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ACCESSION OF BRAZIL TO THE CISG: A FIRST ANALYSIS ON THE APPLICATION OF THE CONVENTION BY THE BRAZILIAN JUDGE

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1 INTRODUCTION: ACCESSION OF BRAZIL TO THE CISG – WHAT WILL CHANGE?

What legal changes will the incorporation of the CISG in the Brazilian legal system bring? This seems to be the central concern of lawyers who accompanied the process of the Convention's approval by the Brazilian National Congress, which culminated on 19 October 2012 with the Legislative Decree n. 538.[1] According to this Decree 'the text of the UN Convention on the International Sale of Goods (CISG), established in Vienna on 11 April 1980 under the auspices of the UNCITRAL, is hereby approved'.[2] Subsequently, on 4 March 2013, Brazil deposited its instrument of accession with the Secretary-General of the United Nations, thus becoming the 79th State Party to the

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1 Brazilian House of Representatives website, available at: <http://www2.camara.leg.br/legin/fed/decleg/2012/decretolegislativo-538-18-outubro-2012-774414-convencao-137911-pl.html.l>. (free translation by author).

2 Legislative Decree n. 538, *Ibid*.

Convention. As a consequence of that, the CISG will enter into force in Brazil on 1 April 2014. Then, the only remaining step in order for it to produce effects internally is the promulgation and publication of an executive decree.

But, even before the definitive incorporation of the CISG, Brazilian judges could – and can –, in some limited situations, apply it to contracts for the international sale of goods.[3] The application of the Convention in these cases, however, is based on Brazilian private international law (PIL) rules rather than on CISG's provisions on applicability, which Brazilian judges are clearly not bound to apply before its definitive incorporation. By way of illustration, one can imagine a hypothetical case involving a sale of goods proposed by a party residing in France[4] to another residing in Brazil, with no determination of applicable law by the parties. In this case, the Brazilian judge would be prompted to apply the CISG under Art. 9[5], § 2º,[6] of the Law of Introduction to the Rules of Brazilian Law (LINDB – Decree-Law n. 4,657).[7]

Besides the possibility to be deemed applicable by Brazilian judges under the LINDB, the CISG also could be appointed as the substantive applicable law by parties to arbitrations seated in Brazil, even before its definitive incorporation into the country's legal system[8]. This would be acceptable due to Art. 2, §§1º and 2º, of the Brazilian Arbitration Law (Law n. 9,307/96), which allows parties to choose the rules of law or equity, general principles, uses and customs or international trade rules as the law applicable to the arbitration. Likewise, arbitrators already could and can directly apply

3 See Giffoni, A. de O., "A Convenção de Viena sobre Compra e Venda Internacional de Mercadorias e sua utilidade no Brasil" (1999) 116 *Revista de Direito Mercantil, Industrial, Econômico e Financeiro* 168) "Brazilian judges, when requeired to do so, will apply the Convention as a result of the rules of private international law". The same opinion is supported by the findings of the Viçosa Federal University Law School working group on the CISG: "By analysing Brazilian legislation and case law made available by the working group, which undertook a careful study, it was possible to detect that the Brazilian private international law rules, especially Art. 9, § 2º, of the LICC [Introductory Law to the Civil Code], make it fully possible to determine the law of a State Party to the Convention as the applicable law. In these cases, the fact that Brazil has not ratified the Convention yet matters little, because Brazilian private international law rules themselves require the application of that law". (Vieira, I. de A., Silva, M. A. L. da, and Leão, A. P., "Direito Uniforme sobre a compra e venda internacional de mercadorias: convergências e divergências em sua aplicação" (2007) 35 *Revista de Direito Bancário e do Mercado de Capitais* 151 (free translation by author).

4 The Convention entered into force in France in January 1988.

5 Art. 9. "The law of the country *in which obligations are constituted* shall apply to characterise and govern the obligations" (free translation by author).

6 "§ 2. "An obligation resulting from a contract is deemed to have been constituted *in the place in which the proponent resides*" (free translation by author).

7 The Introductory Law to the Civil Code (LICC – Decree-Law n. 4,657 of 4 September 1942) was renamed the LINDB in 2010, with no further material changes.

