

**DRAFTING CONTRACTS UNDER THE CONVENTION
ON CONTRACTS FOR THE INTERNATIONAL SALE
OF GOODS**

I. INTRODUCTION 245
II. HISTORY AND SCOPE 245
III. CISG INTERPRETATION 249
IV. SUBSTANCE OF THE CONVENTION 252
V. CONCLUSION 262
IV. IN SUMMARY 262

I. INTRODUCTION

On January 1, 1988, the United Nations Convention on Contracts for the International Sale of Goods (CISG or Convention) became law in the United States.¹ The Convention is federal treaty law, superseding article 2 of the Uniform Commercial Code (UCC) where applicable. Any lawyer drafting or litigating an international sales contract must understand the CISG. The purpose of this note is to familiarize common law lawyers with the history and substance of the Convention. Part I of this note presents a brief overview of the history and scope of the CISG. Part II examines the inherent difficulties in interpreting an international treaty. Part III focuses on the Convention's substantive law. Finally, the conclusion presents a working outline to guide U.S. lawyers drafting contracts for the international sale of goods.

II. HISTORY AND SCOPE

The United Nations established the U.N. Commission on International Trade Law (UNCITRAL) to unify international trade law.² Relying on the previous work of the International Institute for the Unification of Private Law (UNIDROIT), UNCITRAL drafted the CISG.³ On June 16, 1978, UNCITRAL unanimously ratified a draft of the CISG.⁴ The United Nations held a conference in Vienna in April

1. CISG art. 99(1). The Convention enters into force one year following the tenth ratification.
2. 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/RS/2205 (XXI) (1966). The original members of UNCITRAL were: Argentina, Australia, Belgium, Brazil, Chile, Colombia, Congo, Czechoslovakia, Egypt, France, Ghana, Hungary, India, Iran, Italy, Japan, Kenya, Mexico, Nigeria, Norway, Romania, Soviet Union, Spain, Syria, Tanzania, Thailand, Tunisia, United Kingdom and United States.
3. UNIDROIT stands for the International Institute for the Unification of Private Law. See Honnold, *A Uniform Law for International Sales*, 107 U. PA. L. REV. 299 (1959).
4. 33 U.N. GAOR Sixth Comm. (62d Mtg.) at 6, U.N. Doc. A/CG/33/SR62 (1978).

of 1980 and ratified the final Act of the CISG⁵. The United States delegation signed this final Act on August 31, 1981.

President Reagan then sent the CISG to the Senate for confirmation on September 21, 1983.⁶ The Senate Committee on Foreign Relations held hearings on the CISG on April 4, 1984 and June 11, 1986,⁷ approving the Convention on September 9, 1986.⁸ Although the Treaty met with opposition on the floor, the Senate unanimously ratified the Convention on October 10, 1986. However, the opposition forced the Senate to include a reservation limiting its application. The United States deposited its instrument of ratification on December 11, 1986.⁹

The CISG became the first substantive international law convention adopted in the United States. United States' ratification, along with China's and Italy's, increased the number of contracting states above ten. According to CISG article 99, the Convention went into effect on January 1, 1988.¹⁰ Thus two bodies of sales law will exist in the United States, UCC article 2 and the CISG. While the UCC remains the domestic law,¹¹ the CISG automatically applies to all international sales of goods unless the contract provides otherwise.

Articles 1 through 6 define the scope of the Convention.¹² Articles 1 through 3 discuss which transactions the CISG covers; article 4 defines the issues covered; and articles 5 and 6 limit the Convention's scope of application.

Article 1 provides that:

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States;

5. The text of the Convention is located at United Nations Conference on Contracts for the International Sale of Goods, Official Records, U.N. Doc. A/Conf. 97/18 at 178-190 (1981). For additional reading on the Convention's background, see Secretariat, Historical Introduction, A/Conf. 97/5 (Mar. 14, 1979), reprinted in United Nations Conference on Contracts for the International Sale of Goods, Official Records (3-5) (1981).

6. S. Treaty Doc. No. 98-9, 98th Cong., 1st Sess. (1983).

7. *International Sale of Goods: Hearing on Treaty Doc. No. 98-9 Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. 39 (1984).

