Contracts, the UCC, and the Vienna Convention on International Sales of Goods

What every US commercial lawyer needs to know

- ‘CISG’
- ‘Vienna Convention’
- Uniform substantive law
Why the CISG is important to US lawyers

- Applies instead of UCC Art 2 in certain circumstances unless parties opt out
- Applies instead of domestic law of another country in certain circumstances unless parties opt out
- Not identical to any other system of law
- Differences between CISG and Art 2
History of CISG

- 1964 Hague Conventions
  - Uniform Law for the International Sale of Goods (ULIS)
  - Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF)
  - Largely drawn up by Western European countries
  - Only adopted by 8 countries (not US)
  - UK only adopted it if parties opted in
Process leading up to CISG: UNCITRAL

- Series of debates
- Participants:
  - Common law jurisdictions
  - Civil law jurisdictions
  - Developing nations
- Considerable influence by US (many similarities to UCC Article 2)
Ratification

- Ratified by 68 countries
- Ratified by the US in 1988
- Ratified by Mexico in 1989
- Ratified by Canada in 1992
- Not yet ratified by the UK
Plan of CISG

- PART I - Sphere of Application and General Provisions (Arts. 1-13).
- PART III - Sale of Goods (i.e. substantive provisions of contract of sale):
  - Ch. I - General Provisions (Arts. 25-29)
  - Ch. II - Obligations of Seller (Arts. 30-52)
  - Ch. III - Obligations of Buyer (Arts. 53-65)
  - Ch. IV - Passing of Risk (Arts. 66-70)
  - Ch. V - Provisions Common to the Obligations of the Seller and of the Buyer (Arts. 71-88)
Sphere of application (art 1)

- Contract of sale where parties have places of business in different Contracting States
  - Not if parties ignorant of this fact
- Contract of sale when the rules of private international law lead to the application of the law of a Contracting State
- US opted out of latter provision
- Use as lex mercatoria
Contracts excluded (arts 2 & 3)

- Consumer contracts
- Sales by auction
- Sales on execution or by authority of law
- Sales of
  - Investment securities
  - Ships, aircraft, hovercrafts
  - Electricity
- Sale of goods to be manufactured
- Contracts where the preponderant part is labour
Other exclusions

- Seller’s liability for death or personal injury excluded (art 5)
Other exclusions

- CISG is not concerned with the validity of the contract or any provisions (art 4)
Other exclusions

- CISG is not concerned with the effect the contract may have on property in the goods sold (art 4)
Opt-out by parties

- Opt-out: parties may exclude application of CISG (art 6)
- Parties may derogate from or vary any of the provisions of CISG (Art 6)
Interpretation (art 7)

- CISG is to be interpreted with reference to:
  - Its international character
  - The need to promote uniformity in its application
  - Observance of good faith in international trade
- Gaps to be filled in accordance with principles on which CISG is based.
Requirements of form

- Contract for sale of goods under CISG does not have to be in writing or comply with any other formal requirements (art 11)
- Ratifying States can opt out of art 11 (art 12)
Formation of contract

- Largely ordinary offer and acceptance rules (arts 14-18)
1. Contract must explicitly or implicitly fix the price or make provision for determining the price (art 14(1))

2. Offer effective on communication to offeree (art 15). Until then can be withdrawn (art 15(2))

3. Offer can be revoked until acceptance dispatched (art 16(1)) unless offer irrevocable or offeree has acted in reliance (art 16(2))

4. Cannot accept by silence (art 18(1), but can accept by conduct (art 18(3))

5. Acceptance effective on communication to offeror (art 18(2)). Can withdraw acceptance before acceptance reaches offeror.

