ALPHABET SOUP: HOW THE UCC, CISG, UNIDROIT PRINCIPLES, INCOTERMS, UETA, E-SIGN, AND THE U.N. ELECTRONIC COMMERCE CONVENTION INTERACT IN INTERNATIONAL SALES OF GOODS

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THE LAW GOVERNING INTERNATIONAL SALES OF GOODS†

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I. INTRODUCTION TO U.S. INTERNATIONAL SALES LAW

A. The CISG’s Origin and Status


B. The CISG’s Effect

As a treaty of the United States, the CISG is the law of every U.S. state and territory.3 The CISG preempts state law to the extent that non-CISG state law, including the Uniform Commercial Code (UCC), conflicts with the CISG.4


2 In addition to the U.S., Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, (the Republic of) Korea, Kyrgyzstan, Latvia, Lesotho, Liberia, Lithuania, Luxembourg, (the former Yugoslav Republic of) Macedonia, Mauritania, Mexico, Moldova, Mongolia, Montenegro, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Romania, Russian Federation, Saint Vincent and the Grenadines, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, Uruguay, Uzbekistan, and Zambia are Contracting States. El Salvador has acceded to the CISG, but it will not take effect there until December 1, 2007. The United Kingdom and Japan are particularly noteworthy non-parties to the CISG.

For an up-to-date table listing the countries that have signed, acceded to, accepted, approved, ratified, or succeeded to the CISG, as well as the date on which the CISG entered or will enter into force in each country, see http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited June 26, 2007).

3 See U.S. CONST. art. VI, cl. 2.

The CISG preempts non-CISG state law causes of action that fall within its scope. The CISG does not preempt state law causes of action rooted in the same facts as a contract claim but based on a regulatory statute, in equity, or in tort, nor does it preempt contract-based causes of action brought by third parties.

C. The CISG’s Scope (A Very Brief Introduction)

Subject to a number of exceptions and further explanation, the CISG governs a sale of goods or a contract for the sale of goods between a party whose place of business or habitual residence is in the U.S. and a party whose place of business or habitual residence is in another country that has acceded to, accepted, approved, ratified, or succeeded to the CISG.

D. Augmenting the CISG

Not all international sales of goods fall within the CISG’s scope. Moreover, the CISG does not purport to address every issue that might arise in an international sale of goods that is within the CISG’s scope. Therefore, the UCC and other state and federal law governing sales of goods remain relevant – sometimes governing, sometimes suppletive, and sometimes persuasive.

For present purposes, we assume either basic (or greater) competence with UCC Articles 1 and 2 or access to other resources that can provide the necessary foundation. We will address particular portions of Articles 1 and 2 as they relate to our substantive discussions of the CISG. By contrast, we do not necessarily assume widespread familiarity with two important “secondary” sources of international sales law: the UNIDROIT Principles of International Commercial Contracts and the Incoterms. Each deserves a few words here.

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9 See CISG art. 4 (providing that the CISG governs only the buyer’s and seller’s contractual rights and obligations); see, e.g., American Mint LLC v. GOSoftware, Inc., 2006 WL 42090, at *4 (M.D. Pa. Jan. 6, 2006); Usinor Industeel, 393 F. Supp. 2d at 674.

10 CISG art. 1(1)(a).
1. The UNIDROIT Principles\textsuperscript{11}

The International Institute for the Unification of Private Law (UNIDROIT) has published two editions of its Principles of International Commercial Contracts.\textsuperscript{12} The Principles “set forth general rules for international commercial contracts” that courts and other tribunals may use “to interpret or to supplement international uniform law instruments” – such as the CISG – as well as domestic law – such as the UCC.\textsuperscript{13} As such, the Principles function much like the \textit{Restatement (Second) of Contracts} – a point not missed in the title of Professor Bonnell’s treatise.

If the parties to an international commercial contract have expressly provided that the Principles will govern their contract, a court or other tribunal should treat the Principles as governing law to the extent that they are not inconsistent with mandatory law.\textsuperscript{14} If the parties to an international commercial contract have not expressly provided for governing law, a court or other tribunal may apply the Principles as if they were governing law – again, to the extent that they are not inconsistent with mandatory law.\textsuperscript{15}

By their terms, the Principles apply only to contracts that are “international” – but this is meant to have the broadest possible interpretation and to exclude only those contracts “where all the relevant elements of the contract in question are connected with


\textsuperscript{13} \textit{UNIDROIT Principles} at 1 (Preamble).

\textsuperscript{14} \textit{See id.} The Principles state “shall,” rather than “should.” \textit{Id.} However, because the Principles are not mandatory law (as are the CISG and the UCC where they apply), a court or other tribunal may – but ought not –ignore the parties’ express invocation of the Principles.

