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### C. International Sale of Goods

Cross-border contracts for the sale of goods are part and parcel of international trade. When a U.S. buyer or seller is involved in an international sale of goods, the court must consider how the sales contract relates to a particular treaty:

- 1980 U.N. Convention on Contracts for the International Sale of Goods<sup>2</sup>

This section refers to that treaty simply as the Convention, although many writings, some quoted below, also refer to it by the acronym CISG.

Other statements of international sales norms exist. For example, UNIDROIT, the Rome-based International Institute for the Unification of Private Law, promulgated the third edition of its Principles of International Commercial Contracts<sup>3</sup> in 2010. The Principles are influential, as nonbinding persuasive authority, in judicial and arbitral tribunals. *See infra* § III.C.1.d.4. But as the Convention is the principal source of binding international sales law in U.S. tribunals, it is the focus here.

This chapter outlines the status and contents of the Convention, with specific reference to issues of applicability and interpretation. The chapter does not discuss other issues, such as formation of the contract, obligations of the parties, breach of contract, risk of loss, and remedies. Print and online resources for researching such issues are included *infra* § III.C.2.

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<sup>1</sup> For what this section contains, see the Detailed Table of Contents, <http://www.asil.org/benchbook/detailtoc.pdf>.

<sup>2</sup> U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1983), 1489 U.N.T.S. 3, available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf> (last visited Dec. 16, 2013). This treaty, which entered into force on Jan. 1, 1988, has 80 states parties, among them the United States, for which it entered into force on Jan. 1, 1988. U.N. Comm’n Int’l Trade L., *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html) (last visited Dec. 16, 2013). For U.S. citation purposes, the U.N.-certified English text was published at 52 Fed. Reg. 6262, 6264-6280 (Mar. 2, 1987), and is reprinted at 15 U.S.C.A. App. (West Supp. 2003).

<sup>3</sup> *See* Int’l Inst. for the Unification of Private L., *UNIDROIT Principles of International Commercial Contracts*, <http://www.unidroit.org/english/principles/contracts/main.htm> (last visited Dec. 13, 2013) (describing Principles and containing links to same).

## 1. U.N. Convention on Contracts for the International Sale of Goods

Following years of drafting under the auspices of UNCITRAL, the U.N. Commission on International Trade Law, on April 11, 1980, the U.N. Convention on Contracts for the International Sale of Goods was adopted at a diplomatic conference in Vienna, Austria.<sup>4</sup>

On December 11, 1986, the United States became one of the first countries to deposit an instrument ratifying the Convention. See U.N. Comm'n Int'l Trade L., *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html) (last visited Dec. 16, 2013).

At the time of ratification the United States limited the “sphere of application,” the Convention’s term referring to the situations in which the Convention applies. The United States’ limitation was made pursuant to Article 95 of the Convention, which allows a state to declare “that it will not be bound by subparagraph (1)(b) of article 1.” Article 95(1)(b) applies if just one party to a dispute is located in a “Contracting State,” the Convention’s term for member states. In keeping with these allowances, the U.S. instrument of ratification included a declaration that the United States is not bound when only one party is located in a contracting state.<sup>5</sup> See *Impuls I.D. Internacional, S.L. v. Psion-Teklogix, Inc.*, 234 F. Supp. 2d 1267, 1272 (S.D. Fla. 2002) (citing U.S. declaration); Joseph Lookofsky, *Understanding the CISG in the USA* 159 (2d ed. 2004) (naming “the United States and China” as “prominent among those States” attaching this declaration).

A sufficient number of other states having ratified, the Convention entered into force on January 1, 1988. Eighty states now are parties to the Convention, including Canada, Mexico, China, Egypt, Japan, Chile, Australia, New Zealand, and most of Europe. U.N. Comm'n Int'l Trade L., *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html) (last visited Dec. 16, 2013). A notable nonparty state is the United Kingdom.

No U.S. Supreme Court decision has analyzed the Convention, although a little over a hundred lower court decisions have referred to it. This section is based on decisions in the lower federal courts.<sup>6</sup> Given the statement in Article 7(1) of the Convention that “regard is to be had to its international character and to the need to promote uniformity in its application,” select

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<sup>4</sup> U.N. Comm'n Int'l Trade L., *Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods*, in *U.N. Convention on Contracts for the International Sale of Goods* 33-34 (2010), available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf> (last visited Dec. 16, 2013).

<sup>5</sup> The text of this declaration – the only condition the United States attached to its ratification – was: “Pursuant to article 95, the United States will not be bound by subparagraph 1(b) of article 1.” See Pace L. Sch. Inst. of Int'l Commercial L., *United States*, <http://www.cisg.law.pace.edu/cisg/countries/cntries-United.html> (last visited Dec. 16, 2013).

<sup>6</sup> A few state judicial decisions have mentioned the Convention. *E.g.*, *C9 Ventures v. SVC-West, L.P.*, 202 Cal. App. 4th 1483, 136 Cal. Rptr. 3d 550 (2012); *Orthotec, LLC v. EuroSurgical, S.A.*, 2007 WL 1830810 (L.A. Cnty. Super. June 27, 2007); *Vision Sys., Inc. v. EMC Corp.*, 2005 WL 705107 (Mass. Super. Feb. 28, 2005).

decisions from foreign jurisdictions, as well as prominent scholarly commentary, will supplement the discussion of domestic case law. This interpretive mandate is discussed more fully *infra* § III.C.1.d.

#### **a. Status of the Convention As U.S. Federal Law**

The Convention has the status of U.S. federal law, and is reprinted at 15 U.S.C.A. App. (West Supp. 2003). To be precise:

[I]t fully preempts state contract law within its stated scope – including a state’s adoption of the Uniform Commercial Code (UCC) Article 2, as well as state common law. The application of the CISG also fully supports federal question jurisdiction under U.S.C. § 1331.

Jack Graves, *The ABCs of the CISG* 1-2 (American Bar Association Section of International Law 2013). For additional discussion of the relationship between the Convention and the Uniform Commercial Code, see *infra* § III.C.1.d.i.2.

