

A NEW ERA REGARDING TURKISH CROSS BORDER TRADE TRANSACTIONS THE UNITED NATIONS CONVENTION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (“CISG”)



THE UNITED NATIONS CONVENTION OF Contracts for the International Sale of Goods (hereinafter referred to as “CISG”) came into force in Turkey on August 1, 2011. More than 78 countries, including the USA, most of the European countries, China, Russia, Singapore and Japan are parties to the CISG. The CISG aims to unify the different international trade legislations and provides uniform rules for international trade transactions of goods between parties whose place of businesses are in different member states. Albeit many entrepreneurs prefer domestic legislation, more and more agreements are governed by the CISG. The increasing choice of the CISG as contract law is based on the global knowledge and acceptance of the CISG as international uniform law. With this article GSI Meridian wants to offer you a general overview of the CISG, which will gain importance in Turkey.

Requirements of Application

The basic requirement for the application of the CISG is that the parties have their place of business in different member states. If there is more than one place of business, the closest connection to the contract and its fulfilment is evident. The nationality of the parties is insignificant. It should be underlined that the CISG automatically governs cross border trade transaction of goods, if parties have their businesses in different member states and if the CISG is not excluded explicitly. If such parties do not want the application of the CISG they have to exclude it in the contract, otherwise it will apply. Furthermore where CISG applies to the transaction, parties could exclude or vary the effect of certain provisions to meet their needs in this way. Notwithstanding this, the parties are bound by

any terms to which they have agreed and by any practise which they have established between themselves. The CISG is applicable only for the sale of movable goods (personal property) to be sold, manufactured or produced.

The Scope of the CISG

The CISG governs the sale of goods only in its core areas, such as the conclusion of contract by offer and acceptance, the obligations of the parties and the consequences in cases of defected goods. Not regulated are issues which are connected to the sale of goods, such as product liability, representation, contractual penalties, limitation and procedural law. The place of delivery, assumption of risk and other obligations regarding the transportation of the goods are usually regulated by Incoterms.

Outlines of the CISG

The main obligations of the seller regulated in the CISG are such as; the timely and full delivery of contractual goods, the transfer of any papers and documents relating to the goods and the grant of the ownership. The main obligations of the buyer are the timely and full payment of the purchase price and the timely and full acceptance of the goods sold. Furthermore the buyer has the duty to inspect the goods within a very short time and to give notice of defects. Regarding the quantity, the quality, the kind and the packaging of the goods the CISG expects conformity with the contract. Conformity means, as agreed or as for the contractual usage.

The CISG is divided into four parts:

- (1) The first part (Art. 1-13 CISG) contains rules of application and a number of general provisions;
- (2) The second part (Art. 14-24 CISG) deals with the formation of the contract;
- (3) The third part (Art. 25-88 CISG) provides the “sales law” of the CISG; and
- (4) The fourth part (Art. 89-101 CISG) contains final provisions which deal in particular with the details of ratification etc. (e.g. reservations against certain parts or provisions of the CISG).

Formation of the Contract

The acceptance of an offer under the CISG is effective, when it reaches the offeror. It shall be noted that the offeror cannot revoke the offer once the offeree has dispatched his acceptance. The CISG’s provisions on revocation of an offer are specific; an offer cannot be revoked if it indicates, whether by stating a fixed time for acceptance or otherwise that it is irrevocable. In this context, the “battles of terms and conditions” shall be mentioned. In case of discrepancies between the seller’s conditions and the buyer’s conditions based on exchanging of conflicting terms and conditions, the conflicting conditions are “cut off”.

Defect Goods and Remedies

The CISG regulates the obligations of the parties and provides remedies in cases of breach. If a party fails to perform any of its obligations under the contract or the CISG, the other party may have claims as described briefly below.

Remedies for Breach of Contract by the Seller

In case of “**simple breach of contract**”:

- 1. performance (such as fulfilment; rectification);
- 2. the reduction of the purchase price; (compensation)

3. damages;

In case of “**essential breach of contract**”, in addition to the above

- 4. avoidance of the contract (as the case may be e.g. after a failed rectification);
- 5. substitution.

An essential breach of contract is defined in the CISG as a breach which results in such detriment to the other party that deprives that party of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Damages may be independently claimed in addition the other above mentioned remedies.

The buyer is obliged to give a notice for defective goods, but if the buyer has a valid excuse for not giving a notice or for not giving it in the proper way; then he still can continue to use the rights regarding these defects goods. The buyer shall act properly in the objective circumstances and in the practices of a prudent businessman.