8 See Giffoni, A. de O., *A Convenção de Viena*, *supra* fn 3, at pp. 169-170 "[I]n international sale of goods contracts that stipulated the Convention as applicable, there is no doubt that private arbitration is the safest route. The waiver of the parties from judicial courts prevents the emergence of questions about the validity and efficacy of the option for the Convention. Law n. 9,307/96 [...] established the principle of party autonomy for arbitrations seated in Brazil, in its Art. 2, § 1º" (free translation by author).

the CISG to contracts for international sale of goods involving a Brazilian party and where parties have not stipulated the applicable substantive law any time those arbitrators consider the Convention to be the most appropriate law to the contractual relationship, and as long as this *voie directe* is at least authorized by the arbitration rules governing the proceedings.[9]

Furthermore, the fact that a foreign arbitral award applied the Convention in a dispute involving a Brazilian party did not pose an obstacle to its recognition and enforcement in Brazil – on grounds of public policy – even before the internalization of the CISG. In this respect, the *Superior Tribunal de Justiça* (Superior Court of Justice – STJ)[10] in 2009, while judging the SEC n. 3035/FR,[11] recognized the applicability of the CISG in a case seeking the recognition of an award rendered in an international arbitration involving a Brazilian company. The parties in that arbitration had elected "Swiss substantive law" as applicable to the merits.[12] In her prevailing opinion, Minister Nancy Andrighi held that the limited scope provided to the Brazilian judge in recognizing a foreign award does not allow him to decide, in place of the foreign arbitrator, on the interpretation of the expression "Swiss substantive law".[13] She further held that the inclusion of the CISG – in force in Switzerland since 1 March 1999 – in the concept of "Swiss substantive law" *did not offend* the limits of the

9 About the *voie directe*, *cf.* Art. 21(1) of the new ICC Rules, Art. 28(1) of the ICDR/AAA Rules, and Art. 35(1) of the UNCITRAL Arbitration Rules. See also Dolinger, J. and Tiburcio, C., "Direito Internacional Privado – Arbitragem Comercial Internacional" (2003) *Renovar, Rio de Janeiro* 100-1, stating "currently, in the absence of choice by the parties, arbitrators have complete freedom to set the law to be applied to the merits of the question, without relying on the rules on applicable law of the place of arbitration or any other place, as can be seen from examining the rules transcribed above [London Court of International Arbitration (1985), Art. 13; AAA (1993), Art. 29; WIPO (1994), Art. 59; ICC (1998), Art. 17]" (free translation by author); and Silberman, L. and Ferrari, F., "Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting it Wrong" in Ferrari, F. and Kröll, S. (eds), *Conflict of Laws in International Arbitration*, 2011, Sellier, Munich, at pp. 294-5, stating that "[m]any recent domestic arbitration statutes and rules have eliminated the necessity of using conflict of laws analysis to ascertain the applicable law. Instead, arbitrators may directly apply the substantive law, "thus avoiding the complicated mechanisms of private international law" that require various steps [...]. For example, Art. 17 of the ICC Arbitration Rules provides that the arbitral tribunal shall apply the "rules of law which it determines to be appropriate". Even prior to promulgation of the latest version of the ICC Arbitration Rules, the French CCP and the Dutch CCP had adopted this same approach, providing that the arbitral tribunal may resolve the dispute in accordance with the rules of law it considers appropriate. In giving the arbitrators the authority to decide the case in accordance with the "rules of law" it considers appropriate, the arbitration statutes and rules allow the arbitral tribunal to once again look beyond a national system of rules, even where the parties do not expressly direct them to do so".

10 The *Superior Tribunal de Justiça* (STJ) is the highest court for non-constitutional matters, charged with harmonizing the interpretation of federal laws by the state and regional federal appellate courts. It also has original jurisdiction over recognition of foreign judicial and arbitral awards.

11 STJ, Special Court, Reporting Judge Minister Fernando Gonçalves, Foreign Contested Sentence (SEC) n. 3035/FR, judged on 19 August 2009, unanimous decision.

12 *Ibid.* p 2.

13 *Ibid.* p 15.

arbitration clause or the rules of *Brazilian public policy* for purposes of the recognition of the arbitral award. She also stated that the *same principle* applies for the argument that the *CISG had not been adopted by Brazil*[14].

