

UNIVERSIDADE FEDERAL DE OURO PRETO
Escola de Direito Turismo e Museologia
Departamento do Direito

Isadora Vaz Siqueira Reis Fujisaka

**THE APPLICATION OF THE CISG TO ADDRESS HIDDEN DEFECTS IN GOODS
WITHIN CHINA-BRAZIL TRADE RELATIONS**

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Isadora Vaz Siqueira Reis Fujisaka

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Supervisor: Prof. Dr. José Luiz Singi
Albuquerque

Co-Supervisor: Prof. Dr. Rainer Schackmar

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Isadora Vaz Siqueira Reis Fujisaka

The application of the CISG to address hidden defects in goods within China-Brazil trade relations

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Membros da banca

Doutor José Luiz Singi Albuquerque - Orientador Universidade Federal de Ouro Preto
Doutor Rainer Schackmar - Coorientador - Université Grenoble Alpes
Doutor Claudio Henrique Ribeiro da Silva - Universidade Federal de Ouro Preto
Doutor Roberto Henrique Porto Nogueira - Universidade Federal de Ouro Preto

José Luiz Singi Albuquerque, orientador do trabalho, aprovou a versão final e autorizou seu depósito na Biblioteca Digital de Trabalhos de Conclusão de Curso da UFOP em 11/04/2025



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ABSTRACT

This final paper explores the application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) regarding hidden defects in goods within the context of China-Brazil trade relations. Given the increasing economic interdependence between Brazil and China, which reached a bilateral trade volume of USD 157 billion in 2023, understanding the application and interpretation of CISG principles becomes essential for legal predictability and efficient dispute resolution. The study compares CISG provisions with Brazilian domestic law, specifically examining seller and buyer obligations, conformity of goods, notification periods for defects, and remedies available under each legal framework. Through the analysis of relevant judicial and arbitral decisions involving Brazilian and Chinese traders, this research assesses the practical implications of CISG's adoption and identifies the extent to which Brazilian legal practice has adapted to this international legal standard. The study concludes that while Brazil's late accession and China's initial reservations to the CISG have created unique legal challenges, ongoing jurisprudential developments demonstrate increasing harmonization and potential benefits for bilateral trade.

Keywords: CISG, hidden defects, Brazil-China trade, international trade, commercial disputes

RESUMO

A Aplicação da CISG na Solução de Defeitos Ocultos em Mercadorias nas Relações Comerciais entre China e Brasil

Esta pesquisa analisa a aplicação da Convenção das Nações Unidas sobre Contratos de Compra e Venda Internacional de Mercadorias (CISG) em relação aos vícios ocultos das mercadorias no contexto das relações comerciais entre Brasil e China. Diante da crescente interdependência econômica entre os dois países, este trabalho avalia como a CISG tem sido utilizada para resolver disputas comerciais envolvendo defeitos ocultos nos produtos, examinando especificamente obrigações do vendedor e do comprador, períodos de notificação de defeitos, critérios de conformidade das mercadorias e os remédios jurídicos disponíveis sob cada ordenamento. Por meio da análise de decisões judiciais e arbitrais relevantes que envolvem comerciantes brasileiros e chineses, este estudo avalia as implicações práticas da adesão do Brasil à CISG, destacando em que medida a prática jurídica brasileira adaptou-se ao padrão jurídico internacional representado pela Convenção. Conclui-se que, embora a adesão tardia do Brasil e as reservas iniciais da China tenham gerado desafios específicos, a jurisprudência brasileira vem gradualmente incorporando os princípios da CISG, proporcionando maior segurança jurídica nas transações comerciais bilaterais.

Palavras-chave: CISG, vícios ocultos, relações comerciais Brasil-China, direito internacional privado, comércio exterior

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1. INTRODUCTION

In 2024, Brazil marked ten years since the United Nations Convention on Contracts for the International Sale of Goods (CISG) entered into force in the country as a Contracting State. This milestone provides an opportunity to reflect on how the Convention has been implemented in Brazil and its impact on international trade relations, particularly with key trading partners such as China.

International trade is a fundamental driver of economic growth and globalization, enabling businesses to expand beyond national borders. However, cross-border transactions are inherently complex due to differences in legal systems, contractual frameworks, and dispute resolution mechanisms. As commercial exchanges intensify, the need for legal certainty becomes even more pressing, particularly when dealing with issues such as hidden defects in goods, which frequently lead to disputes over quality standards, liability, and contract performance. In response to these challenges, the CISG was developed to harmonize international sales law and provide a uniform framework applicable across jurisdictions.

Against this scenario, the growing trade relationship between Brazil and China brings additional relevance to the study of how the CISG is applied in this context. In 2023, bilateral trade between the two countries reached a record \$157 billion, according to data from the Brazilian Ministry of Development, Industry, Trade, and Services. Given this volume of commercial exchanges, ensuring a clear and predictable legal framework for resolving disputes is essential.

This study examines the application of the CISG from a Brazilian perspective, analyzing its role in commercial relations between Brazil and China. While China was among the early adopters of the CISG, ratifying it in 1988, Brazil only became a contracting state in 2014. Despite both countries being bound by the Convention, their legal traditions and approaches to its application differ significantly. Given Brazil's relatively recent accession, it is essential to evaluate how Brazilian courts, and arbitral tribunals interpret and apply its provisions in real-world commercial disputes.

One of the focuses of this study is the comparison between the CISG and Brazilian law, particularly in the context of hidden defects in goods. The Brazilian legal system, deeply rooted in civil law traditions, historically relies on domestic regulations to govern contractual obligations and liability for defective goods. The adoption of the CISG introduced an additional layer of legal norms applicable to international sales

contracts, requiring Brazilian businesses and legal practitioners to navigate the intersection of national and international rules.

To achieve these objectives, this research analyzes both judicial and arbitral decisions to assess how the CISG is applied in practice. The study will specifically examine cases involving hidden defects in goods, evaluating how courts and arbitral tribunals interpret and enforce contractual obligations, allocate the burden of proof, and determine the remedies available to the parties.

Additionally, a quantitative survey will be conducted to gauge whether, over the past ten years since Brazil became a Contracting State, Brazilian legal professionals have effectively adapted to the CISG's framework. This analysis will provide insights into the extent to which Brazilian jurisprudence has incorporated CISG principles and whether any patterns or inconsistencies have emerged in its application.

2. CONTEXTUAL OVERVIEW OF THE CISG

The complexities arising from differences in national rules on jurisdiction, applicable law, and enforcement create significant obstacles to international trade. Recognizing these challenges, efforts to harmonize commercial law have been a key focus of international legal bodies seeking to facilitate global trade. In this context, the United Nations Commission on International Trade Law (UNCITRAL), established in Vienna, Austria, in 1980 the United Nations Convention on Contracts for the International Sale of Goods (CISG).

Given the apparent failure of earlier attempts to unify international sales law, the ULIS (The Uniform Law for International Sales) and the UFL (Uniform Law on the Formation of Contracts for International Sales), developed by UNIDROIT (International Institute for the Unification of Private Law) in 1964, that didn't go much beyond a small number of European states, UNCITRAL aimed to establish a unified legal regime for cross-border sales, that could eliminate obstacles, reinforce trust between trading partners and build a more stable and efficient international trade system. As noted by Schlechtriem & Schwenger: "The two effects hoped for from the outset of the work in UNCITRAL were a greater degree of uniformity in applying the CISG than had been the case under ULIS and that the number of reservations could be kept to a minimum." (Schwenger, 2016, p.18)

The limited adoption of these earlier instruments reflected the perception that they were too Eurocentric, failing to accommodate the diverse legal and economic realities of other regions. As a result, UNCITRAL took up the task of revising these laws, with the explicit goal of producing a treaty that would be broadly acceptable to both developed and developing nations, as well as to economies with vastly different political structures.

With this objective, the drafting of the CISG began with a working group tasked with revising ULIS and ULF. By the end of this process, UNCITRAL decided to merge both treaties into a single document. A new drafting committee then prepared a draft that was submitted to a Diplomatic Conference in Vienna in 1980, attended by representatives from 62¹ countries with diverse legal, political, and economic

¹ Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cyprus, Czechoslovakia, Denmark, Ecuador, Egypt, Finland, France, German Democratic Republic, Germany, Federal Republic of, Ghana, Greece,

backgrounds. Some commentators characterize the participants by reference to their political cultures. As Alejandro M. Garro (1989, p. 443) notes:

Sixty-two nations were represented at the Vienna Conference. Roughly speaking, twenty-two from the 'Western developed' part of the world, eleven from 'socialist regimes,' and twenty-nine from 'Third World' countries.

It is clear that the CISG was drafted during a period of profound political and economic shifts in global history, profoundly influenced by the Cold War, consequently, the creation of a unified sales law required bridging vastly different legal traditions, including common law, civil law, and the state-controlled legal frameworks characteristic of socialist countries.

This historical context played a crucial role in shaping the provisions of the convention. Notably, the CISG was drafted before the collapse of the Soviet Union, at a time when socialist economies were still major participants in global trade. As a result, negotiations reflected tensions between Western capitalist economies and planned economies, particularly regarding the role of contractual autonomy and the recognition of trade customs. Some socialist states were reluctant to fully embrace principles that allowed for broad contractual freedom, as such concepts were largely incompatible with their centralized economic planning². This complexity shaped the very nature of the CISG, resulting in a treaty that, while formally uniform, contains compromises that make it susceptible to different interpretations.

Gillette and Scott argue that the necessity of compromise led to a legal text that often prioritizes broad principles over specific rules, allowing different legal systems to interpret provisions in ways that aligned with their own traditions. As they put it:

The theory of uniform law that we elaborate predicts that efforts to accommodate these diverse political considerations will cause the law to be drafted at a high level of abstraction, explicitly to authorize numerous exceptions to the law's uniform application, and implicitly to

Hungary, India, Iran, Iraq, Ireland, Israel, Italy, Japan, Kenya, Libyan Arab Jamahiriya, Luxembourg, Mexico, Netherlands, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Singapore, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Yugoslavia and Zaire. Venezuela sent an observer. See 19 I.L.M. 668 (1980).

² The Political Economy of International Sales Law The Political Economy of International Sales Law. (Clayton P. Gillette and Robert E. Scott) Columbia Law School

tolerate significant variation in the interpretation of the (formally) uniform law. (Gillette & Scott, 2005, p.4)

Beyond political factors, the economic climate of the time also played a critical role in the CISG's development. The 1970s witnessed an expansion of international trade, with an increasing number of transactions occurring between parties in different jurisdictions. This growing interdependence of economies highlighted the inefficiencies and uncertainties created by legal fragmentation. Multinational corporations, in particular, sought greater legal predictability, as navigating multiple national contract laws added to transaction costs and contractual risks.

Ultimately, the CISG was the product of a historical moment in which the need for legal harmonization had to be balanced against the political realities of an ideologically divided world. The compromises embedded in the treaty reflect the practical necessity of creating a document that could gain widespread acceptance, even at the cost of substantive uniformity. The CISG, therefore, remains both a landmark achievement in international trade law and a testament to the challenges of crafting uniform legal principles across diverse legal cultures.

The CISG embodies this legal harmonization, providing a common framework that enables businesses to engage in international trade with greater confidence. Its adoption by 97³ countries to date demonstrates a collective acknowledgment of the need for legal certainty in global commerce.

2.1 China's Early Accession to the CISG

China joined the United Nations Convention on Contracts for the International Sale of Goods (CISG) in 1988, formally ratifying the document on December 11, 1986, and the convention took effect on January 1, 1988, making China one of the earliest major economies to adopt it.

³ Albania, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Belarus, Belgium, Benin, Bosnia and Herzegovina, Brazil, Bulgaria, Burundi, Cameroon, Canada, Central African Republic, Chile, China, Colombia, Congo, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Fiji, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Honduras, Hungary, Iceland, Iraq, Ireland, Israel, Italy, Japan, Kuwait, Kyrgyzstan, Laos, Latvia, Lebanon, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, North Macedonia, Madagascar, Malaysia, Malta, Mauritania, Mexico, Moldova, Mongolia, Montenegro, Netherlands, New Zealand, North Korea, Norway, Palestine, Panama, Paraguay, Peru, Poland, Portugal, Romania, Russia, Rwanda, San Marino, Saint Vincent and the Grenadines, Senegal, Serbia, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Syria, Thailand, Turkey, Uganda, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay, Uzbekistan.

