

# EXCLUSION OF THE CISG 1980 FROM PERSPECTIVE OF ENTERPRISES: INTERNATIONAL EXPERIENCE AND IMPLICATIONS FOR VIETNAM

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## Abstract

*The Vienna Convention on Contracts for the International Sale of Goods Contract or the CISG 1980 is often considered to be a great success in harmonizing private commercial laws. However, there is a common scene that the parties of international sales usually agree to exclude the application of the Convention and forgo the potential benefits it can bring about. Taking into account of the fact that Vietnam has become a member state of the Convention since the beginning of 2017, without proper equipment on the knowledge regarding the issue, there is a high chance that our enterprises will follow the footsteps of the predecessors to constantly opt out of the Convention without any consideration and deprive themselves of the advantages accompanying with it. Hence, this article aims to look deeply into the reasons behind the opting out decision of the enterprises via examining the CISG exclusion situation in some countries and conducting in-depth analysis regarding the problem.*

**Keywords:** CISG 1980, exclusion, international experience, implications, Vietnam.

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## 1. Introduction

The traditional village market has turned into a global market these days. All those products we use or consume on a day-to-day basis are being produced all over the world. Not to mention, manufacturing companies, regardless of size, often obtain their parts, components, raw materials, and supplies from sources beyond their country border. As barriers to trade continue to shrink, billions

of dollars' worth of goods will continue to flow across the national border. As a result, the requirement for one unification and harmonization of law becomes more imperative than ever, which leads to the establishment of the CISG 1980. CISG is often hailed it as "arguably the greatest legislative achievement aimed at harmonizing private commercial law". As the Convention is in force in more than 80 countries, covering

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more than two-thirds of world trade and is increasingly applied by dispute settlement bodies, its success is rarely in doubt.

Nevertheless, there is a well-known fact that the parties of international sales usually agree to exclude the application of the Convention, which is attributable to a variety of reasons, both subjective and objective. The question of what are the aftermaths of the exclusion of CISG receives more and more attention as the number of opt-outs has continuously escalated. The answer to such question becomes even more critical as the CISG was officially in force in Vietnam on 1st January 2017 and hence, it is of importance to conduct a research into the problem, especially from the perspective of enterprises that will be directly influenced from such decisions.

With that in mind, the authors decided to write this paper to show all possible reasons for the choice of opt-out of CISG by enterprises and the potential effect it may have on contracting parties by analyzing the experience from other countries and then provide some remarks for Vietnamese enterprises regarding the issue.

The object of the research is the international experience on exclusion of the CISG 1980 in International Sales of Goods Contract.

As for the scope of content, the research refers to the CISG exclusion from perspective of enterprises, including three main methods: (1) Automatic exclusion from articles in the Convention itself, (2) Subjective exclusion by the enterprises from their own intention or the consultation of commercial lawyer, (3) The exclusion arising from decisions of the juridical body, both precisely and

imprecisely. Regarding the scope of space, the research discusses the exclusion of CISG 1980 between enterprises whose countries have ratified the Convention, specifically the United States, Japan and Korea. These countries are chosen not only because they are the illustrative and prominent examples of the CISG member states but also owing to the abundance of subject-relevant articles and scholar writings. About the scope of time, the article analyzes the academic grounds and the practical application of the CISG exclusion since 1st January 1988 when the Convention was officially in force. The suggestions for Vietnam shall be conforming to the governmental strategy on international trade development to 2020 with a vision until 2030 presented in Decision No.40/QĐ-TTg.

## 2. Literature review

### Exclusion from the CISG itself (Automatic exclusion)

Nong Quoc Binh (2011), *Phạm vi áp dụng và không áp dụng của Công ước Viên 1980 về hợp đồng mua bán hàng hóa quốc tế*. In the article, the author states some limitation of CISG and the case where it is inapplicable that leads the enterprises to exclude the Convention.

Franco Ferrari (2005), *What Sources of Law for Contracts for the International Sales of Goods? Why One has to Look Beyond the CISG*. The article aims at explaining the reasons why other law sources are and will continue to be relevant for international sales of goods transactions despite the entry of CISG into the field using several restrictions in the content of the Convention.

### Subjective exclusion from the choice of enterprises and lawyers

Tran Thanh Tam and his students (2016), *Vấn đề loại trừ công ước viên với tư cách luật áp dụng trong hợp đồng mua bán hàng hoá quốc tế: từ cơ sở pháp lý đến thực tiễn vận dụng*. The authors classify all possible subjective and objective reason for the exclusion of CISG in general and some potential impacts the exclusion decision may have on relevant parties.

