



# Understanding the CISG and its Interrelationship with the UCC

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## Introduction

With increased globalization and advances in technology and logistics capabilities, international trade is commonplace among even local businesses. Defense counsel handling commercial claims are likely well versed in domestic sales law—mainly the Uniform Commercial Code. They should also familiarize themselves with the United Nations Convention on Contracts for the International Sale of Goods (CISG).<sup>1</sup> Knowing when it applies and how to interpret and argue its provisions can mean success or failure for clients. Pace Law School offers a comprehensive database of which every commercial litigator should be aware.<sup>2</sup>

The CISG is a treaty governing the international sale of goods. Its purpose is to promote certainty among contracting parties, simplify judicial understanding, and reduce disparity in the law by establishing a uniform sales law.<sup>3</sup> 83 countries, including the United States, are current members who have ratified, in whole or part, the CISG.<sup>4</sup> This Article provides a summary for commercial litigators of when the CISG applies, its key differences and similarities with domestic sales law, and how federal courts interpret and apply its provisions. The last section also includes a hypothetical fact pattern for an example argument applying the CISG in the absence of domestic law.

## When the CISG applies

The CISG governs contracts between parties from different member states.<sup>5</sup> For example, the CISG governs sales contracts between a Canadian seller

and a United States buyer.<sup>6</sup> Contracting parties, though, can opt out of the CISG. To do so, the parties must expressly contract to be bound by another source of law.<sup>7</sup> But if the contract is silent as to choice of law, the CISG applies by default.<sup>8</sup>

If the CISG governs a sales contract, whether by the parties' intention or their failure to opt out, it preempts state contract law.<sup>9</sup> The CISG's preemptive effect is why commercial litigators defending clients with an international presence should know key differences between the CISG and domestic law and how courts apply CISG Articles. This is also important for attorneys involved prior to contract formation. If they understand the law, they will be in a position to counsel their clients on the pros and cons of international and domestic sales law and advise them whether to opt out of the CISG if need be.

## Key Differences and Similarities Between the CISG and UCC

An exhaustive discussion of the differences between the CISG and the Uniform Commercial Code is beyond the scope of this Article. *The Guide to the International Sale of Goods Convention* provides a user-friendly table of side-by-side comparisons of all UCC and CISG provisions.<sup>10</sup> This Article, though, discusses some key differences and similarities regarding contract formation, damages, and liability. This information is important when deciding choice of law questions or defending CISG claims.

The most significant differences between the CISG and UCC are their formal requirements. CISG Article 11 makes clear that contracts need not be in writing to be enforceable. This is in contrast to UCC § 2-201, which requires contracts for the sale of goods in excess of \$500.00 to be in writing.<sup>11</sup> Practically speaking, parties to a CISG-governed contract can be bound by oral negotiations if the goods, quantity, and price are agreed upon, even if their dealings are not memorialized in a purchase order, invoice, or other written instrument.<sup>12</sup> Merchants and their counsel should understand that negotiations without documentation could have consequences under the CISG.

The CISG also does not exclude the use of *parol* evidence, in contrast to the UCC.<sup>13</sup> Federal courts tasked with interpreting a contract under the CISG are free to consider all relevant circumstances of the agreement—including non-contract documents, oral statements, negotiations, and conduct—to determine the parties' intent.<sup>14</sup>

The CISG and UCC provide for the same remedies in the event of breach. Aggrieved parties can cancel the contract, sue for performance, or collect damages, including consequential damages.<sup>15</sup> This similarity is due in part to federal courts utilizing UCC provisions to interpret the CISG's damages provision, Article 74. That Article allows for damages "as a consequence of the breach," but only lists lost profits as a recoverable damage. In *Delchi Carrier SpA v. Rotorex Corp.*, the Second Circuit interpreted Article 74 by looking to the UCC and case law defining "incidental damages."<sup>16</sup> The court ultimately allowed an aggrieved party to collect not only lost profits, but also other consequential damages, including shipping and customs expenses.<sup>17</sup>

Article 74 also contains the same limit on damages as the UCC and domestic contract law. That Article limits consequential damages to sums "not to exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract."<sup>18</sup> This is similar to domestic sales law, including Wisconsin's UCC, which allows

for consequential damages that are reasonably foreseeable at the time of contract formation.<sup>19</sup>

The difference between the CISG and UCC in terms of damages is a party's ability to collect money for injury to person or property arising from a breach. UCC § 402.715(2)(b) allows a buyer to collect consequential damages for "[i]njury to person or property proximately resulting from any breach of warranty."<sup>20</sup> And while the economic loss doctrine generally bars tort claims in these situations, Wisconsin courts allow a party to collect contract damages for personal injury or property damage resulting from a breach of warranty.<sup>21</sup> CISG Article 5, on the other hand, expressly forbids these damages, stating that the treaty "does not apply to the liability of the seller for death or personal injury caused by the goods to any person."

