

## **UPDATE ON RECENT DEVELOPMENTS IN INTERNATIONAL PURCHASING/CONTRACTING**

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This session provides an overview of recent developments impacting professionals in international purchase/sale of goods with a focus on the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the results of two recent studies—benchmarking on the use/non-use of particular contractual terms and conditions in international commerce as well as the use of arbitration to resolve international disputes.

### **THE CISG**

Since the CISG was promulgated, over 68 countries (including the United States) have executed this treaty. It generally applies to, and controls, the international sale/purchase of “goods,” (as defined) between firms/entities operating (places of business) in those countries that have signed the treaty—countries that account for over two-thirds of the world trade! This treaty was the internationally negotiated endeavor to merge the “best” commercial practices developed over centuries of trade from the common and civil law countries in order to have an international convention that would facilitate global trade.

The CISG unique definition of “goods,” results (to some) in a narrower definition of same from that which professional sellers/buyers may be familiar with through Uniform Commercial Code, Article 2. For example, international sales that are excluded from the CISG are the following

- consumer goods,
- goods bought at auction,
- vessels,
- aircraft,
- ships,
- electricity,
- where the preponderant part is for labor or services,
- assembly contracts whereby a “substantial part of the materials” were provided by the buyer, and
- where the parties specifically “opt out” from having the treaty apply to their international transaction.

It is reported that there have been less than 50 cases under the CISG in the United States and one often stated concern of the legal community is that there is no overarching “decision-authority” for CISG rulings. Other noted aspects (unless modified by mutual agreement) of the CISG include...

- There need not be a writing to find a contract! Thus, in the era of e-commerce, etc. trading protocols are strongly recommended to reflect when and if a contract is being formed!
- A parol evidence rule is very limited in application, e.g. a court “may” consider “all relevant circumstances” including negotiations, trade usages, etc. in interpreting a contract. Again, it may be advisable to “clearly” state if the documented agreement is a fully integrated agreement, etc.
- CISG offers may not be revoked if the offeree reasonably relies on the offer as being irrevocable.
- Acceptance of offers is a little different under the CISG with no “Battle-of-the-Forms” language found in UCC 2-207.
- A buyer may avoid the contract only if there has been a “fundamental breach,” i.e. “substantially deprive the buyer of what s/he is entitled to expect under the contract.” The UCC “perfect tender” rule is not provided in the CISG.

### **BENCHMARKING OF INTERNATIONAL TERMS OF THE DEAL!**

And, while knowing the so-called “in’s and out’s” of the CISG is a “must” for the professional, the reader is ultimately confronted with the following, “what is ‘really’ happening in the international marketplace as to the terms of the deal?” Fortunately, ISM has recently published a significant tool, i.e. a benchmarking report that resulted from an ISM and International Association of Contract and Commercial Managers (IACCM) project, “Benchmarking Standard Contract Terms and Conditions (2004).” This benchmarking project provides valuable insight on 36 vital contract provisions international companies are using, or not using, in international contracts!

Highlights from some of those topics/clauses will be discussed in the presentation including...

- Acceptance
- Payment Provisions
- Warranties/(Performance Issues)
- Delivery
- Indemnification
- Insurance/Limitation of Liability
- Termination
- Delays/Force Majeure
- Dispute Resolution
- Applicable Law/Jurisdiction

### **RESOLUTION OF INTERNATIONAL DISPUTES THROUGH ARBITRATION**

Finally, the issue of a potential international commercial “impasse” must be addressed by the professional buyer/seller. What is the “best” procedural or contractual approach in resolving international disputes? A recent research study sponsored by the international accounting firm of Pricewaterhousecoopers through the School of International Arbitration, Queen Mary, University of London provides critical analysis of related issues. Specifically, this study answers the definitive underlying two-prong question—“is there any data to support arbitration(s) are on the rise and most contracts include arbitration?”

Key “messages” from this independent study include the following...

- Majority of corporations prefer arbitration for international contract disputes.
- Advantages of international arbitration “clearly” outweigh the disadvantages.
- Having a corporate dispute resolution policy provides several strategic advantages.
- Well-drafted contractual arbitration clauses provide tactical advantages.
- Institutional arbitration versus *ad hoc* versus regional arbitration institutions analyzed.
- Why arbitration venue is a crucial factor and which venues are the most popular.
- Corporations overwhelmingly favor the finality of arbitration awards.
- Corporations are looking for arbitrators with the requisite international expertise.
- Corporations are retaining specialist arbitration counsel.
- Cost of international arbitrations may be “more” expensive.
- There is a demand for (more) education on the processes, opportunities and risks in using international arbitration.
- Why the outlook for international arbitration is positive.

#### **ADDITIONAL REFERENCES/BACKGROUND MATERIAL:**

- For additional information on the CISG including text, guidance, questions/answers, cases, etc. go to <http://www.cisg.law.pace.edu/>
- As of the printing deadline for this paper, Professor Peter Fitzgerald, Stetson University College of Law, had posted a request for individuals to complete an International Contracting Practices Survey in order to “assess the familiarity, use, and value of the United Nation’s Convention on the International Sale of Goods (CISG) ... to practitioners, jurists, and legal academics. ...” There are a couple of survey questions addressing ADR. The portal to the survey is at <http://www.law.stetson.edu/CISG/>
- The joint ISM and International Association of Contract and Commercial Managers project, “Benchmarking Standard Contract Terms and Conditions (2004),” resulted in five reports and are posted on the web by ISM. These reports are the following...
  - Administrative Terms <http://www.ism.ws/Files/tools/AdministrativeTerms.pdf>
  - Business Terms <http://www.ism.ws/Files/tools/BusinessTerms.pdf>
  - Financial Terms <http://www.ism.ws/files/Tools/FinancialTerms.pdf>
  - Intellectual Property / Data Production Terms <http://www.ism.ws/Files/tools/IPTerms.pdf>
  - Legal Terms <http://www.ism.ws/Files/tools/LegalTerms.pdf>
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) is located at <http://www.adr.org/sp.asp?id=22096>
- The 2006 PricewaterhouseCoopers sponsored research at the School of International Arbitration, Queen Mary, University of London. The summarized report is available at <http://www.pwc.com/extweb/pwcpublishations.nsf/docid/0B3FD76A8551573E85257168005122C8>