

The U.N. Convention on Contracts for the International Sale of Goods:
An Overview for South Carolina Lawyers

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At the international level, contracts for the sale of goods are often governed by the United Nations Convention on Contracts for the International Sale of Goods or “CISG.”²

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² S. Treaty Doc. No. 98-9 (1983), 1489 U.N.T.S. 3, 19 I.L.M. 668 (April 11, 1980), Official English Text reprinted at 15 U.S.C. App.; see 52 Fed. Reg. 6262 (March 2, 1987).

As of this writing, 83 nations, including the United States, are parties to the CISG.³ The United States ratified the CISG in 1986, and the CISG became effective on January 1, 1988 after it was adopted by the requisite ten countries.⁴

It is often remarked that there is a dearth of reported case law on the CISG.⁵ In South Carolina, the absence of authority is even more apparent. The fact that a CISG claim was asserted against a party was noted in an unreported decision from the United States Court for the District of South Carolina⁶, but the case features no analysis or application of the Convention. A single opinion from the South Carolina Supreme Court cites an article on the CISG, but for an unrelated point of law.⁷ At the same time, however, South Carolina has been experiencing impressive growth in international trade. It seems plausible that future sales disputes in South Carolina could involve application of the CISG.

This paper will discuss the background of the CISG and provide a general overview of its major principles, often with reference to the analogous rules of South Carolina contract law. Although, as will be shown, many sales contracts exclude the CISG, even the act of exclusion requires some working knowledge of the Convention.

I. Background

Efforts to develop a uniform international law for the sale of goods date back as far as 1930. Earlier efforts were unsuccessful, due mainly to lack of acceptance outside Europe (i.e., in the United States). In 1966, the United Nations formed UNCITRAL, the UN Commission on International Trade Law. UNCITRAL appointed a working group, which included the U.S., to consider how prior attempts could be made more broadly acceptable. This led eventually to the 1980 Vienna Convention, where the CISG was approved.⁸ The goal of the Convention was described by one commentator as “to reduce the uncertainty inherent in contracting for the sale of goods among international traders

³ The United Nations Commission on International Trade Law (“UNCITRAL”) maintains a current list of CISG signatories at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

⁴ See *Honey Holdings I, Ltd. v. Alfred L. Wolff, Inc.*, 81 F. Supp. 3d 543, 551 (S.D. Tex. 2015).

⁵ See *MCC-Marble Ceramic Ctr., Inc., v. Ceramica Nuova d'Agostino, S.p.A.*, 144 F.3d 1384, 1389 (11th Cir. 1998); *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1027-28 (2d Cir. 1995) (“there is virtually no caselaw under the Convention”); *Genpharm Inc. v. Pliva-Lachema a.s.*, 361 F. Supp. 2d 49, 54 (E.D.N.Y. 2005) (“There are only a handful of American cases interpreting the CISG”); *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 320 F. Supp. 2d 702, 708 (N.D. Ill. 2004), *aff'd*, 408 F.3d 894 (7th Cir. 2005); *Caterpillar, Inc. v. Usinor Industeel*, 393 F. Supp. 2d 659, 673 (N.D. Ill. 2005); *Usinor Industeel v. Leeco Steel Products, Inc.*, 209 F. Supp. 2d 880, 884 (N.D. Ill. 2002).

⁶ *Cambridge Towel Co. v. Zimmer Am. Corp.*, No. 7:14-CV-04089-GRA, 2015 WL 5268813, at *2 (D.S.C. Sept. 9, 2015)

⁷ See *Collins Entm't Corp. v. Coats & Coats Rental Amusement*, 368 S.C. 410, 416, 629 S.E.2d 635, 638 (2006).

⁸ See generally E. Allan Farnsworth, “The Vienna Convention: History and Scope,” 18 Int'l L. 17 (1994).

who do not understand or accept one another's substantive trade law.”⁹ China adopted the CISG in 1986,¹⁰ and the U.S. ratified it in 1987. Several major trading nations soon followed suit, such as Germany in 1989,¹¹ Switzerland in 1990, and Canada in 1991. South Korea adopted the Convention in 2004, and Japan in 2008. Brazil adopted the CISG in 2013. Notable current non-signatories include the United Kingdom¹² and India.

II. Reception in U.S. Courts

Despite the paucity of case law, courts have had “little difficulty in interpreting and applying the CISG.”¹³ The CISG is, after all, “the international analogue to Article 2 of the Uniform Commercial Code,”¹⁴ with many very similar provisions. Obviously, the UCC is not “per se” applicable in a case governed by the CISG.¹⁵ But given the lack of CISG jurisprudence, “[c]aselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code. . . , may also inform a court where the language of the relevant CISG provisions tracks that of the UCC.”¹⁶ Frequently, application of the CISG and Article 2 of the UCC to a dispute will yield the same result. In one case, a lower court was affirmed when, although it never cited the CISG or discussed its applicability to the dispute, it applied contract principles which found “ample support in the CISG and at common law.”¹⁷ Similarly, in one recent case the court refused to dismiss a complaint which seemed based on UCC provisions, despite the applicability of the CISG to the contract at issue.¹⁸ The enactments were similar enough that facts sufficient to

⁹ Virginia G. Maurer, “The United Nations Convention on Contracts for the International Sale of Goods,” 15 *Syracuse J. Int’l L. & Com.* 361, 362 (Spring 1989).

¹⁰ Many CISG cases recognize China’s adoption of the Convention, e.g. *China, e.g. Weihai Textile Grp. Imp. & Exp. Co. v. Level 8 Apparel, LLC*, No. 11 CIV. 4405 ALC FM, 2014 WL 1494327, at *6 (S.D.N.Y. Mar. 28, 2014).

¹¹ Germany’s adoption of the CISG was recognized in *It’s Intoxicating, Inc. v. Maritim Hotelgesellschaft mbH*, 2013 WL 3973975, *17 (M.D.Pa. July 31, 2013), reconsideration denied *sub nom.* *It’s Intoxicating, Inc. v. Maritim Hotelgesellschaft mbH*, No. CIV.A. 3:11-2379, 2015 WL 1275348 (M.D. Pa. Mar. 19, 2015).

¹² It was noted that “neither the British Virgin Islands nor the United Kingdom are signatories to the CISG” in *Prime Start Ltd. v. Maher Forest Products, Ltd.*, 442 F. Supp. 2d 1113, 1118 (W.D. Wash. 2006). That Barbados, another British Commonwealth nation, had not ratified the CISG was pointed out in *MidAtlantic Int’l, Inc. v. AGC Flat Glass N. Am., Inc.*, No. 2:12CV169, 2014 WL 504701, at *4 (E.D. Va. Feb. 7, 2014).

¹³ *Palm Bay Int’l, Inc. v. Marchesi Di Barolo S.P.A.*, 659 F. Supp. 2d 407, 412 (E.D.N.Y. 2009).

¹⁴ *Chicago Prime Packers, Inc., v. Northam Trading Co.*, 408 F.3d 894, 898 (7th Cir. 2003); *see also* *Dingxi Longhai Dairy, Ltd. v. Beewood Tech. Grp. L.L.C.*, 635 F.3d 1106, 1107 (8th Cir. 2011).

¹⁵ *Delchi Carrier*, *supra* note 5, at 1028; *Orbisphere Corp. v. United States*, 726 F. Supp. 1344, 1355 (Ct. Int’l Trade 1989); *Genpharm Inc. v. Pliva-Lachema a.s.*, 361 F. Supp. 2d 49, 55 (E.D.N.Y. 2005).

¹⁶ *Delchi Carrier* at 1028; *see also* *Dingxi* at 1107; *Claudia v. Olivieri Footwear Ltd.*, No. 96 CIV. 8052 (HB)(TH), 1998 WL 164824, at *4 (S.D.N.Y. Apr. 7, 1998); *Eldesouky v. Aziz*, No. 11-CV-6986 JLC, 2015 WL 1573319, at *2 (S.D.N.Y. Apr. 8, 2015); *Maxxsonics USA, Inc. v. Fengshun Peiying Electro Acoustic Co.*, No. 10 C 1174, 2012 WL 962698, at *4 (N.D. Ill. Mar. 21, 2012) (citing *Dingxi* at 1108 (“in applying the CISG, courts may inform their analysis by looking to parallel UCC provisions”).

