

## OPTING OUT OF CISG: ALWAYS THE BEST APPROACH?

By Sam Wieczorek

### Failure to Meet Expectations

In the United States, use of the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) has not lived up to expectations. In fact, a 2008 survey of American attorneys likely to encounter CISG in their practices, found that the “overwhelming majority,” when negotiating or drafting an international sales contract, elect to opt out of CISG. Often that decision is made reflexively, triggered by factors such as client and attorney unfamiliarity with CISG, the additional time and cost to analyze CISG in light of the transaction at issue, and a shortage of U.S. court decisions interpreting CISG.<sup>1</sup> But is reflexively opting out of CISG always the best solution? This article will explore some of the factors that might be considered in order to make an informed, rather than a reflexive, decision on whether to embrace some or all of the provisions of CISG.

Many American practitioners incorrectly believe that CISG is “foreign” law or that it derogates state law.<sup>2</sup> This is wrong. CISG is American law. It is a self-executing treaty, and accordingly, no subsequent congressional action is required to make it effective. CISG, therefore, is substantive sales law in all 50 states.<sup>3</sup> Unless a party expressly opts out of CISG in a sales contract between parties who are located in different “Contracting States,” it will govern interpretation of the contract.<sup>4</sup> For this reason alone, it is important to have at least a basic knowledge of CISG. Indeed, at least one author has

estimated that 70 to 80% of all international transactions are potentially covered by CISG, in many cases unbeknownst to the parties.<sup>5</sup>

### Why American Lawyers Tend to Reject CISG

The following are some common reasons that American lawyers cite for their reluctance to use CISG. First, customary parol evidence rules don’t apply when interpreting contracts governed by CISG.<sup>6</sup> Under the standard American parol evidence rule, in general, a writing intended by the parties to be the final embodiment of their agreement cannot be varied by evidence of earlier agreements or negotiations. This means that in most cases, a party cannot introduce evidence of negotiations that preceded the signing of the agreement.<sup>7</sup> By contrast, under CISG, when determining a party’s intent, CISG instructs courts to consider all relevant circumstances including the parties’ negotiations, established practices between the parties, and any subsequent conduct of the parties. This ability to go outside the four corners of a contract likely gives many American practitioners concern that the unambiguous words of the contract might be varied by the parties’ pre- or post-signing conduct. However, such a rule could be helpful in cases where a client wishes to vary the terms of the agreement based on pre-signing negotiations.

Second, and closely aligned with the parol evidence rule, is that CISG requires courts to consider the parties’ subjective intent when interpreting a contract. If the court cannot discern the parties’ subjective intent, then it will look to what a reasonable person would believe.<sup>8</sup> As with the parol evidence rule, this ability to vary the terms of a contract, using the parties’ subjective intent--or not even the parties’ intent, but a *reasonable person’s* belief of what the parties’ intent would have been--causes hesitation for practitioners accustomed to relying on the four corners of a contract.

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<sup>1</sup> Philippopoulos, George V., *Awareness of the CISG Among American Attorneys*, 40 No. 3 Uniform Commercial Code L.J. ART 4 (Winter 2008).

<sup>2</sup> Fitzgerald, Peter L., *The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States*, 27 J.L. & Com. 1, 4 (Winter 2008). In response to his survey, one New York lawyer expressed concern with ceding “states’ rights” to a foreign body of law. Another lawyer did not want to cede U.S. law to an “international body.”

<sup>3</sup> Kokoruda, Christopher C., *The UN Convention on Contracts for the International Sale of Goods -- It’s Not Your Father’s Uniform Commercial Code*, 85-Jun Fla. B.J. 103 (June 2011).

<sup>4</sup> CISG art. 1 and art. 6.

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<sup>5</sup> Kokoruda, *supra*, at n.11 citing Ingeborg Schwenzer & Pascal Heschel, *The CISG -- Successes and Pitfalls*, 57 Amer. J. of Comparative Law 457, 457 (2009).

<sup>6</sup> CISG art. 8(3).

<sup>7</sup> *Black’s Law Dictionary* 1149 (8th ed. 2004)

<sup>8</sup> CISG art. 8(1), 8(2).

