

## **The adoption of the CISG in Portugal: benefits and perspectives**

**A adoção da CISG em Portugal: benefícios e perspectivas**

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**RESUMO:** A CISG constitui um exemplo de sucesso de uniformização do direito, tendo sido adotada por 80 Estados, representando mais de 80% da totalidade do comércio internacional. Esta Convenção representa também um marco no direito contratual moderno e tem sido usada como modelo em diversas reformas do direito dos contratos, ao nível regional e nacional, em diversas partes do mundo.

A adoção da CISG traz consigo benefícios imediatos para os operadores do mercado em termos de eficiência do quadro legislativo, o qual está especificamente desenhado para transações de longa distância, previsibilidade quanto à lei aplicável e facilidade na escolha dessa lei. À luz destes benefícios, a vasta maioria dos Estados membros da União Europeia, assim como dos restantes Estados Europeus e praticamente todos os maiores Estados mercantis adotaram já este texto como lei comum para a venda internacional de mercadorias. Portugal deveria considerar seriamente a sua adoção, como forma de promover e auxiliar os seus operadores, sobretudo as pequenas e médias empresas.

As consequências positivas da adoção da CISG incluem ainda a possibilidade de participar mais ativamente no debate académico sobre a reforma do direito dos contratos. Acresce que a adesão de Portugal iria reforçar o interesse pela CISG nos países de língua oficial portuguesa, já evidenciado pela recente adesão do Brasil.

**PALAVRAS-CHAVE:** CISG; venda internacional de mercadorias; UNCITRAL; União Europeia, Common European Sales Law; Países de língua oficial portuguesa.

**ABSTRACT:** The CISG represents a success story of uniform law, having been adopted by 80 States representing more than 80% of global trade. The CISG offers as well a major restatement of modern contract law and has been used as a model for regional and national contract law reform in various parts of the world.

The CISG brings immediate benefits to traders in terms of efficiency of the legislative framework, which is specifically designed for long-distance transactions, predictability of applicable law and ease of choice of law. In light of these benefits, the vast majority of European Union member States, as well as most other European States and almost all major trading States, have already adopted this text as a common law for the international sale of goods. Portugal should seriously consider its adoption to assist its businesses, especially small and medium-sized enterprises.

Positive consequences of the adoption of the CISG include the ability to join more actively the academic debate on contract law reform. Moreover, the accession of Portugal would give further momentum to the interest for the CISG in Portuguese-speaking countries already evidenced by Brazil's adoption of that text.

**KEY WORDS:** CISG, international sale of goods, UNCITRAL, European Union, Common European Sales Law, Portuguese-speaking countries.

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\* The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations.

## 1. Introduction

The United Nations Convention on Contracts for the International Sale of Goods, 1980 (CISG, or the Convention)<sup>1</sup> represents one of the pillars of uniform international trade law and a major success of the United Nations Commission on International Trade Law (UNCITRAL).<sup>2</sup> As of 1 October 2013, the CISG has 80 States parties.<sup>3</sup> These eighty States belong to all legal traditions and economic systems, but CISG membership is particularly high in certain regions, such as North America and Europe, and among developed countries. It is estimated that the CISG may apply to 80% of global cross-border sales. Most main commercial partners of Portugal are already a party to the CISG, including 24 of the 28 members of the European Union, the United States of America, Canada, Brazil and most Latin American countries, China, Japan and South Korea.

## 2. Benefits arising from the adoption of the CISG

The CISG provides a uniform regime for the settlement of disputes related to the international sale of goods, introducing certainty in commercial exchanges. This uniform regime is specifically designed for long-distance trade; it is therefore particularly appropriate for cross-border transactions, given the challenges and costs related to the distance between the parties, for instance due to carriage of goods. Thus, the CISG contains a principle of conservation of contract (*favor contractus*) aimed at minimizing economic losses in case of partial non-performance. It also features a carefully balanced system of contractual remedies that facilitates interaction between buyer and seller in curing any deficiency in performance. These mechanisms are usually not available under national law, which typically contains provisions designed for short-range transactions.

