

International Sale of Goods

- **CISG**
(United Nation's Convention On Contracts For the International Sale Of Goods)
- Website:
- <http://www.uncitral.org/>
- <http://cisgw3.law.pace.edu/>

- **A. United Nation's Convention On Contracts For the International Sale Of Goods (CISG)**
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A. CISG

- United Nations Convention on Contracts for the International Sale of Goods (1980)
- In effect since January 1, 1988
- Current (2021) state parties: 95, including
- Canada  Mexico 
- China  Russia 
- France  United States 
- Germany 

Other contracting states

- Albania
- Armenia
- Azerbaijan
- Brazil
- Cameroon
- Egypt
- Georgia
- Iraq
- South Korea
- Macedonia
- Moldova
- Mongolia
- Serbia
- Syria
- Turkey
- Ukraine

States never ratified CISG

- United Kingdom
- Ireland
- Malta
- South Africa
- Venezuela
- Indonesia
- India
- Pakistan
- Thailand
- Malaysia
- Bangladesh, etc.

B. Transactions Covered In CISG

- **1. CISG Applies to Contracts for the International Sale of Goods**
- a. The sale must be **international**.
- 1) The buyer and seller must have their **places of business in different states**.
- 2) Additionally, either:

- a) Both of the states must be **contracting parties** to the convention, or
- b) The rules of private international law must lead to the application of the law of a Contracting State -**choice of law clause**.
- 1] Note: CISG may apply even if the buyer's and seller's places of business are not in a contracting state.
- 2] Exception: The final provisions of the Convention allow a ratifying state, if it wishes, to declare that it will apply the CISG only when the buyer and seller are both from contracting states (eg. U.S.).

- **2. Opting In and Out**
- **a. The parties to a contract may exclude or modify the CISG's application by a "choice of law" clause.**
- **b. Whether parties can exclude a domestic law and adopt the CISG in its place depends on the rules of the state where the case is heard.**
- ***Case 10-1. Asante Technologies, Inc. v. PMC-Sierra, Inc.***

- **Case 10-1. ASANTE TECHNOLOGIES, INC. v. PMC-SIERRA, INC.**
- **United States District Court, Northern District of California, 2001**
- **FACTS: Asante, a Delaware corporation with its headquarters in California, ordered component parts for the switchers it manufactures from PMC-Sierra, a Delaware corporation with its headquarters in British Columbia. Four of the five orders were placed through Unique Tech., one of PMC-Sierra's authorized distributors in California, but the fifth was sent by fax directly to PMC-Sierra in BC. Asante sued PMC-Sierra in a California court. PMC-Sierra had the suit removed to a US federal court. Asante now challenges the removal (**laws of the U.S. incl. treaties**).**
- **Note: Both the US and Canada are parties to the CISG.**

- **ISSUES:**
- **(1) Does federal jurisdiction attach to claims governed by CISG?**
- **(2) Were the parties from two different CISG states?**

- **LAW**: (1) 28 USC §1331(a) gives US district courts jurisdiction over claims that arise under “treaties of the US.” (2) CISG applies when the parties are from two different CISG states. A distributor is ordinarily not an agent. (3) CISG is the law of both California and BC (because of federal supremacy rules). (4) The well-pleaded complaint rule says that a federal cause of action arises only when the plaintiff’s well-pleaded complaint raises issues of federal law. The introductory text of CISG says that it is meant to establish uniform rules to promote international trade.

- **EXPLANATION:** (1) CISG is a US treaty and therefore US district courts may hear complaints that arise under it. (2) Unique Tech. is a distributor and Asante is not bound by its actions. The transaction was thus between Asante and PMC-Sierra, both from different CISG contracting states, so the CISG applies. (3) The parties' choice of law clause adopted "California law." California law, however, includes the CISG; so the CISG is not excluded. (4) While Asante's complaint only refers to California law, the CISG is actually that law. This is because the CISG is a federal treaty that is meant to preempt all state laws. This can be seen from the CISG statement that it is meant to establish uniform international trade rules. To hold otherwise would defeat this purpose.
- **ORDER:** Asante's motion to remand the case to the state court is denied.