¹⁷ *Simar Shipping Ltd. v. Global Fishing, Inc.*, 540 F. App’x 565, 567 (9th Cir. 2013).

¹⁸ *See* *Saint Tropez Inc. v. Ningbo Maywood Indus. & Trade Co.*, No. 13 CIV. 5230 NRB, 2014 WL 3512807, at *9 (S.D.N.Y. July 16, 2014).

support a UCC Article 2 claim also supported a CISG claim. One case featured a curious choice of law clause which referenced both the CISG and a state's adoption of the UCC.¹⁹

The relative similarity of UCC Article 2 and the CISG, however, can result in the latter instrument being overlooked. A few cases feature broad hints by the court that the parties should consider whether the CISG might apply.²⁰ In other cases, courts have treated a party's failure to raise the CISG as a waiver.²¹ One case described a plaintiff's attempt to invoke the CISG late in its case as "gamesmanship at its worst."²² A few cases also treat the CISG either as foreign law for which notice must be given in the pleadings,²³ or the affirmative defense of preemption which must be raised in the answer.²⁴ Thus any party seeking to take advantage of the CISG would be wise to raise it early on in the pleadings or in other appropriate court filings.²⁵

III. Applicability of the CISG

The CISG consists in the main of 101 articles arranged in a logical order and covering such issues as contract formation, performance, breach, and remedies. These articles are grouped into four parts, the first of which pertains to the CISG's general applicability. Article 1(1)(a) provides that the CISG applies to contracts between parties whose places of business are in different contracting states. However, the fact that the

¹⁹ A. Raymond Tinnerman Mfg., Inc. v. TecStar Mfg. Co., No. 12-CV-667-JPS, 2013 WL 787367, at *2 (E.D. Wis. Mar. 4, 2013). In another interesting case, a distribution agreement specified in one place that it was governed by South African law, and in other that it was governed by the CISG. FPM Fin. Servs., LLC v. Redline Products, Ltd., No. CIV.A. 10-6118 MAS, 2013 WL 5288005, at *3 (D.N.J. Sept. 17, 2013). The plaintiff pointed out that South Africa was not actually a signatory to the CISG, which meant the two provisions of the contract were in conflict. The defendant argued that there was no "specific conflict" between South African law and the CISG, but apparently also conceded that South African and New Jersey law were "essentially the same." Given these concessions, the court simply applied New Jersey law. *Id.* at *3.

²⁰ Source Network Sales & Mktg., LLC v. Ningbo Desa Elec. Mfg. Co., No. 3:14-CV-1108-G, 2015 WL 2341063, at *9 (N.D. Tex. May 15, 2015); Golden Valley Grape Juice & Wine, LLC v. Centrisys Corp., No. CV F 09-1424 LJO GSA, 2009 WL 4828743, at *10 (E.D. Cal. Dec. 9, 2009).

²¹ See Eldesouky v. Aziz, No. 11-CV-6986 JLC, 2015 WL 1573319, at *2 (S.D.N.Y. Apr. 8, 2015); New World Trading Co. v. 2 Feet Prods., Inc., No. 11 CIV. 6219 SAS, 2014 WL 543657, at *1 (S.D.N.Y. Feb. 11, 2014); Semi-Materials Co. v. MEMC Elec. Materials, Inc., No. 4:06CV1426 FRB, 2010 WL 3038086, at *1 (E.D. Mo. Aug. 3, 2010); see also Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 444 (3d Cir. 2003) ("Because the parties have not raised the CISG's applicability to this dispute, we decline to address it here").

²² Rienzi & Sons, Inc. v. N. Puglisi & F. Industria Paste Alimentari S.P.A., No. 08-CV-2540 DLI JMA, 2014 WL 1276513, at *2 (E.D.N.Y. Mar. 27, 2014)

²³ See, e.g., Attorneys Trust v. Videotape Computer Products, Inc., 94 F.3d 650 (9th Cir. 1996) (table) (quoting Fed.R.Civ.P. 44.1.) ("Assuming that Taiwan is a party to the [CISG], [a] party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice").

²⁴ See, e.g. Insituform Technologies, Inc. v. AMerik Supplies, Inc., 850 F. Supp. 2d 1336, 1355 (N.D. Ga. 2012).

²⁵ In federal court, for example, the applicability of the CISG should be brought to the court's attention in the Rule 26(f) report. See Local Civ. R. 26.03(A)(4), DSC.

parties have their places of business in different states must be “disregarded” if that fact is not apparent from the contract or the parties’ dealings.²⁶

Thus if both parties know that the buyer is based in South Carolina and the seller in France, the CISG applies; if, however, the buyer dealt entirely with an agent in South Carolina and could not have known the seller was actually based in France, the CISG will not apply. In short, both parties must know they are engaged in international trade in order for the CISG to apply.²⁷ Thus in *McDowell Valley Vineyards, Inc. v. Sabate USA Inc.*,²⁸ the court refused to apply the CISG despite the goods having been manufactured in France, when “the representations regarding the specifications of the product—both in number and in substance—came largely, if not entirely, from California.”²⁹

The requirement of a contracting state on both sides of the transaction has been said to represent the rejection of a “universalist” approach under which any signatory would apply to the Convention to international sales contracts, regardless of whether the parties are based in contracting states.³⁰

A. Party’s Place of Business

Where a party has multiple places of business, e.g. some in contracting states and others elsewhere, Article 10 of the CISG opts for the location “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.”³¹

Some cases feature disputes over a party’s place of business. In *VLM Food Trading Int’l, Inc. v. Illinois Trading Co.*,³² the lower court concluded that the seller was, like the buyer, based in the United States because it maintained a New Jersey business office. The Seventh Circuit reversed, concluding that the New Jersey office was maintained for regulatory purposes, whereas all of the seller’s relevant conduct was linked to its Canada office.³³ In *Am. Mint LLC v. Gosoftware, Inc.*,³⁴ the court declined to apply the CISG

²⁶ CISG Art. 1(2); see *It’s Intoxicating*, supra note 11, at *16.

²⁷Note, however, that the fact that goods are imported from a signatory country does not make the CISG applicable if the contracting parties are based in the U.S. See *Food Team Int’l, Ltd. v. Unilink, LLC*, 872 F. Supp. 2d 405, 414 (E.D. Pa. 2012). Similarly, the CISG does not apply simply because the contract calls for delivery of the goods in another signatory country. See *Grace Label, Inc. v. Kliff*, 355 F. Supp. 2d 965, 971 (S.D. Iowa 2005)

²⁸ No. C-04-0708 SC, 2005 WL 2893848 (N.D. Cal. Nov. 2, 2005).

²⁹ *Id.* at *4.

³⁰ See *Impuls I.D. Int’l, S.L. v. Psion-Teklogix, Inc.*, 234 F. Supp. 2d 1267, 1272 (S.D. Fla. 2002)

³¹ See *Am. Mint LLC v. Gosoftware, Inc.*, No. CIV.A. 1:05-CV-650, 2006 WL 42090, at *4 (M.D. Pa. Jan. 6, 2006) (quoting CISG art. 10).

³² 748 F.3d 780 (7th Cir. 2014).

³³ *Id.* at 787.

