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# **International Sale of Goods Contracts: Navigating CISG, Formation, Performance, Payment and Opt-Outs**

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# **International Sale of Goods Contracts:**

**Navigating CISG, Formation,  
Performance, Payment and Opt-Outs**

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# I. Initial Considerations

- Cultural and Language Issues
- Differences from the UCC
- Other Laws That May be Implicated

# General Comments

- Law is territorial
- Boilerplate is not boilerplate
- You are responsible for what you sign (even if in a different language) and maybe even for what you don't sign
- You break it, you own it
- Prevention
- “We have this in all our agreements” —NOT
- Contract as roadmap
- Contract as legal rights and obligations

# Cultural and Language Issues

- You need to understand the transaction and make sure the contract reflects it
- Do not assume any of the “legal stuff” is standard; make sure you understand it.
- Make sure you know whose law applies so the enforceability of terms is understood up front
- Do not settle for ambiguity and if there is pushback, rethink your transaction
- Understand the cultural context and signals

# Kicking the Can

- Agreement to not decide has ramifications
- Can lead to application of CISG or even other law
- Surprises are for birthdays



# Civil Law vs. Common Law

- Code versus Case
- Non or limited precedent versus precedent
- Separately trained judges versus experience
- Substantive differences: no punitive damages, limited or non-existent juries in non-criminal cases, oral versus written agreements, statutory versus non-existent rights (e.g., third party beneficiaries)
- Lengthy US contracts versus minimal civil law ones

# Language Issues

- Different translations of English and idioms
- English English versus American English
- A Dane may “gor,” but an American may “walk,” “amble,” “stroll,” “perambulate,” “go”
- Cultural nuances: yes means maybe, maybe means no, up and down versus sideways headshakes, and so forth
- Use of uncommon terms: “contract avoidance,” e.g.

# The Impact of International

- International parties engaged in agreements spanning different countries implicate foreign law concerns
- Parties are not necessarily independent legal entities, but divisions or units of others
- Choice of law issues arise

# Philosophical Differences Between UCC and CISG (1)

UCC	CISG
business and consumer	business
objective standards	subjective standards
writings required (some exceptions)	writings not required (some exceptions)
mailbox rule	receipt basis
addresses formation and validity	formation only
“material breach”	rights of cure; “fundamental breach”
knock out rule	rejection/counteroffer

# Philosophical Differences Between UCC and CISG (2)

UCC	CISG
no specific performance	specific performance
applies to sale of goods	some goods excluded
consideration	no consideration
damages for buyer (perfect tender)	rights to reduce price
incidental and consequential damages	anticipated lost profits
no statement re interest	interest
warranties and exclusions	not address warranty, but conforming goods
no opt out but modify	opt out/modify

# Philosophical Similarities

- Goods portion of contract must dominate
- Analogous provisions for “fill in” of absent terms
- Recognition of party and industry customs and practices

# General Provisions of CISG

- Interpret in recognition of international character
- Settle questions consistent with private international law principles (i.e., conflicts of law)
- Conduct interpreted based on intent
- Reasonable person's understanding standard
- Parties bound by their practices between them

# Other Laws Implicated

- E-Signature federal/state laws (US)
- Digital signature laws (EU)
- Local contract law (combined goods/services)
- Attorneys fees: civil law grants versus common law need for statute or by contract



# Applicability of CISG

- If a party has more than one place of business in more than one nation, then the CISG becomes applicable if the place of business that has the closest relationship to the contract and its performance is within a signatory state. CISG, Art. 10; *Asante Techs., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1148-49 (N.D. Cal. 2001)
- CISG disregards nationality in favor of this “place of business” determination; if an American company’s foreign subsidiary conducts business in a non-CISG location, the Convention will not apply

# Goods and Services

- CISG will not apply where not clearly a contract for sale of goods. *Helen Kaminski Pty. Ltd. v. Mktg. Austl. Prods., Inc.*, M-47 (DLC), 1997 U.S. Dist. LEXIS 10630, 1997 WL 414137 (S.D.N.Y. July 23, 1997)
- Exclusive distributorship and sales commission agreements failed to refer to the sale of goods with enough specificity to justify application of CISG.
- (*Viva Vino Imp. Corp. v. Farnese Vini S.r.l.*, No. 99-6384, 2000 U.S. Dist. LEXIS 12347, at \*4 (E.D. Pa. Aug. 29, 2000)

