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United Nations Convention on Contracts for the International Sale of Goods

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This article briefly addresses why business lawyers who may be involved in sales transactions with parties from different countries need to know and understand the United Nations Convention on Contracts for the International Sale of Goods (CISG), a treaty ratified by the United States and over 80 other countries including Canada, Japan, China, and Cuba. The following discussion references a number of CISG provisions: each of these can be found at http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf. Canada, China, and Japan are common trading partners with businesses in the United States and Cuba may be in the near future. Understanding how and when to avoid or retain the CISG in a contract's choice-of-law clause could make the difference in whether attorneys diligently represent their clients because the CISG differs from the Uniform Commercial Code (UCC), the law that usually will apply in similar transactions in most states, in a number of significant ways.

Introduction and Historical Context

During the first 20 years of its existence, the CISG did not fare well in the United States. In 1998, 12 years after the United States ratified the CISG, Professor Michael Wallace Gordon wondered whether Florida attorneys and judges were understanding and using the CISG in appropriate cases. He conducted a random survey of Florida attorneys who practiced in the area of international law, professors who taught contracts and commercial law at ABA approved Florida law schools, and Florida judges who heard civil cases, to determine their familiarity with and knowledge of the CISG. Professor Gordon reported his results in "Some Thoughts on The Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected in One State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar With an International Practice, and (3) Judges," 46 *Am. J. Comp. L.*, 361 (1998). To his surprise, only 30 percent of the international attorneys indicated they had "reasonable knowledge" of the CISG, and the judges who responded to the survey showed an even greater lack of understanding of the CISG. When asked what law would govern an international sales contract containing a clause stating, "the law of Florida shall apply," over 90 percent of the judges wrongly answered that the clause would mean either that the UCC or the common law applied to the contract and not the CISG, even though a treaty ratified by the United States clearly trumps state law.

Ten years later, attorney George Philippopoulos wondered whether awareness and use of the CISG was any more common among practicing attorneys than it had been in the past. He sent a survey to a group of attorneys who practiced in areas where one would expect them to encounter the CISG to determine whether U.S. attorneys were now embracing and using the CISG in appropriate cases. He reported the results of the survey in "Awareness of the CISG Among American Attorneys," *UCC Law Journal*, Volume 40, Issue 3, Winter 2008. One of his main conclusions was that many attorneys prefer to simply opt out of the CISG instead of learning about the law and determining whether it would be a better choice of law for their clients. Of course, if the opt out is not written properly, as is common, it will not affect the contract's choice of law, and the CISG will control if the contract is within its scope.

That leads to the queries of whether this trend against using the CISG continues today and, if it does, what does it mean for international business attorneys? Is it better to just avoid the law, or can it be used for a client's benefit? The trend is definitely

changing. Knowledge and familiarity with the CISG is becoming much more important than in the past because of a growing acceptance among the courts. In the last 10 years, it seems clear that courts have become much more knowledgeable about the CISG because the number of reported and unreported cases applying the CISG has grown considerably. In fact, the courts decided well over 100 CISG cases since 2004, as compared to fewer than 40 cases during the first 18 years that the CISG existed. With more courts applying the CISG, many attorneys who decide to take the easy way out by attempting to opt out of the CISG may create an even larger problem for their clients. If attorneys do not understand the scope of the CISG or realize where the UCC and CISG differ, they will be doing their clients a grave disservice and they will not be able to educate their clients about what law would better serve the client's needs. Further, attempts to opt out may be futile if written incorrectly.

Choice of Law/Opting Out of the CISG

CISG Article 1 indicates when a contract falls within the CISG. Article 1(1)(a) applies when a contract involves a sale of goods between parties who both have their principal place of business in countries that are parties to the CISG, while Article 1(1)(b) allows the CISG to be applied when the forum's choice-of-law rules lead to the application of the law of a country that is a party to the CISG. In the United States, Article 1 (1)(a), which is called the "direct applicability" provision, is the only source of jurisdiction because the United States has opted out of Article 1(1)(b), the "indirect applicability" provision.

