

## TEACHING THE CISG IN CONTRACTS: WHY AND WHAT

**By:**

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### I. Why

The CISG<sup>1</sup> is American Contract law, just as are the UCC and the common law of Contracts.

It has now been part of U.S. law for 18 years, having entered into force on January 1, 1988.

It applies to contracts for the sale of goods between a party whose place of business is in the United States and a party whose place of business is in another country that has joined the CISG.<sup>2</sup>

Under the Supremacy Clause of the Constitution it preempts state common law and the UCC on any issues to which it applies.<sup>3</sup>

As of January 1, 2006, 64 countries have joined the CISG including seven of our top ten trading partners: Canada, Mexico, China, Germany, South Korea, France, and Italy.<sup>4</sup>

In 2004, U.S. exports of goods to and imports of goods from these seven countries alone exceeded \$1.2 trillion.<sup>5</sup>

Failure to spot the applicability of the CISG is probably malpractice, particularly since it is U.S. law.

Differences between the CISG and the common law or the UCC can be used to get students to think critically about the rules of Contract law.

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<sup>1</sup> United Nations Convention on Contracts for the International Sale of Goods, *reprinted in* 15 U.S.C.A. App. 332-62, *available at* <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf> [hereinafter CISG]. The CISG is also reproduced in many Contract casebook supplements.

<sup>2</sup> CISG Art. 1(a).

<sup>3</sup> *See* U.S. Const., art. VI, cl. 2.

<sup>4</sup> *See* [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).

<sup>5</sup> *See* <http://www.census.gov/foreign-trade/top/dst/2004/12/balance.html>.

Recognizing the importance of teaching the CISG, the latest editions of many Contracts casebooks now include at least one CISG case, a substantial shift since 1999.

## II. What

### A. *Applicability and Scope*

On a practical level, the most important CISG topic is probably its applicability and scope. If students can spot that the CISG applies, they will know when other substantive issues may have to be researched.

The CISG applies to contracts for the sale of goods between parties whose places of business are in different countries when both those countries have joined the CISG.<sup>6</sup>

If a party has more than one place of business, the one with the closest relationship to the contract is used.<sup>7</sup>

There are a number of exclusions from the CISG, including “goods bought for personal, family, or household use.”<sup>8</sup>

The CISG deals only with contract formation and the rights and obligations of the parties. Questions of validity (e.g. incapacity, fraud, unconscionability) are governed by the applicable domestic law.<sup>9</sup>

The parties may opt out of the CISG.<sup>10</sup> But courts have held that a provision excluding application of the CISG must be express and, significantly, that a choice-of-law clause selecting domestic law is not sufficient because the CISG *is* domestic law for those countries that have joined it.<sup>11</sup>

### B. *Battle of the Forms*

The CISG’s rule on the battle of the forms is another topic of great practical significance because it is effectively impossible to contract out of. For example, if

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<sup>6</sup> CISG Art. 1(1)(a).

<sup>7</sup> CISG Art. 10(a). *See, e.g.,* McDowell Valley Vineyards, Inc. v. Sabate USA Inc., 2005 WL 2893848 (N.D. Cal. Nov. 2, 2005) (holding CISG inapplicable because defendant’s place of business with closest relationship to contract was same as plaintiff’s).

<sup>8</sup> CISG Art. 2(a).

<sup>9</sup> CISG Art. 4.

<sup>10</sup> CISG Art. 6.

<sup>11</sup> *See, e.g.,* BP Oil Int’l, Ltd. v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333, 337 (5th Cir. 2003); American Mint LLC v. GOSoftware, Inc., 2005 WL 2021248, at \*2-3 (M.D. Pa. Aug. 16, 2005); Ajax Tool Works, Inc. v. Can-Eng. Mfg. Ltd., 2003 WL 223187, at \*3 (N.D. Ill. 2003); Asante Techs., Inc. v. PMC Sierra, Inc., 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001).

one party's form includes an explicit exclusion of the CISG but the other's does not, a court will have to apply the CISG to determine which party's term governs.

In contrast to UCC § 2-207, CISG Article 19 adopts a "mirror image" rule like the common law's.

I teach Article 19 by using *Filanto, S.p.A. v. Chilewich International Corp.*, a case in which the court misapplied the CISG rules.<sup>12</sup> One may use *Filanto* to:

- show how the CISG's battle-of-the-forms rules differ from the UCC's;
- and to discuss the circumstances under which silence may constitute acceptance of an offer.

On the related question of "rolling contracts," another CISG case, *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*,<sup>13</sup> treats terms in the box as proposed modifications that do not become part of a contract without express agreement. It provides an interesting contrast to such cases as *ProCD, Inc. v. Zeidenberg*<sup>14</sup> and *Hill v. Gateway 2000, Inc.*<sup>15</sup>

### C. Parole Evidence Rule

In contrast to the common law and UCC, the CISG lacks a parole evidence rule. Article 8(3) provides: "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."

The leading case is *MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino*,<sup>16</sup> which is included in a number of Contracts casebooks. One may use *MCC-Marble*:

- to examine whether the CISG's views on subjective intent really differ from the common law's, as the court asserts;
- to evaluate whether the CISG really dispenses with the parole evidence rule;
- and to discuss what impact a merger clause would have under the CISG.

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<sup>12</sup> 789 F. Supp. 1229 (S.D.N.Y. 1992). For an edited version of the case and a copy of my lecture notes, see [http://w3.uchastings.edu/dodge\\_01/teaching\\_the\\_cisg.htm](http://w3.uchastings.edu/dodge_01/teaching_the_cisg.htm).

<sup>13</sup> 328 F.3d 528 (9th Cir. 2003) (per curiam).

<sup>14</sup> 86 F.3d 1447 (7th Cir. 1996).

<sup>15</sup> 105 F.3d 1147 (7th Cir. 1997).

<sup>16</sup> 144 F.3d 1384 (11th Cir. 1998). For an edited version of the case and a copy of my lecture notes, see [http://w3.uchastings.edu/dodge\\_01/teaching\\_the\\_cisg.htm](http://w3.uchastings.edu/dodge_01/teaching_the_cisg.htm).