Moreover, the adoption of the CISG leads to greater predictability of the law applicable to the contract for international sale of goods, both in cases where there has been a valid choice of law and in those where there has either been an invalid choice or no choice at all. From the economic perspective, the adoption of the CISG brings a reduction in transaction costs, which translates into lower prices for imported and exported goods: thus, Portuguese final users and consumers could receive more value for their money, and Portuguese exports' lower prices could be more competitive in global markets.

<sup>1</sup> United Nations, *Treaty Series*, vol. 1489, p. 3.

<sup>2</sup> A large amount of academic materials on the CISG is available in several languages. The UNCITRAL secretariat compiles a bibliography of works relating to UNCITRAL texts that includes a large section on the CISG; it is available, with monthly updates, at [http://www.uncitral.org/uncitral/en/publications/bibliography\\_consolidated.html](http://www.uncitral.org/uncitral/en/publications/bibliography_consolidated.html). For a comprehensive introduction to the CISG, see I. SCHWENZER/P. HACHEM, "The CISG – Successes and Pitfalls", in *American Journal of Comparative Law*, n.º 57, 2009, pp. 457-478.

<sup>3</sup> For the updated status of the CISG, see the UNCITRAL website at [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)

Such results are achieved by greatly simplifying the search for and application of the relevant rules of private international law. In fact, under its article 1(1)(a), the Convention applies to contracts for the international sale of goods between parties whose places of business are located in one of the contracting States. Moreover, under its article 1(1)(b), the CISG applies to contracts for the international sale of goods when the rules of private international law indicate the law of a CISG contracting State as the law applicable to the contract for international sale of goods. This mechanism eliminates the possibility of divergent results in the determination of the applicable law.

Hence, the application of the CISG provides parties to the contract with a uniform, neutral, easily ascertainable legal text. This is particularly important in those cases when parties have limited access to qualified legal advice while negotiating a contract due to financial constraints, business culture or other reasons. Therefore, small and medium-sized enterprises, which form the backbone of the economy in many countries, would particularly benefit by the application of the CISG.

The availability of the CISG may also be significantly helpful for finding an acceptable outcome in cases involving negotiations on the applicable law of the contract. Contractual parties naturally favour their own national law as the one applicable to the contract. This can result in the imposition of the law of the party with more bargaining power, or in the choice of the law of a third, neutral country. The latter option is only apparently more equitable, as the parties need to seek qualified and expensive legal advice in case of any disputes. In truth, parties should seek the same qualified and expensive legal advice also if they wish to engage themselves seriously and proactively in contract management, as should especially be the case for contracts for the sale of goods concluded in the framework of supply chain arrangements.

The CISG provides an ideal solution to such challenges. Indeed, the text of the CISG is widely known, and a multitude of books and articles about the Convention are readily available in many languages. Moreover, thousands of court decisions dealing with its provisions have been collected and are often available at no cost. The CISG, being a uniform text, is by its own nature neutral and therefore no party may claim an advantage by applying it. However, it is true, at the same time, that in those States that have already formally adopted the CISG, the legal community has a stronger incentive to become familiar with its provisions. Hence, formal treaty adoption opens the door to the application of the CISG either as a default regime or by parties' choice.

It must be stressed that the Convention does not have a hegemonic attitude towards its application. Party autonomy is an overarching principle of the CISG: parties may opt out of the Convention or vary any of its provisions, thus providing maximum flexibility to fit any business need. However, any decision to do should be justified in light of actual business needs. Generic opting out – i.e., opting out for no specific reason – is to be discouraged, as it may expose parties' to significant legal and financial consequences. Luckily, the practice of

generic opting-out appears to be on the decline, as parties and especially their legal counsels are increasingly familiar with the provisions of the CISG.

