Dissecting the CISG Framework and the Indian Sale of Goods Regime in the Context of 'delivery', 'time' and 'risk': A Comparative Account

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ABSTRACT

India is among those few countries which despite having participated in the 1980 Vienna Convention did not ratify the Vienna Convention on International Sale of Goods (CISG, 1980). Sale of goods transactions in India are primarily governed by Sale of Goods Act, 1930 and Indian Contract Act, 1872. Some Commentators have poignantly said that these two are one of the finest legislations relating to commercial transactions that a country could have. However, as these laws are not very recent and by no stretch of imagination it can be argued that these laws in all sense incorporate the new 'Lex Mercatoria' that has been developing since these laws came into being. Albeit, it must be stressed that these two legislations are one perfect pieces of legislations but they might still lack the conformity with the new standards in the context of International sales transactions. Also, beyond any shadow of doubt, these laws do hold water even in the present era of modern Lex Mercatoria as the basic principles have strengthened over a period of time. So there might be a lot of similarities in both the regimes. But then, there are certain differences as well. And in the light of the whole debate as to whether India should ratify the CISG or not, it becomes pertinent to examine and highlight these differences and similarities and propose a feasible solution to the debate. The present paper focuses on this issue especially in the context of 'delivery', 'time' and 'risk' in International Sales.

I. BACKGROUND: THE GENESIS OF CISG

The most important legal instrument operative in the field of the International Sales transactions is the Vienna Convention on Contracts for the International Sale of Goods, 1980. It has been ratifying by most of the major trading nations of the world and it exerts considerable influence

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over the sale transactions across the world. It is also however necessary to understand the relevance of CISG in historical terms because just like other international instruments, CISG too is not devoid of a magnificent historical genesis.

1. *The Contribution of Professor Rabel and UNIDROIT's efforts*

The inspiration for the work that culminated in the form of CISG can be found in the work of a great Austrian Jurist called Professor Ernst Rabel. He began work on the creation of the international uniform sales law in the late 1920s and published his influential comparative work in sales law "*Recht des Warenkaufs*". His work was taken and developed further by the UNIDROIT which began the task on building the edifice of an international uniform sales law of goods.[3] A draft document was approved in 1939 by the Governing Council of UNIDROIT but the whole work got suspended due the World War II. After the end of the war, the work did resume and it was not futile. It gave birth to two Hague Conventions, namely the Uniform Law on the International Sale of Goods and Uniform Law on the Formation of Contracts for the International Sale of Goods, the text of both agreements agreed upon in 1964 but did not come to force until 1972, when there were required ratifications to the effect.

2. *Problems with the Hague Conventions*

Neither of the Hague Conventions can be called a successful experiment. Only nine states ratified them.[4] But it is not the case that they were devoid of any kind of practical importance. Professor Peter Schlechtriem has pointed out that Hague sales law were quite successful in terms of practical significance in the sense that at that time, many courts had applied the said instruments in deciding the disputes relating to international sales.[5] But even after the realization of a limited practical success, there were certain stronger reasons behind the failure of these conventions. Some of the major reasons have been bulleted below[6]:

- It was perceived a purely European project as most of the ratifying states were European. More importantly, participation of non-European states in the drafting of the conventions was very less as compared to the European ones.
- In particular, the conventions failed to secure the participation of the developing countries of the world.
- They also failed to secure the ratification of major trading nations of the World like United States.
- There was a mindset developing at that time that states that did not sign the convention also did not felt morally

[3] John O. Honnold, "Uniform Law for International Sales under the 1980 United Nations Convention", 4th ed., Wolters Kluwer Law & Business (July 2009) [edited and updated by Harry M. Fletchner].

[4] These were United Kingdom, Belgium, West Germany, Italy, Luxemburg, Netherlands, San Marino, Israel and Gambia.

[5] Peter Schlechtriem, 'Uniform Sales Law-The Experience with Uniform Sales law in the Federal Republic of Germany' (1991-2) 3.

[6] Ingeborg Schwenzer & Christiana Fountoulakis, ed., "International Sales Law", Routledge-Cavendish (2007).

obligated to sign the conventions. In simple terms, the conventions failed to receive the mass-acceptance.

- Another problem associated was that the conventions could be ratified on an opt-in basis. This has the consequence that even though these conventions were ratified, there was not much practical effect.
- Conventions themselves suffered from certain technical weaknesses in the sense that the substantive legal content of the conventions did not receive warm acceptance by the countries worldwide.

The only significance that lay in these conventions was that they did provide a significant starting point for further and more acceptable development of International Uniform Sales Law. [7]

3. The birth of CISG

The immediate origin of CISG is to be found in the work of the United Nations Commission on International Trade (UNCITRAL) which was launched in 1966. Its first step was to send the Hague Conventions together with a commentary by Professor Andre Tunc, to all governments and to invite them to comment on the conventions and indicate their attitude of acceptance towards the ratification. This consultation process established that a number of major trading nations including the US, Soviet Union and China did not intend to ratify the Hague Conventions. Once this point got established, work began on the preparation of new convention and now the consultation process was much more extensive than at the time of consultation with respect to the Hague Conventions. A working group was formed in 1968 and it produced its first draft in 1976. The work then culminated into a diplomatic conference which was held in Vienna between 10 March and 11 April 1980. In this conference only, the CISG Convention got adopted on 11 April, 1980. The Convention came into force on January 1, 1988.