# Solutions?

- Address CISG issue, especially if in doubt
- Two agreement solution? Depends on context, legal relationship of companies
- Profit margin in sales price can affect Transfer Pricing
- Service component may relate to internal affairs and not always work

## II. Formation Issues

- Common law: “mirror image”—any deviation is a rejection.
- UCC:
  - Contract formed if acceptance has additional or different non-material terms, unless acceptance conditioned on acceptance of those.
  - Additional non-material terms are part of contract between merchants unless certain exceptions apply

# Formation--CISG

- **Article 19**
- (1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.
- (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
- (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially

# Formation--CISG

- Contract must specify quantity and price,
- Any response to an offer that rejects or offers a material change to any provision will be deemed a counteroffer
- No “mailbox” rule.
- The CISG requires that material terms such as price and quantity be specified in any contract. CISG, art. 14. However, CISG, Art. 55 establishes price as that generally charged for the goods under comparable circumstances, where the contract does not explicitly or implicitly reference price.

# Formation -- CISG

- Offer must be sufficiently definite and reflecting an intent to be bound. Those provisions are satisfied if price and quantity are expressly or implicitly specified. Article 14
- It is effective, pursuant to Article 15, if and when it reaches the specified person, and can be withdrawn only if the withdrawal reaches the person at or before the time the offer reaches the offeree.
- If the offeree has already dispatched an acceptance, the revocation is not effective. CISG, Art. 16.
- An offer, even an irrevocable one, is terminated, once the rejection reaches the offeror. CISG, Art. 17.

# Formation -- CISG

- Article 18 allows both conduct and statements to constitute acceptance, although silence or inactivity by itself is not enough. Acceptance occurs when it reaches the offeror; if a time for acceptance was fixed and the acceptance is after that, it will not be effective.
- If no time is fixed, a reasonable time for acceptance will be imputed.
- However, either the offer itself or practices among the parties themselves or usage may also be considered in evaluating whether an acceptance should be effective.



# Formation--CISG

Article 20 deals with computation and interpretation of offeror's time-limits for acceptance. Article 21 allows for late acceptances "if without delay the offeror orally so informs the offeree or dispatches a notice to that effect." There is an exception under certain circumstances for the offeror to immediately notify the offeree that the offeror considers the time for acceptance to have lapsed. An acceptance can be withdrawn if that withdrawal reaches the offeror before the time the CISG makes the acceptance effective. CISG, Art. 22. Article 23 deems the contract concluded at the moment the acceptance of the offer becomes effective under the terms of the CISG. Finally, Article 24 defines the time when a communication is deemed to "reach" the addressee "when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence."

# Formation: Parol Evidence

- Parol refers to oral or extra-contract communications and behavior
- Article 8: “statements made by and other conduct of a party” interpreted according to intent where other party aware or should have been aware
- Article 9: parties bound to “any usage to which they have agreed and by any practices which they have established between themselves”
- Article 11: “contract of sale need not be concluded in or evidenced by writing” or limited to one form

# American Cases

- This augmentation may allow creation of a contract that otherwise would not exist under UCC principles, and as such, American courts originally were in some conflict over whether to condone outcomes that run counter to American precedent.
- Compare *Beijing Metals & Minerals Import/Export Corp. v. Am. Bus. Ctr., Inc.*, 993 F.2d 1178, 1183 n.9 (5th Cir. 1993) (stating that the parol evidence rule would apply to dispute regardless of whether state law or CISG governed the dispute) with *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. at 1238 n.7 (tangentially observing that Art. 8(3) “essentially rejects . . . the parol evidence rule”).

# Early Efforts

- *Beijing Metals* seemed to represent a direct attack upon those who would argue for the globalization of business law and "a new supranational law of international business." See e.g. Randall and Norris, "A New Paradigm for International Business Transactions," 71 Wash. U.P.L.Q. 599 (1993).

# The Current Situation

- *Beijing Metals* was distinguished, if not implicitly criticized, in subsequent decisions on the same point. In *MCC-Marble v. Ceramica Nuova D'Heostino, S.P.A.*, 144 F.3d 1384 (11th Cir. 1998), the 11th Circuit considered parol evidence in accordance with the requirements of the CISG resolving the contract dispute.