### 3. The CISG and the development of modern contract law

The CISG is the product of decades of preparatory work. In particular, extensive studies led to the adoption of the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 1964, (ULF)<sup>4</sup> and of the Convention relating to a Uniform Law on the International Sale of Goods, 1964 (ULIS).<sup>5</sup> While ULF and ULIS did not attract broad State participation, their provisions offered a solid starting point to the drafters of the CISG. At the same time, the universal nature of UNCITRAL ensured participation in the drafting process of representatives from all economic, legal and political systems, thus ensuring that the final text would have a truly global appeal. Portugal provided an important contribution to the preparation of the text, including by participating in the Diplomatic Conference that adopted the Convention.<sup>6</sup>

The exceptional level of legal skill and care that was employed in the preparation of the CISG led to a text that represents a milestone in the history of modern contract law. The fundamental structure of the text, based on a common set of remedies inspired by the principle of favor contractus and by the desire of maximizing the economic benefits of the contract, including by reducing potential sources of diseconomy, represents in itself a major step forward in the development of efficient and effective provisions for contract management.

Thus, the CISG has become the source of inspiration for a number of regional and national legislative initiatives. Moreover, due to the influence of the contract for sale of goods on the general theory of contract, the influence of the CISG has reached beyond the field of sales law.<sup>7</sup> For instance, the provisions of the OHADA Act on General Commercial Law, already originally inspired by the CISG,<sup>8</sup> have been later revised in a manner that further aligns the two texts. The relation is evident in the case of the Unidroit Principles of International Commercial Contracts – actually, Unidroit has been one of the first promoters of the codification of the law of sale of goods – but it is sometimes overlooked that all the texts

<sup>4</sup> United Nations, *Treaty Series*, vol. 834, p. 169.

<sup>5</sup> United Nations, *Treaty Series*, vol. 834, p. 107.

<sup>6</sup> An early outcome of this interaction was the seminal publication by MARIA ANGELA COELHO BENTO SOARES and RUI MANUEL GENS DE MOURA RAMOS, *Do contrato de compra e venda internacional: análise da Convenção de Viena de 1980 e das disposições pertinentes do direito português*, Coimbra, Procuradoria-Geral da República, Gabinete de Documentação e Direito Comparado, 1981.

<sup>7</sup> P. SCHLECHTRIEM, "Basic structures and general concepts of the CISG as models for a harmonisation of the law of obligations", in *Juridica internacional*, 10, 2005, pp. 27-34, available at <[http://www.juridica.ee/get\\_doc.php?id=880](http://www.juridica.ee/get_doc.php?id=880)>. See also, F. FERRARI, "The CISG and Its Impact on National Contract Law – General Report", in *The CISG and Its Impact on National Contract Law*, F. Ferrari (Ed.), Munich, Sellier European Law Publishers, 2008, pp. 413-480; and, for a national perspective, S.A. KRUISINGA, "The Impact of Uniform Law on National Law: Limits and Possibilities – CISG and Its Incidence in Dutch Law", in *Electronic Journal of Comparative Law*, vol. 13.2, 2009, available at <<http://www.ejcl.org/132/art132-2.pdf>>.

<sup>8</sup>G. KENFACK DOUJANI, "La vente commerciale OHADA", in *Uniform Law Review / Revue de droit uniforme*, n.º 1-2, 2003, p. 191.

based on the Unidroit Principles are also rooted in the CISG. At the domestic level, China provides a well-known example of enactment of the provisions of the CISG.<sup>9</sup> More recently, in Japan, the CISG is exercising significant influence on the discussions relating to civil code reform.<sup>10</sup> In Brazil, judicial decisions made reference to the CISG when interpreting domestic law even before the Convention's entry into force in that country.<sup>11</sup>

Unfortunately, in some cases, the role of the CISG as a legislative model is insufficiently taken into consideration. The proliferation of regional initiatives may contribute to create an impression of limited relevance and application of the CISG. Moreover, regional texts usually do not advocate the adoption of the CISG in order to ensure seamless interaction between different normative levels. The harmonization of regional texts with the CISG remains therefore of critical importance.

