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Who's Afraid of the CISG?—Why North Carolina Practitioners Should Learn a Thing or Two About the 1980 United Nations Convention on Contracts for the International Sale of Goods

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INTRODUCTION

The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) is the first model commercial law to gain widespread international acceptance. Over 60 states, including the United States, China, Russia, and France, have ratified the CISG, making it the default substantive law governing contracts for the sale of goods between a buyer and a seller from different Contracting States. However, the CISG has not been as readily applied in the United States as it has in other countries.

It is easy to see why North Carolina practitioners would be reluctant to select an unfamiliar body of law to govern potential disputes between the commercial buyers and sellers they represent. The CISG contains provisions that are significantly different from the familiar principles of North Carolina's version of the Uniform Commercial Code (U.C.C.). For instance, the CISG does not exclude parol evidence of contractual terms, requires no writing for a valid contract, and maintains the "mirror image" rule. Despite the differences that may make a North Carolina practitioner wary, the CISG contains sufficient protections for contracting parties, and in fact, serves the interests of international buyers and sellers of goods better than North Carolina's version of the U.C.C.

Part I of this article will discuss the history and purpose of the CISG. Part II will consider the applicability of the CISG to international commercial contracts where one contracting party is from the United States. Part III will discuss some notable differences between the CISG and North Carolina law. Finally, Part IV will consider situa-

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tions in which the CISG may better serve the interests of parties to a contract for the international sale of goods than the U.C.C. or North Carolina common law.

I. HISTORY AND PURPOSE OF THE CISG

The CISG, also known as the Vienna Convention, (and simply as “the Convention”) stands for the United Nations Convention on Contracts for the International Sale of Goods. The CISG is a set of rules that governs the rights of sellers and buyers that engage in contracts involving the international sale of goods. It is a set of substantive rules, not procedural rules, that governs the means by which a court or arbitral tribunal will resolve a dispute.¹

A. Historical Background

The CISG was developed as a solution to the problems resulting from complexities of law encountered when parties from two different states² enter into a contract for the sale of goods. Its purpose is to provide a body of law that will be accepted and uniformly applied by states with different legal systems.³ The initial draft of the CISG (the 1978 Draft Convention) was completed in 1978.⁴ The Draft Committee established by the United Nations Commission on International Trade Law (UNCITRAL) completed the final version in the spring of 1980, and it was ultimately passed by a two-thirds majority at the Vienna Conference on April 11, 1980.⁵ As of July 17, 2007, seventy nations have ratified the Convention.⁶

1. Predecessors

The predecessors to the CISG are the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) and the

1. JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN THE USA 6 (2d ed. 2004).

2. As used in this article, the term “states” is synonymous with countries.

3. See United Nations Convention on Contracts for the International Sale of Goods pmb., Apr. 11, 1980, 1489 U.N.T.S. 3, S. TREATY DOC. NO. 98-9 (1986) [hereinafter CISG].

4. PETER SCHLECHTRIEM, UNIFORM SALES LAW—THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 18 (1986), available at <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem.html>.

5. SCHLECHTRIEM, *supra* note 4, at 17-19.

6. See United Nations Comm. on Int'l Trade Law, Status: 1980 United Nations Convention on Contracts for the International Sale of Goods (2007), http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html [hereinafter CISG Status].

Uniform Law on the International Sale of Goods (ULIS).⁷ The foundation for the CISG, the ULF, and the ULIS was laid in the 1920s by a group of European scholars, which included Ernest Rabel, who saw a need for a uniform law.⁸ Their idea quickly took hold, and the International Institute for the Unification of Private Law (UNIDROIT) convened a working group to begin drafting a uniform body of law governing the international sale of goods.⁹ UNIDROIT's progress was halted during World War II, but efforts toward development resumed following the war's conclusion.¹⁰

After the war, a sales conference at The Hague, attended predominately by Western European states, reviewed the pre-war draft created by the UNIDROIT working group and planned for continuing development of the uniform law.¹¹ By 1956, an initial draft was completed and, at the Hague Convention of April 1964, UNIDROIT adopted the ULF and the ULIS.¹² The ULF established uniform rules for contract formation.¹³ The ULIS had a much broader application and set forth the basic obligations of the parties to a sales contract for goods.¹⁴

Despite the significance of the development of the ULF and ULIS, neither was widely adopted by the international community.¹⁵ Many states, including the United States, were very critical of the uniform laws.¹⁶ To address the concerns of these states, UNCITRAL established a new Working Group composed of fourteen states to review the inadequacies of the ULF and ULIS and to develop a comprehensive

7. See SCHLECHTRIEM, *supra* note 4, at 16.

8. Jacob S. Ziegel, *The Future of the International Sales Convention from a Common Law Perspective*, 6 N.Z. BUS. L.Q. 336, 336 (2000), available at <http://cisgw3.law.pace.edu/cisg/biblio/ziegel3.html>.

9. *Id.*

10. *Id.*

11. Peter Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS § 1.01 (Nina M. Galston & Hans Smit eds., 1984), available at <http://cisgw3.law.pace.edu/cisg/biblio/winship5.html>.

12. *Id.*

13. See generally Uniform Law on the International Sale of Goods, July 1, 1964, 3 I.L.M. 855, available at <http://www.jus.uio.no/lm/unidroit.ulis.convention.1964/portrait.pdf>.

14. See generally Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 3 I.L.M. 854, available at <http://www.jus.uio.no/lm/unidroit.ulf.convention.1964/landscape.pdf>.

