

# GUIDE TO USEFUL INTERNATIONAL TREATIES

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It's a scenario that's easy to imagine. A local manufacturer of restaurant equipment calls you up. One of his customers established in another country is 90 days late on paying its invoice. He wants to get paid, get his products back, collect damages – something!

Fortunately for him, there are many treaties that may be of assistance. Said treaties relate particularly to international sale of goods, arbitration and judicial cooperation. This article will provide guidance with regard to some of their key provisions.

## **United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)**

The United Nations Convention on Contracts for the International Sale of Goods (“**CISG**”) is an important document when it comes to determining rights and obligations of sellers and buyers in international sale of goods. It is enforced in more than 66 countries including the U.S.A., Canada, Mexico, China, Russia, Argentina, France, Germany, Poland and Italy.

Applicable to both written and verbal contracts (with certain exceptions), the treaty governs sales of goods (with exceptions for securities, ships, airplanes and electricity and for goods for personal or household use) between parties residing in different member states, or between parties

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residing in different states when the rules of private international law lead to the application of the law of a member state.

In international debt collection, it is important to determine the time and location of payment. The CISG provides that, unless otherwise provided under contract, the buyer must pay the price *when* the seller places the goods or the documents controlling their disposition at the buyer's disposition and *at* the seller's place of business or at the place where the handling of goods related documents takes place, if any (Art. 61 et seq.). The CISG also provides rules for determining the price of the goods when it has not been expressly or implicitly fixed under valid contract.

### When Sales Go Wrong

When the buyer is in default, the CISG grants sellers with various remedies, including requiring the buyer to pay or declaring the contract void and claiming restitution of the delivered goods.

Prior to triggering a remedy, the unpaid seller may, as evidence of its good faith which is important under the CISG, grant an additional period of time (defined only as reasonable) for the buyer to pay up (Art. 7 and 63). And although the seller may not attempt any remedies for breach of contract within the period, unless the buyer gives notice that he will not perform his obligation, damages can still be claimed for losses during the delay in performance as well as interest calculated at the domestic legal rate, in absence of an interest rate specified in the contract. If the buyer responds to the notice with payment, then the seller's job is done.

### Fundamental Breach: Declaring the Contract Void

If the buyer declares he will not perform his obligations, or the grace period expires without payment, the CISG allows the seller to declare the contract avoided due to "fundamental breach" – and as an American court ruled in 2001 in *Shuttle Packaging Systems v. Tsonakis*, there is no breach as fundamental as failure to pay.

### Restitution of the Delivered Goods

Avoidance releases both parties from their obligations to each other, but it's not the end of the story. If delivery has already been made in whole or in part by the seller, the seller may claim the restitution of delivered goods as well as damages (Art. 74 et seq.) that may include legal costs.

However, restitution is not always possible. The goods may have been consumed or sold, or if there is an insolvency, there may be a third-party debtor in the mix. The CISG does not provide rules for reclaiming ownership of property. In this situation, courts have relied on applicable domestic law to determine who became owner when. When the goods are actually owned by the debtor – according to applicable domestic rules on transfer of ownership – the third party had a right to seize them. Fortunately, this potential minefield can be neutralized by ensuring that transfer of ownership to the buyer is made upon full payment.

However, restitution is not a one-way street. Courts have ruled that if a buyer pays part of the price, and the seller subsequently avoids the contract and has his goods returned via restitution, the buyer is still entitled to a refund of the paid portion, unless the contract specifies otherwise (Art. 84). Case laws related to CISG may be found at the following websites: [www.uncitral.org](http://www.uncitral.org), [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) and [www.cisg-online.ch](http://www.cisg-online.ch).

### International Disputes

Knowing your client's rights is only the first step toward collecting his debt – the seller still has to take action before a court or via arbitration. There are currently no treaties relating to provisional measures. But there are several treaties covering arbitration and judicial cooperation in international disputes.

### Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

If the sales contract contains a written arbitration clause, the seller may want to make sure that the clause is enforced and his dispute does not end up before a court. Fortunately, if the debtor intends to take action in a country that is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), any court in that country, at the request of one party, will normally deny its jurisdiction and refer the parties to arbitration unless it finds that the arbitration clause is null, void, inoperative or incapable of being performed. This and other provisions are further developed in the 1985 UNCITRAL Model Law on International Commercial Arbitration that served as a basis for the development of domestic legislations of many countries and jurisdictions.

The New York Convention is in force in more than 135 countries. Furthermore, it facilitates the execution of arbitral awards by ensuring that

after the arbitral award is made, said award will generally be recognized and enforced in any country that is a member of the New York Convention.

The process for getting the award recognized, however, varies from one jurisdiction to another. Generally it involves applying to the court for recognition within a certain time period, resulting in a certificate equivalent to – and enforceable the same way as – a judgment. Judges are able to evaluate the arbitration award for form, but cannot reopen the merits of the case; it either conforms or it doesn't.

The Inter-American Convention on International Commercial Arbitration (Panama, 1975) ("*Panama Convention*") serves a similar purpose to that of the New York Convention for some 17 American countries, including the U.S.A.

### **EC Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters**

If arbitration is not possible, the seller needs to choose the competent court in which to bring about the lawsuit. Generally, it is the court of the jurisdiction where the buyer is domiciled that will be competent. This principle has been retained in the EC Council Regulation of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters amended in 2002 ("*EC Council Regulation*"), which is directly applicable to all European Union member countries except for Denmark. Under the EC Council Regulation, persons domiciled in a member state should be sued in the courts of that member state.

There are limited exceptions to that principle. In matters relating to a contract, a person may also be sued in the courts of a European Union member state where the goods were or should have been delivered or where the services were or should have been provided. When the parties have agreed to grant jurisdiction to the courts of a member state, said courts shall generally have exclusive jurisdiction.

The EC Council Regulation has broadly supplanted the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 1968) ("*Brussels Convention*"), which was agreed by the member states of the EU and its almost identical treaty the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano, 1988) ("*Lugano Convention*"), which was agreed with by the then six members of the European Free Trade Area except for Liechtenstein.

### **Convention on Choice of Courts Agreements**

Open to all states, the Convention on Choice of Court Agreements ("*Hague Choice of Court Convention*"), concluded on June 30, 2005 and not yet in force, will solely apply to exclusive choice of court agreements in international cases. Under the Hague Choice of Court Convention, the courts of a contracting state designated in an exclusive choice of court agreement will have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that designated state.

Furthermore, a court of a contracting state other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies. Even if there are many exceptions to this principle in the Hague Choice of Court Convention, it is useful to note that careful attention should increasingly be put to choice of court agreements.

After the seller has selected the court where it intends to sue the buyer, it needs to serve the buyer that may be domiciled in a different jurisdiction.

### **Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (The Hague, 1965)**

The fact that a defendant may be domiciled and served outside the jurisdiction of the court where the lawsuit is being brought is not the headache it appears to be at first glance. In addition to bilateral treaties, more than 54 countries, including Canada, China, France, Germany, Japan, Korea, Mexico, the UK and the U.S.A. are members of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("*Hague Service Convention*").

Under the Hague Service Convention, member nations set up a "Central Authority" to receive foreign judicial and extrajudicial documents, and serve them in accordance with that country's internal laws. This one-size-fits-all receiving policy has some caveats – the document must conform to the Hague Service Convention's own standards (using its model form) and be in the appropriate language for the country (although Art. 7 allows English and French to be used).

The Hague Service Convention also recognizes other methods for serving judicial documents abroad. Providing there is no objection by the state of destination, documents may be served directly to persons abroad by registered mail, through judicial officers of the state of destination, or

through diplomatic or consular agents of the originating state. To make sure that a method of service be considered valid, it is important to read the reservations, declarations and notifications for each party to the Hague Service Convention [www.hcch.net]. Failure to use a valid method may render the judgment unenforceable.

