

COMPARING THE CISG'S CONTRACT FORMATION PROVISIONS WITH THOSE OF UCC

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Comparing the CISG's Contract Formation Provisions with those of UCC

The following page provides a non-exhaustive list of differences between the Uniform Commercial Code (“**UCC**”) and the United Nations Convention on Contracts for the International Sale of Goods (“**CISG**”) focussing particularly on contract formation provisions. Below are four important differences between the UCC and the CISG.

Executive Summary

First, parties may form CISG **contracts orally**; no written evidence is necessary.¹ In contrast, the UCC requires parties to put into writing contracts worth over \$500.² The same is true for **modifications**; parties seeking to modify UCC contracts worth over \$500 must use a written modification,³ while parties may modify CISG contracts orally provided the contract does not preclude oral modification.⁴

Second, unlike under the UCC, **no parol evidence rule exists under the CISG**. This means that under the CISG, decision makers can examine all surrounding circumstances when interpreting a contract, including negotiations and subsequent conduct.⁵ In contrast, the UCC limits decision makers to the “four corners” of the written contract and negotiations are only useful to complement the written agreement.⁶

The third difference lies in the consequences of parties **failing to fix a price at contract formation**. Absent a price – the UCC fixes the price and ties it to what is reasonable at the time of delivery.⁷ In contrast, when a CISG contract does not name a price, the CISG fixes it at what is reasonable at the time the contract is concluded.⁸

Lastly, while parties may make **irrevocable offers (firm offers)** under both the UCC and the CISG, under the UCC these offers will not remain irrevocable beyond three months.⁹ The CISG, however, places no such time limit.¹⁰ In addition, under the UCC, if the firm offer language appears on a form supplied by the offeree, the offeror needs to separately sign, initial, or otherwise authenticate the part of the contract that makes the offer irrevocable. The CISG has no such requirement.

¹ CISG Art 11 allows oral contracts. In fact, the CISG does not impose formal requirements on its contracts.

² UCC §28:2-201. There are four exceptions to the UCC’s Statute of Frauds requirement explained in section II of this document. While the UCC is not definitive on the following point, parties should also sign these written agreements and modifications.

³ UCC §28:2-209.

⁴ CISG Art 29. The CISG goes further than by preventing a party from relying on a no-oral-modification clause to the extent that the other party has relied on an oral statement.

⁵ CISG Art 8.

⁶ UCC §28:2-202.

⁷ UCC §28:2-305.

⁸ CISG Art 55.

⁹ UCC §28:2-205.

¹⁰ CISG Art 16.

I. ORAL AND MODIFIED AGREEMENTS

Parties may form CISG contracts **orally**; no written evidence is necessary.¹¹ In contrast, the UCC requires parties to put into writing contracts worth over \$500.¹² The same is true for **modifications**; parties seeking to modify UCC contracts worth over \$500 must use a written modification,¹³ while parties may modify CISG contracts orally provided the contract does not preclude oral modification.¹⁴

APPLICATION

Example I-A (oral agreements)

Party A telephones Party B requesting 10,000lbs of potatoes, packed in 1000 x 10lb bags, at \$3 per bag, delivery in one week. No money is exchanged and the potatoes are never delivered.

- Under the UCC, this contract is not enforceable.
- Under the CISG, this contract is enforceable.

Four exceptions exist under the UCC's Statute of Frauds

The Ten-Day-Reply Doctrine

(See UCC, §2-201(2))

Specially Manufactured Goods

(See UCC, §2-201(3)(a))

The Admission Exception

(See UCC §2-201(3)(b))

The "Payment or Delivery and Acceptance" Exception

(See UCC §2-201(3)(c))

Example I-B (modification)

Party A sends a written offer to Party B requesting 10,000lbs of potatoes, packed in 1000 x 10lb bags, at \$3 per bag, delivery in one week. Two days later, Party A calls Party B asking it to instead send 500 x 20lb bags, at \$6 per bag. One week later, Party B sends 1000 x 10lb bags of potatoes.

- Under the UCC, a court relying on the four corners rule may not enforce the amendment.
- Under the CISG, this contract is enforceable if Party A can prove the modification was requested (offered) and accepted.

II. NO PAROL EVIDENCE RULE EXISTS UNDER THE CISG

Unlike under the UCC, **no parol evidence rule exists under the CISG**. This means that under the CISG, decision makers can examine all surrounding circumstances when interpreting a contract, including negotiations and subsequent conduct.¹⁵ In contrast, the UCC limits decision makers to the

¹¹ CISG Art 11 allows oral contracts. In fact, the CISG does not impose formal requirements on its contracts.