Lisa Spagnolo (2014), *CISG Exclusion and Legal Efficiency*. The book presents analysis of the substantive and non-substantive advantages and disadvantages of the CISG towards the economy and all pertinent parties to a contract on both micro and macro level. Then, the authors analyzes the reason why CISG is excluded from the Contract using the factors in choices of law and a number of economic theories as well as the cost arising to relevant parties connecting to excluding the Convention.

#### **Exclusion by the judgement of juridical body**

La Trobe University (1985), *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?*. The author approaches the aspect of excluding CISG by the Court, which results from the homeward trend, given the ambiguities within the CISG, the U.S.' experience with trade usage under the U.C.C., and diverse international viewpoints on the Convention trade usage provisions

William P. Johnson (2011), *Understanding Exclusion of the CISG: A New Paradigm of Determining Party Intent*. The paper talks about how befuddled U.S. Court has been when facing the questions as to when CISG applies and how it can be excluded. It also

mentions the fact that there is a widespread and growing body of U.S. jurisprudence having propagated incorrect and inaccurate analysis of the CISG and its effective exclusion.

#### **International experience of Contracting Nations in the world**

Yoshimochi Taniguchi (2013) *Deepening Confidence in the Application of CISG to the Sales Agreements between the United States and Japanese Companies*. The paper is about the tendency in excluding the CISG in Sale Agreements of U.S. and Japanese companies. It also compares the differences between CISG with U.S. Law and Japanese Law respectively and introduces some laws that are already in effect and can be used as an alternative to CISG.

Yong Eui Kim (2010), *The Present and Future Role of the CISG in Korea*. The research provides an overview of the application and exclusion situation of the CISG in Korea. It examines why the Convention is not yet broadly recognized and applied in Korea in spite of its extensive applicability and why CISG cannot be employed more often in terms of international trade despite its overall advantages and superiority to any other domestic sales law in Korea.

### **3. Methodology**

*Secondary data collection, summarization and analysis:* The method process includes collecting, summarizing, making statistics, comparing, contrasting and analyzing the data and information collecting from the trustworthy sources, namely books, newspaper, magazines, legal articles, reports and research papers in Vietnam

and the world, and from the main website of the Vienna Convention and of the Law University conducting studies on the CISG 1980 (<http://www.cisg.law.pace.edu>). The gathered data focused on the exclusion situation of the CISG on the world and the reasons behind it.

*Comparative law:* This method is applied to collate the CISG 1980 with other national legal systems to identify the similarities and the differences in the way each system deals with issues relating to international transactions to figure out the reason for opting out.

*In-depth interview:* The experts to be consulted are: (1) Dr. Pham Van Chat - Arbitrator at Vietnam International Arbitration Center (VIAC), and (2) Assoc. Prof. Dr. Nguyen Minh Hang – Dean of Faculty of Law in Foreign Trade University. The interview questions revolve around the subject of choice of law clauses, the exclusion of CISG situation in Vietnam and suggestions on the problems.

#### **4. Results and Findings**

##### ***CISG 1980***

The CISG 1980 was developed by the United Nations Commission on International Trade Law (UNCITRAL) as a uniform and harmonizing international law used in international sales contracts. The Convention was signed at one conference of UNCITRAL taking place in Vienna (Austria) on 11th April 1980 with the presence of representatives from 60 countries and 08 international organizations. The CISG 1980 came into force as a multilateral treaty on 01st January 1980 after being ratified by 11 countries. With its continuous expansion in size and influence, the CISG 1980 has now been in

force in 89 countries and accounts for two-thirds of the world trade.

Vietnam is the 84<sup>th</sup> member state of the CISG 1980. As the Convention is the harmonizing treaty having ratified by many countries, most of which are Vietnamese main trading parties, being in the same trade law proves extremely advantageous to Vietnamese enterprises when trading with other member states of the Convention. Moreover, participating in the CISG 1980, an international uniform law, also helps our country to identify and improve the drawback in our national legal system in pursuant to the world's standard as the differences between the national laws of each country are often perceived as a big hinder when conducting international transactions. Therefore, deciding to participate in the CISG 1980 allows Vietnam to solve the limitations of the national legal system to facilitate the integration process into the world economy and promote the bilateral as well as multilateral relationships with other countries. Also, the Vietnamese enterprises now stand on the same ground when dealing with issues arising in a business relationship, which opens the door to more transactional opportunities.