China's early accession to the CISG carries a subtle irony: a nation governed by a centralized economic model, where state control over trade was the norm, positioned itself among one of the pioneers to adopt an international framework aimed at fostering legal uniformity and market-driven commercial relations.

For China, this act marked a significant step in its legal and economic integration into global trade. More than just a legal decision, it was also a strategic move that aligned with its Open Door Policy⁴ and demonstrated its commitment to conforming to international trade standards.

Before becoming a CISG member, China operated under a centrally planned economy, where state-owned enterprises dominated trade, and transactions were heavily regulated. At that time, Chinese contract law was rigid and highly formalistic, requiring strict written agreements to validate commercial deals, and given the state's tight control over foreign trade, maintaining contract certainty and predictability was crucial. This approach was further reinforced by the 1985 Foreign Economic Contract Law (FECL), which mandated that international contracts be documented in writing to ensure transparency and government oversight.

However, with the economic reforms brought by its Open Door Policy in the late 1970s and early 1980s, China gradually moved towards a market-oriented system, encouraging increased foreign trade and investment. In this context, the CISG was viewed as an essential tool for harmonizing China's contract law with international commercial standards while also offering foreign businesses greater legal certainty when dealing with Chinese entities (Ramaswamy, 2017, p.80).

By joining the CISG, China signaled its commitment to international legal norms, however, it imposed its own reservations, under Articles 95 and 96⁵, which limited its application within the country's jurisdiction.

Taken together, these limitations reflected China's cautious approach during its transition from a state-controlled trade system to a market-driven economy (Zhen,

⁴ The Open Door Policy was announced in December 1978 by Deng Xiaoping to encourage foreign investment and trade in China. The policy was a major turning point in China's economy and society. (Kobayashi, Jia & Sano, *The "Three Reforms" in China*)

⁵ Article 95 Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention. Article 96 A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with Article 12 that any provision of Article 11, Article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

2016, p.148). Aligned with its domestic legal framework, these reservations reinforced formal requirements and restricted CISG's applicability in specific cases. Their lasting impact on the convention's practical implementation in the country remains significant and will be examined further.

Despite these reservations, China's accession to the CISG had an immediate impact on its trade relations and in the years following its accession, Chinese courts and arbitration institutions—particularly the China International Economic and Trade Arbitration Commission (CIETAC)—began applying the CISG in cases involving international contracts.

In this regard, CIETAC played a crucial role in incorporating the CISG into China's legal system. From the convention's entry into force in 1988 onward, CIETAC arbitrated CISG-related disputes. Notably, between 1988 and 2020, it resolved over 777⁶ cases involving the CISG, significantly contributing to the development of legal precedents regarding its application. However, due to China's reservations, domestic courts often relied on national contract law instead of the CISG, particularly in cases where private international law would have led to its application.

Looking at the broader picture, China's accession to the CISG in 1988 was a milestone in its legal modernization and global trade integration. Over time, China continued adapting its legal system to align with global trade laws, culminating in its withdrawal of the Article 96 reservation in 2013. This decision significantly expanded the CISG's applicability within China's jurisdiction.

As China's role in global trade expanded, its engagement with the CISG contributed to greater legal predictability in international commerce. Although the Article 95 reservation remains in place, ongoing discussions suggest that China may eventually consider removing this restriction to further align with international legal norms (Zhen, 2016). Regardless of future developments, China's accession to the CISG laid a crucial foundation for its emergence as a key player in international trade law.

⁶ Wang, Chengjie. "The Application of the CISG in Chinese Arbitration – Special Report on CISG@40 Celebration Conference." Vice Chairman and Secretary General of CIETAC, 25 June 2021, Beijing.

2.2 Brazil's Late Accession to the CISG

Brazil's incorporation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) resulted from years of advocacy within both the legal and business sectors. Since the Convention's drafting in 1980, Brazilian legal scholars and experts in international trade had debated its potential impact on the country.

For a long time, legal professionals and academics pushed for Brazil's accession, arguing that aligning domestic contract regulations with international norms would be beneficial. The movement gained strength as key trading partners (including China, the United States, and the European Union) had already ratified the Convention. Supporters stressed that Brazil's exclusion from the CISG led to legal uncertainties for importers and exporters, forcing them to navigate multiple legal systems without the predictability the Convention provides.

In favor of this movement, even before Brazil formally became a party to the CISG, its principles were already influencing national jurisprudence. Brazilian courts had cited the Convention as a legal reference, demonstrating its significance even in cases governed by domestic law. Several judicial decisions recognized the CISG's principles as guiding frameworks for international contracts, and arbitral tribunals frequently cited its provisions in disputes involving Brazilian entities.

One particularly notable decision was issued by the Court of Appeals of the State of São Paulo in 2012, prior to Brazil's formal accession to the CISG. The ruling stated:

[...] although Brazil is not a signatory to the said Convention, it may be examined from the perspective of customary law applicable to the Brazilian legal system, provided that its application remains within the limits of the domestic legal framework [...]. (São Paulo, 1043982-53.2014.8.26.0100, 2012) (own translation)

The formal legislative process for Brazil's accession commenced on December 8, 2009, when the Brazilian Chamber of Foreign Affairs (CAMEX) submitted a proposal for review. This initiated a sequence of legal and political procedures, culminating in the proposal being forwarded to the President on March 30, 2010. After advancing through various legislative bodies, including approval by the Chamber of Deputies in May 2011 and the Senate in October 2012, Brazil officially deposited its accession instrument with the United Nations on March 4, 2013. The CISG subsequently entered into force in the country on April 1, 2014. Brazil's accession to the CISG was rightly

celebrated by many jurists, lawyers, and Brazilian entrepreneurs, who had fought for decades for the country to incorporate the treaty. (Grebler & Soares, 2016, p. 469, own translation)

Since its implementation, the CISG has significantly contributed to the facilitation of Brazil's international trade relations. The Convention's impact has been especially notable in trade with China, where Brazil's adherence has streamlined contractual negotiations and dispute resolution processes.

With this milestone achieved, it is evident that continued efforts are necessary to raise awareness among potential Brazilian users of the Convention. Without such initiatives, the extensive work that led to Brazil's accession may not yield its full benefits. One of the key areas of focus should now be the judiciary. (Kulezsa, 2016, p.9, own translation)

Unfortunately, a significant number of judges in Brazil did not have the opportunity to study the CISG during their academic training. However, this scenario is gradually changing, as universities increasingly include the Convention in their curricula, and Brazilian teams actively participate in international competitions such as the Willem C. Vis International Commercial Arbitration Moot⁷. These developments have fostered a greater understanding of the CISG among future legal practitioners.

Nonetheless, as an integral part of the Brazilian legal system, the CISG must be applied by judges in cases where its provisions are relevant. Ensuring its proper implementation in judicial decisions is essential to fully realizing the benefits of Brazil's accession to this international legal framework.

⁷ Fundação Getulio Vargas (FGV Direito Rio). "FGV Direito Rio - PPC Graduação 2018-2022." Available at: https://diretorio.fgv.br/sites/default/files/2021-07/fgv_direito_rio_-_ppc_graduacao_2018-2022_rev00_4_1.pdf. Accessed on March 11, 2025

Fundação Getulio Vargas (FGV Direito Rio). "FGV Direito Rio achieves historic result in the 30th Willem C. Vis International Commercial Arbitration Moot." Available at: <https://diretorio.fgv.br/noticia/equipe-da-fgv-direito-rio-alcanca-resultado-historico-no-30th-willem-c-vis-international>. Accessed on March 11, 2025

Pontifícia Universidade Católica de São Paulo (PUC-SP). "International Arbitration Group participates in global competition." Available at: <https://j.pucsp.br/noticia/grupo-de-arbitragem-internacional-participa-de-competicao-global>. Accessed on March 11, 2025

3. SCOPE OF APPLICATION OF THE CISG

While the CISG'S establishment importance is evident, it is equally crucial to understand which contracts fall under its regulation. According to Jolena Perovic, 2011, p.82:

“The CISG governs the contract of sale of goods (application *ratione materiae*) between the parties whose places of business are in different States (application *ratione personae*) when the states are Contracting States (direct application) or when the rules of private international law lead to the application of the law of a Contracting state (indirect application).”

In this sense, the scope of the CISG's application is shaped by both material and subjective factors, which define its reach and potential expansion or limitation.

It is worth highlighting that the Convention has transcended the traditional definition of a sales contract by adopting a broader perspective, as it expanded its scope to encompass contracts involving additional obligations beyond the mere delivery of goods, such as manufacturing and service provisions, thereby increasing the flexibility of its application and promoting a more comprehensive interpretation (Sáez, 2019, p.8, own translation).

Chapter I of the document, which comprises Articles 1 to 6, establishes the parameters that determine whether a contract falls within its scope. These provisions define its direct or indirect applicability while also emphasizing the crucial role of party autonomy in shaping its application.

Article 1 of the Convention starts the document by establishing the material scope of its application: it applies to international contracts for the sale of goods. In summary, the CISG governs “contracts of sale,” which can be interpreted as reciprocal agreements aimed at the exchange of goods for a price. This interpretation can be derived from Articles 30 and 53⁸ of the Convention, which outline the obligations of the parties.

Another fundamental definition in this context is that of “goods” themselves—what qualifies as *goods* under the Convention. Schlechtriem & Schwenzer suggest that the concept of “goods” should be interpreted in light of the rules on non-conformity of

⁸Article 30 The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.
Article 53 The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

Article 35⁹. This allows for a broad understanding of the term, encompassing all objects that can be the subject of commercial sales contracts, including those that the drafters of the Convention may not have anticipated.

Regarding the territorial criterion, Article 10 requires that the parties' places of business be located in different States at the time of the contract's conclusion. From the States in which the contracting parties are located, an important distinction arises: whether they are Contracting States to the CISG. The Convention establishes two possible scenarios: if both parties are from Contracting States, the CISG applies automatically. However, even if this is not the case, the Convention may still apply under Article 1(1)(b) if the rules of private international law led to the application of the law of a Contracting State. This can occur, for example, if one of the parties is based in a Contracting State or if the parties choose to apply the law of a third State that is a CISG signatory, thereby triggering its application.

If, on the one hand, Article 1(1) defines the scope of application of the Convention, on the other, Article 2 establishes its boundaries by listing the situations in which it does not apply.

This article provides a list of exclusions based on different factors. The first exclusion relates to the purpose of the purchase, as the CISG does not apply to goods acquired for personal use by the final consumer, pursuant to Article 2(a) of the Convention, which excludes “goods bought for personal, family, or household use” from its scope.

This distinction separates consumer purchases from large-scale commercial transactions, which the Convention is designed to regulate—an approach similar to that adopted in Brazilian law through the Consumer Protection Code. In this regard, Article 2 of the Consumer Protection Code defines a consumer as “any natural or legal person who acquires or uses a product or service as the final recipient.”

⁹ Article 35 (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used; (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement; (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model; (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods. (3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Likewise, civil actions would not, at first, be resolved under the CISG—not due to the involvement of natural persons, but rather because of their objective nature.

In this regard, both the CISG and Brazilian law align with the German legal tradition, which distinguishes between commercial contracts and consumer contracts, the latter encompassing civil transactions. As the German scholar Claus-Wilhelm Canaris defines:

Commercial law should be understood as a special branch of private law applicable to merchants, distinguished from general private law by its particularities and specific regulations. (Claus-Wilhelm Canaris, 2011, p.591)

Accordingly, the CISG establishes a subjective criterion for the contracting parties in determining its material scope of application. The parties must qualify as "merchants," as indicated by the requirement that they have "places of business" (Article 1, caput). Additionally, the sale must be conducted with the awareness that the goods are not intended for personal use (Article 2(a)).

The CISG may also be excluded based on the nature of the transaction, the type of goods involved, or by operation of law, particularly if the subject matter of the contract is already the object of pending legal proceedings.