¹² UCC §28:2-201. While the UCC is not definitive on the following point, parties should also sign these written agreements and modifications.

¹³ UCC §28:2-209.

¹⁴ CISG Art 29. The CISG goes further than by preventing a party from relying on a no-oral-modification clause to the extent that the other party has relied on an oral statement.

¹⁵ CISG Art 8.

“four corners” of the written contract and negotiations are only useful to complement the written agreement (See UCC §28:2-202.)

The CISG does away with all of this. CISG Article 8 explains that a decision maker is free to look 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* to ascertain what the parties intended to mean in their contract, notwithstanding the words used in the contract.

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Example II (no parol evidence under the CISG)

A written contract between A and B calls for A to purchase clementine from B for a price much lower than usual for similar clementine. Party A suspects that B probably thinks it's selling a different variety that matches the lower price but says nothing. Party A seeks to enforce the clementine contract. The CISG allows a decision-maker to investigate all surrounding circumstances to determine if the contract was for clementine or the other lower priced variety. For example, looking to prior discussions (which may have centered on the lower cost variety) become relevant. The four-corners rule, in contrast, is an obstacle to concluding what the parties objectively intended.

- Under the UCC, it's likely the contract is for clementine at the contract price.
- Under the CISG, it's possible the contract is not for clementine but for the appropriately priced other variety.

III. FAILING TO FIX A PRICE AT CONTRACT FORMATION

The consequences of parties **failing to fix a price at contract formation** is another difference between the UCC and the CISG. Absent a price – the UCC fixes the price and ties it to what is reasonable at the time of delivery.¹⁶ In contrast, when a CISG contract does not name a price, the CISG fixes it at what is reasonable at the time the contract is concluded.¹⁷

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Example III (failing to fix a price at contract formation)

The price of cherries fluctuates. On Monday, the market price is \$10lb, and by Friday, the market price is \$12lb. Party A and B have entered into a contract for cherries on Monday, but fail to include the price. The cherries are delivered on Friday.

- Under the UCC the price for the cherries is \$12lb.
- Under the CISG the price for the cherries is \$10lb.

IV. IRREVOCABLE OFFERS (FIRM OFFERS)

While parties may make **irrevocable offers (firm offers)** under both the UCC and the CISG, under the UCC these offers will not remain irrevocable beyond three months.¹⁸ The CISG, however, places no such time limit.¹⁹ In addition, under the UCC, if the firm offer language appears on a form

¹⁶ UCC §28:2-305.

¹⁷ CISG Art 55.

¹⁸ UCC §28:2-205.

¹⁹ CISG Art 16.

supplied by the offeree, the offeror needs to separately sign, initial, or otherwise authenticate the part of the contract that makes the offer irrevocable. The CISG has no such requirement.

APPLICATION

Example IV (firm offers)

On January 1, A makes an offer to B and offers to hold the offer open until January 30. The next day, Party A attempts to revoke the January 1 offer. On January 10, B informs A that it accepts the January 1 offer.

- Under the CISG A's attempt to revoke the offer is ineffective. B accepted within the period set by A. The parties formed a contract.
- Under the UCC the offer is revocable, unless it was signed and even if signed the irrevocability may not exceed three months. Therefore, if the promise to hold the offer was not signed, not supported by separate consideration, or the term of irrevocability exceeded three months, B could not accept the offer on January 10 and no contract is formed.

Appendix

RELEVANT UCC AND CISG PROVISIONS

UCC PROVISIONS

§ 2-201. Formal Requirements; Statute of Frauds.

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

- if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or
- if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or
- with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2-606).

§ 2-202. Final Written Expression: Parol or Extrinsic Evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

- by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
- by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement

§ 2-205. Firm Offers.

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

§ 2-209. Modification, Rescission and Waiver.

(1) An agreement modifying a contract within this Article needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

§ 2-305. Open Price Term.

(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if

- (a) nothing is said as to price; or
- (b) the price is left to be agreed by the parties and they fail to agree; or
- (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

CISG PROVISIONS

Article 8. Interpreting contracts (no parol rule).

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 16. Revocation.

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

- (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
- (b) 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.

Article 29. Modification.

(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

Article 55. Fixing Price for contract.

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.