15. See Winship, *supra* note 11, at § 1.01.

16. *Id.*

body of rules that would be more acceptable.¹⁷ In 1978, UNCITRAL approved a new body of rules, the Draft Convention on Contracts for the International Sale of Goods, which effectively combined ULF and ULIS.¹⁸ The Draft Convention was the first draft of what would become the CISG.

B. Purpose

The purpose of the CISG is stated in its Preamble.¹⁹ Its principal goal is the promotion of friendly relations between states by the adoption of a set of uniform rules to govern contracts for the international sale of goods.²⁰ The Preamble also recites the opinion of the drafters that adopting the uniform rules of the CISG, which “take into account the different social, economic and legal systems[,] would contribute to the removal of legal barriers in international trade and promote the development of international trade.”²¹

1. Harmonization of Common Law and Civil Law Principles

One primary function of the CISG is to harmonize common law and civil law legal principles.²² International sales transactions can involve parties who come from states with very different legal backgrounds. Contracts for the sale of goods in an international business environment regularly cross legal boundaries between common law and civil law states. Any uniform international commercial body of law must therefore take into consideration both types of legal systems. The CISG specifically “seeks to maintain a delicate balance between the contrasting attitudes and concepts of the civil law and of the common law” in order to achieve international uniformity.²³ Maintaining this balance required the drafters to make compromises in certain provisions of the CISG. For example, the requirement of good faith contained in Article 7(1) of the CISG is not generally recognized in

17. John Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, 27 AM. J. COMP. L. 201, 209 n.25 (1979).

18. *Id.* at 203.

19. See CISG, *supra* note 3, pmbl.

20. See *id.*

21. *Id.*

22. Jürgen Basedow, *Towards a Universal Doctrine of Breach of Contract: The Impact of the CISG*, 25 INT'L R.L. ECON. 486, 487-88 (2005), available at <http://cisgw3.law.pace.edu/cisg/biblio/basedow.html>.

23. William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (codified and uncodified)*, 60 LA. L. REV. 677, 718 (2000), available at <http://www.cisg.law.pace.edu/cisg/biblio/tetley.html> (quoting ROY GOODE, COMMERCIAL LAW 927 (2d ed., Penguin Books 1995)).

English common law, but is an important concept in civil law states.²⁴ Furthermore, the principles of interpretation of the CISG follow both an objective approach, an important common law concept, and a subjective approach, followed in civil law states.²⁵

2. *Uniform Interpretation*

The compromise between civil and common law states, accompanied by a body of law that is uniformly applied, creates an environment in which parties from different states feel comfortable engaging in commercial transactions. The drafters of the CISG recognized that a uniform interpretation of the rules was necessary to ensure widespread use. Consequently the drafters attempted to eliminate colloquial language, called “domestic baggage,” when drafting the CISG.²⁶

II. APPLICATION OF THE CISG TO INTERNATIONAL COMMERCIAL CONTRACTS WHERE ONE PARTY IS FROM THE UNITED STATES

When the CISG is the substantive law that applies to a contract for the sale of goods, whether by operation of law or express agreement of the parties, its provisions will govern the formation of the contract and the rights and obligations of the buyer and seller.²⁷ Issues that are governed but not settled by the CISG should be resolved in accordance with the general principles upon which the CISG is based,²⁸ such as “good faith, reasonableness, and estoppel.”²⁹ If an issue cannot be settled by looking to the CISG’s general principles, then as a last resort, the tribunal should resolve it by applying the appropriate domestic law.³⁰

Whether practitioners would like for the CISG to govern resolution of a dispute or would prefer to avoid it altogether, it is important to understand the circumstances under which the CISG applies to commercial sales contracts so that they can represent their clients

24. ROY GOODE, *COMMERCIAL LAW* 931-32 (2d ed., Penguin Books 1995).

25. *Id.*

26. Vikki M. Rogers & Albert H. Kritzer, *A Uniform International Sales Law Terminology*, in *FESTSCHRIFT FÜR PETER SCHLECHTRIEM ZUM 70. GEBURTSTAG* 223, 226 (Ingeborg Schwenzer & Günter Hager eds., 2003), available at <http://www.cisg.law.pace.edu/cisg/biblio/rogers2.html>.

27. CISG, *supra* note 3, art. 4.

28. *Id.*, art. 7(2).

29. LOOKOFSKY, *supra* note 1, at 36 (footnote call numbers omitted).

30. Peter Schlechtriem, *Requirements of Application and Sphere of Applicability of the CISG*, 36 *VICT. U. WELLINGTON L. REV.* 781, 789-91 (2005).

accordingly.³¹ The application of the CISG to contracts entered into by parties from the United States occurs as a result of ratification and adoption of the CISG, which was signed on behalf of the United States at United Nations Headquarters on August 31, 1981 and went into effect in 1988.

A. *Application under CISG Art. 1(1)*

Article 1 of the CISG is the starting point for application of the Convention:

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.³²

Under Article 1, the Convention will apply only if two requirements are met: (1) the seller and the buyer have their places of business in different States; and (2) both of these States are Contracting States (i.e., states that have adopted the CISG). In addition to these requirements, the United States ratified the Convention subject to an Article 95 declaration.³³ The result of this declaration is that an American court will apply the CISG by default only to contracts involving sales with an international character between parties in whose countries the Convention is in force.³⁴

31. In *GPL Treatment v. Louisiana-Pacific Corp.*, counsel for the plaintiffs failed to recognize that the CISG applied to the parties' contract, which would have made the statute of frauds defense raised by the defendant inapplicable. 894 P.2d 470, 477 n.4 (Or. Ct. App. 1995). See also William S. Dodge, *Teaching the CISG in Contracts*, 50 J. LEGAL EDUC. 72, 74 (March 2000) (noting that plaintiffs' counsel gave up an argument that was "a sure winner").

