the preponderant part of the obligations of the party who

furnishes the goods consists in the supply of labour or other services^[5]. For example, the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce in a Protective Steel Fence case^[16] where deciding issues regarding payment of price and interest noted that a “contract for supply and installation of the protective steel fence should be qualified as a contract for sale^[17]” which satisfies all requirements for application of the Convention as stipulated in Article 3 paragraph (2) of the CISG.

Article 4

Helps a court or tribunal to decide whether an issue regarding scope of the CISG is governed by the Convention or not. It states that issues regarding the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract are governed by the Convention. According to this rule issue regarding the validity of the contract or of any of its provisions or of any usage is not governed by the Convention. The issue regarding effect which the contract may have on the property in the goods sold is also not governed by the CISG^[18]. For example, in the Milk packaging equipment case^[19] the Foreign Trade Court of Arbitration in Serbian has applied Article 4 and decided that the question of validity of the pactum reservati domini clause is not regulated by the CISG but should be rather appraised under Serbian law, which allows for such provisions, because Article 4 of the Convention envisages that the effect which the contract may have on the property in the goods sold are not regulated by the Convention.

Article 5

Helps a court or tribunal to decide whether an issue regarding the liability of the seller for death or personal injury caused by the goods is governed by the CISG or not. The provision states that the Convention does not govern any issue regarding the liability of the seller for death or personal injury caused by the goods to any person^[20].

Conclusion

The gap filling guidelines serves as central rule to identify the issues those are covered by the CISG and which are not. The gap filling guidelines deal only with questions concerning “matters governed by the CISG” which in a way defines boundary of questions governed but not settled by the Convention. This function of the gap filling guidelines reminds interpreters that the CISG does not authorize extension of the scope of the Convention but it is concerned with the approach to solve problems falling within the Convention. The boundary of the unsettled questions requires that these questions have to fall within the scope of the Conventions. Matters which are not governed by the CISG could not be settled by applying gap filling guidelines. An interpreting court or tribunal can identify these matters by applying “Five Articles” Test. Article 1 helps a court or tribunal to decide an issue whether a contract is governed by the CISG or not. Article 2 helps a court or tribunal to decide the issue whether a sale is governed by the CISG or not. Article 3 helps a court or tribunal to decide the issue whether a contracts which involves supply of goods is governed by the CISG or not. Article 4 helps a court or tribunal to decide whether an issue regarding scope of the CISG is governed by the Convention or not. Article 5 helps a court or tribunal to decide whether

an issue regarding the liability of the seller for death or personal injury caused by the goods is governed by the CISG or not.

References

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2. Working Group on the International Sale of Goods; report on the work of the Second Session, 7-18 December, 1970. (A/CN.9/52).
3. Introduced method of identifying the boundary of “questions concerning matters governed by the CISG which are not expressly settled in it” has been extracted from the authors PhD thesis titled “Methods for the Application of Article 7 in the interpretation of the United Nations Convention on Contracts for International Sale of Goods (CISG), 1980.
4. Contracting State means a State which has consented to be bound by the CISG. See Article 2 of the Vienna Convention on the Law of Treaties, Vienna, 1969.
5. Article 1 paragraph (3) of the CISG, “Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.
6. Plaintiff D. versus Defendant AG. The District Court of Michalovce, 11 October, 2010. [22 Cb/152/2010]
7. The Mineral Water Case, Foreign Trade Court attached to the Serbian Chamber of Commerce, Serbia 19 October, 2009. available at <http://cisgw3.law.pace.edu/cases/091019sb.html>.
8. To know more detail on it please see Mausumi Akter, “The United Nations convention on contracts for international sale of goods (CISG) and the applicable legal rule for its interpretation”, International Journal of Law, Volume 5, Issue 3, May, 2019, p6-17.
9. To know more detail on internationality see Jhon Honnold commentary on Article 1 of the CISG, Uniform Law for International Sales under the 1980 United Nations Convention, Kluwer Law and Taxation Publishers, Deventer/Netherlands, 3rd edition, 1999.
10. Article 2 of the CISG, “*This Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;*
11. (b) by auction; (c) on execution or otherwise by authority of law; (d) of stocks, shares, investment securities, negotiable instruments or money; (e) of ships, vessels, hovercraft or aircraft; (f) of electricity.”
12. Ibid.
13. Ibid.
14. Article 3 paragraph 1 of the CISG, “Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.
15. Ibid.
16. Article 3 paragraph 2 of the CISG, “This Convention does not apply to contracts in which the preponderant

- part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.
17. Serbia Versus Bosnia and Herzegovina, available at <http://cisgw3.law.pace.edu/cisg/text/110302serbian.pdf>.
 18. Milena Djordjevic, Editorial Remarks on Protective Steel Fence case, available at <http://cisgw3.law.pace.edu/cases/110302sb.html>
 19. Article 4 of the CISG, “This Convention 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. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold.”
 20. Milk packaging equipment case, Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia 15 July 2008, available at <http://cisgw3.law.pace.edu/cases/080715sb.html>.
 21. Article 5 of the CISG, “This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.”