A third common objection to CISG is that it contains no statute of frauds. A contract need not be in writing to be completely enforceable under CISG.<sup>9</sup> However, analyzing this difference should lead one to ask, why this difference would matter. If a sales contract need not be in writing under CISG, and if CISG automatically applies in international sales contracts unless expressly opted out of, then any time there was an allegation of an oral contract, CISG would presumably govern. So, although this is a common objection to CISG among some lawyers, this difference probably shouldn't matter in most contexts.

A fourth common objection to CISG is that it does not contain a perfect tender rule. Under typical state UCC laws, if the goods purchased or their delivery fail to conform *exactly* to the contractual description, the buyer may reject the goods or accept only a portion of the goods and reject the rest.<sup>10</sup> By contrast, under CISG, the buyer may avoid the contract only in the case of "fundamental breach."<sup>11</sup> A breach is "fundamental" only if it substantially deprives the other party of what he or she expects under the contract.<sup>12</sup> Understandably, practitioners may prefer to avoid having to prove a "fundamental" breach in advising a client whether to void a contract.

### When Using CISG May Make Sense

The foregoing list of differences with American law is certainly important to be aware of. However, rather than reflexively opting out of CISG in all cases, American lawyers may serve their clients better by making an informed decision, on a case-by-case basis, when deciding whether or not to opt out of CISG. The following section summarizes some reasons why a practitioner might select CISG to govern an international sales contract.

First, the inclusion of CISG may put a client in a stronger negotiating position if his lawyer is aware of the tenets of CISG but other counsel is not. Such a knowledgeable practitioner would be able to select certain provisions of CISG that apply or don't apply. At a minimum, it would give the lawyer another set of laws to compare for favorability for his or her client, rather than just mechanically applying local sales law.

Another reason is that in the case of certain foreign laws, it may be preferable for the more uniform CISG to apply than another country's laws. For instance, some practitioners elect to have CISG govern in lieu of Chinese law because CISG is easier to understand, in their opinion, than Chinese law.<sup>13</sup>

Other practitioners elect to use CISG when a given contract contains mandatory arbitration. These practitioners feel that CISG is easier for international arbitrators to understand and apply.<sup>14</sup>

Another aspect to consider, if dealing with a corporate client who has a policy of opting out of CISG in all cases, is that it may be beneficial to reexamine this policy from time to time to make sure it still accomplishes the client's goals. This is particularly true as more and more case law is created interpreting CISG. Or if a client's form sales contracts contain a mandatory arbitration provision, it may make sense to use CISG instead of local law.

Consider also that opting out of CISG isn't an all-or-nothing proposition. CISG allows parties to opt out of certain provisions of CISG.<sup>15</sup> For instance, if you're not comfortable with waiving the statute of frauds, then you could opt out of Article 11. If you don't want to contend with evidence of course of dealing, then you could opt out of Article 9.

What if, after performing this analysis, you decide that you'd still like to opt out of CISG applicability for a transaction? It is not enough merely to rely on a choice-of-law provision that applies a particular state law. You must affirmatively opt out of CISG applicability.<sup>16</sup> However, opting out of CISG would not end the analysis. At this point, you must determine which jurisdiction's laws would apply. This may require you to become familiarized with another country's laws if the other party is in a stronger negotiating position.

### Conclusion

Although opting out of CISG may still be a lawyer's preferred practice, an understanding of its differences will, at least, give the lawyer another tool when negotiating an international contract. For this reason

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<sup>13</sup> Philippopoulos, *supra*.

<sup>14</sup> *Id.*

<sup>15</sup> CISG art. 6.

<sup>16</sup> CISG art. 6; *BP Oil Intern., Ltd. v. Empresa Estatal Petroleos*, 332 F.3d 333, 337 (5th Cir. 2003) ("Where parties seek to apply a signatory's domestic law in lieu of the CISG, they must affirmatively opt-out of the CISG.").

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<sup>9</sup> CISG art. 11 ("A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.")

<sup>10</sup> UCC § 2-601.

<sup>11</sup> CISG art. 49.

<sup>12</sup> CISG art. 25.

alone, it is worth reviewing CISG and understanding its main differences from the UCC. At a minimum, counsel needs to be aware that simply staying silent on CISG in

the context of an international sales contract does not equate to opting out of CISG. There must be a provision specifically opting out of all or some of CISG.

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