\textsuperscript{15} \textit{See id.}
Likewise, the Principles apply only to “commercial” contracts; but, the drafters intended to exclude only those contracts that are essentially “consumer transactions,” which are typically subject to a wide range of consumer protection statutes, regulations, and judicial decisions.\textsuperscript{17}

\section*{2. Incoterms}

The CISG is silent on transportation terms (e.g., “F.O.B.”).\textsuperscript{18} The International Chamber of Commerce periodically publishes Incoterms – “the dominant source of definitions for the commercial delivery terms used by parties to international sales contracts.”\textsuperscript{19} The most current version is Incoterms 2000.\textsuperscript{20}

Several courts have treated Incoterms as a trade usage of which the parties were or should have been aware when they made a contract including one or more terms defined by Incoterms.\textsuperscript{21}

\section*{E. International Sales and E-Contracting}\textsuperscript{22}

The CISG clearly contemplates electronic contracting.\textsuperscript{23} However, as the telegram and telex are things of the past, a court must look beyond the text of the CISG for guidance at the intersection of international sales contracts and electronic communications.

\begin{itemize}
  \item \textsuperscript{16} Id. at 2 (Preamble cmt. 1).
  \item \textsuperscript{17} See id. (Preamble cmt. 2).
  \item \textsuperscript{18} Compare U.C.C. §§ 2-319 to 2-325 (2002).
  \item \textsuperscript{21} See, e.g., BP Oil Int’l, Ltd. v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333, 337-38 (5th Cir. 2003) (“Even if the usage of Incoterms is not global, the fact that they are well known in international trade means that they are incorporated through article 9(2).”); St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH, 2002 WL 465312, at *4 (S.D.N.Y. Mar. 26, 2002) (similarly reading Article 9(2) to incorporate Incoterms by reference), aff’d, 53 F. App’x 173 (2d Cir. 2002).
  \item \textsuperscript{22} The discussion of this subpart draws upon and updates Keith A. Rowley, Electronic Contracting, in HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 26:1 et seq. (3d ed. rev. 2007).
  \item \textsuperscript{23} See CISG art. 13 (“For the purposes of this Convention ‘writing’ includes telegram and telex.”).
\end{itemize}
Since January 1, 2000, Congress has passed and President Clinton signed the Electronic Signatures in Global and National Commerce Act (E-SIGN), the American Law Institute and the National Conference of Commissioners on Uniform State Law have promulgated the Uniform Electronic Transactions Act (UETA), which 46 states and the District of Columbia have enacted, and the U.N. Commission on International Trade Law (UNCITRAL) has promulgated and the General Assembly has adopted a new U.N. convention – all of which address electronic transactions.

II. THE CISG'S SCOPE

A. General Rule

Subject to a number of exceptions discussed below, the CISG applies to

♦ a sale of goods or contract for the sale of goods

♦ between a party whose place of business or habitual residence is in the U.S. and a party whose place of business or habitual residence is in another country that has acceded to, accepted, approved, ratified, or succeeded to the CISG.


26 Georgia, Illinois, and New York each enacted and retains its own electronic transactions or electronic signatures act in lieu of UETA. See GA. CODE ANN. § 10-12-1 et seq. (2000 & Supp. 2006); ILL. COMP. STAT. ANN. § 5/175-101 et seq. (Smith-Hurd 2005); N.Y. STATE TECH. LAW art. III, § 301 et seq. (McKinney Supp. 2006). Washington has neither adopted UETA nor its own substitute. As such, electronic transactions subject to Washington law are governed by E-SIGN, to the extent that Washington state law conflicts with E-SIGN, and Washington state law, to the extent that Washington state law does not conflict with E-SIGN.


29 CISG art. 1(1)(a). Article 1 also provides that the CISG applies to contracts for the international sale of goods for which “the rules of private international law” dictate applying the law of a country that has acceded to, accepted, approved, ratified, or succeeded to the CISG. See CISG art. 1(1)(b). Because the United States has declared an Article 95 reservation to Article 1(1)(b), the CISG does not apply to a contract between a U.S. party and a party from a non-Contracting State, notwithstanding “the rules of private international law.” See, e.g., Prime Start Ltd. v. Maher Forest Prods., Ltd., 442 F. Supp. 2d 1113, 1118 (W.D. Wash. 2006) (holding that the CISG did not govern a sales contract between a U.S. seller and a
1. **Sale of Goods**

The CISG does not define “sale” or “goods.” Absent specific guidance, the task of defining “sale” and “goods” is left to non-CISG domestic law. Thus, if the law of any U.S. state (other than Louisiana) governs a particular international sales transaction, that state’s version of UCC §§ 2-105 & 2-106 will define “goods” and “sale,” respectively, for purposes of the transaction and any dispute that might arise from it.

