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GOOD NEWS FOR JAPANESE TRADE

Japan’s recent accession to the UN Convention on Contracts for the International Sale of Goods (CISG) has considerable implications for importers and exporters — and the lawyers advising them. By Troy Kelly and Benjamin Hayward

The importance of goods trade between Australia and Japan means that any change to the law potentially applicable to contracts of sale between the two countries has considerable ramifications.

Japan has been Australia’s largest export market for 40 years. In 2008-09, exports to Japan were valued at $52.5 billion. This figure represents one-fifth of Australia’s total exports and is greater than merchandise exported to China and the US combined. Australia is also an important market for Japanese goods. Imports from Japan in 2008 were valued at $17.8 billion, ranking Australia 10th on the list of Japan’s principal export destinations. Accordingly, Japan’s recent accession to the UN Convention on Contracts for the International Sale of Goods (the CISG) is cause for Australian lawyers and businesses to take note.

The CISG came into force internationally on 1 January 1988. It was designed to remove legal barriers in, and promote the development of, international trade by providing a uniform law to govern contracts for the international sale of goods. For this reason, the CISG has the potential to benefit Australian commercial clients — it represents an accessible legal regime that is now relatively well understood at the international level and, more importantly, it is a “neutral” regime that can effectively regulate the affairs of commercial parties often coming from very different legal traditions.

In its short history, the CISG has proved a significant success. The majority of all international sales transactions are potentially governed by it. With Japan’s accession to the CISG, the UK remains the only leading trading nation not to adopt it and to resist the tide of a global uniform sales law.

Japan’s accession is an additional vote of confidence in support of the CISG. Further, the importance of the trading relationship between Japan and Australia means that the CISG now carries even greater significance for Australian importers and exporters. This article will look at Japan’s decision to become a CISG member state, consider how the CISG’s reach has now been cast wider over Australian-Japanese trade and give an overview of the CISG’s operation.

JAPAN AND THE CISG: WHY NOW?

Japan’s accession to the CISG became effective on 1 August 2009, 21 years after it originally came into force. Japanese insiders have speculated about reasons for the Japanese government’s late change of mind and their conclusions underscore the success of the CISG and the benefits that now flow to international trade from this uniform sales law.

In the early days of the CISG, it would appear that several factors weighed in favour of a “wait and see” approach, including:

- scepticism in Japanese legal and business circles about the merits and predictability of the CISG;
- a strong preference for maintaining the home-ground advantage of domestic Japanese law;
- the distraction of dealing with a failing economy; and
- a low number of countries initially signing up to the CISG.
The "phenomenal success of the CISG" eventually proved a lure too great for Japan to withstand. In time the number of CISG member states increased to include all major trading economics (except the UK), and concerns about the predictability of the CISG were abated with the emergence of a significant body of academic writing and international case law. As a result, the Japanese legal community became more comfortable with the CISG. The Japanese business community also came to realise the benefits of a uniform sales law, including the decreased costs of dealing with many different domestic laws. This became particularly apparent as Japan's trade with China (a CISG member since 1988) and other Asian economies rapidly increased.

SCOPE OF THE CISG

Both Australia and Japan are now "Contracting States" for the purposes of the CISG. This is important because the CISG will now apply to a greater number of contracts for the sale of goods between the two nations.

This is not to say that the CISG was previously irrelevant to Australian-Japanese trade. Pursuant to Article 10(1), the CISG applies to contracts of sale where the rules of private international law lead to the law of a Contracting State applying. The CISG became effective in Australia on 1 April 1989, so even before Japan's accession it had the potential to govern Australian-Japanese trade if a court, applying its conflict of laws rules, determined that Australian law was applicable. While there is little Australian case law concerning the CISG, this was precisely the situation arising in one unreported Victorian decision - the Supreme Court case of Playcorp Pty Ltd v Taiyo Kogyo Ltd, where Hansen J held that Victorian law governed an Australian-Japanese contract, thus opening the door for consideration of the CISG (notwithstanding that at the time Japan was not a Contracting State).

Now that both Australia and Japan are Contracting States, however, the CISG casts a much wider net over the two nations' goods trade. Pursuant to Article 10(1), the CISG also applies to contracts of sale where the parties' places of business are in different Contracting States. This will mean that all contracts of sale between parties with places of business in Australia and Japan are now presumptively governed by the CISG, regardless of whether a conflict of laws analysis would have led to the application of Australian law, Japanese law or the law of a third country. This "presumptive" application of the CISG can be displaced. Pursuant to Article 6, parties to a contract of sale are afforded the autonomy to exclude the application of the CISG, or otherwise "derogate from or vary the effect of any of its provisions". While this option must be given due consideration in advising an Australian client in negotiations with a Japanese counterpart, it is one that should not be exercised too readily. As has recently been pointed out, advising a client to automatically exclude the CISG, without first giving due attention to its content and the consequences of its application, could arguably amount to a breach of professional responsibility.