Differences in liability under the two laws depend on the specific claim. Liability for breach of contract is similar under both, even though the CISG contains language implying a stricter standard. Article 25 requires a breach to be "fundamental," in that it must "result[] in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract."<sup>22</sup> This implies a stricter standard than UCC § 2-601, which creates liability for breach of contract if the goods "fail in any respect to conform to the contract." However, CISG Article 35 requires goods to strictly conform to the contract. As a result, despite implying a stricter standard, a seller is still liable under the CISG for "any lack of nonconformity."

Liability for breach of express warranty is the same under both laws, with both providing that warranties only exist as provided for in the parties' agreement.<sup>23</sup> However, liability for breach of warranty for fitness for a particular purpose is much stricter under the CISG. UCC § 2-315 creates a warranty for fitness for a particular purpose only if the seller knows or "has reason to know" of any purpose for which the goods will be used. This requires the seller to have knowledge of the buyer's use for the goods at issue. But CISG Article 35(2) creates liability for a seller if the goods are not "fit for the purpose

for which goods of the same description would ordinarily be used.” A buyer could theoretically introduce evidence under the CISG showing how similar goods are ordinarily used in the industry to prove breach of warranty of fitness for a particular purpose, even if the seller never had knowledge of how the buyer would use the specific goods.

### **Applying the CISG in Domestic Courts**

Domestic law interpreting the CISG is limited, so it may be difficult to discover and cite even persuasive authority to bolster arguments favoring your client’s position. Litigants are obviously free to discuss international cases applying the convention. District courts, in fact, have analyzed and applied foreign cases when deciding contract disputes governed by the CISG.<sup>24</sup> The Pace Law School database includes a comprehensive collection of international legal decisions arranged by the articles they interpret.<sup>25</sup> It is a helpful tool when domestic case law on a specific CISG issue does not exist.

Even if foreign case law exists, federal courts may prefer utilizing domestic law when considering CISG issues previously undecided in domestic venues. Courts will therefore analyze comparable domestic law to assist in interpreting the CISG in the absence of existing authority.<sup>26</sup> This is due to CISG Article 7, which states that the ultimate purpose of the treaty is uniformity of laws.

The following example helps illustrate how an issue previously undecided by federal courts can be analyzed using the UCC to bolster a defense to a breach of contract or warranty claim.

A domestic buyer purchases raw goods from a German seller. The contract is governed by the CISG per Article 1(1) because the parties are from different member states and did not expressly opt out of the convention. The buyer receives the raw goods and processes them into a finished, labeled product, but later discovers a nonconformity. The buyer sues the seller in federal court. The seller has a good defense that the buyer violated CISG Articles 38 and 39 by failing to (1) examine the

goods in “as short a period as is practicable in the circumstances” and (2) provide timely notice of the alleged nonconformity.

Domestic courts, including the Seventh Circuit, have addressed the general issue of timely examination and notification under the CISG, so there is helpful law.<sup>27</sup> No domestic court, however, has decided the specific issue of whether examination and notice must occur before the goods are transformed or processed.

A quick search of the Pace Law School database confirms European courts, mainly Holland and Germany, have addressed this issue. These decisions are clear that a buyer must examine goods and notify the seller of nonconformity prior to processing, or even prior to sending the product out to a third party for processing.<sup>28</sup> In fact, foreign decisions usually disallow damages for nonconformity if the buyer fails to examine the goods within a matter of days or weeks.<sup>29</sup>

A U.S. District Court with jurisdiction over the dispute in the above hypothetical might consider the foreign law, but will probably be more interested in knowing how fellow district and circuit court judges have interpreted and applied the CISG. Defense counsel, understanding Article 7 and federal courts’ application of the same, should know and understand that applicable domestic law can be used to interpret and apply this previously undecided issue.

Defense counsel should therefore find and use the domestic sales law analogous to the uninterpreted CISG provisions. In most cases, that will be the Uniform Commercial Code. The UCC section analogous to the CISG Articles 38 and 39 requirements that inspection and notice occur within “as short a time as is practicable under the circumstances” is § 2-608(2). That section provides that “[r]evocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects.” Federal and

state courts use this section to disallow breach of contract or warranty actions if the seller processed or transformed the goods prior to revoking the contract.<sup>30</sup> These decisions conform to European case law interpreting CISG Articles 38 and 39.

Defense counsel handling a commercial claim governed by the UCC ultimately must research domestic law and, in its absence, find foreign law on point and argue their position by analogizing the CISG to similar UCC sections and cases.