2. **Place of Business/Residence**

A party’s place of business is the one having “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 key is not the place of birth, incorporation, or registration, or the principal place of business or chief executive office. Therefore, the CISG might govern a contract between two U.S. corporations, if one has a place of business in another signatory country and that non-U.S. place of business bears the closest relationship to the contract. Similarly, the CISG might not govern a contract between a French société anonyme and a German gesellschaft mit beschränkter haftung if each party’s U.S. place of business is the most relevant to their contract.

The leading case to date, *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, involved a dispute between a buyer with its place of business in California and a seller – both were Delaware corporations – with places of business in Canada and Oregon. When the seller’s goods did not meet the warranted specifications, the buyer sued. The court held that the CISG governed the parties’ contract because the buyer dealt directly with the seller’s Canadian office more than once; all of the components about which the buyer complained were manufactured in Canada; and all of the seller’s representations on which Asante’s suit hinged emanated from PMC’s corporate headquarters in Canada. Therefore, the seller’s Canadian place of business, rather than its Oregon one, was the relevant place of business for purposes of CISG Article 10.

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30 CISG art. 10(a). Article 10(b) provides that “if a party does not have a place of business, reference is to be made to his habitual residence.” *Id.* art. 10(b).

31 See CISG art. 1(3).


33 See also, e.g., McDowell Valley Vineyards, Inc. v. Sabate USA Inc., 2005 WL 2893848 (N.D. Cal. Nov. 2, 2005) (holding that the CISG did not govern a contract dispute between a French seller and a U.S. buyer because the U.S. buyer dealt primarily with the French seller’s wholly-owned California subsidiary and because the representations regarding the quality of the seller’s products came “largely, if
The key is the parties’ places of business at the time the buyer accepts the seller’s offer, not the location of the seller’s supplier or the buyer’s customers, nor a parties’ subsequent change of location or assignment.

B. Excluded Transactions

The CISG does not govern a sale of goods or contract for the sale of goods

♦ if the contract, or information disclosed by or dealings between the parties at any time prior to or at the time the offeree’s acceptance takes effect, fails to indicate that the parties have places of business in different Contracting States;

♦ to a buyer who is purchasing the goods primarily for personal, family, or household use, unless the seller neither knows nor should know the buyer’s intended use before or at the time the offeree’s acceptance takes effect;

♦ if the buyer “undertakes to supply a substantial part of the materials necessary for [their] manufacture or production;” or

♦ for which the predominant purpose of the contract is supplying labor or other services, rather than selling goods.

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34 See, e.g., Grace Label, Inc. v. Kliff, 355 F. Supp. 2d 965, 971 (S.D. Iowa 2005) (holding that the CISG did not govern a contract between an Iowa seller of Britney Spears trading cards and a California buyer who was purchasing for resale to a third party in Mexico).


36 See CISG art. 1(2). Article 1(2) uses the phrasing “at any time before or at the conclusion of the contract.” Id. The CISG defines a contract to be “concluded at the moment when an acceptance of an offer becomes effective ….” CISG art. 23.

37 Id. arts. 2(a) & 23.

38 Id. art. 3(1).

39 Id. art. 3(2); see, e.g., TeeVee Toons, Inc. v. Gerhard Schubert GmbH, 2006 WL 2463537, at *5 (S.D.N.Y. Aug. 23, 2006) (finding that the preponderant part of the seller’s obligation to design, sell, and
CISG Article 2 also excludes from the Convention’s scope auction sales; foreclosure sales and other sales made “by authority of law”; sales of stock, shares, investment securities, negotiable instruments, or money; sales of ships, vessels, hovercraft, or aircraft; and sales of electricity.40

The collective effect of these exclusions is to make the CISG’s scope narrower than that of UCC Article 2, which governs sales of goods for personal, family, or household use; goods sold at auction, foreclosure,41 and other sales made by authority of law; sales of ships, vessels, hovercraft, and aircraft; and, at least in some jurisdictions, sales of electricity.

C. Contracting State Reservations

Article 92-96 allow a Contracting State to declare that parties whose place of business or habitual residence is in the declaring Contracting State will not be bound by certain CISG provisions in some or all transactions that would otherwise fall within the CISG’s scope. Four types of reservation warrant a brief discussion here.

