

In the days following the introduction of the new strategy, Kosovo's "economic diplomats" have completed a manufacturing contract with German auto maker BMW and are in discussions with multinational corporations from the US, China,

France, Switzerland and Sweden. They are now negotiating € 70,000,000 in potential business which did not exist a mere two months ago.

In the meanwhile, the international development industry should take note.

The days when report writing posing as foreign aid was sufficient are now gone. Emerging nations, like Kosovo, are demanding results. Just as businesses do.

They deserve nothing less. ■

## Convention on Contracts for the International Sale of Goods - An Example of Successful International Commercial Diplomacy

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### History of the CISG

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.<sup>i</sup> Initial work on a uniform law for the international sale of goods began in 1930 at the International Institute for the Unification of Private Law (UNIDROIT), an independent intergovernmental organization originally established by the League of Nations in 1926 and based in Rome.<sup>ii</sup> However, two initial attempts at unification of international sales law (the Hague Conventions of 1964) were roundly criticized and failed to achieve international acceptance and application.<sup>iii</sup>

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.<sup>iv</sup> 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."<sup>v</sup>

Sixty-two nations participated in the Vienna Conference, which took place at the Neue Hofburg. The Conference's "deliberations were for the most part free from political influence. The main concern behind the proposals and amendments was almost always to achieve the best objective solution and not simply to perpetuate the regulations of one country's domestic law."<sup>vi</sup>

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."<sup>vii</sup> 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."<sup>viii</sup>

### Ratification

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.<sup>ix</sup> There are currently (as of July 2010) 76 States which have adopted the CISG, including the United States and Canada, all of the members of the EU (other than the UK, Ireland, Malta and Portugal), Switzerland, the Russian Federation, Australia, the People's Republic of China, Japan, the Republic of South

Korea, Egypt, Iraq and Israel, as well as several Latin American and African countries, including Mexico, Argentina, Columbia, Liberia, Mauritania and Uganda.<sup>x</sup> It is anticipated that over 100 countries will ultimately become governed by the treaty.

### 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

- a) when the States are Contracting States; or
- b) when the rules of private international law lead to the application of the law of a Contracting State.<sup>xi</sup>

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'."<sup>xii</sup> 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<sup>xiii</sup> regardless of whether they are new or used.<sup>xiv</sup>

In addition, the CISG does not define "the concept of 'place of business'"<sup>xv</sup> 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."<sup>xvi</sup> 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.”<sup>xvii</sup>

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.<sup>xviii</sup> 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.”<sup>xix</sup> 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).<sup>xx</sup>

### Right to Limit Scope

When ratifying the CISG, a country can exclude application of subparagraph 1(b) of Article 1, as permitted by Article 95 of the Vienna Convention, thereby restricting 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.<sup>xxi</sup> Both China and the United States have made Article 95 declarations. 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.<sup>xxii</sup>

### Successful Diplomacy

It is now estimated that upwards of eighty per cent of all international sales transactions are potentially governed by the CISG.<sup>xxiii</sup> Also, the CISG has directly influenced the development of substantive international law, including the Principles of European Contract Law (PECL) and the UNIDROIT Principles of International Commercial Contracts (PICC).<sup>xxiv</sup> Thus, as noted by two international scholars: The CISG “is indeed the story of a worldwide success that everyone had hoped for but most probably did not expect.”<sup>xxv</sup> ■

