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Practice Areas

Commercial Contracts - Domestic
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Good Company

Contracts for International Sale of Goods:

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Businesses which buy or sell goods internationally face unique legal issues in addition to financial, cultural and geographical issues. The contract between the buyer and seller will govern all those issues. Effective January 1, 1988, the United States ratified the United Nations Convention on Contracts for the International Sale of Goods (the "CISG", also commonly known as the Vienna Convention). Under the U.S. Constitution, the CISG became "supreme law of the land" superseding any conflicting state law, including the Uniform Commercial Code. What does that mean?

This article is a brief overview of the CISG issues to consider in international sales contracts. It is by no means comprehensive. Each business and transaction has its own unique factors to consider. Buyers and sellers should consult their own counsel for a full and complete analysis and understanding of their own situation.

What is the CISG?

The CISG applies to international contracts for the sale of goods between parties whose businesses are located in countries which have adopted the treaty. Currently, as of the issuance of this article, 74 countries have adopted the CISG. It is worth noting, however, that there are a few major trading countries which have not yet adopted the CISG, including Brazil, India, South Africa and the United Kingdom. The CISG permits adopting countries to "opt out" of several provisions (such as the permissibility of oral contracts discussed below) so it is important to verify not only that your trading partner's country is a signatory to the treaty, but also whether and to what extent it has made acceptable variations to the treaty terms as applied in its national law.

The CISG governs some key terms and conditions of contracts for international sales of goods, but not all terms and conditions. It covers formation of contracts, rights and obligations of sellers and rights and obligations of buyers. It does not cover liability of a seller for death or personal injury caused by the seller's goods. It also does not cover transfer of title, existence of agency relationships, forum selection, statutes of limitations, interest rate issues, currency of payment or even the validity of the contract itself.

The CISG does not apply to contracts for the sale of services. Where, as is common, the sale of goods includes the sale of services, a court determines which element constitutes the preponderance of the obligation to decide applicability. Generally the CISG does not apply to distributorship agreements unless they include definite terms on material issues like quantity to be sold, price of sales and delivery of goods.

What Does this Mean?

The CISG allows exporters and importers of adopting countries to avoid choice of law concerns, establishing default provisions on key issues. Recognizing that businesses often are unwilling to subject themselves to the laws of the other party's country for fear of differences between jurisdictional public policy, underdeveloped national commercial laws, and judicial system integrity, the CISG offers a neutral and uniform law to govern some common areas for contract disputes. However, even where applicable, it does not preempt a private contract: that is, it does not overrule contract terms and provisions agreed upon by the parties, which differ from the CISG rules. The CISG also leaves many issues open for determination by other law.

Businesses in adopting countries, like the U.S., may choose whatever law or terms they wish to incorporate in their contracts and may even decide to exclude or waive the application of the CISG entirely. Many U.S. businesses are unaware, though, that the CISG will be the governing law of the contract on covered issues unless specifically disclaimed. Common provisions such as "This contract shall be governed by Massachusetts law" – do not exclude application of the CISG to a dispute about the terms of a contract with an international customer or vendor. This can lead to unpleasant surprises. Businesses which are aware of the CISG often disclaim its application without analyzing whether that is the best thing to do in their situation.

We recommend that businesses make an informed decision on whether the CISG may be or should be the governing law in their standard contracts (or a specific contract), whether and how they wish to vary some of the CISG rules, and what law to designate as gap-filling law for the issues not regulated in the CISG. (In the absence of a designated gap-filling law, the gap-filling law will be determined by the rules of private international law, a subject which is not covered by this article.) To make such informed decisions, businesses needs to understand some of the key differences between their local sales law and CISG provisions.