#### **b. Organization of the Convention**

The text of the Convention is divided into four parts. The first three parts provide rules for the covered sales transaction and the fourth part concerns a variety of other matters, as follows:

- *Part I (Articles 1-13)*: Sphere of application, rules for interpretation of the Convention and the sales contract, and contractual form requirements
- *Part II (Articles 14-24)*: Rules for contract formation
- *Part III (Articles 25-88)*: Provisions related to the sale of goods, including general provisions, obligations of seller and buyer, remedies for breach, passing of risk, anticipatory breach and installment contracts, damages, interest and exemptions
- *Part IV (Articles 89-101)*: Covered are:
  - State’s ratification, acceptance, approval or accession to the Convention, as well as applicability (Articles 91, 100)
  - Convention’s relationship with other international agreements (Article 90)
  - State declarations (Articles 92, 94-97)
  - Reservations (Article 98)
  - Applicability to territorial units (Article 93)

- Denunciation (Article 101)
- Relationship of this 1980 Convention to its predecessors, the 1964 Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods<sup>7</sup> and the 1964 Convention relating to a Uniform Law on the International Sale of Goods (Article 99)<sup>8</sup>
- The final paragraph provides that the texts of the Convention in the six official U.N. languages – Arabic, Chinese, English, French, Russian and Spanish – are equally authentic.<sup>9</sup>

### c. Sphere of Application of the Convention

In the United States, the Convention governs contracts for the sale of goods when the parties' places of business are in different contracting states – as set forth in Article 1(1)(a) of the Convention<sup>10</sup> – unless the contract designates otherwise. It is this requirement that the parties' place of business be in different Convention member states that renders the contract “international.”

If one of the parties has its place of business in a nonparty state, the Convention will not apply even if U.S. law applies under choice of law rules. Instead, if U.S. law applies, the law of the pertinent U.S. state will apply; everywhere except Louisiana, this is the relevant state's version of the Uniform Commercial Code. *See* Ralph H. Folsom, Michael W. Gordon & John A. Spanogle, *International Business Transactions* 11 (2d ed. 2001).

The requisites of the Convention's sphere of application are discussed below, in the following order:

- Place of business
- Contract for the sale of goods

<sup>7</sup> Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 169, available at <http://www.unidroit.org/english/conventions/c-ulf.htm> (last visited Dec. 16, 2013). This treaty entered into force on Aug. 23, 1972, but it did not attract many ratifications, and some of those later were denounced; moreover, the United States, which signed on Dec. 31, 1965, never ratified. *See* U.N. Treaty Collection, *Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods*, <http://treaties.un.org/Pages/showDetails.aspx?objid=08000002801153d9> (last visited Dec. 16, 2013).

<sup>8</sup> Convention relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107, available at <http://www.unidroit.org/english/conventions/c-ulis.htm> (last visited Dec. 16, 2013). This treaty, which entered into force on Aug. 18, 1972, but it did not attract many ratifications, and some of those later were denounced; moreover, the United States, which signed on Dec. 31, 1965, never ratified. *See* U.N. Treaty Collection, *Convention relating to a Uniform Law on the International Sale of Goods*, <http://treaties.un.org/Pages/showDetails.aspx?objid=08000002801154bf> (last visited Dec. 16, 2013).

<sup>9</sup> In addition to these official language versions, unofficial versions of the Convention are available in many languages, including Czech, Danish, Dutch, Finnish, German, Italian, Japanese, Norwegian, Persian, Polish, Portuguese, Serbian, and Swedish. *See* CISG Database, *Texts of the CISG*, available at <http://www.cisg.law.pace.edu/cisg/text/text.html> (last visited Dec. 16, 2013).

<sup>10</sup> As explained *supra* § III.C.1, Article 1(1)(b) of the Convention, which describes a broader sphere of application, does not apply on account of a declaration by which the United States conditioned its ratification.

- Designation of applicable law

### **i. Place of Business**

As noted above, Article 1(1)(a) of the Convention, as ratified by the United States, applies only to contracts “between parties whose places of business” are in different contracting states. If a party has multiple places of business, Article 10(a) of the Convention provides that

the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract ...

The Convention does not define “place of business.” Nevertheless, case law and commentary – including foreign sources, as specified in Article 7, the Convention’s interpretation provision – point to a party’s location, not the party’s country of incorporation, as the controlling factor. *See* Stavros Brekoulakis, “Article 10,” in *The United Nations Convention on Contracts for the International Sale of Goods* 176 (Stefan Kröll, Loukas A. Mistelis & Maria del Pilar Perales Viscacillas eds., 2011) (stating that most courts place importance on the location from which “a business activity is carried out,” requiring “a certain duration and stability”).

The Convention applies to sales contracts between two parties that are incorporated in the United States if their places of business are in different contracting states. Accordingly, in *Asante Technologies v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1147 (N.D. Cal. 2001), the court ruled that the Convention covered a contract between two Delaware corporations, because the place of business of the seller that had the closest connect to the contract was in Canada, a different state party. To the same effect is an Austrian decision concerning Austrian nationals, one with its place of business in Italy. *See* UNILEX, *Oberster Gerichtshof*, 2 Ob 191/98 X, 15.10.1988, available at <http://unilex.info/case.cfm?id=386> (last visited Dec. 16, 2013). (On UNILEX, see *infra* § III.C.b.iv; on the use of interpretive sources, see *infra* § III.C.1.d.)

### **ii. Contracts for the Sale of Goods**

The Convention applies only to contracts for the sale of goods, does not define the term “contract.” Nor does it define the terms “sale” or “goods,” except in the negative sense that some provisions state what the terms do not cover. The Convention’s text, as well as relevant case law, help to define what transactions are covered.

#### **ii.1. Convention Text**

Article 2 states in full:

This Convention does not apply to sales:

- (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
- (b) by auction;

- (c) on execution or otherwise by authority of law;
- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels, hovercraft or aircraft;
- (f) of electricity.

This language establishes six transactions that do not amount to a “sale of goods” within the meaning of the Convention. The six exclusions fall into two categories:

- Exclusions based on the character of the transactions (Art. 2(a)-(c))
- Exclusions based on the character of the products (Art. 2(d)-(f))

For the most part, the list of exclusions is self-explanatory; a few, however, merit further consideration.

