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CISG, 1980 and the Indian Legal Sphere

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ABSTRACT

The United Nations Convention on Contracts for the International Sale of Goods was formed in response to economic liberalization, privatization, and globalization, in order to secure the continued expansion of international commerce. The number of nations that have ratified the CISG, as well as the number of incidents dealing with its implementation, has increased dramatically. In light of the increased utilization of the CISG and the fact that India is a prominent competitor in international commerce, it is necessary to analyze the differences between the CISG and the Indian Contract Act of 1872 and the Sale of Goods Act of 1930. The ICA, which is the basis of India's earliest commercial laws, establishes basic regulations for contract administration and regulation. The SGA is solely engaged with the selling of products. The CISG is a more recent version of these statutes that deals with contract formation, buyer and seller obligations, and contract breach remedies. This article aims to identify and analyze the differences between the CISG, the SGA, and the ICA, both in terms of content and application. It also aims to analyze if it is a viable choice for India to ratify the CISG.

Keywords: *CISG, ICA, SGA, comparison, ratification, contract, international trade and commerce.*

I. INTRODUCTION

International commerce and investment are the backbone of contemporary business in the era of globalization, and they have a tremendous influence on a country's economic growth. The increased volume of cross-border goods flow has necessitated the development of uniform trade practices in the form of multilateral agreements and market conventions, in order to enable beneficial and productive dialogue between nations and ensure that free trade and global commerce are not hampered.

Contracts for the sale of commodities in India are governed by the broad principles of law recognized by the nation's courts, as well as the law established by two important statutes: The Sale of Goods Act, 1930, and The Indian Contract Act, 1872[2]. The ICA is the governing

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[2] Academike. 2021. *Sale Of Goods: In Domestic And International Domain - Academike*. [online] Available at: <https://www.lawctopus.com/academike/sale-goods-domestic-international-domain/> [Accessed 17 December 2021].

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legislation for all contracts in India, whereas the SGA, as the name implies, is a legislation that deals only with the sale of goods, and it defines, distinguishes, and otherwise regulates structures for the legitimate sale of goods and their transfer between the parties involved.

The United Nations Convention on Contracts for the International Sale of Goods 4, which went into effect in 1980, is a modern, internationally standardized framework that establishes rules and mechanisms for resolving disputes between international buyers and sellers. Despite participating in the Vienna Diplomatic Conference in 1980, India has not signed the CISG[3]. The CISG was founded "to offer a contemporary, standard, and fair system for contracts for the international sale of products"[4]. As a result, the CISG exists to provide some degree of security in international business transactions while also assisting in the lowering of transaction costs. The CISG is the cornerstone of all international trade between states, independent of their economic growth or existing legal agreements, by its very nature. Consequently, the CISG is believed to be the one of the most essential international trade law treaties whose universal ratification is universally sought.

II. COMPARISON WITH INDIAN LAW

The CISG is exclusively concerned with the selling of goods. Its scope excludes some issues such as contractual obligation, legality, fraud, tortuous liability, and other issues that are frequently disputed by parties. The CISG would not therefore meet one of the fundamental purposes of the uniform laws[5]. As a result, the first thought that occurs is that, when what the parties really require is a method of resolving these concerns, why establish another regulating law? The CISG's entire objective is to standardize and simplify the contractual relationship between nations with differing legal systems.

Numerous legal difficulties are produced by generically formulated regulations that contain many undefined and novel phrases that must be addressed at an international level by courts and arbitral tribunals with no hierarchy or precedents to rely on. In fact, the CISG's goal of bringing about legal unity or resolving problems caused by competing laws and issues has resulted in a variety of interpretating techniques and traditions. Different nations' courts have interpreted sections of the CISG in distinctly different ways, partially due to unclear phrasing,

[3] Indraneel Basu Majumdar & Srishti Jha, The Law Relating to Damages under International Sales: A Comparative Overview between the CISG and Indian Contract Law. 2001. <https://www.cisg.law.pace.edu/cisg/biblio/majumdar.html#a1>

[4] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. No. 98-9, 1489 U.N.T.S. 3 U.N. Doc. A/ Conf. 97/18

[5] *The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?* Available at <http://www.cnr.it/CTDCS/frames9.htm, and also at www.worldcatlibraries.org> [Accessed 17 December 2021].

thus complicating the goal of consistency and simplicity.