The Inter-American Convention on Letters Rogatory (Panama, 1975) and Additional Protocol with Annex (Montevideo, 1979) serves a similar purpose to that of the Hague Service Convention for a limited number of American countries, including the U.S.A., as well the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Minsk, 1993, amended in 1997) ("Minsk Convention"), which was adopted by the member states of the Commonwealth of Independent States (CIS) and, which also regulates a wide spectrum of legal matters including service of judicial or extrajudicial documents and recognition and enforcement of civil and criminal judgments as well as cooperation between competent authorities in the field of civil, family and criminal law.

#### **Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (The Hague, 1970)**

Obtaining evidence in a foreign country may also be a challenge. Many countries have enshrined the principle of international comity in their domestic laws and in some bilateral conventions as the basis on which their domestic courts will provide assistance to foreign courts seeking to obtain evidence from their jurisdiction. As well, some 65 countries are party to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention").

This Convention provides a mechanism for collecting evidence abroad for court cases without resorting to diplomatic channels. It streamlines procedures for compulsion of testimony and documentary or physical evidence, utilizing the "Model Letter of Request" provided in the Hague Evidence Convention. As provided in the Convention, a domestic court of a contracting state can request the competent authority of another contracting state, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act. The Letter of Request would be transmitted with appropriate translations directly to the central authority of the other state which would thereafter normally transmit it to the authority competent to execute it.

However, it must be noted that each country to the Hague Evidence Convention had the opportunity of making reservations and declarations

regarding its applicability. For instance, some countries allow the taking of depositions of willing witnesses only under certain specific conditions. In some countries, evidence may only be taken in its territory by a diplomatic officer or consular agent of the requesting court's contracting state. Others have provided for the possibility of court appointed commissioners to take depositions under restrictions similar to those confronting consular officers. Very few have given broad permission for court appointed commissioners to take depositions. Most countries object to the execution of letters of request issued for the purpose of obtaining pre-trial discovery of documents. As it is applied differently for each country, it is advisable to seek country specific information [www.hcch.net].

#### **Enforcing a Foreign Judgment**

After a final judgment is made, the claimant will want to execute it against its debtor who may have assets in a foreign country. In this case, there is no equivalent to the New York Convention and the Hague Choice of Court Convention which is limited in scope to choice of court agreements has not yet entered into force.

Save for countries that are bound by the EC Council Regulation, Brussels Convention, Lugano Convention, Minsk Convention or the Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo, 1979), the recognition and execution of foreign judgments relies mainly on a series of bilateral treaties and on domestic laws. For instance, Canada has had since 1984 a relationship of reciprocal enforcement of judgments with the United Kingdom. Enforcing judgments from most Canadian provinces in the UK requires registration with the High Court of Justice, but otherwise suffers few formalities.

There are also countries that have enacted laws on their own to simplify the task of enforcing foreign judgments on their soil. For example, the *Australian Foreign Judgments Act* (1991) allows judgments of courts of listed countries to be enforceable in Australia via a process of registration similar to the bilateral Canada-UK treaty.

In conclusion, there are many treaties that are of assistance to collecting international debts. The CISG, which is supplemental to contracts when applicable, will set a time and place of payment as well as remedies in case of default of a party.

If the contract contains an arbitration clause, the New York Convention and the Panama Convention will protect it and deny court jurisdiction at the

request of a party and will facilitate the foreign execution of arbitral awards and limit the grounds for judicial review.

If the claim is brought before a tribunal, in addition to bilateral and regional treaties, the Hague conventions will assist in servicing judicial documents and in taking evidence abroad, the enforcement of which may be different from one country to the other in accordance with reservations and declarations made. Regarding the execution of foreign judgments, it is mainly governed by a series of regional and bilateral treaties and domestic legislations. The Hague Choice of Court Convention is not yet in force and is limited in scope as compared for instance to the EC Council Regulation.

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