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THE CISG: TOOL OR TRAP FOR CONTRACTS FOR THE SALE OF GOODS

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It comes as a great surprise to many American businesses and lawyers that the United Nations Convention on the International Sale of Goods (CISG) – and not the UCC - may be the law applicable to a contract. Because the United States has signed and ratified the CISG, its provisions qualify as American federal law, thereby pre-empting state law. Unless specifically excluded, the CISG – and not the UCC – is applicable to any contract that falls within its scope.

Scope

By its terms, the CISG applies to any contract for the sale of goods between parties whose places of business are in different countries that are parties to the CISG (Party States). The "place of business" may not be immediately obvious; for example, a contract entered into between a US buyer and a distributor incorporated and having offices in the US for goods manufactured by the seller1 outside the US may fall within the scope of the CISG. The CISG will also apply even if the sale of goods is entirely domestic provided that the parties' places of business are not in the same country as would be the case of a contract between a US buyer and a foreign seller for goods to be delivered from the seller's US store or stockroom.

The contract must concern "predominantly" the sale of goods rather than services. A contract for the sale of goods to be manufactured will fall within the scope of the CISG unless the buyer supplies a "substantial" part of the materials necessary for the manufacture of the goods to be produced. The CISG does not apply to sales of stocks, shares, investment securities, negotiable instruments or money.

If the parties to a contract do not want the CISG to apply, the contract must contain an express exclusion. A simple clause, such as "this contract shall be governed by the law of the State of New York" will not suffice because, as explained above, the CISG is New York law. A specific reference such as the following is recommended:

- The parties hereby agree that the United Nations Convention on Contracts for the International Sale of Goods will not apply to this contract.
- The CISG does allow parties to opt out of some but not all of its provisions – as long as the specifics of the partial opt-out are clearly spelled out in the contract. The CISG also generally allows the parties to opt in for contracts for services or for a combination of services and goods.

Differences between the CISG and the UCC

There are some significant differences between the UCC (state law generally applicable to domestic contracts) and the CISG. When the CISG applies, the parties may make incorrect assumptions concerning the existence of a contract between them.

Missing Terms

For example, under the CISG, a contract may fail for indefiniteness if neither the price nor a specific method for determining a price is specified whereas under the UCC this would not be the case. Where a court is called upon to supply the price under the CISG, the court will determine the price generally charged at time of conclusion, whereas under the UCC, the standard is the reasonable price at the time of delivery. The CISG also provides that an otherwise revocable offer becomes irrevocable as soon as the offeree mails an acceptance, or if the offeree relies on it, thereby giving rise to a potential claim for full contractual damages rather than simply a reliance interest or other quasi-contractual or equitable remedy.

Revocability of Offers

Under the CISG, if the offer includes a date by which it may be accepted, the offer is deemed irrevocable until that date. Under the UCC, however, an offer is revocable until it is accepted unless the fairly stringent requirements for a "firm offer" – including separate written assurances- have been fulfilled.

Statute of Frauds

Unlike the UCC, the CISG does not require that the parties put their agreement in writing nor does it impose any other obligation as to form. Under the CISG, a contract may be proved by any means, including by witness testimony. Businesses are therefore advised to pay particular attention to the keeping of records during negotiations in order to adequately protect themselves against a claim that a contract was formed under the CISG in the absence of a writing or that the terms of a contract are other than, or in addition to, those that appear in a written contract or exchange of writings.

Battle of the Forms

If there is not a perfect match between the offer and the acceptance – a situation which arises regularly where the buyer and the seller each use their own standard forms – the terms of the contract will be different under the CISG and the UCC. The CISG uses the "mirror-image" rule: any difference between the terms of the offer and the acceptance will convert the acceptance into a counter-offer which, typically, will be accepted by performance of the contract. As a result, the "last shot" rule applies, i.e. it will be the terms of the acceptance/counteroffer that control whereas, under the UCC's "knock-out" rule, the terms of the contract would be only those to which both parties have agreed. Buyers may, then, have a strong interest in opting out of the CISG in order to avoid having all of the seller's terms (including those appearing in the boilerplate clauses) apply to the purchase and sale.

Conclusion

There has been significantly more litigation concerning the UCC than the CISG in the United States. The extensive case law interpreting the UCC may lead American businesses to feel that there is a greater degree of legal certainly under the UCC. In order to have the UCC apply, specific reference to, and exclusion of, the CISG must be make in all international contracts for the sale of goods.