32. CISG, *supra* note 3, art. 1.

33. See CISG Status, *supra* note 6.

34. See CISG, *supra* note 3, art. 95.

1. *Between Parties Whose Places of Business Are in Different Contracting States*

The threshold issue when determining whether the CISG will apply to any given dispute is to determine whether the parties to the contract have their respective places of business in different Contracting States. A good example of this application is highlighted by Professor Lookofsky:

[I]f a contract for the sale of wine is entered into in January 2000 between a seller in France and a buyer in California (France and the United States being different Contracting States), both French and American courts are bound by Article 1(1)(a) of the treaty to apply the CISG as the gap-filling regime. In this situation, the Convention applies without any recourse to rules of private international law; indeed, in this situation there is no conflict between the domestic sales laws of the US and France.³⁵

Accordingly, the CISG will apply under Article 1(1)(a) to any contract for the sale of goods between a party from the United States and party from another Contracting State.

2. *Rules of Private International Law Lead to the Law of a Contracting State*

The second situation arises when one or both parties do not reside in a Contracting State. Article 1(1)(b) applies when “private international rules,” the domestic conflict of laws rules of a particular state, direct the court or arbitral tribunal to the CISG.³⁶ Another hypothetical demonstrates this application:

[I]f a contract for the sale of wine is made in January 2000 between a seller in France and a buyer in *England*, French courts would not be bound by Article 1(1)(a) to apply the CISG as the gap-filling regime: the contract is of course between parties residing in different States, but because England (as of January 2000) is still not a CISG Contracting State, the different States concerned are not different “Contracting States.” (Of course, English courts are not bound to apply the Convention either.) But the Convention becomes applicable nonetheless - at least in a French court - if the applicable rules of *private international*

35. Joseph Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, in INTERNATIONAL ENCYCLOPAEDIA OF LAWS—CONTRACTS 32 (J. Herbots ed., Supp. 29 2000), available at <http://cisgw3.law.pace.edu/cisg/biblio/lookofsky.html>.

36. *Id.*

law (i.e., the choice of law or conflict of laws rules of the forum court) lead to the application of the law of a (single) Contracting State.³⁷

Thus, although the CISG strives to promote uniformity, the domestic laws of Contracting States still play a role and can lead to different results.

3. *United States' Article 95 Declaration*

Article 95 was the drafters' effort to address the concerns expressed by many about Article 1(1)(b).³⁸ Several states, including the United States and China, have adopted the CISG subject to an Article 95 declaration.³⁹ Thus, when the domestic conflict of laws rules of the United States lead to United States domestic law, under which the CISG would ordinarily apply by default under Article 1(1)(a), the court or arbitral tribunal is not bound to apply the CISG under Article 1(1)(b) if one party is not from a Contracting State.⁴⁰ However, the court or tribunal still has the discretion to apply the CISG, so an Article 95 declaration does not guarantee that the CISG will be inapplicable.⁴¹

III. NOTABLE DIFFERENCES BETWEEN THE CISG AND NORTH CAROLINA LAW

The CISG provides a more flexible approach to contract formation and interpretation than the U.C.C.⁴² While a contract for the sale of goods for five hundred dollars or more is unenforceable unless it is evidenced by a writing under the U.C.C.,⁴³ the CISG allows an enforceable contract for the sale of goods at any price to be formed without a written document.⁴⁴ The CISG also rejects the parol evidence rule,⁴⁵

37. *Id.* at 33.

38. See 1980 Vienna Diplomatic Conference, Vienna, Austria, Apr. 10, 1980, *Summary Records of the First Committee to the Plenary Conference*, ¶¶ 78-98, U.N. Doc. A/CONF.97/11/Add.2, available at <http://cisgw3.law.pace.edu/cisg/plenarycommittee/summary11.html>.

39. See CISG Status, *supra* note 6.

40. See CISG, *supra* note 3, art. 95.

41. LOOKOFSKY, *supra* note 1, at 158-59.

42. As used in this article, the term "U.C.C." means the Uniform Commercial Code version enacted in North Carolina, which is codified in Chapter 25 of the North Carolina General Statutes.

43. N.C. GEN. STAT. § 25-2-201 (2007).

44. CISG, *supra* note 3, art. 11.

45. CISG AC Opinion no. 3, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG*, 23 October 2004.

and in contrast to the U.C.C.,⁴⁶ allows oral statements made prior to or contemporaneous with the signing of a written contract to become part of the parties' agreement.⁴⁷ The CISG's flexibility in these areas minimizes the potential negative consequences of its battle-of-the-forms approach,⁴⁸ a common law rule replaced by the framework of U.C.C. section 2-207.⁴⁹

A. *Writing Requirements*

Unlike the U.C.C., which requires contracts for the sale of goods valued at five hundred dollars or more to be in writing, the CISG does not impose a writing requirement on parties to contracts for the sale of goods at any price. Instead, the existence and terms of a contract may be proved by any means, including testimony of witnesses or the conduct of the parties.

