

## International Art Transactions under CISG

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Art transactions are often conducted internationally, with dealers, collectors, and other art market participants buying and selling artwork in different countries around the world. Since 1988, the U.N. Convention on Contracts for the International Sale of Goods (“CISG”) has governed sales of goods, including art, between entities and individuals with places of business in the United States and those with places of business in other contracting states to CISG, including 77 other countries and most of the major trading nations of the world.<sup>1</sup> Due to the global nature of many art transactions, it is important to understand CISG and its implications for these transactions.

The three main areas of CISG encompass: (1) elements of a contract, (2) the seller’s obligations and the buyer’s remedies, and (3) the buyer’s obligations and the seller’s remedies. According to Article 1(3) of CISG, the nationality of the parties is not taken into consideration when determining whether CISG applies. Therefore, CISG could apply to contracts for the sale of goods between two Delaware corporations with relevant places of business in two different signatory nations. Even so, CISG does not apply to purely domestic transactions in the United States or to contracts that are primarily for labor or other services. In addition, Article 2 of CISG expressly provides that the treaty does not apply to, among other things, sales “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,” or sales “by auction.” While collectors and dealers may believe these exceptions to CISG will exempt most transactions involving the sale of artwork, this may not always be the case.

Although CISG generally would **not**, under the “personal use” exception, apply to a sale of an artwork by an art dealer from a signatory nation to a private collector in the United States (or any other signatory nation), at least one international opinion has suggested that the determination of whether the exception applies is less than straightforward. In a 1997 decision by the Austrian Supreme Court of

Justice, the court stated that a seller could dispute the application of the “personal use” exception by proffering evidence that he or she did not know or ought not to have known that the goods were purchased for personal use.<sup>2</sup> If the seller was able to make this showing, the “personal use” exception would not apply and the transaction would be governed by CISG. Therefore, if an art dealer can show that he or she did not know that the artwork was purchased for a collector’s personal use, CISG could apply to the contract.

Likewise, interpretation of the sales “by auction” exception may require additional analysis under certain circumstances. For example, in *Kunsthaus Math. Lempertz OHG v. Wilhemina van der Geld*, a Dutch seller consigned a painting to a German auctioneer. The painting was then purchased by a second German auctioneer and offered for auction. Prior to the auction, however, the attribution of the painting was disputed. When the initial German auctioneer brought suit against the Dutch seller, the court determined that CISG was applicable, notwithstanding the sales “by auction” exception of Article 2 of CISG, because the case “did not concern a sale on an auction but an order to sell by auction.”<sup>3</sup>

Two recent German decisions involving stolen property may also have implications for art transactions governed by CISG. According to Article 41 of CISG, a seller is required “to deliver goods which are free from any right or claim of a third party.” In a 2006 case, car dealers with places of business in different contracting states entered into a contract for the sale of a used car, which was subsequently identified as stolen and seized by authorities. Two months after the seizure, the buyer demanded repayment from the seller and initiated an action in Germany for termination of the contract and for damages. Applying CISG, the court held that the buyer of the stolen vehicle could not avoid the contract and seek damages. Though the buyer argued that the seller had breached the contract by failing to deliver conforming goods pursuant to Article 41, the court determined that the buyer lost the right to rely on



Article 41 because he had failed to provide timely notice to the seller of the third party’s claim as required under Article 43 of CISG. The court did not reach the issue of whether the buyer had acquired title to the car.<sup>4</sup>

But, in a 2008 case involving stolen property, the court did address this issue, suggesting that CISG governs only the formation of the contract and the rights and obligations arising from that contract, not the later effect the contract may have on the property. In that case, car dealers from signatory nations entered into a contract for a sale of a used car, which turned out to be stolen. In the litigation that followed, the court found that CISG applied to the formation of the contract, but did not apply to the effect of the transfer of the property (i.e., whether the good-faith purchaser had acquired good title), and that German law governed the issue of title. Applying German law, the court found that title to the stolen property was not transferred.<sup>5</sup>

### Significant Differences Between the UCC and CISG

In the United States, domestic sales of goods, including works of art, are generally governed by Article 2 of the Uniform Commercial Code (UCC). There are several important differences between the UCC and the CISG, a few of which are discussed below.