For example, Myanmar is not a party to the CISG, so a contract between a United States party and a Myanmar party would not fall within the jurisdiction of Article 1(1)(a). If, however, the matter were being decided in Spain, and Spain's choice-of-law rules pointed to the application of United States law, the CISG would apply pursuant to Article 1(1)(b). The fact that the United States has entered a declaration to Article 1(1)(b) does not prevent a court in Spain, where no such declaration exists, from using Article 1(1)(b) to apply United States law.

Even where the CISG would otherwise apply, however, CISG Article 6 allows parties to opt out. The cases interpreting Article 6 commonly examine the parties' contract to see whether it effectively disclaims application of the CISG. *Fisher v. Thyssen Mannesmann Handel GmbH*, 2006 WL 211858 (N.D. Ill. 2006), provides an example of effective opt out language:

> All legal relations between [ITC and Fisher Industries] and [Thyssen] shall be subject to German substantive law applicable to the legal relations between domestic parties in addition to these Terms and Conditions. The provisions of the Convention on Contracts for the International Sale of Goods (CISG) of April 11, 1980 shall be excluded.

Another method suggested by the court in *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142 (N.D. Cal. 2001), is to simply identify a specific body of law, such as "the California Commercial Code" or "the Uniform Commercial Code."

Roser Technologies, Inc. v. Carl Schreiber GmbH, 2013 WL 4852314 (W.D. Pa. 2013), illustrates an ineffective opt out. This case involved an alleged breach of a contract for the manufacture and sale of copper molding plates. Buyer Roser Technologies, Inc.'s place of business was in the United States and seller Carl Schreiber GmbH's was in Germany, so the CISG would normally apply pursuant to CISG Article 1(a). The contractual language stated that "supplies and benefits shall exclusively be governed by German law. The application of laws on international sales of moveable objects and on international purchase contracts on moveable objects is excluded."

In holding that the contract did not exclude the CISG, the court noted that the contract language did not specifically mention the CISG. In fact, "German law" would include the CISG, since Germany is a party to the convention. In addition, the term "moveable objects" was confusing because this language never appears in the CISG. Finally, the court noted that the parties' positions in litigation showed that they did not believe the CISG had been excluded in favor of German law: one party argued that the UCC applied, while the other argued for the CISG.

The *Roser* opinion is not limited to German law. A number of cases make similar points regarding the law of various states: *It's Intoxicating, Inc. v. Maritim Hotelgesellschaft mbH*, 2013 WL 3973975 (M.D. Pa. 2013) ("[T]he laws of the state of Pennsylvania" do not exclude the CISG); *Microgem Corp., Inc. v. Homecast Co., Ltd.*, 2012 WL 1608709 (S.D.N.Y. 2012) ("New York law would apply the CISG"); *Remy, Inc. v. Tecnomatic, S.p.A.*, 2010 WL 4174594 (S.D. Ind. 2010) ("Indiana law" includes the CISG); and *Travelers Property Cas. Co. of America v. Saint-Gobain Technical Fabrics Canada Ltd.*, 474 F.Supp.2d 1075 (D. Minn. 2007) ("Minnesota law" does not exclude the CISG).

Another issue arises when the case would normally fall under the CISG, but the parties have failed to even consider its applicability. This concept was explored in *Rienzi & Sons, Inc. v. N. Puglisi & F. Industria Paste Alimentari S.p.A.*, 2014 WL 1276513 (E.D.N.Y. 2014).

The court considered a motion for reconsideration following summary judgment in favor of N. Puglisi & F. Industria Paste Alimentari SPA, a manufacturer of Italian pasta products. One basis for the motion was Rienzi & Sons, Inc.'s contention that the court should have applied the CISG to the parties' dispute. Notably, this case fell within Article 1(1)(a) since the parties were each from contracting countries, the subject matter was within the scope of the CISG, and the parties did not opt out of the CISG.

In denying the motion, the court held that whether the CISG should have applied based on the parties' contractual language was irrelevant, because neither party, in the six-year history of the litigation, had raised the CISG prior to summary judgment. The court held that considering the CISG at this point would prejudice Puglisi, especially because the CISG does not have a parol-evidence rule or a statute of frauds, both of which were pertinent to this case.