³⁴ Supra note 31.

when, although the buyer's parent was based in Germany, the buyer itself was a Pennsylvania company.³⁵

Some cases also deal with which of several parties involved in a dispute are subject to the CISG. In general, "the CISG applies only to buyers and sellers, not to third parties."³⁶ That said, one case rejected the argument that there could be only one seller in an international sale of goods.³⁷

B. Contracting States

Usually, the status of a country as a CISG signatory is as simple as consulting UNCITRAL's list. But some cases have involved disputes over a particular country's status. The cases are split as to whether China's ratification of the CISG extends to Hong Kong, now an administrative region of China but under British control when China ratified the CISG.³⁸

Note that CISG Article 1(1)(b), the Convention can also apply "when the rules of private international law lead to the application of the law of a Contracting State." Under this prong of Article 1, the CISG could apply if, under a choice of law test, the law of the United States or some other contracting state was applicable. The United States, however, has excepted to Article 1(1)(b), which is expressly permitted by Article 95.³⁹ Thus in United States courts, the CISG does not apply unless both parties are based in a signatory state.⁴⁰ In *Prime Start Ltd. v. Maher Forest Products, Ltd.*,⁴¹ a party tried to argue that, since the CISG is the supreme law of the land, it should govern if state law applied under the applicable choice of law rules. The court rejected this argument as an attempt to circumvent the United States' rejection of 1(1)(b).⁴²

The CISG also permits countries to declare themselves unbound either by Part II of the Convention, dealing with the formation of contracts, or Part III, dealing with sale of goods.⁴³ Sweden and Finland, for example, have both disclaimed Part II.⁴⁴ If a

³⁵ Id. at *5.

³⁶ Id. at *4; *Usinor*, supra note 5, 209 F. Supp. 2d at 885.

³⁷ 2P Commercial Agency S.R.O. v. Familant, No. 2:11-CV-652-FTM-29, 2012 WL 6615889, at *3 (M.D. Fla. Dec. 19, 2012).

³⁸ Compare *America's Collectibles Network, Inc. v. Timlly (HK)*, 746 F. Supp. 2d 914, 920 (E.D. Tenn. 2010) and *Innotex Precision Ltd. v. Horei Image Products, Inc.*, 679 F. Supp. 2d 1356, 1358-59 (N.D. Ga. 2009) (Hong Kong not a contracting state) with *Electrocraft Arkansas, Inc. v. Super Elec. Motors, Ltd.*, No. 4:09CV00318 SWW, 2009 WL 5181854, at *3 (E.D. Ark. Dec. 23, 2009) and *CNA Int'l Inc. v. Guangdon Kelon Electronical Holdings*, No. 05 C 5734, 2008 WL 8901360, at *6 (N.D. Ill. Sept. 3, 2008).

³⁹ Ralph H. Folsom, 1 *International Business Transactions* § 1.4 (3d ed.).

⁴⁰ See *Innotex Precision* at 1358; *Impuls I.D. Internacional, S.L. v. Psion-Teklogix Inc.*, 234 F.Supp.2d 1267, 1272 (S.D.Fla.2002); *Princesse D'Isenbourg Et Cie Ltd. v. Kinder Caviar, Inc.*, No. CIV.A. 3:09-29-DCR, 2011 WL 720194, at *4 (E.D. Ky. Feb. 22, 2011) (CISG not applicable "when a contract is between parties having places of business in different States and only one State is a Contracting State").

⁴¹ 442 F. Supp. 2d 1113 (W.D. Wash. 2006).

⁴² Id. at 1118.

⁴³ CISG Art. 92.

contracting state has declared itself unbound by Part II, then issues of contract formation are subject to the vagaries of a conflict of laws analysis.

C. Excluded Matters

Even if the parties are located in different contracting states, certain transactions are excluded from the CISG's coverage. 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" are excluded.⁴⁵ "Maquiladora" contracts, in which the buyer furnishes a "substantial part of the materials necessary" for the manufacture of goods, are also excluded.⁴⁶ Death and injury claims are excluded.⁴⁷ Also, the validity of the contract itself is not governed by the CISG--issues of legality, fraud, duress, and so on, must be resolved under other law.⁴⁸

Neither does the CISG deal with the effect of the contract on "the property in the goods sold."⁴⁹ Here the CISG is less expansive than Article Two of the UCC, which deals with title to goods in Section 2-401.⁵⁰ It makes no effort to reconcile divergent national law on such issues as whether a seller may retain title in goods delivered to a buyer.

Most cases also agree that the CISG does not reach distributorship agreements. The UCC Article Two definition of "contract" includes a contract to "sell goods at a future time."⁵¹ Thus distributorship agreements are often treated as covered by the UCC.⁵² However, the CISG applies to "contracts of sale of goods."⁵³ Cases interpreting this provision have held that, unlike the UCC, the CISG does not reach distributorship agreement disputes, at least when no specifically identified goods are at issue.⁵⁴

⁴⁴ Mitchell Aircraft Spares, Inc. v. European Aircraft Serv. AB, 23 F. Supp. 2d 915, 918 (N.D. Ill. 1998) (Sweden); Valero Mktg. & Supply Co. v. Greeni Oy, 373 F. Supp. 2d 475, 480 (D.N.J. 2005) rev'd and remanded, 242 F. App'x 840 (3d Cir. 2007) (Finland).

⁴⁵ CISG Art. 3(2); Martini E Ricci Iamino S.P.A.--Consortile Societa Agricola v. Trinity Fruit Sales Co., 30 F. Supp. 3d 954, 965 (E.D. Cal. 2014); TeeVee Toons, Inc. v. Gerhard Schubert GmbH, No. 00 CIV. 5189 (RCC), 2006 WL 2463537, at *5 (S.D.N.Y. Aug. 23, 2006).

⁴⁶ CISG Art. 3(2).

⁴⁷ CISG Art. 5. See Geneva Pharm. Tech. Corp. v. Barr Labs., Inc., 201 F. Supp. 2d 236, 286 (S.D.N.Y. 2002) aff'd in part, rev'd in part and remanded, 386 F.3d 485 (2d Cir. 2004) ("The CISG clearly does not preempt the claims sounding in tort"); Viva Vino Imp. Corp. v. Farnese Vini S.r.l, No. CIV.A. 99-6384, 2000 WL 1224903, at *1 (E.D. Pa. Aug. 29, 2000)

⁴⁸ CISG Art. 4(a). See *Geneva Pharm.*, 201 F. Supp. 2d at 282 ("Under the CISG, the validity of an alleged contract is decided under domestic law"). See also *Miami Valley Paper, LLC v. Lebbing Eng'g & Consulting GmbH*, No. 1:05-CV-00702, 2006 WL 2924779, at *3 (S.D. Ohio Oct. 10, 2006) ("the CISG does not prevent Plaintiff from pleading negligent misrepresentation and fraudulent inducement").

⁴⁹ CISG Art. 4(b). *Usinor*, supra note 5, at 209 F. Supp. 2d 886.

⁵⁰ See S.C. Code §36-2-401.

⁵¹ See S.C. Code §36-2-106(1).

⁵² E.g. *Kirby v. Chrysler Corp.*, 554 F. Supp. 743, 749 (D. Md. 1982).

⁵³ Art. 1(1).

⁵⁴ E.g. *Gruppo Essenziero Italiano, S.p.A. v. Aromi D'Italia, Inc.*, No. CIV. CCB-08-65, 2011 WL 3207555, at *3 (D. Md. July 27, 2011) ("Although exclusive distributorship agreements are considered contracts for the sale of goods under the Uniform Commercial Code adopted in Pennsylvania, this approach has been rejected in connection with the CISG"); *Viva Vino Imp. Corp. v. Farnese Vini S.r.l*, No. CIV.A. 99-6384,

Article 2 of the CISG excludes sales of “ships, vessels, hovercraft or aircraft.” While the rationale for that exclusion might seem to be that sales of such items are covered by other bodies of law, it is worth noting that a sale of a vessel is not subject to United States maritime law.⁵⁵ In the U.S., a vessel sale is considered a sale of goods governed by UCC Article 2.⁵⁶

D. Exclusion by Contract

Article 6 of the CISG allow the parties to exclude or derogate from its application.⁵⁷ In practice, many sales contracts exclude the CISG in favor of other law (often a state’s version of the UCC). This tendency has been attributed to the fact that U.S. attorneys “do not understand [the CISG] as well as they understand the UCC.”⁵⁸ Whether the CISG offers advantages or disadvantages compared to the UCC is perhaps best decided on a case by case basis.

