International Sales Law - Practical Issues Related To The Application Of

THE UN CONVENTION ON CONTRACTS FOR INTERNATIONAL SALES OF GOODS (“CISG”)

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Agenda

1. Why is the CISG important?
2. Selected Practical Issues Related to the Application (USA)
3. Comment on the application in the Czech Republic
4. Looking towards the future
Basic Facts

78 Signatories of the CISG (San Marino joined last week)

Major Absentees (ex. Brazil, UK, Portugal, Saudi Arabia, India)

The United States ratified the CISG in 1986

The Convention had entered in effect in the Czechoslovakia on 1 April 1991. The Czech Republic and Slovak Republic succeeded to the convention as of 1 January 1993
Structure Of The CISG

Part I  Sphere of Application and General Provisions (Art.1-13)

Part II Formation of the Contract (Art.14-24)

Part III Sales of Goods  (Art.25-88)

PART IV Final Provisions (Art.89-101)
Common Obligations

Include:

- Anticipatory Breach (Art.71-76)
- Entitlement to Interest (Art.78)
- Exemptions (Art.78-80):
- Effect of Avoidance (Art.81-84)
- Preservation of Goods (Art.85-88)
When Does It Not Apply To Sales?

- Stocks, shares, investment securities, negotiable instruments, money, ships, vessels, hovercraft, aircraft, and electricity (Article 2)
- Generally sales of goods for personal, family or household (Article 2)
- Sales of goods by Auction or Execution (Article 2)
- When substantial part of the contract is supply of labor or other services
# Drafting International Contracts

## Example of Clauses:

<table>
<thead>
<tr>
<th>Goods (Description)</th>
<th>Export/Import Documentation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Price</td>
<td>Subsistence of Obligations</td>
</tr>
<tr>
<td>Delivery conditions</td>
<td>Termination</td>
</tr>
<tr>
<td>Packaging</td>
<td>Force Majeure</td>
</tr>
<tr>
<td>Payment</td>
<td>Applicable law</td>
</tr>
<tr>
<td>Delivery</td>
<td>Resolution of Disputes</td>
</tr>
<tr>
<td>Contractual Responsibility</td>
<td></td>
</tr>
<tr>
<td>IP Rights</td>
<td>Language</td>
</tr>
<tr>
<td>Certifications of product</td>
<td></td>
</tr>
</tbody>
</table>
Why Is It Important To Choose Applicable Law?

- Promotes greater certainty in international trade

- Preserves party autonomy
  (ex. in the absence of selection the third party decides)

- Reduces litigation/arbitration duration and costs

- Reduces risk of the transaction
Most Fundamental Mistake

- Parties often do not realize the CISG applies to their contract
- It applies with to any contract for the sale of goods between parties whose principal places of business is in different CISG countries
- In order to exclude its application, the signatories need to expressly opt-out of its application
Examples Of Choice Of Law Clauses

- This contract shall be governed by the Convention on Contracts for the International Sales of Goods ("CISG")

- This agreement shall be governed by the law of Czech republic

- The contract between the parties is made, governed by, and shall be construed in accordance with the laws of the State of New York and the laws of United States of America applicable therein, which shall be deemed to be the proper law hereof
Client Issue (USA)

- **German** Seller and the U.S. Manufacturer

- Improper Termination of Contract; Restitution/Resale of goods in the possession of non-breaching party; Damages

- Contract with Dispute Settlement Clause ...

“Any dispute shall be settled by a South Carolina, United States Court.”
Any disputes shall be settled by a South Carolina, United States Court.

Does CISG apply?

Analysis
What commodity?
Is the post-sale service only supplementary?
Are the countries signatories of the CISG?
The CISG In The United States

- The U.S. Senate ratified the CISG in 1986

- It is applies to the transaction between parties from the signatory states unless specifically excluded (e.g. Assante Technologies, Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142 2001)

- Article 95 Reservation - Article 1(1)(b) restricts the role of private international law in determining the applicability of the CISG when both contracting parties do not have their relevant places of business in Contracting States
Withdrawal of reservation under Article 95?

"NYSBA International Section is looking at this issue with high interest because it has become known that the unavailability of Article 1(1)(b) causes technical issues and uncertainties that increases transactional costs."

Albert Bloomsbury
Chair, International Contract Committee
Another Client Example

- U.S. Manufacturer/ Seller and Japanese Buyer:

  “All disputes, controversies, or differences which may arise between parties, out in relation to or in connection with this contract, or the breach thereof, shall be finally settled by arbitration pursuant to the Japan-American Trade Arbitration Agreement by which each party hereto is bound.”