Differences between the UCC and the CISG

There are many important differences between the CISG and the UCC. For example, sellers may receive consequential damages under the CISG even though the UCC generally prohibits them. Other examples of differences between the CISG and the UCC arise in the areas of the rules for contract formation, the statute of frauds, and the parol-evidence rule – just to name a few. The following discussion describes just a few of those differences.

Contract Formation

The UCC section often referred to as the battle of the forms, Section 2-207, and the other UCC Article 2 sections on contract formation are good examples of important differences in how the CISG and the UCC treat contract formation and different or additional terms. The UCC drastically changed the common law contract rule, nicknamed the "mirror image" rule. Instead of following the common law rule that communications with additional or different terms are rejections of offers and become counter offers, thereby often allowing the last major communication with changes to control the deal, the UCC rejected this approach to contracting. The UCC's rules are somewhat more complicated when determining the exact terms in a deal; however, the most important change rejected the mirror image rule by allowing a communication with additional or different terms following an offer to become an acceptance, even though the new terms changed the offer. Whether those terms become part of the contract requires an analysis of Section 2-207 that is beyond the scope of this brief article.

The CISG does not follow the same contract formation rules as the UCC or the common law. The CISG, by combining both rules, developed a new way to determine whether a contract has been formed in an international sales contract and what terms to include. If an attorney believes the UCC applies to her or his contract but later learns that the CISG rules apply, that attorney could be in for a rude awakening.

A case that illustrates this potential problem is *Allied Dynamics Corp. v. Kennametal, Inc.*, 2014 WL 3845244 (E.D.N.Y. 2014). The main issue in this case was whether a forum-selection clause was part of the contract between Allied, a New York buyer, and Kennametal, the parent company of MFS, an Italian company that manufactures investment castings for gas turbines. That answer turned on the rules of contract formation. Allied did not want a forum-selection clause requiring litigation of disputes in Milan, Italy, contained in Kennametal's documents to be part of the sales contract. Had this contract been governed by the UCC, that argument might have won the case. However, the CISG applied.

Kennametal produced a quote for a customer after receiving an initial inquiry from a potential buyer. These quotations did not state quantities and only listed prices for "budgetary" considerations because Kennametal needed to conduct more testing and determine other specifications for the product. After Kennametal sent a quotation to Allied, Allied replied with various purchase orders (POs). These POs contained quantities, costs, the parts desired, and other important specifications. Once Kennametal received the POs from Allied, it conducted an internal review to ensure that the POs matched the original quotation. Then, it sent a four-page document to Allied acknowledging the order and finalizing the order confirmation. That order confirmation contained additional general terms and conditions, including the disputed forum selection clause.

Although the court acknowledged that sales quotations could be offers under the CISG, they were not in this case because they were listed as "budgetary" and did not state the quantities that Allied would order. The result under the UCC likely would be the same. The POs that Allied sent after receiving the quotes, however, were definite enough to be offers under the CISG and the UCC. After Kennametal received the POs, they sent order confirmations containing the forum selection clause, as well as detailing the order and other terms and conditions. If this contract were governed by the UCC, those order confirmations could be acceptances under 2-207 (1), despite the fact that they contained new and different terms. Whether the forum selection clause was included would depend on §2-207 (2) and Allied might be able to knock the forum selection clause out of the contract if it materially altered the contract. However, under Article 19 of the CISG, Kennametal's order confirmations were rejections that became counter offers because they incorporated new standard terms and changed the payment terms in the contract, which materially changed the original offer. The UCC does not allow a material change to thwart an acceptance. Instead, a material change becomes relevant under the UCC after the acceptance occurs, when determining whether the term is part of the contract.

Although there was some dispute about how and whether those counter offers were accepted, the court ultimately decided that the credible evidence showed that the parties intended to contract and that the counter offers were accepted when Allied did not object to the inclusion of the new terms and conditions. Because this case was governed by the CISG, the contract was formed at a different point than it would have been under the UCC.