1. *Statute of Frauds*

North Carolina's version of U.C.C. section 2-201,⁵⁰ the statute of frauds, states:

[A] contract for the sale of goods for the price of five hundred dollars (\$500.00) 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.⁵¹

North Carolina General Statutes section 25-2-201 differs slightly from the 2000 uniform version of section 2-201 in that North Carolina law does not make enforceable contracts signed by the authorized agent or broker of the party against whom enforcement is sought.⁵²

When North Carolina enacted Article 2 of the U.C.C. in 1965, this provision made the statute of frauds applicable to contracts for the sale of goods for the first time in nearly two hundred years.⁵³ The North Carolina Supreme Court, in a decision published in 1908, noted "the

46. See N.C. GEN. STAT. § 25-2-202 (2007).

47. See CISG, *supra* note 3, art. 8(3).

48. See *id.*, art. 19.

49. See N.C. GEN. STAT. § 25-2-207 (2007).

50. Like most states, North Carolina has not enacted the 2006 amendments to Article 2 of the Uniform Commercial Code. Thus, the 2000 version of the U.C.C. is the most recent version to which Article 2 of Chapter 25 of the North Carolina General Statutes is comparable.

51. N.C. GEN. STAT. § 25-2-201(1) (2007).

52. Contrast N.C. GEN. STAT. § 25-2-201(1) (2007) with U.C.C. § 2-201(1) (2000).

53. Odom v. Clark, 60 S.E. 513, 515 (N.C. 1908).

English statute of frauds,"⁵⁴ which required contracts for the sale of goods above a certain value to be in writing, had "not been in force [in North Carolina] since 1792."⁵⁵

Under the exceptions to the statute of frauds enumerated in North Carolina General Statutes section 25-2-201, a contract for the sale of goods at a price of five hundred or more may be enforceable without a writing signed by the party against whom enforcement is sought. For example, contracts for specially manufactured goods may be enforceable by the seller without a writing.⁵⁶ Between merchants,⁵⁷ a confirmatory writing sent within a reasonable time after an oral agreement is made is enforceable against the receiving party unless the receiving party notifies the sender of his objection within 10 days of receipt.⁵⁸ Additionally, a contract will be enforceable without a writing as to the quantity admitted in court by a party against whom enforcement is sought.⁵⁹

The U.C.C. also provides for a limited part performance exception to the statute of frauds. Under section 2-201, a contract for the sale of goods is enforceable to the extent that payment has been made or that goods have been received and accepted by the buyer.⁶⁰ In some states, part performance and estoppel principles will remove an entire contract from the statute of frauds.⁶¹ In North Carolina, however, the protection afforded by the part performance doctrine is limited to the provisions of North Carolina General Statutes section 25-2-201(3)(c).

2. *Writing Not Required for a Valid Contract under CISG Article 11*

Unlike the U.C.C., oral contracts for the sale of goods at any price are enforceable under the CISG. Article 11 of the CISG states, "A contract of sale need not be concluded in or evidenced by writing and is

54. *Id.*

55. *Id.*

56. N.C. GEN. STAT. § 25-2-201(3)(a) (2007).

57. The term "merchant" is defined by N.C. Gen. Stat. § 25-2-104 (2007) as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction. . ." One who employs "an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill" may also be considered a merchant under this section.

58. N.C. GEN. STAT. § 25-2-201(2) (2007).

59. § 25-2-201(3)(b).

60. § 25-2-201(3)(c).

61. *See, e.g.,* Royster-Clark, Inc. v. Olsen's Mill, Inc., 714 N.W.2d 530 (Wis. 2006); Metz Beverage Co. v. Wyoming Beverages, Inc., 39 P.3d 1051 (Wyo. 2002); Allied Grape Growers v. Bronco Wine Co., 249 Cal. Rptr. 872 (Cal. Ct. App. 5th 1988).

not subject to any other requirement as to form. It may be proved by any means, including witnesses.”⁶² Recognizing that the domestic laws of some states attach significance to contractual formalities, the CISG allows a state “whose legislation requires contracts of sale to be concluded in or evidenced by writing”⁶³ to make an Article 96 reservation, under which the provisions of Article 11 are inapplicable to contracts concluded in that state.⁶⁴ Nine states have ratified the CISG with an Article 96 reservation.⁶⁵ Interestingly, although the domestic laws of the United States typically require contracts to be concluded in writing, the United States did not make an Article 96 reservation.⁶⁶

An Article 96 reservation does not necessarily guarantee that a particular state's domestic laws on contractual formalities will apply. When only one party to a contract is from a state that made an Article 96 reservation, the tribunal will apply conflict-of-laws rules⁶⁷ to determine which state's law governs contractual formalities.⁶⁸ Even when a contract involves a party in a state that made an Article 96 reservation, if conflict-of-laws analysis leads to the application of another Contracting State's law, the tribunal may enforce an oral agreement under Article 11. For example, if a party from the United States enters into a sales contract with a party from Russia, a state that made an Article 96 reservation,⁶⁹ the no-writing-requirement principle of Article 11 would still apply if the application of conflict-of-laws rules led to the domestic law of the United States.⁷⁰

62. CISG, *supra* note 3, art. 11.

63. *Id.*, art. 96.

64. *Id.*; see also 1980 Vienna Diplomatic Conference, Vienna, Austria, Mar. 17, 1980, *Summary Records of the First Committee*, ¶¶ 9-66, U.N. Doc. A/CONF.97/5, available at <http://cisgw3.law.pace.edu/cisg/firstcommittee/Meeting8.html>.

65. The nine states that made an Article 96 reservation are Argentina, Belarus, Chile, Hungary, Latvia, Lithuania, Paraguay, Russia, and Ukraine. See CISG Status, *supra* note 6.

66. See *id.*

67. “[North Carolina’s] traditional conflict of laws rule is that matters affecting the substantial rights of the parties are determined by *lex loci*, the law of the situs of the claim, and remedial or procedural rights are determined by *lex fori*, the law of the forum.” *Stetser v. TAP Pharm. Prods. Inc.*, 598 S.E.2d 570, 580 (N.C. Ct. App. 2004) (quoting *Boudreau v. Baughman*, 368 S.E.2d 849, 853-54 (N.C. 1988)).