#### **4. The contribution of the CISG to the establishment of a common European market**

The relation between the CISG and European Union law deserves particular attention in light of the recent formulation of a Common European Sales Law (CESL),<sup>12</sup> an optional instrument whose choice could, in the intention of its drafters, displace the application of the CISG.<sup>13</sup>

Initially, the discussion on the relation between the CISG and the CESL was framed in terms of mutual exclusivity and competition. Three justifications have been given in support of the replacement of the CISG by the CESL when the CESL would find application under its own scope: (1) the CISG does not find universal application in the European Union, as some European Union member States are not a party to it, and others have lodged declarations that vary the CISG's scope of application; (2) certain matters, including sales to consumers, are excluded from the CISG; and (3) no supranational judicial system exists to guarantee the CISG's uniform interpretation.<sup>14</sup> In response, it has been noted that only four European Union member States are not a party to the CISG, and existing declarations are being reviewed and withdrawn; that the CISG does not cover those matters where global consensus was (and still is) impossible to reach; and that the imposition of a supranational

<sup>9</sup> DING DING, "China and CISG", in *CISG and China: Theory and Practice*, M. Will (Ed.), Geneva, 1999, pp. 25-37.

<sup>10</sup> SOUICHIROU KOZUKA and LUKE NOTTAGE, *Policy and Politics in Contract Law Reform in Japan* (paper on file with author).

<sup>11</sup> Materials on the CISG in Brazil are available on the CISG Brasil website, at <http://www.cisg-brasil.net/>.

<sup>12</sup> Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels 11.10.2011 COM (2011) 635 final.

<sup>13</sup> However, the CISG contains the principle of autonomous interpretation, demanding to use primarily the provisions of the CISG itself. Hence, a valid opting out from the CISG is to be assessed against the CISG's own rules.

<sup>14</sup> B. FAUVARQUE-COSSON, "Vers un droit commun européen de la vente", in *Recueil Dalloz*, n. 1, 2012, pp. 34-35.

judicial system with final competence over cases relating to international sale of goods would have greatly reduced the appeal of the CISG and hence State's participation.<sup>15</sup>

However, it should be noted that, although the scope of application of the CESL is still subject to adjustments prior to adoption, it would appear that the CESL could overlap with the CISG only with respect to certain contracts concluded by small and medium-sized enterprises based in the European Union, and subject to specific opting in. Moreover, the CESL owes much to the CISG in general structure and specific provisions. The adoption of an approach that highlights similarities between the two texts and that explains accurately the differences, especially those in the respective intended goals, seems therefore more appropriate. In that analysis, particular attention should be paid to avoiding confusion between the provisions of the two texts, especially when similar but not identical, at the moment of their interpretation and application. Indeed, the CISG should always be interpreted under its own provisions, while other texts, including the CESL, might require different interpretative rules.

The CESL has been widely discussed, especially among scholars. Concerns have been expressed with respect to the structure, content, expected benefits and legitimacy.<sup>16</sup> It is interesting to note how the introduction of the CESL has revived interest for the CISG and has suggested proposals for a new engagement of UNCITRAL in the field of contract law,<sup>17</sup> proposals that in turn have been dismissed in favour of the status quo.<sup>18</sup>

With respect to the geographic scope of application of the CISG, the fact that 24 European Union member States are already a party to the CISG, and that their main commercial partners outside the European Union are also CISG State parties, is already very significant. The four exceptions are Ireland, Malta, Portugal and the United Kingdom. In November 2011, the Irish Sales Law Review Group issued its final "Report on the Legislation Governing the Sale of Goods and Supply of Services",<sup>19</sup> whose Chapter 15, dealing specifically with the CISG, recommends that Ireland should accede to the treaty. This recommendation echoes the position already expressed by the Irish Law Reform Commission which, in 1992, had already recommended the adoption of the CISG.<sup>20</sup> While the position of Malta is unknown,

<sup>15</sup> For more details see L.G. CASTELLANI, "CISG in Time of Crisis: an Opportunity for Increased Efficiency", in *Globalization versus Regionalization - 4<sup>th</sup> Annual MAA Schlechtriem CISG Conference*, I. Schwenzer and L. Spagnolo (Eds.), Eleven International Publishing, 2013, pp. 37-46.