Statute of Frauds

The CISG has no statute of frauds. Instead, under Article 11, contracts memorialized by a writing are not privileged over verbal contracts. However, a country can choose to enter a declaration pursuant to Article 96 of the CISG opting out of certain CISG Articles, including Article 11. This effectively reanimates the statute of frauds for that country's purposes. The more important question is, what happens when a dispute arises between parties from one country with an Article 96 declaration and one with none? This issue was explored in *Forestal Guarani S.A. v. Daros International, Inc.*, 613 F.3d 395 (3d Cir. 2010).

In this case, which involved a dispute between New Jersey buyer Daros International, Inc., and Argentinian seller Forestal

Guarani S.A, nearly 2 million dollars' worth of lumber products had been contracted for by verbal agreement. Although there was indisputably a contract, the contract was not memorialized by a writing. Daros paid the first $1.4 million, but refused to pay the balance, claiming that its liability for the additional sum could not be established in writing. The parties agreed that the CISG applied: the complication was that Argentina, but not the United States, has made an Article 96 declaration.

The court noted a difference in approach between courts, with the minority holding that a writing is required if either country has issued an Article 96 declaration, and the majority requiring a choice-of-law analysis to determine which country's law should apply – and thus whether a writing should be required. The minority approach would allow one country's approach to trump the other's.

The court found that the CISG did not "expressly settle" how to address a situation in which one country, but not both, had opted out of Article 11, and held that the "general principles" referenced by Article 7(2), which are normally used to fill gaps in the language of the convention, did not provide sufficient guidance to fill the gap. Thus, the court applied the rules of private international law as directed by Article 7(2). Lacking sufficient information in the record to complete a choice-of-law analysis, the court remanded the matter for the trial court to do so.

Parol Evidence

Article 8(3) has been described as a "command" to give "due consideration" to parol evidence in all circumstances. The "due consideration" language leaves leeway for courts to decide how much consideration to give, depending on the specific evidence in question.

Cedar Petrochemicals, Inc. v. Dongbu Hannong Chemical Co., Ltd., 2011 WL 4494602 (S.D.N.Y. 2011), involved the sale of phenol from Dongbu Hannong Chemical Co., Ltd., a South Korean seller, to Cedar Petrochemicals, Inc., a New York buyer, and ultimate resale to a third party, Erista. The parties' final agreement specified phenol meeting a color specification of 10 Hazen units maximum on the Platinum-Cobalt Scale. The phenol was conforming when it was inspected in the South Korean port where delivery took place. By the time the phenol reached Rotterdam, on its way to be resold to Erista, the color had degenerated to over 500 Hazen units.

The question was whether the phenol was conforming because it met the contractual specifications at the time of delivery, even though it later degraded. Cedar presented conflicting narratives – one in which it informed Dongbu of the intention to resell the phenol to Erista *before* the contract was concluded, and one in which it informed Dongbu of this intention *after* the contract was concluded. In each instance, Cedar argued that the fact that Erista required phenol of 10 Hazen units maximum became part of the parties' contract. Dongbu contends that the Erista specifications never became part of the parties' contract and that, because the phenol was conforming at delivery, there was no breach.

Dongbu alleged that the court could not consider extrinsic evidence regarding either the ordinary use of phenol or Cedar's intent to resell the phenol to Erista, because the contract contained a merger clause. In rejecting this argument insofar as the "ordinary use" evidence was concerned, the court held that, even if the merger clause were dispositive as to the kind of parol evidence mentioned in CISG Article 8, the evidence would still be admissible as a trade usage pursuant to CISG Article 9. In addition, insofar as Cedar's intent to resell the phenol was concerned, the court held as a preliminary matter that the mere existence of the merger clause would not be dispositive. Instead, "extrinsic evidence . . . should not be excluded, unless the parties actually intend the merger clause to have this effect." In addition, even were the merger clause found to signify that extrinsic evidence not be considered, thus effectively "re-animat[ing] the parol evidence rule," the parol-evidence rule would not block consideration of any post-contractual discussions. Since the evidence was in conflict as to whether Cedar informed Dongbu of its intentions before or after the contract was memorialized, this issue could not be decided at summary judgment.

Conclusion

The increased use of the CISG by U.S. courts represents a positive trend. Therefore, it has become important that U.S. attorneys be familiar with the CISG to properly represent their clients by either planning for the transaction to be governed by the CISG or by choosing to opt out of it, and doing so effectively.

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