### **ii.1.a. Case Law Interpreting the Convention’s Application to “Goods”**

In case law interpreting the Convention, “goods” are items that are movable and tangible at the time of delivery. When considering the definition of “goods,” courts should consult Convention-centered case law, including foreign sources, rather than domestic interpretations of ostensibly similar laws, such as the Uniform Commercial Code. This interpretive mandate, grounded in the explicit text of Article 7 of the Convention, is discussed *infra* § III.C.1.d.i.; resources for researching such Convention-centered case law and commentary may be found *infra* § III.C.2.

Distinctions made in Convention-centered case law include:

- Qualifying as a “sale of goods” covered by the Convention: sales of items as varied as art objects, pharmaceuticals, live animals, propane, computers, computer hardware, and secondhand or used goods.
- Not qualifying as a “sale of goods” covered by the Convention: the sale of intellectual property and the sale of a business, as well as distribution and franchise contracts. Ralph H. Folsom, Michael W. Gordon & John A. Spanogle, *International Business Transactions* 17, 19 (2d ed. 2001) (discussing intellectual property and distribution contract, respectively); Joseph Lookofsky, *Understanding the CISG in the USA* 18 (2d ed. 2004) (treating distribution and franchise agreements).

### **ii.1.b. Consumer/“Personal Use”**

Article 2(a) specifies that the Convention can apply to “goods bought for personal, family, or household use,” if the seller neither knew nor “ought to have known” that the goods would be used for one of those purposes.

In determining whether a transaction should be excluded on the ground it is a consumer-based sale, courts should look to decisions interpreting the precise language of Article 2(a) – the

sale of goods “bought for personal, family or household use” – rather than to understandings of the term “consumer” found in Uniform Commercial Code or U.S. consumer-protection jurisprudence. This interpretive mandate, grounded in the explicit text of Article 7 of the Convention, is discussed *infra* § III.C.1.d.i. Resources for researching such Convention-centered case law and commentary may be found *infra* § III.C.2.

What matters is the use intended within the specific contract, and not the usual or traditional use of item at issue. Accordingly, the sale of goods traditionally deemed personal use may be covered by the Convention if they are purchased by a distributor for the purpose of resale. *See* Steven L. Harris, Kathleen Patchel & Frederick H. Miller, “Contracts Governed by CISG: Excluded Contracts,” in 10A *Hawkland UCC Series (CISG)* § 10:14 (2013) (noting that a dealer’s purchase of a car falls under the Convention). Likewise, the intended use – not the actual use – is what matters. *See* Ingeborg Schwenzer & Paschal Hachem, “Sphere of Application,” in *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* 50 (Ingeborg Schwenzer, 3d ed. 2010).

Commentators are split on whether goods purchased for dual purposes – for personal use and for professional use – are covered. Nor is there developed case law on this matter.

Some commentators have stressed that the Convention was never intended to displace domestic consumer laws; accordingly, these commentators have recommended that courts consider the potential for overlap of international law and domestic consumer laws before choosing to displace one or the other regime. *See* Frank Spohnheimer, “Sphere of Application,” in *The United Nations Convention on Contracts for the International Sale of Goods* 42 (Stefan Kröll, Loukas A. Misteli, & Maria del Pilar Perales Viscacillas eds., 2011).

### **ii.1.c. “Auction”**

As quoted in full *supra* §III.C.1.c.ii.1, Article 2(b) excludes from the scope of the Convention sales by auction.

The exclusion clearly pertains to traditional, physical-presence auctions; however, whether it applies to online auctions is less clear. The primary purpose for excluding auctions local – and thus noninternational – nature of the transaction. This feature is absent in the case of an Internet auction. *See* Ingeborg Schwenzer & Paschal Hachem, “Sphere of Application,” in *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* 56 (Ingeborg Schwenzer, 3d ed. 2010).

Commentators are divided on this question, and case law is sparse. At least one case refused to characterize e-Bay as an auction, and thus held the Convention applicable to the transaction at bar. *See* Frank Spohnheimer, “Sphere of Application,” in *The United Nations Convention on Contracts for the International Sale of Goods* 42 (Stefan Kröll, Loukas A. Misteli, & Maria del Pilar Perales Viscacillas eds., 2011) (discussing the decision in *Bundesgerichtshof*, VIII ZR 275/03 (Ger. Nov. 3, 2004)).

### **iii. Contracts for Supply of Goods vs. Mixed Goods-Labor Contracts**

The Convention specifies which types of mixed transactions qualify as contracts for the sale of goods. The pertinent provision, Article 3, states in full:

- (1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.
- (2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

This provision thus distinguishes two types of contracts:

- Contracts for the supply of goods to be manufactured or produced (Article 3(1))
- Mixed contracts, involving obligations to supply labor or other services as well as goods (Article 3(2))

Each is considered in turn below.

#### **iii.1. Contracts for Supply of Goods to be Manufactured or Produced**

In general, as stated in Article 3(1), the Convention applies to a contract for the sale of “goods to be manufactured or produced,” unless the buyer provides a substantial portion of the materials to be used in that manufacturing or production. A typical example of such a transactions occurs when a U.S. company supplies materials to be assembled in a country whose labor force works at lower wages. *See* Ralph H. Folsom, Michael W. Gordon & John A. Spanogle, *International Business Transactions* 19-20 (2d ed. 2001). *See also* UNILEX, *Oberster Gerichtshof*, CLOUT Case 105, 8 Ob 509/93 (Austria, Oct. 27, 1994) (holding that Convention did not apply, given that Austrian firm provided materials to be processed by Yugoslav firm), *available at* <http://unilex.info/case.cfm?id=131> *and* <http://www.uncitral.org/clout/showDocument.do?documentUid=1308&country=AUS> (last visited Dec. 16, 2013). (On CLOUT and UNILEX, see *infra* §§ III.C.b.i, III.C.b.iv.; on the use of interpretive sources, see *infra* § III.C.1.d.)

Commentators are divided on the meaning of the term “substantial” in Article 3(1). The fact that Article 3(2) uses “preponderant,” a term implying greater weight, indicates a lower threshold will meet the Article 3(1) standard of “substantial part.”