8. SENATE COMM. ON FOREIGN RELATIONS, EXEC. REP. 99-20, 99th Cong., 2d Sess. (1986).

9. S15773-74 (daily ed. Oct. 9, 1986) (role call vote No. 339 — Treaty Doc. No. 98-9).

10. CISG art. 99(1).

11. The major proponents of the CISG view the Convention as the first step towards worldwide unification of domestic sales law.

12. The CISG text is divided into a beginning overview and a commentary divided into four parts. Part I discusses the sphere of application and general provisions, covering articles 1-13. Part II, articles 14-24, discusses formation of the contract. In Part III, articles 25-88, the sale of goods transaction is examined. Part IV lists some final provisions in articles 89-101.

- (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.
- (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.
- (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.¹³

Article 95, however, permits member states to declare article 1(1)(b) non-binding.¹⁴ Article 1(1)(b) extends the CISG to sales transactions between member and non-member states, an extension that the United States opposed.¹⁵ Therefore, the CISG only applies where both parties have their place of business in different contracting states.

Whether the CISG applies to a transaction first depends on the parties' places of business. Articles 1(2) and 10 are the relevant provisions. If a party has more than one place of business, the permanent business site with the closest relationship to the contract determines nationality.¹⁶ Moreover, article 1, subparagraph 2, provides that if the place of business is indeterminable, such as when a party uses an agent, the sale is not international.¹⁷ When one party to the transaction is a foreign branch office or a venture with multiple offices, the contract should specify the closest place of business.

If the parties' places of business are in different contracting states, the next threshold issue is whether the CISG covers the nature of the transaction and the goods. Articles 2 and 3 limit the type of transactions governed by the CISG. Article 2 provides:

13. CISG art. 1.

14. CISG article 95 states that, "Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention."

15. *Supra* note 9.

16. CISG article 10 provides:

For the purposes of this Convention:

- (a) 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;
- (b) if a party does not have a place of business, reference is to be made to his habitual residence.

17. CISG art. 1(2).

The Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; (b) by auction; (c) on execution or otherwise by authority of law; (d) of stocks, shares, investment securities, negotiable instruments or money; (e) of ships, vessels, hovercraft or aircraft; (f) of electricity.¹⁸

Exclusion (a) is particularly important. The drafters excluded consumer transactions so that the CISG would not invade the province of consumer law, an area of particular concern within individual nations. Similarly, article 3 excludes service contracts from the CISG.¹⁹ If, however, the supply of goods is inextricably related to a service and the goods are a substantial part of the service, the transaction is a sale.

When the parties are from different member nations and the CISG covers the subject and type of sale, the final threshold issue is whether the CISG governs the specific issue. The CISG only covers issues of contract formation and of parties' rights and obligations.²⁰ It does not govern the validity of the contract or any of its provisions nor any provision's effect on third parties' property.²¹ Therefore, issues of fraud, incapacity, illegality or agency are outside the scope of the CISG.²² Article 5 removes product liability issues from the CISG because some countries require greater consumer protection.²³

18. CISG art. 2.

19. CISG article 3 states:

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

20. CISG article 4 provides:

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold.

21. J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (1982).

22. *Id.*

23. CISG art. 5.

The CISG defines which transactions and issues fall within its scope. Nonetheless, the parties ultimately determine what contract law controls. The Convention's dominant theme is that interpretation shall conform with the parties' intent as espoused in their contract.²⁴ The offeror remains the master of his offer and the offeree of his acceptance. Article 6 is perhaps the most important article of the Convention, permitting parties to opt out of the Convention, even if the sale otherwise falls within its jurisdiction.²⁵ If the parties opt out but don't provide a choice of law, the rules of private international law determines the applicable law.²⁶ The parties may alternatively remain under the CISG but vary the effect of certain provisions.²⁷

These articles are vital for the practicing attorney and for the Convention's future. They provide flexibility, which practitioners desire when adapting to a new system; they also provide greater control over the transaction. With the ability to mold the controlling law, parties will likely remain under the Convention's jurisdiction. In so doing, neither party has the competitive advantage of operating under its own domestic law, and the parties do not face difficult choice-of-law problems. Moreover, a party may find that the CISG is the most beneficial law to govern this contract. A study of the substance of the Convention enables attorneys to weigh the advantages and disadvantages of applying Convention law to their clients' contracts.

