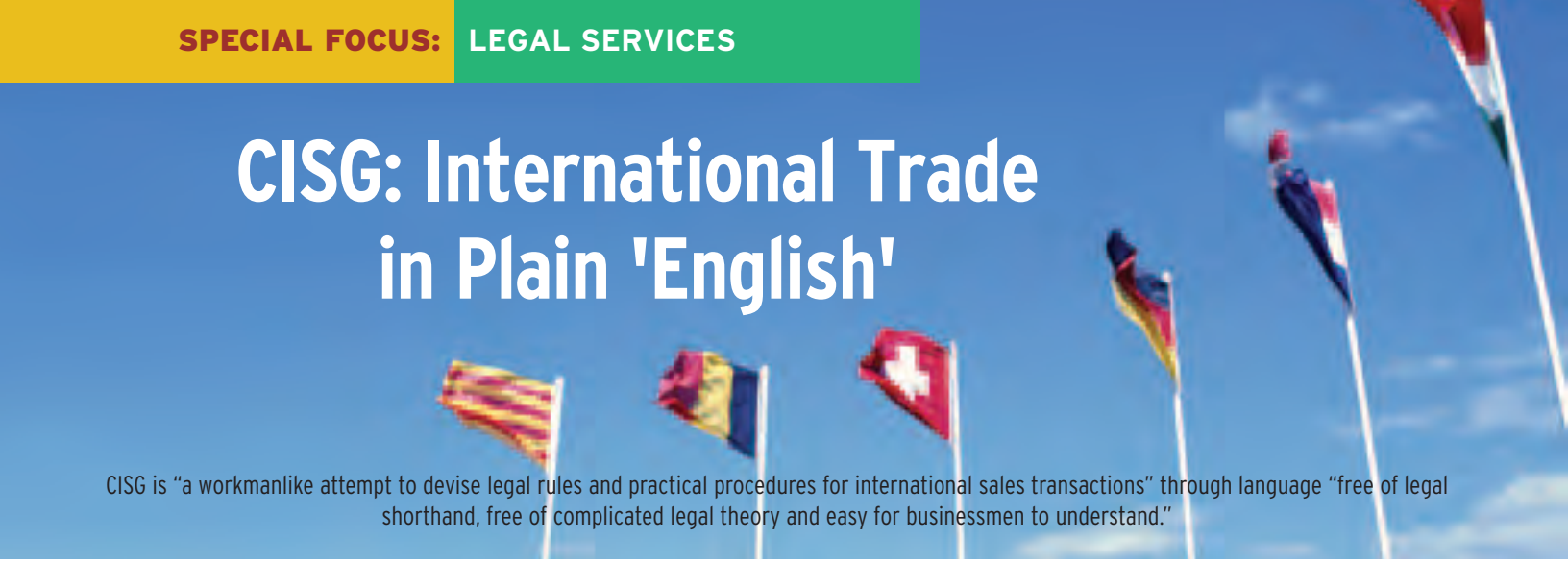
CISG: International Trade in Plain 'English'



CISG is "a workmanlike attempt to devise legal rules and practical procedures for international sales transactions" through language "free of legal shorthand, free of complicated legal theory and easy for businessmen to understand."

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On April 11, 1980, the United Nations created the Convention on Contracts for the International Sale of Goods (CISG), also referred to as the Vienna Convention, since the diplomatic conference which finalized the CISG took place in that city. The CISG was the result of work begun in 1968 by the United Nations Commission on International Trade Law (UNCITRAL), the core legal body of the United Nations in the field of international law.

UNCITRAL was created by the General Assembly of the United Nations in 1966 "to further the progressive harmonization and unification of the law of international trade by," among other mandates, "preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field."

According to its Preamble, the CISG was premised upon the beliefs "that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States," and "that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade."

In furtherance of its lofty goals, the CISG is "a workmanlike attempt to devise legal rules and practical procedures for international sales transactions" through language "free of legal shorthand, free of complicated legal theory and easy for businessmen to understand," since "it is, after all, businessmen who must understand the meaning of the provisions."

Adoption by the United States. Any nation seeking to be a "Contracting State," and, thus, bound by the terms of the CISG, must have the Convention ratified, accepted or approved by its government. In addition to the United States of America, which adopted the CISG effective Jan. 1, 1988, there are currently (as of March 2005) 65 States which have adopted the CISG, including Canada, all of the members of the European Union (other than the United Kingdom, Ireland, Malta and Portugal), Switzerland, the Russian Federation, Australia, The Peoples Republic of China, Republic of Korea and Israel, as well as several Latin American countries, including Mexico, Argentina and Colombia.