In the final analysis, given that in some cases, as illustrated above, the CISG already could be applied by Brazilian judges and to Brazilian parties, what will change with its incorporation in our legal system? Besides the effect of becoming part of the Brazilian material law, the answer for this question lays on the legal hypothesis and criteria the Brazilian judge will be bound to rely on while determining the applicability of the Convention. While before the incorporation of the CISG the Brazilian judge was only supposed to apply it by following our PIL rules, after its incorporation he will be bound to observe the legal hypothesis and criteria the CISG establishes for its own application. Let us see which hypotheses and criteria are these.

2 *HYPOTHESES OF APPLICATION OF THE CISG BY BRAZILIAN JUDGES*

2.1 *APPLICATION OF THE CISG* RATIONE TEMPORIS *BY BRAZILIAN JUDGES AND THE PROCESS OF INTERNALIZING THE CISG IN THE BRAZILIAN LEGAL SYSTEM*

Article 1(1)(a) of the CISG provides for the *direct* or *automatic application* of the CISG – *i.e.*, before considering the forum's conflict of laws rules – by the judges of a Contacting State[15] when faced with a dispute involving 'contracts of sale of goods between parties whose places of business are in different States'.[16]

Therefore, as of the moment the CISG is definitively internalized in the Brazilian legal order, the Brazilian judge will have to directly apply the CISG in the absence of a choice of law clause to a contract for the international sale of goods where one of the parties has its place of business in Brazil and the other party has its place of business in any other Contracting State[17] – or also to a contract between parties whose places of business are located in any two different Contracting States other than Brazil. With respect to the direct application of the CISG by Brazilian judges, it is worth recalling

14 See Prof. Lemes, S. M. F., "Homologação de sentença arbitral estrangeira. Lei aplicável. Convenção das Nações Unidas sobre a Compra e Venda Internacional de Mercadorias (CISG)" (2010) 24 *Revista de Arbitragem e Mediação* 196 who is of the opposite opinion: "[The] arbitral award, by applying a rule contained in an international convention not in force in Brazil, violates a constitutional precept and cannot be accepted in the internal ambit, due to affront to Brazilian public policy, as established in Art. 39, II, of Law 9,307/1996 and Art. V, 2, *b*, of Decree 4,311/2002 (New York Convention)" (free translation by author). Prof. Selma Lemes' position was submitted as a legal opinion by the Brazilian party in SEC n. 3035, but it did not prevail, as can be seen from the final decision of STJ on the case.

15 Given that this article does not bind judges from Non-Contracting States.

16 CISG, art. 1(1)(a). "(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".

17 A complete and updated list of all States Parties to the Convention is available at: <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.

that

> *[o]f the 15 main destinations of Brazilian exports, only the UK and Venezuela are not parties to the Convention. On the import side, of the 15 leading countries sending products to Brazil, only Taiwan, India, and Nigeria are not bound by the CISG*[18].

This indicates the importance that the direct application of the Convention is likely to assume for Brazilian judges.

On its turn, Art. 1(1)(b), once the CISG is incorporated into the Brazilian legal system will strengthen the obligation of Brazilian judges to apply the Convention to 'contracts of sale of goods between parties whose places of business are in different States [...], when the rules of private international law lead to the application of the law of a Contracting State'.[19] This comes to be its ***indirect application***.

The emergence of the former obligation (direct application) and strengthening of latter (indirect application), however, will only operate as of the conclusion of the process of internalizing the Convention in our legal system. It is therefore relevant to examine when, in the internal sphere, the CISG can be considered definitively incorporated in the country's legal system so that it becomes mandatory for Brazilian judges, and when, in the international sphere, it will take effect in relation to Brazil.

The "script" for internalizing international treaties in the Brazilian legal system[20] indicates that the step of approval by the National Congress (Brazilian Federal Constitution, art. 49, I) starts with a message from the Executive and ends with the publication of a legislative decree. The next step is an international action taken by the President, which can have two forms. If Brazil signed the original text of the treaty, that action will have the form of a *ratification*, which can consist of an exchange of notes (in the case of bilateral treaties), or of a deposit of the ratification instrument (for multilateral treaties) with the international organization under whose auspices the treaty was formulated. In turn, if Brazil was not a signatory to the treaty, that presidential action will be called an *accession*, with the same effects as the ratification's. Finally, for the treaty to produce effects internally – and in the case of the CISG, to bind Brazilian judges to its own applicability criteria – the promulgation and publication step must occur, by means of which the President promulgates and sends for publication an executive decree containing the entire text of the treaty in

18 Dantas, A. and Abbud, A., "Brasil rumo à harmonização das regras aplicáveis aos contratos internacionais de compra e venda de mercadorias" (2012) 39 *BM&A Review* 1.

