

A Study on the Contract Formation and Related Matters under the United Nations : CISG

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I. Introduction

The contract formation Articles of the United Nations Convention on Contracts for the International Sale of Goods (CISG) has made some significant changes in the law regarding contract formation and it is likely that in the next several years it will play an increasingly significant role in the drafting of contracts for the international sale of goods. There are

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several reasons that a large number of countries are considering or have already adopted the CISG, for example, if the parties do not make a choice of law as part of the contract, the CISG will apply.

In the event of a dispute as to the appropriate choice of law for the contract, the CISG is a useful alternative for resolving the problem. As people become more familiar with the CISG, it will be used more frequently.

However, the choice to use should not be made without serious thought. Although the CISG is slightly different than "U.C.C." "the CISG" is basically common law in substance. There are nevertheless significant differences between the two uniform laws.

The rules of contract formation in commercial area have been significantly liberalized in the United States through the adoption of the Uniform Commercial Code ("U.C.C.") and it's amendments. Since, however, U.C.C. was first written, American business have become "increasingly" involved in international trade. As a result, the contracts governing these international trade may be subject to apply the laws other than U.C.C.

This paper considers that because of significant influence by civil law and other countries over the development and drafting of the CISG there are a number of sections contrasted with the relevant parts of the U.C.C. and the common law approach to contract formation

The CISG's legislative history will be discussed in order to provide a basic for understanding how the relevant CISG provisions may be interpreted by courts in the common law jurisdictions and perhaps the courts of countries with the different legal system.

This paper concludes in some ways the CISG is more likely directed to the structural formation of contract under the U.C.C. rather than the common law approach.

II . Legislative history

The United Nations established the United Nations Commission on International Trade Law ("UNCITRAL"). In 1965, UNCITRAL formed a working group which drafted the Convention on Contracts for the International Sale of Goods ("CISG").

The final draft was based on revisions of the ULF and ULIS. After remarkably increased level of participation in the draft of the CISG than previous attempts to draft a Uniform Sales Law, the CISG was adopted in April 1980 at the United Nations Conference on Contracts for the International Sale of Goods: the CISG entered into the force on January 1, 1988.

The United States ratified the CISG on December 11, 1986 and CISG came into force on January 1, 1988 consequently.

III . Overview of the CISG

As the result of the United State's ratification of the CISG, contracts made among the ratifying nations after January 1, 1988 are now subject to the uniform for international sales.

The CISG only applies to contracts for the sale of goods between parties have both ratified the convention and whose place of business are different countries.

However, it is possible that the parties may designate the law of a particular country in their contract as law of applicable law thus avoid the application of CISG.

Furthermore, where the CISG is silent, a contract dispute that is subject to the law of a state under United States will be interpreted under the rule of U.C.C.

CISG states specifically that applies to contracts for supply of goods which are manufactured or produced. It does not apply where contract involves in services, like labor. This approach seems to be consistent with the U.C.C. application

Finally, the CISG specifically states the contracts for the sale of goods are enforceable without the need for any writing whatsoever this provision is opposing view of the U.C.C. in the contract formation, for U.C.C. requires the writing for sale of goods at or more than \$500. Thus, when the CISG is applicable to those in the United States who are contracting for the sale of goods in the international market, they must follow the approach used for enforcing purely oral contracts is common law jurisdictions and many other civil jurisdictions.

A. What is an “offer” under CISG?

1. Price and Definiteness

The common law requires a statement to be “definite” in order to qualify as an offer. Statements which do not contain the price and quantity of goods are subject to being construed as lacking sufficient definiteness to qualify as an offer.

The Uniform Commercial Code, on the other hand, has a number of provisions that liberalized the common law rule so that the offer need not specifically state a number of items, such as price and quantity, which would be fatally critical to the formation of a contract if not addressed under the common law.

As a result of these position, the United Nations language that “a proposal is sufficiently definite if it indicates the good and expressly or implicitly fixes or makes provision for determining the quantity and the price.” The United States found this language to be too restrictive and attempted to amend the provision.