Two other types of contracts are covered by Article 3: those involving the supply of materials to be manufactured and mixed contracts that include both materials and labor. This article determines applicability using two terms that have sparked some legal controversy: "substantial" in contracts for goods to be manufactured; and "preponderant" in complex contracts. This controversy was addressed by the Advisory Council in Opinion No. 4, which systematized and defined interpretative criteria based on jurisprudence and legal doctrine. In summary:

In interpreting the words "preponderant part" under Article 3(2) CISG, primarily an "economic value" criterion should be used. [...] In interpreting the words "substantial part" under Article 3(1) CISG, primarily an "economic value" criterion should be used. (CISG Advisory Council, 2004, p. 80)

In other words, the interpretation of the Convention continues to prioritize and focus on contracts concerning *goods*, even when they are yet to be processed at their destination or combined with labor. The *goods* must remain the primary and principal object of the contract, ensuring that their commercial nature prevails despite any additional work or services involved.

Regarding Article 4, it is important to note that the Convention is limited to the formation and validity of the contract of sale, excluding matters related to validity (sentence 2(a)) and the effects of the contract on property (sentence 2(b)). These issues must be addressed either under domestic law or through other uniform sets of rules in force that govern the subject (Schwenzer, 2016, p.76). Also not covered by the convention is liability for death or personal injury caused 'by the goods' (article 5).

A fundamental pillar of the CISG, Article 6 plays a crucial role in granting parties' autonomy over the applicability of their provisions to their contracts. This principle allows contracting parties to either exclude CISG's application (*opt-out*) or modify its terms to better align with their commercial needs. Similarly, parties may choose to apply the CISG even if it would not automatically govern their transaction (*opt-in*). This flexibility underscores the Convention's objective of fostering international trade through a balanced and adaptable legal framework.

The *opt-in* mechanism is particularly relevant for businesses seeking to standardize contractual terms across multiple jurisdictions, ensuring consistency and predictability in their agreements. On the other hand, the *opt-out* mechanism enables parties to derogate from or entirely exclude the CISG, often in favor of national laws or alternative international instruments. This exclusion can be explicit, through a contractual clause, or implicit, inferred from the choice of a different governing law.

However, as highlighted by Schlechtriem & Schwenzer, a standardized opting-out of the CISG is not necessarily advisable:

"The Convention is a set of rules specifically tailored to the needs of international sales contracts. It is a truly neutral law both with regard to the balance in which the rights and obligations of the parties have been brought as well as the fact that it is equally accessible for both parties and therefore grants no home court advantage." (Schwenzer, 2015, p. 106)

3.1 The Scope of Application in China

China's application of the CISG is characterized by specific conditions and limitations that reflect its cautious approach toward international trade law. Primarily, China applies the CISG only when both parties to an international sales contract have their places of business in Contracting States.

Thus, China limits itself to the automatic application provided by Article 1(1)(a) of the Convention, having exercised the reservation under Article 95¹⁰ to exclude the application of Article 1(1)(b). Consequently, China does not extend the CISG's application to situations where rules of private international law designate the law of a CISG Contracting State as the governing law (Zhen, 2017, p.152). Although there is no official statement clarifying the rationale behind China's reservation, according to Pan Zhen:

"[...] socialist countries at that time had special laws specifically designed to govern international trade. Agreeing to Article 1(1)(b) would deprive these countries of applying its own law specifically designed for foreign-trade when it is otherwise applicable. As a result, Article 95 allows any country to declare, at the time of ratification, not to be bound by Article 1(1)(b)"

Despite these initial limitations, China's engagement with the CISG has progressively evolved towards greater flexibility. Notably, in 2013, China withdrew its earlier reservation that required international sales contracts to be in written form¹¹, thus broadening the applicability of the CISG to transactions regardless of their formal structure. This change marked a significant step in harmonizing Chinese practices with broader international commercial standards, demonstrating China's evolving approach toward integrating with global commercial norms.

Even with these particular reservations, the CISG has played a crucial role in the evolution of international commercial arbitration in China, significantly influencing how disputes are managed and resolved. As highlighted by Wang Chengjie, Vice Chairman and Secretary General of the China International Economic and Trade Arbitration Commission (CIETAC):

"Over the past 30 years, China has changed from a major trading country to a trade power. A large number of disputes related to international trade have benefited from the CISG and have been fairly and reasonably resolved. [...] Commercial arbitration [...] has a natural harmonious connection with the CISG, which also takes party autonomy as its core." (Wang, 2021, p. 2-3.)

¹⁰ Article 95 Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.

¹¹ China Withdraws "Written Form" Declaration Under the United Nations Convention on Contracts for the International Sale of Goods (CISG) United Nations: Information Service Vienna. Available at: <https://unis.unvienna.org/unis/pressrels/2013/unisl180.html>

3.2 The Scope of Application in Brazil

In comparison with China, the absence of any reservation in Brazil's accession to the CISG indicates a broader scope of application of the Convention in the country. In particular, the absence of a reservation concerning Article 1(1)(b) significantly expands the applicability of the CISG in Brazil, allowing courts and arbitration bodies to apply its provisions whenever private international law rules lead to the application of Brazilian law or the laws of any other CISG contracting state.

Interestingly, even before Brazil formally acceded to the CISG, judicial decisions recognized its applicability in international arbitration proceedings. Moreover, in certain cases, Brazilian courts have drawn interpretative parallels with the CISG's provisions, even when resolving disputes based on domestic legal principles, which will be further analyzed in the chapters ahead. These instances illustrate a degree of implicit acceptance of CISG principles within Brazil's judicial landscape, even in the absence of formal adherence at the time.

Despite Brazil's non-restrictive incorporation of the CISG, certain aspects of Brazilian domestic law diverge from principles underlying the Convention. One notable difference is the approach to contractual autonomy. While the CISG strongly emphasizes party autonomy as a guiding principle, Brazilian law has historically maintained a more restrictive stance.

The Law of Introduction to the Norms of Brazilian Law (LINDB)¹² generally adheres to a territorial approach, applying the law of the place where the obligation is constituted. This contrasts with the CISG, which promotes flexibility in the selection of applicable law and provides for the uniform interpretation of international sales contracts.

Despite these divergences, many aspects of Brazilian law are compatible with the CISG, and its principles often align with domestic contract law, facilitating its application. Thus, full integration can only bring advantages to Brazilian importers and exporters. As stated by Muñoz and Moser, Brazil's accession to the CISG:

[...] expanded the possibility of applying uniform international trade rules in contract interpretation [...] integrating Brazil more effectively into international trade by reducing legal uncertainty and consequently lowering costs for parties involved in international sales. (Muñoz & Moser, 2013, p. 81)

¹² Article 9 To qualify and govern obligations, the law of the country in which they are constituted shall apply. (own translation)

4. COMPARISON OF THE CISG AND THE BRAZILIAN CIVIL CODE

Before conducting an in-depth analysis of hidden defects in commercial transactions and in the different legal instruments that underpin this research, it is essential to first establish a clear definition of the concept of hidden defect, in a way to lay the groundwork for a structured comparison of legal instruments and their practical implications.

Firstly, in a broader aspect, the hidden defect is a flaw in goods that is not immediately visible upon delivery but becomes apparent over time. Unlike apparent defects, which can be detected through a reasonable examination at the moment of receipt, hidden defects only reveal themselves after prolonged use or under specific conditions. This characteristic gives rise to deeper legal issues, as it raises questions about when such defects emerge, the applicable time limits for claims, and whether the defect was pre-existing or resulted from the buyer's actions after delivery.

As a result, disputes over hidden defects often present greater legal uncertainties, requiring careful analysis by jurists. Understanding how these cases are treated is essential for resolving commercial disputes effectively.

In Brazil, the renowned civil law scholar Caio Mário defines hidden defects ("*vício redibitório*") as follows:

"Hidden defects or flaws in the received goods arising from a commutative contract or a donation subject to a burden, which render them unfit for their intended use or diminish their value, and which may result in either their rejection or a reduction in price." (Caio Mario, 2009, p.267, own translation)

In this context, the concept of hidden defects under the United Nations Convention on Contracts for the International Sale of Goods (CISG) falls within the broader category of non-conformity of goods, as established in Article 35. According to this provision, the seller must deliver goods that conform to the quality, quantity, and description required by the contract.

The CISG adopts a balanced approach, as analyzed by Dawwas (2012), promoting fairness in international trade while ensuring that both parties' expectations are met. By integrating hidden defects into the broader concept of non-conformity, the CISG prevents sellers from evading liability while also requiring buyers to act diligently in inspecting and reporting any issues in a timely manner.

As previously mentioned, the Brazilian Civil Code and commercial legislation contain provisions that align with fundamental CISG principles, such as the binding nature of contracts, the obligation of good faith, and the recognition of usages and practices established between parties. By first identifying the key differences and similarities between these legal frameworks, it becomes possible to better understand whether judges are incorporating the Convention's provisions into their reasoning or whether domestic legal traditions continue to prevail in contractual disputes.

To build an in-depth analysis and structured comparison, this chapter examines five key aspects of sales contracts that play a crucial role in determining liability and responsibilities in cases involving hidden defects:

1. Seller's obligations
2. Buyer's obligations
3. Notification periods for defects
4. Conformity of goods
5. Fundamental breach of contract
6. Remedies for hidden defects

By analyzing these legal instruments from different perspectives, this study aims to highlight the key aspects that influence the resolution of disputes involving hidden defects and contribute to a broader understanding of their practical implications.

4.1 Seller's Obligations

The first analysis will focus on the obligations of the seller, essential to understanding the role of this part in cases of hidden defects. The CISG defines the seller's obligations in a structured manner, considering the complexities of cross-border transactions. According to Article 30, the seller must deliver the goods, hand over any related documents, and transfer ownership in accordance with the contract and the Convention's provisions.

On the other hand, the Brazilian Civil Code, that primarily regulates domestic transactions, the seller's primary obligation is to physically deliver the goods to the buyer, as ownership does not pass until this act is completed, known as *tradition*. It aligns with a civil law tradition where the act of delivery, rather than mere contractual agreement, is the defining moment of ownership change.

In contrast, the CISG adopts a more functional approach. It does not condition ownership transfer on physical delivery but instead allows for ownership transfer mechanisms that better accommodate international trade, where documentary sales, intermediary transactions, and transport logistics often separate possession from legal ownership. As can be seen in Article 31 of the CISG that provides a detailed classification of the seller's obligations based on the nature of the contract, stepping away from the *tradition* idea used in the Brazilian civil code:

(a) If the contract involves the carriage of goods, the seller fulfills their obligation by handing over the goods to the first carrier for transmission to the buyer.

(b) If the contract pertains to specific goods or goods from a particular stock to be manufactured at a known location, the seller must place the goods at the buyer's disposal at that location.

(c) In all other cases, the seller must place the goods at the buyer's disposal at their place of business.

By explicitly distinguishing between different types of transactions, there's more clarity regarding the seller's responsibilities, facilitating it to adapt to the practicalities of global trade.

The CISG does not regulate property matters, rather, Article 4(b) states that the Convention does not govern the passing of property in the goods sold, leaving such issues to the applicable domestic law. Instead, the CISG focuses on risk allocation, establishing clear rules on when risk shifts from seller to buyer (Articles 66–70), often linked to delivery obligations under INCOTERMS¹³ or specific contractual terms.

From the Civil Code perspective, liability for defects is structured around the seller's awareness of the defect at the time of sale. However, this liability persists even after ownership has been transferred if the goods perish due to a pre-existing hidden defect (Articles 443–444).¹⁴

¹³ INCOTERMS (International Commercial Terms) are standardized trade terms published by the International Chamber of Commerce (ICC), defining responsibilities, risks, and costs between buyers and sellers in international transactions. The latest version, INCOTERMS 2020, includes 11 terms frequently used worldwide.

¹⁴Article 443 If the thing sold had defects or flaws that make it unfit for its intended use or that significantly reduce its value, the buyer may demand the contract's termination or a proportional reduction in price. Article 444 The seller is not liable for apparent defects or flaws that were easily identifiable, except if they expressly assured that the thing was free of such defects. (own translation)

4.2 Buyer's Obligations

One of the key aspects of international sales contracts imposed by the CISG is the obligation of the buyer to examine the goods upon delivery. The Convention explicitly establishes this as a duty of the buyer, setting clear requirements and timeframes for inspection. In contrast, the Brazilian Civil Code does not expressly impose such obligation, limiting itself to delimit the buyer's right to reject defective goods and the timeframe to do so. However, it does not explicitly establish inspection as a duty of the buyer, nor does it grant it the same importance as the CISG. This obligation is essential in international trade, where logistical complexities and extended supply chains can impact on the buyer's ability to verify the quality and compliance of the received goods. CISG Article 38 states that:

- (1) **The buyer must examine the goods**, or cause them to be examined, within as short a period as is practicable in the circumstances.
- (2) **If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.**
- (3) **If the goods are redirected in transit** or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, **examination may be deferred until after the goods have arrived at the new destination.**

This provision imposes an active duty on the buyer to inspect the goods within a reasonable period, taking into account the nature of the contract and the logistical constraints involved in the delivery process. The CISG also accommodates international trade practices by allowing the buyer to defer examination until the goods reach their final destination, which is particularly relevant when goods must go through customs clearance and other administrative procedures before reaching the buyer's premises.