III. CISG INTERPRETATION

The Convention's purpose is to replace diverse domestic laws with a uniform body of law for international sales.²⁸ To achieve uniformity, Courts needs to consistently interpret the CISG. The effort to create uniform international law, however, has to overcome many obstacles. No central court exists, and domestic courts determine cases under

24. See *supra* note 21, at 74.

25. See CISG article 6 which provides: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."

26. See *supra* note 21.

27. CISG article 12 provides:

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

28. See *supra* note 21, at 3.

the CISG.²⁹ Demanding national court judges who are steeped in their own domestic legal traditions to decide cases under a different set of laws will be difficult. Judges will obviously tend to favor their own systems because their systems are more familiar.

Moreover, the Convention blends principles of common and civil law, of capitalist and socialist economies, and of industrialized and developing nations. This melding of diverse principles promotes compromise, and, consequently, some articles are subject to multiple interpretations. Because the Convention does not pour content into many provisions, these vague articles may receive divergent treatment from the various national courts.

Since the Convention was only recently enacted, no precedent exists.³⁰ For instance, the UCC's implied duty of good faith only developed meaning through case law. Forums with polarized legal views could never have developed such uniform interpretation. Such abstract terms may prove difficult to developing uniformly in an international setting, yet they are preferable to technical terms with entrenched meanings which vary from country to country.

Further, UNCITRAL prints official treaty texts in various languages. Because different translations often carry different connotations, judges may not face the same interpretative issue. However, the European Economic Community has demonstrated that law can develop uniformly despite language barriers.

The drafters realized the Convention has to operate under these conditions. Thus they provided guidelines in article 7 for national judges, which minimize the inherent difficulties in interpreting international law.³¹ If the text of the Convention does not settle an issue,

29. Even though the same substantive law will be applied in all the courts, a party may wish to select the forum. Practical concerns such as familiarity with court procedures, language, and customs will keep forum shopping a problem.

30. Even after decisions have been rendered, it may be very difficult to research the decisions. As of writing this article, no digest seems to be carrying CISG decisions from other countries. Since many member countries to the CISG are from civil law countries, where few decisions are reported, the problem is compounded.

31. CISG article 7 provides:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicability by virtue of the rules of private international law.

the courts must interpret the CISG consistently with its purpose of promoting uniform international law.³² Until case law develops, the national courts have to refer to the CISG's legislative history rather than rely on domestic law.³³

Since a major theme of the Convention is the contract's primacy, judges also need to rely heavily on contract terms and render flexible interpretations. The drafters, in article 9, codified this desire for flexible contract interpretation.³⁴ Article 9 binds the parties to practices which they establish between themselves, and to normal practices and usages the parties knew or should have known.³⁵ Furthermore, article 8 statutorily presumes that parties expect each other to observe the general use.

The CISG is a developing body of law requiring precedents to form its substance. This substance has to be uniform; otherwise the CISG will not fulfill its purpose. If national court judges interpret the CISG based on domestic law, a uniform law for international sales can never develop. If courts' interpretations remain broad and flexible, and contract terms primary, the CISG should blossom into a widely recognized code of law. Thus parties should be able to fashion transactions under a neutral international body of law,³⁶ with neither party suffering the competitive disadvantage of operating under a foreign legal system. Moreover, the parties can avoid difficult choice of law decisions.

32. CISG article 7(2).

33. The legislative history of the CISG is composed of a compilation of documents which were considered at the Diplomatic Conference held in Vienna in 1980. The conference convened to revise and adopt the Convention drafted by UNCITRAL. This includes the final draft of the Convention, comments by the Secretary-General, governments and international organizations, the texts of amendments submitted at the Conference, and summary records of plenary and committee meetings. However, no official comments to the final version exist. The most persuasive background material is to examine differences between the final version and the original UNCITRAL drafts.