#### **iii.2. Mixed Contracts: Supply of Labor or Other Services As Well As Goods**

As indicated by the plain language of Article 3(2), quoted in full *supra* § III.C.1.c.iii, the Convention does not cover contracts for the delivery of labor or services. Labor and services are not “goods”; that is, not movable and tangible goods.



Article 3(2) stipulates an exception to this general rule, however. In the case of a mixed contract – one that provides for goods and services – the Convention applies if the services do not constitute “the preponderant part of the obligations of the party who furnishes the goods....” (This test is analogous to the predominant purpose test that most U.S. jurisdictions apply to mixed transactions in order to determine whether a dispute is governed by common law or by the Uniform Commercial Code.)

Few reported U.S. cases address this issue directly. For instance, in *TeeVee Toons, Inc. v. Gerhard Schubert GmbH*, 2006 WL 2463537, at \*5 (S.D.N.Y. Aug. 23, 2006), the court stated briefly that Article 3(2) of the Convention did not apply to the transaction at issue, reasoning that the “preponderant part of the obligations’ here pertains to the manufactured Schubert System, not labor or other services.”

The following is an example of the larger body of foreign decisions that address this issues:

- Reviewing a contract for machines that make yoghurt containers, the *Corte di Cassazione*, Italy’s highest court concluded that the obligation of the seller “exceeded the mere delivery of the contracted good and referred also to the installment and configuration of the device by its own experts,” to an extent that the Convention did not apply, “since the obligation exceeded the mere delivery of the contracted good.” *Jazbinsek GmbH v. Piberplast S.p.A.*, CLOUT abstract no. 728, No. 8224 , § 3(a), (b)(ii) (Corte di Cassazione, Italy, June 6, 2002) (citing Article 3(2) of the Convention), *English translation available at* <http://cisgw3.law.pace.edu/cases/020606i3.html#cx> *and additional case information available at* <http://cisgw3.law.pace.edu/cases/020606i3.html#ctoc> (last visited Dec. 16, 2013). (On CLOUT, see *infra* § III.C.b.i; on the use of interpretive sources, see *infra* § III.C.1.d.)

### iii.3. Mixed Contracts and Computer Software

International contracts involving computer software have posed issues of interpretation of the mixed-contract standard in Article 3(2) of the Convention. For example:

- The Supreme Court of Austria held that the purchase of computer programs “on data storage mediums” constituted a purchase of movable and tangible property, so that the Convention applied to the software contract. *Oberster Gerichtshof*, CLOUT abstract no. 749, 5 Ob 45/05m (June 21, 2005) (*Software case*), *English translation available at* <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/050621a3.html#cx> *and additional case information available at* <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/050621a3.html> (last visited Dec. 16, 2013). (On CLOUT, see *infra* § III.C.b.i.)
- A German court determined that the sale of standard software for an agreed price was a “contract of sale of goods” within the meaning of Article 1 of the Convention. Although the software was ordered, delivered, and installed, the court held dispositive the fact that the installation was not tailor-made. *LG München*, CLOUT abstract no. 131, 8 HKO

24667/93 (Feb. 8, 1995) (*Standard software case*), English translation available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950208g4.html#cx> and additional case information available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950208g4.html> (last visited Dec. 16, 2013). (On CLOUT, see *infra* § III.C.b.i ; on the use of interpretive sources, see *infra* § III.C.1.d.)

In short, case law determines the nature of computer software by looking to whether it is, on the one hand, off-the-shelf, standard software, or, on the other hand, tailor-made software. Commentators and case law characterize standard software as “goods” covered by the Convention. But tailor-made software takes on the characteristics of a service.

#### **iv. Designation of Applicable Law within the Agreement**

Article 6 of the Convention allows parties to opt out:

The parties may exclude the application of this Convention or ... derogate from or vary the effect of any of its provisions.

Exclusion and derogation/modification are discussed separately below.

##### **iv.1. Excluding Application of the Convention**

Most courts have determined that for parties to opt out, the agreement must specifically and clearly exclude the Convention. See Loukas Mistelis, “Article 6,” in *The United Nations Convention on Contracts for the International Sale of Goods* 104 (Stefan Kröll, Loukas A. Mistelis & Maria del Pilar Perales Viscacillas eds., 2011). Examples:

- A choice of law provision selecting British Columbia law was held not to “evinced a clear intent to opt out of the CISG,” because “it is undisputed that the CISG is the law of British Columbia.” *Asante Technologies, Inc. v. PMC- Sierra, Inc.*, 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001) (emphasis in original).
- A federal appellate court held that the Convention applied notwithstanding the parties’ contract that contained the phrase “Jurisdiction: Laws of the Republic of Ecuador,” because the Convention governed under Ecuadorean law and because the contract did not expressly exclude the Convention. *BP Oil Int’l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333, 337 (5th Cir. 2003).
- Referring to a contract stating “that the ‘agreement shall be governed by the laws of the Province of Ontario, Canada,’” a court wrote: “Obviously, this clause does not exclude the CISG.” *Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd.*, 2003 WL 223187, at \*3 (N.D. Ill. Jan. 30, 2003).
- Explaining that the choice of law provision selected the law of a state party to the Convention “without expressly excluding application of the CISG,” a court

approved the parties' stipulation that the Convention governed the transaction. *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH*, 2002 WL 465312, at \*3 (S.D.N.Y. Mar. 26, 2002).

#### **iv.2. Derogating or Modifying the Effect of the Convention**

Pursuant to Article 6 of the Convention, "parties may ... derogate from or vary the effect of any of its provisions." By way of example, parties sometimes prefer certain rules promulgated by the International Chamber of Commerce, a nearly hundred-year-old, global organization headquartered in Paris, France. See Int'l Chamber of Commerce, *The New Incoterms® 2010 Rules*, <http://www.iccwbo.org/incoterms/> (last visited Dec. 16, 2013).

Parties frequently elect to displace some, but not all, provisions of the Convention. In this case, the Convention remains the law applicable to the balance of the contract.

Additionally, the parties later may modify their contracts in order to derogate from all or some terms of the Convention. To do so, they must satisfy the requirements of Article 29 concerning modifications.