<sup>16</sup> Ex multis, and limited to the relation between CISG and CESL, see U. MAGNUS, "CISG and CESL", in *Liber Amicorum Ole Lando*, M. J. Bonell, M. L. Holle and P.A. Nielsen (Eds.), Djøf Forlag, Copenhagen, 2012, pp. 225-255; N. KORNET, "The Common European Sales Law and the CISG - Complicating or Simplifying the Legal Environment?", in *Maastricht Journal of European and Comparative Law*, n.º 19.1, 2012, pp. 164-179; see also V. HEUZÉ, "Le technocrate et l'imbécile. Essai d'explication du droit commun européen de la vente", in *La Semaine Juridique, Edition Générale*, 18 Juin 2012, n.º 25, pp. 1225-1232.

<sup>17</sup> U.N. Doc. A/CN.9/758, Possible Future Work in the Area of International Contract Law: Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law, available at <<http://www.uncitral.org/uncitral/commission/sessions/45th.html>>.

<sup>18</sup> K. LOKEN, "A New Global Initiative on Contract Law In UNCITRAL: Right Project, Right Forum?", in *Villanova Law Review*, n.º 58.4, 2013, pp. 509-520. Volume 4 of 2013 of the Villanova Law Review contains several other articles on this debate.

<sup>19</sup> Prn. A11/1576.

<sup>20</sup> Report on the United Nations (Vienna) Convention on Contracts for the International Sale of Goods, LRC 42 - 1992.

that of the United Kingdom has been discussed at length.<sup>21</sup> From that debate, it does not seem that the reasons that have so far prevented the United Kingdom from acceding to the CISG would be necessarily relevant for other States.

Moreover, under art. 4(1)(a) of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) "a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence". This means that a contract for international sale of good is governed by the CISG if the seller has residence in any of 22 EU member States that are a party of the CISG and apply its art. 1(1)(b),<sup>22</sup> regardless of whether the buyer is also located in a CISG member State.

Last, but not least, CISG States parties in the European Union have been conducting a review of existing CISG declarations that has already led to the withdrawal of a significant number of them. In particular, Denmark, Finland and Sweden have become a party to Part II of the CISG, and Latvia and Lithuania have withdrawn the declaration requiring the use of written form for contracts for the international sale of goods.

To sum up, the CISG is already the common law for sale of goods in the European Union. It is actually also the common law for sale of goods in the broader Europe, extending to the Bosphorus and the Urals. Portugal would be warmly welcome in such vast community.

## 5. After the accession: capacity building and further strengthening.

The above reasons strongly recommend that Portugal should give consideration to the adoption of the CISG. As human and financial resources in public service are often limited, it should be noted that becoming party to the Convention has no financial implications and that the Convention's administration at the domestic level does not require any dedicated body. This is a legislative reform at virtually no cost but of potential great economic benefits given the frequency and value of cross-border sales.

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<sup>21</sup> E. SIMOS, "The CISG: A Lost Cause in the UK?", in *Vindobona Journal of International Commercial Law and Arbitration*, 16.2, 2012, pp. 251-282; K. GEORGIADOU, "Apathy Vis-à-Vis the UN Convention on Contracts for the International Sale of Goods (CISG) in the UK and Two Proposed Strategies for CISG's Incorporation in the UK Legal Order", in *Pace International Law Review Online Companion*, vol. 3, n.º 8, 2012, pp. 256-277; A. ROGOWSKA, "Some considerations on the desirability of accession to the CISG by the UK", in *European Journal of Commercial Contract Law*, n.º 2, 2013, pp. 31-43; S. MOSS, "Why the United Kingdom Has Not Ratified the CISG", in *Journal of Law and Commerce*, n.º 25.6, 2005, pp. 483-488; R.S. BORGES, "The United Kingdom and the UN Convention on Contracts for the International Sale of Goods (CISG): to Ratify or Not to Ratify?", in *Journal of International Maritime Law*, n.º 14, 2008, pp. 331-338.