The United States' proposal, consistent with the approach taken by the U.C.C., would have deleted any references to the necessity of a provision to determine the quantity and the price. However, both the United States' amendment and those of other countries were rejected.

There was also some controversy among the participants at the 1980 convention regarding the required amount of definiteness: Article 55 required for the statement of a definite price in the offer, which is the subject of some debate. This provision has no effect because there can not be a contract... validly concluded unless there is an offer which in return requires some explicit or implicit references to view. This provision has quite opposing position with that of U.C.C.. U.C.C. does not require amount of definiteness including price term. Only required term to satisfy the definiteness in contract in U.C.C. is quantity of merchandise.

The approach taken by the CISG on this matter is certainly far different from that taken by the U.C.C.. For instance, there is no provision and CISG similar to the section 2-305 of the U.C.C. regarding open price term. This section makes it quite clear that a contract can be concluded if the party has the requisite intent. Even though the price is not settled. In fact, under U.C.C. a contract can be concluded if "nothing is said to price." This is far different from the CISG provision 14 (1) which requires an implicit or explicit reference to price. Thus, a communication could be considered an offer under U.C.C. even though there is no reference as to price. However, under the CISG, the communication would not conclude the contract because of omission of a standard for determining price. However, under the CISG, the communication would not conclude the contract the contract the contract because of the omission of a standard for determining price.

2. Quantity

Article 55 of the CISG refers to price, not quantity. However Article does refer to a "provision for determining the quantity and the price" thus, in order to be definite enough to as offer, a statement must include a provision regarding this element.

Although the U.C.C. specifically approves of requirements and output contracts, the CISG makes no reference to them. However, since these contracts deal with any valid contract under the CISG should include, in form of requirements or output contracts, stipulations as to the quantity of merchandise.

3. Invitations to Deal or Negotiate

The issue that often arises regarding contractual intent concerns whether advertisement or circulars are offers or merely invitation to deal common law jurisdictions typically treat an advertisement sent to general public as an invitation to deal or negotiation. The U.C.C. has no provision relating specially to this point. The CISG takes a modern approach and states that one may make an offer to the "specific buyer" by sending of the catalogue after some discussion has been made whereas common law requires a greater expression of intent to enter into the contract.

IV. Communication, Revocation, and Withdrawal of the Offer

1. Communication

There is little difference between the legal systems in the rules concerning communication of the offer. The CIGS contains a specific provision making the communication of the offer effective when it reaches

to the offeree. Although the U.C.C. does not have a similar provision, this language seems to be consistent with the common law approaches to the communication of the offer. Thus, under both common law and the CISG, the offer can only be accepted after it has been communicated to the offeree.

2. Revocation

The CISG is significantly different from the U.C.C. and common law on the issue of revocation. Under the common law, an offer is presumed to be revocable at any time subject to some exceptions, until it is accepted by the offeree.

This is true even if the offeror states that an offer must be accepted within the specific time period, or expressly states that the offer is not revocable unless the consideration from the offeree to hold an for the period of time to be enforceable is given.

The approach to revocation also presumes an offer to be revocable until it is accepted by the offeree. However, the U.C.C. creates an exception for "firm offer" made by merchants, to keep offers open for a period of time, without consideration, provided that such a promise is made in writing and meets other restrictions.

Civil law approach to revocation is considerably different. An offer that states a time limit for an acceptance is generally treated as an irrevocable offer by the civil law.

Thus, if the offeror states that his or her offer must be accepted within "twenty days" the civil law would consider the offer to be irrevocable for the stated period of time.

Common law, however, would treat it as revocable at any time before acceptance. In fact, the common law would generally treat the offer as revocable even if there was a promise to keep it open for a period of time,

unless the consideration was given by is offeree.

In this respect the U.C.C., with regard to contracts for the sale of goods, makes a distinction between an "open offer" which can be revoked before acceptance, and a "firm offer" which can not be revoked during a stated period of time. No such distinction is made in civil law countries.

The CISG adopts the common law approach to revocation with two exceptions. The first exception results from a comprise with the civil law countries: Article 16(2)(a) provides that an offer is irrevocable where the offeror states that an acceptance must be made within a fixed period time.

