

## **A Comparison between the *United Nations Convention on Contracts for the International Sale of Goods* and the *Uniform Commercial Code***

by Peter J. Mazzacano

### *Introduction*

A half century ago in the United States, it became clear that modern commercial practices required a modern commercial law. Thus, in the early 1950s The American Law Institute, in a joint project with the National Conference of Commissioners on Uniform State Laws, drafted the first version of the *Uniform Commercial Code* ("UCC"). Considered to be one of the most important legislative measures in the history of US commerce, the UCC has been adopted by every state except Louisiana. It is a unified, comprehensive set of laws that encompasses all domestic businesses transactions, from the time raw materials are purchased until finished merchandise is sold to the consumer.

There have been many changes in society since the UCC first appeared in the US in 1952. International trade has increased substantially and the need for uniformity in the law governing, not only domestic transactions, but also international sales of goods, has become critical. After decades of effort, the United Nations Commission on International Trade Law ("UNCITRAL") promoted the adoption of the *U.N. Convention on Contracts for the International Sale of Goods* ("CISG"), which became the law in the US in 1988. [1] Today the CISG applies to sixty-three other nations as well, including most of the major trading nations. [2] What follows is an analysis of the CISG, in an effort to identify the major differences that exist between it and the UCC. This comparison will include a discussion of the applicability of the CISG, the formation of contracts, including offer and acceptance, examination and notice, fundamental breach, and the CISG's several provisions that discourage contractual breakdowns.

### *Applicability of the CISG*

Business people and lawyers involved in commerce with foreign countries must be aware of a critically important aspect of the CISG. Unless the parties specifically indicate that it does not apply, the CISG will be the governing law pertaining to all commercial contracts for the sale of goods between parties having their places of business in different countries which have adopted the CISG. For example, if the parties do not agree to the contrary, a commercial sales agreement between a business in Detroit, for example, and one in Toronto, (both the US and in Canada having adopted the CISG), will automatically be subject to its provisions. However, should the parties to a sales contract wish to be bound by some other law, such as the UCC or Ontario sales law, they may "opt out" of the CISG by specifying that the other law will apply, as *well as stating that the CISG will not apply*, in cases of dispute.

While the CISG does not apply to purely domestic transactions, its scope is quite significant. In the US, for international commercial transactions, it replaces a significant part of UCC Article 2, a keystone of the Code concerning contracts for the sale of goods. The UCC, however, applies to both consumer and commercial transactions, while the CISG specifically excludes consumer sales from its provisions. Also excluded from applicability of the CISG are goods purchased at an auction, securities, aircraft, ships, electricity, and service contracts.

### *Formation of Contracts*

The CISG is based partly on the common law tradition, but is also influenced by civil law and socialist law. This blend of laws often leads to principles in the CISG which differ significantly from the UCC. Under common law, for example, a valid contract is an agreement which contains the following elements: (i) it is entered into by mutual assent; (ii) it is supported by sufficient consideration; (iii) the parties have the legal capacity to enter into a contract; and (iv), there is no illegal purpose. Should any of these elements be missing, there is, generally, a void contract. The CISG, however, governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract. Unlike the UCC, it is

not directly concerned with the validity of the contract, where a person is induced into a contract by fraud, where a person does not have capacity to enter a contract, or where domestic law prohibits the sale of goods specified in the contract.

### *Offer and Acceptance*

Contracts can also be formed by an exchange of purchase orders that are accepted or confirmed through the exchange of forms containing conflicting small print terms. This happens quite frequently between parties in an international transaction. Under the CISG, an acceptance that contains modifications operates as a rejection of the offer, and constitutes a counter-offer, unless the modifications do not materially alter the terms of the offer and are not objectionable to the offeror. If the offeror does not object verbally without undue delay, then the contract terms become those of the offer, as modified by the acceptance. In other words, the small print terms of an acceptance or order confirmation are binding unless promptly objected to, or unless they constitute material changes to the offer, or purchase order, with respect to price, quality or dispute resolution. This is known as the "battle of the forms" under both common and civil law.

In this respect, the UCC is somewhat consistent with the CISG in that it attempts to uphold the intentions of the contracting parties where only minor differences exist in written agreements. This rule applies only to merchants contracting with each other and not between consumers and merchants. However, under the UCC, a purported acceptance of an offer that contains additional or different terms that do materially alter the terms of the offer would constitute a rejection of the offer and would be considered a counteroffer. No contract would, thus, exist unless the offeror, in return, accepted all of the terms of the counteroffer.