19 CISG, Art. 1(1)(b). "(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: [...] (b) when the rules of private international law lead to the application of the law of a Contracting State".

20 See Prof. Tiburcio, C. "Fontes do Direito Internacional: os Tratados e os Conflitos Normativos", in Tiburcio, C. (ed.), *Temas de Direito Internacional*, 2006, Renovar, Rio de Janeiro, at pp. 5-8.

Brazilian Portuguese.[21]

In the international sphere, the text of the CISG itself determines when it will enter into force in respect of a determined State. A combined reading of Arts. 99(2) and 91(3) and (4) shows that the CISG will enter into force in relation to Brazil on the first day of the month following the expiration of twelve months after the date of deposit of its instrument of accession[22] with the Secretary-General of the UN. Put in concrete terms, given that Brazil deposited its instrument of accession on 4 March 2013, in the international sphere the CISG will enter into force in respect of Brazil on 1 April 2014.

In the internal sphere, as explained, international treaties take effect in Brazil as of their *promulgation* and *publication*. In the case of the CISG, this started with Message no. 636, of November 2010, by means of which the Ministry of Foreign Relations sent the Convention to Congress. The resulting Legislative Decree Bill (PDL) n. 222/2011 was approved by the House of Representatives, in March 2012 and the renumbered PDL n. 73/2012 was approved by the Senate in October 2012, causing the promulgation of Legislative Decree n. 538. All that remains, then, is that the CISG is promulgated and published by executive decree.[23]

Moreover, Brazilian judges will also have to observe Art. 100, especially in the first months or even years after the internalization of the Convention or when the case before them involves a party whose place of business is located in Brazil or in another recently ratifying or acceding country. According to Art. 100, the CISG only applies to the *formation* of the contract when the proposal for concluding the contract occurs on or after the date when the Convention *enters into force*[24] in relation to *both*

21 In Carmen Tiburcio's words: "this [script] is a *praxis* since the times of the Empire, despite the absence of a specific legal provision in this sense for treaties". She continues to refer to the question in a footnote, stating that "[i]n Brazil, Art. 1 of the Introductory Law to the Civil Code is applied by analogy, which requires publication for laws to enter into force". *Ibid.*, at p. 7 (free translation by author).

22 See Vieira, I. de A., *L'applicabilité et l'impact de la Convention des Nations Unies sur les Contrats de Vente Internationale de Marchandises au Brésil*, 2010, Presses Universitaires de Strasbourg, Strasbourg, at p. 58 affirming that "due to internal mechanisms for the accession to international treaties in Brazil, this country is supposed to *accede* to the Vienna Convention. In fact, the Brazilian delegation present in the diplomatic conference did not have the special powers required for the signature of the Convention. The *ratification* would have been possible if the text had been signed by Brazil on the occasion of the diplomatic conference of April 1980 or until September 30, 1981, the deadline for its signature before the UN. [Therefore] Brazil can *accede* to the Convention, but not *ratify* it" (free translation by author).

23 As can be concluded, the dates of the entering into force of the CISG in the international (1 April 2014) and internal (date to be established in executive decree) spheres in respect of Brazil may vary. Bearing this in mind, Prof. Carmen Tiburcio recommends that Brazilian authorities fix the date for the entering into force of the Convention in the internal sphere (in the executive decree) as the same that is already established for its entering into force in the international sphere. See Tiburcio, C., "Vigência dos tratados: atividade orquestrada ou acaso?", available at: <http://www.conjur.com.br/2013-jul-04/vigencia-interna-internacional-tratados-atividade-orquestrada-ou-acaso>.

24 In the light of a systematic interpretation of the Convention, I believe that the expression "enters into force" used in this article refers to the entering into force in the international sphere, as referred in CISG

Contracting States referred to in subparagraph (1)(a) or the *Contracting State* referred to in subparagraph (1)(b) of Art. 1. Likewise, the CISG will only apply to the *rights and obligations* of the buyer and the seller of the contracts *concluded* on or after the date when the Convention enters into force in relation to both Contacting states referred to in Art. 1(1)(a) or the Contracting State referred to in Art. 1(1)(b).