##### ***The exclusion of the CISG 1980***

Exclusion or opting out of the CISG refers to the case when the Convention and its respective articles are excluded from governing the Contract between relevant parties, including the settlement of the potential dispute by courts or tribunals. Generally, the exclusion can be categorized into 03 main types:

*Automatic exclusion of the CISG 1980:* Believed to have a highly innovative content compared to its predecessors, the CISG still possesses many drawbacks hindering it from covering all aspects of international transactions and has to be automatically excluded by the Convention content per se. The first one is the limited substantive sphere of application. For example, there are several types of contracts for international sale of goods which the CISG cannot govern presented in Article 2 of the Convention. The second comes from its limited international sphere of application. This characteristic is illustrated in Article 1(1) stipulating only parties whose places of business are in different States can apply the Convention to their sale of goods contracts. In other words, only the contracts for the sales of goods concluded between parties who, at the time of the contract establishment, have their respective place of business or habitual residence (in case of absence of place of business) in different States are subject to such Convention.

*Exclusion of the CISG 1980 by enterprises:* The exclusion of the CISG 1980 by enterprises is a result of the Article 6 of the Convention. When drawing up the CISG, considering its automatic application nature and the divergence in legal culture of each country, one solution provided by the drafters is the freedom in subjectively excluding the Convention by contracting parties, which is reflected in Article 6. Such stipulation entitles parties to the freedom in the choice of law. Article 6 does not impose on a specific exclusion and so allows parties to exclude the Convention as a whole or just one part of it. Therefore, even in the case where the

Convention is automatically applied in accordance with Article 1, if parties, for a reason, do not prefer to apply it and mutually agree on opting out of its application, the CISG can be excluded intentionally using Article 6.

*Exclusion of the CISG 1980 by juridical body:* As a dispute settlement body, courts, tribunals and arbitrators always require a specific applicable law to base on when resolving disputes between parties. The accurate identification of the applicable law is the first step in every settlement process as such law affects the final decision. The exclusion of the CISG by the juridical bodies is usually the result of such identification where the judges or board of arbitrators decide that CISG is not the applicable law of the contract and hence, does not govern the dispute settlement process. One problem faced by the jurisdiction body is whether or not the CISG can be excluded. This is a consequence of the requirement by the Convention to take into account of not only the superficial content of the Contract but also the implicit intentions of parties when they came into the Contract as stipulated in Article 8. Even if the court finds that such Contract is governed by the CISG due to the nature of the sales and the location of pertinent parties and there is no explicit exclusion of the Convention stated in the agreement, the analysis of determining the applicable law is yet to fulfill. At that point, it can only be temporarily concluded that CISG will govern such agreement. And as the Convention is the applicable law at that point, the court has to rely on Article 8 to continue the analysis. Article 8 requires the court to go beyond four corners of the Contract to identify the parties' intent. In

reality, most courts fail to reach this point in analyzing the exclusion of the CISG.<sup>2</sup>

*International experience on exclusion of the CISG from perspective of enterprises*

*Japan:* The Convention came into effect in Japan on 1st August 2009. Nevertheless, the exclusion trend of Japanese enterprises started even before the date of effect as Japanese firms whose subsidiaries or branches located in Contracting States and lawyers often opt out of the Convention when conducting transactions with foreign partners that were also CISG member states. There are some apparent reasons for the tendency of excluding the CISG by enterprises in Japan. One involves the uncertainty in the legal background of the Convention.<sup>3</sup> Being quite young compared to other systems such as Common Law, the Vienna Convention does not own an impressive history in cases interpretation, and not to mention, the interpretations per se differ from each country. Therefore, the insufficiency in case-law relating to the CISG is usually given out by enterprises and lawyers to answer the question why they opt out of the Convention.<sup>4</sup> In Japan, there is only one case relating to the CISG.<sup>5</sup> However, CISG is not applied in this case as courts ruled it had no

jurisdiction to hear the case. Therefore, it can be concluded that no court in Japan has ever interpreted a provision of the Vienna Convention. In addition, as Japanese mainly use their mother tongue as the only language in all activities. Even in the case where Japanese court interprets one provision and cites decided cases from other countries, a different interpretation may emerge due to the discrepancies in language. Another explanation bases on differences in content between the CISG and the domestic law of Japan. Generally, Japanese trading activities are governed by the Japanese Commercial Code and the Japanese Civil Code, whose content differs from the CISG in four main aspects, namely (1) determination of when Contracts are considered to be formed between persons at distance, (2) the warranty of the seller against hidden defects in goods, (3) the forecasting time to identify the scope of damages, and (4) the revocation of offer. Additionally, the application of the “hard” international law CISG in Japan also faces the obstacles of “soft” global standard or conventional rules as stipulated under Article 9 and Article 90. To the scope of Article 9, two different sources can be used in place of the CISG, namely usage and practices establishing between parties. Usages under