The remedies mentioned above are excluded if the defect is caused by the buyer’s own fault. Furthermore, the seller’s conscious of the defected goods should result from own wrongful intentions or gross negligence. The buyer loses the right to rely on a lack of conformity within a period of 2 years, from the date on which the goods were actually handed over to the buyer after discovery of these defect.

Requirement of Specific Performance

The CISG accepts the right of asking for a specific performance, only if the requester country has this right in its own legislation. For the claimed performance the buyer can give an additional time to the seller. On request of the buyer the defected goods may be repaired if acceptable and possible. The request of repair should be done when a claim of the defective goods is made or within a reasonable time after the notice has been sent. The repair mentioned above can be done in two ways and these are; replacing or repairing the defective parts.

Reduction of the purchase price

The buyer who has received non-conforming goods and who accepts such goods may unilaterally reduce the price in proportion of the value of the goods as delivered to the value of conforming goods would have had at that time.

According to the CISG, the reduction has two limitations. The first limitation is about the seller repairing the defects and the second one is about the buyer denying the seller’s proper tendering performance.

Damages

The CISG establishes the right to claim damages and defines the methods for calculating damages in certain cases. Furthermore the mitigation of damages is regulated. Damages that have been requested include the entire loss of adjustment and the loss of profit. It shall be mentioned that this profit may not exceed the loss that parties foresaw or ought to have foreseen at the time of entering into the contract. The party against whom a claim is made is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of entering into the contract or to have avoided or overcome it or its consequences.

In cases where the seller engages a third party to perform the contract, the seller is exempt from liability if the aforementioned conditions are complied. Both the seller and the third party have to be exempt from liability within this meaning.

Avoidance of the Contract

Avoidance is a remedy that can be similar to rejection, revocation of acceptance or cancellation of the contract, but it is somehow more difficult. As aforementioned the buyer may declare the contract avoided when the seller commits an “essential breach” of the contract.

The CISG regulates three special implementations regarding the avoidance of a contract:

- The buyer may avoid the contract if the essential breach of the contract is done before the de facto beginning of the agreement;
- The buyer can also use this option if the seller did not deliver the goods in the additional time given by the buyer to the seller;
- The buyer may declare the contract avoided in its entirety if the failure to make delivery of the goods completely or in conformity with the contract amounts to an “essential breach”;
- If the seller does not fulfil its obligations in sale contracts that require successive deliveries, then the buyer can avoid from the contract for the undelivered goods, for the future deliveries and for the delivered goods.

The buyer loses the right to declare avoidance if it is impossible for the buyer to return the goods in the way that they have received them initially. In this context the exceptions shall be noted, these are;

- the buyer is not responsible for the goods not being able to be returned in the way that they were received initially.
- the goods received damage during an inspection done according to the CISG’s provisions;
- the goods are sold, consumed or transformed by the buyer before he has discovered or ought to have discovered the lack of conformity.

Remedies for Breach of Contract by the Buyer

Specific performance

If the buyer fails his obligation, the seller may fix an additional period of time for performance. Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract.

Damages

However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance. The aforementioned methods of calculating damages apply here as well. The seller can avoid the contract if the breach of contract is essential or if the payment was not done during the additional time given.

Conclusion

Somehow the CISG is commonly considered as to the benefit of buyers and precisely for this reason or despite this, the CISG is an important alternative in international trade transactions, which may be for some reasons better than the other options available such as the domestic laws of the parties. Commercial advantages and disadvantages of the exclusion of CISG are most commonly discussed and whether going one way or another depends on the circumstances of each case, the nature of goods, the status of a party and the will of negotiation. The choice of the CISG as the governing law will be appropriate where the parties cannot agree on the choice of the national law or where a party prefers the CISG. There are many valid arguments both for and against the application of the CISG depending on the case. For this reason GSI Meridian recommend to call on legal advice before deciding on the exclusion of the CISG.