II. LEX MERCATORIA: CHANGING NEED WITH CHANGING GOVERNANCE?

The concept of Lex Mercatoria which is also known as 'the Law of the Merchant' – is a versatile term which serves both to depict confines around a neighbourhood and its practices, and to symbolize a legal system. It describes the entirety of actors, usages, secretarial techniques, and guiding principles that sentient private, transnational trading relations, and it refers to the body of substantive law and dispute resolution procedures that preside over these relations.[8] The idea of Lex Mercatoria has evolved over a period of time and the same can be seen in the following segments of this chapter:

A. Medieval times and the Lex Mercatoria

In the medieval times i.e in the 11th and 12th century, the Lex Mercatoria was largely shaped by the merchants, traders and their agents and there was no control of the state. This era saw the

[7] Joseph Lookofsky, Understanding the CISG, 3rd (worldwide) ed. (Wolters Kluwer) (2008)

[8] Sweet, Alec Stone, "The New Lex Mercatoria and Transnational Governance" (2006). Faculty Scholarship Series. Paper 92. http://digitalcommons.law.yale.edu/fss_papers/92

significance of the middlemen in the commercial transactions.[9] There were in existence various codes of conducts that operated a local customs as opposed to the general customs. And the whole struggle in this period involved the dichotomy with the difference between various local customs.

B. Westphalian Order and the Lex Mercatoria

After the treaty of Westphalia, what became the centre of discussion was State Sovereignty. Hence the time period starting from 16th century saw the rise of State, its sovereignty and the control of state over the transactions of the merchants.[10] Now most of the local customs created by these traders were being absorbed a part of law of states on commercial transactions. This period saw the development of state intervention in the area of commercial transactions. [11]

C. The Modern Lex Mercatoria

The modern Lex Mercatoria owes its roots to the advent of Globalisation in the 19th century. Modern or the new Lex Mercatoria is all about trans-nationalism with the development of technology coming to fore and increasing the bulk of various types of commercial transactions. The modern era is an era of a complex network of various transactions. And the same gave rise to a call for unification and harmonisation of rules of such transactions. Modern Lex Mercatoria is not just about accepting unified rules but at the same time rights and obligations of both the buyer and seller are at stake. [12]

The International Chamber of Commerce in Paris (ICC) has adopted the following stand on the matter:[13]

"*ICC believes that, in order to truly harmonize contract law in Europe, it is necessary to elaborate an instrument that is similar in form to the U.S. Uniform Commercial Code (UCC) ... . The scope of the harmonized contract law in Europe could be enlarged as compared to the UCC and also have enhanced structure and substance. It should be stressed that elaborating an instrument for harmonized law in Europe may entail work for many years. ICC is of the opinion that it is more effective for an instrument to evolve slowly and result in a high-quality product than to implement an instrument that is of poor quality and introduced hastily. To this end, ICC would like to recommend that the instrument be adhered to voluntarily by the Member States and that each Member State could choose to enact the instrument in whole or only in part."*

In the light of the above discussion, it is also pertinent to look into the elements of the Preamble of CISG which reflects the underpinning of the Modern Lex Mercatoria. Opinions differ in the legal systems as to the legal

[9] Greif, A. (1989) 'Reputation and coalitions in medieval trade: evidence on the Maghribi traders', Journal of Economic History 49: 857–82

[10] Benson, B. (1992) 'Customary law as a social contract: international commercial law', Constitutional Political Economy 3: 1–27.

[11] Veitch, J. (1986) 'Repudiations and confiscations by the medieval state', Journal of Economic History 46: 31–6.

[12] Berger, K. (1999) The Creeping Codification of the Lex Mercatoria, The Hague: Kluwer.

[13] Sweet, Alec Stone, "The New Lex Mercatoria and Transnational Governance" (2006). Faculty Scholarship Series. Paper 92. http://digitalcommons.law.yale.edu/fss_papers/92.

importance of preambles. In the Eastern European countries preambles, in general, define in a binding way the social function of the respective legal act. That definition is then decisive when it comes to interpreting such act. In common law countries, however, where scepticism prevails in regard to general principles, they play a negligible role.[14] Honnold, in his commentary, does not even comment on the CISG preamble.[15] The preamble of the Convention, which was drafted at the diplomatic conference, was not the subject of substantive discussion. This might be an indication that no particular importance was attached to it. It would, however, be inappropriate to dismiss the preamble from the start as insignificant from a legal point of view. For understanding the preamble, it is pertinent to understand some of the key terms and phrases used in it because they lend credit to the proper explanation of objectives and principles behind the CISG. These have been discussed as follows[16]:

S. No.	Expression/ Phrase/term used in the preamble	Explanation and meaning
1.	'**Establishment of a new economic order'**	Reference is made here to the Declaration on the Establishment of a New International Economic Order of 1 May 1974 and to the Programme of Action on the Establishment of a New International Economic Order of 1 May 1974. Both resolutions contain political-economic principles which aim to eliminate the developing countries' economic backwardness. The first part of the preamble should be understood as including the CISG into the efforts for the establishment of a New International Economic Order and making it a component of those endeavours.