This aspect is particularly beneficial for *trading companies* that import goods for immediate resale, as it ensures that examination can occur at the appropriate point in the distribution chain rather than being constrained to the initial receipt of goods.

Both legal frameworks offer mechanisms for buyers to ensure the quality and conformity of purchased goods. However, the CISG establishes a clearer duty of inspection for the buyer, emphasizing the need for prompt verification. In contrast, the Civil Code focuses more on the consequences of defects rather than the identification

process, aligning it more closely with domestic transactions where immediate inspection may not be as critical.

4.3 Notification Period for Defects

One of the key differences between the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the Brazilian Civil Code lies in the timeframe for notifying defects in goods. Both legal frameworks establish mechanisms for buyers to report non-conformities, but they diverge in terms of flexibility, maximum periods, and consequences for non-compliance. Under Article 39 of the CISG:

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a **reasonable time** after he has discovered it or ought to have discovered it.

The CISG adopts a “*reasonable time*” *criterion* for notifying non-conformities, allowing flexibility depending on the nature of the transaction, the type of goods involved, and other contextual factors. However, this flexibility is limited by an ultimate cut-off period of two years from the delivery date unless a contractual guarantee provides otherwise.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest **within a period of two years** from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

The Brazilian Civil Code, on the other hand, sets stricter and more objective deadlines for defect notification. On article 445, the code stipulates the dead line for notification in thirty days for movable goods and one year for immovables, both counted from the delivery.

Additionally, the code establishes a different time frame for claiming hidden defects. It states that if a defect is not immediately detectable and can only be discovered later, the period for notifying begins from the moment the defect is identified. However, there are maximum time limits: 180 days for movable property and one year for real estate.

The differences in notification periods can have significant practical consequences, particularly in international trade transactions. CISG's flexible approach accommodates the realities of cross-border trade, where factors such as long transportation times, customs clearance, bigger cargos and the need for thorough inspection or distribution can delay defect detection. This extended period allows buyers to adequately assess the goods before forfeiting their rights to claim non-conformities.

The rigid deadlines established by the Brazilian Civil Code create a more uniform system by limiting judicial discretion. However, they may present challenges for Brazilian importers, especially in transactions involving large quantities of goods or technically complex products that require extensive testing. The period imposed may expire before a hidden defect is detected, resulting in a loss of legal recourse.

Another notable distinction is CISG's explicit requirement for detailed notification. Buyers must specify the nature of the defect when notifying the seller, fostering transparency and enabling dispute resolution before litigation arises.

4.4 Conformity of Goods

Establishing clear standards on what constitutes conformity and what qualifies as a defect is essential to ensuring smooth contract performance and minimizing disputes. The CISG and the Brazilian Civil Code approach this issue in distinct ways, while the CISG adopts a broader concept of conformity and clear standards regarding what constitutes conformity, the national law primarily focuses on the identification of hidden defects without necessarily providing objective criteria to determine whether the goods meet the expectations of the buyer.

The CISG establishes the seller's obligation to deliver goods that conform to the contract in terms of quantity, quality, and description, as well as in packaging and preservation. It further specifies that, unless otherwise agreed, goods conform only if they:

- a) Are fit for the purposes for which goods of the same description would ordinarily be used;
- b) Are suitable for any particular purpose expressly or impliedly made known to the seller at the time of contract conclusion, unless the buyer could not reasonably rely on the seller's skill and judgment;
- c) Possess the qualities of goods held out as a sample or model;

d) Are contained or packaged in a manner usual for such goods or, if no standard exists, in a manner that adequately preserves and protects them.

Additionally, the CISG limits the seller's liability for non-conformity if the buyer was aware, or could not have been unaware, of the lack of conformity at the time of contract conclusion.

In contrast, Article 441 of the Brazilian Civil Code stipulates that a thing received under a commutative contract may be rejected if it presents hidden defects that render it unfit for its intended use or significantly reduce its value. The code, therefore, doesn't provide standards for analysis of the goods' conformity with contractual expectations.

The distinction between these legal frameworks has significant implications for international contracts. CISG's broader conformity requirements provide greater legal certainty in cross-border sales, ensuring that goods not only meet contractual specifications but also align with ordinary and specific intended uses communicated by the buyer. This approach is particularly relevant in international trade, where differing quality expectations and industry standards can lead to disputes.

The CISG's approach to non-conforming goods focuses on providing alternatives to avoid contract termination. As noted by Schwenger:

"The CISG acknowledges that in international trade, termination of the contract is often not a commercially viable option due to logistical constraints. Consequently, it prioritizes remedies such as price reduction and repair over contract avoidance, ensuring that goods, even if non-conforming under Article 35(2), can still fulfill their commercial purpose whenever possible." (Schwenger, 2016, p. 580.)

From the perspective of exporters, compliance with the CISG entails a duty to ensure not only formal conformity with contract terms but also suitability for the buyer's market. This requirement mitigates the risk of cargo rejection or legal disputes.

4.5 Fundamental Breach of Contract

The CISG relies on the concept of *fundamental breach of contract* to determine whether a contract may be avoided. This concept is delimited by Article 25, which states:

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

The notion of fundamental breach under the CISG serves as a basis for contract avoidance. Only severe failures that frustrate the essential expectations of the injured party justify contract termination. This approach reflects the drafters' intent to preserve contractual relationships in international trade by ensuring that contract dissolution remains a last resort.

Unlike the CISG, which requires a fundamental breach to justify contract avoidance, Brazilian law, as codified in the Civil Code (CCB), provides broader grounds for contract termination. Article 475 of the CCB states:

The party injured by the default can request the termination of the contract, if it does not prefer to demand compliance with it, in any case, indemnification for losses and damages. (own translation)

This provision grants more discretion to the injured party, and while ensuring contractual flexibility, it may also lead to reduced stability, as parties may be inclined to terminate agreements without exhausting alternative remedies.

Despite the absence of a codified requirement for fundamental breach in Brazilian contract law, the judiciary has recognized the principle of fundamental breach of contract as “*Adimplemento substancial*”. This doctrine prevents contract termination in cases where most obligations have been fulfilled, thereby aligning with the CISG’s objective of preserving contracts whenever possible. The Superior Court of Justice (STJ) has affirmed this principle in landmark cases, such as one presided over by Justice Ruy Rosado de Aguiar, which involved a fiduciary alienation contract. The ruling stated:

The extinction of the contract due to the debtor's default is only justified when the delay causes the creditor such substantial damage that receiving the owed performance is no longer in their interest, as the economic balance of the contract has been affected. If the only outstanding obligation is the last installment of a financing contract with fiduciary alienation, the contract has been substantially performed and should be maintained, with the creditor entitled to seek enforcement of the outstanding debt. (STJ, Recurso Especial n.º 76.362/MT)

The requirement of a fundamental breach in the CISG is also justified by economic considerations. As highlighted by legal scholars such as Schroeter, contract termination in international trade is particularly costly and inefficient due to factors like long-distance transportation and high storage costs. By restricting contract avoidance to cases of fundamental breach, the CISG promotes economic efficiency, ensuring that contractual relationships are maintained whenever possible, thus reducing unnecessary commercial disruptions.

The distinction between the CISG and Brazilian law in terms of breach of contract reflects different legal philosophies. However, the Brazilian judiciary's acknowledgment demonstrates not only an effort to maintain contractual relationships but also an influence from various international instruments that adopt a similar approach, including the CISG.

4.6 Remedies for Hidden Defects

Remedies play a crucial role in ensuring that contracts effectively address non-conformities in delivered goods. The CISG and the Brazilian Civil Code take distinct approaches to remedies for hidden defects. The former prioritizes maintaining contractual performance by offering structured remedies, allowing the seller to cure defects and limiting contract termination to fundamental breaches. In contrast, the latter adopts a more buyer-centric approach, granting broader rights to terminate contracts and seek price reductions without requiring a fundamental breach.

Under the CISG, the buyer may require the seller to perform its obligations, including repairing defective goods or delivering substitutes if the defect constitutes a *fundamental breach*, as established in Article 46(2).

Different from the CISG, the Brazilian Civil Code does not explicitly recognize the right to substitution in commercial contracts. Nevertheless, the Brazilian legal system admits this possibility under the Consumer Protection Code (CDC), which applies exclusively to consumer relations – those involving a supplier and a final consumer, defined as someone who acquires a good for personal use rather than for resale or as an input in a business activity.

Additionally, the CISG gives another important possibility of resolution the extension of time ("Nachfrist"), as established in Article 47. *Nachfrist* is a principle of German origin that allows the buyer to grant the seller an additional period to perform

their obligations before terminating the contract. This mechanism promotes contractual stability by ensuring that minor delays do not automatically justify contract avoidance. As Schwenger explains,

"The Nachfrist mechanism serves as a final opportunity for the debtor to perform and, at the same time, as a means of safeguarding legal certainty by clarifying whether the contract will be performed or avoided" (Schwenger, 2016)

However, If the seller fails to comply within this new timeframe, the buyer may declare the contract avoided, provided the breach is fundamental, and this right is subject to time limitations—if the buyer does not act within a reasonable period, they may lose the right to terminate the contract. Alternatively, instead of avoidance, article 50 permits the buyer to claim for a price reduction proportional to the defect's impact on the goods' value

The Civil Code takes a different stance by prioritizing the buyer's right to reject defective goods. Article 441 establishes that "the thing received by virtue of a commutative contract can be rejected by hidden vices or defects, which make it unfit for its intended use, or decrease its value." If the buyer prefers to retain the goods instead of rejecting them, Article 442 provides the option to seek a reduction in price. This aligns with the CISG's price reduction mechanism but lacks the additional procedural safeguards present in the international convention.

The following table provides a comparison between the remedies available under the CISG and the Brazilian Civil Code:

Remedy	CISG	Brazilian Civil Code (CCB)	Analyses
Replacement of Goods	Art. 46(2): Buyer may require replacement for fundamental breach.	No explicit provision for commercial contracts. CDC provides this right for consumers.	Different (not covered by the BCC)
Cure by Seller (right to correct defects after delivery)	Art. 48: Seller can cure defects post-delivery if it doesn't cause unreasonable inconvenience.	No explicit provision; negotiation or judicial remedy possible.	Different (not covered by the BCC)
Fixing Additional Period for Performance	Art. 47: Buyer may grant additional time before seeking termination.	No explicit provision for buyer-imposed additional time.	Different (not covered by the BCC)
Loss of Right to Avoid for Delay	Art. 49(2): Buyer loses right to terminate if delayed delivery is accepted without timely objection.	No explicit provision regarding loss of right after acceptance.	Different (not covered by the BCC)
Criterion for Contract Termination	Avoidance allowed only for fundamental breach (Art. 49).	Any breach may lead to termination; fundamental breach not required (Art. 475).	Both offer the possibility of termination, however with different criteria
Price Reduction	Art. 50: Buyer may reduce the price proportionally.	Art. 442: Buyer may demand proportional price adjustment.	Similar
Damages	Art. 74: Allows compensation for foreseeable losses.	Art. 475 et seq.: Allows compensation for contractual breach.	Similar
Specific Performance	Art. 46(1): Buyer can demand performance from the seller.	Art. 475: Creditor can demand either performance or termination.	Similar

Source: Made by the author

The table above highlights both similarities and key differences, assisting in understanding how each legal framework addresses specific contractual remedies, while some remedies are regulated similarly in both frameworks, others, like the right to replacement, cure by the seller, and the loss of the right to avoid for delay, are not explicitly covered by the national law.