Therefore, the offer stating that acceptance must be made "within twenty days" would be irrevocable. There has been considerable discussion concerning the confusion that will result in this area.

The second exception to the common law approach adopted by the CISG is that an offer can not be revoked "if it was responsible for the offeree to rely on the offer as being irrevocable the offeree has acted on the offer."

While this provision seems to have aspect of an "estoppel approach" under the common law, it really goes somewhat farther: the comments to this section state that the provision would be applicable in the circumstances where an offeree merely needs time to investigate whether the offer should or should not be accepted under the common law, an offer would not be irrevocable merely because the offeree needs time to investigate whether the offer should or should not be accepted.

However, CISG indicates that the offer should not be revocable in this situation even where offer does not specify irrevocability. This is consistent with the approach of many civil law jurisdictions that an offer is presumed to be irrevocable for a reasonable time to consider it.

3. Withdrawal of the Offer

An "withdrawal" of an offer under the CISG differs from the concept of

“revocation.” Under the common law the word revocation also includes the concept of withdrawal.

However, the CISG takes an approach that makes a distinction between the terms.

The CISG and provision makes clear that even an irrevocable offer may be withdrawn before it becomes effective by reaching the offeree. A similar result would be reached under the common law.

V. The Acceptance

1. Manner and Time of Effectiveness of Acceptance

There are some significant differences between the approaches taken to acceptance by the CISG and the common law. When an acceptance is considered effective where the acceptance is either mailed or made by performance.

The CISG rejected the common law rule that when mailing is authorized method of acceptance and the offeror has not stated otherwise, an acceptance is considered effective when mailed. The CISG states instead that an acceptance is not effective until it reaches to the offeror.

While the effect of the common law rule is to place the risk of a lost acceptance on the offeror, the effect of the CISG approach taken by many civil law countries and place the risk on the offeree. Thus, the CISG is consistent in adopting a receipt theory as opposed to a dispatch theory for all communications concerned with contract formation.

In analyzing the CISG position on acceptance, it is important to recall that the CISG takes a broader approach to the irrevocability of offers than does either the U.C.C. or the common law. It also provides that an offer that is not irrevocable “may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.”

Because of the approach taken by the CISG on revocability of the offer, the adoption of the receipt theory does not make the practical difference that might otherwise.

The CISG also treats acceptance by performance in a manner some what different from what the common law might expect. Both the CISG and the U.C.C. provide that an offer may be accepted by performance. The CISG provides that acceptance by performance may be made without notice to the offeror and the acceptance is effective when the act is performed.

Perhaps more significant is the difference in the requirement of notice of performance under the U.C.C. and the CISG. The U.C.C. requires a notice to the offeror. within a reasonable time, the performance has begun or the offeror may treat that offer as having lapsed.

2. Acceptance with Different or Additional Terms

"Mirror image rule" of the common law, requires the acceptance to be in exact terms as the offer. If it is not, a counter offer results which is construed as rejection. In order for a contract result, the mirror image rule requires the partners to continue to make counter offers until there is a total agreement. If the offeror (buyer) orders with a form containing his terms and the offeree (seller) invoices on a form with "differing terms", under the common law no contract results. No contract will result under this classical approach as long as each party replies to the offer with a different form.

Accordingly, a seller may ship with a "shipment confirmed" form that differs from the seller's form and, unless the buyer accepts the shipment, no contract results. If the buyer does accept the goods, a contract is formed as a result of his or her acceptance of goods and the terms would be those stipulated by the seller.

In section 2-207 of the U.C.C. attempted of relax the rigidity of the

common law by allowing for the formation of the contracts where the acceptance "deviates" in some way for the offer and even where the parties may not be in agreement as to all the terms.

The additional terms become part of the contract for merchants unless one of three situations occur: the offer expressly limits acceptance to the terms of offer; the terms materially alter offer; or the offeror timely notifies the offeree of rejection to the additional terms.

Unlike the mirror image approach, the likely result under the U.C.C. is that a contract will be formed even when there are the discrepancies in meeting of minds. Thus, U.C.C. section 2-207 where the parties can be bound even though they may not agree on material terms may be supplied by background law.

