

CISG Advisory Council Declaration No. 2

Use of Reservations under the CISG

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The CISG Advisory Council recommends that:

- a) **States which newly accede to the Convention do so without making any declarations under Articles 92–96 CISG;**
- b) **Contracting States that have made one or more declarations under Articles 92–96 CISG consider withdrawing them in accordance with Article 97(4) CISG.**

1. Introduction

Articles 92–96 CISG provide States that ratify, accept, approve or accede to the Convention with the option to make a limited number of declarations, thereby excluding or modifying the

** The CISG-AC started as a private initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. The International Sales Convention Advisory Council (CISG-AC) is in place to support understanding of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the promotion and assistance in the uniform interpretation of the CISG.*

At its formative meeting in Paris in June 2001, Prof. Peter Schlechtriem of Freiburg University, Germany, was elected Chair of the CISG-AC for a three-year term. Dr. Loukas A. Mistelis of the Centre for Commercial Law Studies, Queen Mary, University of London, was elected Secretary. The founding members of the CISG-AC were Prof. Emeritus Eric E. Bergsten, Pace University School of Law; Prof. Michael Joachim Bonell, University of Rome La Sapienza; Prof. E. Allan Farnsworth, Columbia University School of Law; Prof. Alejandro M. Garro, Columbia University School of Law; Prof. Sir Roy M. Goode, Oxford, Prof. Sergei N. Lebedev, Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation; Prof. Jan Ramberg, University of Stockholm, Faculty of Law; Prof. Peter Schlechtriem, Freiburg University; Prof. Hiroo Sono, Faculty of Law, Hokkaido University; Prof. Claude Witz, Universität des Saarlandes and Strasbourg University. Members of the Council are elected by the Council.

At subsequent meetings, the CISG-AC elected as additional members Prof. Pilar Perales Viscasillas, Universidad Carlos III, Madrid; Professor Ingeborg Schwenzler, University of Basel; Prof. John Y. Gotanda, Villanova University; Prof. Michael G. Bridge, London School of Economics; Prof. Han Shiyuan, Tsinghua University and Prof. Yesim Atamer, Istanbul Bilgi University, Turkey. Prof. Jan Ramberg served for a three-year term as the second Chair of the CISG-AC. At its 11th meeting in Wuhan, People's Republic of China, Prof. Eric E. Bergsten of Pace University School of Law was elected Chair of the CISG-AC and Prof. Sieg Eiselen of the Department of Private Law of the University of South Africa was elected Secretary. At its 14th meeting in Belgrade, Serbia, Prof. Ingeborg Schwenzler of the University of Basel was elected Chair of the CISG-AC.

legal effect of certain provisions of the Convention (reservations¹).² According to Article 98 CISG, no reservations except those expressly authorized in the Convention are permitted.

2. Newly Acceding States

The drafting history of Articles 92, 94, 95 and 96 CISG demonstrates that these reservations were included in the Convention as a means of compromise, designed to cater to specific concerns of specific countries that existed at the time the Convention's final text was adopted in 1980.³ Since that time, the legal and political situation in many countries has undergone significant changes which have essentially removed the reasons why the reservations were initially created:

Article 92 CISG was included upon the Scandinavian States' request in order to allow them to ratify the Convention without its Part II (the provisions on the formation of contracts)⁴ – a policy decision that the Scandinavian States have recently abandoned by withdrawing their Article 92 reservations.⁵ The reservation under Article 94 CISG through which regionally harmonized law can be accorded a limited prevalence over the Convention was similarly only used by the Scandinavian States, while all other States that were viewed as potential reserving States during the Vienna Diplomatic Conference⁶ opted for an unreserved ratification.⁷ As to Article 95 CISG, the need to preserve a relevant sphere of application for certain domestic legislation in the then CSSR and GDR⁸ has since lapsed (since the respective legislation no longer exists in today's successor States), and also the assumed undesirability of having to apply the Convention in accordance with Article 1(1)(b) CISG while other States do not face a 'reciprocal' obligation⁹ is essentially redundant today as Article 1(1)(a) CISG has become the vastly more important basis for the Convention's applicability. The need to preserve the possibility to apply domestic rules of form by making a declaration under Article 96 CISG¹⁰

¹ See the definition of the term „reservation“ in Article 2(1)(d) Vienna Convention on the Law of Treaties of 23 May 1969.

² It is a matter of dispute whether the so-called ‚federal state clause‘ in Article 93 CISG constitutes a reservation *strictu sensu*. Cf. Anthony Aust, *Modern Treaty Law and Practice* (2000) 170–171.

³ The situation is different as far as Article 93 CISG is concerned, since this provision caters to the continuing need of Federal States in which legislative competences are divided between the Federal State and its territorial units.

⁴ Jan Ramberg, ‚The Vanishing Scandinavian Sales Law‘, 50 *Scandinavian Studies in Law* (2009) 257 at 258–59.

⁵ See below at 3.

⁶ As notably the Benelux countries and Australia/New Zealand; see *United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees* (1981) 436.

⁷ On Article 94 CISG and current regional harmonization efforts, see furthermore CISG-AC Declaration No. 1, The CISG and Regional Harmonization, Rapporteur: Professor Michael Bridge, London School of Economics, London, United Kingdom, adopted by the CISG-AC following its 16th meeting, in Wellington, New Zealand, on Friday, 3 August 2012, at 2.