### References:

- <sup>i</sup> See United Nations Convention On Contracts For The International Sale Of Goods (1980) (“CISG”), 52 Federal Register 6262, 6264-6280 (March 2, 1987); United States Code Annotated (“U.S.C.A.”), Title 15, Appendix (Supp. 1987).
- <sup>ii</sup> Secretariat of the United Nations Commission on International Trade Law, “Explanatory Note by the UNCITRAL Secretariat on the Convention on Contracts for the International Sale of Goods,” United Nations Document V.89-53886 (June 1989), *reprinted with permission of UNCITRAL at [www.cisg.law.pace.edu/cisg/text/p23.html](http://www.cisg.law.pace.edu/cisg/text/p23.html)*.
- <sup>iii</sup> Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview*, 27 AM. J. COMP. L. 225 (1979).
- <sup>iv</sup> See United Nations Convention on Contracts for the International Sale of Goods, Legislative History, Summary of UNCITRAL legislative history of the CISG located at <http://cisgw3.law.pace.edu/cisg/linkd.html>.
- <sup>v</sup> General Assembly resolution 2205 (XXI) of 17 December 1966, quoted in UNCITRAL, <http://www.uncitral.org/en-main.htm>. See also, UNCITRAL, General Information, at <http://www.uncitral.org/english/commiss/geninfo.htm>.
- <sup>vi</sup> Schlectriem, Peter, “Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods,” Manz (Vienna 1986).
- <sup>vii</sup> See CISG, *reprinted at <http://cisgw3.law.pace.edu/cisg/text/treaty.html>*.
- <sup>viii</sup> Sono, Kazuaki, *The Vienna Sales Convention: History and Perspective*, in International Sale of Goods: Dubrovnik Lectures, Sarcevic & Volken eds., Ch. 1, pp. 1 and 6, Oceana (1986), *reprinted with permission of Oceana Publications at <http://cisgw3.law.pace.edu/cisg/biblio/sono.html>*.
- <sup>ix</sup> CISG, Article 91, *reprinted at <http://cisgw3.law.pace.edu/cisg/text/treaty.html>*.
- <sup>x</sup> CISG, Table of Contracting States, at <http://cisgw3.law.pace.edu/cisg/countries/entries.html>.
- <sup>xi</sup> CISG, Article 1, *reprinted at <http://cisgw3.law.pace.edu/cisg/text/treaty.html>*.
- <sup>xii</sup> UNCITRAL, Digest of case law on the United Nations Convention on the International Sale of Goods (“Digest”), Article 1-A/CN.9/SER.C/DIGEST/CISG/1, p. 2, available at [http://www.uncitral.org/english/clout/digest\\_cisg\\_e.htm](http://www.uncitral.org/english/clout/digest_cisg_e.htm), quoting CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994]. Case Law on UNCITRAL Texts (CLOUT) “is a systematic collection and distribution mechanism for information on court decisions and arbitral awards relating to the Conventions and Model Laws that emanated from the work of” UNCITRAL, including the CISG, and is available at <http://www.uncitral.org/english/clout/index.html>.
- <sup>xiii</sup> Id., p. 4, quoting CLOUT case No. 328 [Kantonsgericht des Kantons Zug, Switzerland, 21 October 1999].
- <sup>xiv</sup> Id., citing CLOUT case No. 168 [Oberlandesgericht Koln, Germany, 21 March 1996].
- <sup>xv</sup> Id., p. 5
- <sup>xvi</sup> CISG, Article 10, *reprinted at <http://cisgw3.law.pace.edu/cisg/text/treaty.html>*.
- <sup>xvii</sup> Digest, Article 1-A/CN.9/SER.C/DIGEST/CISG/1, p. 5.
- <sup>xviii</sup> CISG, Articles 2 and 3, *reprinted at <http://cisgw3.law.pace.edu/cisg/text/treaty.html>*.
- <sup>xix</sup> CISG, Article 2, *reprinted at <http://cisgw3.law.pace.edu/cisg/text/treaty.html>*.
- <sup>xx</sup> CISG, Article 3(2), *reprinted at <http://cisgw3.law.pace.edu/cisg/text/treaty.html>*.
- <sup>xxi</sup> See, <http://cisgw3.law.pace.edu/cisg/countries/entries-United.html>.
- <sup>xxii</sup> CISG, Articles 4 and 6, *reprinted at <http://cisgw3.law.pace.edu/cisg/text/treaty.html>*.
- <sup>xxiii</sup> Schwenzer, Ingeborg and Hachem, Pascal, “The CISG: Successes and Pitfalls,” 57 American Journal of Comparative Law (Spring 2009), p. 457.
- <sup>xxiv</sup> See Lando, Ole “CISG and Its Followers; A Proposal to Adopt Some International Principles of Contract Law,” 53 Am. J. Comp. L. 378, 381 (2005).
- <sup>xxv</sup> Schwenzer and Hachem, *supra*.