#### **d. Interpretive Issues**

Challenges posed in interpreting the Convention are treated in Article 7 of the Convention. Meanwhile, Article 8 discusses the interpretation of the parties' conduct, and Article 9 the interpretation of the contract. Each is discussed in turn below.

##### **i. Article 7: Interpretation of the Convention's Text and Gaps**

To reduce the risk that different contracting states might interpret and apply the Convention differently, Article 7, the first provision in the Convention's "General Provisions" chapter, states as follows:

###### Article 7

- (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
- (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Proper interpretation of Convention terms thus requires consideration of the:

- International character of the Convention and need to promote uniformity in application;
- Observance of good faith in international trade; and

- Treatment of matters not expressly discussed in the Convention.

Each is discussed in turn below.

### **i.1. International Character of the Convention and Need to Promote Uniformity**

The references in Article 7(1) to “international character” and to the “need to promote uniformity” indicate that the Convention is to be interpreted independently from domestic law. To be specific, interpretation should rely on the treaty’s text and drafting history; on pertinent domestic and foreign case law; and on commentaries respecting the Convention. Sources endorsing this interpretive approach include:

- *Medical Mktg. Int’l, Inc. v. Internazionale Medico Scientifica, S.R.L.*, 1999 WL 311945, at \*2 (E.D. La. May 17, 1999), in which the court wrote: “Under CISG, the finder of fact has a duty to regard the ‘international character’ of the Convention and to promote uniformity in its application.”
- *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2nd Cir. 1995), in which the court acknowledged that the Convention “directs that its interpretation be informed by its ‘international character and ... the need to promote uniformity in its application and the observance of good faith in international trade” (quoting Article 7(1) of the Convention).
- *Bundesgerichtshof*, CLOUT abstract no. 171, V III ZR 51/95, § II(2)(b) (Apr. 3, 1996) (*Cobalt sulphate case*), *English translation available at* <http://cisgw3.law.pace.edu/cases/960403g1.html#cx> *and additional case information available at* <http://cisgw3.law.pace.edu/cases/960403g1.html#ctoc> (last visited Dec. 16, 2013), in which the court declined the buyer’s invocation of national law contrary to the Convention, explaining that the Convention “is different from German domestic law, whose provisions and special principles are, as a matter of principle, inapplicable for the interpretation of the CISG (Art. 7 CISG).” (On CLOUT, see *infra* § III.C.b.i.)
- *RA Laufen des Kantons Berne*, CLOUT abstract no. 201, § II(2)(b) (May 7, 1993) (*Automatic storage system case*), *English translation available at* <http://cisgw3.law.pace.edu/cases/930507s1.html#cx> *and additional case information available at* <http://cisgw3.law.pace.edu/cases/930507s1.html#ctoc> (last visited Dec. 16, 2013), in which the court refused to apply Finnish law on ground that the Convention “requires uniform interpretation on grounds of its multilaterality, whereby special regard is to be had to its international character (Art. 7(1) CISG),” and thus the Convention “is supposed to be interpreted autonomously and not out of the perspective of the respective national law of the forum.” (On CLOUT, see *infra* § III.C.b.i.)

### **i.2. Relation of the Convention to the Uniform Commercial Code**

Following an approach that contradicts the meaning of Article 7(1) as just stated, some U.S. courts have interpreted Convention provisions by reference to the Uniform Commercial Code, the half-century-old code governing sales contracts within the United States. *E.g.*, *Chicago*

*Prime Packers, Inc. v. Norham Food Trading Co*, 408 F.3d 894, 898 (7th Cir. 2005); *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir. 1995); *Genpharm Inc. v. Pliva-Lachema A.S.*, 361 F. Supp. 2d 49, 55 (E.D.N.Y. 2005).

Statements from the American Law Institute and the National Conference of Commissioners on Uniform State Laws provide additional evidence that consulting the Uniform Commercial Code to interpret the Convention is ill-advised. When revising the Code, these two groups considered referring to Convention provisions like those in Article 2 of the Uniform Commercial Code. But they rejected the idea:

[U]pon reflection, it was decided that this would not be done because the inclusion of such references might suggest a greater similarity between Article 2 and the CISG than in fact exists. The princip[al] concern was the possibility of an inappropriate use of cases decided under one law to interpret provisions of the other law.

U.C.C. art. 2 Prefatory Note (2003). Revisers concluded that “[t]his type of interpretation is contrary to the mandate of both the Uniform Commercial Code and the CISG,” adding:

[T]he CISG specifically directs courts to interpret its provisions in light of international practice with the goal of achieving international uniformity. This approach specifically eschews the use of domestic law ... as a basis for interpretation.

*Id.* (citations to Article 7 of the Convention omitted). *See also* Henry Deeb Gabriel, *The Buyer’s Performance under the CISG: Articles 53-60 Trends in the Decisions*, 25 J.L. & Commerce 273, 279 n.29 (2005) (quoting this passage in discussion of Convention interpretation).

Sources discussing the differences between the Convention and the Uniform Commercial Code include:

- John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3d ed. 1999)
- John P. McMahon; *Applying the CISG Guides for Business Managers and Counsel* (rev. May 2010), <http://www.cisg.law.pace.edu/cisg/guides.html#a1>.

### **i.3. Observance of Good Faith in International Trade**

Article 7(1) states: “In the interpretation of this Convention, regard is to be had ... to the need to promote ... the observance of good faith in international trade.” Autonomous interpretation is particularly advised with respect to this passage, given the myriad constructions of the term “good faith” in U.S. courts.

A close reading of Article 7(1) demonstrates that it does not require that the parties act with good faith. Rather, it requires courts to consider good faith when interpreting the Convention, but not the contract. *See* Ralph H. Folsom, Michael W. Gordon & John A.

Spanogle, *International Business Transactions* 25 (2d ed. 2001); accord Bruno Zeller, *The UN Convention on Contracts for the International Sale of Goods (CISG) – A Leap Forward Towards Unified International Sales Law*, 12 Pace Int'l L. Rev. 79, 92 (2000). A district court wrote:

[O]bservance of good faith in international trade ... embodies a liberal approach to contract formation and interpretation, and a strong preference for enforcing obligations and representations customarily relied upon by others in the industry.

*Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.*, 201 F. Supp. 2d 236, 281 (S.D.N.Y. 2002), *rev'd on other grounds*, 386 F.3d 485 (2d Cir. 2004). That said, several commentators have read a reasonableness requirement into the Convention's "good faith" standard. See Joseph Lookofsky, *Understanding the CISG in the USA* 35 (2d ed. 2004).

The precise meaning and scope of "good faith" is to be found in the context of international trade and within the text of the Convention itself. Textual examples include Articles 36 and 40, which concern sellers' liability for certain nonconformities.<sup>11</sup> Likewise, UNCITRAL has noted other articles that manifest the principle of good faith in international trade.<sup>12</sup> Such good faith expectations within the Convention – expectations also recognized in the context of international trade – do not wholly correspond with constructions of "good faith" in U.S. or other countries' domestic jurisprudence.

#### **i.4. Treatment of Matters Not Expressly Discussed in the Convention**

As is the case with much written law, issues arise that the Convention text does not treat expressly. Article 7(2) of the Convention, which is quoted fully *supra* § III.C.1.d.i, states that such matters "are to be settled in conformity with general principles" or "with the law applicable by virtue of the rules of private international law."

Commentators point to two potential sources for resolution:

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<sup>11</sup> Article 36 of the Convention states in full:

- (1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.
- (2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

Referring to Article 36 and to Article 38, which deals with the buyer's examination of goods, Article 40 of the Convention provides:

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

<sup>12</sup> See U.N. Comm'n Int'l Trade L., "Article 7," in *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods* 28-29 (2008) (listing Articles 16, 21, 29, 37, 40, 46, 64, 82, 85, and 88), available at <http://www.uncitral.org/pdf/english/clout/digest2008/article007.pdf>.

- General principles that may be discerned from analysis of the Convention’s text; and
- Norms compiled in the Principles of International Commercial Contracts<sup>13</sup> that were promulgated in 2010 by UNIDROIT, the International Institute for the Unification of Private Law, headquartered in Rome, Italy.

Each is discussed in turn below.

#### **i.4.a. General Principles in the Convention’s Text**

General principles may be derived from the text of the Convention. More than a dozen have been identified by UNCITRAL, the U.N. Commission on International Trade Law.<sup>14</sup> They include:

- Party autonomy
- Good faith
- Estoppel
- Place of payment of monetary obligation
- Currency of payment
- Burden of proof
- Full compensation
- Informality
- Dispatch of communications
- Mitigation of damages
- Binding usages
- Set-off
- Right to interest
- *Favor contractus* (favoring continuance, rather than avoidance, of a contract)

In light of U.S. jurisprudence, the general principle of informality merits specific examination.

#### **i.4.b. Informality: General Principle That Agreement Need Not Be in Writing**

In the present context, “informality” refers to the general principle that the Convention establishes no requirements regarding the form of an agreement; indeed, the contract need not be written. This corresponds with the express language of Article 11 of the Convention:

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.

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<sup>13</sup> UNIDROIT *Principles of International Commercial Contracts* (2010), <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>.

<sup>14</sup> U.N. Comm’n Int’l Trade L., “Article 7,” in *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods* 28, 29-30 (2008), available at <http://www.uncitral.org/pdf/english/clout/digest2008/article007.pdf>. This source provides discussions of each of the general principles listed.

Because this principle is at odds with much U.S. domestic doctrine, it has caused some confusion in U.S. courts. Nevertheless, for a period of time, U.S. courts have recognized that the Convention allows a party to adduce evidence of the formation, modification, or termination of a contract even if it is not in writing. *See also* the discussion of parol evidence *infra* § III.C.1.d.iii.1.

#### **i.4.c. Exception: Opting Out of the Informality Principle**

Notwithstanding the general principle of informality just described, evidence of an agreement in writing may be required in some disputes; specifically, those involving a party from a contracting state that, pursuant to Article 12 of the Convention, has filed a reservation reserving the right to require such evidence.<sup>15</sup> The United States has not filed such a reservation, but several of its treaty partners have done so. A compilation of which countries have filed such conditions may be found at *CISG: Table of Contracting States*, Pace Law School Institute of International Commercial Law, <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> (last visited Dec. 16, 2013).

An example of a U.S. case raising this issue:

- *Forestal Guarani S.A. v. Daros Int'l, Inc.*, 613 F.3d 395 (3d Cir. 2010) (holding, in a two-to-one panel decision, that in dispute involving one state that opted out of Article 11 of the Convention and one that did not, court should determine applicable law by consulting forum state's choice of law rules)

#### **ii. UNIDROIT Principles**

Another source consulted to determine the general principles that may support interpretation pursuant to Article 7(2) is a set of norms promulgated in 2010 by UNIDROIT. Formally titled the International Institute for the Unification of Private Law, the Rome-based UNIDROIT was founded as an independent intergovernmental organization in 1926. *See Int'l Inst. Unification of Private L., UNIDROIT: An Overview*, <http://www.unidroit.org/dynasite.cfm?dsmid=103284> (last visited Dec. 16, 2013).

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<sup>15</sup> Article 12 of the Convention states in relevant part:

Any provision of article 11 ... of this Convention that allows 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 does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

In turn, Article 96 of the Convention provides with respect to Articles 11 and 12:

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11 ... of this Convention, that allows 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, does not apply where any party has his place of business in that State.



The purpose of this 2010 compilation of norms – called the UNIDROIT Principles of International Commercial Contracts<sup>16</sup> – is stated in the first sentence of the preamble:

These Principles set forth general rules for international commercial contracts.

The preamble then states, in pertinent part, that the Principles “may be used to interpret or supplement international uniform law instruments” and “to interpret or supplement domestic law.” As these passages indicate, the drafters envisioned wide use of the Principles as guides to international commercial contract. Yet though the Principles cover the vast majority of issues arising in international commercial contracts, they were promulgated as guides to the interpretation of law, and not as law itself. *See* Ralph H. Folsom, Michael W. Gordon & John A. Spanogle, *International Business Transactions* 6 (2d ed. 2001).