- **3. Sale Defined**
- **a. CISG does not directly define a sale.**
- **b. Implied definition: The delivery of the goods and their supporting documentation by the seller and the payment of their price by the buyer.**
- **[the US UCC's definition: the passing of title from the seller to the buyer for a price.]**

- **4. Goods Defined**
- **a. CISG does not directly define goods.**
- **1) The drafters assumed that the CISG only applies to goods that are movable and tangible. [This is in accord with international usage.]**
- **b. CISG lists the sales and goods that are excluded from its coverage.**
- **1) Sales transactions that are excluded:**
- **a) Goods bought for **personal, family or household** use.**
- **1] This exclusion does not apply unless the seller knew or ought to have known that the goods were bought for personal use or consumption (**computer case**).**

- b) **Auction** sales.
- c) Sales on **execution** or otherwise by authority of law.
- 2) **Goods** that are excluded:
 - a) Stocks, shares, investment securities, negotiable instruments or money.
 - b) Ships, vessels, hovercraft or aircraft.
 - c) Electricity.
- **Why be excluded?**
 - a) special laws both domestic and intl
 - b) diverse national laws
 - c) not considered as goods in some places

- **5. Mixed Sales**
- a. Mixed **sales and services contracts** are treated by the CISG as sales of goods, unless “the **preponderant part of the obligations**” of the seller “consists in the supply of labor or other services.”
 - 1) Preponderant probably means more than half.
 - 2) Whether this is measured by the cost, the sale price, or by some other basis is not clear.
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- b. Contracts for **goods to be manufactured** are sales (**future sales**) unless the buyer undertakes to supply a substantial part of the materials.
 - 1) Substantial is probably less than half.

C. Contractual Issues Excluded From The Coverage Of The Convention

- 1. The CISG Only Deals With:
 - a. The **formation** of contracts.
 - b. The **remedies** available to the buyer and seller.
- 2. The CISG Specifically Excludes Questions About:
 - a. The **legality** of the contract (e.g. contraband)
 - b. The **competency** of the parties
 - c. The **rights of third parties**
 - d. Liability for **death or personal injury**

- **3. Preemption:** When the CISG applies, domestic law is preempted.
- a. Reason: the CISG's basic function is to establish uniform rules for international sales contracts.
- b. **Scope** of the CISG.
- 1) CISG applies to contractual issues.
- a) CISG preempts the local law even if the local law gives a different name to a particular remedy.
- b) CISG preempts the local law even if the local law adds additional elements to a matter that is contractual in nature.

D. Interpreting the Convention

- 1. Interpreting the Provisions of the CISG
 - a. Apply the following basic principle: The goal of the CISG is the **creation of a uniform body** of international commercial sales law.
 - b. Consider the following sources, in the following order:
 - 1) The **Convention**.
 - 2) The **general principles** on which the Convention is based.
 - 3) The rules of **private international law**.

- **2. Interpreting the CISG**
- **a. To interpret the words of the CISG itself, consider:**
 - **1) The **international character** of the Convention.**
 - **2) The need to **promote uniformity** in the Convention's application.**
 - **3) The obligation to **observe good faith**.**
- **b. Rules of interpretation.**
 - **1) "**Plain meaning**": Look at the words of the Convention itself.**
 - **2) *Travaux préparatoires***: Look to the CISG's legislative history to determine its intent.
 - **3) **Precedent****: Use case law to interpret

- **3. General Principles**
- **a. The CISG calls for courts to look to the general principles on which the Convention is based when interpreting its provisions.**
- **1) The CISG gives no list of general principles.**
- **a) Suggested principles (that appear, in varying forms, throughout the convention):**
- **1] Each party must communicate information needed by the other party.**
- **2] Parties have the obligation to mitigate damages resulting from a breach.**
- **2) The CISG requires that general principles be derived only from rules given within the Convention itself.**

- **4. Rules of Private International Law**
- **a. Rules of **private international law** may be used only when:**
 - **1) The Convention itself **does not directly settle** a matter.**
 - **2) The matter **cannot be resolved** by the application of a general principle derived from the Convention itself.**
- **b. Private international law rules vary from country to country.**
 - **1) Some states have enacted private international law codes.**
 - **2) Some states rely on case law.**
- **c. The reason for allowing courts to turn to the rules of private international law: the Convention avoids the possibility that courts will adopt interpretive aids on an entirely ad hoc basis.**

E. Interpreting the Sales Contract

- 1. **Statements and Conduct** of the Parties
 - a. Varying approaches in domestic law.
 - 1) The **subjective approach**: Look at what was in the minds of the contracting parties at the time they made their contract (**rush sale case**).
 - a) Rule in many civil law countries.
 - 2) The **objective approach**: Look only at the circumstances as they would seem to an impartial bystander.
 - a) Rule in the common law countries.