[14] C.M. Bianca/M.J.Bonell, Commentary on the International Sales Law. The 1980 Vienna Sales Convention, Milan 1987

[15] Dr. Fritz Enderlein and Dr. Dietrich Maskow, Commentary on International Sales Law (CISG)-Preamble, Oceana Publications, 1992

[16] Dr. Fritz Enderlein and Dr. Dietrich Maskow, Commentary on International Sales Law (CISG), Oceana Publications, 1992.

2.	'**Equality and mutual benefit'**	This expressly refers to the relations between States. However, it is exactly this part of the preamble which is relevant for commercial relations as well, for equal and mutually beneficial relations between States in this context have to be specified in the respective commercial relations, including sales contracts.
3.	'**Take into account the different social, economic and legal systems'**	In the quarterly meetings before the holding of the diplomatic conference, agreement could be reached in that the different legal systems were taken into consideration in the Convention. As a result of those discussions, the Convention has the character of a compromise. This can be seen from both the substantive solutions and the regulation methods used.
4.	'**Removal of legal barriers'**	The idea that the unification of law would promote international trade is the underlying motif of any efforts to achieve uniform laws in this field.

In the light of the discussions made above, it is pertinent to have a comparative look at the law in India in relation to sale of goods and a unified law in the form of CISG and to see whether Indian law needs to be modified as per the changing needs especially in the context of three very important factors that play a major role in governing the rights and obligations of buyers and sellers today i.e Deliver, Time and Risk. The particular questions to which answers have been sought in this paper are:

- Do the general principles governing delivery, risk and time in sale transactions in Indian regime coincide and have similarity with the general principles governing damages in International sales transactions under CISG and what is the extent to which these principles can be unified or distinguished?
- How are both the regimes related in terms of principles relating to delivery, time and risk in sale transactions?
- What is the judicial contribution vis-a-vis application of the general principles of International Sales law as contained in the CISG?

III. The Scope of CISG: Understanding the Background

The first six articles of the 1980 Vienna convention define its sphere of application. Article 1 determines when a contract for the sale of goods is "international" and what relation the transaction must have to a State which has ratified or acceded to the convention (a "Contracting State") before the convention is applicable. Although the terms "contract of sale" and "goods" are not defined, Articles 2 and 3 state rules for specific borderline or difficult cases, while Articles 4 and 5 exclude from the convention's coverage certain issues which may arise in connection with sales transactions. Even if, however, these first five articles make the convention applicable to a given transaction Article 6 provides that the parties are free to exclude, derogate from or vary the convention's provisions with virtually no limitation.

These introductory provisions of the Vienna convention make several important changes to the corresponding articles of the 1964 uniform sales laws.[17] The most important of these changes is the rejection of the "universalist" approach of the uniform laws and its replacement with a compromise text which requires some connection between a sales transaction and a Contracting State before the 1980 Vienna convention is applicable.[18] The UNCITRAL Working Group on Sales and the Commission agreed on this compromise text after careful review of the criticisms of ULIS and the possible alternatives.[19] Although the 1980 conference accepted the UNCITRAL text of Article 1 it did agree at the last minute, on the suggestion of the Czechoslovak delegation, to adopt Article 95 which allows a Contracting State to declare it will not be bound by paragraph (1)(b) of Article 1.[20] The changes to the 1964 uniform laws involved less debate about basic policy. The drawn-out debate within UNCITRAL about whether to discard the complex ULIS formula for determining when a transaction is international turned less on the merits of the provision than on the perceived need to have simple, clear rules for determining when the convention applies.[21]

Article 1 of CISG reads as:

"*(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the*

[17] Uniform Law on the International Sale of Goods (ULIS), Article 1 to 8 and Uniform Law on the Formation of contracts for the International Sale of Goods (ULF), Articles 1 and 2.

[18] Compare CISG art. 1(1) with ULIS art. 1(1).

[19] Report of UNCITRAL on the work of its fourth session, A/8417, paras. 57-59 (1971), reprinted in [1971] II Y.B. UNCITRAL 9, 18-20; Report of UNCITRAL on the work of its third session, A/8017, paras. 22-32, 50-51 (1970), reprinted in [1968-1970] I Y.B. UNCITRAL 129, 132-136; Report of the Working Group, third session, A/CN.9/62, Annex II, paras. 1-8 (1972), reprinted in [1972] III Y.B. UNCITRAL 77, 82-83; Report of the Working Group, second session, A/CN.9/52, paras. 11-42 (1971), reprinted in [1971] II Y.B. UNCITRAL 50,51-55; Report of the Working Group, first session, A/CN.9/35, paras. 10-44 & Annex III (1970), reprinted in [1968-1970] I Y.B. UNCITRAL 176, 178-181 & 198-20l.