The UNIDROIT Principles resulted from intensive comparative legal research and debate and have influenced legislators in various countries. What is more, they are frequently consulted in international commercial arbitration and foreign domestic courts. Given that the parties to a contract covered by the Convention intended international legal concepts to apply, when courts must fill gaps in Convention text, the Principles are an interpretive source preferable to jurisprudence based on domestic law. But courts should be aware that the Principles are not limited to contracts for the sale of goods; at times, the Principles set forth substantive rules different from those in the Convention. *See* Ralph H. Folsom, Michael W. Gordon & John A. Spanogle, *International Business Transactions* 6 (2d ed. 2001).

### **iii. Article 8: Interpretation of the Parties’ Conduct**

Article 8 concerns the interpretation of parties’ conduct. It states in full:

- (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
- (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
- (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 8(1) concerns interpretation of subjective intent, while Article 8(2) concerns interpretation of objective intent; Article 8(3) applies an “all relevant circumstances” approach to both.

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<sup>16</sup> *UNIDROIT Principles of International Commercial Contracts* (2010), <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>.

The ensuing section begins with an issue of interpretation not addressed; that is, the parol evidence rule. It then discusses, in turn, the subjective and objective methods of determining parties' intent. The section concludes by examining the Convention rule on usage as a component of interpretation, as spelled out in Article 9, quoted *infra* § III.C.1.d.iv.

### **iii.1. Absence of a Parol Evidence Rule**

The Convention says nothing about the admissibility of oral evidence to clarify written terms of a contract. (As discussed *supra* § III.C.1.d.i.4.b, the Convention generally does not require the agreement to be in writing.) In other words, the Convention omits any parol evidence rule prohibiting such extrinsic evidence.

Courts generally have construed this omission as permission, as demonstrated in this statement:

[C]ontracts governed by the CISG are freed from the limits of the parol evidence rule and there is a wider spectrum of admissible evidence to consider in construing the terms of the parties' agreement.

*Claudia v. Olivieri Footwear Ltd.*, 1998 WL 164824, at \*5 (S.D.N.Y. Apr. 7, 1998); *see also ECEM Eur. Chem. Mktg. B.V. v. Purolite Co.*, 2010 WL 419444, at \*13 (E.D. Pa. Jan. 29, 2010); *Miami Valley Paper, LLC v. Lebbing Eng'g & Consulting GmbH*, 2009 WL 818618, at \*5 (S.D. Ohio Mar. 26, 2009); *Fercus, S.R.L. v. Palazzo*, 2000 WL 1118925, at \*3 (S.D.N.Y. Aug. 8, 2000).

Also ruling that the parol evidence rule does not apply were *MCC-Marble Ceramic Ctr. v. Ceramica Nuova d'Agostino*, 144 F.3d 1384, 1389-90 (11th Cir.1998), and *Mitchell Aircraft Spares, Inc. v. European Aircraft Serv. AB*, 23 F.Supp. 2d 915, 919-21 (N.D. Ill. 1998). These courts rejected a contrary holding in *Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr.*, 993 F.2d 1178, 1183 (5th Cir. 1993), deeming that holding unpersuasive for having failed to take the Convention into account.

### **iii.2. Subjective Determination of Parties' Intent**

Article 8(1) of the Convention makes clear that one party's statements and other conduct are to be interpreted subjectively – according to that party's intent – whenever the “other party knew or could not have been unaware what that intent was.” This intent is to be determined, according to Article 8(3), through examination of “all relevant circumstances,” including the:

- Negotiations;
- Practices the parties have established between themselves;
- Usages; and
- Parties' subsequent conduct.

See *MCC-Marble Ceramic Center v. Ceramica Nuova d'Agostino*, 144 F.3d 1384 (11th Cir. 1998) (citing Article 8(1), (3), and engaging in substantial inquiry into the parties' subjective intent).

Although many circumstances may inform subjective intent, one U.S. district court resisted the parties' efforts to use self-serving declarations of subjective intent in order to create material factual disputes regarding the interpretation of a contract. See *Hanwha Corp. v. Cedar Petrochemicals, Inc.*, 760 F. Supp. 2d 426, 432 (S.D.N.Y. 2011).

### **iii.3. Objective Determination of Parties' Intent**

When it is not possible to determine a subjective intent, Article 8(2) of the Convention provides that a party's statements or conduct are to be interpreted using an objective standard – that of a reasonable person. Examples:

- *Bezirksgericht St. Gallen*, CLOUT abstract no. 215, 3 PZ 97/18 (Switz. July 3, 1997) (*Fabrics case*), *English translation available at* <http://cisgw3.law.pace.edu/cases/970703s1.html#cx> *and additional case information at* <http://cisgw3.law.pace.edu/cases/970703s1.html#ctoc> (last visited Dec. 16, 2013) (applying Article 8(2), (3) in the absence of evidence of subjective intent, and thus determining intent objectively, by consideration of subsequent conduct). (On CLOUT, see *infra* § III.C.b.i; on the use of interpretive sources, see *supra* § III.C.1.d.)
- *Hanwha Corp. v. Cedar Petrochemicals, Inc.*, 760 F. Supp. 2d 426, 432 (S.D.N.Y. 2011) (considering the objective intent standard to determine if the parties' prior history of transactions provided information about contract formation).

### **iv. Article 9: Usage As a Circumstances Relevant to Interpretation**

“Usages” may constitute a “relevant circumstance” for interpretation, as stated in Article 8(3), quoted in full *supra* § III.C.1.d.iii. The Convention elaborates on usage in Article 9, which states:

- (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
- (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Each subparagraph is discussed in turn below.

#### **iv.1. Usages Agreed to and Practices Established between Themselves**

Article 9(1) provides that “parties are bound by any usage to which they have agreed.” Given that informality is a hallmark of the Convention (*see supra* § III.C.1.d.iv.), the usage need not be explicit; rather, it may be inferred from conduct or from the parties’ prior course of dealings.

Most commentators and courts have had little difficulty in determining prior practices between the parties. A question that does arise is how many times something must happen to constitute a prior practice. Certainly one time would not be enough, but at least some courts have found that two or three prior occasions sufficient. Ingeborg Schwenzer & Paschal Hachem, “General Provisions,” in *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* 186 n.51 (Ingeborg Schwenzer, 3d ed. 2010) (referring to split of authority).