<sup>2</sup> See William P. Johnson, Understanding Exclusion of the CISG: A New Paradigm of Determining Party Intent (2011), 59 Buff. L. Rev., page 266, “Article 8 calls on the court to look beyond the four corners of any written agreement to determine the parties’ intent. Courts have largely failed to consider this aspect of the analysis in the analysis of exclusion of the CISG that has taken place, and it is this aspect of the analysis that requires a paradigmatic shift on the part of U.S. courts.”

<sup>3</sup> See Yoshimochi Taniguchi, Deepening Confidence In The Application Of CISG To The Sales Agreements Between The United States And Japanese Companies (2013), 12 Rich. J. Global L. & Bus., page 284 “there is legal uncertainty of the CISG. The CISG does not have a long history of interpretation in cases, and additionally, the interpretation itself differs from country to country.”

<sup>4</sup> See <http://www.cisg.law.pace.edu/cisg/text/caseschedule.html>

<sup>5</sup> The case of Nippon Systemware Kabushikigaisha at Tokyo Chiho Saibansho [District Court] in 19th March 1998. <http://cisgw3.law.pace.edu/cases/980319j1.html>

the CISG include all actions and demeanors normally and frequently observed in the business transactions in one specific trading area or trading center. When usages are validly agreed to, they take precedence over the CISG. Similarly, in pursuant to Article 90, as long as a CISG Contracting State is a member of another international agreement, such agreement also dealing with same law issues and parties having place of business in Contracting States to that agreement, the CISG is unable to prevail over such international agreement. One example of these “soft” global standards is the UCP. The second is the Incoterms® Rules or International Commercial Terms of the ICC. Both of them can fulfill the harmonizing function of the CISG.<sup>6</sup>

*Korea:* Until now, after more than 10 years since its accession into the CISG, Korean legal community and enterprises are still not adequately aware of the Convention.<sup>7</sup> As evidence thereof, up to now, there are merely seven cases involving the CISG on the database website. In one research aiming to get opinions and responses from lawyers who frequently consult enterprises on choices of law.<sup>8</sup> For the first twenty attorneys surveyed, when asked if they know the CISG, eighteen

gave negative answer. After that, those with positive answer to the first question gave negative response to the second one asking whether they have ever dealt with the CISG issue in their transactional or dispute resolution work. The reason for such negative feedback was because they had no real case to do so. And even in the event that they had, they would choose to consult other colleges for CISG knowledge for that issue only. For the rest ten professional attorneys, most of them gave “yes” to both question one and two. Nonetheless, the majority of them only have brief knowledge on the content of the Convention rather than the detail implications. To answer the third question about the time and issue of the CISG cases they have reviewed, these lawyers usually apply the Vienna Convention in transactional work of drafting or negotiating Contracts instead of the dispute settlement work. The issues mainly concern the choice of law in drafting Contracts or reviewing Contracts drafted by the other party. The usual practice of such attorneys is opting out of the CISG taking advantage of Article 6 by adding a clause with the content “*The parties hereby agree to exclude the application of the CISG in this Contract*” and using other applicable law. The reason provided by attorneys

<sup>6</sup> See *supra* note 2, page 288 “There are some frequently used international rules in sales agreements between U.S. and Japanese companies. These rules support the argument that although these parties seem reluctant to follow hard international law like the CISG, in practice there is in fact unification by resorting to another ‘global’ standard. Therefore, maybe the problem of exclusion of the CISG is not such a big problem in reality.”

<sup>7</sup> See Kim Yong Eui, *The Present and Future Role of the CISG in Korea* (2010), 48 *Dong-A L.Rev.*, page 4, “It is a reality that Korean legal community is not sufficiently aware of CISG even after 5 years passed since Korean Congress ratified it. As evidence thereof there is only one high court case<sup>12</sup> which applied the CISG in Korea”, which is the judgment of the Seoul High Court, July 23, 2009, Sentence 2008 Na Judgment.

