

THE ABC's OF THE CISG:

***Comparing the UN Convention on Contracts for the
International Sale of Goods
to UCC Article 2***

presented to ILSA at the University of Idaho College of Law

by

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April 3, 2014

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These materials are intended as an information source for clients and friends of Moffatt Thomas. The content should not be construed as legal advice, and readers should not act upon information in this publication without professional counsel. Christine can be reached at (208) 345-2000 or cen@moffatt.com.

Special thanks to Kirk Houston, Associate, Moffatt Thomas Barrett Rock & Fields for his case research assistance.

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THE ABC'S OF THE CISG:

Comparing the UN Convention on Contracts for the International Sale of Goods (1980) to UCC Article 2

1. BACKGROUND

The United Nations Convention on Contracts for the International Sale of Goods (“Convention” or “CISG”) is essentially an “international UCC,” and was adopted by the United States in 1986, entering into force on January 1, 1988.¹ Its signatories account for three-quarters of all world trade.² Most, but not all, of the United States’ important trade partners have adopted the Convention, and as of April 1, 2014, 80 countries were parties to the CISG (each a “Contracting State”).³ The United States, Canada and Mexico are all Contracting States, making the Convention the effective sales law of NAFTA. A number of countries, when ratifying the Convention, provided for reservations that exclude the application of certain Convention provisions. You can find a current list of signatory nations and any reservations at the UN website.⁴

The contract of sale is the backbone of international trade in all countries, irrespective of their legal tradition or level of economic development. The CISG was developed to provide a uniform base on which parties in differing countries could contract for the sale of goods, and provides a neutral body of rules that can be easily accepted in light of its transnational nature.

The first part of the Convention deals with its application and scope. The Convention applies to sales between parties that have places of business in different countries that are parties to the Convention, and may apply to a contract for international sale of goods when the rules of private international law point at the law of a Contracting State as the applicable law, or by virtue of the choice of the contractual parties, regardless of whether their places of business are located in a Contracting State. Excluded are (i) sales to consumers, (ii) securities transactions (including negotiable instruments), and (iii) sales of ships, aircraft, and electricity. The Convention does not apply to sales in which labor or other services constitute a “preponderant part” of the transaction and manufacturing contracts where the buyer supplies a substantial portion of the materials. Parties are free to exclude the application of the Convention or to derogate from or vary the effect of any of its provisions. Counsel preparing contracts therefore have the latitude to

¹ See generally, Honnold, John O., *Uniform Law for International Sales under the 1980 United Nations Convention* (3d ed., The Hague, The Netherlands: Kluwer Law International, 1999) (“Honnold”).

² See www.cisg.law.pace.edu. For a current list of signatory nations, see www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

³ See Appendix IV.

⁴ For official texts of international conventions and their status, including reservations, see http://www.uncitral.org/uncitral/en/uncitral_texts.html.

include clauses in their contracts modifying or eliminating provisions that the Convention would otherwise mandate, or to exclude the application of the Convention in its entirety.

The second part of the Convention deals with the formation of the contract, which is concluded by the exchange of offer and acceptance.

The third part of the Convention deals with the obligations of the parties to the contract. Obligations of the sellers include delivering goods in conformity with the quantity and quality stipulated in the contract, and related documents. Obligations of the buyer include payment of the price and taking delivery of the goods. In addition, this part provides common rules regarding remedies for breach of the contract. The aggrieved party may require performance, claim damages, or avoid the contract in case of fundamental breach. Additional rules regulate passing of risk, anticipatory breach of contract, damages, and exemption from performance of the contract.

Why should a U.S. lawyer care about the Convention? International treaties are the supreme law of the United States, so the Convention is part of the law of each state in the U.S. – just as much as is that state’s UCC. If a contract concerning the international sale of goods includes a choice of law clause that reads, “*The rights and obligations of the parties under this contract shall be governed by and construed in accordance with the laws of the state of [State]*” such choice of law **includes** the Convention, which preempts the UCC.

As observed by a commentator:

The serious consequences of failure to know about the CISG are illustrated by the case of *Filanto, S.p.A v. Chilewich International Corp.* [*Filanto, S.p.A v. Chilewich Int’l Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992); 91 Civ. 3253 UNILEX; CLOUT (Case 23)] In that case, much to the chagrin of the plaintiff Filanto and much to the elation of the defendant Chilewich, both parties unexpectedly discovered they were subject to the CISG at the litigation stage of their relationship rather than having knowingly negotiated their contract with an awareness of the impact of the CISG. Plaintiff Filanto found that application of the CISG by the federal district court resulted in the incorporation, from a separate but related contract, of an arbitration clause requiring disputes to be settled by arbitration in Moscow. Filanto was therefore barred from initiating a breach of contract suit against Chilewich in the U.S. Federal District Court of New York. The case dramatically indicates the need for lawyers and traders involved in international transactions to be informed of the circumstances in which it would be advantageous to make the Convention applicable to their transactions or, alternatively, to use the opt-out procedure of CISG Article 6 when application of the CISG would not be in the party's best interest.

For the unwary international lawyer or trader, failure to understand the CISG can lead to catastrophic business results. The CISG reflects compromises between common-law and civil-law traditions as well as between developing and developed and controlled economy and free-economy countries. It incorporates these compromises in order to facilitate subsequent adoptions of the Convention

throughout the world and to make it more useful in meeting varying needs of ratifying states. The fundamental compromises mean that the CISG corresponds to the pre-CISG law of no country in the world. Thus, any party potentially subject to the CISG must learn its principles -- or at least enough of them to understand how to elect a preexisting body of national law to govern an international contract for the sale of goods.

Unless the parties expressly waive the application of the CISG either totally or in part (as Article 6 of the CISG permits them to do), it applies to certain contracts for the international sale of goods. Accordingly, those involved in international trade should be aware of the CISG even if they prefer not to adapt their practices to the new law. It is also important to be aware of the CISG because parties to contracts may find that it is desirable to rely on it.

In the United States, the CISG is important because it overrides the applicability of the Uniform Commercial Code in certain international sale of goods transactions unless the parties opt out. In other countries, domestic law can similarly be overridden. Lawyers negotiating contracts concerning U.S. international trade will have to recognize that, while there are similarities between the CISG and the Uniform Commercial Code, important differences also exist. Judgment will have to be exercised as to whether parties to the contract should avail themselves of the opportunity the CISG gives them to opt out of its coverage.

("Practice Under the Convention on International Sale of Goods (CISG); A Primer for Attorneys and International Traders," Louis F. Del Duca and Patrick Del Duca, available at <http://www.cisg.law.pace.edu/cisg/biblio/delduca.html>) (footnotes omitted).

Practice pointer: Parties may explicitly exclude application of the Convention. The following contract provision should effect an exclusion of the Convention and provide governance by a state's UCC and other substantive laws:

The rights and obligations of the parties under this contract shall not be governed by the United Nations Convention on Contracts for the International Sale of Goods. Instead, the rights and obligations of the parties under this contract shall be governed by the laws of the state of [State] without regard to principles of conflict of law, and the United Nations Convention on Contracts for the International Sale of Goods is specifically disclaimed.

COMPARE THE CISG AND ARTICLE 2 OF THE UCC

A number of the Convention's provisions are a compromise between civil law and common law principles, and vary from Article 2 of the Uniform Commercial Code (the "UCC").⁵ Under common law, for example, a valid contract is an agreement which contains the following elements: (i) it is entered into by mutual assent; (ii) it is supported by sufficient consideration; (iii) the parties have the legal capacity to enter into a contract; and (iv) there is no illegal purpose. If any of these elements are missing, there is, generally, a void contract under common law. The Convention, however, governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such contract. Unlike the UCC, it is not directly concerned with the validity of the contract, whether a person is induced into a contract by fraud, whether a person does not have capacity to enter a contract, or whether domestic law prohibits the sale of goods specified in the contract.

Major differences between the Convention and the UCC include:

A. Offer and Acceptance.

An offer under the UCC is revocable until accepted, unless the offer is a firm offer made by a merchant in writing, in which case the UCC places a 3-month time limit on its duration.⁶

Under the Convention, an offer is effective when it reaches the offeree.⁷ The Convention employs a concept unknown in Article 2: an offer under the Convention may be withdrawn – even if the offer is irrevocable – as long as the withdrawal reaches the offeree before or at the same time as the offer.⁸ The Convention is designed to enforce and protect parties' expectations. Withdrawal is allowed before acceptance because no expectations of a contract arise before an effective offer is made. Withdrawal under the Convention is different from revocation because withdrawal occurs before an offer has become effective and revocation occurs after the offer has become effective.

Under the Convention, acceptance is effective when it reaches the offeror.⁹ This is contrary to the common law "mailbox rule," which makes acceptance effective on dispatch¹⁰ (even if it never reaches the offeror) and is incorporated in the UCC through Section 1-103.¹¹

⁵ References in these materials to the UCC are to the Uniform Commercial Code as enacted in Idaho, codified at Title 28, Chapter 2, Idaho Code, and citations are to Idaho's UCC. The reader concerned with another state's enactment of the UCC is cautioned to review such state's codification.

⁶ I.C. § 28-2-205 provides irrevocability for merchant firm-offers only. The common-law principle of revocability is incorporated through I.C. § 28-1-103(3)(b), which provides, "Unless displaced by the particular provisions of the uniform commercial code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions."

⁷ CISG art. 15, para (1).

⁸ CISG art. 15, para (2).

⁹ CISG art. 18, para (2).

¹⁰ See generally, E. Allen Farnsworth, *Farnsworth on Contracts* § 3.22 (1998).

When time for acceptance is fixed under a Convention-governed contract, acceptance must reach the offeror within the time fixed.¹² When no time for acceptance is fixed, acceptance under the Convention must occur within a “reasonable time,” taking due account of the circumstances.¹³ Beware that under the Convention, the parties’ established practices may result in acceptance by performance, since “a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance.”¹⁴

The Convention further provides, “an oral offer must be accepted immediately unless the circumstances indicate otherwise.”¹⁵ Oral offers include face-to-face conversations, telephonic conversations, or any other technical or electronic means of communications that allow immediate oral contract.

Additionally, the Convention allows late acceptance to be effective in certain circumstances. A late acceptance is effective as an acceptance if, without delay, the offeror orally so informs the offeree or dispatches a notice to that effect.¹⁶ An example is:

On June 1 Seller mailed Buyer an offer that stated: “Your acceptance must reach me by June 30.” Mail between Seller and Buyer normally takes five (5) days. On June 29 Buyer mailed a letter expressing acceptance of the offer; the letter reached Seller in due course on July 4. On July 4 Seller sent the following telegram to Buyer: “Your June 29 letter was mailed too late to reach me by the June 30 limit set in my offer but I am treating it as an acceptance.”¹⁷

The parties are, accordingly, bound, because the seller immediately notified the buyer that the late acceptance was effective. If market conditions changed after June 29, causing the buyer to no longer be interested in accepting seller’s offer, the buyer cannot use his late acceptance to argue the contract was not formed. Having chosen a method of communication that normally required five days for arrival, buyer could have withdrawn his acceptance by phone or wire communication that would have overtaken the acceptance letter and thereby avoided entering the contract and the adverse market changes.