#### **iv.2. International Trade Usages**

Article 9(2) provides that parties shall be bound by trade usages even in the absence of agreement, provided that the parties knew or ought to have known of the usage and the trade usage is widespread within the particular trade.

The widespread existence of a particular practice within a trade is measured according to an international standard. As such, the trade usage must be widely known in international – not local or regional – trade. However, several courts have determined that in some industries, such as commodities or local markets, a trade usage exists by the sheer force of the high number of international participants in a well-known, widely regarded market. *See Oberlandesgericht, CLOUT case No. 175, 6 R 194/95 (Austria, Nov. 9, 1995) (Marble Slabs case), available at <http://cisgw3.law.pace.edu/cases/951109a3.html> (last visited Dec. 16, 2013).* (On CLOUT, see *infra* § III.C.b.i; on the use of interpretive sources, *see supra* § III.C.1.d.)

When considering the Article 9(2) ought-to-have-known proviso, most courts have imposed this standard on parties with places of business in the geographical location of the usage, or on a foreign party that conducts relevant transactions regularly in the geographic area. *See U.N. Comm’n Int’l Trade L., “Article 9,” in UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods 40-41 (2008), available at <http://www.uncitral.org/pdf/english/clout/digest2008/article007.pdf>.*

Most importantly, Article 9 should be interpreted to require that a trade usage supersede the Convention. As such, trade usages that require particular formalities or steps in the formation of a contract would supersede any other provisions of the Convention. *See id.*

Finally, as always, pursuant to Article 6, discussed *supra* § III.C.1.c.iv.2., parties remain free to derogate from any provisions within the Convention. Trade usages are no exception.

## 2. Researching International Sales Law

U.S. judicial decisions sometimes have reported that there is little case law available that interprets or applies the terms of the Convention. The reality is to the contrary. National and international decisions are bountiful; however, they are not easily found on the traditional U.S. research databases such as Westlaw or Lexis. Numerous resources, including comprehensive databases respecting the Convention, interpretive decisions, and scholarly commentary, are detailed below.

### a. Print Resources

Books commenting on the Convention and other aspects of international sales law include:

- Ralph H. Folsom, Michael W. Gordon & John A. Spanogle, *International Business Transactions* (2d ed. 2001)
- Jack Graves, *The ABCs of the CISG* (American Bar Association Section of International Law 2013)
- John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Harry M. Flechtner ed., 4th ed. 2009)
- Joseph Lookofsky, *Understanding the CISG in the USA* 159 (2d ed. 2004)
- *International Contract Manual* (Albert Kritzer, Siegfried Eisele, Francesco Mazzotta & Allison Butler eds., 2007-2013) (five-volume looseleaf binder service, via Thompson/Reuters)
- *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Ingeborg Schwenzer, 3d ed. 2010)
- *The United Nations Convention on Contracts for the International Sale of Goods* (Stefan Kröll, Loukas A. Mistelis & Maria del Pilar Perales Viscacillas eds., 2011)

### b. Online Resources

Databases that provide documents and ratification status, thesauri, bibliographies, commentaries, and other information related to international sales law are listed below. These websites were last visited on Dec. 16, 2013.

#### i. UNCITRAL

UNCITRAL is the acronym for the U.N. Commission on International Trade Law, a Vienna-based, nearly half-century-old U.N. entity. Its website is at <http://www.uncitral.org/uncitral/en/index.html>. Among the databases that it maintains is Case

Law on UNCITRAL Texts, known by its acronym, CLOUT. Available at [http://www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html), this database includes abstracts of judicial decisions and arbitral awards, thesauri, a case index, and digests of case law related to conventions and model laws that have been prepared under the auspices of UNCITRAL.

The most recent *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods* (2012) provides helpful guidance on each article of the Convention, and it refers to numerous foreign decisions. This digest is available at <http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf>.

## **ii. CISG-Advisory Council**

The primary function of the Advisory Council of the U.N. Convention on Contracts for the International Sale of Goods, a private entity also known as CISG-AC, is the issuance of opinions on the interpretation and application of multiple aspects of the Convention. International organizations, professional associations, and adjudication bodies may ask the Council for opinions. The opinions may be found at <http://www.cisgac.com/default.php?sid=128>.

## **iii. Pace Law School Database**

The Albert H. Kritzer CISG Database, available at <http://www.cisg.law.pace.edu/>, is maintained by the Institute of International Commercial Law at Pace Law School in White Plains, New York. This free, comprehensive database is updated monthly. Contents include:

- Text of the Convention in the official and unofficial languages
- Negotiating documents and other preparatory materials, or *travaux préparatoires*
- Commentaries
- Cases and arbitral awards from around the world, in English and English translation
- Lists of states parties, dates of entry into force, reservations, and declarations
- Guides and articles written by and for practitioners
- CISG-Advisory Council opinions
- Convention drafting tips

## **iv. Autonomous Network of CISG Websites**

The Autonomous Network of CISG Websites, <http://cisgw3.law.pace.edu/network.html#cp>, offers public access to a current, comprehensive library of reference material on the Convention, in addition to decisions in eleven languages. Participants include more than two dozen providers, including countries and regions throughout the world. Of particular note is the Global Sales Law Project, available at <http://www.globalsaleslaw.org>, and maintained by the law faculty of the University of Basel, Switzerland.

**v. UNILEX**

Available at <http://www.unilex.info/>, the UNILEX database contains key documents, including the Convention and the 2010 UNIDROIT Principles of International Commercial Contracts (discussed *supra* § III.C.1.d.ii.), as well information about states parties, international case law, and a bibliography of additional resources. It is a venture of UNIDROIT and the University of Rome.

**vi. Other Sources**

In addition to the above-mentioned databases on international sales law, many websites provide additional information on international commercial law, including:

- *LexMercatoria*, [www.lexmercatoria.org](http://www.lexmercatoria.org)
- *TransLex*, <http://www.trans-lex.org>
- *Kluwer Arbitration Service*, [www.kluwerarbitration.com](http://www.kluwerarbitration.com)