68. See CISG, *supra* note 3, art. 4; LOOKOFKY, *supra* note 1, at 159-60.

69. See CISG Status, *supra* note 6.

70. See CISG, *supra* note 3, art. 1(1)(a). See, e.g., *J.T. Schuermans/Boomsma Distilleerderij, Hoge Raad der Nederlanden [HR]* [Supreme Court of the Netherlands], 7 November 1997, 1998 NIPR 91 (Neth.) (holding that the no-writing-requirement principle of Article 11 applied to a contract between a buyer from Russia and a seller from the Netherlands where conflict-of-laws rules led to the law of the Netherlands—the CISG).

B. “Battle of the Forms”

Another major difference between the CISG and the U.C.C. is that the CISG retains the common law “mirror image” and “last shot” rules with respect to contract formation. Although these rules still apply to contracts not governed by the U.C.C. in North Carolina, North Carolina General Statutes section 25-2-207 eliminates the “battle of the forms” and provides a different framework for determining the effect of additional or different terms in an acceptance.

1. North Carolina General Statutes Section 25-2-207

Under North Carolina General Statutes section 25-2-207, an acceptance of an offer or confirmation of an agreement “which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.”⁷¹ Additional terms in an acceptance or confirmation are considered “proposals for addition to the contract”⁷² and must be explicitly accepted by the offeror, unless both parties are merchants, in order to become part of the agreement. Where both parties are merchants, the additional terms automatically become part of the contract without explicit acceptance by the offeror unless “the offer expressly limits acceptance to the terms of the offer,”⁷³ the additional terms materially alter the contract,⁷⁴ or “notification of objection to [the additional terms] has already been given or is given within a reasonable time after notice of them is received.”⁷⁵

In some situations, the writings of the parties may not be sufficiently in agreement to create a contract. For example, a merchant buyer may place an order with a merchant seller by submitting an order that specifies a certain quantity of goods to be purchased at a particular price and states that the law of California will govern the contract. This would constitute an offer.⁷⁶ If the seller decides to accept the offer, the seller might ship the goods to the buyer with an invoice that reiterates the quantity and price, states that the law of North Carolina will govern the contract, and provides that the seller may collect interest on past-due invoices as allowed by law. Even though the seller’s reply is not the “mirror image” of the buyer’s offer,

71. N.C. GEN. STAT. § 25-2-207(1) (2007).

72. § 25-2-207(2).

73. § 25-2-207(2)(a).

74. § 25-2-207(2)(b).

75. § 25-2-207(2)(c).

76. See § N.C. Gen. Stat. §25-2-206 (2007).

it would be effective to create a contract under North Carolina General Statutes section 25-2-207. The price would be as agreed by the parties, since both writings stated the same price. Interest would accrue on past-due invoices at a rate allowed by law, unless the buyer objected within a reasonable time,⁷⁷ because the addition of that term is not considered a material alteration.⁷⁸

As to the contradictory choice-of-law provisions in the parties' forms, under North Carolina's approach to different terms in an acceptance, the term specified in the offer would prevail.⁷⁹ North Carolina General Statutes section 25-2-207(2) and the uniform version of this section only apply expressly to additional terms and are silent on the effect of different terms in an acceptance.⁸⁰ Most jurisdictions have adopted the "knock-out" rule under which contradictory terms in an offer and acceptance are excluded from the parties' contract.⁸¹ North Carolina, however, follows a minority approach that treats different terms in an acceptance as though they were additional terms and interprets them in accordance with North Carolina General Statutes section 25-2-207(2). The effect of this approach is a "first-shot" rule—when there are contradictory terms, the first form sent will control.⁸²

2. "Battle of the Forms" under Article 19 of the CISG

Unlike the U.C.C., the CISG still applies the "mirror image" and "last shot" rules to contract formation.⁸³ Under Article 19, "[a] reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer."⁸⁴ According to the Secretariat Commentary to the CISG, the language of Article 19(1) "reflects traditional theory that contractual obligations arise out of expressions of mutual agreement. Accordingly, an acceptance must comply exactly with the offer."⁸⁵

77. § 25-2-207(2)(c).

78. § 25-2-207 cmt. 5.

79. § 25-2-207 cmt.

80. See § 25-2-207(2); U.C.C. § 2-207(2) (2000).

81. See *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1579-80 (10th Cir. 1984) (discussing the three approaches to different terms under U.C.C. § 2-207).

82. See JOHN N. HUTSON, JR. & SCOTT A. MISKIMON, *NORTH CAROLINA CONTRACT LAW* § 7-5-3 (2007); Richard Hyland, *Draft*, 97 COLUM. L. REV. 1343, 1348 (1997).