If the decision is to opt out of the CISG, care must be taken in drafting the necessary contractual language. “The intent to opt out of the CISG must be set forth in the contract clearly and unequivocally.”⁵⁹ Various cases stand for the proposition that, “absent an express statement that the CISG does not apply, merely referring to a particular state’s law does not opt out of the CISG.”⁶⁰ In *Asante Technologies, Inc. v. PMC-Sierra, Inc.*,⁶¹ for example, the buyer and seller each had form contracts which purported to apply the local law (California or British Columbia). Neither clause, however, went so far as to disclaim the CISG. Since the CISG was in fact the law both of California and British Columbia, the court applied it despite the competing choice of law clauses. One line of cases suggests that a forum selection clause alone is sufficient to displace the CISG, but it appears to represent a minority view.⁶² Sales cases include any

2000 WL 1224903, at *1 (E.D. Pa. Aug. 29, 2000); *Helen Kaminski Pty., Ltd. v. Mktg. Australian Products, Inc.*, No. 96B46519, 1997 WL 414137, at *3 (S.D.N.Y. July 23, 1997).

⁵⁵See *Hatteras of Lauderdale, Inc. v. Gemini Lady*, 853 F. 2d 848, 850 (11th Cir. 1988); *Magnolia Ocean Shipping Corp. v. Mercedes Maria*, 1982 AMC 731 (4th Cir. 1981); *The Ada*, 250 F. 194 (2d Cir. 1918).

⁵⁶E.g. *Burris v. Lake Wylie Marina, Inc.*, 330 S.E.2d 559 (S.C. App. 1985); *Richard W. Cooper Agency, Inc. v. Irwin Yacht & Marine Corp.*, 264 S.E.2d 768 (N.C. App. 1980).

⁵⁷*TeeVee Toons, Inc. v. Gerhard Schubert GmbH*, No. 00 CIV. 5189 (RCC), 2006 WL 2463537, at *5 (S.D.N.Y. Aug. 23, 2006).

⁵⁸RALPH H. FOLSOM, MICHAEL WALLACE GORDON, JOHN A. SPANOGLE, JR. AND MICHAEL P. VAN ALSTINE, *INTERNATIONAL BUSINESS TRANSACTIONS* § 1.4 at 15 (3d ed. 2013).

⁵⁹*Hanwha Corp. v. Cedar Petrochemicals, Inc.*, 760 F. Supp. 2d 426, 430 (S.D.N.Y. 2011)

⁶⁰*Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Technical Fabrics Canada Ltd.*, 474 F. Supp. 2d 1075, 1082 (D. Minn. 2007). See also *BP Oil Int’l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333, 337 (5th Cir. 2003); *Honey Holdings I, Ltd. v. Alfred L. Wolff, Inc.*, 81 F. Supp. 3d 543, 552 (S.D. Tex. 2015); *It’s Intoxicating*, supra note 11, at *16; *Am. Mint*, supra note 31, at *3.

⁶¹164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001).

⁶²*Korea Trade Ins. Corp. v. Oved Apparel Corp.*, No. 13-CV-07918 DAB, 2015 WL 1345812, at *2 (S.D.N.Y. Mar. 23, 2015); *Am. Biophysics Corp. v. Dubois Marine Specialties*, 411 F. Supp. 2d 61, 63 (D.R.I. 2006); *Amco Ukrservice v. Am. Meter Co.*, 312 F. Supp. 2d 681, 686 (E.D. Pa. 2004); *Fercus, S.R.L. v. Palazzo*,

number of examples of choice of law clauses which expressly reject the CISG.⁶³ Something along the lines of “the parties expressly exclude the application of the United Nations Convention on Contracts for the International Sale of Goods to this Agreement” is common.⁶⁴

The parties will sometimes dispute whether their contract excludes the CISG, especially if the exclusion clause also contains a forum selection clause one party is resisting. In such situations, the CISG controls the threshold issue of whether the contract includes the relevant language.⁶⁵ These cases often involve a “battle of the forms”⁶⁶ in which a forum selection clause has been added in a confirmation or similar document. Although subsequent confirmations and the like can add terms if they are not material, the CISG expressly states that terms relating to the settlement of disputes are material.⁶⁷ Thus a forum selection clause in a seller’s invoice, sent after the parties reached an agreement, is not binding.⁶⁸ On the other hand, if a buyer expresses assent to the seller’s confirmation (by, for example, signing it), then a forum selection clause contained in the confirmation becomes part of the contract.⁶⁹ If at the end of the day the parties fail to agree on other substantive law, “their competing choices must fall away, leaving the CISG to fill the void by its own self-executing force.”⁷⁰

E. Preemptive Effect

If the CISG does apply, it governs the case. “[U]nder the Supremacy Clause of the United States Constitution, the Convention, would displace any contrary state sales law such as the UCC.”⁷¹ The Convention has been described as is “a self-executing treaty with the preemptive force of federal law.”⁷² Thus it CISG “supersedes state law when it

No. 98 CIV. 7728 (NRB), 2000 WL 1118925, at *3 (S.D.N.Y. Aug. 8, 2000); *Viva Vino Imp. Corp. v. Farnese Vini S.r.l.*, No. CIV.A. 99-6384, 2000 WL 1224903, at *1 (E.D. Pa. Aug. 29, 2000).

⁶³ E.g. *Beaton v. SpeedyPC Software*, No. 13-CV-08389, 2015 WL 3573601, at *1 (N.D. Ill. June 5, 2015); *In re Yahoo! Inc.*, 313 F. App’x 722, 723 (5th Cir. 2009) (“The United Nations Convention on Contracts for the International Sale of Goods does not apply to the Agreement”); *Segal v. Amazon.com, Inc.*, 763 F. Supp. 2d 1367, 1368 (S.D. Fla. 2011); *Peters v. Amazon Servs. LLC*, 2 F. Supp. 3d 1165, 1167 (W.D. Wash. 2013); *BAAN, U.S.A. v. USA Truck, Inc.*, 82 Ark. App. 202, 205, 105 S.W.3d 784, 786 (2003); *KMW Grp., Inc. v. Awarepoint Corp.*, No. 1:11-CV-1212, 2014 WL 2571350, at *1 (W.D. Mich. June 9, 2014); *Centro de Recaudacion de Ingresos Municipales v. Infor (US), Inc.*, 951 F. Supp. 2d 296, 299 (D.P.R. 2013), appeal dismissed (Apr. 30, 2014); *Packgen v. Berry Plastics Corp.*, 973 F. Supp. 2d 48, 55 (D. Me. 2013).

⁶⁴ *SAS Inst. Inc. v. World Programming Ltd.*, 64 F. Supp. 3d 755, 765 (E.D.N.C. 2014).

⁶⁵ *Turfworthy, LLC v. Dr. Karl Wetekam & Co. KG*, 26 F. Supp. 3d 496, 503 (M.D.N.C. 2014).

⁶⁶ See *infra* at Section IV.B.

⁶⁷ CISG Art. 19(3).

⁶⁸ See *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F.3d 528, 531 (9th Cir. 2003); see also *Allied Dynamics Corp. v. Kennametal, Inc.*, 965 F. Supp. 2d 276, 299 (E.D.N.Y. 2013).

⁶⁹ *BTC-USA Corp. v. Novacare*, No. CIV. 07-3998 ADMJSM, 2008 WL 2465814, at *4 (D. Minn. June 16, 2008) (“when Michlitsch initialed the general conditions of sale BTC expressed its assent to the forum selection clause”).

⁷⁰ *Hanwha Corp.*, *supra* note 59, at 431.

⁷¹ *Usinor*, *supra* note 5, at 209 F. Supp. 2d 884.

