

## **APPENDIX: United Nations Convention on Contracts for the International Sale of Goods**

A convention is an instrument that is binding under international law on the states that choose to become a party to that instrument. The states that become parties to the convention are called Contracting States. The United Nations Convention on Contracts for the International Sale of Goods (CISG) was designed to promote friendly relations among the Contracting States, to regulate the sales of goods considered to be fundamental to international trade, and to remove legal barriers to international trade by providing fair and consistent rules for sales transactions. Work on the convention began in the 1930s, was interrupted by World War II, and continued through 1980. The United States became a signatory to the CISG in 1988. Other states bound by the CISG include Australia, Canada, China, France, Germany, Mexico, Russia, and Switzerland. All of the major trade partners of the U.S. are Contracting States, with the exception of the United Kingdom. A complete list of Contracting States is maintained at [www.uncitral.org](http://www.uncitral.org).

The CISG is composed of four Parts. Part I deals with the scope of the CISG. Part II governs contract formation. Part III sets out the obligations and rights of buyers and sellers. Finally, Part IV, titled Final Provisions, deals with procedural issues such as effective dates, ratification and other methods of becoming bound, and opting out of particular provisions.

In the following sections, we discuss some of the more significant differences between the American domestic law of contracts (looking at both the Restatement (2d) and the UCC) and the CISG.

### **I. SCOPE**

The CISG applies to contracts for the sale of goods by parties whose places of business are in different Contracting States. Thus, it does not apply to purely domestic transactions within the U.S. The parties to a domestic sale of goods, however, may select the CISG through a choice of law provision in their contract. Similarly, the parties to an international sale of goods may exclude the application of the CISG (see Article 6).

Certain types of sales are excluded, depending on the purpose of the sale, the nature of the sale, or the nature of the items sold. The CISG does not apply to sales of goods “bought for personal, family or household use” (Article 2(1)). It does not apply to auctions or judicially ordered sales (Article 2(b) and (c)). And it does not apply to the sale of ships, vessels, hovercraft, aircraft, or electricity (Article 2(e) and (f)), as the drafters thought that other legal regimes adequately police the sales of these items.

### **II. DIFFERENCES BETWEEN THE CISG AND AMERICAN DOMESTIC LAW**

#### **A. Formation**

Formation of a contract is the area where the CISG differs most from the Uniform Commercial Code (UCC) and domestic common law. Major differences include:

- Ease of creating irrevocable offers
- Recognition of conditional acceptances
- Receipt rather than dispatch for the effectiveness of acceptances

## 1. **Irrevocable Offers**

Under the CISG the general rule that a contract is formed by an offer and acceptance remains the same as American domestic law (see Article 16(1)). However, the CISG renders it much easier to render an offer irrevocable.

### ARTICLE 16

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

Under the CISG, an offer only needs to state that it cannot be revoked. There is no requirement for a separate consideration, as is required by the common law of options, *but cf.* Restatement (2d) § 87(1)(a), which provides that an offer is binding as an option contract if it is in a writing signed by the offeror and “recites a purported consideration for the making of the offer”). In this sense, the CISG mirrors the UCC option contract rule. The UCC does not require consideration. Under UCC § 2-205, a signed written offer stating that the offer is firm is “not revocable, for lack of consideration.”

But the CISG differs from both the Restatement (2d) and the UCC on the requirement of a writing. The CISG does not require the offer be in writing, as is required by both Restatement (2d) § 87(1)(a) and the UCC § 2-205. Moreover, the CISG treats an offer stating a fixed time for acceptance as irrevocable. *Cf. Normile v. Miller* (case from Chapter 2, where real estate offer that stated it could be accepted until a specific time and date was revocable; language only stated the time when the offer was effective).

The CISG does retain the exception that an offer, otherwise revocable, is made irrevocable if the offeree reasonably relies on the offer, which is consistent with the result in *Drennan v. Star Paving* (case from Chapter 4) and Restatement (2d) § 87(b).

## 2. **Conditional Acceptances**

The CISG is consistent with the UCC regarding conditional acceptances while both differ from the common law. Recall that under the common law a so-called acceptance that adds additional terms is not an acceptance but a counter-offer:

### Restatement (2d) § 59. Purported Acceptance Which Adds Qualifications

A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer.

Under the UCC, an acceptance containing additional or different terms operates as an acceptance, unless it is expressly made conditional on the original offeror's assent to the new terms. Whether the new terms become part of the contract depends on whether the parties are merchants. If one party is not a merchant, the new terms are considered merely proposals, but if the parties are both merchants the new terms become part of the contract, unless the original offer expressly limited acceptance to the terms of the offer, the new terms materially alter the contract, or the original offeror objects to the new terms within a reasonable time. Here is the UCC provision:

UCC § 2-207. Additional Terms in Acceptance or Confirmation.

- (1) A definite and seasonable expression of acceptance ... operates as an acceptance even though it states terms additional to or different from those offered ... unless acceptance is expressly made conditional on assent to the additional or different terms.
- (2) The additional terms are to be considered as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
  - a. the offer expressly limits acceptance to the terms of the offer;
  - b. they materially alter it; or
  - c. notification of objection to them ... is given within a reasonable time after notice of them is received.

...

The CISG appears to state as a general rule the Restatement approach, that new terms in an acceptance render it a counteroffer (Article 19(1)), but then sets out an exception which puts the CISG more in line with the UCC approach to conditional acceptances between merchants (Article 19(2)). Article 19(3) also identifies some alterations that are deemed material.