Application of the CISG. Pursuant to Article 1, the CISG only applies to contracts involving the sale of goods when the parties' places of business are in different States, and: when the States are Contracting States; or when the rules of private international law lead to the application of the law of a Contracting State.

Although the CISG does not specifically define what constitutes "contracts involving the sale of goods," such a contract has been defined as "a contract 'pursuant to which one party (the seller) is bound to deliver the goods and transfer the property in goods sold and the other party (the buyer) is obliged to pay the price and accept the goods.'" The CISG also does not define the term "goods," but that term has been defined to include "moveable and tangible" (as opposed to "intangible," e.g. intellectual property) goods regardless of whether they are new or used.

In addition, the CISG does not define "the concept of 'place of business' " as used in Article 1, other than indirectly in Article 10, which states that "if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract." However, it is clear that "[the] internationality requirement [of the CISG] is not met where the parties have their relevant place of business in the same country."

The CISG does not universally apply to all contracts involving the sale of goods between parties from different countries, since certain types of contracts are specifically excluded from the scope of the Convention. For example, the CISG does not apply to sales of "goods

bought for personal, family or household use" (i.e. consumer goods), or to "stocks, shares, investment securities, negotiable instruments or money." Also, the CISG does not apply to "contracts in which the preponderant part of the obligation of the party who furnishes the goods consists in the supply of labor or other services" (i.e. contracts for personal and professional services).

When ratifying the CISG, the United States specifically excluded application of subparagraph 1(b) of Article 1, as permitted by Article 95 of the Convention. However, when the parties to a covered contract for the sale of goods have their primary places of business in different countries that are Contracting States to the CISG, the Convention automatically governs "the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract," unless, pursuant to Article 6 of the CISG, all of the parties to the contract "exclude the application of" (i.e. "opt-out" of) the Convention based upon evidence of clear intent to do so. For U.S. companies, a failure to contractually exclude application of the CISG can have significant legal consequences in the event of a dispute between the parties.

U.C.C. v. CISG. Under American law, contracts for the sale of goods are governed by Article 2 and related provisions of the Uniform Commercial Code (U.C.C.), as adopted by the individual States. In a dispute over a contract for the sale of goods subject to American law, the U.C.C., as adopted and interpreted by the forum—state, or lex contractus, will provide the primary legal framework for interpretation and enforcement of contract terms.

Although both the CISG and Article 2 of the U.C.C. are intended to unify the law of commercial transactions involving the sale of goods, they differ in interpretation and application of fundamental elements of a contract, and various legal issues which arise in contractual disputes. These differences are primarily due to the distinctions in contract law between common law jurisdictions, such as the United States and the United Kingdom, and the Civil Law tradition of the continental European countries, which has its original basis in Roman law.

For example, under the U.C.C., a long-established legal doctrine known as the "Statute of Frauds" requires that a contract for the sale of goods for the price of $500 or more be in writing. Yet, Article 11 of the CISG specifically allows for a contract for the international sale of goods to be made verbally between the parties, and, in the event of a dispute, will permit a party to use "any means," including the oral testimony of witnesses, to prove the existence of the alleged verbal agreement.

Pursuant to another longstanding American legal doctrine known as the "Parol Evidence Rule," when the par-

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ties have executed a written contract, verbal (parol) statements or agreements allegedly made by the parties during the negotiations which lead to creation of the agreement cannot be used in a subsequent dispute to contradict any terms contained in the written contract. However, Article 8(3) of the CISG permits introduction of verbal statements allegedly made during such negotiations as evidence in a contract dispute governed by the Convention.

In addition, the offer or revocation of a proposed agreement under the CISG is effective upon its receipt by the offeree, as opposed to the U.C.C.'s "mailbox" rule, which makes an offer or revocation effective upon mailing. Also, unlike American law, the remedy of specific performance, where the breaching party is compelled by the court to complete performance in a contract, is emphasized in the CISG, as it is in the Civil Law countries.

Thus, if a U.S. company wants American law to apply to a contract for the international sale of goods governed by the CISG, it should negotiate and include in the prospective contract both an unambiguous opt-out provision pursuant to Article 6 and a choice-of-law provision which establishes that a particular American state's law, and more specifically, that Article 2 of the U.C.C. as interpreted by the courts of that state, will control in the event of a dispute between the parties.

If such provisions are not included in a contract otherwise governed by the CISG, case law interpreting the CISG from Contracting States throughout the world could ultimately control even a U.S. court's disposition of critical terms in the subject contract, and determine the substantive rights and obligations of the parties thereto, since U.S. courts have decided few cases involving application of the CISG relative to other Contracting States. ■

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