Under the Convention, if acceptance was timely dispatched but became late on account of an unexpected delay in transmission, the late acceptance is effective unless, without delay, the

¹¹ See I.C. § 28-1-103(3)(b); nothing in the UCC specifically addresses the effective time of acceptance, hence the common-law mailbox rule supplements the UCC.

¹² CISG, at. 18, para (2).

¹³ CISG art. 18, para (2).

¹⁴ CISG, art. 18, para (1), and *see* art. 18, para (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 . . .”).

¹⁵ CISG art. 18, para (2).

¹⁶ CISG art. 21, para (1).

¹⁷ Honnold, p. 174.

offeror orally informs the offeree that he considers his offer as having lapsed, or dispatches a notice to the offeree to that effect. An example is:

*On June 1 Seller sent Buyer an offer like the one in Example 21B [requiring acceptance of the offer by June 30]. Buyer's reply, dated June 15, was similarly delayed in transmission and reached Seller only on July 20, but in this case Seller did not reply to Buyer's acceptance; Buyer learned of the delay only on August 1 when he called Seller to ask why the goods had not arrived. Seller replied that he had ignored the Buyer's June 15 acceptance because it had not reached him by June 30, the date specified in the offer. Buyer claimed that he assumed that his July 15 letter had arrived in time to close the contract, and had expected to receive the goods.*¹⁸

Since the buyer's reply was dated June 15, the delay in transmission that normally takes 5 days was obvious to the seller. Consequently, the seller's failure to inform the buyer that the offer had lapsed made the late reply "effective as an acceptance" and the parties are bound by contract. The seller will be responsible to the buyer for the seller's breach of contract (failing to ship the goods).

Like an offer, an acceptance under the Convention may be withdrawn if the withdrawal reaches the offeree before or at the same time as the acceptance would have become effective.¹⁹ In common-law systems, there has been no occasion to deal with a delayed acceptance question since the mailbox rule makes the acceptance effective when it is sent. The common-law mailbox rule codified in the UCC makes acceptance effective when it is sent; accordingly, under the UCC, there is no right to withdraw an acceptance. Many civil law codes have receipt rules like the Convention and legislative provisions making late responses effective in situations similar to the Convention, so these provisions of the Convention will be familiar to lawyers who practice in civil law countries.

B. Revocation of Offer; Irrevocable Offers.

While the Convention rejects the common-law mailbox rule for acceptance, the Convention retains an important effect of the common-law mailbox rule with respect to revocation – an offer under the Convention cannot be revoked once the offeree has sent acceptance.²⁰ As a compromise between common law and civil law systems, the Convention contains two exceptions to allowing revocation of an offer before acceptance is sent:²¹

1. an offer cannot be revoked if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

¹⁸ Honnold, p. 176.

¹⁹ CISG art. 22.

²⁰ CISG art. 16, para (1).

²¹ CISG art. 16, para (2).

2. 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.

In comparison, an offer is not revocable under UCC Section 2-205 if “by its terms [it] gives assurance that it will be held open . . . during the time stated or if no time is stated for a reasonable time . . . ,” and the UCC places a three-month time limit on the irrevocability of “firm” offers given without consideration by a merchant.²² In contrast, the Convention leaves unanswered the question of how long an irrevocable offer remains open.

Practice pointer: To avoid disputes arising from potentially differing common-law and civil law interpretations, consider making offers irrevocable only for stated time periods, such as:

This offer will be irrevocable until June 30, 2014 at 5:00 p.m. US mountain time, at which time the Offeror or its designated agent shall have the sole right to terminate this offer.

C. *Battle of the Forms.*

Many agreements for the sale of goods are not formally negotiated, but are established by the exchange of brief faxed or emailed communications coupled with an exchange of “standard” forms of agreement such as purchase orders and acknowledgments. Disputes often arise when a buyer and seller exchange conflicting purchase orders and acknowledgments. The dispute usually centers around one of the following scenarios: (i) after the parties exchange conflicting terms, but before either party has taken further action, there is a rise or fall in the price of the goods – was there a binding contract, or may the disadvantaged party “renege”?; or (ii) the parties perform after exchanging conflicting terms and conditions and a dispute arises – what terms and conditions apply?

Before the UCC, most American jurisdictions followed the “mirror-image rule.” Under this rule, contracts are concluded with an offer and an acceptance that correspond in all respects. Applied to typical transactions that take place by purchase order and acknowledgment rather than negotiation, varied terms of acknowledgement of a purchase order constitute a counteroffer and not an acceptance. If the parties having exchanged forms that contain differing terms do not enter into performance, no contract is formed by the varying response. Either party can walk away from the arrangement.

Typically, however, the seller delivers and the buyer receives the goods in spite of having exchanged conflicting forms. When the transaction is thus completed by performance, the common law assumes that a contract had been formed and the terms of the contract generally consisted of the terms of the original offer as modified by the acceptance.

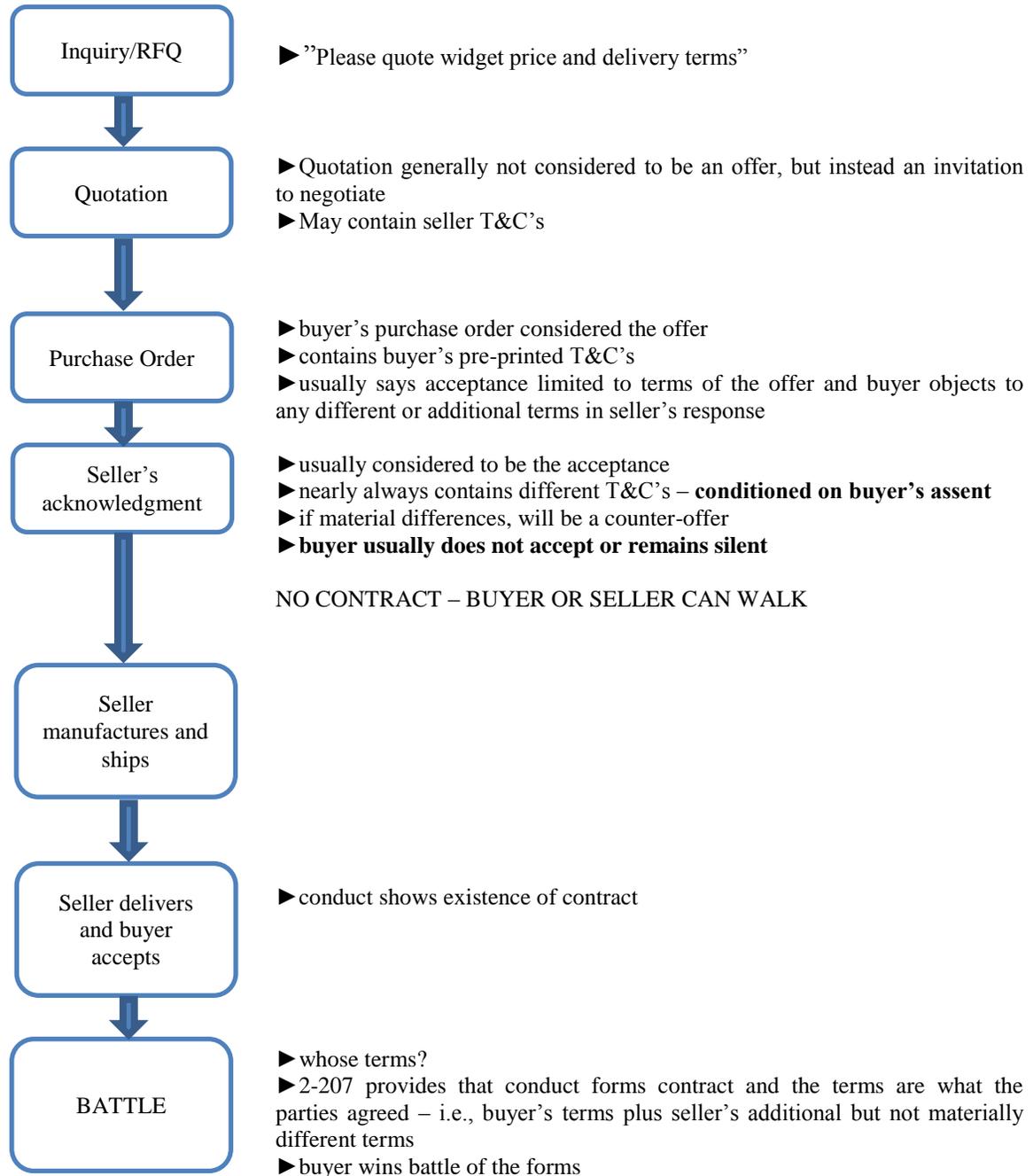
²² I.C. § 28-2-205.

The UCC changed the common law mirror-image rule. Under UCC Section 2-207, a final form that is not intended specifically as a counteroffer will act as an acceptance, even though it contains different terms from the prior form. The different terms are considered as proposals for additions to the contract and, as between merchants, become part of the contract unless: (i) the offer expressly limits acceptance to its terms; (ii) the additional terms materially alter the offer; or (iii) notification of objection to the additional terms is given within a reasonable time after notice has been received.²³ Material alterations under the UCC include changes to price, quantity, quality, or delivery, warranty disclaimers, limitations on liability, differing terms for dispute resolution and differing attorney's fees provisions.²⁴ The normal result under the UCC is to reverse the common law presumption that the last form governs, and to replace it with the result that the second-to-last form usually governs. That is, material differing terms added by the seller in its acknowledgment will not become part of the contract and the buyer's purchase order terms will be the terms the seller is deemed to have accepted. In this respect, the UCC is considered to be pro-buyer. The example on the following page illustrates a typical UCC battle of the forms scenario.

²³ See, e.g., *Tri-Circle, Inc. v. Brugger Corp.*, 121 Idaho 950, 829 P.2d 540 (Ct. App. 1992).

²⁴ See, generally, Colin P. Marks, *The Limits of Limiting Liability in the Battle of the Forms: U.C.C. Section 2-207 and the 'Material Alteration' Inquiry*, 33 PEPP. LAW REV. 3 (2006).

Example of battle of the forms under the UCC:



By contrast, the Convention is generally consistent with the old common law mirror-image rule – a reply to an offer that purports to be an acceptance but contains **material** additions, limitations, or other modifications to the price, payment, quality of goods, place and time of delivery, liability of parties and settlement of disputes is a rejection of the offer and constitutes a counteroffer.²⁵ The Convention identifies price, payment, quality and quantity of the goods, place and time of delivery, limitations on liability or settlement of disputes as terms the alteration of which will be material.²⁶ Prior to performance, either party may be able to claim successfully that no enforceable contract exists. Once the parties undertake performance, however, a contract will undoubtedly be deemed to have existed and the Convention generally favors the last party to submit materially different terms. In this respect, the Convention is considered to be pro-seller.