34. CISG article 9 states:

- (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
- (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

35. If interpreting the contract in light of regularly observed usages would render the contract invalid under local law, then article 4 prohibits such an interpretation.

36. CISG arts. 6 & 12.

IV. SUBSTANCE OF THE CONVENTION

The major differences between civil and common law, as reflected in the CISG, are the offers' binding force without consideration, the dispatch versus receipt theory of acceptance, the Statute of Frauds,³⁷ and the remedy of specific performance.³⁸ The Convention diverges from the UCC primarily in these areas.³⁹

Under the CISG, an offer has to be definite and indicate the parties' intent to be bound.⁴⁰ Article 8(1) interprets this intent using a subjective standard.⁴¹ The offeror is bound if the other party knows of the intent to make an offer.⁴² When the parties do not reach an article 8(1) meeting of the minds, article 8(2) provides a reasonableness stand-

37. Article 12 is another example where compromise overcame consensus. Article 11 allows a contract to be formed or modified without any writing requirement. Article 12, however, provides an exception for common law nations who prefer a statute of frauds by opting out under Article 96. Therefore, Article 11 does not apply to any party who has his place of business in a state whose legislation requires contracts of sales to be concluded or evidenced in writing.

38. See *supra* note 21.

39. The major problem in comparing and contrasting the Convention to the UCC is that the UCC is annotated by a thorough body of case law. Because the CISG recently went into effect on January 1, 1988, a thorough body of case law has not developed yet. The CISG is drafted in a similar style to the UCC; it will require many decisions to put flesh on its bones. Therefore, to compare the UCC to the CISG, one must predict how these cases will develop.

40. CISG article 14 provides:

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

41. CISG article 8 states:

(1) For the purposes of this convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

42. CISG art. 8.

ard.⁴³ By so doing, article 8(3) permits courts to look outside the CISG to determine formation.⁴⁴ Courts may rely on established practices, usages and the parties' subsequent conduct.⁴⁵ The contract needs to include a statement declaring the parties' intent to be bound to avoid interpretation ambiguities.

The second requirement for an offer is definiteness.⁴⁶ A proposal is sufficiently definite if it indicates the goods and provides a measure for determining quantity and price, either expressly or implicitly.⁴⁷ The parties need not be specific in indicating the goods. For instance, requirement contracts sufficiently identify the goods.⁴⁸

However, a basis for determining quantity and price has to be specific.⁴⁹ In this regard, the CISG imposes a higher standard than the UCC. In article 2-305, the UCC provides that an offer is definite even though it does not contain price terms.⁵⁰ Article 55 of the Convention, however, is different. One commentator believes that article 55 is a price gap-filler.⁵¹ Article 55 states that parties can validly conclude a contract without fixing the price.⁵² This argument is persuasive, but it probably misconstrues the purpose of article 55.⁵³

Article 55 is in part III of the Convention, concerning buyer's obligations.⁵⁴ Article 55 assumes the parties validly concluded the contract. Therefore, it does not determine whether the parties validly formed their contract, but rather applies to contracts when the parties opt out through article 14.⁵⁵ Therefore, the contract needs to specifically identify price and quantity.

43. *Id.*

44. *Id.*

45. *Id.*

46. CISG art. 14.

47. *See supra* note 40.

48. *See supra* note 21, at 137.

49. *See supra* note 46.

50. U.C.C. § 2-305.

51. *See supra* note 48.

52. CISG article 55 states:

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

53. Note, *The United Nations Convention on Contracts for the International Sale of Goods: Contract Formation and the Battle of Forms*, 21 COL. J. TRANS. L. 529 (1983).

54. *See supra* note 12 and accompanying text.

55. *See supra* note 27 and accompanying text.