- b. The CISG's approach:
 - 1) Use the **subjective intent** of a speaker.
 - a) Only do so if “the other party knew or could not have been unaware” of the speaker's intent.
 - 2) When a speaker's intent is not clear look at “**objective**” intent (**secondary**).
 - a) The party's statements and other conduct “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.”

- **2. Negotiations**
- **a. CISG Art. 8(3) directs courts interpreting contracts to give “due consideration ... to all relevant circumstances,” including:**
 - **1) The negotiations leading up to the contract.**
 - **2) The practices the parties have established between themselves.**
 - **3) The parties’ conduct after they agree to the contract.**

- b. Purpose of Art. 8(3): to do away with the technical rules that domestic courts sometimes use to interpret contracts.
- 1) Example: the **common law's parol evidence rule** (*written contract preempts all former agreements between parties*).
- 2) Caveat: The CISG allows parties to “derogate from or vary the effect of” any of the provisions of the Convention.
- a) If the parties include a contract term (often called an “**integration clause**”) directing a court to ignore all prior or contemporaneous agreements, the court will have to give effect to that term

- **Case 10-2. MCC-MARBLE CERAMIC, INC. v. CERAMICA NUOVA D'AGOSTINO SpA**
- **United States Eleventh Circuit Court of Appeals, 1998**
- **FACTS: MCC's president (who did not speak Italian) signed a pre-printed contract form in Italian in Italy with Ceramica for the purchase of tiles. The contract specified price, quality, quantity, delivery, and payment. On its reverse side it specified the procedure to follow if the tiles delivered by Ceramica were non-conforming. Under the signature line on the front was a statement in Italian that said that the buyer was aware of all of the conditions of the reverse of the form. Later, when Ceramica sent non-conforming tiles, MCC did not follow the procedure specified on the reverse of the signed form. Instead, it reduced the amount of its**

- **payment to Ceramica (as it is entitled to do under the UN CISG). Later yet, when Ceramica did not satisfy several orders, MCC sued for breach of contract. Ceramica responded that it was under no obligation to deliver the order because MCC had not fully paid for previous shipments and had not followed the procedure for complaining of non-conforming shipments. MCC sought to introduce evidence to show that the terms on the reverse of printed contract form were not intended to be part of the contract. The trial court rejected MCC's offered evidence and relied solely on the terms of the contract. It granted Ceramica's motion for summary judgment.**

- **ISSUES:**
- **(1) Must the subjective intent of the parties be considered in determining the term of a CISG contract?**
- **(2) Does the *parol evidence* rule apply to CISG contracts?**
- **LAW: (1) CISG Art. 8(1) requires courts to consider “a party’s subjective intent as long as the other party to the contract was aware of that intent.” (2) CISG Art. 8(3) directs courts to give “due consideration to ... negotiations.”**

- **EXPLANATION:** (1) MCC's offered evidence attempted to show that the seller did not intend to be bound by the terms on the reverse of the form and that the buyer knew of this. This is exactly the evidence that Art. 8(1) requires a court to consider. (2) Art. 8(3) is a clear rejection of the parol evidence rule.
- **ORDER:** Summary judgment is reversed and the case is remanded.

- **3. Practices and Usages**
- a. CISG states that parties are bound by “any practices which they have established between themselves” including:
 - 1) Usages the **parties agree** to.
 - 2) Usages the **parties knew or ought to have known** and which, in international trade, are **widely known** to, and **regularly observed** by, parties of contracts of the type involved in the particular trade concerned.

- **4. Form**
- **a. Most delegates at the CISG Convention felt that a writing requirement is inconsistent with modern commercial practice.**
 - **1) The Soviet delegates insisted that a writing requirement is important for protecting their country's longtime pattern of making foreign trade contracts.**
- **b. The CISG compromise.**
 - **1) Art.11: No writing is required.**
 - **2) Art.96: Unless the contracting state of one of the parties to a contract made a declaration at the time of ratification requiring that the contract be in writing.**

F. Formation Of the Contract

- **1. A Contract is Formed when an offer to buy or sell a good is accepted**



- **2. The Offer**
- a. Defined: A proposal **addressed to specific persons** indicating an **intention** by the offeror to be bound to the sale or purchase of particular goods for a price.
- 1) For a communication to be an offer:
 - a) The offeror must communicate an intention to be bound.
 - b) The proposal must be definite.
- 1] A proposal is sufficiently definite if it:
 - a] **Describes the goods**, and
 - b] States or provides a means for determining the **quantity**.