<sup>8</sup> The research lasted three months conducted by the author Kim Yong Eui Kim in *supra* note 6 including telephone and direct personal interview with thirty active lawyers, ten of whom are randomly selected from the Member Directory of The Korean Bar Association, ten of whom are acquaintances of the author. The remaining are attorneys coming from big law firms having more than 50 law practitioners and working on Korean international commercial law.

for such manner is the unpredictability of the result, the lack of awareness on the CISG and the concern about the expenses incurred in interpreting the content of the Convention on court or arbitration in Korea. The substitutes recommended by these law practitioners include Korean Commercial Code, Korean Civil Code and the UCC which they have been long familiar with. An additional piece of fact is that in reality, these attorneys frequently apply a contract form containing a standard provision on governing law which includes the exclusion clause of the CISG 1980. Therefore, even when the Korean lawyers and enterprises knew well of the Convention, there still exists a strong inclination to exclude the CISG out of the international sales of goods. This is because firstly, despite being known to a significant extent by some Korean attorneys, the CISG is still low in the degree of familiarity with the application and function mechanic in the practice.<sup>9</sup> That is why both law practitioners and businesses continue to hold a preference towards the Korea domestic law or the somewhat familiar legal system such as the UCC or Japanese law as they have done

for hundreds of year. Not only Korean, the reality has proved that whenever the position of a party in the negotiation table allows the retaining of its own domestic law, it will do so without further consideration.<sup>10</sup> Hence, the final reason is that the parties and maybe the attorneys have yet to be convinced of the benefits that the CISG can offer in comparison to the domestic sales legislation, which is also stemmed from the lack of familiarity.

*The U.S:* One survey by Dr. Martin F. Koehler and Guo Yujun revealed that in the U.S., among more than 3,000 questionnaires sent, merely about 50 were returned, which could be viewed as a sign of poor acceptance of the Convention in the country. The results based on the responses received revealed that merely 29.2 percent of law practitioners in the U.S. had contacted with the CISG in their daily work. Along with that, 70.8 percent of U.S. lawyers opted out of the CISG preponderantly and principally.<sup>11</sup> The high exclusion rate in the U.S. can be explained with respect to the difference in content between the CISG and U.S. main law, the U.C.C along with the “homeward trend”, the act of national courts, lawyers

<sup>9</sup> See Lisa Spagnolo, CISG Exclusion and Legal Efficiency (2014), Global Trade Law Series. Wolters Kluwer Law & Business. page 214 “in South Korea where the CISG was only adopted in 2005, familiarity levels were found to be low, as might be expected. A very small survey of Korean lawyers found 76% of respondents were unaware of the CISG. The remainder mostly indicated that they excluded it, and were aware of it mostly to that extent only. Their preference for exclusion appears to have been motivated by perceived unpredictability, lack of counterparty familiarity, or anticipation of higher litigation costs, or preference for familiar law.”

<sup>10</sup> See Schwenzer, Ingeborg and Kee, Christopher, International Sales Law-The Actual Practice (2011), Penn State International Law Review: Vol. 29: No. 3, Article 4., page 438 “other evidence suggests that problems in practice still remain, most notably what might be termed the domestic orientation of lawyers. This is evidenced by the, albeit decreasing, but in our opinion still surprisingly high number, of those who are opting out of the CISG.”

<sup>11</sup> See Martin F. Koehler & Guo Yujun, The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems an International Comparison of Three Surveys on the Exclusion of the CISG’s Application Conducted in the United States, Germany and China (2008), 20 PACE Int’l L. Rev. 45, 46. The survey was sent directly and via several discussion forums as well as emails to private lawyers and in-house counsel in the U.S., China and German.



or enterprises to resort to domestic law or rules in interpreting the CISG application. Considering the failure of the ULIS and ULF in achieving any significant level of uniformity, the UNCITRAL and its Working Group on Sales then decided to reject the previous “universalist” approach and sought a compromise text. With that decision, the final content of the CISG holds an array of exceptions and exclusions with a view to neutralizing the concerns or objections of one part or all of the drafters. By taking advantages of these exclusions, enterprises, law practitioners and dispute settlement bodies can easily replace the otherwise-applied CISG by their own national legal system. Examples for *express-stated exclusion* include Article 2 with six categories excluded from the Convention. Among them, the most noticeable exclusions include the sales for personal, family or household use as the drafters would like to avoid impairing the national rules specifically dedicated to the protection of consumers. The remaining exclusions address either matters akin to those in the domestic laws of countries or the conflicts between definitions of goods of each country. Sales by auction and execution as well as those of securities, ships, and aircraft are often regulated by substantial national rules and regimes. Likewise, securities, ships, aircraft, and electricity are generally not regarded as “goods”. Additionally, Article 3 expressly omits mixed contracts of goods