- Silence on Choice of Law
Drafting The Choice Of Law Clause

- Tendency to exclude the application of the CISG
- Comparative exercise to evaluate the CISG and the Uniform Commercial Code (UCC) which is applies to the sale of goods
- Which benefits your client’s situation?
CISG v. UCC: Six Key Differences

- **Statute of Frauds**
  - \textbf{Cf. CISG Art. 11 and UCC §§2-201(1), 202}
    - CISG allows for oral contracts and parol evidence
    - UCC requires writing for sale of goods above $500, generally no parol evidence

- **Price and Contract Formation**
  - \textbf{Cf. CISG Art. 14 and UCC §2-305}
    - Contract will fail for indefiniteness under CISG where no price or price mechanism
    - UCC will supply a reasonable price if none specified
Six Key Differences (continued)

- **Mailbox Rule**
  - *Cf. CISG Art. 18(2) and UCC §2-207*
    - CISG: acceptance recognized only when received
    - UCC: acceptance recognized when mailed or transmitted

- **Nonconforming Goods and Perfect Tender**
  - *Cf. CISG Art. 49(1), 64 and UCC §§2-601, 606(1)(a)*
    - Can only reject **fundamental** breaches under CISG; must be prompt to raise objection
      - CISG allows for unilateral price reduction as a remedy *(See Art. 50)*
    - UCC favors buyer, can reject for **any** reason (i.e., can require perfect tender); gives greater flexibility of time to inspect delivery
Six Key Differences (continued)

**Battle of the Forms**
- *Cf. CISG Art. 19(1) and UCC §2-207*
  - CISG is consistent with pre-UCC common law rule; modifications treated as rejection and counteroffer
  - As between merchants, new terms become part of contract under UCC, unless objected to promptly

**Commercial Impracticability**
- *Cf. CISG Art. 79 and UCC §2-615*
  - CISG will excuse both parties where seller alleges impracticability
  - UCC will excuse only the seller for impracticability
The CISG In The Czech Legal System

- The CISG is applicable between signatory states unless excluded (Law No.160/1991 Sb)
- Article 95 declaration, the Czech Republic is not to be bound by Article 1(1)(b)
Client Issue: Canadian Seller and The Czech Buyer

- Agricultural Commodities

- Article 11: BINDING ARBITRATION

“THE BUYER AND SELLER AGREE TO ATTEMPT TO RESOLVE ALL DISPUTES IN CONNECTION WITH THIS CONTRACT OR THE FULLFILMENT OF THIS CONTRACT THROUGH FRIENDLY DISCUSSION. IF THE DISPUTE CANNOT BE RESOLVED THROUGH FRIENDLY DISCUSSION, THE DISPUTE SHALL BE ARBITRATED IN LONDON, UNITED KINGDOM BY THE ICC WITH THE PREVAILING LAW TO THE "UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALES OF GOODS (1980)" AND THE LAWS OF CANADA.”
“Universe” of Choice of Law

Substantive Law

- CISG
- Law of 1st Party
- Law of 2nd party
- Unrelated Law

Making a Choice
How To Exclude CISG’s Application?

Effective opting out

- Choice of law clause must use specific language of opting out

- For example, “The parties hereby agree that the United Nations Convention on Contracts for the International Sale of Goods will not apply to this contract.”

- Both parties must exclude in their contracts
Examples:

- Supreme Court, 32 Odo 725/2004] (Carpet case) Arts. 8(3), 18, 35, 50

- Supreme Court, 32 Odo 824/2007] (Manufactured paint case), Arts 18, 55

- Supreme Court, 23 Cdo 4197/2009

- Supreme Court, 4 Tdo 460/2011
Looking Towards The Future

- Tremendous international success
- Real Alternative to stalling a transaction
- CISG strides towards uniformity of application and Predictability
- Article 95 developments to Watch
Examples - February 2012:

- Management of the potential global product recalls related to the claims that the products sold by my client infringe the IP rights.

- International contracts (Sales to the EU, Japan).

- Export – Import Advice on the US Customs laws, FDA and FTC laws and regulations, Consumer Product Safety Act related to the labeling and designation of the imported consumer products from Asia.

- Choice of Law Issues, Settlement Negotiation: Dispute pending in the Canadian court involving Czech & French parties and the insurance company based in the United States.

Contact through:
More Information on the CISG

CISG database: http://www.cisg.law.pace.edu/

UNCITRAL (Clout Search)
http://www.uncitral.org/clout/showSearchDocument.do

Thank you.