In an effort to “soften” the result of the mirror-image rule, the Convention allows the seller to avoid formation of a contract on immaterially different terms – a reply to an offer that purports to be an acceptance but contains additional terms that do not materially alter the terms of the offer will be an acceptance under the Convention UNLESS the offeror immediately objects orally to the discrepancy or dispatches a notice of such objection.²⁷ Since most terms that a seller wants will be considered material under the Convention, this contract out is fairly meaningless.

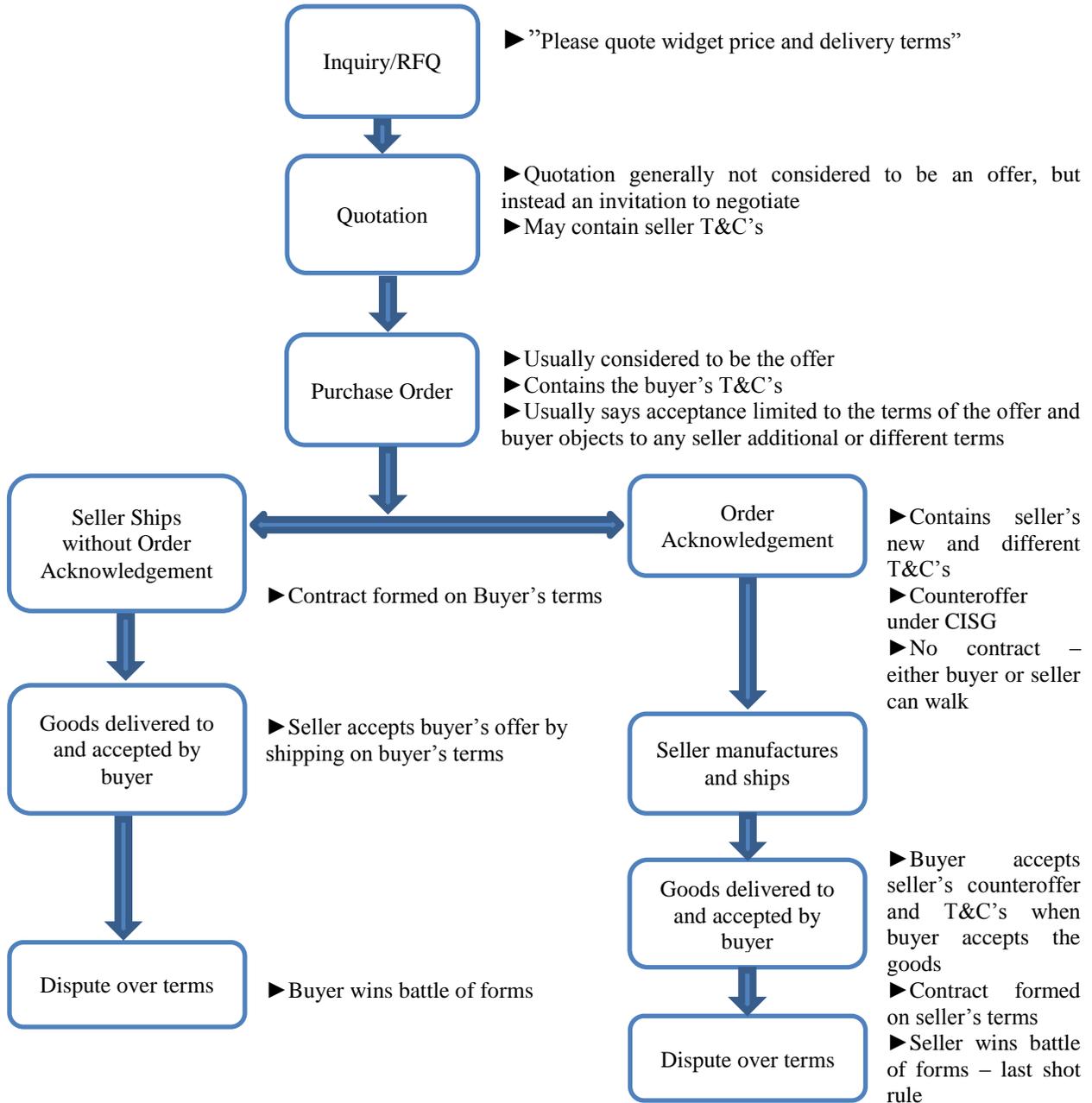
The example on the following page illustrates a typical Convention battle of the forms scenario.

²⁵ CISG art. 19, para (1).

²⁶ CISG art. 19, para (3).

²⁷ CISG art. 19, para (2).

Example of battle of the forms under the Convention:



Practice pointer: When dealing in international sales of goods it is best to either (i) avoid purchase orders altogether in favor of either a master purchase and sale agreement that contains all of the terms to which the parties agree for all shipments; or (ii) be the party that fires the last shot in the battle of the forms, which is often an acknowledgment form in response to a buyer's purchase order, or a buyer's confirmation form in response to a seller's acknowledgement.

D. Statute of Frauds.

The Convention specifically provides that “a contract of sale need not be concluded in or evidenced by a writing . . . [and] may be proved by any means, including witnesses.”²⁸

UCC Section 2-201 provides that a contract for the sale of goods for \$500 or more is not enforceable unless the sales agreement is evidenced by a signed writing. Under the UCC, any amendment or modification to a contract must be in writing if the underlying contract is required to be in writing.²⁹

Practice pointer: In order to avoid having significant contract issues arise that can be proved or disproved without the benefit of written documentation, a material condition of an offer can be that an acceptance must be in writing. An offeree, on the other hand, can add in its acceptance that the offer and its acceptance contain all the terms and conditions of the agreement between the parties, which terms may not be varied except in writing. Additionally, the parties can incorporate their own “statute of frauds” in their contract, as is customary in most U.S. domestic negotiated agreements.

E. Parol Evidence.

Under the UCC, testimony concerning terms of a written contract and the parties' intent that contradict or vary from the written terms is generally inadmissible.

While the Convention doesn't require the sales contract be written, parties will frequently document their agreement by some form of writing, so a court may have to decide whether to allow one of the parties to argue that their actual agreement differed from the terms contained in the writing. The Convention does not expressly address this issue, but since it provides that a contract may be proved by any means – including witnesses – and it endorses oral contracts, the

²⁸ CISG art. 11. Be aware that a number of countries that ratified the Convention made a reservation eliminating this provision so their domestic statutes of frauds may apply.

²⁹ I.C. § 28-2-209(3).

Convention abandons the parol evidence rule in favor of a more liberal approach that permits testimony that contradicts the terms of a written contract.³⁰ In *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.*³¹ the Eleventh Circuit applied CISG principles to hold that parol evidence of subjective intent of the parties must be considered to interpret the parties' preprinted forms, which did not contain a merger clause. Whether a merger clause in a contract governed by the Convention would preclude parol evidence remains an open question under U.S. case law dealing with the CISG, but including it provides ammunition for the lawyer seeking to avoid oral testimony that varies the written terms of a contract for the international sale of goods.

Practice pointer: In your "Statute of Frauds" provision, address the fact that the Convention has no parol evidence rule by considering including a merger clause providing that all of the terms of the contract are contained in the writing.

F. Warranties and Disclaimers.

UCC Section 2-313 provides that: (i) any affirmation of fact or promise by the seller relating to the goods creates an express warranty that the goods will conform to the affirmation or promise; and (ii) the seller's description of the goods or presentation of a sample creates an express warranty that all of the goods will conform to the description or sample.

The Convention nowhere uses the term "warranty." Under the Convention, a seller has a fourfold obligation to deliver goods of quantity, quality, and description required by the contract, contained or packaged in the manner required by the contract.³² Goods do not conform to the contract unless they possess the qualities of goods that the seller held out to the buyer as a sample or model, and unless they are contained or packaged in the manner usual for such goods. The Convention allocates the risk of non-conformity – usually the result of unintentional defects in manufacturing rather than outright seller fraud – on the seller. Why not adopt the once-dominant "buyer-beware" standard? Perhaps because of the great distance that often separates an international seller and buyer that precludes the buyer from inspecting the goods before purchase.

UCC Sections 2-314 and 2-315 set forth the familiar implied warranties of merchantability and fitness for a particular purpose. Article 35 of the Convention states that goods do not conform with the contract unless they "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" by the buyer. To disclaim UCC implied warranties, the contract must contain words of art or expressions in conspicuous writing satisfying UCC

³⁰ See Honnold at 121-23.

³¹ *MCC Marble Ceramics v. Ceramica Nuova D'Agostino, S.p.A.*, 144 F.3d 1384 (11th Cir. 1998).

³² CISG art. 35.

Section 2-316. No similar provision requiring conspicuous notice is contained in the Convention, which appears to permit disclaimers of warranties as long as the parties “have agreed” in writing or orally.³³ Be cautioned, however, that even though the Convention says that its requirements apply unless the parties have agreed otherwise, restrictions in national or local laws on the validity and enforceability of warranty disclaimers may affect the validity of an agreement that excludes the seller’s Convention-based representations as to the conformity of the goods.³⁴

Practice pointer: A U.S. party might consider including a definition of “warranty” in a Convention-governed contract, such as: “The term ‘warranty’ is defined as a commitment that a certain fact regarding the subject of this agreement is, or shall be, as it is expressly or by implication declared or promised to be.”

G. Rejection of Non-conforming Goods/Convention Unilateral Price Reduction.

The UCC recognizes the “perfect tender” rule, under which a buyer is entitled to reject goods that fail in any respect to conform to the contract, even if a defect in the goods is not serious and the buyer would have received substantially the goods for which it bargained.³⁵

Because the international sale of goods often involves transportation of goods over thousands of miles, the Convention departs from the perfect tender rule. Under the Convention, a buyer may declare the contract avoided (i.e., terminated) only if the failure by the seller to deliver conforming goods constitutes a “*fundamental breach*” of the contract.³⁶ 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,” and if the seller foresaw or reasonably would have foreseen such a result.³⁷

³³ CISG art. 35. A California federal case suggests in the battle of the forms, that Article 35 does not apply to warranty disclaimers, which may be waived if the parties so intended. In *Supermicro Computer Inc. v. Digetechnic, S.A.*, (U.S N.D. CA 2001(<http://cisgw3.law.pace.edu/cases/010130u1.html>), the plaintiff brought an action in federal court in California for declaratory judgment as to the validity of a warranty disclaimer in a purchase order. The court dismissed the action in favor of a French action between the parties that had been pending for more than a year, but stated in dicta that Article 35 of the CISG deals with seller’s obligations to deliver conforming goods and does not discuss disclaimers, stating that “a disclaimer in this case might not be valid because the CISG requires a “mirror-image” approach to contract negotiations that allows the court to inquire into the subjective intent of the parties.” Commentators are generally of the contrary view that under the language of Article 35 (“Except where the parties have agreed otherwise”), warranties as to fitness may be disclaimed.

