"Application of the UN Convention on Contracts for the International Sale of Goods (CISG) to E-Contracts"

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CERTIFICATE

This is to certify that **SnehaSrivastava** Semester X, B.A.LL.B (Hons.), University of Petroleum & Energy Studies; Dehradun has completed her dissertation on ***"Application of the UN Convention on Contracts for the International Sale of Goods (CISG) to E-Contracts"*** under my guidance.

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I would sincerely like to convey my deepest gratitude to Mr. AjitKaushal, who has guided me in the making of this report. ~~S~~He has been a source of motivation and encouragement and generated interest in the specific field.

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I. ABSTRACT

This dissertation, as its name suggests, discusses the application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Electronic Contracts.

The first chapter of this paper gives a general introduction to the CISG and discusses the scope, application and scheme of the Convention. It also discusses the basics of Electronic Contracts and the concepts of 'offer' and 'acceptance' with respect to Electronic Contracts.

The second chapter is the core of this paper. It discusses the concepts of 'offer' and 'acceptance' as under the CISG, the concept of when a message is deemed to reach a person and it interprets the definition of 'writing' as under the CISG. In doing so, it builds the base for the argument that although the CISG is an old law, it is suited well enough for application to the modern Electronic Contracts. Thereafter, the chapter discusses how various articles of the CISG are applicable to Electronic Contracts in the same way as they are applied to traditional contracts. The chapter then goes on to discuss how Article 13 can be subject to domestic legislation. In its concluding part, the UNCITRAL Model Law on Electronic Contracts and it application to the CISG.

The third chapter concludes the paper by summarizing the contents and presenting the comments of the author.

The paper includes an additional chapter in the end which throws light on the Indian aspect of the CISG. It discusses the pros and cons of ratification of the CISG. This chapter is not included in the cauterisation because it is not directly linked to the topic of the paper.

LIST OF ABBREVIATIONS

AC - Advisory Council

CISG - UN Convention on Contracts for the International Sale of Goods

CIF - Cost Insurance Freight

CD - Compact Disk

CLOUT - Case Law on UNCITRAL Texts

E-Contracts - Electronic Contracts

EDI - Electronic Data Interchange

FOB - Free on Board

NSW - New South Wales

ROM - Read Only Memory

UK - United Kingdom

UNIDROIT - Institute International Pour L'Unification du Droit Prive (French, Translation: *International Institute for the Unification of Private Law)*

ULIS - Uniform Law for the International Sale of Goods

ULF - the Uniform Law on the Formation of Contracts for the International Sale of Goods

UN - United Nations

UNCITRAL - The United Nations Commission on International Trade Law

US - United States of America.

LIST OF CASES

1. *Cf Doulton Potteries* v *Bronotte* (1971) 1 NSWLR 591
2. *Hadley v Blaxendale* (1854) 9 Exch 341
3. *Adams* v. *Lindsell* (1818), 106 E.R. 250
4. *Stevenson Jacques & Co.* v. *McLean* (1880), 5 Q.B.D. 346
5. *Carow Towing Co.* v. *The "Ed McWilliams"* (1919), 46 D.L.R. 506 (Ex. Ct.)
6. *Malady* v. *Jenkins Steamship Co.* (1909), 18 O.L.R. 251 (Div. Ct.)
7. *Nova Scotia* v. *Weymouth Sea Products Ltd.* (1983), 149 D.L.R.(3d) 638 at 651
8. *Re Viscount Supply Co.*, [1963] 1 O.R. 640 (S.C.)
9. *Entores Ltd.* v. *Miles Far East Corp.*, [1955] 2 Q.B. 327 (C.A.)
10. *Joan Balcom Sales Inc.* v. *Poirier* (1991), 49 C.P.C.(2d) 180 (N.S. Co. Ct.)
11. *Brinkibon Ltd. v. Stahag Stahl*, [1982] 1 All E.R. 293 (HL)
12. *Corinthian Pharmaceutical Systems Inc.* v. *Lederle Laboratories* (1989) 724 F. Supp 605 (S.D. Ind.)
13. *Internationale Jute Maatschappij* v. *Marín Palomares*
14. *Geneva Pharmaceuticals Tech. Corp.* v. *Barr Laboratories, Inc.*, 789 F. Supp. 1229 (S.D.N.Y.2002)
15. *Filanto S.p.A.* v. *Chilewich Int'l Corp.*, 201 F. Supp. 2d 236 (S.D.N.Y. 1992).

AIMS AND OBJECTIVES OF THE STUDY

1. To make a study of the CISG with focus on its applicability to electronic contracts for sale of goods entered into by parties belonging to different states.
2. To analyze the rules of the CISG with respect to their suitability for application in the sphere of E-Contracts.
3. To raise questions as to the feasibility of applying the CISG to electronic contracts and to demonstrate how the CISG is suitable for application to E-Contracts.

HYPOTHESIS

The hypothesis of this paper is that the CISG is suitable for application to international contracts for sale entered into electronically and that the rules of the CISG, even though enacted in 1980 when e-commerce was still a distant prospect, its precepts are applicable international law for e-commerce nowadays.