5 CASE LAW ON CHINESE TRADE

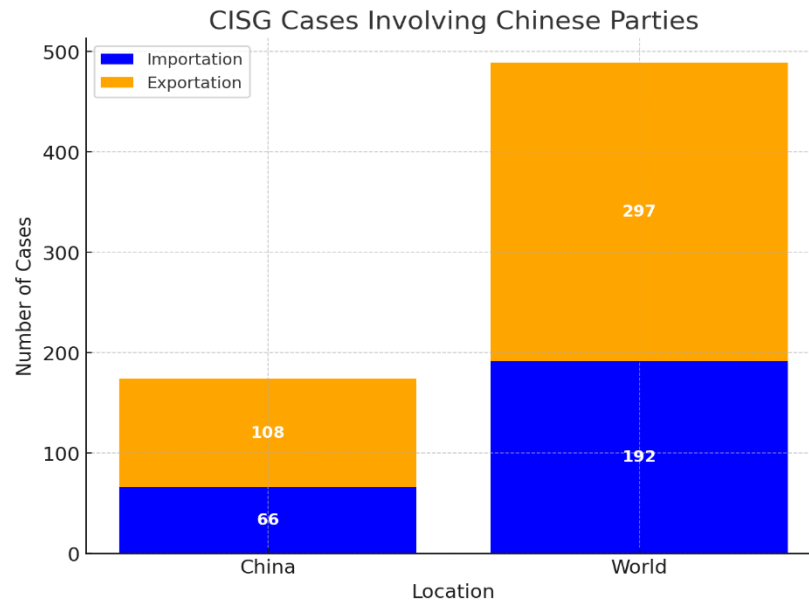
It is important to highlight that analyzing case law on the CISG in Chinese trade presents a unique challenge, mainly due to the linguistic barrier. Unlike jurisdictions where legal materials are widely available in English, Chinese court rulings and arbitral awards are often only available in Chinese characters (Hanzi). As a result, direct access to primary sources is more restricted, making the study of Chinese decisions more complex. Consequently, the scope of the analysis for this study is necessarily narrower for China compared to Brazil.

In order to identify and examine relevant cases involving China, two research platforms were used: *CISG Online*¹⁵ and the UNCITRAL Database. Based on the cases retrieved, this analysis focuses not only on decisions rendered by Chinese courts and arbitration panels but also on cases from other jurisdictions involving Chinese buyers or sellers.

As previously discussed, China made specific reservations upon adopting the CISG, particularly regarding Article 1(1)(b) and the requirement for written contracts, the second one being later revoked. These reservations have deeply impacted how China applies the Convention in cases involving Chinese international traders across the world. To better understand the practical effects of these limitations, this section examines landmark cases decided by both Chinese and international tribunals, illustrating how the CISG is applied in commercial disputes involving Chinese parties.

The following data, sourced from CISG Online, offers a quantitative perspective on the practical application of the CISG in China since its ratification in 1986. Over nearly four decades, Chinese courts (state and arbitral) have rendered 208 decisions applying the Convention, whereas globally, 503 cases have involved at least one Chinese party, totaling 711 cases founded applying the CISG for a Chinese trade, as it can be seen in the following graphic:

¹⁵ CISG-online is a research platform dedicated to the CISG and international commercial law, providing access to 7,210 decisions, including 6,248 court rulings from 73 jurisdictions and 962 arbitral awards. Maintained by Prof. Dr. Ulrich G. Schroeter and his team at the University of Basel, it is a pro bono project and an institutional CLOUT partner.



Source: Made by the author

These figures underscore the pivotal role of China within the CISG framework and its far-reaching influence on international commercial disputes. In this scenario, examining specific judicial decisions becomes essential to grasp how these legal dynamics unfold in practice.

One such case that vividly illustrates the impact of China's reservations and their implications in cross-border trade is *Zhuguang Oil Company v. Wuxi Zhongrui Group Corporation*.

This case serves as an excellent example as it precisely aligns with the core theme of this study, particularly in the context of defective products in international trade between Brazil and China. Adjudicated in Jiangsu Province, China, in 2002, *Zhuguang Oil Company v. Wuxi Zhongrui Group Corporation* stands as a significant precedent in interpreting China's application of the CISG.

The dispute arose when the Brazilian buyer sought compensation for severe quality defects in acrylic acid bulk yarn purchased from a Chinese seller. The contract was negotiated through a Korean intermediary, and the goods were shipped to Santos, Brazil. While the letter of credit provided written terms, key contractual provisions, including quality standards and liability clauses, were not explicitly documented.

When the defective nature of the goods became evident, the buyer pursued compensation, but the seller denied any liability for quality issues. In resolving the dispute, the Brazilian buyer invoked the CISG as the governing law; however, the Chinese court ruled that the CISG was inapplicable due to China's reservation under Article 1(1)(b), since Brazil was not a CISG contracting state at the time.

As a result, the court applied Chinese law and ultimately, the was ruled in favor of the Chinese seller, rejecting the Brazilian buyer's claim for compensation. The absence of explicit contractual provisions regarding quality standards, combined with the application of Chinese law instead of the CISG, significantly limited the buyer's ability to hold the seller accountable for the defective goods.

It is evident here that even before Brazil's accession to the CISG, Brazilian importers already recognized its value and frequently sought its application in international contracts, given its capacity to provide clearer and more predictable outcomes in cross-border disputes.

This case underscores not only the impact of China's CISG reservations on cross-border disputes but also highlights how Brazil's non-accession to the CISG at the time placed its importers in a disadvantageous position. Without the uniform framework of the CISG, the Brazilian buyer was forced to litigate under foreign domestic law, which ultimately resulted in an unfavorable outcome.

Similarly, in *Dong Feng Trade Co. Ltd. v. Hangzhou Dongli Rubber & Plastomer Co. Ltd.*, heard in Shanghai on 2002, the Chinese court declined to apply the CISG because, although the buyer was from China (a CISG contracting state), the seller's country, South Korea, was not a signatory to the convention.

Since Shanghai was the port of destination and the place of contract performance, the court concluded that Chinese law governed the dispute. This case reaffirms the China's reservation to apply the Article 1(1)(b) of the CISG, while favoring the application of domestic law through the closest connection principle.

Chinese arbitration panels have also used this approach. In the Medical Equipment Case, this case was arbitrated by the China International Economic and Trade Arbitration Commission (CIETAC) in 2004. A Japanese seller initiated arbitration against a Chinese buyer over a payment dispute. Since the contract did not specify the governing law, the arbitration tribunal had to determine it. The tribunal ruled out the CISG because Japan was not a CISG contracting state at the time. Instead, Chinese law was deemed applicable, based on multiple factors, including the contract's conclusion and performance occurring in China, the arbitration taking place in China, and the parties referencing Chinese law in their submissions (CIETAC, 2004). This ruling demonstrates the consistent stance of Chinese arbitration panels in aligning with the judicial approach to CISG application.

Overall, while China maintains its reservation under Article 1(1)(b), limiting the CISG's applicability, its legal framework has evolved, as evidenced by the recognition of oral contracts since 1999 and the eventual withdrawal of the written-form requirement. These developments suggest a gradual shift in China's legal landscape toward a broader acceptance of the CISG, influenced by domestic contract law reforms.

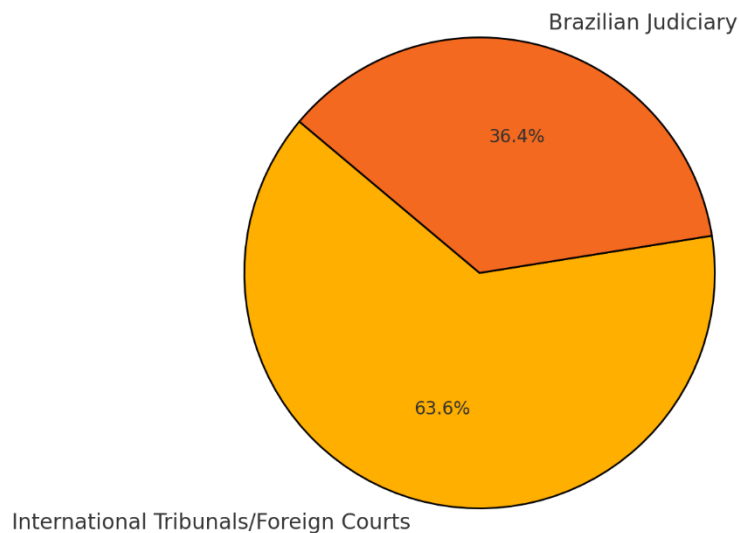
6 CASE LAW ON BRAZILIAN TRADE

The practical application of the CISG in Brazilian imports and exports requires an initial consideration of Brazil's delayed adoption compared to China and other contracting states. While many countries had long incorporated the CISG into their commercial practices, Brazil only ratified the convention in 2014. This delay placed Brazilian importers at a disadvantage, as they had to navigate an international framework where their counterparts were already well-versed in CISG provisions, while Brazil was still adapting.

This situation intensified legal uncertainty especially in trade with China. Due to China's reservations under Article 1(1)(b) of the CISG, contracts between Brazilian and Chinese parties were not automatically governed by the convention before Brazil's accession unless explicitly chosen by the contracting parties. This lack of automatic applicability created additional hurdles for Brazilian businesses, which, unlike many of their international counterparts, had no prior experience with the CISG and struggled to incorporate it into their contractual practices. As a result, transactions between Brazil and China were marked by legal unpredictability, more complex negotiations, and an increased risk of disputes.

Despite its late accession, Brazil has always played an active role in international trade, raising the question of how its courts and traders engaged with the CISG before it became binding. Interestingly, even before official ratification, Brazilian jurists had referenced the convention in legal cases, and courts drew upon its principles in judicial decisions.

To identify relevant decisions, three main platforms were utilized: CISG Online, UNCITRAL, and *JusBrasil*. The research encompassed rulings from all Brazilian national courts, as well as cases involving Brazilian parties abroad and in arbitral tribunals. The keywords "CISG" and "*United Nations Convention on Contracts for the International Sale of Goods*." were used as search parameters to ensure a comprehensive collection of relevant case law. This research identified and analyzed cases 22 cases involving Brazil in which the CISG was applied as binding law. Of these, 14 decisions were from international arbitral tribunals or foreign courts, while 8 were from the Brazilian judiciary, as follows:



Source: Made by the author

The following sections will analyze the identified case law through selected landmark cases, illustrating Brazil's interaction with the CISG. Additionally, multiple decisions from the Brazilian judiciary that used this convention as inspiration will be examined to assess how this instrument has influenced the Brazilian judicial system.

6.1 Arbitral Tribunals and Foreign Courts

This chapter examines how arbitral tribunals, and international courts have addressed the complexities arising from the interaction between Brazil's delayed ratification of the CISG and its impact on cross-border dispute resolution. Despite Brazil's accession to the Convention, legal uncertainties persist in international commercial disputes involving Brazilian and Chinese parties, particularly when contracts were formed before Brazil became a contracting state.

One of the earliest cases illustrating this issue is the 2002 case *Zhuguang Oil Company v. Wuxi Zhongrui Group Corporation*, analyzed in the chapter about China, which demonstrated how China's reservations effectively excluded the CISG from governing contracts with Brazilian parties before Brazil's accession. However, the analysis of decisions made even after Brazil's ratification of the Convention shows that the effects of this delay persist.

In the 2019 arbitral decision in *XCMG v. Êxito Importadora*, which arose from a dispute over hidden defects in construction equipment, affecting its functionality and causing financial losses to the Brazilian company. The seller, in turn, contested these

claims, asserting the quality of its products and questioning the validity of Êxito's complaints.

The tribunal ultimately focused on the applicability of the CISG and ruled that it did not govern the dispute because Brazil was not a contracting state when the contract was signed. As the ruling stated:

"Since Brazil was not a contracting state at the time of the contract's conclusion, the CISG does not govern the present dispute, in accordance with the principle of non-retroactivity and the reservation made by China under Article 1(1)(b)." (CAM-CCBC Case No. 95/2014/SEC3)

This case exemplifies how the trade relation between Brazil and China, its main trading partner, is deeply shaped by two defining contrasts in their adoption of the CISG: late ratification by the former and reservations by the latter. These differences continue to echo in their commercial exchanges, influencing the convention's reach and the resolution of disputes between Brazilian and Chinese companies.

