



Navigating the Legal Waters of International Commerce

By Michael C. Gibbons and Peter Gojcaj

With the explosion of global commerce, it is imperative that lawyers (and companies who conduct business with foreign entities) familiarize themselves with the United Nations Convention on the International Sale of Goods (hereinafter the CISG).¹ Many sophisticated commercial parties enter into contracts without giving any thought to what law applies to their relationship and are later surprised to learn that the Uniform Commercial Code (UCC) does not control their transaction involving the sale of goods. In today's global economy, those businesses are more likely than ever to be located in different countries. Although the CISG and article 2 of the UCC are similar in many respects, there are also differences that could affect the outcome of cases.

The CISG is the international equivalent of article 2 of the UCC as adopted by most of the states.² As of January 1, 2009, 72 countries had ratified the CISG, including the United States, Mexico, Canada, most of Europe, and China.³

The CISG went into effect on January 1, 1988, after the United States Senate, and subsequently President Reagan, ratified it.⁴ By virtue of the United States Constitution's Supremacy Clause, the CISG significantly displaces state sales laws (most notably, the UCC).⁵ This article will attempt to navigate some of the differences and similarities between the UCC and the CISG with respect to nonconforming goods, warranties, disclaimers, and damages.

When and How is the CISG Applied?

"[W]hen two foreign nations are signatories to the CISG, ... the CISG governs contracts for the sale of goods between the parties...."⁶ This is an important distinction because although the parties to a contract may exclude the application of the CISG, in order to effectively do so, the contract must expressly state that the CISG does not apply.⁷

Courts have ruled that it is not enough to exclude the application of the CISG by "stating that Michigan law applies" because the law of Michigan is the CISG under the Supremacy Clause of the United States Constitution.⁸ Thus, if businesses do not want the CISG to apply, they must expressly disclaim its applicability. Many businesses do indeed opt out of the CISG because of uncertainties in how courts will apply it, so "[c]ase law interpreting the CISG is rather sparse."⁹

"Many provisions of the UCC and the CISG are the same or similar," so cases interpreting the UCC may provide assistance to a court analyzing the CISG.¹⁰ However, UCC caselaw is not automatically applied.¹¹

The CISG Eliminates the UCC's Statute of Frauds

Importantly, the CISG provides that a contract need not be reduced to written form, effectively precluding application of the

FAST FACTS

The United Nations Convention on the International Sale of Goods (CISG) is the international equivalent of article 2 of the Uniform Commercial Code.

When two foreign nations are signatories to the CISG, it governs contracts for the sale of goods between parties that are citizens of those nations.

It is not enough to state the applicable law in the contract; the CISG will apply unless expressly excluded.

statute of frauds.¹² The opposite rule is true under the UCC.¹³ This distinction, though, may in many cases be one without a difference since the UCC includes many exceptions that undercut, if not eliminate, the general rule of a statute of frauds.¹⁴

The Seller Must Deliver Conforming Goods

Article 35 of the CISG is similar to MCL 440.2606 with respect to the requirement that sellers must deliver goods that are of the quantity, quality, and description required by the contract.¹⁵ MCL 440.2606 states, in pertinent part, that sellers must deliver goods in strict conformity with the contract and that the buyer may accept or reject the goods in whole or in part if the goods or delivery do not conform in any respect.¹⁶ Similarly, article 35 of the CISG requires that “the seller must deliver goods which are of the quantity, quality and description required by the contract....”¹⁷

“The CISG does not state expressly whether the seller or buyer bears the burden of proof as to the product’s conformity with the contract.”¹⁸ However, “[a] comparison with the UCC reveals that the buyer bears the burden of proving nonconformity under the CISG.”¹⁹

Warranty-Related Issues

Like the UCC, article 35 of the CISG also provides for express warranties, implied warranties of merchantability, and implied warranties of fitness for a particular purpose.²⁰ In pertinent part, article 35 states that unless

- (2) the parties have agreed otherwise, the goods do not conform with the contract unless they:
 - (a) are fit for the purposes for which goods of the same description would ordinarily be used;
 - (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller’s skill and judgment;
 - (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
 - (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.²¹

The CISG’s warranties are similar to the UCC warranties provided by MCL 440.2313 through 440.2316.²² Thus, the CISG accomplishes in one concise article what the UCC accomplishes in four different sections. Both the UCC and the CISG require that at the time of contracting, the seller must know the particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods in order for an implied warranty of fitness for a particular purpose to apply.

The CISG states that not only must the buyer rely on the seller’s skill, but if “it was unreasonable for [the buyer] to rely” on a seller’s skill or judgment, the implied warranty of fitness for a particular purpose would not apply.²³ The UCC does not include this requirement.

Disclaimers or Exclusions of Warranties

Unlike the UCC, the CISG does not expressly provide for disclaimers or exclusions of warranties. However, the CISG requires the application of “private international law” (for example, Michigan’s UCC) with regard to matters not expressly addressed by its statutory scheme.²⁴ Also, by use of the introductory phrase “[e]xcept where the parties have agreed otherwise,” article 35 of the CISG seems to suggest that the parties are free to contract for warranty limitations and exclusions.²⁵

Unpublished opinions of courts applying the CISG generally defer questions of warranty limitations and disclaimers to private international law.²⁶ The trend appears to be that courts will apply private international law when examining warranty disclaimers.²⁷

The Buyer’s Damages Under the UCC and the CISG

Both the CISG and the UCC allow for similar damages in connection with the seller’s failure to provide conforming products. However, the drafters of the CISG found the UCC to be needlessly complex in dealing with damages. For instance, under a UCC breach-of-warranty theory, the measure of damages is generally the difference between the value of goods accepted as compared to the value of the goods as warranted.²⁸ But UCC breach-of-warranty cases sometimes provide damages in an amount that will place the injured party in as good a position as the party would have been in had the other party performed.²⁹ The UCC also permits consequential damages when the plaintiff establishes a loss sustained as a consequence of the seller’s breach of its warranties, under section 2-714(3) and 2-715(2) of the UCC.³⁰ Thus, the UCC and cases applying it unnecessarily complicate the issue by allowing the aggrieved buyer either conventional breach-of-warranty damages or conventional breach-of-contract damages, clouding or eliminating the difference between the two.