## Conclusion

Defense counsel handling commercial claims must be aware of the CISG and its application. If it applies, it preempts domestic law, but domestic law can still play a role in defending the case. Ultimately, knowing the differences between the provisions of the CISG and UCC can lead to success in litigation.

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## References

- 1 A full text of the CISG is available at <http://www.cisg.law.pace.edu/cisg/text/treaty.html>.
- 2 <http://www.cisg.law.pace.edu>.
- 3 A.E. Butler, *A Practical Guide to the CISG: Negotiations through Litigation*, § 1.08, at 1-15 (2007); see CISG Art. 7.
- 4 A full list of member states is available at <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>.
- 5 CISG Art. 1(1).
- 6 *Ajax Tools Works, Inc. v. Can-Eng Mfg. Ltd.*, 2003 WL 223187 3 (N.D. Ill. 2003) (unpublished decision).
- 7 *Viva Vino Import Corp. v. Farnese Vini S.r.l.*, 2000 WL 1224903 (E.D. Pa. 2000) (unpublished decision) (holding that the CISG applies to contract claims when the underlying contract is for the sale of goods and the contract does not expressly opt out of CISG coverage).
- 8 Construction and Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG), 200 A.L.R. Fed. 541, at Section II.A.3 (2005).
- 9 *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.*, 201 F. Supp. 2d 236, 2002-1 Trade Cas.

(CCH) ¶73680 (S.D.N.Y. 2002), aff'd in part, rev'd in part, and remanded on other grounds, 386 F.3d 485, 2004-2 Trade Cas. (CCH) ¶74583 (2d Cir. 2004); see also *supra* note 8.

- 10 I Gd to Intl Sale of Goods Convention § 2.:1: Comparison table of CISG and UCC provisions.
- 11 Wis. Stat. § 402.201.
- 12 CISG Art. 14(1); *Filanto, S.p.A. v. Chilewich Intern. Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992).
- 13 UCC § 2-202.
- 14 *MCC-Marble Ceramic Center, Inc., v. Ceramica Nuova d'Agostino, S.p.A.*, 144 F.3d 1384, 1388-90 (11th Cir. 1998).
- 15 UCC §§ 402.711, 402.703; CISG Arts. 45-52, 61-65, 74-77.
- 16 *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1030 (2d Cir. 1995).
- 17 *Id.*
- 18 CISG Art. 74.
- 19 WIS JI-CIVIL 3710; *Peterson v. Cornerstone Property Development, LLC*, 2006 WI App 132, 294 Wis. 2d 800, 720 N.W.2d 716.
- 20 See Wis. Stat. § 402.715(2)(b).
- 21 *City of Stoughton v. Thomason Lumber Company*, 2004 WI App 6, 269 Wis. 2d 339, 675 N.W.2d 487.
- 22 CISG Art. 25; see also CISG Art. 35.
- 23 Compare CISG Art. 35(1) with UCC § 2-313.
- 24 *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 320 F. Supp. 2d 702 (N.D. Ill. 2004).
- 25 A full database of CISG case law is available at <http://www.cisg.law.pace.edu/cisg/text/digest-cases-toc.html>.
- 26 *Orbisphere Corp. v. United States*, 726 F. Supp. 1344 (Ct. Int. Trade 1989).
- 27 See *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F.3d 894 (7th Cir. 2005).
- 28 See 12 March 2001 Appellate Court Stuttgart (Apple juice concentrate case) (available at <http://cisgw3.law.pace.edu/cases/010312g1.html>); 15 December 1997 Appellate Court Hertogenbosch (Netherlands) (Fur Coat Case) (available at <http://cisgw3.law.pace.edu/cases/971215n1.html> & <http://www.unilex.info/case.cfm?pid=1&do=case&id=352&step=Abstract>); 5 March 1997 District Court Zwolle (Netherlands) (Fish Sticks Case) (available at <http://cisgw3.law.pace.edu/cases/970305n1.html> & <http://www.unilex.info/case.cfm?pid=1&do=case&id=332&step=Abstract>).
- 29 See No. 2 C 395/93, Amstsgericht Riedlingen, Germany ((Oct. 21, 1994), UNILEX 1994); No. 54 O 644/94, Landsgericht Landhut, Germany ((April 5, 1995), UNILEX 1995).
- 30 See *Intervale Steel Corp. v. Borg & Beck Div., Borg-Warner Corp.*, 578 F. Supp. 1081 (E.D. Mich. 1984); *Republic Corp. v. Procedyne Corp.*, 401 F. Supp. 1061 (S.D.N.Y. 1975); *Borges v. Magic Valley Foods, Inc.*, 616 P.2d 273 (Idaho 1980).