UCC versus CISG

All fifty states in the United States have adopted the Uniform Commercial Code (UCC) as their state law on commercial contracts, with some minor variations. Thus, in both Massachusetts and New Hampshire, Article 2 of the UCC is the state law governing contracts for sales. The CISG is similar to the UCC in that both provide a means for uniformity in governing the contractual sale of goods. However the UCC differs from the CISG on several noteworthy provisions:

Writing Requirement – The CISG does not include a statute of frauds, and thus, does not require that a sales contract be reduced to writing. Consequently, unlike the UCC, the CISG allows for oral agreements unless the adopting party opts out of this provision. The U.S. did not opt out, so there is no default rule in the U.S. requiring that the contract be in writing. (Note that China, for example, opted out of this provision and under the default CISG rules, at this time, a contract with a Chinese vendor or customer must be in writing.)

Mirror Image Rule – Under the CISG rules, a reply with *nonmaterial* modifications constitutes acceptance of an offer (with the modifications) unless promptly objected to. Under the CISG and the UCC, a reply that purports to be an acceptance, but contains *material* modifications, is a rejection. Nonmaterial modifications under the UCC are also considered an acceptance, but the UCC provides the offeror more flexibility to expressly limit the acceptance to the terms of the original offer or argue the additional terms should be "proposals for additions."

Nonconforming Goods – Under the UCC, if goods or tender of delivery fail in any respect to conform to the contract, the buyer can accept or reject the entire shipment or part of the shipment. The buyer cannot partially accept the delivery, nor can the buyer make modifications to the price for goods which do not "perfectly" conform to the contract requirements. Under the CISG, a buyer can avoid the contract only if the seller's failure to perform amounts to a *fundamental breach* (relieving the seller of its obligation to make a "perfect tender") and there are stricter rules concerning the timeliness and detail contained in the notice of breach. On the other hand, the CISG permits the buyer to unilaterally reduce the price of nonconforming goods delivered.

Price and Contract Formation – Under the CISG, a contract will not be formed unless the price is specified or at

least provisions for its specification are included in the agreement. Under the UCC, a contract may exist despite the failure to state the price or manner in which the price is to be determined.

A Recent Glitch

The U.S. Constitution requires that U.S. courts enforce U.S. treaties, along with the Constitution and federal statutes. However, the courts have divided treaties into two categories for the purposes of enforcement. Some treaties are “self enforcing” upon ratification and therefore enforceable as U.S. law without further legislative action, while others require action by Congress to become enforceable by U.S. courts. The distinction can be very confusing and ambiguous.

Since the CISG was ratified by the United States, U.S. courts have been enforcing its provisions as U.S. law. A 2008 U.S. Supreme Court decision (dealing with a different treaty) has further confused the field of treaty enforcement by requiring that a “self enforcing” treaty “convey an intention” to be self enforcing (although it does not need express language to that effect). Whether this will change judicial enforcement of the CISG is not yet known.

What Should I Do?

It is easy to include a provision disclaiming applicability of the CISG in all international contracts for purchase or sale of goods. However, we suggest you consider maintaining the applicability of the CISG, particularly in contracts with trading partners whose legal systems are strikingly different from the U.S. system or where you may want to look to international bodies for contract enforcement. If you decide not to disclaim the CISG, we suggest you discuss with legal counsel modifications to its provisions, such as:

- Express adoption of the CISG to prevent confusion
- Express rejection of oral contracts
- Express rejection of oral modifications to contracts
- Prohibition of unilateral price reductions
- Provision that terms and conditions, if different from offer, constitute a counteroffer
- Disclaimers of warranties
- Conformity notice deadlines
- Specification of limitations period
- Specification of gap law, choice of forum, availability of attorneys’ fees in event of dispute
- Specification of currency and interest rates

Conclusion

It is always important for parties to carefully draft contracts in order to minimize the risk of unanticipated legal consequences and to ensure that acceptable rules will apply to all aspects of the contract. International laws, like the CISG, try to reduce risk and transactional costs associated with the drafting of international contracts by creating unified rules which bridge differing legal systems. These uniform rules facilitate trade across borders, but require specialized attention and in depth consideration at the time of the drafting for protection of specific business interests.

This article is intended to serve as a summary of the issues outlined herein. While it may include some general guidance, it is not intended as, nor is it a substitute for, legal advice. Your receipt of Good Company or any of its individual articles does not create an attorney-client relationship between you and



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