[20] Réczei, Area of Operation of the International Sales Conventions, 29 Am. J. Comp. L. 513, 519-521 (1981).

[21] Report of UNCITRAL on the work of its fourth session, A/8417, paras. 58-62 (1971), reprinted in.[1971] II Y.B. UNCITRAL 9, 18-19; Report of Working Group, second session, A/CN.9/52, paras. 14-31 (1971), reprinted in [1971] II Y.B. UNCITRAL 50, 52-54.

rules of private international law lead to the application of the law of a Contracting State. (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between or from information disclosed by, the parties at any time before or at the conclusion of the contract. (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention."[22]

Professor Dr. Fritz Enderlein and Dr. Dietrich Maskow have opined that provisions governing the sphere of application can be regarded as "**vertical norms of conflict**". While norms of conflict usually occur between domestic laws existing at the same level, a distinction should be made between the domestic laws and international law. In so doing, the sphere of application is defined positively and negatively by way of inclusion and exclusion. This becomes particularly obvious where the Convention refers back directly to domestic law, as is done in Article 7, paragraph 2. A vertical norm of conflict can, however be linked with a horizontal norm, not only when it serves to answer the question whether national or international law is to be applied, but also which national law is to be applied (as in Article 28). And finally, it should be pointed out that there are also (horizontal) conflict rules which refer to the relations between different conventions. In this context one can speak of delimitation norms, e.g. Article 90. When one makes a distinction between horizontal and vertical norms of conflict, then the question arises of what is their relationship. Here there is a clear preference for vertical norms of conflict. There from results a functional interpretation which is guided by the underlying idea of unifying the law. That underlying idea is not least to overcome uncertainties in reference to horizontal norms of conflict and to avoid that they be reintroduced through the backdoor. When a State decides in favour of a convention, it does so in regard to the provisions contained therein with respect to the sphere of application as autonomous norms. There is no question of horizontal conflict rules since because of the existence of uniform norms there is no longer a need to choose between different legal systems. [23]

For the analysis of Article 1, the important expressions/principles/phrases etc have been discussed along with important case decisions as below:

A. The Rule of Internationality and place of business

The Convention does not apply to every kind of contracts for the international sale of goods; rather, its sphere of application is limited to contracts for the sale of goods that meet a specific internationality requirement set forth in article 1(1). Pursuant to that provision, a contract for the sale of goods is international when the parties have -- at the moment of the conclusion of the

[22] CISG, Article 1.

[23] Dr. Fritz Enderlein and Dr. Dietrich Maskow, Commentary on International Sales Law (CISG), Oceana Publications, 1992.

contract[24] their relevant places of business in different States.[25] One court stated that the relevant places of business of the parties are their "principal places of business".[26] The concept of "place of business" is critical in the determination of internationality. The Convention, however, does not define it, although it does address the problem of which of a party's multiple places of business is to be taken into account in determining internationality. [27] One tribunal stated that there is a place of business where there is "a permanent and stable business organisation and not the place where only preparations for the conclusion of a single contract have been made".[28]

B. Convention prevails over recourse to Private International Law

Whenever a contract for the sale of goods is international (in some sense of that term), courts cannot simply resort to their own substantive law to solve disputes arising out that contract. Rather, courts must determine which substantive rules to resort to in order to do so. Traditionally, when a situation is international, courts resort to the private international law rules in force in their country to determine which substantive rules to apply. In those countries, however, where international uniform substantive rules are in force, such as those set forth by the Convention, courts must determine whether those international uniform substantive rules apply before resorting to private international law rules at all.[29] This means that recourse to the Convention prevails over recourse to the forum's private international law rules.[30] This approach has been justified on the grounds that, as a set of uniform substantive law rules, the Convention is more specific insofar as its sphere of application is more limited and leads directly to a substantive solution, whereas resort to private international law requires a two-step approach -- that is, the identification of the applicable law and the application thereof.

C. Autonomous applicability

[24] CLOUT case No. 867 [ITALY Tribunale di Forlì 11 December 2008]; [ITALY Tribunale di Padova 5 February 2004]; CLOUT case No. 608 [ITALY Tribunale di Rimini 26 November 2002] (see full text of the decision); [GERMANY Oberlandesgericht Dresden 27 December 1999].

[25] [GREECE Polimeles Protodikio Athinon 2009 docket No. 4505/2009)]; [ITALY Tribunale di Padova 25 February 2004]; CLOUT case No. 608 [ITALY Tribunale di Rimini 26 November 2002]

[26] UNITED STATES District Court, Eastern District of Pennsylvania 29 January 2010].

[27] CISG, Article 10.

[28] ICC Arbitral award case No. 9781 of 2000.

[29] [GREECE Polimeles Protodikio Athinon 2009 (docket No. 4505/2009) (*Bullet-proof vest case*); CLOUT case No. 867 [ITALY Tribunale di Forlì 11 December 2008]; [ITALY Tribunale di Padova 31 March 2004 (*Pizza boxes case*)]; [ITALY Tribunale di Padova 25 February 2004 (*Agricultural products case*)]; CLOUT case No. 608 [ITALY Tribunale di Rimini 26 November 2002]); CLOUT case No. 378 [ITALY Tribunale di Vigevano 12 July 2000.]