³⁴ In a 1996 German case (OLG Köln 21 May 1996, <http://cisgw3.law.pace.edu/cases/960521g1.html>), the excludability of a warranty with respect to a used car was deemed a matter of German law and not the CISG, and was held invalid under German law due to the seller’s fraudulent acts.

³⁵ I.C. § 28-2-601.

³⁶ CISG art. 49.

³⁷ CISG art. 25.

Under UCC Section 2-513, a buyer is afforded a reasonable opportunity to inspect the goods. Under the Convention, however, the buyer must inspect the goods within as short a period as is practicable under the circumstances.³⁸

The Convention requires the buyer give notice to the seller specifying the nature of the nonconformity “within a reasonable time” after the buyer has discovered or should have discovered it.³⁹ UCC Section 2-602 also requires notice within a “reasonable time,”⁴⁰ but the Convention has been construed to require faster notice than does the UCC.⁴¹

Practice pointer: If you represent the seller, consider specifying the time within which the buyer has an obligation to inspect the goods and give seller notice of nonconformity. Convention Article 39 sets a two-year outside limit on the time within which a buyer must give notice of a lack of conformity. Counsel for a buyer might consider whether to increase the period beyond two years.

Under UCC Section 2-601, a buyer may reject any goods that fail to conform to the contract and, under UCC Section 2-711, the buyer may cancel the contract and recover monetary damages, such as costs of cover. A UCC-buyer may revoke acceptance of non-conforming goods within a reasonable time if the goods were accepted on the assumption that the non-conformity would be cured and the seller fails to cure or if acceptance was induced by the difficulty of discovering the non-conformity before acceptance or by the seller’s assurances.⁴² If a UCC-buyer accepts non-conforming goods and fails to properly revoke acceptance, a buyer may recover damages under UCC Section 2-714 (including incidental and consequential damages).

The Convention contains a pro-buyer, self-help remedy of unilateral proportionate purchase price reduction for the seller’s delivery of non-conforming goods.⁴³ This remedy

³⁸ See, e.g., *La Delizia v. Columbia Distrib.*, <http://cisgw3.law.pace.edu/cases/040909u1.html> (W.D. Wash. 2004) (Oregon company’s notice of non-conformity given five months after delivery of Italian wine was not timely under CISG).

³⁹ CISG art. 38 (buyer must examine the goods “within as short a period as is practicable”), and CISG art. 39.

⁴⁰ I.C. § 28-2-602.

⁴¹ See, e.g., Obergericht Kanton Luzern, 8 January 1997, www.unilex.info/case.cfm?pid=1&id=241&do=case, CLOUT 192 (<http://www.uncitral.org/clout/showDocument.do?documentUid=1081>), English translation available at: <http://cisgw3.law.pace.edu/cases/970108s1.html> (Swiss court holds one month as reasonable time under Article 39, following review of other countries that shows eight days as reasonable time for notice of defect and several months as reasonable time under U.S. law).

⁴² I.C. § 28-2-608.

⁴³ CISG art. 50.

represents a concession to the demands of adopting civil law countries and is not available if the seller is able to cure nonconformity without causing unreasonable delay or inconvenience to the buyer.

The Convention does not contain a statute of limitations, so counsel should consider agreeing upon the time within which a court action or arbitration must be brought, if such agreement is permissible under the law governing the contract. Governing law may preclude modifications of the applicable time bar in the sales contract. The United Nations 1974 Convention on the Limitation Period in the International Sale of Goods (“Limitation Convention”) establishes a general four-year limitation period for claims arising out of contracts to which it applies. A 1980 Protocol brought the 1974 Convention into line with the Convention. The Limitation Convention applies to contracts for the sale of goods between parties whose places of business are in different States if both of those States are Contracting States or when the rules of private international law lead to the application to the contract of sale of goods of the law of a Contracting State. It may also apply by virtue of the parties' choice. The Limitation Convention further provides rules on the cessation and extension of the limitation period. In general, the period ceases when the claimant commences judicial or arbitral proceedings or when it asserts claims in an existing process. If the proceedings end without a binding decision on the merits, it is deemed that the limitation period continued to run during the proceedings. However, if the period has expired during the proceedings or has less than one year to run, the claimant is granted an additional year to commence new proceedings. The Limitation Period Convention does not permit contracts of sale to which it applies to modify the limitation period, but it does permit the parties to exclude its application and permit stipulations that arbitration must be commenced within a shorter period of limitation.

Practice pointer: Consider providing a limitation period by excluding the Convention on the limitation period using a clause such as: “The Convention on the Limitation Period in the International Sale of Goods shall not apply to claims arising from this contract” or “The convention on the Limitation Period in the International Sale of Goods is excluded and shall not apply to claims arising from this contract or relating to its breach.”

If the Limitation Period Convention applies by contract and the parties wish to adopt a shorter or longer limitation period, consider excluding Article 22 of the Limitation Period Convention. If the Limitation Period Convention does not apply, the domestic statute of limitations applicable to claims arising out of the contract may permit clauses modifying the applicable limitation period. For example, UCC Section 2-725 permits a provision in the contract of sale to reduce the period of limitation to not less than one year.

H. Hybrid Transactions.

Since the Convention does not apply to contracts where the “preponderant” part of the obligations is the supply of services, the Convention will not ordinarily apply to agreements solely for distribution, development, licensing, leasing, transportation, shipping, insurance and

finance. Agreements that cover both the sale of goods and the provision of services present difficult legal issues under the Convention, as they do under the UCC. CISG Advisory Council Opinion No. 4 provides that when interpreting hybrid transactions under the Convention, an “economic value” criterion should be used to determine whether the sale of goods component is preponderant and should be based on an overall assessment of the transaction.

I. Gap-Filler/Risk of Loss Provisions.

(i) ***Gap Fillers.*** The Convention provides only one “gap-filler.” Article 31 of the Convention provides a gap-filler with respect to place for delivery. If the contract does not state where the seller shall deliver the goods, then for a contract providing carriage (i.e., requires the seller hand the goods over to a third-party carrier for transmission to the buyer), Article 31 requires delivery to the carrier. If the contract does not involve carriage, the place for delivery is the place where the goods are to be manufactured or from where the goods are supplied, or otherwise at the place where the seller had its place of business when the parties contracted. No other gap-fillers are provided.

By contrast, the UCC provides numerous gap-fillers to complete the contract’s terms in the event the parties have failed to specify something:

- if the price is left out, the price will be a reasonable price set by some standard on delivery⁴⁴
- if the contract fails to specify single or multiple deliveries of the goods, then all goods must be tendered in a single delivery and payment is due on such tender⁴⁵
- if place of delivery is not specified, then there is to be no delivery; purchaser must pick up at seller’s place of business⁴⁶
- if time for delivery is not stated, then any reasonable time is supplied⁴⁷
- if a contract provides for successive performances but the term of the contract is indefinite, the contract is valid for a reasonable time and unless otherwise agreed may be terminated at any time by either party⁴⁸

(ii) ***Risk of Loss.*** The delivery term is essential in a Convention-governed contract because place of delivery determines the passage of risk of loss. All sales involve movement of goods -- whether by the seller to the buyer, by a carrier for further delivery to the buyer, or by the buyer’s removal of the goods he has purchased from the seller. Under the Convention, if the contract involves carriage (that is, the seller is obligated to give the goods to a carrier for transmission to the buyer), risk of loss passes to the buyer when the goods are handed over to the

⁴⁴ I.C. § 28-2-305.

⁴⁵ I.C. § 28-2-307.

⁴⁶ I.C. § 28-2-308.

⁴⁷ I.C. § 28-2-309.

⁴⁸ *Id.*

first carrier for transmission to the buyer,⁴⁹ and if the contract does not involve carriage, risk of loss passes when the buyer takes or should have taken over the goods.⁵⁰ In this regard, the approach to transit risk in the Convention is similar to that of the UCC:

28-2-509. RISK OF LOSS IN THE ABSENCE OF BREACH. (1) Where the contract requires or authorizes the seller to ship the goods by carrier (a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 28-2-505) . . .

Damage during carriage is often only discovered after the goods reach the buyer and are inspected by the buyer. Additionally, in international transactions, the seller and buyer are often located great distances from each other and the buyer is in the best position to assess the damage and make a claim against the carrier or insurer. Accordingly, transit risk has historically been placed on the buyer.

If the parties' contract provides that the buyer is to come for the goods or that the seller is to transport the goods to the buyer in the seller's own vehicles, or requires the buyer to take over the goods "at a place other than a place of business of the seller" (for example, goods in storage at a public warehouse), then risk of loss passes to the buyer when the goods are placed at the buyer's disposal in the required place.⁵¹

The Convention addresses risk of loss in Articles 67, 68 and 69, but passage of title is never addressed -- passing of ownership is not regulated by the Convention but is left to domestic law.⁵² The Convention does require the seller to deliver goods that are free from any right or claim of a third party.⁵³

Practice pointer: U.S. parties to contracts subject to the Convention should use a conflict of laws clause to incorporate U.S. law to cover issues not governed by the Convention.

⁴⁹ CISG art. 67.

⁵⁰ CISG art. 69.

⁵¹ CISG art. 69.

⁵² 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."

⁵³ CISG art. 42, para (1).

In contrast, validity and passage of title issues are addressed by various provisions of the UCC⁵⁴ and, to the extent that issues are not addressed by the UCC, Section 1-103 provides that "the general rules of law and equity" shall be applicable.

Section 3 of UCC Article 2 includes certain risk of loss allocations and, as a general rule, provides that when title passes, so does risk of loss:

Type of Delivery:	Title Passes	Risk of Loss Passes
By Carrier		
A. Shipment contracts	When seller properly completes delivery to carrier	same as title
B. Destination contracts	When goods are physically delivered to required destination	same as title
Through Bailee:		
A. Negotiable document of title	With document (i.e., own the document = own the goods)	same as title
B. Non-negotiable document of title	With document	when (1) buyer has the document and (2) a reasonable time to present document passes OR as below
C. No document of title	When contract is made or goods are identified to the contract, whichever is later	when bailee acknowledges buyer's rights to the goods
All other situations	Later of when contract is made or goods are identified to the contract	if seller = merchant, risk passes on physical receipt by buyer if seller = non-merchant, risk passes when delivery is "tendered" to buyer

J. Transportation Terms; INCOTERMS.

The UCC incorporates a handful of transportation trade terms in its provisions, such as Free on Board (F.O.B.), Free Alongside (F.A.S.),⁵⁵ Cost, Insurance and Freight (CIF), and Cost

⁵⁴ Explicit "validity" or "passage of title-property" provisions of Article 2 include I.C. § 28-2-401 pertaining to passage of title; I.C. § 28-2-402 regarding rights of seller's creditors against sold goods; I.C. § 28-2-403 pertaining to third party rights as "good faith purchasers for value" or "buyers in ordinary course of business;" I.C. § 28-2-316 pertaining to procedures for excluding or modifying express, and implied merchantability and fitness warranties; I.C. § 28-2-718 pertaining to liquidation or limitation of damages; and I.C. § 28-2-719 pertaining to contractual modification or limitation of remedies.