Article 92 allows a Contracting State to declare that it will not be bound by Part II (the CISG’s contract formation rules).42 An Article 92 reservation does not take contracts involving parties whose place of business is in the declaring state out of the CISG; rather, it circumscribes what issues the CISG will govern in a contract within the CISG’s scope.43

Article 94 allows a Contracting State to declare that the CISG will not govern a sale of goods contract between a party having its place of business in the declaring country and a party having its place of business in another country (whether a Contracting State or not) “which has the same or closely related legal rules on matters

install equipment designed to build, load, and close biodegradable compact disc packaging was specially manufacturing and selling goods, not providing labor or other services).

40 CISG art. 2(b)-(f).

41 Article 2 does not govern the foreclosure itself, nor does it govern a buyer’s rights against a secured creditor that has foreclosed on a security interest the buyer’s seller gave it. See, e.g., Carey Aviation, Inc. v. Giles World Mktg., Inc., 46 B.R. 458, 460-62 (D. Mass. 1985).

42 CISG art. 92(1). To date, Denmark, Finland, Norway, and Sweden have each declared that it is not bound by Part II. Article 92(1) also allows a country to declare that it is not bound by Part III (Articles 25-88). No country has exercised that right to date.

43 See, e.g., Mitchell Aircraft Spares, Inc. v. European Aircraft Serv. AB, 23 F. Supp. 2d 915, 918 (N.D. Ill. 1998) (“[T]he CISG governs most of the issues in this case because the United States, where Mitchell has its place of business, and Sweden, where EAS has its place of business, are both States Party to the CISG…. [T]he CISG does not govern issues which are addressed in Part II of the CISG because Sweden declared in its instrument of ratification that it would not be bound by Part II.” (citations and parenthetical omitted)).
governed by” the CISG. Unlike an Article 92 reservation, an Article 94 reservation takes the entire contract out of the CISG.

Article 95 allows a Contracting State to declare that it will not be bound by Article 1(1)(b), which provides that the CISG applies to international sales of goods between one or more persons whose place of business is not a Contracting State if “the rules of private international law lead to the application of the law of a Contracting State.”

Article 96 allows a Contracting State to declare that “any provision … 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 [its] place of business in that State.”

Article 97 empowers a Contracting State to withdraw any declaration it has previously made pursuant to Articles 92, 93, 94, 95, or 96.

D. Consensual Exclusion (a.k.a. “Opting Out”)

Article 6 empowers contracting parties to agree to “exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.” If contracting parties are concerned about the effect of part or all of the CISG or have a specific interest in applying non-CISG domestic law, this “opt out” provision affords them the flexibility to agree that non-CISG law will govern part or all of their contract. However, if a Contracting State has declared and Article 96 declaration, then no party whose place of business, or whose contracting partner’s place of business, is in that Contracting State can derogate from or vary the effect of the Article 96 declaration.

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44 See CISG art. 94(1)-(2). To date, Denmark, Finland, Iceland, Norway, and Sweden have each declared that the CISG will not govern contracts between parties whose places of business are in said countries.

45 See id. art. 95. China, the Czech Republic, Germany, Saint Vincent and the Grenadines, Singapore, Slovakia, and the United States have each declared that it is not bound by Article 1(1)(b).

46 Id. art. 96. To date, Argentina, Belarus, Chile, China, Hungary, Latvia, Lithuania, Paraguay, the Russian Federation, and Ukraine have each declared an Article 96 reservation. China’s declaration is idiosyncratic. See Rowley, supra note 28, § 23:4 n.18.

47 See CISG art. 97(4).

48 Id. art. 6; see, e.g., Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd., 2003 WL 223187, at *3 (N.D. Ill. Jan. 30, 2003) (recognizing the seller’s 90-day repair-or-replace limited warranty as a potentially valid contractual substitute, authorized by Articles 6 and 35(2), for the implied warranties that would otherwise apply).

49 See CISG art. 12.
U.S. courts have repeatedly held that the parties must expressly opt out of the CISG – simply including a geographic choice of law clause, without explicitly rejecting the CISG, will not suffice. Where the parties do expressly opt out of the CISG, U.S. courts have consistently honored the parties’ contractual freedom to choose another body of governing law.

E. Topics Outside the CISG’s Scope

The CISG does not attempt to address every question that may arise relating to an international sale of goods. Faced with an international sales transaction giving rise to one or more issues the CISG does not address, U.S. courts should look first to the UCC, then to common law and equity only where necessary to supplement the UCC.

The CISG “governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract” and is not concerned with the “validity of the contract or any of its provisions,” “the effect which the contract may have on the property in the goods sold,” or third-party rights and obligations – leaving those matters to non-CISG domestic law. Moreover, the CISG “does not apply to the liability of the seller for death or personal injury caused by the goods to any person.”