or services from the scope of application of the Vienna Convention when the supply of labor accounts for the “preponderant part” of such contract. Similarly, according to Article 4, the Convention is only applicable to formation of the contract along with the rights and obligations of both parties arising from such contract. Unless clearly provided otherwise, the validity of the contract or the nature of property interests stemming from the contract is not governed by the Convention. Article 5 takes after the same policy when excluding matters concerning goods liability. The *implied exclusion* involves the trade usage in Article 9 with Article 9(1) incorporating express usage agreements and Article 9(2) mentioning implicit usage agreement. Two requirements for usages to be accepted under Article 9(2) include objective or subjective knowledge and “regular observance” by enterprises in trade judged in the context of a specific region, product or set of trade partners.<sup>12</sup> Another stipulation pertinent to the treatment of usage is Article 6. The article permits enterprises to modify the effect of the CISG, which pave the way for usages if not affirmatively excluded in the contract. As parties can choose to opt out partially or entirely, Article 6 can replace substantial provisions of the CISG with the application of a usage.<sup>13</sup> This effect combining with evidence of regular observation in trade stipulated under Article 9(2) can bind parties to usage of their own will.<sup>14</sup>

<sup>12</sup> See La Trobe University, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?* (1985), 21 *Tex. Int'l L. J.*, p.544,545

<sup>13</sup> See John Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention Deventer* (1982), The Netherlands: Kluwer Law and Taxation, p. 586.

<sup>14</sup> See Gyula Eörsi, *General Provisions*, in *International Sales: The United Nations Convention On Contracts For The International Sale Of Goods 2-2* (Nina M. Galston & Hans Smit eds., 1984), available at <http://www.cisg.law.pace.edu/cisg/biblio/eorsi1.html> (“usages in the CISG appear completely on a contractual basis”).

Implications for Vietnam from international experience on exclusion of the CISG from perspective of enterprises

The causes for exclusion of the CISG by enterprises

There are three main sources that lead enterprises to the decision to exclude the CISG: the Convention content, the subjective choice of businesses and the decision to exclude such Convention by conflict settlement bodies.

*Firstly*, the content of the CISG contains many restrictions for its application, both the international and substantive scope. As discussed previously, Article 1(1) limits the CISG in that it can only apply to sales contract concluded between parties having place of business and habitual residence in different States. And the requirement must be met before or at the time of contract formation through either the contract itself or information about previous dealings between parties. Besides these automatic exclusions, the CISG also has to give way to other legal systems to govern the contract as provided in some Articles. An illustration is Article 92 which allows the member states at the time of ratification to choose not to be bound by certain parts of the Convention. Hence, a party having its place of business in a country that has made a declaration in pursuant to Article 92 is to be regarded as having its place of business in a non-contracting country in dealing with reserved parts. In other words, the CISG cannot automatically apply to such excluded part unless otherwise stated in the agreement. On the other hand, the CISG also stays intact in several contract matters.

According to Mrs. Nguyen Minh Hang in the interview with the writer, these includes: effects of contract on third parties, transfer of goods title, the issue of whether one is jointly liable, the acknowledgement and assumption of debts, statute of limitations, passing of obligation, assignment of contract, breach penalty, set-offs, etc. These external gaps decrease the attractiveness of the CISG in the eyes of enterprises and render them to find another law that better suit their needs.<sup>15</sup>

*Secondly*, the CISG exclusion by enterprises comes from either their own willingness or the advice and consultation of their lawyers. Taking advantage of Article 6, enterprises choose to exclude the Vienna Convention from their sales contract for a plurality of reasons. The most apparent among them is the fear of the unknown or the unfamiliarity with the Convention, which has long been to blame for opt-outs. It has been indicated that unfamiliarity often results in “legal ethnocentricity” that encourages enterprises to utilize their own set of law in international sales contracts. Hence, across member states of the CISG which frequently opt out of the Convention, there seems to be a strong positive correlation between unfamiliarity and the exclusion rate. Familiarity rate has a close relationship with the next reason, the cost in terms of effort and time needed to become familiar with the Convention. The reason may be somewhat confusing as the CISG, compared to other foreign sales law, inherently required less information cost to master. The learning cost mentioned here is the “start-up” cost or the perception of information cost, which bears a few connections with the real costs but can be

<sup>15</sup> Nguyễn Minh Hằng (Mrs.) – Dean of Faculty of Law, Foreign Trade University.