⁵⁵ I.C. § 28-2-319, providing that FOB and FAS are delivery terms that specify both the mode of delivery as well as allocate the cost of delivery and risk of loss of the goods.

and Freight (C&F),⁵⁶ but such terms are used in the UCC to both allocate delivery costs and to allocate risk of loss of the goods.

The Convention does not contain transportation terms similar to the UCC. Allocation of loss under the Convention is distinct from whether a party has complied with its contract delivery obligations. The Convention separates delivery terms from risk of loss. With respect to contractual delivery obligations, the Convention provides four situations. If the parties have agreed upon a place of delivery in their contract, then the seller is contractually bound to deliver to that place. If the parties have not agreed to a specific delivery location, and the contract of sale involves carriage of the goods, the seller's delivery obligation is to hand the goods over to a carrier for transmission to the buyer. This obligates the seller to deliver the goods by handing them to an independent carrier and this obligation is fulfilled upon transfer to the first carrier. Liability for the carrier's failure to perform will not lie with the seller unless the seller has contractually undertaken the obligation to carry out the carriage of goods. If the contract does not require delivery at a particular location, nor carriage of the goods, but relates to specific goods or goods to be drawn from a specific stock or to be manufactured or produced and the parties knew that the goods were at or were to be manufactured or produced at a particular place, the seller shall deliver the goods by placing the goods at the buyer's disposal at that particular place. In all other cases where the contract does not require the seller to deliver the goods at a particular location, the seller shall deliver the goods by placing the goods at the buyer's disposal at the seller's place of business. The seller's delivery obligation in this last circumstance is satisfied by offering the goods at the place where the seller had its place of business at the time of the conclusion of the contract, ready and fit for carriage (which includes all necessary packaging).

If the seller is obligated to provide carriage, the seller must identify the goods by the fixing of labels or the address of the receiver if the goods are not clearly identified by markings on the goods, by shipping documents or otherwise, and the seller must give the buyer notice of the consignment specifying the goods. When these conditions have been met, under the Convention, the risk passes to the buyer at the point of handing over the goods to the first carrier.

In such circumstance, the seller must make such transportation contracts as are necessary for carriage to the place fixed in the contract by means appropriate in the circumstance and according to usual terms for such transportation. Usage of trade has imbued many transportation terms with specific meaning that allocates cost and risk. Without such trade terms in the Convention, parties to a Convention-governed agreement must include their own trade terms. Most parties include trade terms promulgated by the International Chamber of Commerce ("ICC"), known as INCOTERMS.⁵⁷ INCOTERMS include: (i) origin terms, such as EXW ("ex works" – the named place where shipment is available to the buyer, not loaded, and seller does not contract any transportation); (ii) international shipping terms, where the seller may or may not pay carriage, such as FAS ("free alongside ship" – the seller delivers the goods to the named

⁵⁶ I.C. § 28-2-320, providing that C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination, that C&F or C.F. means that the price so includes cost and freight to the named destination, and that CIF and C&F allocate such costs to the seller and allocate risk of loss of the goods to the seller until the goods are delivered to the common carrier.

⁵⁷ See www.iccwbo.org/incoterms/id3045/index.html. See also, Appendix I.

ocean port of shipment) or CPT (“carriage paid to named port of destination” – used for containerized shipments); and (iii) destination terms such as DAP (“delivered at place” – seller will deliver the goods by placing them at the disposal of the buyer on the arriving means of transport ready for unloading at the agreed point, if any, at the named place of destination on the agreed date or within the agreed period). Remember that under the Convention, risk of loss passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer if the contract involves carriage, and if the contract does not involve carriage, risk of loss passes when the buyer takes or should have taken over the goods.⁵⁸ Familiarity with INCOTERMS is essential for the practitioner writing agreements for international trade. Areas for negotiation under INCOTERMS include who is responsible for export clearance, who is responsible for import clearance, who will provide insurance, who will select carriage, who will arrange loading, and who will arrange unloading. The buyer will have the responsibility to accept delivery in accordance with the INCOTERM that is used in the contract for the sale and purchase of the goods.

Practice pointer: INCOTERMS are revised every ten years. If you are using INCOTERMS in your contract, be sure to reference the intended year of application. For example, reference “INCOTERMS 2010” rather than “INCOTERMS.” This is particularly important because, from time to time in revising INCOTERMS, the buyer and seller’s responsibility reverses. For example, the INCOTERMS 2000 FAS term made it the seller’s responsibility to clear goods for export, which was a reversal from the INCOTERMS 1990 FAS version that required the buyer to arrange for export clearance.

Who is responsible for export licenses and taxes becomes an issue under the Convention. In litigation and drafting contracts, INCOTERMS should be facilitated or examined to clarify these issues. Many INCOTERMS allocate export problems to the seller (for example, FCA and CPT) and some INCOTERMS allocate export problems to the buyer (for example, FAS, FOB and CFR). The responsibility for export licenses and export taxes are not dictated by the Convention’s terms, but may be addressed by separate contractual language or embedded in INCOTERMS. When the contract is silent, modern practices governing export sales often indicate that the seller’s responsibility to dispatch goods to a foreign destination calls for the seller to deal with export licenses and export taxes.

⁵⁸ CISG art. 67.

Practice pointer: Be sure your chosen trade terms clearly allocate export licenses and taxes the way the parties intend, or include an express contractual provision clearly making that allocation, such as “Notwithstanding” anything else to the contrary in this Agreement, the Seller shall be responsible for all export licenses, clearances and taxes . . .”

K. Dispute Resolution.

Neither the Convention nor the UCC addresses the forum used to hear disputes that arise from the sales contract. Parties to an international sales contract governed by the Convention frequently choose to arbitrate these disputes, but they may also provide in their sales contract that a particular judicial forum will (perhaps exclusively) determine their disputes. The enforceability of these contract terms will be governed by non-Convention law.

Since the Convention is a United States treaty, federal subject matter jurisdiction can be established by a party to an international sale of goods contract governed by the Convention. In addition to subject matter jurisdiction, a federal court must have jurisdiction over the persons involved in the suit. A contractual consent to jurisdiction of U.S. courts by a foreign company in a contract governed by the Convention will likely be given effect. However, arbitration is often selected by parties to a Convention-governed sales agreement.

Courts will generally hold firm on the party’s choice of forum expressed in the Convention-governed document.

Because judges outside of major U.S. commerce centers may not have familiarity with the provisions of the Convention and may not have local case precedent for Convention-related issues, litigation of disputes under a Convention-governed document may be particularly unsatisfactory. By selecting arbitration as the method of dispute resolution, the parties may achieve greater comfort that the dispute solvers will have the knowledge and experience necessary to correctly interpret and apply the Convention. Arbitration may also be better suited to Convention-governed documents specifically drafted for international commercial actors, since the Convention provides great flexibility to the contract formation and performance, which is well suited to arbitration as the method of dispute resolution.

If arbitration is selected, courts generally will effect a party’s agreement to arbitrate. If a party fails to adhere to an arbitration provision in a Convention-governed contract and obtains a foreign judgment in contrast to the provisions, the provisions of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitrable Awards (“CREFAA”) should be considered by counsel.⁵⁹ The CREFAA reinforces a strong federal policy in favor of arbitration over litigation, a policy that applies with special force in the field of international commerce.⁶⁰

⁵⁹ 9 U.S.C. §§ 201-208.

⁶⁰ *Standard Bent Glass Corp. v. Glassrobots OY*, 333 F.3d 440, 447 (3d Cir. 2003); *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

Where dispute arises from an international commercial agreement, a court must address the following four factors to determine whether the arbitration agreement falls under CREFAA:

- (i) Is there an agreement in writing to arbitrate the subject of the dispute?
- (ii) Does the agreement provide for arbitration in the territory of a signatory of the Convention?
- (iii) Does the agreement arise out of a legal relationship, whether contractual or not, that is considered commercial?
- (iv) Is a party to the agreement not an American citizen, or does the commercial relationship have some reasonable relation to one or more foreign states?

If the answers are all in the affirmative, a U.S. court must order arbitration unless it determines the agreement is null and void.⁶¹

The parties may agree to an *ad hoc* arbitration, where the proceedings are not controlled by an arbitrable institution, or an institutional arbitration, where the proceedings are administered by an institution that furnishes lists of arbitrators with relevant specialties, and the parties choose the arbitrators from the lists.

In an *ad hoc* arbitration, the parties agree on an arbitrator, location, applicable language, etc. The parties decide on which rules of procedure will apply and often agree on rules of established organizations like the AAA or UNCITRAL,⁶² even though the proceedings are not administered by those organizations.

In an institutional arbitration, the institution provides the rules of procedure for the arbitration and performs supervisory and administrative functions, such as keeping the proceedings on a timetable. The Court of Arbitration of the International Chamber of Commerce is often selected as the forum for arbitration of a Convention-governed document,⁶³ though there are numerous other arbitral institutions that provide arbitration services for international

⁶¹ Germany, 26 June 2006 App. Ct. Frankfurt (printed goods case), available at <http://cisgw3.law.pace.edu/cases/060626gl.html> (the arbitrable award was not sufficiently authorized by an “agreement in writing”).

⁶² The United Nations Commission on International Trade Law (UNCITRAL) (established in 1966) is a subsidiary body of the General Assembly of the United Nations, with the general mandate to further the progressive harmonization and unification of the law of international trade. The UNCITRAL arbitration rules are widely used in *ad hoc* arbitration.

⁶³ See <http://www.iccwbo.org/court/>.

transactions, such as AAA,⁶⁴ UNCITRAL, Judicial Arbitration and Mediation Service (JAMS),⁶⁵ and the London Court of International Arbitration (LCIA).⁶⁶

Accordingly, an arbitration provision contained in a Convention-governed contract should clearly express the parties' intent to arbitrate disputes in the territory of a signatory of the Convention. It should specify the rules of arbitration that will be followed and the language of the arbitration, and if it will be an institutional arbitration, what institution is chosen.

Practice pointer: ICC arbitration can be effected by including a clause such as the following in your Convention-governed agreement:

All disputes arising out of or in connection with this Agreement shall be finally settled under the rules of arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with said rules.

The place of arbitration and the language of the arbitration should also be specified in the Convention-governed document.