On the other hand, as mentioned earlier, the survey identified 14 cases from arbitral tribunals and international courts that did apply the CISG as the governing law in disputes involving Brazilian companies. These cases are detailed in the table below:

APPLIED AS BIDDING LAW									
Year	Country of the Court	Type	Claimant	Country	Role	Respondent	Country	Role	Article Applied
1999	Germany	State	N/A	Brazil	Seller	N/A	Germany	Buyer	Article 25 Article 35(1) Article 39 Article 45 Article 49(1) & 49(2) Article 74 Article 76 Article 81(1) Article 88(3)
2000	Switzerland	State	N/A	Brazil	Buyer	N/A	Switzerland	Seller	Article 1(1)(b) Article 31 Article 32(2) Article 66
2003	Switzerland	Arbitration	ATECS Mannesmann	Germany	Seller	Rodrimar S/A Transportes Equipamentos Industriais e Armazéns Gerais	Brazil	Buyer	Art. 1(1)(b)
2003	Germany	State	N/A	Germany	Seller	N/A	Brazil	Buyer	Art. 1(1)(b) Art. 29(1) Art. 31 Art. 53 Art. 54 Art. 57(1)(a)
2009	Argentina	State	Texinter S.A.	Argentina	Seller	VARIG S.A.	Brazil	Buyer	Article 31(a)
2007	Sweden	Arbitration	N/A	China	Buyer	N/A	Brazil	Seller	Article 25 Article 35 Article 49(1) Article 74
2010	USA	Arbitration	Triângulo Pisos e Painéis Ltda.	Brazil	Seller	BR-111 Imports & Exports, Inc.	USA	Buyer	Article 7(2) Article 9(1) Article 35 Article 71(1)
2011	France	Arbitration	Various	Brazil	Seller	Steel Base Trade AG	Switzerland	Buyer	Article 75 Article 76 Article 78
2013	Switzerland	Arbitration	Asia Steel & Metals Limited	China	Buyer	Mineração Vila Nova Ltda.	Brazil	Seller	Article 35 Article 49 Article 74 Article 77 Article 78
2016	Uruguay	Arbitration	YPF S.A.	Argentina	Seller	AES Uruguiana Empreendimentos S.A. (AESU)	Brazil	Buyer	Article 25 Article 30 Article 35 Article 45
2016	USA	State	W.W. Sports Importadora Exportadora e Comercial Ltda	Brazil	Buyer	BPI Sports, LLC	USA	Seller	Article 1 Article 4 Article 35 Article 45
2016	USA	State	GPS Granite Ltda.	Brazil	Seller	Ultimate Granite, Inc.	USA	Buyer	Article 1 Article 4 Article 9 Article 11 Article 23
2019	Luxembourg	Arbitration	N/A	Luxembourg	Seller	N/A	Brazil	Buyer	Article 25 Article 53 Article 54 Article 64(1)(a)
2020	New Zealand	State	P Mundy Heavy Equipment Ltd; U&M Mineração e Construção S/A	Brazil and New Zealand	Seller	National Plant and Equipment Pty Ltd	Australia	Buyer	Article 53 Article 63(1) Article 64(1)(b) Article 81A1:L16

Source: Made by the author

In this context, a particularly illustrative example that aligns well with the focus of our study is the 2007 case of a Brazil-China dispute before the Arbitration Institute of the Stockholm Chamber of Commerce (sixth case in the table above), known as “*Pressure sensors case*”, which raises significant issues regarding the application of the CISG in international contracts involving Brazilian companies, particularly concerning hidden defects and contract termination.

The buyer claimed that the pressure sensors supplied by the seller had hidden defects, failing to meet the agreed technical specifications under certain temperature ranges. Based on these allegations, the buyer rejected the goods, demanded a refund, and sought contract termination under CISG Article 49, arguing a fundamental breach. The seller, in turn, denied liability, asserting that the sensors met the required specifications.

The arbitrator applied the CISG and ruled in favor of the Brazilian seller, finding that the buyer failed to substantiate its claims regarding hidden defects. The tribunal emphasized that test results presented by the buyer were unreliable, either due to damaged samples or inconsistencies in testing methods. Consequently, the arbitrator held that no fundamental breach occurred under CISG Articles 25 and 35, and the buyer's attempt to terminate the contract under Article 49 was unjustified.

This case underscores the critical role of evidentiary standards in proving hidden defects under the CISG and highlights the convention's approach to contract termination. It reinforces that minor deviations in product quality do not automatically justify avoidance, aligning with the CISG's conformity requirements (Article 35). Additionally, the convention explicitly mandates detailed notification by buyers (Article 39), requiring them to specify the nature of the defect when informing the seller.

6.2 Brazilian Courts

The research conducted on Brazilian court decisions reveals a striking pattern regarding the invocation of the United Nations Convention on Contracts for the International Sale of Goods (CISG). An overwhelming majority of the cases merely cited the CISG in an interpretative or inspirational capacity rather than applying it as the operative law. Specifically, a total of 1,018 decisions referenced the CISG to support interpretations or to draw parallels with other judicial decisions. These citations were used to reinforce a broader legal narrative or as a tool for interpretative guidance, rather than serving as the basis for the court's final ruling.

Accordingly, this section will examine both the decisions that have applied the CISG as they should—namely, as a legally binding norm—and those that have merely referenced it in an interpretative capacity. By doing so, this analysis seeks to assess the ways in which the Convention has influenced Brazilian law and the extent of its impact on judicial reasoning.

6.2.1 CISG applied for Legal Interpretation

Interestingly, even before official ratification, Brazilian jurists had referenced the convention in legal cases, and courts drew upon its principles in judicial decisions, as seen in the 2003 arbitral decision *in ATECS Mannesmann GmbH v. Rodrimar S/A*, later confirmed by the Superior Court of Justice (STJ) in 2009.

In the notable case of *ATECS Mannesmann GmbH v. Rodrimar S/A Transportes Equipamentos Industriais e Armazéns Gerais*, a dispute arose between a German seller and a Brazilian buyer regarding the enforcement of a foreign arbitration sentence issued in Switzerland. The arbitration tribunal awarded damages for the German seller for the buyer's alleged breach of contract related to the purchase of a mobile port crane. Later, in 2009, the Brazilian buyer challenged the recognition of this arbitral sentence before Brazil's Superior Court of Justice (STJ), arguing that the arbitration panel had exceeded its mandate by applying the CISG through Swiss private international law rules, despite the parties explicitly selecting Swiss substantive law in the contract.

Additionally, the buyer contended that the application of the CISG violated Articles 49(I) and 84(VIII) of the Brazilian Constitution, as Brazil had not yet ratified the convention at the time. The Court clarified that its jurisdiction was limited to verifying formal requirements for recognition, not reviewing the merits of the arbitration award itself. Importantly, the Court noted that by choosing Swiss substantive law, the parties indirectly agreed to the application of the CISG, as Switzerland is a contracting state, it falls under the hypothesis of Article 1(1)(b).

Consequently, the Court held that applying the CISG as part of Swiss substantive law neither violated Brazilian public policy nor contradicted the agreed arbitration clause.

Thus, through this ruling that recognizes the decision applying the CISG as valid, the main body of Brazilian judiciary system acknowledged that the CISG should be applied for transaction with Brazilian parties even before the ratification.

Additionally, this phenomenon of Brazilian courts utilizing the CISG before the country's official adoption, also occurred in purely domestic disputes as a comparative interpretative tool, even concerning hidden defects.

In a 2009 decision by the Court of Appeals of the State of Rio Grande do Sul, a dispute arose between two Brazilian entities, PRAKASA Indústria e Comércio de Utilidades do Lar Ltda. (the buyer) and Mercomáquinas Indústria Comércio e

Representações Ltda. (the seller), concerning damages resulting from a hidden defect in an electro-erosion machine. The buyer purchased the used machine in December 2005, but shortly after delivery, it was rendered inoperable due to mechanical failures. Initially believed to be an electrical issue, the defect was later diagnosed as a hydraulic failure, revealing that the machine had been delivered in an *unfit condition for use*. As the defect was not apparent at the time of purchase and only became evident upon attempted operation, the buyer sought compensation for repair expenses and lost profits.

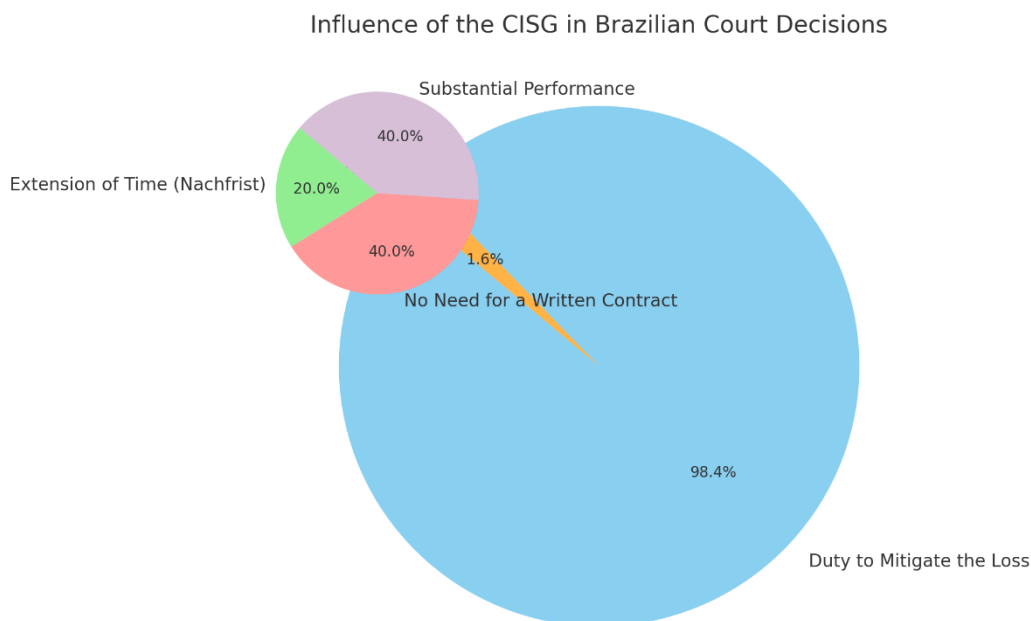
On appeal, Judge Umberto Guaspari Sudbrack—a jurist who has issued several decisions and has been a prominent advocate for the application of the CISG in Brazil, as analyzed in this work—recognized the seller’s liability for the defect and partially granted the claim. He ordered reimbursement for direct expenses, reinforced the duty to mitigate losses, and cited Article 77 of the CISG in support of his decision.

"[...] Article 77 of the 1980 Vienna Convention on the International Sale of Goods establishes that the party invoking the setback resulting from a commercial misfortune must take reasonable measures, considering the contingencies of the specific case, to mitigate the loss, including the damage arising from the misfortune. The reading of this provision leaves no doubt about the burden placed on the party that suffered the harm: to act reasonably within the surrounding circumstances to mitigate the loss. In other words, the claimant is required to prove that they have taken all appropriate measures to prevent the damage suffered." (Own translation)

These cases demonstrate that Brazilian courts frequently referenced and adopted CISG principles, reinforcing the Convention's importance as a source of interpretation in Brazil prior to its official accession. This created an initial expectation that its entry into force would significantly impact Brazilian jurisprudence. However, in practice, the scenario has not changed substantially.

The analysis of the 1.018 decisions that merely referenced the CISG as an interpretative source revealed that the Convention has primarily influenced Brazilian jurisprudence in four key areas: *Duty to Mitigate the Loss*, *the need for a written contract*, *extension of time (Nachfrist)*, and “*substantial performance*”.

This distribution of influence can be seen in the following chart:



Source: Made by the author

Notably, the vast majority of cases relied on the CISG to support interpretations related to the *Duty to Mitigate the Loss*, demonstrating its predominant role in shaping judicial reasoning.

The *Duty to Mitigate the Loss* is a fundamental principle in international contract law, ensuring that an injured party takes reasonable measures to reduce the damage resulting from a breach. Article 77 of the CISG establishes that if the aggrieved party fails to mitigate the loss, the breaching party may request a reduction in damages. Flávio Tartuce highlights its importance, stating that

"the provision is inspired by Article 77 of the 1980 Vienna Convention on the International Sale of Goods (CISG), stating that 'the party relying on a breach of contract must take reasonable measures, in consideration of the circumstances, to mitigate the loss, including the loss of profit caused by the breach.'" (various decisions, own translation)

Similarly, Véra Maria Jacob de Fradera discusses the legal nature of this duty, explaining that:

"with regard to the obligation of the creditor to mitigate their own loss, we have seen that its legal nature is difficult to define, as it may be

considered either a duty (where there is a positive rule, as in the CISG), an obligation of lesser significance, as the Swiss doctrine suggests, or even a minor obligation, in accordance with German doctrine." (various decisions, own translation)

During this research study, numerous cases were found in which judges explicitly cited these specific passages to use the CISG as a basis for applying the duty to mitigate the loss.