# *Mitchell*

- A comparable result was reached in *Mitchell Aircraft Spares, Inc. v. European Aircraft Service A.B.*, 23 F. Supp. 2d 1915 (N.D. Ill. 1998), in which the district court denied cross-motions for summary judgment. In that case, plaintiff acted as a speculator and broker in the market for surplus commercial aircraft parts, and defendant bought parts in Europe and the United States and resold them to airlines and other entities. Ultimately, plaintiff sued for breach of contract and warranty, and moved for summary judgment. The court ruled that the CISG applied, and relied heavily on *MCC* in holding that it could consider parol evidence.

# Subjective Intent Matters

- *MCC-Marble* and *Mitchell Aircraft* analysis and approach of the CISG's relationship with parol evidence is the accepted one. Comparable results have been reached. *See, e.g., Calzaturificio Claudia s.n.c. v. Olivieri Footwear Ltd.*, No. 96 Civ. 8052, 1998 U.S. Dist. LEXIS 4586 (S.D.N.Y. Apr. 7, 1998). The *Calzaturificio* court concluded that “the standard UCC inquiry regarding whether a writing is fully or partially integrated has little meaning under the CISG and courts are therefore less constrained by the ‘four corners’ of the instrument in construing the terms of the contract.”

# *Battle of the Forms*

- *Chateau Des Charmes Wines LTD. v. Sabate USA Inc.*, 328 F.3d 528 (9th Cir. 2003)(oral agreement between the parties found where price, quantity and type of goods discernible, but a forum selection clause was found not to be part of agreement).
- *Magellan International Corp. v. Salzgitter Handel GmbH*, 76 F. Supp. 2d 919 (N.D. Ill. 1999), the court held that under the CISG, a contract existed where one party had indicated acceptance by performance, based on the subjective intent, even though various documents had gone back and forth that never actually mirrored each other.



# Where contract process is unclear, litigation is costly

- *Hanwha Corporation v. Cedar Petrochemicals, Inc.*, 760 F. Supp. 2d 426 (S.D.N.Y. 2011)
- Offer and acceptance of “firm bid” for 1,000 metric tons of toluene at then-current market price.
- In 20 transactions, parties would later bargain over additional terms, including choice of law, not always agreeing, but always performing.
- Court found seller did not “intend to be bound” by its bid unless agreement was reached on additional terms to be proposed by buyer.
- Court held conflict re choice of law in contract documents for 21<sup>st</sup> sale was “material,” therefore no contract.

# A Kind of “Promissory Estoppel”

- *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs., Inc.*, 201 F. Supp. 2d 236, 281-286 (U.S. Dist. , 2002)( interpreting Article 16, holding that "[t]he CISG establishes a modified version of promissory estoppel that does not appear to require foreseeability or detriment, and to apply an American or other version of promissory estoppel that does require those elements would contradict the CISG and stymie its goal of uniformity.")

# III. Key Provisions

- Performance
- Payment
- Opt-out
- Dispute resolution

# Performance: Seller's Obligations

- **Article 31-Place of Delivery**
- If contract involves carriage of the goods deliver by handing the goods over to the first carrier for transmission to the buyer;
- If not, and contract relates to specific goods, or unidentified goods from a specific stock or to be manufactured or produced, and the parties knew that the goods were at, a particular place - in placing the goods at the buyer's disposal at that place;
- Other cases - place the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

# Performance: Time of Delivery

- Article 33-Time of Delivery
- The seller must deliver the goods:
- (a) if a date is fixed by or determinable from the contract, on that date;
- (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
- (c) in any other case, within a reasonable time after the conclusion of the contract.