Common and civil law heritages differ on determining the revocation of an offer. The Convention adopts the common law approach in article 16.⁵⁶ The revocation of the offer has to reach the offeree before the offeree dispatches an acceptance.⁵⁷ The dispatch of acceptance terminates the offeror's right to revoke.⁵⁸ This is very similar to UCC § 2-205 and Restatement Second of Contracts section 87.⁵⁹ As a concession to civil law countries, however, parties can more readily make an offer irrevocable.⁶⁰

An offer is irrevocable under the CISG when it indicates that it is irrevocable or if the offeree reasonably and actually relies on the offer being irrevocable.⁶¹ The parties do not have to exchange consideration to make the offer irrevocable. The UCC similarly provides that merchants may make an offer irrevocable without consideration.⁶² Non-merchant offerors under the UCC, however, must receive consideration before their offer is irrevocable. The offeror should indicate the offer's revocability in the contract to prevent the offeror from becoming unknowingly bound.

The different approaches to revocability indicate a more central divergence between the UCC and the CISG. The CISG never mentions consideration.⁶³ Although theoretically different than common law, its practical importance is limited. In contracts for the sale of goods, consideration almost always exists in the mutual promises to pay and deliver. Moreover, since the Convention does not govern contract validity, article 4(a) may exclude consideration issues from the CISG.⁶⁴

The basis of a contract is agreement, and article 23 of the CISG states that the parties have reached agreement when the acceptance

56. CISG art. 16.

57. CISG art. 16 provides:

- (1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.
- (2) However, an offer cannot be revoked:
 - (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
 - (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

58. *Id.*

59. *See supra* note 53.

60. *See* CISG art. 16(2), *supra* note 57.

61. *See infra* note 65.

62. U.C.C. § 2-205.

63. Hauserman & Lansing, *A Comparison of the Uniform Commercial Code to UNCITRAL's Convention on Contracts for the International Sale of Goods*, 6 N.C. J. INT'L L. & COM. REG. 63, 68 (1980).

64. *See supra* note 20.

becomes effective.⁶⁵ Acceptance becomes effective when the offeree indicates assent to the offer.⁶⁶ The offeree may indicate assent by statement or conduct, but not by silence.⁶⁷ Acceptance by performance, such as dispatching the goods, is only effective when the offeror knows that the offeree may accept by performance.⁶⁸ In such circumstances, the offeree can bind the offeror without giving notice.⁶⁹

Parties to an international sale often form a contract by exchanging forms. When parties exchange identical forms, they form a contract. When the acceptance varies the offeror's terms, the CISG determines which terms control. Under UCC 2-207, the parties form a contract even though the acceptance contains different or additional terms.⁷⁰ The offeree's terms will not be in the contract if the offeree knew or should have known that the offeror would object.⁷¹ The Convention, on the other hand, provides that the acceptance is a rejection and a counter-offer when it contains material additions or modifications.⁷² Material modifications under article 19(3) are modifications of terms relating to price, quantity, quality, payment, and place and time of delivery.⁷³ This list is not exhaustive, and courts decide whether other

65. CISG art. 23.

66. CISG art. 18.

67. CISG article 18 provides:

(a) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

68. *Id.*

69. CISG art. 18(3).

70. U.C.C. § 2-207.

71. *Id.*

72. CISG art. 19.

73. CISG art. 19(3).

terms are material.⁷⁴ Therefore, the offeror should list in the offer all modifications he deems to be material. If the additions or modifications are not material, they become contract terms unless the offeror objects.⁷⁵ If the offeror objects, the acceptance is deemed a rejection and counter-offer.⁷⁶

Once the contract is formed, both parties expect performance. Part III of the Convention concerns the buyer's and seller's obligations under the contract.⁷⁷ It provides predictable and equitable rules determining when sellers may not recover the full purchase price and conversely, when buyers must pay for the goods and accept delivery. Parties should generally expect a greater degree of non-performance in international sales.⁷⁸ Infrastructures are not well developed in many foreign countries, and communication is more difficult. Similarly, longer transportation distances increase the likelihood of damage or spoilage.

When these difficulties lead to damages, risk-of-loss rules have to determine when the risk passes from the seller to the buyer. However, multi-stage transportation, containerization and other modern shipping techniques make it difficult to pinpoint when damage occurs.⁷⁹ The CISG generally places the risk of loss on the party with effective control of the goods when the damage occurs, depending on the transportation and delivery requirements.⁸⁰

The contract may require the buyer to pick the goods up at the seller's place of business. Under this provision, the risk passes to the buyer when he takes or was supposed to take the goods.⁸¹ Although

74. Subsection 3 of Article 19 states that additional terms such as price, payment, quantity, among other things, are material. The "among other things" language indicates that the list is not exhaustive.