In brief, Brazilian judges will be required to apply the CISG under its Art. 1(1)(a) or (b) as of the date the Convention is *promulgated* and *published* by means of an executive decree,[25] provided this is on or after 1 April 2014, *i.e.* on or after the first day of the month that ends the period of twelve months counted from the date Brazil deposited its accession instrument with the UN Secretary-General (arts. 99(2) and 91(3) and (4)). Besides this, Brazilian judges will also have to observe the provisions of Art. 100.[26]

2.2 *APPLICATION OF THE CISG* RATIONE MATERIAE *BY BRAZILIAN JUDGES*

Concerns that Brazilian lawyers might have over the changes the imminent internalization of the CISG in Brazil will bring could be, to a large extent, attenuated by a clear understanding of the precise subject matters to which the CISG will potentially be applied. The material scope of the CISG does not cover all contracts, not even all international contracts, or all aspects of international contracts for the sale of goods.

It is also important to clarify here that there are no doubts about the absolute respect

Arts. 99(2) and 91(3) and (4), *i.e.*, on the first day of the month following the expiration of twelve months after the date of deposit of its instrument of accession with the Secretary-General of the United Nations.

25 Given that, before the aforementioned promulgation and publication, the Convention may not produce effects internally (in the Brazilian legal order), and thus does not bind the Brazilian judge to observe its own applicability criteria.

26 One can imagine a hypothetical case where a Brazilian judge, after the CISG enters into force in Brazil, analyzes an international contract for the sale of goods between a party with its place of business in Brazil and another with its places of business in France (where the CISG entered into force in January 1988). The offer and conclusion of this agreement occurred in November 2012 (when the CISG was in full force in France but not yet in Brazil). The contract was proposed by the French party and did not contain any stipulation on the applicable law. Therefore, to determine the applicable law, the Brazilian judge would first consult Art. 1(1)(a) of the CISG. In November 2012, however, the CISG was not in force in Brazil, so the requirement of Art. 100 that it be in force "in both Contracting States' is *not* satisfied for its application, based on Art. 1(1)(a), to the *formation* of the contract or the *rights and obligations* arising therefrom. Noting this, the Brazilian judge would then follow Brazilian PIL rules to determine the law applicable to the contract, as per Art. 1(1)(b) of the CISG. In this case, Art. 9, § 2º, of the LINDB would call for the application of French law (law of the place where the proponent resides), *i.e.* the CISG. And Art. 100, in this case, would support the application of the Convention to that contract because when the CISG comes to be applicable under Art. (1)(b), Art. 100 only requires that it is in force "in the Contracting State" to which the forum's PIL rules directed the applicable law.

the Convention preserves for the will of the parties.[27] Therefore, when there is a *clear*, *unequivocal* and *affirmative*[28] agreement of the parties excluding the application of the CISG to their contract, that agreement will have to be respected, even if the Convention would otherwise be applicable.[29]

Therefore, a joint reading of Arts. 1(1), main section,[30] and 4, main section,[31] leads to the conclusion that the CISG materially applies to (*a*) the *formation* of contracts of international sale of goods and (*b*) the *rights* and *obligations* of the seller and the buyer emerging therefrom. The Convention itself contains specific provisions both on the formation (Arts. 14-24) and the obligations of the seller and buyer (Arts. 30-65 and 71-88). So, in this essay's following sections, a tripartite analysis of the definition of *contracts for the international sale of goods* – which is in the Convention's title and is the essential object of its application under Art. 1(1) – will be undertaken.

Before proceeding, it is very important to point out that just like all the other provisions, notions, and terms employed in the CISG, the following notions, provisions, and terms of the CISG that delineate its field of material application must be interpreted within the uniform and autonomous terminology of the Convention,[32] and not in light of domestic law concepts.

27 Article. 6. "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."

28 According to several decisions, vague indications by the parties regarding the applicable law do not suffice in order to exclude the application of the CISG. For example, a clause stating that the applicable law is the one of State X, when State X is party to the Convention, would not be a sufficient reason not to apply the CISG to that contract. For more details and cases addressing this topic, see UNCITRAL Digest of CISG Article 6, at pp. 33-4.