⁷² *Am. Mint*, *supra* note 31 at *3; accord *Hanwha* at 430.

applies.”⁷³ Since the CISG is effectively U.S. law, there is no need for a foreign law expert to establish its provisions.⁷⁴ For contracts subject to the CISG, “the applicable commercial law is not the U.C.C., but rather, the [CISG] unless the parties expressly contract out of the Convention's coverage.”⁷⁵ Thus the CISG “preempts state common law and the UCC.”⁷⁶

As a treaty, the CISG provides a separate basis for federal jurisdiction. Federal courts have jurisdiction over cases arising under the Constitution, laws, or treaties of the United States.⁷⁷ Several cases have acknowledged that the CISG creates a private right of action enforceable in federal court.⁷⁸

IV. Existence and Terms of Contract

As previously mentioned, Part II of the CISG deals with the formation of a contract. As such it is analogous to Part 2 of Article 2 of the UCC, which deals with “Form, Formation and Readjustment of Contract.”⁷⁹ It is at this point that we encounter one of the major differences between the CSIG and UCC Article 2. The UCC’s statute of frauds requires that contracts for the sale of goods “for the price of \$500 or more” are not enforceable “unless there is some writing sufficient to indicate that a contract of sale has been made between the parties and signed by the party against whom enforcement is sought.”⁸⁰

The CISG has no such provision. According to Article 11, “[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form.”⁸¹ Instead, the contract “may be proved by any means, including witnesses.”⁸² Most cases agree that, as a corollary, “the CISG does not adopt the parol-evidence rule⁸³ of American law,” and instead allows “allows all relevant information into evidence

⁷³ VLM Food Trading Int'l, Inc. v. Illinois Trading Co., 748 F.3d 780, 787 (7th Cir. 2014).

⁷⁴ Semi-Materials Co. v. MEMC Elec. Materials, Inc., No. 4:06CV1426 FRB, 2011 WL 134062, at *1 (E.D. Mo. Jan. 10, 2011). This implies that Fed. R. Civ. Proc. 44.1, which requires a party to give notice of its intention to raise a point of foreign law, should not apply to the CISG.

⁷⁵ Orbisphere Corp. v. United States, 726 F. Supp. 1344, 1356 n. 7 (Ct. Int'l Trade 1989) (Hong Kong a contracting state).

⁷⁶ Honey Holdings I, Ltd. v. Alfred L. Wolff, Inc., 81 F. Supp. 3d 543, 552 (S.D. Tex. 2015).

⁷⁷ 28 U.S.C.A. § 1331.

⁷⁸ *Delchi Carrier*, supra note 5, at 1027–28; *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333, 336 (5th Cir. 2003); *Hanwha* at 430; *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1147 (N.D. Cal. 2001); *D & G Grp., S.R.I. v. H.A. Imp. USA*, No. 14-CV-2850 TPG, 2015 WL 694925, at *1 (S.D.N.Y. Feb. 18, 2015)

⁷⁹ S.C. Code § 36-2-201 et seq.

⁸⁰ S.C. Code § 36-2-201(1).

⁸¹ See *Urica, Inc. v. Pharmaplast S.A.E.*, No. CV 11-02476 MMM RZX, 2014 WL 3893372, at *11 (C.D. Cal. Aug. 8, 2014); *TeeVee Toons, Inc. v. Gerhard Schubert GmbH*, No. 00 CIV. 5189 (RCC), 2006 WL 2463537, at *7 (S.D.N.Y. Aug. 23, 2006) (“Unlike American contract law, the CISG contains no statute of frauds”); *Claudia v. Olivieri Footwear Ltd.*, No. 96–8052, 1998 WL 164824, at *4–5 (S.D.N.Y. Apr. 7, 1998)). *Korea Trade Ins. Corp. v. Oved Apparel Corp.*, No. 13-CV-07918 DAB, 2015 WL 1345812, at *2 (S.D.N.Y. Mar. 23, 2015)

⁸² CISG Art. 11; *Weihai Textile Grp. Imp. & Exp. Co. v. Level 8 Apparel, LLC*, No. 11 CIV. 4405 ALC FM, 2014 WL 1494327, at *6 (S.D.N.Y. Mar. 28, 2014);

⁸³ See S.C. Code §36-2-202 (parol evidence rule).

even if it contradicts the written documentation.”⁸⁴ This will come as a bit of a shock to American lawyers, who are used to treating contracts as integrated statements of the parties’ agreement. In CISG cases, a party is free to contend that, notwithstanding the clear provisions of an agreement, the parties actually agreed on something else.

Article 9 of the CISG permits a contracting state “whose legislation requires contracts of sale to be concluded in or evidenced by writing” to make a declaration that Article 11 does not apply if one of the parties has its place of business in the contracting state. Despite the UCC’s inclusion of a statute of frauds, the United States has made no Article 96 declaration. One of the United States’ major trading partners, China, has made that declaration.⁸⁵ What happens in sales cases involving a counterparty in a jurisdiction which, like China, has made such a declaration? The cases are unclear. In one unreported case, a district court held that China’s Article 11 declaration meant that a writing was required to prove the alleged contract.⁸⁶ In *Forestal Guarani S.A. v. Daros Int’l, Inc.*,⁸⁷ the Third Circuit held that a choice of law analysis would be needed to fill in the “gap” created by the signatory states’ differing views on the necessity of a writing, and remanded for application of such an analysis.⁸⁸ A recent unreported decision dodged the question because, regardless of whether Chinese or U.S. law applied under a choice of law analysis, a writing would be required.⁸⁹

CISG Article 8(1) states that party’s statements should be interpreted “according to his intent where the other party knew or could not have been unaware what that intent was.” Thus the CISG “requires courts to consider evidence of a party’s subjective intent when signing a contract if the other party to the contract was aware of that intent at the

⁸⁴ TeeVee Toons, Inc. v. Gerhard Schubert GmbH, No. 00–5189, 2006 WL 2463537, at *7 (S.D.N.Y. Aug. 23, 2006) (quoting *Claudia v. Olivieri Footwear Ltd.*, No. 96–8052, 1998 WL 164824, at *4–5 (S.D.N.Y. Apr. 7, 1998)); see also *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova d’Agostino, S.p.A.*, 144 F.3d 1384, 1389 (11th Cir. 1998); *Mitchell Aircraft Spares, Inc. v. European Aircraft Serv. AB*, 23 F. Supp. 2d 915, 920 (N.D. Ill. 1998); *Filanto, S.p.A. v. Chlewich Int’l Corp.*, 789 F. Supp. 1229, 1238 (S.D.N.Y. 1992); *Urica, Inc. v. Pharmaplast S.A.E.*, No. CV 11-02476 MMM RZX, 2014 WL 3893372, at *11 (C.D. Cal. Aug. 8, 2014); *Weihai Textile*, 2014 WL 1494327 at *6; *Claudia v. Olivieri Footwear Ltd.*, No. 96 CIV. 8052 (HB)(TH, 1998 WL 164824, at *6 (S.D.N.Y. Apr. 7, 1998); but see *Beijing Metals & Minerals Imp./Exp. Corp. v. Am. Bus. Ctr., Inc.*, 993 F.2d 1178, 1183 (5th Cir. 1993) (applying parole evidence rule); David H. Moore, “The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying Beijing Metals & Minerals Import/export Corp. v. American Business Center, Inc.,” 1995 B.Y.U. L. Rev. 1347, 1351 (1995)

⁸⁵See *Zhejiang Shaoxing Yongli Printing & Dyeing Co. v. Microflock Textile Grp. Corp.*, No. 0622608-CIV, 2008 WL 2098062, at *3 (S.D. Fla. May 19, 2008); *Weihai Textile Grp. Imp. & Exp. Co. v. Level 8 Apparel, LLC*, No. 11 CIV. 4405 ALC FM, 2014 WL 1494327, at *7 (S.D.N.Y. Mar. 28, 2014); *China N. Chem. Indus. Corp. v. Beston Chem. Corp.*, No. Civ.A. H–04–0912, 2006 WL 295395, at *6 n. 6 (S.D.Tex. Feb. 7, 2006).