[30] CLOUT case No. 867 [ITALY Tribunale di Forlì 11 December 2008]; [GERMANY Oberlandesgericht Schleswig 24 October 2008]; CLOUT case No. 888 [SWITZERLAND Kantonsgericht Schaffhausen 20 October 2003]; [SWITZERLAND Obergericht Thurgau 11 September 2003]; [AUSTRIA Oberster Gerichtshof 18 December 2002]; CLOUT case No. 608 [ITALY Tribunale di Rimini 26 November 2002] (see full text of the decision); CLOUT case No. 648 [ITALY Corte di Cassazione 18 October 2002]; CLOUT case No. 380 [ITALY Tribunale di Pavia 29 December 1999]; [GERMANY Landgericht Zwickau 19 March 1999 (Chemical products case)]; CLOUT case No. 251 [SWITZERLAND Handelsgericht des Kantons Zürich 30 November 1998]; CLOUT case No. 345 [GERMANY Landgericht Heilbronn 15 September 1997]; CLOUT case No. 84 [GERMANY Oberlandesgericht Frankfurt am Main 20 April 1994]

The internationality of a contract for the sale of goods, by itself, is not sufficient to make the Convention applicable. Article 1(1) lists two additional alternative criteria for applicability, one of which has to be met in order for the Convention to apply as part of the law of the forum. According to the criterion set forth in Article 1(1) (a), the Convention is "directly" or "autonomously" applicable, i.e., without the need to resort to the rules of private international law, when the States in which the parties have their relevant places of business are Contracting States. So, "*If the two States in which the parties have their places of business are Contracting States, the Convention applies even if the rules of private international law of the forum would normally designate the law of a third country*."[31] This is true, unless the parties have designated a given law with the intention to exclude the Convention, which they are allowed to do pursuant to Article 6.

Secondly, the time when a State becomes a Contracting State is determined by Article 99 and temporal rules for applying the Convention under article 1(1) (a) are set forth in Article 100. For the Convention to apply by virtue of Article 1(1) (a), one must also take into account whether the States in which the parties have their relevant place of business have declared either an Article 92 or an Article 93 reservation. Where one State has made an Article 92 reservation declaring that it is not bound by a specified part of the Convention, the Convention as a whole cannot be applicable by virtue of Article 1(1) (a). Rather, one must determine on the basis of Article 1(1) (b) whether the part of the Convention to which the reservation relates applies to the contract. The same is true mutatis mutandis if a party is located in a territory of a Contracting State in relation to which the State has declared, pursuant to Article 93, that the Convention does not extend. On the basis of Article 93, some courts consider parties who have their place of business in Hong Kong as having their place of business in a non-Contracting State, thus making it impossible for them to apply the Convention pursuant to Article 1(1) (a), while other courts consider those parties to have their place of business in a Contracting State. A Contracting State that declared an Article 95 reservation is to be considered a full-fledged Contracting State for the purpose of article 1(1)(a).[32] Thus, the Convention can apply pursuant to article 1(1)(a) also in the courts of Contracting States that declared an Article 95 reservation,[33]and this even where both parties have their place of business in a Contracting State that declared an Article 95 reservation.[34]

[31] 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 Committee, 1981, 15.

[32] [AUSTRALIA Federal Court of Australia 28 September 2010]; [FRANCE Cour de Cassation 7 October 2009]; [CHINA International Economic and Trade Arbitration Commission, People's Republic of China, 2007 (Arbitral award No. CISG/2007/01)]; [RUSSIA Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 February 2004].

[33] [UNITED STATES District Court, Eastern District of California 21 January 2010]

[34] [SLOVAKIA District Court in Trnava 17 September 2008]; [SLOVAKIA District Court in Nitra 29 May 2008]; [UNITED STATES District Court, Southern District of Florida 19 May 2008]; [SLOVAKIA District Court in Nitra 27 June 2006]

D. Relevance of the Civil or Commercial nature of the Contract

The notion of international sales contract had to be freed from the possible influence of different national differentiation which already, in regard to the scope of application, could prevent the uniform application of law. The criteria cited can only be examples by which it is to be generally expressed that the term "international sales contract" can only be interpreted on the basis of the Convention. The latter, however, gives a differentiation which is comparable to some of the national rules that have been rejected.[35]

IV. 'DELIVERY' IN SALE OF GOODS: A COMPARISON BETWEEN INDIAN LAW AND CISG REGIME

In this section, a comparison has been made through the means of a tabular representation between some important nuances in relating to delivery of goods and hence this section will describe how the performance of contract in terms of delivery is regulated under the Indian Sale of Goods Act, 1930 and the CISG.