Other rules concerning contractual offers, and acceptance of such offers, differ under the CISG and the UCC. American law under the UCC, for example, recognizes that if a contract is made by mail, the time of acceptance of an offer is the instant the acceptance is mailed. This is known as the "mailbox" rule. The CISG takes the opposite position: an offer is accepted only at the moment it is received. The CISG also limits a party's ability to withdraw an irrevocable offer. Under the UCC, irrevocable offers can generally be revoked if they have not yet been accepted.

There is no contract until the offeree accepts an offer. Acceptance under the CISG may take the form of any statement or action on the part of the offeree that suggests an intention to be bound to the contract. However, under common law, the mode of acceptance must be one that is specified by the offeror, and if not specified, must be of a mode that is appropriate under the circumstances.

### *Examination and Notice*

Under the CISG, the buyer must examine the goods as soon as practicable and notify the seller of any lack of conformity within a reasonable time after a defect has been discovered, or at the latest, within two years of delivery. Failure to conduct this examination or make the complaint forfeits the buyer's right to reject the goods and, more significantly, the right to claim damages or a price reduction. The notice must be sufficient to specify the nature of the defects. The UCC also contains provisions that allow the buyer to refuse deliveries of nonconforming or defective goods. These remedies are known as "rejection" and "revocation of acceptance" while they are referred to as "avoidance of the contract" under the CISG. In both cases, these terms refer to a party's right to cancel a contract.

### *Fundamental Breach*

The CISG preserves the buyer's right to sue for breach of contract. However, the right to "avoid" or terminate the contract and reject the goods is quite limited. The buyer may reject goods and require delivery of substitute goods if the contract has been "fundamentally breached." The result must be of such a contractual detriment to the buyer as to substantially deprive the buyer of the goods that were expected under the contract. In general, however, the CISG allows the seller who fails to perform on time, or who delivers nonconforming goods, to correct the performance as long as it does not cause the buyer an unreasonable delay or

inconvenience. In addition, the buyer can also avoid the contract if, after notifying the seller to perform the contract within a reasonable time, the seller refuses to do so. This is a novel remedy in common law. Under the UCC, in contrast, a buyer has the right to terminate when the seller has breached a "condition" of the sale, no matter how minor.

The CISG also affords the seller protection against the potential financial failure of the buyer. The seller may, by sending appropriate notice, suspend delivery or prevent the release of goods if it becomes apparent that the buyer may not have the ability to pay for the merchandise. The seller must continue with delivery if the buyer then provides adequate assurance of payment. Under the UCC, the seller has no right to withhold delivery simply due to fear of non-payment, unless authorized to do so under the contract.

### *Other Differences*

The CISG is also substantially different from the UCC in a number of other ways. For example, while the UCC includes a statute of frauds, the CISG posits no such requirement. Under the CISG, contracts may be proven by any form, including use of the testimony of a witness or with parol evidence. Also, formation of a contract under the CISG does not require the presence of consideration, as is the case in common law jurisdictions. Finally, the CISG eliminates the "mirror image" rule of contract formation. Under the CISG, acceptances containing immaterial additional or alternate terms can still form a contract.

### *Conclusion*

The provisions in the CISG attempt to facilitate the successful completion of an exchange of international goods by discouraging contractual breakdowns, even when events go awry. In this respect, the CISG goes far beyond the legal architecture of the UCC. Many provisions encourage, or even require, communication and reasonable conduct between the parties to resolve problems before a total contractual breakdown. In this respect, the CISG promotes freedom of contract over the regulation of private international behavior. In doing so, it allows businesspersons to operate more efficiently in the growing international marketplace by replacing potentially litigious legal regimes, such as the UCC, with a set of laws that allows for self-regulation.

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[1] *United Nations Convention on Contracts for the International Sale of Goods* , April 11, 1980 , 1489 U.N.T.S. 3, 19 I.L.M. 671, hereinafter cited as the "CISG."

[2] As of December 15, 2004 , *United Nations Convention on Contracts for the International Sale of Goods* , April 11, 1980 , 1489 U.N.T.S. 3, 19 I.L.M. 671, hereinafter cited as the "CISG." The signatory states , in alphabetical order are: Argentina, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Colombia, Croatia, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Kyrgyzstan, Latvia, Lesotho, Lithuania, Luxembourg, Mauritania, Mexico, Mongolia, Netherlands, New Zealand, Norway, Peru, Poland, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saint Vincent & the Grenadines, Serbia & Montenegro, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Uganda, Ukraine, United States of America, Uruguay, Uzbekistan, Venezuela, and Zambia. Significant exceptions include Brazil , Indonesia , India , Japan , Malaysia , and the United Kingdom .