6. Battle of the forms. Art 19: reply with modification is a counter-offer unless terms of offer not materially altered.
Sale of Goods: general provisions

- Contract can be modified or terminated by mere agreement of parties (Art 29)

- A breach of contract committed by one of the parties 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,
  - unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. (Art 25)
Obligations of Seller (delivery)

- Delivery of goods to buyer or carrier (art 30 – 31)
- Time of delivery: on specific date determinable from contract, or within determined time period, or within reasonable time (art 33)
Obligations of seller (conforming goods)

- Deliver conforming goods (art 35)
  - Fitness for usual purpose
  - Fitness for special purpose made known to seller
  - Possess qualities held out by seller (e.g., sample)
  - Adequately packaged

- Time for conformity: when risk passes (art 36)

- Buyer loses right to rely on lack of conformity:
  - If does not notify seller within reasonable time of when discovers or ought to have discovered (art 39(1))
  - After two years from delivery (art 39(2))
  - But not if lack of conformity related to facts seller knew or ought to have known and did not disclose (art 40).

- Buyer can still sue for damages or reduction in price if has reasonable excuse for not giving notice (art 44)
Obligations of seller (rights of third parties)

- Goods must be free from claims of third parties (art 41 & 42)
- Can sell only such title as seller has (art 41)
- Buyer must give notice to seller within reasonable time of becoming aware of third party claim (art 43)
- Buyer can still sue for damages or reduction in price if has reasonable excuse for not giving notice (art 44)
Buyer’s remedies (general)

- Remedies also apply to part of contract quantity if short delivery or part of the quantity does not conform (art 51)
Buyer’s remedies: specific

- Specific performance (art 28, art 46) : only to be awarded if court would do so under own law.
- If non-conformity
  - Buyer can require repair (art 46(3))
  - Buyer can require replacement if fundamental breach (art 46(2))
Buyer’s right to avoid contract

- Buyer can extend time for performance *(Nachfrist)*(art 47).
  - If seller does not perform within extended time buyer can avoid contract even if breach not fundamental (art 49(1))

- Seller has right to cure after date for delivery, subject to not causing the buyer unreasonable inconvenience and if contract not yet avoided by buyer (art 48)

- Buyer can declare contract avoided (art 49) if
  - fundamental breach or
  - non-delivery within *nachfrist*
  - Avoidance has to be within a reasonable time of knowledge of breach (art 49(2))
Reduction in price

- If goods do not conform, buyer may reduce price (art 50)
  - in proportion of value of goods actually delivered to value of goods if had conformed.
  - Does not require recourse to court.
- Buyer can also claim damages for consequential loss.
- Can claim reduction in price even if seller not liable because of art 79.
Obligations of buyer

- Payment of price (arts 53-59)
- Take delivery (art 60)
Remedies of the seller

- Seller may require buyer to pay price (art 62)
- Seller may fix additional reasonable period of time for buyer to perform (*nachfrist*) (art 63)
- Seller can declare contract avoided (art 64) if
  - fundamental breach or
  - non-performance within *nachfrist*
- If buyer, in breach of contract, fails to make specification, seller can make specification himself (art 65)
Passing of risk

- Rules provide for passing of risk
- If contract of sale involves carriage of goods (by third party) risk pass when goods handed over to first carrier (art 67)
- If goods sold in transit risk passes from time of contract unless circumstances indicate that risk should pass when goods originally handed to carrier (art 68)
- Otherwise, risk passes to buyer when he takes over the goods (art 69)
Provisions common to obligations of buyer and seller: anticipatory remedies

- Party may suspend performance if becomes apparent that other party will not perform a substantial part of obligations (art 71)
- Buyer may avoid contract if clear that seller will commit fundamental breach (art 72)
Provisions common to obligations of buyer and seller: damages

- Sum equal to loss suffered as a consequence of breach.
- Limited to loss foreseen or ought to have been foreseen (art 74).
- Usually difference between contract price and market price (or price actually paid for substitute goods)
- Difference in price calculated at the time of avoidance.
- Failure to mitigate loss may lead to reduction in damages (art 77) (but only damages: not other remedies)
- Buyer not deprived of right to damages by exercising right to other remedies (art 45(2))
Provisions common to obligations of buyer and seller: exemptions (art 79)

- Relief from liability if failure to perform obligations was due to a circumstance beyond the control of the performing party
- Includes non-performance of any obligation (i.e., partial non-performance of the contract)
- Only relieves from liability to pay damages
- Other party can avoid contract if failure amounts to fundamental breach
- Party may not rely on failure of other party to perform if caused by first party’s acts or omissions (art 80)