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AN OVERVIEW OF THE CISG

Unfortunately, practitioners advising on Australian-Japanese (or other international) trade wishing to acquaint themselves with the CISG have a wealth of information at their disposal. Several key texts have been written on it and thousands of cases and journal articles exist on the topic. Above all, however, the CISG itself is written in a plain and often easy to understand manner.

The CISG is in four parts, covering its "sphere of application and general provisions" (Part I), the "formation of the contract" (Part II) and the "sale of goods" (Part III, setting out obligations, rights and remedies of the parties). Part IV, setting out relevant public international law rules, will not be considered further in this article.

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SPHERE OF APPLICATION

In addition to Article 1 considered above, Part I contains other rules concerning the CISG's sphere of application. For example, the exceptions to the "mirror image rule" in relation to the matching of offers and acceptance (Article 15(1)) are outside the CISG and thus fall to be settled in accordance with the applicable domestic law.

FORMATION OF THE CONTRACT

There is much that the common lawyer is likely to find familiar in Part II. However, extreme caution should be exercised where references are made to the CISG and its familiar domestic concepts. Article 6 explicitly states that in interpreting the CISG, "regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade". This interpretative mandate requires that the CISG be given an autonomous interpretation, i.e. an interpretation unconnected by conceptions of any particular domestic law.

The CISG's contract formation provisions are structured around the concept of offer and acceptance. No consideration is required for the formation of a contract (Article 23) or its modification or termination (Article 29). In addition, the CISG adopts a concept of "withdrawal" of offer (Article 15(2)) that is separate from the concept of revocation (Article 16(1)), as well as the "withdrawal" of acceptance (Article 22) which is separate from the concept of rejection.

SALE OF GOODS

The seller's obligations are set out in Article 30, which identifies that the seller must "deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention". The buyer's obligations are set out in Article 33, according to which the buyer must "pay the price for the goods and take delivery of them as required by the contract and this Convention". In both cases, any trade terms (such as those contained in the ICC's Incoterms 2000 publication) must be considered, as these may (pursuant to Article 6) amount to a variation of the CISG's provisions concerning making delivery, taking delivery, and the passage of risk.

Article 35 plays a particularly important role in defining the parties' rights and obligations by defining when goods "conform" with the contract. Article 35(1) requires that the goods conform with the contract's express or implied requirements. In addition, where the parties have not agreed otherwise, four terms are implied by law: that the seller delivers goods free of material vice (Article 68(1a)); is responsible for the risk of destruction of the goods until risk is transferred (Article 91(1)); is responsible for the risk of loss of or destruction of the goods (Article 91(2)); and is responsible for the risk of deterioration of the goods (Article 91(3)).
performance (Article 46(1)), enforce a price reduction in the case of non-conformity (Article 50), and refuse to take delivery if the seller performs early (Article 52). On the seller’s side, other remedies include requiring performance (Article 62) and specifying certain features such as form and measurement where the buyer has failed to do so (Article 65). It should be noted, however, that pursuant to Article 28, specific performance can only be awarded by a court if it would have done so under its own law in respect of a similar domestic contract.

CONCLUSION

Japan’s recent accession to the CISG has significantly widened its net in terms of the volume of Australian-Japanese trade captured by the CISG. Now more than ever it is important for practitioners to be aware of the CISG’s potential application to international sales of goods transactions, be aware of its features and the consequences of its application to a particular contract, and to make informed decisions on whether to “contract out” of the regime.

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5. Hiroo Sano, note 4 above, pp188.
7. The Pace University School of Law’s CISG Database reports only 13 Australian decisions referring to the CISG – see Pace University, CISG Database – Country Case Schedule, (2010) Electronic Library on International Commercial Law and the CISG: www.cisg.law.pace.edu/cisg/text/casestud.html (accessed 29 April 2010). This can be contrasted with other jurisdictions such as Germany, and cases heard by the China International Economic and Trade Arbitration Commission, whose CISG cases run into the hundreds (some involving Australian parties).
9. Article 1(3) confirms it is the parties’ places of business, rather than their nationalities, which are the relevant criteria.
11. An excellent (and free) collection of material is available on the Pace University School of Law’s CISG Database at www.cisg.law.pace.edu.
12. The full text of the CISG, accompanied by an explanatory note from the UNCITRAL Secretariat, can be obtained from the UNCITRAL website www. uncitral.org.

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