Interestingly, some critics of the CISG are now seriously considering its adoption in light of the CESL: see E. CLIVE, "What if the UK quickly ratified the CISG?", in *European Private Law News*, 29 April 2012, available at <<http://www.law.ed.ac.uk/epln/blogentry.aspx?blogentryref=8916>>.

<sup>22</sup> The Czech Republic and Slovakia have excluded the operation of art. 1(1)(b) by virtue of a declaration and therefore are not interested by this mechanism of application of the CISG for the time being. Withdrawal of those declarations, originally lodged by Czechoslovakia due to needs of its socialist legal system, is under consideration.

The CISG is a dynamic text, constantly enriched by a steady flow of doctrinal studies and judicial applications that keep it abreast of developments in international trade practice. In fact, flexibility and adaptability have been key factors in building the CISG's success. Therefore, it is important to ensure that the CISG's application and interpretation takes place in line with the prevailing international interpretative trends, in implementation of article 7 of the CISG, mandating, inter alia, the uniform interpretation of the Convention in light of its international character.

To this end, the UNCITRAL Secretariat has prepared some tools to promote awareness of interpretative trends. Those tools include the CLOUT (Case Law on UNCITRAL Texts) series, a collection of case abstracts covering most UNCITRAL texts,<sup>23</sup> and the Digest of Case Law on the CISG<sup>24</sup> which provides a comprehensive overview of the main trends in the interpretation of the Convention's provisions. Due to their nature, CLOUT and the Digest may be of great assistance in capacity-building exercises in those countries which are becoming a party to the CISG, as they provide stakeholders with timely and accurate information, thus strengthening their ability to fully grasp and adequately apply the Convention.

This educational work needs, of course, support from national stakeholders, first and foremost academics and the legal profession. It would therefore be desirable to benefit from the renewed engagement of the Portuguese legal community in the field of international sale of goods and uniform law in general.

The positive effects of that renewed engagement would actually extend outside Portugal. Brazil has recently become the first Lusophone country to adopt the CISG. The increased availability of materials on the CISG in Portuguese is likely to increase the familiarity with the CISG in other Lusophone countries. The many benefits that such increased familiarity would bring include an opportunity for exposure to current trends in the modernization of contract law where opportunities for academic exchange are rare.

## 6. Conclusions

A steep increase in cross-border trade, including in the context of regional economic integration; the organization of manufacturing processes along international supply chains coordinating otherwise independent entities in a joint effort for efficiency and innovation; and the widespread use of electronic communications are among the features of globalization. Uniform law provides specific answers to such issues by increasing the legal predictability of

<sup>23</sup> See the UNCITRAL website at <[http://www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html)>.

<sup>24</sup> See the UNCITRAL website at <[http://www.uncitral.org/uncitral/en/case\\_law/digests/cisg.html](http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html)>. See also J. SEKOLEC, "Digest of case law on the UN Sales Convention: the combined wisdom of judges and arbitrators promoting uniform interpretation of the Convention", in *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention*, F. Ferrari, H. Flechtner, R. Brand (Eds.), Munich, Sellier European law publishers, 2003. pp. 1-20.

international transactions, especially with respect to legal systems of countries that are newcomers in global markets, and therefore reducing transaction costs.

The CISG is a splendid example of successful uniform law. The adoption of the CISG by Portugal would support Portuguese economic growth and integration in the global economy at reduced or no cost; it would also allow for closer interaction between the Portuguese legal community and foreign ones.

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