New York Law Journal

New York Law Journal
The CISG: 35 Years After the Treaty's Adoption: What Lawyers Need to Know
By Kyle Kolb
February 28, 2023

Despite being one of the most widely adopted international treaties, covering approximately two-thirds of international trade contracts today, many feel the United Nations Convention on Contracts for the International Sale of Goods (the CISG), adopted by the United Nations in 1980, is not widely understood in the United States. This article highlights the importance of understanding when the CISG applies and why it matters.

Any lawyer involved in cross-border transactions or disputes should be aware of the United Nations Convention on Contracts for the International Sale of Goods (the CISG). The CISG (sometimes referred to as the Vienna Convention) is a treaty that governs international contracts for the sale of goods between parties doing business in those countries that have ratified the treaty. It applies by default to any such contracts, and has been adopted by 94 countries, including the U.S., most of Europe, and most of Asia (though notably not the U.K., India, and Taiwan). That makes it one of the most widely adopted international treaties, and it covers approximately two-thirds of international trade contracts today.

The CISG was developed by the United Nations Commission on International Trade Law (UNCITRAL), and was adopted by the United Nations in 1980. Despite that, many feel it is not widely understood in the United States, with one U.S. court noting there is "little case law addressing the CISG" in U.S. courts. *MCF Liquidation, LLC v. Int'l Suntrade, Inc.*, 2015 WL 12670169, at *3 (S.D. Iowa Nov. 16, 2015). This article highlights the importance of understanding when the CISG applies and why it matters.

The text of the CISG is divided into four Parts, which are useful to know when considering its purpose and scope. Part I sets forth when it applies and discusses the goals in adopting the CISG. These goals include having a regard for the CISG's international character, promoting good faith in international trade, and providing uniformity in its application across countries, forums, and types of disputes.

The breadth of the applicability of the CISG is limited in certain other specific respects through provisions in Part I. By its own terms, the treaty does not apply to contracts involving consumer sales, securities contracts, and services. In addition, parties can "opt out" of the CISG pursuant to Article 6. To effectively do so, the parties must "clearly manifest" the intent to opt out of the CISG before any contract is formed. *See Hanwha Corp. v. Cedar Petrochemicals, Inc.*, 760 F. Supp. 2d 426, 430 (S.D.N.Y. 2011) ("The intent to opt out of the CISG must be set forth in the contract clearly and unequivocally."); *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333, 337 (5th Cir. 2003).

Many contracting parties may assume that a choice of law provision stating, for example, that New York law governs the interpretation of the contract means that the parties have opted out of the CISG. Under the CISG's high "clearly manifest" standard for opting out, such a choice of law provision alone would not be sufficient. *Microgem Corp. v. Homecast Co.*, 2012 WL 1608709, at *3 (S.D.N.Y. Apr. 27, 2012) ("[T]he [New York] choice of law clause is, standing alone, insufficient to establish that the parties intended to opt-out of the CISG.").

Beyond that high standard, such a choice of law provision is also not sufficient as an opt out because the CISG was a self-implementing treaty that took effect in the U.S. in 1988, and it has since been a part of U.S. federal law. That means it preempts state law covering the same subject matter, so a selection of New York law also incorporates the CISG as a piece of law that applies in New York. In other words, a CISG opt out

must expressly exclude the treaty's application by expressly stating that it does not apply and "also state[] what law shall govern the contract." *BP Oil*, 332 F.3d at 337 ("[I]f the parties decide to exclude the Convention, it should be expressly excluded by language which states that it does not apply and also states what law shall govern the contract.").

Part II of the CISG sets forth the framework for when a contract is validly formed. This is particularly important for U.S. lawyers to be aware of and understand. In the U.S., the Uniform Commercial Code (the UCC) is typically relied upon to determine whether a contract for the sale of goods was formed. Although both the UCC and the CISG use an offer and acceptance framework to determine whether a contract was formed between negotiating parties, there are significant differences.

An offer is valid under the CISG if it is "sufficiently definite," as required by Article 14 in Part II, and to be sufficiently definite an offer must indicate the goods, quantity, and price. However, parties may determine what material terms must be agreed upon in order for an offer to be sufficiently definite. The UCC states that quantity is the only material term—and thus must be agreed upon, whereas Article 19(3) of the CISG contains a longer list of *per se* material terms: price, payment, quality and quantity of goods, delivery terms, and dispute resolution provisions.

Unlike the UCC, the CISG does not contain a statute of frauds requiring contracts be in writing, and parol evidence can be relied upon. Industry standards and prior course of dealing are relevant under both the UCC and the CISG. *See CoorsTek Korea Ltd. v. Loomis Products Co.*, 586 F. Supp. 3d 331, 335-36 (E.D. Pa. 2022); *New Excelsior, Inc. v. Amut Dolci Bielloni Srl*, 2022 WL 17095194, at *3 (W.D.N.C. Nov. 21, 2022).

Perhaps most notably, the CISG relies upon a "mirror image" concept for contract formation. Under this concept, the acceptance of an offer must be a "mirror image" of that offer. *Atl. Tool & Die Co. v. Klein Unformtechnik GmbH*, 2008 WL 11480273, at *7 (N.D. Ohio Feb. 20, 2008) ("The CISG incorporates the common law mirror image rule, where a response to an offer which does not mirror the offer's terms constitutes a rejection and counteroffer.").

Further, an acceptance must reflect "unqualified" assent, meaning that silence in response to an offer or a response reflecting only a partial acceptance are generally insufficient to be valid acceptances. This is very different from the "battle of the forms" concept under the UCC. This is also true with respect to modifying a contract under Article 29 of the CISG, which establishes that even modifications to a contract must be accepted unequivocally and the acceptance must mirror the proposed modification.

Part III of the CISG addresses the obligations placed upon buyers and sellers after a contract is validly formed. This includes the seller's obligations around delivery, how to address issues arising from non-conformity of the goods, and what remedies are available after a breach. One unique aspect of the remedies available is that the CISG embraces the concept of *nachfrist*, which establishes how parties can address the delivery of non-confirming goods. Further, unlike in many jurisdictions, specific performance is not disfavored under the CISG.

Part IV contains provisions addressing procedural issues such as how a country can ratify the treaty and when it takes effect.

One final note for U.S. practitioners: The noted lack of U.S. federal courts interpreting the CISG can lead to a lack of authorities to rely upon when litigating here. Only some authorities are in English, or otherwise readily available. Thus, relying on counsel with knowledge of the best treatises, authoritative interpretations of the CISG (including by the Advisory Council that has issued opinions on certain subject matters), and sources for case law is key.

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