75. *Infra* note 81.

76. *Id.*

77. CISG arts. 25-88.

78. Clausson, *Avoidance in Non-Payment Situations and Fundamental Breach Under the 1980 UN Convention on Contracts for the International Sale of Goods*, 6 N.Y.L. SCH. J. INT'L & COMP. L. 93 (1986).

79. Note, *After the Damage is Done: Risk of Loss Under the United Nations Convention on Contracts for the International Sale of Goods*, 22 COL. J. TRANSNAT'L L. 575 (1984).

80. CISG art. 36.

81. CISG article 69 provides:

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than

the Convention does not define when the buyer "takes" the goods, it will probably be an actual control issue.⁸²

When goods in transit are sold, the risk passes to the buyer at the contract's conclusion. If the seller knew the goods were damaged and did not disclose to the buyer, the seller bears the risk. In practice, this rule places the risk of loss during transit on the buyer, since difficulty arises in determining the goods' condition when the parties form the contract.⁸³ For instance, if parties conclude a contract for oil on board a tanker and the shipment delivered is non-conforming, the buyer must prove that the damage to the oil occurred before the contract concluded and that the seller should have known it.⁸⁴ When the party sells goods in transit, a sounder policy places the risk on the party most able to prevent the damage.⁸⁵ This is also the party best able to insure the goods against any loss.

Often contracts require the seller to transport the goods to the buyer. If the seller has to deliver the goods to a particular place, then the risk of loss does not shift to the buyer until the goods reach the destination.⁸⁶ If the contract does not specify a particular destination, the risk passes to the buyer when the seller delivers the goods to the first non-seller owned carrier.⁸⁷ Unless the buyer detects the damage, the buyer will realistically bear the entire risk.⁸⁸ The parties, especially the buyer, should clearly indicate in the contract when the risk passes.

a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

82. Note, *supra* note 79.

83. *Id.*

84. *Id.*

85. *Id.*

86. CISG art. 67.

87. CISG article 67 states:

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

88. CISG art. 36.

The seller is liable for any non-conformity which exists when the risk passes from the seller to the buyer, and the seller's liability continues for latent defects.⁸⁹ Likewise, article 35 requires the seller to deliver conforming goods.⁹⁰ Once the risk passes to the buyer, however, the buyer becomes obligated to pay.⁹¹ If the goods are damaged, the buyer is not discharged from the obligation to pay unless the seller caused the damage.⁹² This rule provides greater protection for buyers than UCC § 2-314(2)(c) because unlike the UCC, the CISG discharges the buyer's obligation to pay if the seller damages the goods.⁹³

Risk of loss rules govern damages not amounting to a breach.⁹⁴ When a breach occurs, the buyer may still want to perform the contract. In such a situation, the Convention provides for a reduction in price.⁹⁵ This remedy is popular under civil law but unavailable under common law. UCC 2-601 provides the buyer's only option: revoking the goods.⁹⁶

89. *Id.*

90. CISG article 35 provides:

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

91. CISG article 66 provides: "Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller."

92. *Id.*

93. *See* U.C.C. § 2-314(2)(c).

94. *See supra* notes 79-88 and accompanying text.

95. CISG art. 50.

96. *See* U.C.C. § 2-613.

Price reduction is a form of specific performance which reimburses the buyer for the difference in value between the contract goods and the delivered goods.⁹⁷ The delivered goods are non-conforming if they are not the right quality or quantity, or not fit for their intended purpose, or not properly packaged.⁹⁸ The buyer may seek a price reduction and also sue for damages for breach.