2. BE AWARE OF POSSIBLE APPLICATION OF CISG

Counsel will be well-served to recognize the application of the Convention. A recent commentator observed:

A U.S. court case, *GPL Treatment Ltd. v. Louisiana-Pacific Corp.*,⁶⁷ serves as a warning to attorneys that ignorance of the Convention is no excuse. *GPL Treatment* involved the sale of wood products by a Canadian seller to a U.S. buyer. Although the dispute was resolved under U.S. domestic law, the governing law of the contract should have been the Convention since both Canada and the United States are Contracting States to the Convention. Apparently, the plaintiff's attorney was unaware that the Convention governed the contract until it was too late to amend the pleadings. The court ruled that the plaintiff's attempt to raise the Convention issue was untimely and therefore waived any cause of action under Convention. The material issue in the case was defendant's statute of frauds defense. The UCC requires a writing for sale of goods contracts over US \$500, while the Convention specifically states that a contract and sale need not be concluded or evidenced by writing. If the plaintiff's attorney had recognized the

⁶⁴ See <http://www.adr.org/>; international rules available here: <http://www.adr.org/icdr>.

⁶⁵ See <http://www.jamsadr.com/>; international arbitration rules available here: <http://www.jamsadr.com/rules-international-rules/>.

⁶⁶ See <http://www.lcia.org/>.

⁶⁷ 894 P.2d 470 (Or. App. 1995).

applicability of the Convention, commentators suggest that he might have won the case.⁶⁸

Many courts have been hesitant to infer the inapplicability of the Convention simply because the parties failed to recognize its existence or relevance to their dispute. An opinion of the Tribunale di Padova in 2004 (February 25, 2004) concluded that exclusion of the Convention is possible only where the parties were aware of its applicability, by noting that since the pleadings in that case revealed ignorance of the Convention, the parties “could not have excluded – even implicitly – the application of the CISG, by choosing to make an exclusive reference to the Italian law.”⁶⁹

A recent case from the United States District Court for the Southern District of New York, however, took a broader view of the effects of pleadings that failed to recognize the applicability (or the existence) of the Convention. In *Ho Myung Moolsan, Co. Ltd. v. Manitou Mineral Water, Inc.*,⁷⁰ a South Korean buyer of mineral water filed a breach of contract action against an American seller. In its initial complaint and in all pleadings through the discovery stage – including a motion for a preliminary injunction and an appeal from denial of that motion – the buyer had relied on New York law and asserted that its claims were brought “under state law.” After the close of discovery and thereafter, however, the buyer maintained (correctly it appears) that the Convention governed the transaction. The court concluded that the buyer “by its actions” had consented to the application of the New York Uniform Commercial Code and it was “far too late” to withdraw that consent without undue prejudice to the seller. The court relied on New York law that allowed parties in litigation to consent by their conduct to the law to be applied – even though that decision was erroneous under prevailing legal principles. The court further concluded that the “course of the case would not have changed” even if the CISG applied. The decision is consistent with other cases that have precluded parties from asserting CISG claims after the commencement of litigation, although those cases often concern efforts to raise the claims for the first time during the appellate process.

Choice of law gymnastics in dispute resolution proceedings can be avoided if counsel representing parties in international sales agreements simply acknowledge the application of the Convention and negotiate to explicitly exclude it or agree that it governs the transaction at hand. The Convention has wide-spread acceptance among lawyers and businesses in foreign Contracting States. Generally speaking, unless the local company has considerable bargaining power, international parties in a Contracting State expect the Convention to apply and negotiating it away may be difficult for a U.S.-based business that lacks considerable bargaining power in a particular sales transaction. If the parties agree to exclude the Convention’s application, appropriate choice of law language should be used.

⁶⁸ David N. Goldsweig & Joon Lee, “The United Nations Convention on Contracts for the International Sale of Goods,” in: Sandstrom & Goldsweig ed., *Negotiating and Structuring International Commercial Transactions*, 2d ed., Section of International Law and Practice, American Bar Association (2003).

⁶⁹ Available at <http://cisgw3.law.pace.edu/cases/040225i3.html>.

⁷⁰ S.D.N.Y. (Dec. 2, 2010), available at <http://cisgw3.law.pace.edu/cases/101202u1.html>.

3. WHAT CHOICE OF LAW PROVISION WILL BE SUCCESSFUL IN EXCLUDING THE CONVENTION?

The more specific the choice of law clause, the better. Clauses intended to exclude the application of the Convention altogether must be drafted with care. The commentators suggest clauses that specifically rule out the application of the Convention, e.g., “the law of France, excluding the CISG” or “Article 2 of the UCC as enacted in New York.” A variety of suggested choice of law clauses may be found in articles available on the Pace University CISG website: *Changing Contract Practices in Light of the United Nations Sales Convention: A Guide for Practitioners*,⁷¹ and *Drafting Considerations under the 1980 Convention on Contracts for the International Sale of Goods*.⁷²

Practice pointer: To EXCLUDE the Convention, your choice of law clause might read:

“The rights and obligations of the parties under this agreement shall not be governed by the provisions of the 1980 United Nations Convention on Contracts for the International Sale of Goods; rather, these rights and obligations shall be governed by the law of the State of [State], without reference to the 1980 United Nations Convention on Contracts for the International Sale of Goods, specifically including the Uniform Commercial Code as enacted in [State].”

OR

“This Contract shall be governed by and construed under the laws of the State of [State], not including the 1980 United Nations Convention on Contracts for the International Sale of Goods.”

⁷¹ Peter Winship, <http://www.cisg.law.pace.edu/cisg/biblio/winship.html>.

⁷² B. Blair Crawford, 8 J. Law & Com. 187, 192-94 (1988), and at <http://www.cisg.law.pace.edu/cisg/biblio/crawford.html>.

Practice pointer: To INCLUDE the Convention, your choice of law clause might read:

“Questions that are not expressly answered in this Contract or in the United Nations Convention on Contracts for the International Sale of Goods are to be settled in conformity with those provisions of the Uniform Commercial Code as adopted in the State of that do not conflict with the provisions of this Contract or the Convention.”

OR

“Questions that are not expressly settled in this Contract or in the United Nations Convention on Contracts for the International Sale of Goods are to be settled in conformity with those provisions of the Contract Law of the People’s Republic of China adopted and promulgated on March 15, 1999, that do not conflict with the provisions of this Contract or the Convention.”

OR

“Questions that are not expressly settled in this Contract or in the United Nations Convention on Contracts for the International Sale of Goods are to be settled in conformity with those rules stated in the Unidroit Principles of International Commercial Contracts that do not conflict with the provisions of this Contract or of the Convention.”

Remember, however, that even when the Convention is included in your contract, you still should consider including a choice of law provision to provide that law that will supplement the Convention in the interpretation and enforcement of your contract.

Attached as Appendix II is a list of summarized cases from the 9th and 11th Circuits and courts within those circuits that have addressed the Convention, and attached as Appendix III is a list of Idaho cases construing Article 2.⁷³

4. CONCLUSION

The Convention often involves sales of goods between parties that are separated by great geographic distance, where goods are shipped at high cost and shipping may take a long time. The provisions in the Convention generally attempt to facilitate the successful completion of such international sales of goods by discouraging contractual breakdowns, even when events go awry. In this respect, the Convention goes far beyond the legal architecture of the UCC. Many

⁷³ Appendix II and Appendix III were compiled by Kirk J. Houston, an Associate with Moffatt Thomas.

provisions encourage, or even require, communication and reasonable conduct between the parties to resolve problems before a total contractual breakdown, and allow businesspersons to operate more efficiently in the growing international marketplace by replacing potentially litigious legal regimes, such as the UCC, with a set of laws that allows for a considerable amount of self-regulation.

Be aware of the fundamental differences between the UCC and the Convention when assisting a client in connection with an agreement to which the Convention applies, make an informed decision on choice of law, and draft your choice of law clause accordingly.

APPENDIX I

Select INCOTERMS from: <http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/the-incoterms-rules/>; available at:
<http://iccbooks.com/Product/ProductInfo.aspx?id=653>

RULES FOR ANY MODE OR MODES OF TRANSPORT

- **EXW -- Ex Works**

“Ex Works” means that the seller delivers when it places the goods at the disposal of the buyer at the seller’s premises or at another named place (i.e., works, factory, warehouse, etc.). The seller does not need to load the goods on any collecting vehicle, nor does it need to clear the goods for export, where such clearance is applicable.

- **FCA -- Free Carrier**

“Free Carrier” means that the seller delivers the goods to the carrier or another person nominated by the buyer at the seller’s premises or another named place. The parties are well advised to specify as clearly as possible the point within the named place of delivery, as the risk passes to the buyer at that point.

- **CPT -- Carriage Paid To**

“Carriage Paid To” means that the seller delivers the goods to the carrier or another person nominated by the seller at an agreed place (if any such place is agreed between parties) and that the seller must contract for and pay the costs of carriage necessary to bring the goods to the named place of destination.

- **CIP -- Carriage And Insurance Paid To**

“Carriage and Insurance Paid to” means that the seller delivers the goods to the carrier or another person nominated by the seller at an agreed place (if any such place is agreed between parties) and that the seller must contract for and pay the costs of carriage necessary to bring the goods to the named place of destination.

The seller also contracts for insurance cover against the buyer’s risk of loss of or damage to the goods during the carriage. The buyer should note that under CIP the seller is required to obtain insurance only on minimum cover. Should the buyer wish to have more insurance protection, it will need either to agree as much expressly with the seller or to make its own extra insurance arrangements.”

- **DAT -- Delivered At Terminal**

“Delivered at Terminal” means that the seller delivers when the goods, once unloaded from the arriving means of transport, are placed at the disposal of the buyer at a named terminal at the named port or place of destination. “Terminal” includes a place, whether covered or not, such as a quay, warehouse, container yard or road, rail or air cargo terminal. The seller bears all risks involved in bringing the goods to and unloading them at the terminal at the named port or place of destination.

- **DAP -- Delivered At Place**

“Delivered at Place” means that the seller delivers when the goods are placed at the disposal of the buyer on the arriving means of transport ready for unloading at the named place of destination. The seller bears all risks involved in bringing the goods to the named place.

- **DDP Delivered Duty Paid**

“Delivered Duty Paid” means that the seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import on the arriving means of transport ready for unloading at the named place of destination. The seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities.

RULES FOR SEA AND INLAND WATERWAY TRANSPORT

- **FAS Free Alongside Ship**

“Free Alongside Ship” means that the seller delivers when the goods are placed alongside the vessel (e.g., on a quay or a barge) nominated by the buyer at the named port of shipment. The risk of loss of or damage to the goods passes when the goods are alongside the ship, and the buyer bears all costs from that moment onwards.

- **FOB Free On Board**

“Free On Board” means that the seller delivers the goods on board the vessel nominated by the buyer at the named port of shipment or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards.

- **CFR Cost and Freight**

“Cost and Freight” means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. the seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination.

- **CIF Cost, Insurance and Freight**

“Cost, Insurance and Freight” means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. The seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination. The seller also contracts for insurance cover against the buyer’s risk of loss of or damage to the goods during the carriage. The buyer should note that under CIF the seller is required to obtain insurance only on minimum cover. Should the buyer wish to have more insurance protection, it will need either to agree as much expressly with the seller or to make its own extra insurance arrangements.