Annex: Parties of the CISG

State	Signature Date	Ratification, Accession(*), Approval(†), Acceptance(\$) or Succession(\$)	Valid from
Albania		13/05/2009(*)	01/06/2010
Argentina		19/07/1983(*)	01/01/1988
Armenia		02/12/2008(*)	01/01/2010
Australia		17/03/1988(*)	01/04/1989
Austria	11/04/1980	29/12/1987	01/01/1989
Belarus		09/10/1989(*)	01/11/1990
Belgium		31/10/1996(*)	01/11/1997
Benin		29/07/2011(*)	01/08/2012
Bosnia and Herzegovina		12/01/1994(\$)	06/03/1992
Bulgaria		09/07/1990(*)	01/08/1991
Burundi		04/09/1998(*)	01/10/1999
Canada		23/04/1991(*)	01/05/1992
Chile	11/04/1980	07/02/1990	01/03/1991
China	30/09/1981	11/12/1986(†)	01/01/1988
Colombia		10/07/2001(*)	01/08/2002
Croatia		08/06/1998(\$)	08/10/1991
Cuba		02/11/1994(*)	01/12/1995
Cyprus		07/03/2005(*)	01/04/2006
Czech Republic		30/09/1993(\$)	01/01/1993
Denmark	26/05/1981	14/02/1989	01/03/1990
Dominican Republic		07/06/2010(*)	01/07/2011
Ecuador		27/01/1992(*)	01/02/1993
Egypt		06/12/1982(*)	01/01/1988
El Salvador		27/11/2006(*)	01/12/2007
Estonia		20/09/1993(*)	01/10/1994
Finland	26/05/1981	15/12/1987	01/01/1989
France	27/08/1981	06/08/1982(†)	01/01/1988
Gabon		15/12/2004(*)	01/01/2006
Georgia		16/08/1994(*)	01/09/1995
Germany	26/05/1981	21/12/1989	01/01/1991
Ghana	11/04/1980		
Greece		12/01/1998(*)	01/02/1999
Guinea		23/01/1991(*)	01/02/1992
Honduras		10/10/2002(*)	01/11/2003
Hungary	11/04/1980	16/06/1983	01/01/1988
Iceland		10/05/2001(*)	01/06/2002
Iraq		05/03/1990(*)	01/04/1991
Israel		22/01/2002(*)	01/02/2003
Italy	30/09/1981	11/12/1986	01/01/1988
Japan		01/07/2008(*)	01/08/2009
Kyrgyzstan		11/05/1999(*)	01/06/2000
Latvia		31/07/1997(*)	01/08/1998
Lebanon		21/11/2008(*)	01/12/2009
Lesotho	18/06/1981	18/06/1981	01/01/1988
Liberia		16/09/2005(*)	01/10/2006
Lithuania		18/01/1995(*)	01/02/1996

Luxembourg		30/01/1997(*)	01/02/1998
Mauritania		20/08/1999(*)	01/09/2000
Mexico		29/12/1987(*)	01/01/1989
Mongolia		31/12/1997(*)	01/01/1999
Montenegro		23/10/2006(\$)	03/06/2006
Netherlands	29/05/1981	13/12/1990(‡)	01/01/1992
New Zealand		22/09/1994(*)	01/10/1995
Norway	26/05/1981	20/07/1988	01/08/1989
Paraguay		13/01/2006(*)	01/02/2007
Peru		25/03/1999(*)	01/04/2000
Poland	28/09/1981	19/05/1995	01/06/1996
Republic of Korea		17/02/2004(*)	01/03/2005
Republic of Moldova		13/10/1994(*)	01/11/1995
Romania		22/05/1991(*)	01/06/1992
Russian Federation		16/08/1990(*)	01/09/1991
Saint Vincent and the Grenadines		12/09/2000(*)	01/10/2001
San Marino		22/02/2012(*)	01/03/2013
Serbia		12/03/2001(\$)	27/04/1992
Singapore	11/04/1980	16/02/1995	01/03/1996
Slovakia		28/05/1993(\$)	01/01/1993
Slovenia		07/01/1994(\$)	25/06/1991
Spain		24/07/1990(*)	01/08/1991
Sweden	26/05/1981	15/12/1987	01/01/1989
Switzerland		21/02/1990(*)	01/03/1991
Syrian Arab Republic		19/10/1982(*)	01/01/1988
The former Yugoslav Republic of Macedonia		22/11/2006(\$)	17/11/1991
Uganda		12/02/1992(*)	01/03/1993
Ukraine		03/01/1990(*)	01/02/1991
United States of America	31/08/1981	11/12/1986	01/01/1988
Uruguay		25/01/1999(*)	01/02/2000
Uzbekistan		27/11/1996(*)	01/12/1997
Venezuela (Bolivarian Republic of)	28/09/1981		
Zambia		06/06/1986(*)	01/01/1988

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