⁸⁶*Zhejiang*, 2008 WL 2098062 at *3.

⁸⁷ 613 F.3d 395, 400 (3d Cir.2010).

⁸⁸ 613 F.3d at 402.

⁸⁹ *Weihai Textile Grp.* 2014 WL at *7.

time.”⁹⁰ Only if when the other party is unaware of the first party’s subjective intent does the CISG make recourse to “the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.”⁹¹

A. Offer and Acceptance

Contrasting with this subjectivity is a comparatively demanding standard with respect to the definiteness of the contract. Article 14(1) requires that an offer be sufficiently definite and indicate the offer’s intention to be bound by an acceptance, and that an offer is sufficiently definite if “it indicates the goods and expressly or implicitly fixes a provision for determining the quantity and price.”⁹² Thus a simple sales quote will suffice as an offer.⁹³ The UCC, by comparison, states that a contract will not fail for indefiniteness if “one or more terms are left open,” provided there is a “reasonably certain basis for giving an appropriate remedy.”⁹⁴

Article 18 of the CISG governs acceptance. Mere “silence or inactivity” cannot constitute acceptance, but “other conduct of the offeree indicating assent to an offer is an acceptance.”⁹⁵ Thus “acceptance does not require a signature or formalistic adoption of the offered terms.”⁹⁶ An order in response to which product is shipped forms a valid contract under the CISG.⁹⁷

Article 16(2)(b) of the CISG prevents an offeror from revoking an offer “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.” One case viewed this provision as a “modified version of promissory estoppel that does not appear to require foreseeability or detriment,” and declined to apply a more exacting promissory estoppel rule.⁹⁸

⁹⁰ MCC-Marble Ceramic Ctr., Inc., v. Ceramica Nuova d’Agostino, S.p.A., 144 F.3d 1384, 1388 (11th Cir. 1998); Guang Dong Light Headgear Factory Co. v. ACI Int’l, Inc., 521 F. Supp. 2d 1153, 1166 (D. Kan. 2007).

⁹¹ CISG Art. 8(2).

⁹² See *Solae, LLC v. Hershey Canada, Inc.*, 557 F. Supp. 2d 452, 457 (D. Del. 2008) (“Courts have held that a binding contract exists when the parties sufficiently agree to the goods, the quantity and the price”); *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.*, 201 F. Supp. 2d 236, 281 (S.D.N.Y. 2002) *aff’d in part, rev’d in part and remanded*, 386 F.3d 485 (2d Cir. 2004); *Hanwha Corp. v. Cedar Petrochemicals, Inc.*, 760 F. Supp. 2d 426, 432 (S.D.N.Y. 2011) (offeror must intend to be bound).

⁹³ *Golden Valley Grape Juice & Wine, LLC v. Centrisys Corp.*, No. CV F 09-1424 LJO GSA, 2010 WL 347897, at *3 (E.D. Cal. Jan. 22, 2010).

⁹⁴ S.C. Code § 36-2-204(3).

⁹⁵ CISG Art. 18(1).

⁹⁶ *Golden Valley* at *5.

⁹⁷ *It’s Intoxicating*, *supra* note 11, at *14.

⁹⁸ *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.*, 201 F. Supp. 2d 236, 286-87 (S.D.N.Y. 2002) *aff’d in part, rev’d in part and remanded*, 386 F.3d 485 (2d Cir. 2004).

B. Counteroffers; “Battle of the Forms”

The CISG’s “battle-of-the-forms provision, Article 19, is significantly different from § 2-207.”⁹⁹ It is limited to terms contained in “a reply to an offer which purports to be an acceptance.”¹⁰⁰ Article 19(1) of the CISG has been held to default to the old mirror image rule in which a purported acceptance proposing additional terms is treated as a rejection and counteroffer.¹⁰¹ Thus, under the CISG, “ ‘no contract results from such an exchange if the purported acceptance contains additional or different terms that materially alter the offer.’ ”¹⁰² Additional terms in an acceptance which do not materially alter the terms of the offer do become part of the contract.¹⁰³ However, different terms relating to price, payment, quality, quantity, delivery, liability or dispute resolution are all considered material.¹⁰⁴ Thus an acceptance purporting to modify any of those terms is actually a counteroffer. Under the UCC, the acceptance would still be effective. The new terms may or may not become part of the contract depending on various factors, including their materiality.¹⁰⁵

Nearly all the CISG “battle of the forms” cases involve forum selection clauses. As noted above, such clauses are deemed per se material for purposes of the conditional acceptance rule. Sometimes the distinction makes no practical difference. Various cases find a contract based on the parties’ conduct, and conclude that the offeree’s additional terms and conditions are not part of the contract if they are material.¹⁰⁶ Such cases often involve forum selection clauses, which are “material” under CISG Art. 19(3). In *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*,¹⁰⁷ the court declined to enforce a forum selection clause inserted in a seller’s invoice after the contract was made.

One recent case features a detailed application of CISG principles to a forum selection clause dispute. In *Allied Dynamics Corp. v. Kennametal, Inc.*,¹⁰⁸ the seller sent a quote which included a proposed price but no quantity term. Instead, the operative offer was the buyer’s purchase order, which fixed all of the terms required by the CISG. The seller responded with a confirmation, which, due to its inclusion of a forum selection clause, was a rejection and counteroffer. However, the seller’s confirmation requested the

⁹⁹ VLM Food Trading Int’l, Inc. v. Illinois Trading Co., 748 F.3d 780, 786 (7th Cir. 2014).

¹⁰⁰ Id.

¹⁰¹ Id. See also *Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Technical Fabrics Canada Ltd.*, 474 F. Supp. 2d 1075, 1082 (D. Minn. 2007).

¹⁰² *Claudia v. Olivieri Footwear Ltd.*, No. 96 CIV. 8052 (HB)(TH), 1998 WL 164824, at *11 n. 7 (S.D.N.Y. Apr. 7, 1998) (quoting *Legal Analysis of the United Nations Convention on Contracts for the International Sale of Goods*, (1980), commentary on Article 19).

¹⁰³ CISG Art. 19(2).

¹⁰⁴ CISG Art. 19(3).

¹⁰⁵ See S.C. Code § 36-2-207(2).

¹⁰⁶ See, e.g., *Solae*, supra note 92, at 458 (condition of sales document not part of contract).

¹⁰⁷ 328 F.3d 528, 531 (9th Cir. 2003).

¹⁰⁸ No. 12-CV-5904 JFB AKT, 2014 WL 3845244 (E.D.N.Y. Aug. 5, 2014).

buyer to object within fifteen days of receipt of the confirmation, and the buyer's failure to do so in a series of transactions amounted to an acceptance.¹⁰⁹

By contrast, in *CSS Antenna v. Amphenol-Tuchel Electronics, GmbH*,¹¹⁰ the court declined to enforce a similar forum selection clause, at least initially. In that case, it was not clear whether the buyer had in fact assented to the seller's general conditions. The court agreed that the seller's confirmation, sent in response to the buyer's purchase order, was accepted by the buyer. It was, however, unclear to the court whether the confirmation put the buyer on notice that additional terms, including a forum selection clause, were to be included in the contract.¹¹¹ The court therefore denied the seller's motion to dismiss without prejudice.¹¹²

C. Customs and Usages; Incoterms

Like Article 2 of the UCC, the CISG makes "usages" in trade or commerce applicable to the interpretation of a contract. Under Article 9(1), the parties are bound by any usage "to which they have agreed." Otherwise they are bound by usages which are widely known in international trade. *Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.*,¹¹³ involved the issue of whether an express agreement between the parties was needed in order to vary the usual trade usages, or whether an agreement as to usages could be implied from the parties' conduct. The Eleventh Circuit held that "the parties' usage of a term in their course of dealings controls that term's meaning in the face of a conflicting customary usage of the term."¹¹⁴

Several cases have acknowledged that Article 9(1) effectively incorporates Incoterms¹¹⁵ as widely accepted trade usage.¹¹⁶ Thus, although Incoterms do not technically have the form of law, they may be treated as essentially binding in CISG contracts, unless the parties agree otherwise. The UCC, on the other hand, contains its own definitions of certain shipping terms.¹¹⁷ In the unlikely absence of an applicable Incoterm governing delivery, the CISG requires delivery to the first carrier for shipment to the buyer, if the

¹⁰⁹ Id. at *12.