S. No.	Specific provision /rule as to delivery	Concerned Law	Provision no/ Article /Section	Description
1.	Relation of Delivery With Payment	Indian Law	Section 32	Delivery and payment have been said to be concurrent conditions on the basis of the Seller's and buyer's **readiness and willingness** to give possession of the goods and pay the price respectively. Obviously it is subject to the party autonomy which has been saved by this provision.
		CISG	No such provision	

[35] CISG, Article 2, sub-para. (a) And note 2 to that Article.

Comments: Indian Law is much clear on the aspect of relationship between payment and delivery of the goods. The 'readiness and willingness test' has not been prescribed by the CISG.				
2.	Obligation to apply for delivery	Indian Law	Section 35	The obligation to apply for delivery has been put on the Buyer unless there is an express contract to that effect.
		CISG	Article 60	The obligation here also has been put on buyer to take delivery and this obligation also extends to the conduct of the buyer that enables the seller to expedite the delivery of the goods concerned.
Comments: CISG provision is wider than the Indian provision in the sense that it clearly specifies that conduct of the buyer also matters and hence leaves no ambiguities.				
3.	Time of Delivery	Indian Law	Section 36, Section 63	First rule- According to the time fixed in the contract. Alternate- Reasonable amount of time (question of Fact)
		CISG	Article 33	Same criteria as that in Indian law. However, the convention does not define or throw light on the 'reasonable time' criteria.
Comments: Reasonable time is generally understood to be a question of fact. Indian law makes it very clear by stating it in another provision altogether. However, CISG leaves the same to the party autonomy.				

4.	Place of Delivery	Indian Law	Section 36	The general rule is that delivery of goods is to be made at the place where the goods are situated in case of sale. In case of agreement to sell, if the goods are not in existence, then the place becomes the place of manufacture or production. Obviously, here also Party autonomy is saved by the act.
		CISG	Article 31	Same rule exists in relation to unidentified or future goods i.e the place of manufacture of production. However, if it is a case of carriage of goods, then the delivery of goods has to be made by handling over the goods to the first carrier which is supposed to transmit the goods to the buyer. Another rule also exists if none of the above cases exist which says that seller's place of business at the time when contract was concluded becomes relevant.

Comments: The rule in relation to place of delivery is broader as contained in CISG as compared to the Indian law. The CISG not only covers cases of carriage of goods but also pays heed to any other mode of delivery which is not part of the general rule. In this sense, the CISG rule conforms to the requirements of modern contractual transactions.				
5.	Delivery by Attornment	Indian Law	Section 36 (3)	It mentions the rule regarding delivery when there is a third party involved. In such a case, the third party which is holding the goods on behalf of the buyer when acknowledges or sends notice to the buyer regarding the same, delivery of goods takes place.
		CISG	No such provision of third party.	Although the CISG has provisions relating to third party claims but those provisions do not correspond to delivery by Attornment.
Comments: With respect to this rule, CISG is silent and it can be safely concluded that it has left the governance of such a situation open to the parties, hence saving party autonomy.				
6.	Expenses of Delivery	Indian Law	Section 36 (5)	Expenses as a general rule have to be borne by the seller in relation to putting the goods in deliverable state. Here also party autonomy is saved.
		CISG	No such pro	

			visi on.	
Comments: CISG does not talk about who would bear the expenses. It saes party autonomy here also and leaves this area of contest to be decided by the parties themselves.				
7.	Delivery of Wrong quantity	Indian Law	Sec tion 37	Indian statute caters to both short and excess delivery. In the case of former, the buyer may reject the goods but in any case if he accepts the short delivery, he is bound to pay for the same at the contract rate. In case of the latter, the buyer can accept the goods as per contract and reject the excess or he may also exercise the option of rejecting the whole goods. But in any case if the buyer accepts the whole, he will have to pay for the excess at the contract rate.
			CISG	Art icle 52	CISG only caters to excess delivery of goods. Here, the rule is that- option is given to the buyer to either accept or reject the excess of goods. But in any case, if he accepts the whole or 'part' of the

				excess, he will have to pay for them at the contract rate.
Comments: CISG in relation to delivery of wrong quantity caters only to the situation of excess quantity. So some authors have taken the assumption that it does not contemplate the situation of short delivery.				
8.	Instalment deliveries	Indian Law	Section 38	General rule is that the buyer is under no obligation to accept the delivery of goods in instalment. Of course, if the contract stipulates a contrary position, then the obligation can be put on buyer. Party autonomy again has been saved here. However, there is a rider attached to the general rule. That is, in case the buyer and the seller decide to form a contract based on the instalment delivery mechanism, then in that case if no delivery or defective delivery is made by the end of the Seller, then remedies to it as to compensation or breach of whole contract will depend upon every case to case and the doctrine of severability

				in relation to the concerned instalment vis-a-vis the whole contract will be applied accordingly.
		CISG	No such provision on instalment delivery of goods in CISG.	
Comments: CISG does not at all deals with instalment contracts and no rule has been made for the same. Sometimes having a rule is also good. In this vein, Indian law seems to be better in terms of providing a rule to that effect while at the same time saving the party autonomy.				