APPENDIX II

SELECT CISG CASES SINCE 1990⁷⁴

- Ninth Circuit Court of Appeals
- *Attorneys Trust v. Videotape Computer Products*, 1996 WL 472755 (9th Cir. 1996).

Summary: The district court entered judgment against the defendant for breach of contract. On appeal, the defendant argued that the district court should have applied the CISG. The Court of Appeals refused to consider the argument because the defendant did not give adequate notice of his intent to raise an issue concerning the law of a foreign country (applying the CISG would have led to the application of the substantive law of Taiwan). *See Fed. R. Civ. P. 44.1.*

Citation to case summary: Albert H. Kritzer, *CISG Case Presentation: Attorneys Trust v. Videotape Computer Products*, PACE LAW SCHOOL INST. OF INT'L COMMERCIAL LAW (Feb. 18, 2014, 11:25 AM), <http://cisgw3.law.pace.edu/cases/960820ul.html>

- *Chateau des Charmes Wines Ltd. v. Sabate USA*, 328 F.3d 528 (9th Cir. 2003).

Facts and Procedural History: Plaintiff placed eleven telephone orders for wine corks from the Defendant. The shipments each contained forum selection clauses stating that any disputes would be resolved in “the Court of Commerce of the City of Perpignan.” The Plaintiff discovered that the wine corks were tainted, and filed suit in federal district court. The Defendants moved to dismiss on grounds that per the forum selection clause, the California federal court was not the proper forum. The district court applied the forum selection clause and granted the motion to dismiss. The Ninth Circuit reversed.

Issue: Whether the forum selection clauses modified the parties’ oral sales contract.

Holding: The forum selection clauses did not modify the parties’ oral argument. As such, the case could be heard in federal district court.

⁷⁴ This appendix discusses cases decided since 1990 by (1) the Ninth Circuit Court of Appeals; (2) federal district and state appellate courts in California; (3) state appellate courts in Oregon; and (4) federal district courts in Washington. At this date, the CISG has not been applied in any cases decided by (1) the Tenth Circuit Court of Appeals; (2) federal district and state appellate courts in Idaho, Montana, Utah, and Wyoming; (3) federal district courts in Oregon; or (4) state appellate courts in Washington. For a complete list of cases decided throughout the United States, visit: <http://www.cisg.law.pace.edu/cisg/text/casecit.html#us>.

Reasoning: The CISG does not state that one party's failure to object to a written forum selection clause (after forming a verbal contract) constitutes an agreement under the CISG. Also, the Plaintiff's behavior did not evidence assent to the forum selection clause. Since the forum selection clause did not become part of the agreement, the district court should not have dismissed the case.

Citation to case summary: Ryan E. Thompson, *CISG Case Presentation: Chateau des Charmes Wines Ltd. v. Sabate USA, Sabate S.A.*, PACE LAW SCHOOL INST. OF INT'L COMMERCIAL LAW (Feb. 18, 2014, 11:13 AM), <http://cisgw3.law.pace.edu/cases/030505u1.html>

- *Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc.*, No. 06-35398 (9th Cir. Nov. 16, 2007) (order reversing district court's order granting summary judgment).

Summary: The Ninth Circuit Court of Appeals held that since the parties' places of business were located in different member states, the CISG applied to the formation of the alleged contract. The district court erred by not analyzing the contract formation issue under the CISG.

Citation to case summary: *CISG Case Presentation: Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc.*, PACE LAW SCHOOL INST. OF INT'L COMMERCIAL LAW (Feb. 18, 2014, 11:35 AM), <http://cisgw3.law.pace.edu/cases/071108u1.html>

- California federal and state appellate courts
- Federal district courts
- *Supermicro Computer Inc. v. Digitechnic, S.A.*, No. C-00-0224-CAL (C.D. Cal. Jan. 30, 2001)

Summary: A computer parts manufacturer located in the United States sold parts to a customer in France. The orders were placed by telephone. The parts were shipped with invoices that contained warranty disclaimers. The buyer filed suit in France alleging that the parts were defective. The seller filed suit in California seeking a declaration that its disclaimers were effective, and as such, it was not liable. The federal district court in California held that the CISG did not address whether the seller could disclaim the warranty. Since there was some evidence in the record tending to show that the French buyer was unaware of the disclaimer, and since the parties were already litigating the issue in a French court, the federal district court refused to grant declaratory relief.

Citation to case summary: *CISG Case Presentation: Supermicro Computer Inc. v. Digitechnic, S.A.*, PACE LAW SCHOOL INST. OF INT'L COMMERCIAL LAW (Feb. 18, 2014, 5:00 PM), <http://cisgw3.law.pace.edu/cases/010130u1.html>

- *China Nat'l Metal Products Import Export Co. v. Apex Digital, Inc.*, 141 F. Supp. 2d 1013 (C.D. Cal. 2001)

Summary: The Plaintiff, headquartered in China, sold DVD players to the Defendant, located in California. The plaintiff sold the DVD players, but many of them were defective and returned by retail purchasers. As such, the Defendant refused to pay the Plaintiff for the final shipment of DVD players. The parties submitted to arbitration in China. The Plaintiff then filed a motion in federal court for a writ of attachment during the pendency of the arbitration. Since neither party affirmatively demonstrated whether California law or the CISG applied, the court applied the law of the forum (California law). As such, the Court refused the buyer's request to apply the CISG.

- *Asante v. PMC-Sierra*, No. C-01-20230-JW (N.D. Cal. July 30, 2001).

Summary: American Plaintiff purchased component parts from a Canadian Defendant. The delivered components did not conform to the buyer's specifications, and the buyer brought suit in California state court. The defendant removed the case to federal court on grounds that the CISG applied, and as such, the lawsuit raised a federal question. The Plaintiff filed a motion to dismiss. The Court denied the motion, finding that the CISG applied because the parties resided in different member countries and the contract did not specifically displace the CISG.

Citation to case summary: *CISG Case Presentation: China Nat'l Metal Products Import Export Co. v. Apex Digital, Inc.*, PACE LAW SCHOOL INST. OF INT'L COMMERCIAL LAW (Feb. 18, 2014, 5:00 PM), <http://cisgw3.law.pace.edu/cases/010727u1.html>

- *McDowell Valley Vineyards, Inc. v. Sabate USA Inc.*, No. C-04-0708 SC (N.D. Cal. Nov. 2, 2005).

Summary: The American buyer sued a seller of wine corks in federal district court for breach of contract. Defendants moved for summary judgment on the contract claim. The court denied the motion, finding that since both parties had their principal place of business in the United States, the CISG did not apply and as such, there was no federal question. The Court then dismissed the case (having dismissed the case for lack of subject matter jurisdiction, it could not rule on the summary judgment motion). In determining whether the parties are from different countries, the key issue is where their places of business are, not necessarily where they are organized.

Citation to case summary: *CISG Case Presentation: McDowell Valley Vineyards, Inc. v. Sabate USA Inc.*, PACE LAW SCHOOL INST. OF INT'L

COMMERCIAL LAW (Feb. 19, 2014, 11:00 AM),
<http://cisgw3.law.pace.edu/cases/051102u1.html>

- *Golden Valley Grape Juice and Wine, LLC v. Centriys Co.*, No. CV-F-09-1424-LJO-GSA (E.D. Cal. Jan. 21, 2010)

Summary: An American Plaintiff purchased equipment from the American Defendant. When the product failed, the purchaser sued the seller, who then filed a third-party complaint against the Australian manufacturer. The agreement between the seller and manufacturer stated that any dispute would be resolved in Australia. The seller argued that the forum selection clause was never attached to any correspondence between it and the manufacturer, and was otherwise never assented to. Both parties agreed that the CISG applied since they were from different member states. Applying the CISG, the Court determined that the forum selection clause was part of the agreement because (1) under the CISG, acceptance can be manifested by conduct; and (2) the American seller manifested acceptance by incorporating the manufacturer's terms in its presentation to the buyer.

- Citation to case summary: *CISG Case Presentation: Golden Valley Grape Juice and Wine, LLC v. Centriys Co.*, PACE LAW SCHOOL INST. OF INT'L COMMERCIAL LAW (Feb. 19, 2014, 12:15 AM), <http://cisgw3.law.pace.edu/cases/100121u1.html>
- State appellate courts: *Orthotec, LLC v. Eurosururgical S.A.*, 2007 WL 1830810 (Cal.App.2 Dist. June 27, 2007)

Summary: Defendant argued that CISG applied to the contract between the parties, and that the trial court erred in determining that the CISG did not apply to the underlying contract. The appellate court did not address the merits of Defendant's argument because Defendant did not demonstrate that the failure to instruct the jury on the CISG resulted in prejudice.

Citation to case summary: *CISG Case Presentation: Orthotec, LLC v. Eurosururgical S.A.*, PACE LAW SCHOOL INST. OF INT'L COMMERCIAL LAW (Feb. 18, 2014, 4:35 PM),
<http://cisgw3.law.pace.edu/cases/071108u1.html>.<http://cisgw3.law.pace.edu/cases/070627u1.html>

- Oregon state appellate courts

GPL Treatment v. Louisiana-Pacific, 894 P.2d 470 (Or. App. 1994)

Summary: Plaintiffs, Canadian manufacturers and sellers of wood shingles, sued an American buyer for breach of contract. Defendant filed a motion *in limine* to dismiss on grounds that the alleged contract did not satisfy the UCC statute of frauds. The trial court denied the motion. During trial, the Plaintiffs asserted that the CISG governed the contract as opposed to the UCC. The trial court precluded the Plaintiffs from raising the

CISG issue. Plaintiffs prevailed at trial and were awarded damages for lost profits. Defendants appealed, arguing that the trial court should not have denied its motion *in limine*. The Oregon Court of Appeals affirmed by a vote of 2-1, holding that the Plaintiffs had satisfied the statute of frauds. The dissenting judge stated that the trial court abused its discretion by not deciding the CISG issue.

Analysis: Scholars have criticized Plaintiff's counsel for failing to realize earlier in the case that the CISG (which does not have a statute of frauds for the sale of goods) applied instead of the UCC. If Plaintiff's counsel had realized this, the Defendant's statute of frauds defense would have been defeated at the beginning of the case.

Citation to case summary: *CISG Case Presentation: GPL Treatment v. Louisiana Pacific*, PACE LAW SCHOOL INST. OF INT'L COMMERCIAL LAW (Feb. 18, 2014, 2:44 PM), <http://cisgw3.law.pace.edu/cases/950412ul.html>

- Washington federal district courts
- *Beltappo Inc. v. Rich Xiberta, S.A*, No. C05-1343Z (W.D. Wash. Feb. 7, 2006).

Summary: American manufacturer sued Spanish distributor for breach of a distribution agreement. The manufacturer alleged that the distributor had not purchased the minimum amount of the manufacturer's product, and had not used best efforts to promote sales. The contract stated that Washington state law would govern any dispute arising thereunder. Defendant filed a motion to dismiss for *forum non conveniens*. The district court denied the motion, basing its ruling in part on the fact that since both the United States and Spain were signatories to the CISG, the CISG would apply in either forum.