A breach occurs when the buyer is substantially deprived of his expectations. The buyer may require performance within a reasonable time and then cancel if the seller does not perform.⁹⁹ However, since breaches are more likely to occur initially due to the international nature of the transaction, the CISG allows more time to cure and perform.¹⁰⁰ Article 37 permits the seller to cure any defect until the delivery date, if the buyer does not incur unreasonable expenses or inconvenience.¹⁰¹ Moreover, article 48 provides the seller an opportunity to remedy any non-performance within a reasonable time after the delivery date.¹⁰²

However, if the seller substantially deprives the buyer of his expectations, the buyer may avoid the contract.¹⁰³ The buyer may also avoid or terminate the contract if the seller fundamentally breaches the contract. A fundamental breach is measured objectively and occurs

97. CISG article 46 provides:

(1) The buyer may require performance by the seller of his obligation unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 38 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

98. CISG art. 35.

99. CISG art. 47.

100. *See generally supra* note 21.

101. CISG article 37 provides:

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

102. CISG art. 48.

103. *See* CISG art. 49.

when the breach results in damages to the innocent party, the breach substantially deprives the innocent party of its contract expectations, and the result was foreseeable to a reasonable person.¹⁰⁴ A fundamental breach occurs when the seller fails to deliver the goods within the additional time period article 47 provides.¹⁰⁵ Otherwise, a fundamental breach is an open-ended concept which occurs when the seller does not perform its contract obligations.¹⁰⁶ In comparison, under the UCC, the buyer may revoke after acceptance if the non-conformity substantially impairs the goods' value.¹⁰⁷

After delivery, the buyer soon loses his right to avoid.¹⁰⁸ To protect the seller's interests, the buyer must declare avoidance within a reasonable time after the breach.¹⁰⁹ The declaration becomes effective when the buyer sends notice to the seller.¹¹⁰ Further, if the seller fears its breach will cause the buyer to avoid, the seller can request the buyer to disclose whether she will accept performance within an additional time period.¹¹¹ If the buyer does not respond, the seller may perform.¹¹² Therefore, the CISG provides the seller ample opportunities to cure any non-conformance. However, if after a reasonable amount of time the seller does not perform his contract obligations, a fundamental breach exists.

On the other side, the contract obligates the buyer to take delivery and pay.¹¹³ Eventually, a buyer's non-payment amounts to a fundamental breach. Payment is due when the seller tenders the goods.¹¹⁴ The seller may fix an additional reasonable period for the buyer to perform its obligations,¹¹⁵ but after the time expires the seller may avoid the contract.¹¹⁶ If prior to delivery the seller becomes aware that the buyer will clearly commit a fundamental breach, the seller may anticipatorily declare the contract avoided.¹¹⁷

104. CISG art. 25.

105. *Id.*

106. CISG art. 49.

107. U.C.C. § 2-608(1).

108. *See* CISG art. 49(2).

109. *Id.*

110. *Id.*

111. CISG art. 49.

112. *Id.*

113. CISG art. 53.

114. *See generally* CISG art. 58.

115. CISG art. 63.

116. CISG art. 64.

117. CISG art. 72.

Once a fundamental breach occurs, the CISG provides for damages.¹¹⁸ Civil law prefers specific performance over substitutional damages.¹¹⁹ In a planned economy, substitute markets for performance do not exist. The CISG, therefore, provides that the buyer can demand the seller to perform or deliver substitute goods.¹²⁰ Similarly, the seller may require the buyer to accept delivery and pay the contract price.¹²¹

Common law, however, generally opposes granting specific performance. Common law delegates lobbied through an exception allowing courts the option of not demanding specific performance if the court cannot require specific performance under its own law.¹²² Thus, specific performance ultimately depends on local law.

If the court does not grant specific performance, article 74 of the CISG limits substitutional damages to the amount of loss suffered because of the breach, including lost profits.¹²³ Including lost profits returns the promisee to his expectations. However, article 77 provides that parties must take reasonable measures to mitigate any losses including lost profits.¹²⁴ If such steps are not taken, the breaching party may reduce damages by the amount which the other party could have mitigated.¹²⁵

Two different damages measurements exist depending upon whether the innocent party engaged in a substitute transaction. When the seller resells the goods or the buyer purchases substitute goods, article 75 measures damages as the difference between the contract price and the price of the substitute transaction, including consequential damages.¹²⁶ If the aggrieved party does not enter a substitute transaction, damages are the difference between the contract price and the current price.¹²⁷ However, the aggrieved party recovers the lower amount where a substitute transaction would have mitigated

