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UN sale of goods convention may be trap for the unwary

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The United Nations Convention on the International Sale of Goods (CISG) governs trade between Canada and the United States, as well as among 60 other signatory states. Despite the CISG's far-reaching consequences, many North American legal practitioners on both sides of the border are barely aware of the CISG, which was enacted in 1980 and adopted by the United States and Canada in 1988 and 1992, respectively.

Equally striking, Canadian and U.S. courts have only limited experience in applying the CISG. There are only a handful of published U.S. opinions that discuss any of its numerous provisions in detail, and there is even less Canadian caselaw. It appears likely that courts are continuing to apply Canadian or U.S. law even where the CISG clearly ought to govern.

These circumstances suggest that while the CISG was enacted with the laudable goal of promoting uniformity in international transactions, the opposite may be occurring. At least in North America, the CISG may be a trap for the unwary — a set of only partially tested and poorly understood rules which courts neither uniformly nor predictably apply.

Applicability

In the absence of contrary agreement, the CISG applies to "contracts of sales of goods between parties whose places of business" are in different CISG contracting (*i.e.*, signatory) states. (CISG Art 1, (1).)

(The full text of the CISG is available, among other sources, at the website of the Institute of International Commercial Law of Pace Law School (www.cisg.law.pace.edu.)

In addition, the CISG applies where only one of the parties has its place of business in a contracting state, if private international choice of law principles lead to the application of that state's law. (CISG Art 1, (1)(b). The U.S., however, has opted out of this provision.)

The CISG thus generally applies whenever parties whose respective places of business are the U.S. and Canada contract for the sale of goods. (See, *e.g.*, *Chicago Prime Packers v. Northam Ford Trading Co.*, 2003 WL 21254262 (N.D.Ill. 2003).) Even this proposition is not as simple as it may seem, given the realities of modern business.

For example, what does "contracts of sales of goods" mean? "Goods" presumably refers to movable, tangible objects and excludes real estate and services. The CISG further explicitly excludes goods bought for per-

sonal or household use, at auction, as well as ships, aircraft, and securities. (CISG Art. 2.)

Nevertheless, it is not clear to what extent the CISG applies to certain forms of intellectual property. Are "shrink-wrap" com-



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puter programs goods? Downloads?

Academic commentary further suggests that the CISG applies to true sales only and not to leases and licences. But, as any commercial practitioner knows, distinguishing a true sale from something else is not always simple. The CISG does not define "sale," so a court would have to resort to other law to resolve this question.

No less complicated is the term "place of business." The CISG provides that "if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance." (CISG Art. 10.)

But assume that Company A, a Canadian manufacturer, through an American sales office contracts to deliver widgets to Company B, an American company, at its German distribution centre. Company A's widgets are custom-designed in Canada but manufactured in Ireland, a non-contracting state. What is Company A's place of business?

Differences from North American common-law traditions

The often nebulous question of the CISG's applicability might not be so disconcerting if its substantive provisions were consistent with existing North American law. The CISG, however, varies significantly from both the U.S.'s *Uniform Commercial Code* (UCC) and applicable Canadian law, including the *Sale of Goods Act*.

For example, the CISG is less formal with respect to contract formation than the UCC. There are no CISG counterparts to such familiar doctrines as the *Statute of Frauds* and the *Parol Evidence Rule*. (See *M.C.C. Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostina S.p.A.*, 144 F.3d 1384, 1388-89

(5th Cir. 1998).) Significantly, the CISG emphasizes subjective rather than objective intent in determining whether a contract has been formed, unlike common-law traditions. (CISG Art. 8(1), (2).) Courts are to give "due consideration ... to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, and any subsequent conduct of the parties." (CISG Art. 8(3).)

Another important area of departure is the absence of the perfect tender rule, which permits a buyer to reject non-conforming goods without question. Instead, the buyer may declare the contract avoided only if "the failure by the seller to perform ... amounts to a fundamental breach of contract." (CISG Art. 49(1)(a).) Further, many courts have construed CISG notice provisions as requiring a high degree of specificity, and the CISG limits the default notice period to two years. (CISG Art 39 (2).)

These are just a few of many differences between the CISG and North American law. Perhaps outweighing the significance of individual variations, however, is the paucity of

guiding North American precedent. Indeed, given the CISG's international character and explicit goal of promoting legal uniformity, many believe that courts interpreting the CISG should look primarily to acad-



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emic commentary and foreign precedent for authority. However laudable in theory, such an approach, if applied, will hardly simplify the essential tasks of advising clients and weighing litigation risks for practitioners schooled in the common law.

Given the uncertainty associated with the CISG, interna-

tional sellers and buyers are well advised to consider specifying the application of other law.

Nevertheless, the CISG will often be unavoidable. Parties are not always willing to consider choice of law provisions. Moreover, even very significant agreements are often made orally. In such cases, attempts to insist upon written choice of law terms will fail unless there is an explicit, subsequent mutual agreement. (See *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F.3d 528 (9th Cir. 2003).)

International practitioners therefore have little choice but to become well versed in the provisions of the CISG in order to safeguard their clients' interests.

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