Citation to case summary: *CISG Case Presentation Beltappo Inc. v. Rich Xiberta, S.A*, PACE LAW SCHOOL INST. OF INT'L COMMERCIAL LAW (Feb. 19, 2014, 10:21 AM), <http://cisgw3.law.pace.edu/cases/060207u2.html>

- *Prime Start Ltd. v. Maher Forest Products Ltd.*, No. C05-1195C (W.D. Wash. July 16, 2006).

Summary: Defendant, headquartered in the British Virgin Islands, purchased wood siding from a Washington corporation. The buyer sued the seller for supplying non-conforming goods. The Defendants moved for summary judgment. Since the United Kingdom was not a signatory to the CISG, the Court applied Washington contract law instead of the CISG. Applying Washington law (to this diversity case) the Court determined that genuine issues of material fact precluded summary judgment.

Citation to case summary: *CISG Case Presentation Prime Start Ltd. v. Maher Forest Products Ltd.*, PACE LAW SCHOOL INST. OF INT'L COMMERCIAL LAW (Feb. 19, 2014, 10:30 AM), <http://cisgw3.law.pace.edu/cases/060717u1.html>

APPENDIX III

Cases Applying Idaho's Version of UCC Article 2 By Topic

Offer and acceptance

Smith v. Boise Kenworth Sales, Inc., 102 Idaho 63, 625 P.2d 417 (1981)

Revocation of offers; irrevocable offers

Battle of the forms

Figueroa v. Kit-San Co., 123 Idaho 149, 845 P.2d 567 (Ct. App. 1992)

Rangen, Inc. v. Valley Trout Farms, Inc., 104 Idaho 284, 658 P.2d 955 (1986)

S. Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc., 98 Idaho 495, 567 P.2d 1246 (1977)

Statute of frauds

Mitchell v. Barendregt, 120 Idaho 837, 820 P.2d 707 (Ct. App. 1991)

Christensen v. Ransom, 123 Idaho 99, 844 P.2d 1349 (Ct. App. 1992)

Figueroa v. Kit-San Co., 123 Idaho 149, 845 P.2d 567 (Ct. App. 1992)

Beal v. Griffin, 123 Idaho 445, 849 P.2d 118 (Ct. App. 1993)

Parol evidence

Herrick v. Leuzinger, 127 Idaho 293, 900 P.2d 201 (1995)

Anderson & Nafziger v. G.T. Newcomb, Inc., 100 Idaho 175, 595 P.2d 709 (1979)

Brewer v. Pitkin, 99 Idaho 114, 577 P.2d 1162 (1978)

Warranties and disclaimers

Keller v. Inland Metals All Weather Conditioning, Inc., 139 Idaho 233, 76 P.3d 977 (2003)

Tolmie Farms, Inc. v. J.R. Simplot Co., 124 Idaho 607, 862 P.2d 299 (1993)

Dickerson v. Mountain View Equip. Co., 109 Idaho 711, 710 P.2d 621 (1985)

Robinson v. Williamsen Idaho Equip. Co., 94 Idaho 819, 498 P.2d 1292 (1972)

Duff v. Bonner Bldg. Supply, Inc., 105 Idaho 123, 666 P.2d 650 (1983)

Consol. Supply Co. v. Babbitt, 96 Idaho 636, 534 P.2d 466 (1975)

Steiner Corp. v. Am. Dist. Tel., 106 Idaho 787, 683 P.2d 435 (1984)

Farmer v. Int'l Harvester Co., 97 Idaho 742, 553 P.2d 1306 (1976)

Duffin v. Idaho Crop Improvement Ass'n, 126 Idaho 1002, 895 P.2d 1195 (1995)

Rejection of non-conforming goods

In re Terra Distrib., Inc., 148 B.R. 598 (Bankr. D. Idaho 1992)

Keller v. Inland Metals All Weather Conditioning, Inc., 139 Idaho 233, 76 P.3d 977 (2003)

G & H Land & Cattle Co. v. Heitzman & Nelson, Inc., 102 Idaho 204, 628 P.2d 1038 (1981)

Hybrid transactions

Fox v. Mountain W. Elec., Inc., 137 Idaho 703, 52 P.3d 848 (2002)

Gap-filler/risk of loss provisions

Lickley v. Max Herbold, Inc., 133 Idaho 209, 984 P.2d 697 (1999)

D.R. Curtis, Co. v. Mathews, 103 Idaho 776, 653 P.2d 1188 (1982)

In re Nevins Ammunition, Inc., 79 B.R. 11 (Bankr. D. Idaho 1987)

Transportation terms

In re Nevins Ammunition, Inc., 79 B.R. 11 (Bankr. D. Idaho 1987)

APPENDIX IV

All dates: DD/MM/YYYY

State	Notes	Signature	Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)	Entry into force
Albania			13/05/2009(*)	01/06/2010
Argentina	(a)		19/07/1983(*)	01/01/1988
Armenia	(a), (b)		02/12/2008(*)	01/01/2010
Australia			17/03/1988(*)	01/04/1989
Austria		11/04/1980	29/12/1987	01/01/1989
Bahrain			25/09/2013(*)	01/10/2014
Belarus	(a)		09/10/1989(*)	01/11/1990
Belgium			31/10/1996(*)	01/11/1997
Benin			29/07/2011(*)	01/08/2012
Bosnia and Herzegovina			12/01/1994(§)	06/03/1992
Brazil			04/03/2013(*)	01/04/2014
Bulgaria			09/07/1990(*)	01/08/1991
Burundi			04/09/1998(*)	01/10/1999
Canada	(c)		23/04/1991(*)	01/05/1992
Chile	(a)	11/04/1980	07/02/1990	01/03/1991
China	(b)	30/09/1981	11/12/1986(†)	01/01/1988
Colombia			10/07/2001(*)	01/08/2002
Croatia			08/06/1998(§)	08/10/1991
Cuba			02/11/1994(*)	01/12/1995
Cyprus			07/03/2005(*)	01/04/2006
Czech Republic	(b)		30/09/1993(§)	01/01/1993
Denmark	(d)	26/05/1981	14/02/1989	01/03/1990
Dominican Republic			07/06/2010(*)	01/07/2011
Ecuador			27/01/1992(*)	01/02/1993

Egypt			06/12/1982(*)	01/01/1988
El Salvador			27/11/2006(*)	01/12/2007
Estonia			20/09/1993(*)	01/10/1994
Finland	(d)	26/05/1981	15/12/1987	01/01/1989
France		27/08/1981	06/08/1982(†)	01/01/1988
Gabon			15/12/2004(*)	01/01/2006
Georgia			16/08/1994(*)	01/09/1995
Germany	(e)	26/05/1981	21/12/1989	01/01/1991
Ghana		11/04/1980		
Greece			12/01/1998(*)	01/02/1999
Guinea			23/01/1991(*)	01/02/1992
Honduras			10/10/2002(*)	01/11/2003
Hungary	(a), (f)	11/04/1980	16/06/1983	01/01/1988
Iceland	(d)		10/05/2001(*)	01/06/2002
Iraq			05/03/1990(*)	01/04/1991
Israel			22/01/2002(*)	01/02/2003
Italy		30/09/1981	11/12/1986	01/01/1988
Japan			01/07/2008(*)	01/08/2009
Kyrgyzstan			11/05/1999(*)	01/06/2000
Latvia			31/07/1997(*)	01/08/1998
Lebanon			21/11/2008(*)	01/12/2009
Lesotho		18/06/1981	18/06/1981	01/01/1988
Liberia			16/09/2005(*)	01/10/2006
Lithuania	(a)		18/01/1995(*)	01/02/1996
Luxembourg			30/01/1997(*)	01/02/1998
Mauritania			20/08/1999(*)	01/09/2000
Mexico			29/12/1987(*)	01/01/1989
Mongolia			31/12/1997(*)	01/01/1999
Montenegro			23/10/2006(§)	03/06/2006
Netherlands		29/05/1981	13/12/1990(‡)	01/01/1992
New Zealand			22/09/1994(*)	01/10/1995
Norway	(d)	26/05/1981	20/07/1988	01/08/1989

Paraguay	(a)		13/01/2006(*)	01/02/2007
Peru			25/03/1999(*)	01/04/2000
Poland		28/09/1981	19/05/1995	01/06/1996
Republic of Korea			17/02/2004(*)	01/03/2005
Republic of Moldova			13/10/1994(*)	01/11/1995
Romania			22/05/1991(*)	01/06/1992
Russian Federation	(a)		16/08/1990(*)	01/09/1991
Saint Vincent and the Grenadines	(b)		12/09/2000(*)	01/10/2001
San Marino			22/02/2012(*)	01/03/2013
Serbia			12/03/2001(§)	27/04/1992
Singapore	(b)	11/04/1980	16/02/1995	01/03/1996
Slovakia	(b)		28/05/1993(§)	01/01/1993
Slovenia			07/01/1994(§)	25/06/1991
Spain			24/07/1990(*)	01/08/1991
Sweden	(d)	26/05/1981	15/12/1987	01/01/1989
Switzerland			21/02/1990(*)	01/03/1991
Syrian Arab Republic			19/10/1982(*)	01/01/1988
The former Yugoslav Republic of Macedonia			22/11/2006(§)	17/11/1991
Turkey			07/07/2010(*)	01/08/2011
Uganda			12/02/1992(*)	01/03/1993
Ukraine	(a)		03/01/1990(*)	01/02/1991
United States of America	(b)	31/08/1981	11/12/1986	01/01/1988
Uruguay			25/01/1999(*)	01/02/2000
Uzbekistan			27/11/1996(*)	01/12/1997
Venezuela (Bolivarian Republic of)		28/09/1981		
Zambia			06/06/1986(*)	01/01/1988

Parties: 80

Notes

(a) This State declared, in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29 or Part II of the Convention that allowed 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, would not apply where any party had his place of business in its territory.

(b) This State declared that it would not be bound by paragraph 1 (b) of article 1.

(c) Upon accession, Canada declared that, in accordance with article 93 of the Convention, the Convention would extend to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories. In a declaration received on 9 April 1992, Canada extended the

application of the Convention to Quebec and Saskatchewan. In a notification received on 29 June 1992, Canada extended the application of the Convention to the Yukon Territory. In a notification received on 18 June 2003, Canada extended the application of the Convention to the Territory of Nunavut.

(d) Norway declared that it would not be bound by Part II of the Convention ("Formation of the Contract"). Denmark, Finland, Iceland, Norway and Sweden declared that the Convention would not apply to contracts of sale or to their formation where the parties have their places of business in Denmark, Finland, Iceland, Norway or Sweden.

(e) Upon ratifying the Convention, Germany declared that it would not apply article 1, paragraph 1 (b) in respect of any State that had made a declaration that that State would not apply article 1, paragraph 1 (b).

(f) Upon ratifying the Convention, Hungary declared that it considered the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance to be subject to the provisions of article 90 of the Convention.

(from http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html)