Significantly, CISG abandons the statute of frauds approach of the UCC, which generally requires contracts for the sale of goods valued at \$500 or more to be evidenced by a writing. Instead, according to Article 11 of CISG, “[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.” Therefore, CISG’s definition of a contract is broader than the UCC’s, and has serious implications regarding the parol evidence rule, which has not been incorporated into CISG. Once there is a final written agreement, the parol evidence rule generally prohibits the consideration of extrinsic materials or prior agreements that contradict the agreement. Under CISG, however, evidence of terms and conditions negotiated prior to execution of the written contract may be admissible. Furthermore, under Article 8(1) of CISG, the interpretation of contracts focuses on the subjective intent of the parties, contrary to the general principles of contract interpretation followed by many jurisdictions in the United States.

Also, CISG does not adhere to UCC rules with respect to disclaimers of implied warranties. Under § 2-316(2) of the UCC, a disclaimer of the warranty of

merchantability is effective if it mentions the word “merchantability” and is deemed to be “conspicuous” and in writing. A disclaimer of the warranty of fitness for a particular purpose pursuant to the UCC is effective if it is both conspicuous and in writing. Under Article 35(2) of CISG, the presumption is that the goods “are fit for the purpose for which goods of the same description would ordinarily be used” and are “fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract.” Since under CISG this presumption is neither a “warranty” nor “implied,” the commonly used language disclaiming warranties under the UCC may not be effective.

Like the UCC, a buyer may sue for breach of contract under Article 45 of CISG, but the right to terminate the contract and reject the goods is limited. The buyer may reject goods and require delivery of substitute





goods if the contract has been “fundamentally breached.” Under Article 46(2) of CISG, a breach is fundamental “if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract.” Under Article 48(1), however, CISG allows the seller who fails to perform on time, or who delivers nonconforming goods, to correct the performance as long as it does not cause the buyer an unreasonable delay or inconvenience. In addition, the buyer can also avoid the contract if, after demanding that the seller perform the contract within a reasonable time, the seller refuses to do so. See Article 49(b). In contrast, § 2-601 of the UCC provides that a buyer has the right to terminate when the seller has breached a “condition” of the sale, no matter how minor or insignificant.

Under § 2-204(3) of the UCC, a contract will not fail for indefiniteness even if one or more terms are not included, so long as “the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.” In contrast, Article 14 of CISG provides that a definite offer is one that “indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.” CISG does, however, provide some flexibility where the parties have a valid contract that does not fix a price. Under such circumstances, the parties are considered “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.”

Under both the UCC and CISG, a buyer must give notice of a breach within a reasonable time, but CISG provides an outer time limit on when notice must be given. Under Article 39(2), the buyer will lose “the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof within a period of two years from the date on which the goods were actually handed over to the buyer,” absent any contractual agreement to the contrary.

### Relevant Limitation Period

Statutes of limitation can be determinative in many art litigations, especially in the Holocaust-era and cultural property contexts. Thus, it is important to understand the applicable limitation period for transactions governed by CISG. This issue is covered by a separate treaty: the U.N. Convention on the Limitation Period in the International Sale of Goods (“LPISG”).<sup>6</sup> Of the 77 nations that are parties to CISG, 28 nations, including the United States, are also parties to LPISG. Like CISG, LPISG applies to contracts for the sale of goods between contracting parties whose places of business are in different signatory nations. LPISG sets the limitation period within which parties must assert claims regarding such contracts. LPISG does not apply to purely United States domestic transactions; sales of goods bought for personal, family, or household use; or sales by auctions. See LPISG, Article 4.