distorted on account of psychological biases. This amount of perceived learning cost will differ in different countries based on three factors: education system, litigation exposure and influence on domestic law. The deeper universities and colleges in economic and law incorporate teaching on the CISG into their curriculums, textbooks and examination, the more familiar with the CISG enterprises and lawyers and the less perceived learning cost required to get used to and apply the Convention. There is a common characteristic in the CISG member states which often choose to opt out of the Convention listed in aforementioned part is that the number of law cases on offer in all the countries is quite humble.<sup>16</sup> That's why the more cases relating the CISG in a country, the lower the exclusion rate in such country as businesses and law practitioners shall be forced to invest in learning more about the Convention whether they like it or not. The perception of the size of required information cost is also affected by the extent to which domestic law of the country has been influenced or modeled based on the Vienna Convention. In the event that the national legal system has a lot in common with the Convention, which results in the close resemblance between the content of the ever-familiar domestic law of enterprises and that of the CISG, the perceived information cost is drastically cut down and so is the exclusion rate of the Convention. An additional reason given out by Mrs. Nguyen Minh Hang and Mr. Pham

Van Chat comes from what is called "path dependence" arising from the heavy reliance of international enterprises on the general conditions such as BHP Billiton Marketing General Terms and Conditions of Sale and Purchase, ECC 2002, FOSFA International, GAFTA No.120.<sup>17</sup> Such terms and conditions always include a stipulation on the non-application of the Vienna Convention.<sup>18</sup> This is of frequent occurrence to small- and medium- sized enterprises because the redrafting those standard terms always incurs additional cost for legal advice. As a result, they have to accept it and exclude the CISG even if it is against their will.

Thirdly, the exclusion of the CISG by enterprises can come from decisions of dispute settlement bodies, which can be classified into two branches: the homeward trend and the misunderstanding of the choice of law provision. The former emerges owing to many articles the Vienna Convention, which permits the court to refer to their own domestic laws when entering a judgement regarding the sales contract. One noteworthy example is Article 28 which states that courts can choose to not make a verdict on the specific performance that is not allowed in their own legal system. Hence, this Article opens the door for domestic law of a court to be referred to as the question of whether the court is obliged to enter judgment for specific performance will rely on the substantive law of the forum. Besides this example, there exist many other contents in the Vienna Convention

<sup>16</sup> See <http://www.cisg.law.pace.edu/cisg/text/casecit.html> for the specific number of case law in CISG member state.

<sup>17</sup> Nguyen Minh Hang (Mrs.) - Dean of Faculty of Law, Foreign Trade University & Pham Van Chat (Mr.) - Arbitrator at Vietnam International Arbitration Center.

<sup>18</sup> Article 27 INTERNATIONAL CONVENTIONS of GAFTA No.120 states that "The following shall not apply to this contract: (b) The United Nations Convention on Contracts for the International Sale of Goods of 1980."

that both explicitly and implicitly allows the court to depend on other sources of law as the replacement for the CISG. Another source for the exclusion of the CISG by the court is the misunderstanding of the choice of law clause. Courts in many CISG contracting states have a wrong perception of the proper role of a choice of law in the analysis of the CISG exclusion. In case when the parties to contract include a choice of law provision in their sales agreement, provided the jurisdiction whose law is chosen by such clause is a member state of the Vienna Convention, then that choice of law clause generally shall not per se have the effect of excluding the CISG given that the Convention is otherwise applicable. This arises from the fact that when a country enters into the CISG, the Convention will become one part of the national legal system of such country and therefore, the law of the jurisdiction. For instance, a choice of law clause expressly selecting the laws of Japan indicates the selection of the CISG, not the exclusion of it, provided the Convention is applicable to the agreement because the CISG has been integrated into Japanese domestic laws when the country ratified the Convention. Unfortunately, many judicial bodies are not fully aware of the fact and are misled by the belief that the mere inclusion of a choice of law can be automatically interpreted as the choice of opting out of the Convention by contracting parties. As a result, there are multiple inaccurate conclusions by judicial bodies that the CISG shall not apply when the Convention should have been the applicable law body.