⁸ See in more detail CISG-AC Opinion No. 15, Reservations under Articles 95 and 96 CISG, Rapporteur: Professor Ulrich G. Schroeter, University of Mannheim, Germany, adopted by the CISG-AC at its 18th meeting in Beijing, China, on Monday, 21 October 2013, Comment 2.2.

⁹ See Malcolm Evans, in Bianca & Bonell eds., *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987), Art. 95 notes 2.2 and 2.5; Rolf Herber, ‚Anwendungsvoraussetzungen und Anwendungsbereich des Einheitlichen Kaufrechts‘, in Schlechtriem ed., *Einheitliches UN-Kaufrecht und nationales Obligationenrecht* (1987), 100; Peter Schlechtriem, *Uniform Sales Law* (1986), 25.

¹⁰ See CISG-AC Opinion No. 15 (footnote 8), Comments 2.4, 4.5.

has similarly lost its relevance because almost all Article 96 reservation States no longer impose writing requirements on international sales contracts in their domestic laws.¹¹

Today's weakening (or altogether vanished) need for the reservations in Articles 92–96 CISG stands in contrast to their continuing detrimental effect upon the Convention's practical application: Any use of reservations under the Convention inevitably undermines the considerable measure of uniformity that exists¹² and increases the likelihood of confusion regarding the application of the CISG.¹³

In light of these considerations, the CISG Advisory Council recommends that States which newly acceded to the Convention do so without making any declarations under Articles 92–96 CISG.

3. Current Reservation States

Contracting States that have made one or more of such declarations are reminded of the possibility to withdraw them by formal notification in accordance with Article 97(4) CISG, as the existence of these declarations in itself complicates the Convention's application in practice and threatens its uniform interpretation.

In this context, it is helpful to consider the International Law Commission's 'Guide to Practice on Reservations to Treaties' which calls for a periodic review of the usefulness of reservations:

1. "States or international organizations which have formulated one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.
2. In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, consider the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated."¹⁴

The needs of commercial practice similarly support the withdrawal of reservations under the CISG. In the case of the former Scandinavian reservations under Article 92 CISG, for example, the practical problems caused were sufficiently serious for the International Chamber of Commerce (ICC) to intervene by requesting the ICC's National Committees to

¹¹ See Ulrich G. Schroeter, 'The Cross-Border Freedom of Form Principle Under Reservation: The Role of Articles 12 and 96 CISG in Theory and Practice', 31 *Journal of Law and Commerce* (forthcoming 2014).

¹² See CISG-AC Declaration No. 1 (footnote 7), at 2.

¹³ See Camilla Baasch Andersen, 'Recent Removals of Reservations under the International Sales Law – Winds of Change heralding a Greater Unity of the CISG?', 7 *Journal of Business Law* (2012) 698 at 700; Harry M. Flechtner, 'The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)', 17 *Journal of Law and Commerce* (1998) 187 at 193.

¹⁴ International Law Commission, Guide to Practice on Reservations to treaties, as finalized by the Working Group on Reservations to Treaties from 26 to 29 April, and on 4, 5, 6, 10, 11, 12, 17 and 18 May 2011, U.N. Doc. A/CN.4/L.779 of 19 May 2011, at para. 2.5.3.

insist on a withdrawal of the reservation in order to avoid misunderstandings between merchants to the detriment of international trade.¹⁵

In the past, Canada,¹⁶ Estonia,¹⁷ Finland,¹⁸ Sweden,¹⁹ Denmark,²⁰ Latvia,²¹ China²² and Lithuania²³ have all withdrawn reservations initially made under the Convention.²⁴ In recent years, the number of such withdrawals has rapidly increased, which makes it appropriate to speak of a trend towards an increased uniformity under the Convention by way of an increasing withdrawal of reservations.²⁵

In light of these considerations, the CISG Advisory Council recommends that Contracting States that have made one or more declarations under Articles 92–96 CISG consider withdrawing them in accordance with Article 97(4) CISG.

¹⁵ Ramberg, op. cit. (footnote 4) at 259.

¹⁶ Withdrawal of a declaration under Article 95 CISG, notified on 31 July 1992.

¹⁷ Withdrawal of a declaration under Article 96 CISG, notified on 9 March 2004.

¹⁸ Withdrawal of a declaration under Article 92 CISG, notified on 28 November 2011.

¹⁹ Withdrawal of a declaration under Article 92 CISG, notified on 25 May 2012.

²⁰ Withdrawal of a declaration under Article 92 CISG, notified on 2 July 2012.

²¹ Withdrawal of a declaration under Article 96 CISG, notified on 13 November 2012.

²² Withdrawal of a declaration under Article 96 CISG, notified on 16 January 2013.

²³ Withdrawal of a declaration under Article 96 CISG, notified on 1 November 2013.

²⁴ Norway is expected to similarly withdraw its declaration under Article 92 CISG, but had not yet formally notified its withdrawal when the present CISG-AC Declaration was adopted.

²⁵ Andersen, op. cit. (footnote 13) at 710; Peter Schlechtriem & Ulrich G. Schroeter, *Internationales UN-Kaufrecht* (5th ed. 2013), para. 813.