¹¹⁰ 764 F.Supp.2d 745 (D. Md. 2011).

¹¹¹ Id. at 753-54.

¹¹² Id. at 754.

¹¹³ 464 F.3d 1235 (11th Cir. 2006).

¹¹⁴ Id. at 1239.

¹¹⁵ See International Chamber of Commerce, INCOTERMS 2010.

¹¹⁶ *In re World Imports, Ltd.*, 511 B.R. 738, 744 (Bankr. E.D. Pa. 2014); *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co.*, No. 06 CIV. 3972 LTS JCF, 2011 WL 4494602, at *4 (S.D.N.Y. Sept. 28, 2011); *China N. Chem. Indus. Corp. v. Beston Chem. Corp.*, No. CIV.A. H-04-0912, 2006 WL 295395, at *6 (S.D. Tex. Feb. 7, 2006); *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH*, No. 00 CIV. 9344 (SHS), 2002 WL 465312, at *3 (S.D.N.Y. Mar. 26, 2002) *aff'd*, 53 F. App'x 173 (2d Cir. 2002) ("INCOTERMS are incorporated into the CISG through Article 9(2)").

¹¹⁷ See S.C. Code § 36-2-319, S.C. Code § 36-2-320.

contract involves carriage of goods.¹¹⁸ The UCC, by contrast, makes the default place of delivery the seller's place of business.¹¹⁹

V. Performance

A. Seller's Obligations

The seller must deliver the goods in accordance with the contract, which includes making any required contracts of carriage.¹²⁰ With respect to the condition of the goods, the CISG does not rely on the concept of a warranty; it does, however, include rules which effectively duplicate the familiar UCC implied warranties. According to Article 35, "[t]he seller must deliver goods which are of the quantity, quality and description required by the contract." They must have the same qualities as any sample or model which the seller may have provided.¹²¹ Article 35(2)(a) states that goods do not conform unless they are "fit for the purposes for which goods of the same description would ordinarily be used"¹²² --much the same thing as merchantability. The goods must also be "fit for any particular purpose expressly or impliedly made known to the seller at the conclusion of the conclusion of the conduct."¹²³ The parties can, however, simply agree that these analogs of the implied sales warranties do not apply. The UCC's requirement of a conspicuous disclaimer, specifically mentioning merchantability, does not carry over into the CISG.¹²⁴

B. Buyers Obligations

The buyer must obviously pay for the goods.¹²⁵ The buyer must also take such steps, and comply with such formalities, as may be necessary, for payment to be made,¹²⁶ and must take delivery of the goods.¹²⁷ CISG Article 38 also requires the buyer to "examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances," although examination may be deferred until the goods have arrived at their destination.¹²⁸ "The determination of what period of time is 'practicable' is a factual one."¹²⁹ Article 39 deprives the buyer of the right to rely on a nonconformity if the buyer fails to provide the seller with notice of the nonconformity within a reasonable time after it should be discovered.¹³⁰ This provision essentially duplicates UCC Article 2's requirement that the buyer must notify the seller of a breach with respect to accepted

¹¹⁸ CISG 31(a).

¹¹⁹ S.C. Code § 36-2-308(a).

¹²⁰ CISG Arts. 30-32.

¹²¹ CISG Art. 35(2)(c); c.f. S.C. Code § 36-2-313(1)(c).

¹²² See *Chicago Prime Packers*, supra note 5, at 709.

¹²³ CISG Art. 35(2)(b).

¹²⁴ Compare CISG Art. 35(2) with S.C. Code § 36-2-316(2).

¹²⁵ CISG Art. 53; *In re Victoria Alloys, Inc.*, 261 B.R. 424, 431 (Bankr. N.D. Ohio 2001).

¹²⁶ CISG Art. 54.

¹²⁷ CISG Art. 60.

¹²⁸ CISG Art. 38(2).

¹²⁹ *Chicago Prime Packers v. Northham Food Trading Co.*, 2003 WL 2125426, at *4 (N.D. Ill. May 29, 2003).

¹³⁰ *CWF Hamilton & Co. v. Schaefer Grp., Inc.*, No. 3:10-CV-339, 2012 WL 1106672, at *4 (S.D. Ohio Apr. 2, 2012) (citing *Caterpillar, Inc. v. Usinor Industeel*, 393 F.Supp.3d 659, 673 (N.D.Ill.2005)).

goods within a reasonable time after discovery “or be barred from any remedy.”¹³¹ Absent a guarantee of longer duration, the buyer “loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer.”¹³² According to one case, the intent of the CISG is “that buyers examine goods promptly and give notice of defects to sellers promptly.” Given, however, that “notification in a matter of a few weeks” may not be “practicable,” “the outer limit of two years is set for the purpose of barring late notices.”¹³³

VI. Breach

The seller is “liable in accordance with the contract and this Convention for any lack of conformity.”¹³⁴ If the seller delivers goods before they are due, it may, up to the delivery date, make up any missing or nonconforming portion of the delivery so long as doing so does not cause the buyer “unreasonable inconvenience or unreasonable expense.”¹³⁵ This provision is akin to the UCC’s right to cure by making a conforming delivery within the time allowed.¹³⁶

Under the CISG, “the buyer-defendant bears the burden of proving nonconformity at the time of transfer.”¹³⁷ However, according to one Fourth Circuit case, the buyer need to offer proof of exactly why the goods did not perform as expected; it is enough to show that they were used in the normal fashion and did not produce the expected results.¹³⁸

VII. Remedies

In general, the CISG allows party injured by a breach of contract to recover loss, including loss of profit, sustained as a consequence of the breach.¹³⁹ Such damages may not exceed the loss which the breaching party “foresaw or ought to have foreseen at the time of contracting.”¹⁴⁰ Thus the CISG codifies the familiar rule of foreseeability established in *Hadley v. Baxendale*.¹⁴¹ In one recent case, a court refused to assume the

¹³¹ S.C. Code § 36-2-607(3)(a).

¹³² CISG Art. 39(2).

¹³³ *Shuttle Packaging Sys., L.L.C. v. Tsonakis*, No. 1:01-CV-691, 2001 WL 34046276, at *9 (W.D. Mich. Dec. 17, 2001).

¹³⁴ CISG Art. 36; *Delchi Carrier*, supra note 5, at 1028.

¹³⁵ CISG Art. 37.

¹³⁶ See S.C. Code § 36-2-508.

¹³⁷ *Chicago Prime Packers*, supra note 14, at 408 F.3d 898.

¹³⁸ *Schmitz-Werke GmbH + Co. v. Rockland Indus., Inc.*, 37 F. App'x 687, 692 (4th Cir. 2002).

¹³⁹ CISG Art. 74.