- 2] A proposal should also state or provide a means for determining the **price**.
- a] Otherwise the price will be: The price **generally charged at the time of the contract** for like goods sold under comparable circumstances in the trade concerned.
- c) The proposal must be addressed to one or more specific persons.
- 1] Proposals made to the public are **invitations to negotiate**, unless the contrary is clearly indicated.

- b. Effectiveness of an Offer.
- 1) An offer becomes effective only **after it reaches the offeree.**
- a) Offers may be withdrawn any time before they reach the offeree.
- 1] Offers that promise that they are **irrevocable** can be withdrawn prior to their reaching the offeree.
- 2) **Revocation.**
- a) Offers that do not state that they are irrevocable.
- 1] Can be revoked anytime **before the offeree dispatches an acceptance.** a] Similar to the English common law's "post box" rule.
- b) Firm Offers.

- **1] The CISG rule: An offeror's promise to keep an offer open for a fixed period is enforceable.**
- **a] Requirements:**
- **(1) The offeror must expressly state the offer is irrevocable, or**
- **(2) The offeror's conduct must imply that the offer is firm.**
- **b] The promise of irrevocability:**
- **(1) Does not have to be signed.**
- **(2) Does not have to be in writing.**
- **c] There is no time limitation.**

- **3. The Acceptance**
- **a. A contract comes into existence at the point in time when an offer is accepted.**
- **b. Acceptance is a statement or conduct by the offeree indicating **assent** that is communicated to the offeror.**
- **1) The form or mode in which an offeree must express assent: **Any form or mode is allowed** (see: common law “same form rule”)**
- **2) The offeree **must communicate** his assent to the offeror.**

- **c. Silence.**
- 1) Generally, silence or inactivity **does not**, in and of itself, **constitute acceptance**.
- 2) Exception: Where a party voluntarily assumes the duty to respond, silence will constitute acceptance.
- **d. Time of Acceptance: Acceptance must be received by the offeror within the time period specified in the offer.**
- 1) If no time period is given: Acceptance must be received within a “reasonable” time.
- a) If the offer is oral, acceptance must be made immediately unless the circumstances indicate otherwise.

- **Case 10-3. UNITED TECHNOLOGIES INTERNATIONAL, INC. v. MAGYAR LÉGI KÖZLEKEDÉSI VÁLLALAT**
- **Hungary, Metropolitan Court of Budapest, 1992**
- **FACTS: Pratt and Whitney (P&W) offered to sell Malév Hungarian Airlines (MHA) either two or three PW4000 series engines for installation in a Boeing aircraft or two or three PW4100 series engines for installation in an Airbus aircraft. The offer stated different prices for the different series engines. It also said that it was subject to Hungarian and US government approval. One week later, MHA sent a letter accepting the offer for the PW4000 series engines. When MHA stepped back from going forward with the purchase, P&W sued to obtain a declaratory judgment that a contract existed.**

- **ISSUES:** (1) Was there an offer? (2) Was there an acceptance? (3) Was the requirement of governmental approval meant to be a condition precedent or condition subsequent?
- **LAW:** CISG Art. 14(1) provides that “a proposal 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.” And “a proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provisions for determining the quantity and the price.” Art. 18(1) defines an acceptance as “a statement ... indicating assent to an offer.” Art. 32: “a contract is concluded at the moment when an acceptance of an offer becomes effective,”

- **EXPLANATION:** (1) The offer **described the goods**, and the fact the buyer had the right to choose between the listed engines does not affect the description of the engines. The offer **stated a quantity**, even though the buyer could choose between two or three engines. The offer **stated a price** and the offer stated **a time for delivery**. Thus, there was a valid offer. (2) MHA's letter unambiguously stated its acceptance. A contract was therefore concluded at the time of acceptance. (3) The offeror did not mean for the proposed government approval to function as either a condition precedent or subsequent, but as only the need to obtain appropriate licenses, etc.
- **ORDER:** The parties entered into a contract.