# Conformity of Goods

- CISG does not have warranty provisions as such
- But Article 35 requires seller to “deliver goods which are of the quantity, quality and description required by the contract” and “are fit for any particular purpose expressly or impliedly made known to the seller”

# Seller Liability for Non-Conformity

- Seller not liable under Article 35 for non-conformity if buyer knew at time of contract or could not have been unaware
- Seller liable at time of transfer of risk, even if lack of conformity becomes apparent later
- Buyer obligated to examine goods in timely fashion, and loses right to object if does not give notice in reasonable time

# Goods Free From Claim

- Seller must deliver goods free from rights or claims of third parties
- Buyer obligated to give timely notice of violation of this



# Buyer's Remedies

- Specific performance
- Require delivery of substitute goods in case of fundamental breach
- Remedy lack of conformity
- Fix additional time for performance
- Remedy at own expenses and claim damages
- Reduce price for non-conforming goods

# Fundamental Breach

- Buyer can declare contract avoided if (1) fundamental breach or (2) non-delivery after extension of time
- If goods delivered, buyer must act in timely fashion
- Fundamental breach not defined, but encompasses failure to make complete delivery or in conformity with contract, after other remedies fail

# Buyer's Obligations: Payment

- Article 54: buyer must pay
- Article 55: if “validly concluded” contract but no fixed price or mechanism for determining, price “generally charged at the time” of contract for comparable goods in comparable circumstances applies
- Article 56: parties can agree to place of payment, or else at place where goods transferred

# Buyer's Inspection

- “The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity” (Article 58)
- Consider use of Incoterm Standard Shipping Terms and specify

# Buyer's Receipt

“The buyer's obligation to take delivery consists: (a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and (b) in taking over the goods.” (Article 60)

# Seller's Remedies

- Specific performance (Article 62)
- Fix additional period for performance (Art. 63)
- Declare contract avoided for fundamental breach
- Seller must act in timely fashion if buyer has performed late
- Seller may meet specifications it deems reasonable and on notice

# Passing of Risk

- “Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.” (Article 66)
- Where no place of transfer designated, risk passes on delivery of seller to first carrier; if designated, risk passes at transfer at that place (Article 67)

# Risk: Goods in Transit

“The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. . . Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.” (Article 68)



# Passing of Risk: Other

If not set forth above, risk passes to buyer when “takes over the goods,” but if a set place other than seller’s place of business, risk passes when delivery due and goods at buyer’s disposal at the named place. (Article 69)

# Anticipatory Breach

- Either party may suspend performance if “it becomes apparent” other party will not substantially perform due to (1) creditworthiness or (2) conduct
- Seller can recall goods, subject to applicable bankruptcy laws
- Immediate notice required
- If apparent that fundamental breach will occur, can avoid (Article 71)

# UCC Comparison

- UCC permits anticipatory breach and provides for demand for adequate assurance of performance
- Two step process: need to have a basis for requesting adequate assurance, and then decision as to adequacy relevant to the assurance

# Dispute Resolution

- Damages are the loss, including loss of profit as consequence of breach, up to foreseeable amounts, considering all the circumstances (Article 74)
- *Compare* Uniform Commercial Code more specific formulas, and references to incidental and consequential damages, as defined
- Seller's exclusions and limitations of damages

# “Cover”

- Buyer’s damages include “cover” concept, as well as Article 74 damages
- Seller also entitled to resell goods and recover difference from contract price
- Both parties have duty to mitigate
- Interest
- CISG only addresses issues it addresses, so still need to look to applicable law for mechanics

# Force Majeure

- CISG recognizes certain “exemptions” from performance, including if “failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.” (Article 79)
- If you want specificity, put it in

# Effect of Avoided Contract

- Both parties released, subject to damages
- Restitution for performance (Article 81)
- Duties to preserve goods (Article 82)

# Opt Out

- “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.” (Article 6)
- Per Article 12, a state that otherwise requires written contracts may declare that the provisions of the CISG for non-written contracts do not apply where a party has its place of business in that state.
- U.S. has not exercised Article 12.



# Opt Out and Choice of Law

- The CISG must be expressly disclaimed
- Adopting a “choice of law” for a particular state, e.g., New York, will not disclaim CISG, since New York is subject to the U.S. Constitution and treaties are “law of the land.”
- Query: Can one demonstrate express disclaimer through non-written proofs?

# Statute of Limitations

- CISG not contain a statute of limitations
- Consider contractual one
- Otherwise, governing law
- 1974 Convention on the Limitation Period in the International Sale of Goods establishes a four-year limitation; U.S. a signatory

# Concluding Comments

- The CISG in large part consists of accessible, common sense rules
- More than the UCC, it seeks to hold parties to their contracts
- The main surprise for US attorneys is the ability to form non-written contracts
- It is becoming more known and a body of jurisprudence has afforded more certainty in its interpretation in the US
- <http://www.cisg.law.pace.edu/>