118. See generally CISG arts. 74-80.

119. *Id.*

120. CISG art. 46.

121. CISG art. 62.

122. See CISG art. 28.

123. CISG art. 74.

124. CISG art. 77.

125. *Id.*

126. CISG article 75 states:

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

127. CISG art. 76.

the damages. With either measurement, damages may not exceed the losses which the breaching party foresaw or should have foreseen at contract formation.¹²⁸ Moreover, the award may never include punitive damages or personal liability tort suits; thus local law is left to decide these issues.¹²⁹

V. CONCLUSION

The CISG is a promising alternative law for international sales. The Convention has not yet achieved a high level of predictability or sophistication because of lack of case law development. The Convention's enactment does not instantly create uniformity. Rather it provides a path to uniformity. Uniformity will ultimately depend on consistent interpretation in the national courts.

The Convention's immediate and far-reaching effects will also depend on its commercial acceptance. Although most practicing attorneys will applaud the effort to unify international sales law, it remains unanswered whether they will use Convention law or opt out. In blending the characteristics of different legal traditions, the Convention necessarily differs from UCC article 2 and American lawyers may feel uneasy using the Convention. Differences, such as the revocability of offers, the lack of a Statute of Frauds, and the remedy of specific performance exist. The Convention, however, provides transitional articles allowing attorneys to vary the effect of any provision. If choice of law clauses are stumbling blocks, the CISG becomes particularly appealing. Moreover, the attorney may conclude that the CISG laws benefit his client.

VI. IN SUMMARY

The following summary outlines key CISG provisions in a quick reference, question/answer format.

1. Does the CISG apply to your contract in general, and this issue specifically?

128. CISG article 74 provides:

Damages for breach of contract by one party consists of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

129. See CISG arts. 5 and 6.

If the CISG is to apply, the parties' places of business must be in different member states. The sale can be neither a consumer transaction nor a service contract. The CISG does not govern issues of product liability or contract validity, or the contract's effect on third parties' property.¹³⁰

2. How can an attorney research CISG issues?

Interpretation problems are the core problem in developing international sales law. No CISG central court exists. National court judges will tend to favor their national system in interpreting broad open-ended terms, even though the CISG demands interpretation consistent with its purpose. To complicate matters, since some member nations are from civil law countries, they may not report their rulings. The best approach is to rely on interpretations which foster the Convention's general principles of uniformity and contract primacy.¹³¹

3. How and when do the parties form the contract?

An offer under the CISG must be definite and indicate an intent to be bound. The offer is revocable until the offeree dispatches an acceptance, but an offer can be made irrevocable without consideration. In fact, the CISG never requires consideration. Acceptance occurs when the offeree indicates assent to the offer, by statement or conduct. If the acceptance varies material terms of the offer, it is a rejection and counter offer.¹³²

4. What remedies are available to the buyer if the seller does not perform?

The CISG generally places the risk of loss on the party with effective control of the goods at the time the damage occurs. If a non-conformity is the seller's responsibility, the buyer may demand a reduction in the purchase price and damages for breach. If the breach is fundamental, the buyer may avoid the contract. The CISG, however, grants the seller reasonable time after delivery to cure any defects.¹³³

5. What remedies are available to the seller if the buyer does not perform?

The contract obligates the buyer to take delivery and pay. If the buyer does not tender payment within a reasonable period after delivery, the seller may avoid the contract.¹³⁴

130. See *supra* notes 12-27 and accompanying text.

131. See *supra* notes 28-36 and accompanying text.

132. See *supra* notes 37-76 and accompanying text.

133. See *supra* notes 77-112 and accompanying text.

134. See *supra* notes 113-117 and accompanying text.

6. When a breach occurs, how does the Convention measure damages?

Damages are limited to the loss suffered, which includes consequential damages proximately caused, plus lost profits. The injured party may demand specific performance if that court's national law provides it. However, the injured party has to take reasonable measures to mitigate damages. In any event, the breaching party is only liable for foreseeable damages.¹³⁵

Michael Stonberg

135. *See supra* notes 118-128 and accompanying text.