Similarly, the extension of time ("Nachfrist"), as established in Article 47 of the CISG already analyzed, was another concept identified in Brazilian court rulings where the Convention was used as an influence. The identification of *Nachfrist* in judicial rulings where the CISG was referenced demonstrates that Brazilian courts are gradually incorporating international doctrines into contract law interpretation.

Another principle that emerged in the judicial decisions analyzed was the lack of formal requirements for contract formation, as provided in Article 11 of the CISG. This article establishes that a contract for the sale of goods does not need to be in writing and may be proven by any means, including the conduct of the parties. In Brazilian case law, some decisions invoked this principle when determining the validity of agreements, particularly in cases where one party contested the existence of a contract due to the absence of a written document.

While Brazilian contract law traditionally imposes formal requirements in certain situations, the review of court rulings showed that judges relied on the CISG to justify the acceptance of unwritten agreements in some cases.

Finally, the principle of substantial performance, also already analyzed in this document, was another concept identified in Brazilian court decisions in a way to prevent the creditor from terminating the contract if the breach does not deprive them of its essential benefits.

6.2.2 CISG applied as Biding Law

While the CISG has been referenced in over a thousand cases before Brazilian courts, it has most often been used as a source of inspiration rather than as the governing law of the dispute. In contrast, there are only eight cases found where the CISG was directly applied as the governing law, demonstrating a missed opportunity for greater legal consistency in cross-border commercial transactions.

The table below presents an overview of these eight cases, providing key details on how the CISG was interpreted and enforced:

CASES IN BRAZILIAN TRIBUNALS THAT APPLIED THE CISG AS BIDDING LAW								
Year	Tribunal	Claimant	Country	Role	Respondent	Country	Role	Articles Applied
2017	TJRS	Noridane Foods S.A.	Denmark	Buyer	Anexo Comercial Importação e Distribuição Ltda.	Brazil	Seller	Art. 47(1) Art. 49(1)(b) Art. 81(2) Art. 30 Art. 53 Art. 7(1)
2017	TJRS	IMETAL I.C.A.	Venezuela	Buyer	Voges Metalurgia Ltda.	Brazil	Seller	Article 7(1)
2017	TJSP	Jiangsu Sinorgchem Technology Co. Ltd	China	Seller	Proquitech Indústria de Produtos Químicos e Representação Comercial S.A.	Brazil	Buyer	Article 79
2017	TJSP	Angliss Singapore Pte Ltd	Singapore	Buyer	Intermeat Assessoria e Comércio Ltda	Brazil	Seller	Article 79
2019	TJSC	Lindner Aktiengesellschaft Decken-Boden Trennwandsysteme	Germany	Seller	Orientador Alfandegário Comercial Importadora e Exportadora Ltda.	Brazil	Buyer	Article 11 Article 30 Article 53
2021	TJSP	SOCIETÀ AGRICOLA BEOLETTO AURELIO & MARIO S.S.	Italy	Seller	AGROPEL AGROINDUSTRIAL PERAZZOLI LTDA.	Brazil	Buyer	Article 11 Article 18(3)
2024	TJSP	MCG International Pty Ltd.	Australia	Buyer	Minerva S.A.	Brazil	Seller	Article 35 Article 36 Article 38 & 39
2024	TJSC	Texvista International PTE Ltd.	Singapore	Seller	4A Importadora e Exportadora EIRELI	Brazil	Seller	Article 8 Article 25 Article 81

Source: Made by the author

Notably, the first case in which the CISG was applied as the governing law in Brazil dates back to 2017, a decision rendered by the Court of Appeals of the State of Rio Grande do Sul, with Judge Umberto Guaspari Sudbrack serving as the reporting judge. This case, known as *The Chicken Feet Case*, is particularly significant as it marked Brazil's first application of the CISG, emphasizing its role in addressing hidden defects in international sales contracts.

The Chicken Feet Case involved a dispute between Noridane Foods S.A. and Anexo Comercial Importação e Distribuição Ltda. regarding the sale of 135 tons of frozen chicken feet (Grade A) and 27 tons (Grade B). The buyer made a partial payment but faced continuous delays in delivery, leading to a claim for damages, contract termination, and reimbursement. The seller defended itself by citing bureaucratic delays and the involvement of an intermediary, asserting that the goods were available for collection at the port in Hong Kong. However, the court ruled in favor

of the buyer, determining that the seller's failure to deliver justified contract termination under CISG provisions. The ruling explicitly stated that:

"The international sale of goods contract is declared rescinded by virtue of the joint application of the provisions of Article 47(1), Article 49(1)(b), and Article 81(2) of the United Nations Convention on Contracts for the International Sale of Goods ('1980 Vienna Convention'), whose legal framework is simultaneously complemented by the UNIDROIT Principles on International Commercial Contracts." (own translation)

Although not one of the main parties in the transaction, China also played a role in this case, as the goods in question were sourced from Chinese suppliers and were intended for export to Brazil. The seller claimed that the delay in delivery was due to bureaucratic and logistical issues in China, where the intermediary, Vilson Gobbato ME, was responsible for procuring the frozen chicken feet. Additionally, the port of Hong Kong was designated as the location where the goods were allegedly made available for collection, but the buyer refused to retrieve them, citing non-conformity. The case highlights the challenges in cross-border trade between Brazil and China, particularly regarding quality control, supply chain accountability, and contract performance. The application of the CISG was instrumental in resolving the dispute, as it provided a uniform legal framework to assess the seller's obligations and the buyer's rights in an international sales contract.

A critical aspect of this case was the presence of *hidden defects*, as the buyer argued that the goods, when eventually located, did not conform to the agreed specifications. The court relied on CISG provisions, particularly Article 49(1)(b), to affirm the buyer's right to terminate the contract due to the seller's failure to meet contractual obligations. The ruling reinforced the importance of the CISG in ensuring good faith in international trade, highlighting its applicability in cases involving non-conforming goods and latent defects.

For a more recent reference regarding the duties of inspection and notification under the CISG, the decision of the São Paulo Court of Justice, rendered by Judge Fernanda Cristina da Silva Ferraz Lima Cabral, provides clear guidance. Specifically, this decision concerns the case between *MCG International Pty Ltd.*, an Australian intermediary company, and *Minerva S.A.*, a Brazilian exporter, involving significant financial losses due to quality defects (excessive fat content) in frozen beef exported to the Egyptian Army.

In her analysis, Judge Fernanda explicitly applied the CISG, highlighting Articles 38 and 39 related to the buyer's obligations. The Court explicitly recognized that MCG had properly fulfilled its duty to inspect the goods promptly upon their arrival at the destination. Additionally, it concluded that MCG had adequately notified Minerva about the nature of the defects within a reasonable time frame, complying fully with the procedural requirements established by the CISG. As it is stated by the judge:

"The claimant notified the respondent (emails on pages 61 to 67 and extrajudicial notifications on pages 76 to 99 and 114 to 122), thereby complying with the requirements set forth in Articles 38 and 39 of the CISG. The respondent's objection regarding the absence of specific container numbers in the notification is not sustainable, as Article 39 of the CISG only requires the buyer to communicate the nature of the non-conformity (excessive fat content in the meat), which the claimant duly fulfilled." (own translation)

Consequently, given these factors, Minerva was found liable under Articles 35 and 36 of the CISG for supplying goods non-compliant with contractual specifications. The decision underscores the critical importance of the buyer's procedural duties to inspect promptly and communicate any defects clearly to preserve their legal rights under international trade agreements.

Minerva was ordered to compensate MCG International for the damage incurred, amounting to USD 656,397.17. This judgment reinforces the significance of adherence to CISG standards regarding inspection and notification, emphasizing their role in protecting parties involved in international sales transactions.

7. CONCLUSION

This study aimed to examine the application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) in trade relations between Brazil and China, with a particular focus on the practical implications of its adoption in both jurisdictions. Given China's early accession to the CISG and Brazil's more recent ratification, the research analyzed how the Convention has been applied in practice and whether it has fulfilled its intended role of harmonizing international sales law. The findings highlight both the benefits, and the challenges associated with the CISG's implementation, especially concerning legal certainty and transaction costs in cross-border trade.

The part of this paper that explores the scope of the CISG's application in China, has led to notable findings. Although China was among the early adopters of the CISG, certain restrictions on its applicability have become evident. Consequently, the examination of judicial decisions has highlighted the practical effects of these limitations on trade relations between China and Brazil.

More specifically, China's reservation to Article 1(1)(b) required Brazil to accede to the CISG in order for the convention to be applicable under Article 1(1)(a) when dealing with Chinese counterparts. On the other hand, Brazil's approach to applying the CISG appears to be more flexible than China's at the time of its accession, given the lack of reservations.

Thus, based on the analyses conducted within the scope of application, compared with the assessment of its actual implementation, it is possible to conclude that the CISG offers two key benefits for trade between Brazil and China, namely mitigating legal uncertainties and lowering transaction costs. These aspects are particularly relevant in resolving disputes related to hidden defects in cross-border sales contracts.

Before Brazil's accession to the CISG, determining the applicable law for sales contracts between businesses in the two countries was challenging. Indeed, the convention was rarely applicable, leading to considerable uncertainty regarding the governing law for Brazilian-Chinese transactions before 2014. However, Brazil's accession simplified this issue by establishing the CISG as the default legal framework for contracts between businesses in both nations, providing more legal certainty.

Additionally, by providing this standardized framework for various aspects of sales contracts, the CISG also helps reduce transaction costs. Given the differences between domestic laws, contracting parties face additional expenses, such as those associated with understanding foreign legal systems (document translations, legal consultancy during negotiations, and litigation under unfamiliar jurisdictions). Nevertheless, the CISG mitigates these challenges by harmonizing critical aspects of sales contracts, including contract formation, buyer and seller obligations, and available remedies, all under a unified set of rules accessible in multiple languages. Lowering litigation expenses and facilitating contract formation.

Furthermore, as analyzed in this paper's comparison between the CISG and Brazilian law, the convention includes provisions that discourage contract termination while considering specific aspects of international trade. It adopts a uniform approach for defects under Article 35, treating all forms of non-conformity under the same legal standards. This uniformity enhances security for buyers to avoid litigating and strengthens sellers' incentives to ensure their products meet contractual specifications.

However, an evaluation of case law after the Brazilian accession to the CISG indicates that, in practice, even though the CISG was incorporated as binding law within the Brazilian legal system, Brazilian courts have continued to treat it primarily as a persuasive legal source rather than as the governing law for cases.

In light of the case law collected throughout this study, it becomes clear that Brazilian courts predominantly utilize the convention merely as an inspirational tool rather than as binding legislation. This limited application directly contradicts the Convention's intended role as a uniform framework governing international sales.

Abbott and Snidal defined in their article "Hard and Soft Law in International Governance" of 2000, that legally binding obligations that are precise and delegate authority for interpretation and enforcement constitute what is known as *hard law*, in other words, treaties and international agreements, which are enforceable in courts and arbitral tribunals.

In contrast, *soft law* refers to non-binding norms, guidelines, declarations, or codes of conduct that, despite lacking formal enforceability, can shape decisions and influence the development of customary international law.

In this scenario, it is clear that the United Nations Convention on Contracts for the International Sale of Goods (CISG), as a legally binding, uniform and enforceable treaty is unequivocally *hard law*.

However, the analyses of case law show a tendency of Brazilian courts' to invoke CISG norms primarily as *soft law* rather than applying them directly as binding law. This constitutes a significant deviation from the Convention's true legal nature, which is explicitly *hard law*, carrying obligatory force following Brazil's formal ratification.

Rather than treating the Convention as the primary governing instrument in cases where it is applicable, judges often invoke its principles selectively, particularly to reinforce pre-existing domestic doctrines. The CISG is frequently cited in discussions on contractual formation, good faith, and mitigation of damages, yet its actual enforcement remains sporadic and inconsistent, preventing it from fulfilling its harmonizing function.