Article 19

- (1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.
- (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
- (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

**3. *Timing of Acceptance: Dispatch versus Receipt***

The CISG also alters the common law rules regarding the timing of the effectiveness of acceptances. Under the Restatement (2d) "mailbox rule," acceptances are effective upon dispatch. Restatement (2d) § 63 provides that an acceptance made in a manner and by a medium invited by an offer "is operative ... as soon as put out of the offeree's possession, without regard to whether it ever

reaches the offeror” although an acceptance under an option contract is not operative until received by the offeror.

Under the CISG, acceptances are only effective upon receipt by the offeror. Article 18(2) provides that an acceptance “becomes effective at the moment the indication of assent reaches the offeror” and if it does not reach the offeror within the time set by the offer or, if no time is set, within a reasonable time it is not effective.

However, despite this difference in the timing of the effectiveness of acceptances, both regimes treat the revocation of offers in relation to acceptance the same.

#### **4. *Timing of revocation and withdrawal of offers***

Under both the Restatement (2d) and the CISG, an offer may only be revoked before the offeree has dispatched her acceptance.

Under Restatement (2d) § 42, revocation of an offer is effective upon receipt by the offeree, provided receipt occurs before the offeree has accepted the offer. Recall that acceptance occurs when the offeree dispatches her acceptance. Restatement (2d) § 63. Thus, revocation of an offer must be received prior to the offeree dispatching her acceptance.

Under CISG Article 16(1): “an offer may be revoked if the revocation reaches the offeree before he has *dispatched* an acceptance” (emphasis added). Yet Article 18 provides that an acceptance is only effective upon receipt by the offeror. Thus, despite the differences in the timing of the effectiveness of an acceptance, both the Restatement and the CISG require revocation of an offer to occur prior to dispatch of an acceptance. Some commentators have described the CISG as adopting a modified mailbox rule, requiring a revocation of an offer to be received prior to dispatch of an acceptance, but putting the risk of a lost or misdirected communication on the offeree. See William S. Dodge, *Teaching the CISG in Contracts*, 50 J. Leg. Ed. 72 (2000).

Finally, the CISG recognizes the idea of withdrawal as a separate concept from revocation of an offer. CISG Article 15(2) provides that “An offer, even if irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.” Because the CISG allows revocation of a (revocable) offer after the offeree has received the offer (but prior to dispatch of an acceptance), withdrawal appears to be limited to irremovable offers, which cannot be revoked but can be withdrawn. The Restatement does not have an analogous provision, but of course under the Restatement it is more difficult to create an irrevocable offer than it is under the CISG (see above).

### **III. POST-FORMATION ISSUES**

Two major differences between the CISG and American domestic law involve the importance of a writing under the statute of frauds and the parol evidence rule, and the distinction between perfect tender and fundamental breach.

#### **1. *No statute of frauds or parol evidence rule***

The CISG rejects any statutes of frauds requirement that the contract be in writing:

“A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.”

Given the CISG’s rejection of the written formality required by the statute of frauds, it is not surprising that the CISG omits any type of parole evidence rule. Indeed, in Article 8(3) the CISG explicitly directs a court to consider negotiations between the parties when interpreting a contract’s terms.

However, the CISG does recognize the effectiveness of a no-oral-modification (NOM) clause in Article 29(2) which provides as follows:

Article 29

“(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.”

The second sentence of Article 29(2) also recognizes a detrimental reliance exception to the effectiveness of the NOM clause.

**2. Perfect Tender Rule versus Fundamental Breach**

The basic obligations of a seller and a buyer under the CISG are similar to those set out in the UCC: a seller must deliver the goods and a buyer must take delivery of the goods and pay the purchase price. Cf. Articles 30 and 50 under the CISG with UCC §§ 2-301.

One place where the CISG diverges from the UCC is with regard to the “perfect tender” rule. Recall that under UCC § 2-601, unless the sale is an installment sale, the buyer may reject “if the goods or the tender of delivery fail in any respect to conform to the contract.” The potential harshness of this rule is mitigated by UCC § 2-508 on the seller’s right to cure. UCC § 2-508(1) gives the seller the ability to cure a non-conforming tender or delivery if the seller seasonably notifies the buyer of his intent to do so and “the time for performance has not yet expired.” Subsection 2 expands the seller’s opportunity to cure for a “further reasonable time” if “the seller had reasonable grounds to believe [the non-conforming tender] would be acceptable with or without money allowance” and the seller “seasonably notifies” the buyer of his intent to cure.

While the CISG requires that the seller “must deliver goods which are of the quantity, quality and description required by the contract” (Article 35(1)), it also makes the buyer’s rights depend upon whether the lack of conformity constitutes a “fundamental breach” of the contract. A breach is fundamental under the CISG “if it results in such [a foreseeable] detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract.” CISG Article 25. Similar to the UCC, the CISG also grants the seller of non-conforming goods the right to cure up to the time for performance, although the CISG puts limitations on the seller’s right to cure: “provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense.” It also tempers the seller’s right to cure by letting the buyer retain the right to claim any damages despite cure.

Under the CISG the buyer's remedies for non-conforming goods depend on whether the non-conformity involves a fundamental breach. Article 46(2) provides:

“If the goods do not conform to the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach...”

Likewise CISG Article 49(1) allows the buyer to cancel the contract only if the seller's failure to perform amounts to a fundamental breach.

By limiting the buyer's right to avoid the contract to situations involving a fundamental breach, the CISG aligns more with the common law rules pertaining to material breach and substantial performance. See Chapter 9.

In summary, while much of the CISG should be familiar to lawyers knowledgeable about American domestic law, there are some differences. Major differences include the scope of the CISG, the creation of irrevocable offers and conditional acceptances, the timing of acceptances and revocations, the rejection of the statute of frauds and parol evidence rule, and the standard of fundamental breach versus perfect tender.