The CISG, on the other hand, is simple and concise in regard to damages and does not distinguish between breach-of-warranty damages and breach-of-contract damages for buyers. Article 74 of the CISG states:

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other

With many domestic companies engaged in international commerce, it is essential that commercial parties familiarize themselves with the CISG.

party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

This provision is designed to place the aggrieved party in as good a position as if the other party had performed.³¹ Article 74 is similar to MCL 440.2714 and 440.2715. Indeed, the CISG provides that a plaintiff in a breach-of-contract action may recover damages to compensate for the full loss. This includes lost profits, subject to the limitation that the breaching party must have foreseen, or should have foreseen, the loss as a probable consequence of the failure to perform.³²

Conclusion

With many domestic companies engaged in international commerce, it is essential that commercial parties familiarize themselves with the CISG, including how to effectively exclude its application and the consequences of not doing so. Although similar in many respects, there are important differences between the UCC and the CISG that could significantly impact the outcome of litigation over commercial disputes. Thus, knowing the CISG is imperative. ■



Michael C. Gibbons is a shareholder of the Bloomfield Hills-based law firm Beier Howlett, P.C. and a member of the firm's Business Practice Group. He practices in the areas of business and commercial law and litigation, and has litigated commercial disputes in state and federal courts throughout the country.



Peter Gojcay, a partner of Beier Howlett's Business Practice Group, concentrates his practice in commercial litigation, business litigation, labor and employment matters, business formation, shareholder/member rights, creditors' rights, and corporate law.

FOOTNOTES

1. United Nations Convention on Contracts for International Sale of Goods, April 11, 1980, UN Doc A/Conf 97/18, available at United Nations Commission on International Trade Law, 1980—United Nations on Contracts for the International Sale of Goods (CISG) <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html> (hereinafter CISG). All websites cited in this article were accessed February 24, 2011.
2. See *Chicago Prime Packers, Inc v Northam Food Trading Co*, 408 F3d 894, 898 (CA 7, 2005).
3. United Nations Commission on International Trade Law, *The UNICITRAL Guide: Basic Facts About the United Nations Commission on International Trade Law*, Annex II, available at <http://www.uncitral.org/pdf/english/texts/general/06-50941_Ebook.pdf>.
4. Sutton, *Measuring damages under the United Nations convention on the international sale of goods*, 50 Ohio St LJ 737, 737 (1989).
5. *Id.*
6. *Supernico Computer, Inc v Digitechnic, SA*, 145 F Supp 2d 1147, 1151 (ND Cal, 2001), citing CISG, art 1.
7. See CISG, art 6.
8. *Riccitelli v Elemer New England Marble & Granite, LLC*, unpublished opinion of the United States District Court for the District of Connecticut, issued September 14, 2010 (Case No. 3:08CV01783); 2010 WL 376711; 2010 US Dist LEXIS 95086.
9. *Schmitz-Werke GmbH v Rockland Indus, Inc*, 37 Fed Appx 687, 693 (CA 4, 2002).
10. *Chicago Prime Packers*, 408 F3d at 898.
11. *Id.*
12. See CISG, art 11.
13. MCL 440.2201.
14. See, e.g., UCC 2-201; MCL 440.2201.
15. *Accord Delchi Carrier SpA v Rotorex Corp*, 71 F3d 1024, 1028 (CA 2, 1995).
16. MCL 440.2601.
17. *Delchi Carrier*, 71 F3d at 1028, quoting CISG, art 35(1).
18. *Chicago Prime Packers*, 408 F3d at 898.
19. *Id.*
20. See CISG, art 35(2)(b) and (c).
21. CISG, art 35(2)(a) to (d).
22. *Cf. Fargo Machine & Tool Co v Kearney & Trecker Corp*, 428 F Supp 364, 370 (ED Mich, 1977).
23. See CISG, art 35(2)(b).
24. CISG, art 7(2).
25. CISG, art 35(2).
26. *Norfolk S Ry Co v Power Source Supply, Inc*, unpublished opinion of the United States District Court for the Western District of Pennsylvania, issued July 25, 2008 (Docket No. 06-58 JJ); 2008 WL 2884102; 2008 US Dist LEXIS 56942.
27. See, e.g., *Zapata Hermanos Sucesores, SA v Hearthside Baking Co, Inc*, 313 F3d 385, 390 (CA 7, 2002); *Pescatore v Pan Am World Airways Inc*, 97 F3d 1, 12-13 (CA 2, 1996); *Geneva Pharm Tech Corp v Barr Labs*, 201 F Supp 2d 236, 282-283 (SD NY, 2002).
28. MCL 440.2714(2).
29. *Taylor & Gaskin, Inc v Chris-Craft Indus*, 732 F2d 1273, 1277 (CA 6, 1984), quoting *S C Gray, Inc v Ford Motor Co*, 92 Mich App 789, 810; 286 NW2d 34 (1979).
30. *Taylor & Gaskin*, 732 F2d at 1278.
31. *Delchi Carrier*, 71 F3d at 1029.
32. *Id.* at 1230, citing CISG, art 74; *Hadley v Baxendale*, 9 Ex 341; 156 Eng Rep 145 (1854).