83. See *Magellan Intern. Corp. v. Salzgitter Handel GmbH*, 76 F. Supp. 2d 919, 925 (N.D. Ill. 1999).

84. CISG, *supra* note 3, art. 19(1).

85. United Nations Conference on Contracts for the International Sale of Goods, *Commentary on the Draft Convention on Contracts for the International Sale of Goods*

The strict requirements of the first section of Article 19 are relaxed a little by the second section, under which only additional or different terms that “materially alter⁸⁶ the terms of the offer” constitute a counteroffer.⁸⁷ Therefore, an acceptance will be effective even if it includes non-material additional or different terms, unless the offeror objects to the terms “without undue delay.”⁸⁸ If the offeror objects to the non-material new terms, then the offeree’s purported acceptance is considered a rejection of the offer.⁸⁹ Unlike North Carolina General Statutes section 25-2-207, under which a contract would exist consisting of the terms on which the writings of the parties agreed, there is no contract at all if the offeror objects to non-material additional or different terms.⁹⁰

A. Parol Evidence

The views of the CISG and the U.C.C. on the admissibility of extrinsic evidence to prove the existence or terms of a contract stem from different approaches to ascertaining the parties’ intent. Under the objective approach of the U.C.C., contracting parties may not introduce evidence of any prior written agreement or prior or contemporaneous oral agreement to contradict the terms of a final written agreement.⁹¹ By contrast, consistent with its informal requirements as to contract formation, the CISG’s subjective approach permits parties to prove the existence or terms of a contract by any means, including parol evidence.⁹²

prepared by the Secretariat, art. 17 ¶ 2, UN Doc. A/CONF. 97/5 (1979) [hereinafter Secretariat Commentary].

86. Examples of material terms are provided in Article 19(3) and include “price, payment, quality and quantity of the goods, place and time of delivery, extent of one party’s liability to the other or the settlement of disputes.” CISG, *supra* note 3, art. 19(3).

87. CISG, *supra* note 3, art. 19(2).

88. *Id.*

89. See Secretariat Commentary, *supra* note 85, art. 17 ¶ 10.

90. See *id.*

91. N.C. GEN. STAT. § 25-2-202 (2007).

92. CISG-AC Opinion no. 3, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG*, ¶ 1, 23 October 2004 [hereinafter CISG-AC Opinion no. 3]. See also *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D’Agostino, S.P.A.*, 144 F.3d 1384, 1386-90 (11th Cir. 1998) (interpreting Article 8 of the CISG as a rejection of the parol evidence rule).

1. *Parol Evidence Rule under North Carolina General Statutes Section 25-2-202*

In general, North Carolina General Statutes section 25-2-202 prevents parties from introducing evidence of any prior or contemporaneous oral agreements or prior written agreements to vary the terms of a final written agreement.⁹³ A party is permitted, however, to introduce parol evidence of “course of performance, course of dealing, or usage of trade”⁹⁴ to supplement or explain an agreement. Furthermore, a party may introduce evidence of “consistent additional terms” to supplement or explain a writing unless the court considers the writing to be a “complete and exclusive statement of the terms of the [parties] agreement.”⁹⁵

2. *CISG's Rejection of the Parol Evidence Rule*

The CISG permits the parties to prove the terms of a contract by relevant evidence of any kind. Article 8(1) prioritizes the subjective intent of each party in interpreting their contract, stating, “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.”⁹⁶ In an opinion released in 2004, the CISG Advisory Council expressly rejected the parol evidence rule, stating, “The Parol Evidence Rule has not been incorporated into the CISG. The CISG governs the role and weight to be ascribed to contractual writing.”⁹⁷ Specifically, Article 8(3) of the CISG allows a tribunal to consider “all relevant circumstances”⁹⁸ to determine the intent of the parties. Accordingly, “the CISG indicates that a writing is one, but only one, of many circumstances to be considered when establishing and interpreting the terms of a contract.”⁹⁹

IV. SITUATIONS IN WHICH THE CISG MAY BETTER SERVE THE INTERESTS OF PARTIES TO A CONTRACT FOR THE INTERNATIONAL SALE OF GOODS THAN THE U.C.C. OR NORTH CAROLINA COMMON LAW

Whether the CISG will better meet the needs of contracting parties than Article 2 of the U.C.C. depends on the nature of the parties

93. See N.C. GEN. STAT. § 25-2-202.

94. § 25-2-202(a) (internal citations omitted).

95. § 25-2-202(b).

96. CISG, *supra* note 3, art. 8(1).

97. CISG-AC Opinion no. 3, *supra* note 92, ¶ 1.

98. CISG, *supra* note 3, art 8(3).

99. CISG-AC Opinion no. 3, *supra* note 92, cmt. 2.2.

and transaction involved. The two uniform laws were drafted with different types of parties in mind. The U.C.C. was intended to apply to all contracts for the sale of goods, including consumer sales, and its provisions are written to encompass a broad range of transactions.¹⁰⁰ Parts of Article 2 are therefore necessarily protective to prevent consumers from being taken advantage of. In a number of sections, the U.C.C. makes a distinction between merchants and non-merchants and holds the latter to a higher standard than the former.¹⁰¹ Although consumer-protective provisions are important in domestic law, their inflexibility is not well-suited to international commercial sales.

The CISG, on the other hand, was drafted specifically for international commercial actors. Under Article 2(a), the CISG “does not apply to sales of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use.”¹⁰² Leaving consumer protection in sales of goods transactions to domestic law,¹⁰³ the CISG serves the interests of commercial actors by giving them the freedom to define their contract without fear that it will be invalidated for failing to comply with needlessly restrictive formalities.

The CISG’s flexibility is better suited to contracts in which the parties have selected arbitration instead of litigation as the method of dispute resolution. When dealing with the court system, parties often have little control over which judge will preside over their case. It is likely that a North Carolina superior court judge, or even a federal district court judge for that matter, would have little or no experience with the CISG.¹⁰⁴ Subjecting a dispute to resolution before a judge who is unfamiliar with the governing substantive law and for which there is no North Carolina case precedent¹⁰⁵ would almost certainly

100. See CHRISTIAN TWIGG-FLESNER, CONSUMER PRODUCT GUARANTEES 92 n.3 (2003) (“Article 2 of the U.C.C. deals with all types of sales and therefore has to be sufficiently broad to cover the smallest of consumer sales as well as the large-scale inter-state transactions.”).