RESEARCH METHODOLOGY

Source of Data:

The source for the completion of this research paper is doctrinal in nature; doctrinal to the extent that books and articles have been referred in great depth. For this purpose I have exhausted both library sources as well as the Internet sources such as Lexis Nexis, Westlaw, Jstor and various other websites.

Method of Writing:

The method of writing is primarily descriptive. The case law method has been used as and when required.

Mode of Citation:

A uniform mode of citation has been followed in this paper.

LIMITATIONS

The area of research in this paper is limited to the application of the CISG to electronic contracts entered into by parties belonging to different states for the sale of goods. Since the CISG is concerned only with contracts for sale of goods and that too such goods which are not bought for personal, family, or household use, this paper is also limits its scope to these parameters. Electronic contracts not concerning sale of goods and contracts which are not covered by the CISG are out the scope of this paper.

1. INTRODUCTION

A.1 GENERAL INTRODUCTION TO THE CISG

The United Nations Convention on Contracts for the International Sale of Goods (CISG)[1] is a treaty offering a uniform international sales law that, as of April 2011, has been ratified by 76 states[2] that account for a significant proportion of world trade, making it one of the most successful international uniform laws. Turkey is the most recent state to have ratified the Convention. The CISG allows exporters to avoid choice of law issues as it offers "accepted substantive rules on which contracting parties, courts, and arbitrators may rely".[3]

The drafting of the CISG began in the 1930s by European scholars, at the behest of the International Institute for the Unification of Private Law (UNIDROIT).[4] By 1935, a preliminary draft of a uniform law for international sales was issued. World War II interrupted drafting, and in 1956, twenty-one nations continued the project. Revised drafts were sent to governments in 1956 and 1963 for evaluation. Meanwhile, a draft for a uniform law of contract formation began in 1958. The 1964 Hague Convention discussed both related drafts, resulting in two Conventions: the Uniform Law for the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). Five states, mostly European, ratified these Conventions in 1972. In 1966, a General Assembly of the United Nation's Resolution desired worldwide support of such Conventions to promote the harmonization of international trade law. Thus, the United Nations Commission on

[1] United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980, S.Treaty Document Number 98-9 (1984), UN Document Number A/CONF 97/19, 1489 UNTS 3. The full text of the CISG is available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html, last accessed 2nd April, 2011

[2] The list of States that have ratified the CISG is available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html, last accessed 2nd April, 2011

[3] United States Department of Commerce, 'The U.N. Convention on Contracts for the International Sale of Goods' http://www.osec.doc.gov/ogc/occic/cisg.htm, last accessed 25 August, 2010

[4] Peter Schlechtriem, Uniform Sales Law–The UN Convention On Contracts For The International Sale Of Goods 17-20 (Manzche Verlags 1986), available at http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html (last visited April. 2, 2012).

International Trade Law (UNCITRAL) was born, holding its first session in 1968. Because UNCITRAL felt that both Conventions would not achieve worldwide acceptance due to countries' legal, economic and political differences, the Conventions were revised by fourteen States. By 1978, the updated Conventions, the ULIS and ULF, were combined into one document: the CISG. It received unanimous approval and represented the equality and mutual benefit that is an important element in promoting friendly relations among the States.

The CISG as developed by the UNCITRAL was signed in Vienna in 1980. The CISG is sometimes referred to as the *Vienna Convention.* It came into force as a multilateral treaty on 1 January 1988, after being ratified by eleven countries.[5] CISG has been regarded as a success for UNCITRAL as the Convention has since been accepted by States from "every geographical region, every stage of economic development and every major legal, social and economic system".[6] Countries that have ratified the CISG are referred to within the treaty as "Contracting States". Unless excluded by the express terms of a contract, the CISG is deemed to be incorporated into (and supplant) any otherwise applicable domestic law(s) with respect to a transaction in goods between parties from different Contracting States. Of the uniform law conventions, the CISG has been described as having "the greatest influence on the law of worldwide trans-border commerce".[7]

The CISG has been described as a great legislative achievement[8] and the "most successful international document so far" in unified international sales law[9], in part due to its flexibility in allowing Contracting States the option of taking exception to some specified articles. This flexibility was instrumental in convincing states with

[5] Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, United States of America, Yugoslavia and Zambia.

[6] John Felemegas, 'The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation' (2000) Pace Review of the Convention on Contracts for the International Sale of Goods (CISG) 115.

[7] Peter Schlechtriem, 'Requirements of Application and Sphere of Applicability of the CISG' (2005) 36 Victoria University of Wellington Law Review 781.

[8] Joseph Lookofsky, 'Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules' (1991) 39 American Journal of Comparative Law 403.

[9] Bruno Zeller, CISG and the Unification of International Trade Law (1st ed, 2007) 94.

disparate legal traditions to subscribe to an otherwise uniform code. A number of countries that have signed the CISG have made declarations and reservations as to the Treaty's scope,[10] though the vast majority - 55 out of the current 76 Contracting States - has chosen to accede to the Convention without any reservations.