V. TIME' IN SALE OF GOODS: A COMPARISON OF CISG AND INDIAN STATUTORY POSITION

In relation to this section, stipulations as to time of payment and performance have been studied for the purposes of comparison between the CISG and the Indian Sales Law which is governed by Sale of goods Act, 1930 and Indian Contract Act, 1872. This section however does not make the tabular comparison as done in the previous section and adopts a descriptive methodology approach.

5.1. Indian Sales Law and Stipulations as to time

A. Time of Payment for goods concerned

Section 11 of the Sale of Goods Act, 1930 prescribes for two principles that have to be observed under Indian Sales transaction regime. The first principle relates to the time of payment under a contract says the general rule i.e the stipulations in relation to time of payment are not the essence of the contract. [36]This general rule is subject to the party autonomy principle which means that if parties want they can specify the same in the contract as to the time of payment being the essence. [37] So generally buyer's failure to pay in time does not entitle the seller to repudiate the contract. [38]

[36] Section 11 of Sale of Goods Act, 1930.
[37] Ibid, First sentence.
[38] Martindale v. Smith [(1841) 1 QB 389 55 RR 285]

But if the parties have contemplated that time of payment is essence of contract through the terms of the contractual obligations themselves, then a failure on the part of buyer to not pay in time will cost him in terms of repudiation of contract or suit for damages. [39]

B. Time of performance of contract

The second principle stated in the Section 11 of Sale of Goods Act, 1930 covers the stipulations in relation to time apart from payment. [40] This provision in itself is very broad and leaves it to the party autonomy to decide in relation to any other stipulation connected with time. The provision simply states that whether any other kind of stipulation which is connected with time has to be treated as the essence of the contract depends upon the terms of the contract, hence saving the party autonomy to the fullest and not mentioning any general rule like in the case of time for payment. This openness of the provision has led the courts to interpret this provision in the light of ordinary commercial contracts. The general principle adopted by the courts is that time is the essence of the contract in ordinary commercial transactions. [41] The peculiarity of these ordinary commercial transactions is that usually such contracts are not isolated or independent transactions. These are a bundle of transactions taking place in a chain of events. This makes the performance of the contract go to the roots of all the mini transactions taking place.[42] So in essence, time is to be considered as the essence in relation to performance in following cases[43]:

- Parties having expressly agreed that they would treat the same as essence of contract.
- Delay is operating as an injury;
- The nature and necessity under the contractual terms wants the time to be essence.

The above stated principles are also subject to one more stipulation. If in any case, the buyer himself either by his conduct or express implication waives his right to cancel the contract on the ground of delay in performance, later on the claim of 'essence' of contract cannot be brought into the picture. [44]

The above positions under Indian Sales Law also get justified under Section 55 of the Indian Contract Act, 1872. [45]

5. 2. CISG and Stipulations as to time

A. Time of payment for goods concerned

Article 58 of the CISG stipulates the principles in relation to the time of payment for the goods in the transaction concerned. Article 58 talks about the time when the price of payment becomes due in the absence of any kind of contractual term in the contract. [46]This provision creates a simultaneous handing over of the goods or the

[39] Ryan v. Ridley & Co. [(1902) 8 Com Cas 105]
[40] Section 11, Sale of Goods Act, 1930.
[41] Orissa Textile Mills v. Ganesh Das [AIR 1961 Pat 107, 109]
[42] Ibid, para 109.
[43] Supra, note 15.
[44] Hartley v. Hymans [(1920) 3 KB 475]
[45] Refer Section 55 of Indian Contract Act, 1872 for the same.
[46] [SWITZERLAND Handelsgericht des Kantons Bern 17 August 2009]

documents controlling their disposition and the price payment. So, buyer is under an obligation to pay the price at the time when the seller places the goods or the documents controlling the goods at its disposition. [47] In this general rule, the right of examination of the buyer is also saved.[48] And the main general rule is also subject to the party autonomy i.e if the parties have already specified any particular time. [49]

B. Time of performance of contractual obligations

Unlike in Indian Sales law, CISG provides additional time limits for the performance of the contractual obligations.[50] This is contained in Article 47 of CISG read with Article 49 (1) (b) of the CISG. The provisions directly relate to the time of performance and also to remedies for the breach of contract. Both these provisions relate to the principle of "**Nachfrist**", which is nothing but granting of additional time limits for performance.[51] The basic idea underlying the principle of Nachfrist enshrined in these articles of CISG is that buyer should not be allowed to repudiate the contract just because the seller did not deliver the goods on time. This also implies that late delivery is not a criterion to determine if there is a fundamental breach. [52]Of course this is also subject to the party autonomy i.e if the parties themselves have agreed that time is the essence of the contract, then that might lead to a situation of fundamental breach. With this additional time availability for performance, there is a remedy available too. If the seller is still not able to perform the obligation within this additional time period, the buyer can avoid the contract. [53]

Analysis

The reading of the above discussions made indicates that the CISG has much more clear and convenient principles for the purposes of the time of performance and payment. CISG as a general rule prescribes an ideal time for payment while at the same time saving party autonomy however no such rule exists in Indian sales law which creates ambiguities. Not only this, CISG also provides for the availability of additional time limits for the purposes of performance which is not be found in the Indian sales law.