The fact that the CISG is, in some respects, international law implemented locally is a substantial concern. This invariably gives CISG interpretation a regional character. One of the most grievous challenges to establishing a consistent worldwide sales regime that CISG aspires is the lack of an international court to administer the CISG. The parochialism of domestic courts coupled with their suspicion of foreign judgments that may be differently decided at home is undoubtedly a major impediment to uniform application of CISG[6].

According to the UNCITRAL Rules, even in cases involving arbitration, the 1996 Act provides in Section 34 that an award issued by a foreign court of competent jurisdiction can be challenged by an Indian court and will not serve as res judicata between the parties for a variety of reasons. These frequently involve disputes covered by an arbitration agreement, as well as procedural concerns such as the arbitral tribunal's erroneous composition, prejudice, and fraud. Even in the past, the Indian Supreme Court has construed foreign arbitration cases narrowly[7]. In a recent decision, the Supreme Court stated that any wrong interpretation of Indian law would fall under this category, and that courts would be required to set aside domestic arbitration awards if there was an incorrect interpretation of Indian law, and that such awards would be considered null and the trial “corum non judice”[8].

(A) Formation of contract

When an offer to purchase or sell commodities for a price is made and accepted under Indian law, a legal contract for the sale of commodities is formed[9]. A contract for the sale of goods might specify whether the goods will be delivered immediately or later, and whether payment will be made in a lump sum or in increments. Furthermore, in addition to the specific elements required by the Sale of Goods Act, any contract made in India, whether for the sale of goods or otherwise, must meet the conditions set out in Section 10 of the Indian Contract Act. Parties competent to enter into a contract can enter into a legal contract, comprising of an offer and acceptance of that offer, when there exists a lawful object, a lawful consideration, and be enforceable under Indian law.

The CISG, on the other hand, governs contract formation under Part II, especially the requirements of Articles 14 to 24. Articles 11, 13, and 29 are also thought to give insight on contract creation. The CISG has embraced the 'conventional' notion of contractual obligations,

[6] Killian, M. CISG and the Problem with Common Law Jurisdictions.
[7] Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644
[8] ONGC v. Saw Pipes, (2003) 5 SCC 705
[9] Section 5 of Sale of Goods Act, 1930

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which is equivalent to Turkey's and Switzerland's "Law of Obligation" principles, which declare that contracts are established solely as a consequence of two declarations of intent - the offer and the acceptance[10].

There is no prerequisite under the CISG for there to be consideration in order for a contract to be enforceable, which is a significant divergence from common law provisions incorporated in Indian legislation[11]. Moreover, Article 55 states that where a contract is validly concluded but does not expressly or implicitly fix or provide for setting the value, the parties are presumed to have made an implied reference to the price typically charged at the time of the contract's conclusion for similar goods sold in similar settings in the trade concerned, unless the contrary is stated[12]. Offers that are not directed to one or more specific individuals are regarded as invitations for offers; as a result, mass distribution of catalogues, brochures, and websites does not constitute an offer, but will be treated as invitations until otherwise stated[13].

(B) Breach of Contract

A contract can be breached by a party's failure to fulfil, or by interfering with or obstructing that party's performance. Parties to a contract must perform or propose to perform their respective obligations and promises as assigned and made under the contract, unless such performance is waived or excused by the ICA or any other legislation[14].

Furthermore, unless the other party has directly or impliedly indicated its approval for the contract to continue, the other party may terminate the contract if the party has refused to execute, or has disabled himself from completing, his commitment in its entirety. Repudiation occurs if the other party decides to discontinue the contract, it is said to be broken, and the party not executing or refusing to perform its commitment under the contract is said to be in breach of contract[15].

