

The Accession to and Implementation of the CISG (summary)

Hiroo SONO

Professor of Law, Hokkaido University

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is a uniform law treaty prepared by the United Nations Commission on International Trade Law (UNCITRAL). It was adopted on April 11, 1980, and has been in force since January 1, 1988. It applies to contracts for the international sale of goods (Art. 1) and governs the formation of the contract of sale and the rights and obligations of the seller and buyer (Art. 4).

Japan acceded to the CISG on July 1, 2008, and the CISG entered into force in respect of Japan on August 1, 2009. No declaration of reservation was filed. Internally, it was promulgated on July 7, 2008, as Treaty No. 8 of 2008. Japan is the 71st Contracting State of the CISG.

One purpose of this paper is to provide an overview of Japan's accession process and measures taken for the implementation of the CISG (Part II). Another purpose is to explore the structure of CISG's scope provisions (especially Arts 1, 6, 95, and 100) from a private international law perspective (Parts III-V).

In Part II, the process of accession to the CISG in accordance with the Constitution of Japan as well as with the treaty law provisions of the CISG is described. One theoretical point which is emphasized in Part II is the need to maintain an analytical framework that clearly distinguishes the public international law obligations of a Contracting State under the CISG, and the internal implementation measures of such public international law obligations.

Utilizing the analytical framework provided in Part II, Part III discusses Japan's decision regarding the implementation of the public international law obligations under the CISG. Section 1 explains Japan's adoption of a "direct application" approach. Two necessary prerequisites for this approach are that Japan is a "monist" state and that the CISG is designed as a "self-executing treaty". Japan's decision, however, was also a result of conscious deliberation of the need of uniform application of the CISG (cf. Art. 7(1)) and the superfluous nature of any domestic implementing legislation (cf. Art. 7(2)).

Section 2 then analyzes the structure of CISG's scope provisions which autonomously

determine the applicability of the CISG without resorting to the private international law process (“autonomous application”). This applies not only to Art. 1(1)(a) but also to Art. 1(1)(b) which provides that the CISG applies “when the rules of private international law lead to the application of the law of a Contracting State.” Rebutting the old (and recently renewed) argument that private international law is actually “applied” in the application of Art. 1(1)(b) thus mandating application of the CISG as law of the designated Contracting State, this paper joins the prevailing view that private international law is merely “referred to” or “borrowed” in the application of Art. 1(1)(b) and thus the CISG applies as the law of the forum Contracting State. This is the better view because the former view may cause difficulty in achieving uniform application (Art. 7(1)) and also because it may lead to the intolerable consequence that application of the CISG may differ depending on whether the application is based on Art. 1(1)(a) or (b).

Section 2 also argues that the declaration of reservation under Art. 95 is not an “absolute reservation” but rather a “relative reservation”. That understanding not only fits better with the language of Art. 95 (“Any State may declare ... that *it* will not be bound by [Art. 1(1)(b)]” (emphasis added)) but also with legislative history. It also argues that the often raised criticism that treating an Art. 95 reservation as a “relative reservation” would produce more forum shopping is a fallacy, because the same would happen even if Art. 95 reservation is treated as an “absolute reservation”: this is because even if the *non-applicability of the CISG* is decided by an absolute reservation, the *applicable law* will have to be decided by divergent private international laws of the forum.

Section 3 deals with the question of whether all of the above analysis means that private international law is excluded under the CISG. The answer is in the negative. Although the private international law process is not used in deciding the *applicability of the CISG*, it is important to note that private international law still must be used to decide the applicable law for matters not governed by the CISG (cf. Art. 4). In conclusion, there is a dual mechanism that designates the applicable norm in international sales: Art. 1 CISG and the private international law process. It is also important to note that any conflict of laws that results from the dual process will be resolved in accordance with Art. 7(2).

Part IV clarifies the nature of “opting out” under Art. 6 and provides some examples of clauses that will or will not be interpreted as an “opting out” clause.

Part V deals with provisions on the temporal scope of application of the CISG (Art 100). Special attention is given to cases of contractual relationships continuing from the

time when the CISG was not yet in force. Continuing contractual relationships often consist of a framework contract and individual application contracts. The CISG may apply to individual application contracts. The framework contract may include a choice of law clause making the law of a non-Contracting State the governing law. Such clause will be incorporated into individual application contracts, but if that non-Contracting State has become a Contracting State by the time of a given individual contract, will that clause be treated as a clause opting out of the CISG? This paper proposes that, unless indications to the contrary exist, such clause is not an “opting out” clause. Otherwise, it will be tantamount to upholding a “freezing clause”.