In a study published by the Brazilian Arbitration Committee (CBAr), Gustavo Kulesza analyzes the limited yet significant influence of the CISG on Brazilian courts.

"[...] the CISG is a treaty and, as such, represents a typical binding international instrument (hard law), it is as soft law that the Convention has influenced our courts. This soft influence of international instruments on Brazilian judges represents a true 'international test' of domestic law. This test is welcome. The interpretation of domestic law with an outward-looking approach to international practice (outward trend) tends to benefit the development of internal legal frameworks [...] This is the role that the CISG has been playing in Brazilian law."
(own translation)

The analysis of the decision made in this research reveals a pattern of fundamental misinterpretation of the CISG's legal nature. Brazilian courts have been applying the Convention as soft law, a behavior conceptually flawed. The CISG is not a set of non-binding recommendations, it is a ratified treaty that should carry the same force as domestic legislation. However, its provisions are often applied in a discretionary manner, as if they were mere interpretative aid rather than obligatory legal norms.

In this context, the improper application of the CISG by Brazilian courts further exacerbates the already challenging trade relations between Brazil and China, which is both Brazil's largest trading partner and the primary focus of this research. Before Brazil ratified the CISG, legal uncertainty in cross-border sales was a persistent issue due to China's reservation under Article 95, which made it very difficult to apply the Convention in trade with Brazil, then a non-contracting state. Now, despite Brazil's

formal accession, the reluctance of Brazilian courts to enforce the CISG as binding law continues to undermine its harmonizing role.

Ultimately, the analysis reveals that Brazil's formal accession to the CISG, was indeed merely formal. Its integration into the Brazilian legal system remains incomplete. While the Convention provides a clear and uniform legal framework for international sales, Brazilian courts have been reluctant to treat it as binding law, often applying it in a discretionary manner. This misinterpretation undermines the CISG's purpose and creates inconsistencies in its enforcement, which in turn affects Brazil's trade relations with China. For the Convention to achieve its full potential, a shift in judicial practice is necessary, ensuring that the CISG is applied as the governing law in relevant cases, thereby strengthening legal predictability and fostering a more stable commercial environment between the two nations.

8. REFERENCES

ABBOTT, Kenneth W.; SNIDAL, Duncan. **Hard and Soft Law in International Governance**. *International Organization*, v. 54, n. 3, p. 421-456, 2000.

ALPER, Gizem. **Empirical Findings – CISG 2023**. Institute of International Commercial Law, 2023.

ATECS MANNESMANN GMBH v. RODRIMAR S/A. São Paulo State Court of Justice (TJSP), Appeal No. 0003157-49.2009.8.26.0562, decided on 24 Apr. 2014.

BENETI, Ana Carolina. **First CISG decision in Brazil: Brazilian courts take the first steps towards application of the CISG**. *IHR – Internationales Handelsrecht*, v. 1, p. 8-11, 2018.

BRASIL. Lei nº 8.078, de 11 de setembro de 1990. **Código de Defesa do Consumidor**. Diário Oficial da União: Seção 1, Brasília, DF, 12 set. 1990.

BRASIL. Lei nº 10.406, de 10 de janeiro de 2002. **Código Civil**. *Diário Oficial da União: Seção 1*, Brasília, DF, 11 jan. 2002

CANARIS, Claus-Wilhelm; GRIGOLEIT, Hans Christoph. **Interpretation of Contracts**. In: HARTKAMP, Arthur S.; HESSELINK, Martijn W.; HONDIUS, Ewoud H.; DU PERRON, Edgar; VELDMAN, Muriel (Eds.). *Towards a European Civil Code*. 4. ed. Nijmegen: Ars Aequi Libri, 2011. p. 587–610.

CHENGJIE, Wang. **The Application of the CISG in Chinese Arbitration – Special Report on CISG@40 Celebration Conference**. CIETAC, Beijing, 2021.

CISG ADVISORY COUNCIL. **CISG Advisory Council Opinion No. 4: Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG)**. In: *Pace International Law Review*, v. 17, n. 1, p. 79–94, 2005.

DAWWAS, Amin. **Non-Conformity of Goods in Light of CISG, Unidroit Principles and the Palestinian Commercial Law Draft**. *UAEU Law Journal*, v. 2012, n. 52, p. 1-25, 2012.

DIZ, Jamile Bergamaschine Mata; RIBEIRO, Clarissa Correa Neto. **Impacto e influência dos tratados e convenções internacionais sobre a lei brasileira de arbitragem**. *Revista de Direito Internacional*, Brasília, v. 10, n. 1, 2013, p. 219-230. DOI: 10.5102/rdi.v10i1.2378.

DONG FENG TRADE CO. LTD. v. HANGZHOU DONGLI RUBBER & PLASTOMER CO. LTD. China International Economic and Trade Arbitration Commission (CIETAC), China, 2005.

ERICSON, Inger Anna Lena Þórðardóttir. **Can Uniformity as a Goal within the CISG Be Measured and Do Reservations Have an Effect on That Goal?** Thesis in Law on International Contract Law, Aalborg University, 2020.

FARIA, Luis Cláudio Furtado; COSTA, Vitor Chavantes Godoy da; COSTA, Mariana Rodrigues da. **A aplicação da CISG como usos e costumes do comércio internacional.** *Migalhas Marítimas*, 24 mar. 2022. Disponível em: <https://www.migalhas.com.br/coluna/migalhas-maritimas/362257/a-aplicacao-da-cisg-como-usos-e-costumes-do-comercio-internacional>. Acesso em: 15 mar. 2025

GILLETTE, Clayton P.; SCOTT, Robert E. **The Political Economy of International Sales Law.** New York University Law & Economics Research Paper Series, Working Paper No. 05-02, 2005.

GRANJA, Rubens. **Adimplemento substancial: visão atual da teoria.** 2020. 428 f. Tese (Doutorado em Direito Civil) – Faculdade de Direito, Universidade de São Paulo, São Paulo, 2020.

GUIMARÃES, Aléssia. **A resolução do contrato de compra e venda mercantil por inadimplemento do devedor no Código Civil Brasileiro e na Convenção de Viena sobre Compra e Venda Internacional de Mercadorias (CISG): similitudes e contradições.** [s.l.]: [s.n.], [s.d.].

GULLO, Marcelly Fuzaro. **Proposta e aceitação: estudo comparativo acerca da formação de contratos na Convenção das Nações Unidas sobre Contratos de Compra e Venda Internacional de Mercadorias e no Código Civil Brasileiro.** Coimbra: Faculdade de Direito da Universidade de Coimbra, 2015. ISBN: 978-989-8787-09-5.

KALLÁS, Fernanda Araújo; SANTOS, Magno Alves. **A CISG no Brasil: uma análise comparativa entre as regras convencionais do comércio e o Código Civil brasileiro.** E-Civitas - Revista Científica do Curso de Direito do UNIBH, Belo Horizonte, v. X, n. 2, dez. 2017.

KRÖLL, Stefan. **Selected Problems Concerning the CISG's Scope of Application.** Journal of Law and Commerce, v. 25, p. 39-61, 2005.

KULESZA, Gustavo. **A influência branda da Convenção das Nações Unidas sobre Contratos de Compra e Venda Internacional de Mercadorias sobre o Judiciário brasileiro.** CBar – Comitê Brasileiro de Arbitragem, 2025. Disponível em: <https://cbar.org.br>. Accessed on: 2025-03-11.

KULESZA, Gustavo (Coord.). **A CISG e o Judiciário Brasileiro.** 1. ed. Grupo de Estudos sobre a Convenção sobre Compra e Venda Internacional de Mercadorias e Arbitragem do Comitê Brasileiro de Arbitragem (CBAR) & CISG-Brasil.Net, 2016.

LANNAN, Kate. **Sphere of Application of the United Nations Convention on Contracts for the International Sale of Goods.** [S.l.]: UNCITRAL, [s.d.].

LOPES, Christian Sahb Batista. **A mitigação dos prejuízos no direito contratual.** 2011. Tese (Doutorado em Direito) – Universidade Federal de Minas Gerais, Faculdade de Direito, Belo Horizonte, 2011

MCG INTERNATIONAL PTY LTD. v. MINERVA S.A. Federal Court of Australia, New South Wales District Registry, General Division, Case No. NSD 1387, decided on 12 Nov. 2010.

MENEZES, Wagner; CARVALHO, David França Ribeiro de. **The opting-out and opting-in systems of the 1980 Vienna Convention on the International Sale of Goods (CISG) and its application in Brazil.** Revista Jurídica, Curitiba, v. 1, n. 50, p. 122-146, 2018.

MUNIZ, Joaquim de Paiva. **Brazil: The Vienna Convention (CISG) will govern contracts for the international sale of goods involving Brazil.** Global Arbitration News, 18 fev. 2015. Disponível em: <https://www.globalarbitrationnews.com>. Accessed on: 2025-03-11.

MUNOZ, Edgardo; MEIRA MOSER, Luiz Gustavo. **Brazil's adherence to the CISG – Consequences for trade in China and Latin-America.** Revista Brasileira de Arbitragem, n. 34, p. 52-71, 2012.

PEREIRA, Caio Mário da Silva. **Instituições de Direito Civil.** 23. ed. Rio de Janeiro: Forense, 2009.

PEROVIĆ, Jelena. **Selected Critical Issues Regarding the Sphere of Application of the CISG.** Belgrade Law Review, v. LIX, n. 3, p. 181-195, 2011.

PRAKASA INDÚSTRIA E COMÉRCIO DE UTILIDADES DO LAR LTDA. v. MERCOMÁQUINAS INDÚSTRIA COMÉRCIO E REPRESENTAÇÕES LTDA. Paraná State Court of Justice (TJPR), Civil Appeal No. 921642-0, decided on 23 Nov. 2012.

PRESSURE SENSORS CASE (BRAZIL v. CHINA). Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Stockholm, 2003.

RAMASWAMY, M. P. **The Scope of CISG in China and Brazil and Facilitation of Trade with Portuguese Speaking Countries.** PEOPLE: International Journal of Social Sciences, v. 3, n. 2, p. 78-92, 2017.

SACRAMENTO, Ananda Brandão. **A conformidade dos bens, os padrões éticos nas relações contratuais e a extensão da responsabilidade do vendedor: uma análise no âmbito da Convenção das Nações Unidas sobre os Contratos de Compra e Venda Internacional de Mercadorias.** Salvador: Faculdade Baiana de Direito, 2018.

SÁEZ, Mauricio Inostroza. **Sobre a ampliação do âmbito de aplicação material da Convenção de Viena acerca dos contratos de compra e venda internacional de mercadorias.** REDES – Revista Eletrônica de Direito Social, v. 7, n. 1, p. 1-20, 2019.

SCHWENZER, Ingeborg (Ed.). **Schlechtriem & Schwenzler: Commentary on the UN Convention on the International Sale of Goods (CISG).** 4. ed. Oxford: Oxford University Press, 2016.

TRIBUNAL DE JUSTIÇA DO ESTADO DO RIO GRANDE DO SUL (TJRS). Apelação Cível nº 70072362940, 12ª Câmara Cível, Rel. Des. Guinther Spode, julgado em 14 dez. 2017.

UNITED NATIONS. **United Nations Convention on Contracts for the International Sale of Goods**. 1980. Disponível em: <http://lexmercatoria.org>. Accessed on: 2025-03-11.

UNCITRAL. **United Nations Convention on Contracts for the International Sale of Goods**. Nova York: United Nations, 2010. Disponível em: <https://uncitral.un.org>. Accessed on: 2025-03-11.

XCMG v. ÊXITO IMPORTADORA. Superior Court of Justice (STJ), Brazil, Special Appeal No. 1.633.878/MG, Rapporteur Justice João Otávio de Noronha, decided on 2 Oct. 2018.

ZHEN, Pan. **China's Withdrawal of Article 96 of the CISG: A Roadmap for the United States and China to Reconsider Withdrawing the Article 95 Reservation**. University of Miami Business Law Review, v. 25, p. 141-166, 2016.

ZHUGUANG OIL COMPANY v. WUXI ZHONGRUI GROUP CORPORATION. China International Economic and Trade Arbitration Commission (CIETAC), China, 2004