101. See, e.g., N.C. GEN. STAT. §§ 2-201(2), 2-205, 2-207(2), 2-209(2), 2-312(3), 2-314, 2-327(1)(c), 2-402(2) (2007).

102. CISG, *supra* note 3, art. 2(a).

103. SCHLECHTRIEM, *supra* note 4, at 31-32 (discussing deference to domestic law with regard to consumer protection laws affecting validity of a contract pursuant to Article 4).

104. See Dodge, *supra* note 31.

105. A LexisNexis search of North Carolina state and federal cases for the term “CISG” returned only one case—an unpublished decision by the United States Court of Appeals for the Fourth Circuit in which the court notes, “Case law interpreting the

result in problems for everyone involved. However, by selecting arbitration as the method of dispute resolution, the parties can agree on a list of potential arbitrators who have the knowledge and experience necessary to correctly interpret and apply the CISG.

The benefits of resolving disputes governed by the CISG through arbitration rather than litigation have important implications for practitioners who draft commercial sales contracts. In cases in which the CISG applies by default,¹⁰⁶ practitioners should include an arbitration provision in the parties' agreement to avoid being subject to litigation. If the parties would prefer to settle disputes arising from their contract in the courts, then the choice-of-law provision should expressly state that the U.C.C., not the CISG, is the controlling substantive law.¹⁰⁷

A. *Contract Formation and Modification*

One of the goals of the CISG is the harmonization of common law and civil law principles in order to promote the development of international trade.¹⁰⁸ Although contractual formalities are well-known requirements to parties from the United States, other cultures have a less rigid approach.¹⁰⁹ The CISG gives parties the freedom to define the terms of their contract without imposing formalities that may hinder the purpose of the agreement by creating unnecessary delays in performance. Initial contractual terms and modifications thereto need not be memorialized in a signed writing to be enforceable.¹¹⁰

The effect of North Carolina General Statutes section 25-2-201 is to create a presumption against enforceability of agreements that can only be rebutted by producing a signed writing.¹¹¹ While the statute of frauds may serve a legitimate purpose in some cases by protecting

CISG is rather sparse." *Schmitz-Werke GmbH & Co. v. Rockland Indus., Inc.*, No. 00-1125, 2002 U.S. App. LEXIS 12336, at *8 (4th Cir. June 21, 2002).

106. See discussion *supra* Part II.

107. It is not enough to simply specify "the laws of the State of North Carolina" as the governing substantive law. See *Asante Techs. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1149-50 (N.D. Cal. 2001).

108. See discussion *infra* Part I.B.

109. See Bruno Zeller, *The Parol Evidence Rule and the CISG—a Comparative Analysis*, 73 COMP. & INT'L L.J.S. AFR. 308 (2003), available at <http://cisgw3.law.pace.edu/cisg/biblio/zeller6.html> (noting the cultural differences in views on writing requirements for enforceability).

110. If the parties choose to impose a writing requirement for contract modifications, they can do so by including a no-oral-modification clause in their agreement. See CISG, *supra* note 3, arts. 6, 29.

111. See N.C. GEN. STAT. § 25-2-201 (2007).

parties who never intended to enter into a contract,¹¹² it can cause problems in others by invalidating an agreement to which both parties intended to be bound.¹¹³ In such cases, although an agreement actually exists between the parties, the terms cannot be enforced. The CISG reaches a more favorable result than the U.C.C. in these cases, because it recognizes that a contract may be concluded before the parties have memorialized their agreement in a signed writing.¹¹⁴

B. *Additions and Modification of Terms of an Offer*

The CISG's adherence to the "mirror image" and "last shot" rules is a better way to protect the expectations of contracting parties than the framework of North Carolina General Statutes section 25-2-207. The CISG's principles regarding additional or different terms are preferable in two respects. First, the CISG makes it less likely for buyers and sellers to be contractually bound when the so-called "non-material" additional or different¹¹⁵ terms on the parties' standard forms disagree. Second, the seller, who is typically the offeree in commercial sales transactions, is better protected by the CISG's approach to different terms, under which the terms in the last form sent control.

1. *Existence of a Contract*

Under the CISG, no contract is formed if an offeror objects to additional or different terms included in an acceptance that are deemed to be non-material.¹¹⁶ By contrast, under North Carolina General Statutes section 25-2-207, a contract between the parties will exist that consists of the writings upon which the parties agree, supplemented as necessary by the gap-filler provisions of the U.C.C.¹¹⁷ Even though the terms of the parties' standard forms may be considered non-material relative to other provisions of the contract, they could be significant to the party who drafted them. While these terms may not be specifically negotiated in every transaction, it seems reasonable to conclude that they were made part of a party's standard form because

112. See, e.g., *Neugent v. Beroth Oil Co.*, 560 S.E.2d 829 (N.C. Ct. App. 2002).

113. See, e.g., *Lowe's Cos. v. Lipe*, 201 S.E.2d 81 (N.C. Ct. App. 1973).

114. See, e.g., *GPL Treatment*, 894 P.2d at 477 n.4.

115. With regard to different terms, Professor Farnsworth remarked, "It is difficult to imagine variations that would not be material." E. Allan Farnsworth, *Formation of Contract*, in *INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* § 3.04 (Nina M. Galston & Hans Smit eds, 1984).