¹⁴⁰ *Id.*

¹⁴¹ See *Delchi Carrier* at 1029, citing *Hadley v. Baxendale*, 156 Eng.Rep. 145 (1854); see also *Orica Australia Pty Ltd v. Aston Evaporative Servs., LLC*, No. 14-CV-0412-WJM-CBS, 2015 WL 6172147, at *5 (D. Colo. Oct. 21, 2015).

defendant could foresee that the plaintiff was a trader who would likely suffer a loss in profits if a chemical shipment failed to arrive within a set delivery window.¹⁴²

A. Reduction of the Price

Under the UCC, the buyer can reject non-conforming goods, but must pay for them if they are accepted.¹⁴³ The buyer retains a right to recover for breach of warranty, but must pursue the seller to collect damages.¹⁴⁴ The CISG entitles the buyer to a price adjustment: “If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.”¹⁴⁵ The buyer may take this reduction “unilaterally.”¹⁴⁶

B. Avoidance of the Contract; Fundamental Breach

The CISG uses the term “avoid” where the UCC uses “cancel.” Under Article 81, avoidance releases both parties from their obligations under the contract, “subject to any damages which may be due.” Avoidance does not affect any provisions of the contract which relate to the resolution of disputes. Both the seller and the buyer can avoid the contract based on a “fundamental” breach, or a breach which results in “such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract.”¹⁴⁷ In *Banks Hardwoods Florida, LLC v. Maderas Iglesias, S.A.*,¹⁴⁸ the buyer argued that “the inclusion of sapwood and the wrong size timber constituted a fundamental breach.” Noting that the seller described those nonconformities as “slight,” the court denied the buyer’s motion for summary judgment on its right to avoid the relevant contracts.¹⁴⁹

In addition, the buyer may avoid the contract if the buyer grants the seller reasonable additional time in which to deliver the required goods and the seller fails to do so within that time.¹⁵⁰ The seller may avoid the contract if the buyer fails to perform within a similar extension within which to pay for the goods or take delivery of them.¹⁵¹

¹⁴² CITGO Petroleum Corp. v. Odfjell Seachem, No. CIV.A. H-07-2950, 2014 WL 7004049, at *8 (S.D. Tex. Dec. 10, 2014).

¹⁴³ S.C. Code § 36-2-607(1).

¹⁴⁴ See S.C. Code § 36-2-714.

¹⁴⁵ CISG Art. 50.

¹⁴⁶ New World Trading Co. v. 2 Feet Prods., Inc., No. 11 CIV. 6219 SAS, 2014 WL 2039138, at *6 (S.D.N.Y. May 16, 2014).

¹⁴⁷ CISG Art. 25.

¹⁴⁸ No. 08-23497-CIV-GARBER, 2009 WL 3618011 (S.D. Fla. Oct. 29, 2009)

¹⁴⁹ Id. at *2.

¹⁵⁰ CISG Art. 49(1)(b).

¹⁵¹ CISG Art. 64(b).

Although consequential damages are often disclaimed in sales contracts, the reliability of such disclaimers may be questionable under the CISG. As noted above, avoidance of the contract relieves the parties of all obligations under the contract save those relating to dispute resolution. In *Topp Paper Co., LLC v. ETI Converting Equipment*,¹⁵² the court held that a consequential damages limitation did not relate to the settlement of disputes and was therefore avoided along with the rest of the contract.

C. Specific Performance

CISG Article 46(1) states that the buyer “may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.” In *Saint Tropez Inc. v. Ningbo Maywood Indus. & Trade Co.*,¹⁵³ the court recognized that the CISG “authorizes the Court to order specific performance.” The UCC, however, limits reserves the remedy of specific performance to “where the goods are unique or it other proper circumstances.”¹⁵⁴

D. Interest and Attorney’ Fees

Article 78 of the CISG specifically provides that a party may recover interest on “the price or any other sum that is in arrears.”¹⁵⁵ However, the Convention provides no guidance on the applicable rate. In *San Lucio, S.r.l. v. Imp. & Storage Servs., LLC*,¹⁵⁶ the court awarded prejudgment interest at the treasury bill rate because it had broad discretion to set the interest rate in a federal question case.

Although there is some controversy in the case law and commentary, the CISG does not appear to allow attorney’s fees awards.¹⁵⁷

VIII. Defenses

Article 77 of the CISG requires the non-breaching party claiming breach of contract to “take such measures as are reasonable in the circumstances to mitigate the loss.” The burden, however, is on the breaching party to “claim a reduction in the damages in the

¹⁵²No. 12–21014–CIV, 2013 WL 5446341, *3-4 (S.D.Fla. Sept. 28, 2013).

¹⁵³No. 13 CIV. 5230 NRB, 2014 WL 3512807, at *9 (S.D.N.Y. July 16, 2014).

¹⁵⁴S.C. Code § 36-2-716(1).

¹⁵⁵*San Lucio, S.r.l. v. Imp. & Storage Servs., LLC*, No. CIV A 07-3031(WJM), 2009 WL 1010981, at *3 (D.N.J. Apr. 15, 2009), as amended (Apr. 20, 2009); but see *Zhejiang*, supra note 85, at *5 (“The CISG is silent on the issue of interest. Because substantive domestic law does not apply, the plaintiff is not entitled to any interest”).

¹⁵⁶Supra note 155.

¹⁵⁷See *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 313 F.3d 385, 388 (7th Cir. 2002); *San Lucio, S.r.l. v. Imp. & Storage Servs., LLC*, No. CIV A 07-3031(WJM), 2009 WL 1010981, at *3-4 (D.N.J. Apr. 15, 2009), as amended (Apr. 20, 2009); but see *Stemcor USA, Inc. v. Miracero, S.A. de C.V.*, 66 F. Supp. 3d 394, 401 (S.D.N.Y. 2014), appeal dismissed (Nov. 12, 2014), appeal withdrawn (Jan. 8, 2015) “CISG Article 74 does not unambiguously bar recovery of fees and costs”; David B. Dixon, “Que Lástima Zapata! Bad CISG Ruling on Attorneys’ Fees Still Haunts U.S. Courts,” 38 U. Miami Inter–Am. L. Rev. 405, 422 (2007).

amount by which the loss should have been mitigated.”¹⁵⁸ Article 79 incorporates the concept of force majeure, in that it absolves a party for his “failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.” In one case, goods could not be inspected per the requirements of a letter of credit because the inspectors withdrew from Iraq after the outbreak of war. “Because hostilities prevented inspection and acceptance of the goods per the terms of the Contract while the Letter of Credit was in effect, performance under the Contract was impossible.”¹⁵⁹

The CISG has no statute of limitations. In one very recent case, the court applied New York’s four year statute of limitations given the absence of a limitation period in the CISG.¹⁶⁰ However, the United States is a signatory to the Convention on the Limitation Period in the International Sale of Goods,¹⁶¹ Article 8 of which establishes a limitations period which also happens to be four years. In what may be the only U.S. case on this convention, a court refused to apply its set-off provisions in a CISG case because China, where one party had its place of business, was not a signatory.¹⁶² At present, only 29 parties are signatories to the limitation convention, so it is far from co-extensive with the CISG. Where one party to a goods transaction is based in a country which is a signatory to the CISG but not the limitation convention, the statute of limitations will probably be governed by the law of the forum--six years in South Carolina.¹⁶³ If, however, the relevant states are signatories to both conventions, a four year statute should be applicable--although there is no actual case to that effect.

IX. Conclusion

The CSIG has yet to be applied in a South Carolina case, and it is a fair bet that most sales contracts for imports into or exports from South Carolina disclaim the CISG. That does not make the Convention irrelevant. In many cases, the clause opting out of the CISG is part and parcel of a dispute resolution clause which one or the other party may wish to contest. The dispute over whether such a clause is part of the sales contract will be governed by the CISG, assuming the other jurisdictional requirements are met. That alone is a good reason for the parties’ counsel to be familiar with the CISG and its departures from more familiar UCC law.

¹⁵⁸ *Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.*, 464 F.3d 1235, 1240 (11th Cir. 2006).

¹⁵⁹ *Hilaturas Miel, S.L. v. Republic of Iraq*, 573 F. Supp. 2d 781, 800 (S.D.N.Y. 2008)

¹⁶⁰ *U.S. Nonwovens Corp. v. Pack Line Corp.*, 48 Misc. 3d 211, 217, 4 N.Y.S.3d 868, 873 (N.Y. Sup. Ct. 2015).

¹⁶¹ 13 I.L.M. 952 (1974)

¹⁶² See *Maxxsonics*, supra note 16, at *6.

¹⁶³ S.C. Code § 36-2-725(1).