- e. Responsibility for **Delays in Communicating Acceptance.**
- 1) CISG uses the “**receipt rule**”: The offeree is responsible for insuring that the acceptance gets to the offeror.
- a) Reason for using this rule: Because it is the offeree who chooses the medium through which to send a response, it is the offeree who is better able to avoid the risk of loss or delay (**risk allocation**)

- **f. Assent by Performance of an Act:** If the offeror asks for performance of an act rather than the indication of acceptance, the acceptance is effective at the moment the act is performed.
- 1) *Caveat:* An act does not constitute acceptance if the offeree is required to notify the offeror first.
- a) The **notification requirement** may be:
 - 1] In the offer.
 - 2] A trade usage.

- g. **Withdrawal:** An offeree may withdraw his acceptance any time before or simultaneous with its receipt.
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- h. **Rejection.**
- 1) A rejection becomes effective when it reaches the offeror.
- a) If an offeree dispatches both a rejection and an acceptance at the same time, the one which reaches the offeror first will be the one given effect.

- **4. Acceptance with Modifications**
- a. A would-be acceptance that contains material differences from the offer is a **counter-offer**.
- 1) Terms relating to the following constitute **material differences**:
 - a) Price.
 - b) Payment.
 - c) Quality of the goods.
 - d) Place or time of delivery.
 - e) The extent of one party's liability to the other.
 - f) The manner of settling disputes.
- b. Additions that are not material are proposals for addition that will become part of the contract unless the offeror promptly objects.

- **Case 10-4. FILANTO, SPA v. CHILEWICH INTERNATIONAL CORP.**
- **United States District Court, Southern District of New York, 1992.**
- **FACTS: Chilewich (a US export-import firm) had a contract to deliver footwear to Russia. This contract contained an arbitration provision that called for all disputes to be arbitrated in Moscow. Chilewich then engaged Filanto (an Italian corporation) to supply it with footwear that Chilewich had contracted to deliver to Russia. Chilewich's correspondence to Filanto said that the arbitration provision in the Russian contract was to be part of their contract as well. Filanto supposedly sent Chilewich a counteroffer rejecting the arbitration provision.**

- **Chilewich meanwhile proceeded to obtain a letter of credit benefiting Filanto and proceeded as if there was a contract. Filanto, however, signed a contract on August 7 that contained this provision, although it said in its cover letter that it was not bound by the provision. When a dispute arose and Filanto sued in a US court, Chilewich invoked the arbitration provision and asked the court to dismiss Filanto's suit.**
- **ISSUE: (1) Was the August 7 reply a counteroffer? (2) If it was, was there a contract anyway based on unobjected to performance?**

- **LAW**: A reply that purports to be an acceptance but contains material (such as the rejection of an arbitration provision) additions, limitations, or modifications are a rejection of the offer and a counteroffer. If the offeree knows that the offeror has begun performance and fails to notify the offeror within a reasonable time that it objects to the terms of the contract, it will be deemed to have assented to those terms.
- **EXPLANATION**: (1) The objections to the arbitration provision in the August 7 cover letter were a material modification amounting to a rejection of the offer. (2) Because Chilewich went ahead with the contract (getting the letter of credit) and Filanto did not timely object, Filanto accepted the terms of the Chilewich's proposed contract.
- **ORDER**: Case dismissed; the matter must be arbitrated in Moscow.

G. General Standards For Performance

- **1. Fundamental Breach**
- **a. Defined: When one party substantially fails to deliver what the other reasonably anticipated receiving.**

- **2. Avoidance**
- a. **Defined: The right to be excused from having to perform any obligation required by the contract (not the same as cancellation!).**
- 1) **Requirements:**
- a) **The other party must have committed a fundamental breach.**
- b) **The injured party must notify the other party.**

- **2) Effect of avoidance:**
- **a) Only the obligation to perform is set aside.**
- **b) Avoidance does not affect any provision in the contract concerning:**
 - **1] The settlement of disputes (such as arbitration, choice of law, or choice of forum clauses), or**
 - **2] Any other provisions governing the rights and duties of the parties “consequent upon the avoidance of the contract.”**

- **3. Requests for **Specific Performance****
- **a. An injured party may ask a court “to require performance” if the other party fails to carry out its obligations.**
- **b. A court is not obliged to order specific performance unless the court can do so under its own domestic rules.**

NOTE: In civil law countries it is an obligation for the court, while in common law countries the court has discretionary power in this regard.

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