Under § 2-725 of the UCC, the statute of limitations for “an action for breach of any contract for sale” is four years from the date the cause of action accrues. The limitation period under Article 8 of LPISG is also four years. As provided in Article 10 of LPISG, a claim for breach of contract accrues “on the date on which such breach occurs.” Likewise, for claims arising from a defect or lack of conformity, accrual is “on the date on which the goods are actually handed over to, or their tender is refused by, the buyer.” But, for claims of fraud, accrual is “on the date on which the fraud was or reasonably could have been discovered.” Unlike LPISG, the UCC does not have a separate provision regarding the statute of limitations for fraud.

Pursuant to Articles 13 to 21 of LPISG, the limitation period may be tolled or extended under certain circumstances, including during bankruptcy or liquidation proceedings, by written acknowledgment of the obligation of the debtor to the creditor, or by payment of the interest or partial performance. Article 23, however, limits the total limitation period to 10 years from the date the claim accrued.



### Conclusion

There are many significant differences between the UCC and CISG that could have far-reaching consequences for art market participants based in the United States. Unless both parties to a transaction expressly agree that CISG and LPISG will not apply, CISG and LPISG will be the governing law for all commercial contracts for the sale of goods, including art, between parties having their places of business in different countries that have adopted CISG and LPISG. To avoid application of CISG and LPISG, both of which are treaties and therefore the law throughout the United States, a specific disclaimer must be included in the contract. Parties should consult with a legal professional regarding the language of such a disclaimer.

- 1 United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1983) (entered into force on Jan. 1, 1988), available at 15 U.S.C.A. App. at 49 (West Supp. 1996), 52 Fed. Reg. 6262-80, 7737 (1987).
- 2 [Parties not listed], Oberster Gerichtshof (Austria, 1997). Abstract available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=283&step=Abstract>.
- 3 *Kunsthaus Math. Lempertz OHG v. Wilhemina van der Geld*, Arrondissementsrechtbank Arnhem (Netherlands, 1997). Abstract available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=355&step=Abstract>.
- 4 [Parties not listed], Bundesgerichtshof (Germany, 2006). Abstract available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1098&step=Abstract>.
- 5 [Parties not listed], Oberlandesgericht München (Germany, 2008). Abstract available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1342&step=Abstract>.
- 6 United Nations Convention on the Limitation Period in the International Sale of Goods, June 14, 1974, and Protocol amending the Convention on the Limitation Period in the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. No. 103-10 (1993) (entered into force on Dec. 1, 1994), – [http://www.uncitral.org/pdf/english/texts/sales/limit/limit\\_conv\\_E\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/sales/limit/limit_conv_E_Ebook.pdf).

On June 27, 2012, Herrick, Feinstein’s client, the Royal Library of Sweden, announced that, with the assistance of the United States Government and Herrick, it recovered a 415-year-old atlas that had been stolen along with dozens of other rare volumes 10 years ago. Created by Cornelius van Wytfliet and known as the “Wytfliet Atlas,” the book had been part of the Royal Library collection for more than 300 years prior to its theft. The Wytfliet Atlas is the first printed atlas solely devoted to depicting maps of North America and South America. It contains 19 rare maps, including the first printed map of California. The successful return of the atlas is the result of an ongoing investigation and recovery effort launched by the Royal Library in cooperation with U.S. officials, and with Herrick’s assistance, in hopes of locating all of the stolen books. The story behind the atlas’s recovery was reported on the front page of the Arts section of the *New York Times*, and is available at [http://www.nytimes.com/2012/06/27/books/swedish-royal-library-recovers-stolen-1597-atlas-in-new-york.html?\\_r=1](http://www.nytimes.com/2012/06/27/books/swedish-royal-library-recovers-stolen-1597-atlas-in-new-york.html?_r=1). For a complete list of the stolen books, as well as images of several pages from the Wytfliet Atlas, please visit [www.wytflietatlas.com](http://www.wytflietatlas.com).