VI. 'RISK' UNDER CISG AND INDIAN SALES LAW REGIME

Under this section also, the concept of transfer of risk has been discussed for the purposes of comparison between CISG and Sale of Goods Act, 1930. The transfer of risk criteria is important as the same is closely linked with the idea of personal liability of either the buyer of the seller.

6.1. 'Risk' under the Sale of Goods Act, 1930

In the words of Justice Blackburn, **Res Parito Domino** doctrine means that when the property

[47] Article 58 (1), CISG.
[48] Refer Article 58 (3) of CISG.
[49] Article 58 (1), 1st sentence.
[50] Article 47 of CISG.
[51] John Felemegas ed., *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, Cambridge University Press (2006) 378-381.
[52] Fundamental breach has to be determined as per Article 25 of CISG.
[53] Article 49 (1) (b) of CISG.

in goods passed, the risk of the prima facie loss is on the person in whom the property is.[54] The same principle is contained in Section 26 of the Sale of Goods Act, 1930. [55] Section 26 however also subjects this rule to the party autonomy i.e both seller and buyer together may decide otherwise in the contract. The important point to be noted under this provision is that Section 26 links the transfer of risk with the passing of the property in goods and not with the delivery of the goods. However, this general rule is also subject to two important exceptions:

- In case of delay in delivery, risk lies with the party in fault;[56]
- Also preserves the duties and liabilities of both the parties as bailee of goods for the other. [57]

5. 2. 'Risk' under the CISG

Unlike under the Indian Sales law, the CISG prescribes very clear specific rules as opposed to the general rules in relation to passing of the risk. These have been bulleted below:

- If a contract of sale relates to the carriage of goods, then in that case, if the seller has not been put under any obligation to hand the goods at any specific place, then the risk passes to the buyer when the seller hands over the goods to the first carrier for the purposes of transmission. [58]
  - ✓ Retention of documents relating to the disposition of goods with the seller does not affect the transfer of risk. [59]
  - ✓ The general rule here is that risk in any case will not be transferred to the buyer unless the goods are clearly identified to the contract. [60]
- If it is a case of goods sold in transit, the risk passes to the buyer with the conclusion of the contract for goods sold in transit itself. [61]
  - ✓ In certain circumstances, risk is assumed by the buyer from the period of time when the seller hands over the goods to the carrier.
  - ✓ If at the time when the contract of sale was concluded, the seller knew that goods under consideration have been lost or damaged and he did not inform the same to the buyer, the risk is on him.
- Section 69 of the CISG lays down a general rule for passing of risk for cases not covered by Section 67 and 68 of the CISG.
  - ✓ A same rule as that in Section 68 is contained here also. That is, clear identification of goods and notice to buyer is necessary for the purposes

[54] Martinean v. Kitching [(1872) LR 7 QB 436]
[55] Section 26 of Sale of Goods Act, 1930.
[56] Section 26 of Sale of Goods Act, 1930, 1st proviso.
[57] Ibid, 2nd Proviso.
[58] Article 67 (1) of the CISG.
[59] Ibid.
[60] Article 67 (2) of the CISG.
[61] Article 68 of the CISG.

of claiming that buyer was under any kind of risk. [62]

- ✓ In all other cases other than those mentioned in Section 67 and 68, the risk passes to the buyer when the buyer takes over the goods. If any case, if the buyer does not take over the goods in the reasonable due time, the risk passes to the passes from the time when the seller had already placed the goods at the buyer's disposal.

Analysis

Here also, CISG in relation to passing of the risk lays down very specific rules as compared to that in Sale of Goods Act, 1930. The latter only provides for a general principle which is also subject to party autonomy. There can be times when the parties have decided in a certain way and the rule of Res Parito Domino is a not applicable, then those situations go totally in the hands of party autonomy and might not be healthy. However, CISG contemplates the rule in the context of very specific situations hence making it more clear and certain and not leaving to parties to decide. In such a scenario party autonomy may sometimes be harmful. Because passing of risk is closely connected with the personal liability of the buyer of the seller.

VII. CONCLUSION

As we see in all the discussions made above, the three pillars of modern sale transactions i.e. Delivery, Passing of risk and Time (of payment and performance) are so important that they directly govern the rights and obligations of the seller and the buyer. As we saw in the first chapter, Lex Mercatoria has changed its form from the olden version to a modern version which requires clarity, consistency, balance of rights and obligations and ability on the part of a law to cater to most of the situations. In the light we also analysed the three pillars present in the two sale transaction regimes. It is safe to conclude at this juncture that CISG seems to be in consonance with the modern Lex Mercatoria as caters to all these features mentioned above. However, Indian law still lacks behind in terms of catering to specific situations and mostly provides for general rules applicable to all situations which may not work at all times. But then again, just because Indian sales law has fashioned itself in a different way does not mean that India should ratify CISG. This suggestion cannot be given only on the basis of the examination of these factors. However, it can be pressed upon that amendments can be made in the Indian law on the lines of provisions of CISG which seems to be more practical idea at this juncture.

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[62] Article 69 (3) of the CISG.