As per Section 12 (2) of the SGA, a condition is fundamental to the contract's principal purpose and whose infringement gives rise to the right to regard the contract as repudiated. As a result, when a condition represents the fundamental foundation of the contract, and its breach causes the buyer irreparable harm, he has the right to cancel the contract of sale, entitling him to return

[10] Mondaq.com. 2021. *Formation Of Contracts Under CISG - Corporate/Commercial Law - Turkey*. [online] Available at: <https://www.mondaq.com/turkey/contracts-and-commercial-law/456716/formation-of-contracts-under-cisg> [Accessed 17 December 2021].
[11] <https://www.cisg.law.pace.edu/cisg/biblio/winship3.html/> [Accessed 17 December 2021].
[12] Fatma Esra Güzeloğlu & Abdülkadir Güzeloglum, 2016. *Contract Formation under the CISG: Sufficient definiteness of an Offer*. <https://www.lexology.com/library/detail.aspx?g=0ef26dd9-f98a-42b6-8a07-d326578f4cd9> [Accessed 17 December 2021].
[13] *Supra* 7
[14] Section 37 of Indian Contract Act, 1872
[15] Section 39 of Indian Contract Act, 1872

the products and get a refund of the purchase price.

The CISG defines a fundamental breach as one that: "results in such detriment to the other party as substantially to deprive him 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.[16]" The margin between when it will be considered essential and when it will not be is incomprehensible.

The CISG takes away the buyer's statutory right under domestic law to reject products if they do not meet the quantity or quality requirements. Because of the CISG's ambiguous language and the adoption of the "fundamental breach" notion, Indian trading organizations and their legal counsel would be concerned about the ambiguities in the regulations[17]. Similarly, Article 8 makes the act highly prone to inconsistencies. The purpose clause introduces the function of representation in the judgements, which is at odds with the real value. The notion of 'good faith' in Article 7 creates an even more difficult scenario. The CISG is entirely silent on the interpretation of good faith, whether it is good faith in terms of the parties' behavior or good faith in terms of advocating fair transactions. Article 7(2), often known as the "gap-filling clause", is what causes the confusion. It once again directs us to the edge of an arbitrary zone, making it very subjective in the context. Other international treaties, such as the UNIDROIT Principles and the Restatement, Principles of European Contract Law (PECL), use good faith as an interpretive concept, but they also specify that it is a requirement placed on the parties' actions.

(D) Damages

According to Article 74 of the CISG, only the party who is in violation is obliged to anticipate, or ought to have foreseen, the damage that may result from the breach. According to the clause, foreseeability "must refer to losses that may occur as a result of a contract violation." As a result, foreseeability only refers to losses that were an assessable consequence of a breach of obligation at the time of the contract's conclusion, and for which the obligor cannot exempt himself under Article 79 by proving that the failure to fulfil his contractual obligations was due to an impediment beyond his control that he was not expected to take into account at the time of the contract's conclusion and was not required to have avoided to overcome[18]. The mere likelihood that a violation of contract would result in some form of loss, on the other hand, is insufficient. The obligor must be able to perceive that a breach of contract would result in a

[16] Article 25 of CISG, 1980
[17] Article 49 of CISG, 1980
[18] Saidov D. & Cunnington R., *Contract Damages: Domestic and International Perspective.*

loss substantially of the type and magnitude that transpired[19].

The CISG has expressly included the "doctrine of mitigation" in Article 77, but the norm is also represented in Articles 85 and 86, which deal with the preservation of commodities following a breach[20]. Article 77 states that a plaintiff cannot be compensated for damages or losses that he should have avoided[21]. As per Article 77, losses include a loss of earnings. It creates a legal obligation[22], allowing the original violating party to seek a set-off. It can be viewed as "a responsibility due by the injured party to the party in breach"[23] or as "an obligation owed to the aggrieved party to alleviate the damage"[24]. This viewpoint is backed by Article 77's second line, which states that if the aggrieved person does not follow the advice offered in the first part of the provision, he will be responsible for a portion of the expenses connected with the violation. It could not be more apparent that "must" is related to the second clause, implying that inaction or refusal to take appropriate mitigation efforts are not acceptable[25].

Damages under the ICA, on the other hand, are compensatory rather than punitive[26]. The explanation for this provision further states that when evaluating the loss or damage caused by a breach of contract, the current cost of resolving the annoyance may be considered. This section gives rise to two compensation concepts, both of which stem from it. To begin with, if money cannot replace the damage suffered, the aggrieved party must be placed in the same position as it would have been in if the contract had been fulfilled. The second principle qualifies this concept by requiring the defaulting party to take reasonable measures to reduce the effects of the violation.