116. See CISG, *supra* note 3, art. 19; Secretariat Commentary, *supra* note 85, art. 17 ¶ 10.

117. See N.C. GEN. STAT. § 25-2-207 (2007).

they were the terms on which that party wanted to transact business. By substituting the judgment of the tribunal for the judgment of the parties as to what terms are material, a party may end up bound to a contract containing terms to which it had not agreed or even contemplated.

Article 19 of the CISG, which treats an offeror's objection to non-material additional or different terms in an acceptance as a rejection, protects the parties from this undesirable outcome and better reflects the parties' intent. Under Article 19, neither party is bound at the time of the offeror's objection,¹¹⁸ but a contract could be created by the parties' subsequent conduct.¹¹⁹ If, after receiving notice of the offeror's objection, the offeree performs as requested by the offeror, it is reasonable to conclude at that point that the offeree intends to be bound despite the exclusion of the objectionable terms.

2. *Treatment of Different Terms—First Shot vs. Last Shot*

The minority approach to different terms in an acceptance adopted by North Carolina has been criticized by commentators.¹²⁰ Although both the first-shot and last-shot rules arbitrarily determine which party's terms should prevail, the last-shot rule is more in line with traditional contract formation principles and better approximates the parties' intent. Generally, an acceptance must be a positive, unambiguous, and unequivocal manifestation of assent in order to be effective.¹²¹ An expression of acceptance containing terms different from those of the offer cannot be considered a manifestation of assent to be bound by the offer's contradictory terms. Whatever else such an acceptance may be, it is clearly a rejection of those particular terms.

The last shot rule of Article 19 comes closer to reflecting the parties' intent. Since an acceptance containing different terms rejects on its face the contradictory terms of the offer, the first-shot rule is not the best approach. The two alternative approaches are to "knock out" the different terms and allow the court to impose terms of the contract by resorting to the supplemental provisions of the U.C.C., or to apply the

118. See Secretariat Commentary, *supra* note 85, art. 17 ¶ 10.

119. See CISG, *supra* note 3, art. 18(3).

120. See Franklin G. Snyder, *Clouds of Mystery: Dispelling the Realist Rhetoric of the Uniform Commercial Code*, 68 OHIO ST. L.J. 11 (2007); Corneill A. Stephens, *Escape from the Battle of the Forms: Keep it Simple, Stupid*, 11 LEWIS & CLARK L. REV. 233 (2007).

121. 2 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 6:10 (4th ed. 1993).

last-shot rule.¹²² By knocking out the different terms and supplementing the parties' agreement in accordance with the U.C.C., it is possible that the contract will contain terms that neither party intended. If determining the parties' intent is the interpretive goal, the better approach is found in Article 19 of the CISG. Under the last-shot approach of Article 19, the terms of the last form sent control if there is any disagreement.¹²³ Logically, this makes sense. The idea is that by sending an acceptance containing different terms, the offeree has rejected the contradictory terms in the offer. If the offeror performs after receiving the acceptance, then it is fair to say that the offeror has assented to those terms. This places the burden on the offeror to read the acceptance form and object or decline to perform if he disagrees. Although this is not a perfect solution, it is more likely to result in an agreement that reflects the parties' intent and appropriately places the burden on the offeror to be aware of the language of an acceptance.

D. *Contract Interpretation*

One of the critical differences between contract interpretation under the U.C.C. and the CISG is the role of the parties' actual intent. Because the CISG focuses on subjective intent,¹²⁴ the parties may use any relevant extrinsic evidence to prove the existence or terms of a contract. The U.C.C. is less concerned with the parties' subjective intent; instead, it interprets agreements based on an objective standard:

[C]ommon lawyers long ago discarded any attempt to discover the subjective intent of any party to the contract. Though the unfortunate phrase "meeting of the minds" may appear even in current judicial opinions, there is no doubt that the phrase must be understood as requiring only an objective manifestation of assent, as any month old student of contract law in the United States knows.¹²⁵

The parole evidence rule is a function of the U.C.C.'s objective approach, and it seemingly values ease and consistency of application over the consideration of probative evidence of the parties' agreement. Under North Carolina General Statutes section 25-2-202, if the parties' confirmatory memorandum objectively appears to be a final and complete expression of their agreement, extrinsic evidence will be inadmis-

122. See *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1579-80 (1984).

123. See CISG, *supra* note 3, art. 19.

124. See CISG, *supra* note 3, arts. 8(1), (3).

125. John E. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & Com. 11, 46-47 (1988).

sible to contradict the terms of their written agreement.¹²⁶ This approach necessarily excludes relevant evidence of contractual terms and potentially obscures the parties' actual intent.

Of course, any decision by a court or arbitral tribunal concerning the intent of contracting parties will have an objective component.¹²⁷ It is impossible to know with certainty the parties' subjective intent at the time of the conclusion of a contract, but considering "all relevant circumstances of the case"¹²⁸ in order to make a determination is a better method of objectively evaluating their intent.

CONCLUSION

The CISG is not for everyone, but it may better suit the needs of parties to international sales contracts than North Carolina's version of the U.C.C. Unlike the U.C.C., the CISG does not include a statute of frauds or the parol evidence rule. The CISG also rejects the approach of North Carolina General Statutes section 25-2-207 to additional or different terms in an acceptance and maintains the common law "mirror image" and "last shot" rules. Freedom of form and provisions that give priority to the parties' actual intent allow buyers and sellers to conduct business without the unnecessary restrictions and delays caused by the formalities of domestic sales laws.

126. See N.C. GEN. STAT. § 25-2-202 (2007).

127. See JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 116 (3d ed. 1999) (noting the problems of a purely subjective approach).

128. CISG, *supra* note 3, art. 8(3).