*Irrational and ineffective exclusion of the CISG 1980*

The exclusion of the CISG takes place frequently around the world, which has become a common practice for the enterprises to do so whenever concluding a cross-border sales contract. However, such impulsive decision without considering can be of serious detriment. It is advised that enterprises should at first thoroughly understand themselves and the contract context before coming to any decision regarding the choice of law clause to gain the highest advantage. Both parties should select the law that best meets their demand. Such process depends on many factors, such as power of party, familiarity with the law, legal customs of a specific country or industry, etc. Mrs. Nguyen Minh Hang believed that albeit the CISG may not be the best option but as a world-recognized uniform and neutral law, it can serve as a fair and negotiable choice of law. Only if both parties surely believe that the CISG offer fewer benefits than other sources of law should they opt out of the Convention to secure the highest gains possible for themselves.<sup>19</sup>

On the other hand, the intention to exclude the CISG by enterprises may be in vain if it was made in an inaccurate manner. The situation stems from both the lack of knowledge and the ambiguity of the Convention regarding the issue. Article 6, the article that was designed to serve the specific purpose of exclusion of the CISG, provides only little guidance on how the parties can eliminate the CISG application from contracts that would be otherwise governed by the Convention. The content of Article 6 is too brief and simple, which makes it quite difficult for parties to fully understand and apply it to effectively opt out of the CISG. The mere inclusion of

<sup>19</sup> Nguyễn Minh Hằng (Mrs.) – Dean of Faculty of Law, Foreign Trade University.

the clause choosing a specific national law is not sufficient to exclude such Convention, even if the country whose law is chosen is CISG non-Contracting State or a member State reserving Article 1.1(2) like Singapore. Therefore, to make sure that the CISG is effectively excluded, enterprises should include a stipulation expressly stating that “*The Parties agree that the United Nations Convention on Contracts for the International Sale of Goods (adopted at Vienna on 10 April 1980) does not apply in any respect to this Contract*”. Moreover, as Article 8 of the CISG allows the exclusion as long as parties can prove it is of their true intention by “*all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties*”. Hence, enterprises should draw up their contract in an organized manner that clearly indicates their intents.

#### *International efforts to ease the exclusion trend of the CISG*

Realizing the lack of knowledge is a prominent indicator of the exclusion decision, many countries have made great attempts in enhancing the awareness of enterprises about the CISG. There is a belief that the prevalence of CISG law cases and contracts weighs heavily on the decisions of schools to include the CISG into the curriculum and ensure that it is well covered in mandatory subjects. The same influence on the awareness may impact on the decision to integrate the CISG as an examinable topic in bar exams for legal qualifications. In German, the CISG is “part of the ordinary curriculum of most German

law faculties” and “almost every standard commentary on the German Civil code”. Similarly in Denmark, the Convention is incorporated into the curriculum of University of Copenhagen. In Korea, the government also tries to reduce the exclusion rate by means of reforming educational system, which makes the CISG a compulsory subject and examinable content in the National Judicial Examination for professional qualifications. Moreover, up to now, out of more than 100 colleges across Korea, most of them have been teaching the CISG as one separate subject for more than ten years.<sup>20</sup> Efforts also are made to diffuse the content and CISG-related articles as dispersed as possible. In Korea, more than 100 articles including the dissertations on the subject of the CISG can be easily accessed on the Database of the Korean Research Foundation. Adding to that, an excess of 20 publications having outstanding volume of distributions such as textbook for university students and bar preparation materials for bar exam applicants are nationwide available. In the U.S., the State Department also cooperates with some publishing company to diffuse knowledge of the CISG in the form of printed books. Another attempt to alleviate the opting out of the Convention by governments in many countries is adapting their domestic legal system following the content of the CISG to minimize the differences and enhancing the familiarity for enterprises. Such measure has been taken in Japan, Korean and the U.S.

### **5. Conclusion**

The above analyses show the actual situation of the opting-out practice of the

<sup>20</sup> See *supra* note 6, page 6, “most of all the colleges of law the number of which is more than 100 in Korea nation-wide have been teaching the same subject for almost 10 years”.

CISG 1980 in some countries, namely Japan, Korea and the U.S., to withdraw a few implications for Vietnam as a new member of the Convention. These consist of the reasons for the exclusion trend, the impulsiveness in opting-out decisions and inaccuracy in the excluding process as well as the international efforts in easing the situation.

By taking these implications into account, it is hoped that Vietnamese government can prepare some plans in advance to hinder the

exclusion trend from occurring and cope with it when it does take place so that the CISG 1980 can properly function and actually bring about its intended benefits. Additionally, Vietnamese enterprises and lawyers should think twice when deciding to exclude the CISG from their cross-border sales contracts. Lastly, the courts in Vietnam should also thoroughly consider before concluding whether the Convention is inapplicable to the contract to avoid making incorrect judgement./.

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