29 These observations address party autonomy to *exclude* application of the CISG, a situation expressly regulated by the first part of Art. 6. The recognition of party autonomy to opting-in for the CISG as the applicable law even if outside the sphere of application determined by the Convention itself, is another question. In Iacyr de Aguilar Vieira's words, citing Franco Ferrari: "Le texte conventionnel ne règle pas la question de savoir si la Convention de Vienne peut être designée directement comme lex contractus ou si les parties peuvent la rendre applicable alors même qu'elle ne le serait pas, notamment dans les cas où les conditions de son application ne sont pas remplies". Vieira, I. de A., *L'applicabilité et l'impact de la Convention*, *supra* fn 22, at p. 204. Therefore, the solution for this second question would depend on what the forum's private international law says regarding recognition of parties' autonomy to choosing the applicable law in general. For a range of Brazilian scholars' opinions and Brazilian courts' decisions, under the LINDB (1942), see Araujo, N. de, *Contratos Internacionais: Autonomia da Vontade, Mercosul e Convenções Internacionais*, 2009, Renovar, Rio de Janeiro, at pp. 108-120; and Vieira, I. de A., *L'applicabilité et l'impact de la Convention*, *supra* fn 22, at pp. 142-6.

30 CISG, Art. 1(1). "This Convention applies to contracts of sale of goods between parties whose places of business are in different States [...]".

31 CISG, Art. 4. "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. [...]".

32 See Magnus, U. "*Autonome Auslegung bedeutet, daß die Begriffe des CISG aus sich selbst heraus zu interpretieren sind. Ein Rückgriff auf das nationale Recht des Anwenders oder auf bestimmte nationale Begriffe oder Verständnisse verbietet sich. Gleiches gilt für die Qualifikation*' in von Staudinger, J. (1836-1902), Magnus, U. and Martinek, M. (eds), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch, mit Einführungsgesetz und Nebengesetzen,* v. 2, 2005, Sellier-de Gruyter, Berlin, at p. 171.

2.2.1 "CONTRACTS OF SALE"

Although the Convention does not contain a direct definition in this respect, the concept can be inferred from a joint reading of Arts. 30 and 53. In simple terms, by determining the obligations of the seller, Art. 30 provides that seller is required to deliver the goods,[33] the respective documents and to transfer the property in the goods. In turn, Art. 53, in defining the buyer's obligations, provides that buyer must pay the price of the goods and take delivery of them. In a few words, under the CISG, contracts of sale of goods can be defined as *agreements by which goods are exchanged for a sum of money*.

This broad concept encompasses different kinds of sales transactions. This is the case of sales involving the carriage of goods (Arts. 31(a) and 67), of sales entered into after the seller has provided to the buyer a sample or model of the good (Art. 35(2)(c)), and of sales in accordance with specifications made by the buyer (Art. 65),[34] among others.

Moreover, according to Art. 3, contracts for the supply of goods to be manufactured or produced can also be considered contracts of sale, but only if the party that orders those goods *does not* supply a substantial part of the components or materials necessary to manufacture or produce the final product. According to the same provision, but from a negative standpoint, contracts will not be considered as sales of goods when the preponderant part of the seller's obligations consists in the supply of labor or other services.

Finally, as already briefly mentioned, the CISG *does not* apply to all aspects of contracts that fully meet the definition of its subject matter. Besides those more generic constraints extracted from Arts. 1(1), main section, and 4, main section, according to which the sphere for application of the Convention is limited to the *formation* of the contract and to the *rights* and *obligations* of the buyer and seller resulting therefrom, the Convention's text also contains a series of other provisions that impose further limits on its scope of incidence.

This is exactly the case of Art. 4 according to which the CISG *does not apply* in certain circumstances.[35] Subsections (a) and (b) of Article 4 state that the CISG does not apply: (a) to the *validity* of the contract or of any of its provisions, and (b) to the

33 This is a difference between the essential elements of sale contracts in the CISG and in Brazilian law. In the CISG, delivery is an essential element to complete the sale, while in Brazilian law, delivery is part of the nature, but not of the essence, of a sale contract, which essentially only requires the seller to transfer ownership of the good (Civil Code, Art. 481).

34 Schwenzer, I. and Hachem, P., "Article 1" in Schwenzer, Ingeborg (ed), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods*, 2010, Oxford University Press, New York, at pp. 31-2.

35 Unless otherwise expressly provided in other provisions of the CISG. Article 11, *e.g.*, refers to the validity of the contract while addressing the principle of freedom from requirements as to form.