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53 CISG art. 4.


55 CISG art. 5.
1. “Validity” (Enforceability)

The CISG does not address any issue that might render a contract void, voidable, or unenforceable under non-CISG domestic law.56 Interesting questions may arise as to whether certain domestic rules are validity rules and whether they, therefore, might govern international contracts that are subject to the CISG.57 Certainly, the UCC’s bar on unconscionable contracts58 is a validity rule. Thus, for example, a court deciding the validity of an exculpatory clause in a contract otherwise governed by the CISG applied non-CISG domestic unconscionability law.59 It is not clear whether UCC rules on warranty disclaimers and limitations60 would fall into the same category. But, while the CISG is silent on the issue of unconscionability, it is not silent on limiting or disclaiming quality warranties: Article 35(2) subjects the CISG’s counterparts to the implied warranties of merchantability and fitness for a particular purpose to the caveat “[e]xcept where the parties have agreed otherwise.”61

2. “Property in the Goods Sold” (Title)

The “effect which the contract may have on the property in the goods sold” refers to title to goods, how and how much title passes from the seller to the buyer as a result of the international sales transaction at issue, and whether the seller’s creditors or others have a claim against the goods that survives the sale.62

3. Third-Party Rights and Obligations

The CISG leaves third-party rights and obligations to domestic law. But, to which domestic law does the CISG leave third-party rights and obligations and how does the


60 See U.C.C. §§ 2-312(2) & 2-316. Curiously, while Article 4 indicates that the CISG does not address title to goods, see CISG art. 4(b), Article 41 creates a warranty of title that is, admittedly, less expansive than § 2-312, but is a title warranty nonetheless.


CISG reconcile those third-party rights and obligations with potentially conflicting rights and obligations of the buyer or seller?

In *Usinor Industeel v. Leeco Steel Products, Inc.*, a French seller (Usinor) sought to reclaim steel it had sold to a U.S. buyer (Leeco) pursuant to a contract provision that Usinor retained title to the steel until Leeco paid “all sums due.” Leeco purchased the steel, which Leeco intended to resell, using a line of credit against which Leeco granted its lender (LaSalle) a security interest in, *inter alia*, Leeco’s inventory. The issue before the court distilled to whether Usinor’s UCC Article 2 rights as a seller who claimed to have retained title were superior to LaSalle’s UCC Article 9 rights as the holder of a security interest in Leeco’s inventory, including the steel Leeco purchased from Usinor. As preliminary matters, the court found that (1) the CISG applied to the Usinor-Leeco contract because each party had its place of business in a different Contracting State; (2) non-CISG domestic law governed Usinor’s attempt to retain title and Leeco’s rights as a third-party creditor; (3) applying both the Restatement (Second) of Conflicts of Law and UCC § 1-105, the Illinois UCC, rather than French law, was the relevant non-CISG law to determine title and LaSalle’s third-party rights and obligations; and (4) Illinois UCC § 2-401(1) gave Usinor a security interest in the steel. Whether Usinor’s UCC § 2-401 rights as a seller who claimed to have retained title were superior to LaSalle’s UCC Article 9 rights as the holder of a security interest in Leeco’s inventory, including the steel Leeco purchased from Usinor, boiled down to whether and when Usinor and LaSalle perfected their respective security interests in the steel. Because Usinor voluntarily surrendered possession of the steel and never perfected its security interest by filing, its unperfected security interest yielded to LaSalle’s perfected security interest in the steel.

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64 *Compare* U.C.C. § 2-401 *with* U.C.C. § 9-322.

65 See *Usinor Industeel*, 209 F. Supp. 2d at 884-88. The third finding was a significant blow to Usinor.: “[u]nder French law, the seller of goods has an absolute right to contract for title until payment, and therefore the retention of title clause in the Agreement would be determinative,” *id.* at 886; whereas, under UCC § 2-401(2), “transfer of title was effected upon delivery to Leeco” – despite Usinor’s contractual retention of title, *id.* at 887.

66 See U.C.C. § 9-322(a).

67 See *Leeco Steel Products*, 209 F. Supp. 2d at 888-89.

But cf: Roder Zelt-Und Hallenkonstruktionen GmbH v. Rosedown Park Pty Ltd, [1995] 17 A.C.S.R. 153 (holding that the German seller retained title to goods sold to an Australian buyer, pursuant to the terms of the parties’ contract, because the default rule under both German and Australian law was that title did not pass from the seller until the buyer paid in full or otherwise satisfied “the payment requirement of the condition relating to retention of title”).