The CISG provides the solution where the additional or material terms are not significantly different than the offer if also states when terms are contained in a printed form that materially alters the offer.

Since the parties will normally act as if there is a contract, the proposal provides a solution as to what the actual terms of the contract are when there is performance. While this approach differs from the U.C.C. this proposal concludes a contract when the parties, although not in agreement on all terms, actually manifest an intent to be bound. Thus, the CISG seems clearly to take an approach closer to the traditional mirror image rule than the philosophy of the U.C.C. with regard to the battle of the form issue.

These proposals illustrate the problems inherent in attempting to adopt a uniform law for the international area. The result is often a compromise that is less than satisfactory. In this case, while the compromise on its face attempts to preserve some degree of flexibility, the result is an approach that seems to be particularly inappropriate in situations where the parties are dealing in large volume commercial dealings—as opposed to those where there are relatively large cost items. In the typical battle of forms situation, however, the terms of agreement will usually be the terms

of the party sending the last form that is accepted by performance.

3. Affect of Choice of Law Provision

One more problem may arise when both the offeror and offeree specify in their forms that the law of contract is the law of "their own jurisdiction." Article 1 of the CISG provides that it applies to parties from different states. Thus, if the parties have designated the law of a contracting nation as the law of the contract, then the CISG is applicable even though the parties do not specifically mention the CISG.

Notwithstanding this provision, the CISG is not mandatory and the parties may exclude it's application of any of it's provision. The drafter would have to be more specific and state in his or her choice of law provision that CISG is not to apply. Therefore, standard forms sent by business located in two contracting states that simply select their own states locating in two contracting states do not specifically exclude the CISG.

VI. Conclusion

In the future, the CISG will play an increasingly important role in the formation of contracts for the international sale of goods. The CISG makes significant changes to the common law, civil law and U.C.C. process of contract formation. In some cases, the change reflected a more restrictive approach to contract formation. This is particularly true of the manner in which an offer must be accepted.

Although there seems to be some flexibility in the variance from the offer that may be contained in the acceptance, the CISG approach is closer to the old common law mirror image rule than to the approach of U.C.C. section 2-207. The CISG is also arguably more restrictive than the U.C.C.

with regard to the amount of definiteness required for a valid offer

The CISG also makes some important changes with regard to other aspects of contract formation process. The CISG adopts a receipt theory of communication and rejects the common law dispatch theory, thus, placing the burden of loss on the offeree if the communication is not delivered

The CISG may be a useful alternative to the U.C.C. in choosing the law of contract. Generally, where no law is selected, contract will be decided under the CISG.

Thus, CISG is likely to have a significant impact on the contract formation process in the future and should be viewed as a useful tool in the negotiation of contract in the international area.

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국 문 요 약

유엔에서 협약한 국제거래법규(CISG)의 이론적 구성에 관한 연구

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유엔에서 협약한 국제거래법규는 국가간의 물품매매 계약시에 지대한 영향을 행사하며 앞으로의 국제거래법에서 중요한 표준규범이 되리라 전망된다.

특히 국제거래법규는 영미법의 표준거래규범과 유사한 점이 많지만 세부적으로 살펴보면 상이점 또한 지대하다고 하겠다.

본 연구는 국제거래법규의 형성과정을 영미법을 근간으로 하고 있는 표준거래규범의 측면과 대륙법적 측면에 대한 이론적 구성을 계약형성과정을 통하여 세부적으로 검토하고자 한다.

아울러 국제거래법규의 입법취지의 이해를 돕고자 유엔에서 협약했던 유사한 국제거래규범들의 입법에 관한 역사를 연대순으로 정리하였다.

본 연구의 결론은 계약형성과정에서의 이론적 구성이 대륙법적 측면보다 영미법의 표준거래규범 측면에 있다는 것이다.

그러므로 본 연구는 영미법의 표준거래규범(U.C.C)과 더불어서 물품거래 계약시에 지대한 영향을 미치는 국제거래법규(CISG)에 대해서 근접적인 접근방식으로 고찰하였다.

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