(E) Frustration of Contract

The ICA does not define contract frustration in any way. The notion, however, is envisioned in Section 56 of the Act, which stipulates that "a commitment to perform an act that is impossible in and of itself is void." Furthermore, a contract to do an act that becomes impossible or unlawful due to an incident that the promisor could not prevent becomes invalid when the conduct becomes impossible or unlawful.' As a result, frustration occurs when an act

[19] *Ibid.*
[20] Zeller B., *Damages under the Convention on Contracts for the International Sale of Goods*. 2005.
[21] *Comparison with Principles of European Contract Law*. 2010. <http://cisgw3.law.pace.edu/cisg/text/peclcomp77.html> [Accessed 17 December 2021].
[22] Saidov D., *Methods of limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods*. 2001 <http://cisgw3.law.pace.edu/cisg/biblio/saidov.html> [Accessed 17 December 2021].
[23] Secretariat Commentary to Article 73 of the 1978 Draft, ¶ 3, 2006. <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-77.html> [Accessed 17 December 2021].
[24] Bernstein H. & Lookofsky J., *Understanding the CISG in Europe*. 2003.
[25] *Supra* 17
[26] Section 73 of ICA, 1872

occurs outside of the contract that prevents the contract from being completed. Frustration of contract can be proved if the following requirements are met: the parties have a legitimate contract; the contract has yet to be fulfilled; the contract's performance has become impossible or unlawful; and the impossibility to perform is caused by an event beyond both parties' control.

Article 79 of the CISG, on the other hand, deals with the exclusion of a party's culpability when that party fails to execute his duties owing to an obstacle beyond his control. Article 79 does not follow any one domestic theory of frustration, and as domestic law cannot be used to interpret Article 79, it is extremely difficult to do so[27]. Since Article 79 offers a general ground of exemption for non-performance of any responsibilities, and applies to any sort of obligations established by a contract of sale of goods, all of the buyer and seller's obligations, whether under the Convention or under the contract, may be exempted[28]. The Convention, like civil law systems, extends the standards of excuse to all areas of a party's performance[29]. Article 79 (1) does not apply to the defaulting party if the impediment existed at the time of the contract's completion and was known to the defaulting party. "At the time of the conclusion," the defaulting party may have "taken the hindrance into consideration."

The expenses of negotiating the law that governs an international contract are largely determined by the significance the parties place on the matter and their understanding of the repercussions of their choice of law. Because there are various dubious components in the CISG, India's overseas traders and their legal experts will have to examine if it fulfils the Standards in the end. A good contract law allows the buyer and seller to contact their lawyer and ask him to forecast, as closely as possible, what a court would do in the event of a conflict. For greater expediency and precision in the event of lawsuit, firms should consult with skilled legal counsel before negotiating or entering into such contracts.

It would be prudent to invest a little more time and effort in developing a better contract agreement with international clients rather than relying solely and entirely on a, albeit internationally standardized but still ambiguous sales of goods act and spending a fortune as a result of the ambiguity of this international law. In light of all of this, it can be said that adhering to the CISG will further complicate cross-national business transactions; now all that's needed is modification and careful drafting of international contracts, resulting in clear contracting terms and thus safer and more welcoming international trade.

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[27] Lee W., *Exemptions of Contract Liability Under the 1980 United Nations Convention*,1990 DICKINSON JOURNAL OF INTERNATIONAL LAW <https://www.cisg.law.pace.edu/cisg/biblio/lee.html#58> [Accessed 17 December 2021].
[28] Articles 30 & 53 of CISG, 1980
[29] *Supra* 19

III. Conclusion

The main principles of law that the CISG and the two Indian legislations, SGA and ICA, opted to address trade in a significantly different manner. A brief, incisive overview of the two bodies of law reveals that they are quite distinct and, in many situations, thoroughly incompatible; perhaps owing to more tolerant standards or due to analytical diligence as a result of historically formed concepts. Though there are some parallels, it is clear that the CISG, as well as the SGA and ICA, are very different and their basic ideas are vastly different. Adopting CISG concepts, which were mostly conceived with a civil law mindset by nations such as India, which uphold common law, will be difficult on multiple levels. In conclusion, signing up for the CISG will only exacerbate international commercial operations; all that is necessary is improvisation and careful structuring of international contracts.

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