[10] See list of signatories and their associated declarations and reservations at www. http://uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html, last accessed 2nd April 2011

A.2 SCOPE AND APPLICATION OF THE CISG

The CISG is a self-executing treaty[11] divided into three distinct parts: Part I explains the sphere of application and general provisions, Part II describes contract formation, and Part III provides substantive rules for contracting. The Convention grants a "buyer and seller [a] reasonable certainty as to their respective legal rules and obligations." It encompasses the international sale of commercial goods for business purposes only, not including accompanying services, consumer goods, or products procured through auction.[12] It also excludes goods comprising material parts necessary for manufacture or production, including labour services. Personal injury liability arising from goods is also excluded from the Convention. The Convention only concerns the "formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract." It does not regulate contract validity or property in goods sold. The Convention is further limited to international sales and, therefore, does not encompass domestic transactions.

Transacting parties must be from different contracting states who have adopted the CISG, in order for the convention to apply to the contract. Alternatively, the CISG may be applied when a state has domestically incorporated the rules of the CISG. As an example of the former situation, a seller of ceramic tiles from Italy contracting with a buyer from Australia would have the CISG apply to their transaction because the contract is for the international sale of goods (the Italian ceramic tiles) and both contracting states have adopted the CISG.[13] As an example of the latter situation, if a South African buyer (non-contracting state) purchased goods from an Austrian seller (contracting state), the CISG would apply because Austrian law has adopted the CISG

[11] Franco Ferrari, The Sphere Of Application Of The Vienna Sales Convention 4-5 (Kluwer Law International 1995

[12] Article 2 additionally excludes goods for personal use, family use or household goods—unless the seller was unaware of this fact before contracting, goods prohibited by law, "stocks, shares, investment securities, negotiable instruments of money," and "ships, vessels, hovercraft or aircraft and electricity."

[13] However, if parties appear to have their places of business in the same State," but one party uses an agent from an undisclosed foreign principle, the CISG would not apply.

as part of domestic law.[14] The nature of the CISG enables it to have a neutralizing effect on domestic laws, which puts both the buyer and seller from different States on equal footing, enabling transparent decisions and accountability through equal legal principles. At a minimum, the CISG provides a common language for the international business community to rely upon in negotiating and structuring transactions.

Parties, however, have a right to contract around the CISG's default rules by choosing the application of domestic law, the forum's private international law rules, or particular sections therein. Such terms may be expressly accepted or rejected as long as domestic law validity requirements are met. Parties may also opt-in to the CISG when their transaction falls outside the Convention's scope. Furthermore, parties can also refer to the CISG in their transactions by *lex mercatoria* (customs and practices governing commercial law developed through time by merchants). However, if parties want to ensure that the CISG does not apply to their transaction, an explicit opt-out clause should be inserted in the international sales contract, favouring a choice of law provision instead of or in place of the CISG.

The importance of the CISG has been established not only by the great efforts taken by the United Nations to transform three uniform sales conventions on contracts for the international sale of goods into one, but also from the sheer number of states who have ratified it. We shall now look into the scheme of the Convention.

[14] Not all domestic states agreeing to this combination have reserved to Article 95. If, for example, the South African company had contracted with the United States, the CISG would not apply because the United States reserved to its application within the private rules of international law. Article 95 reads: "[a]ny State may declare at the time of the deposit of the instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of Article 1 of this Convention."

A.3 SCHEME OF THE CONVENTION

Part I - Sphere of Application and General Provisions (Articles 1-13)

The CISG applies to contracts of sale of goods between parties whose places of business are in different States when these States are Contracting States [Article 1(1)(a)]. Given the significant number of Contracting States, this is the usual path to the CISG's applicability.

The CISG also applies if the parties are situated in different countries (which need not be Contracting States) and the conflict of law rules lead to the application of the law of a Contracting State.[15] For example, a contract between a Japanese trader and a Brazilian trader may contain a clause that arbitration will be in Sydney under Australian law[16] with the consequence that the CISG would apply. It should be noted that a number of States have declared they will not be bound by this condition.[17]

The CISG is intended to apply to commercial goods and products only. With some limited exceptions, the CISG does not apply to domestic goods, nor does it apply to auctions, ships, aircraft or intangibles and services. The position of computer software is "controversial"[18] and will depend upon various conditions and situations.[19] Importantly, parties to a contract may exclude or vary the application of the CISG.[20]

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[15] Article 1 (b).

[16] More correctly, the law of New South Wales as mandated in Sale of Goods (Vienna Convention) Act 1986 (NSW).

[17] Specifically, China, Germany, Czech Republic, Saint Vincent and the Grenadines, Singapore, Slovakia and United States of America. See http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html

[18] Peter Schlechtriem, 'Requirements of Application and Sphere of Applicability of the CISG' (2005) 36 Victoria University of Wellington Law Review 781.

[19] Frank Diedrich, 'Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG' (1996) 8 Pace International Law Review 303, 321, 322.

[20] Articles 6, 12.

Part II - Formation of the Contract (Articles 14–24)

An offer to contract must be addressed to a person, be sufficiently definite – that is, describe the goods, quantity and price – and indicate an intention for the offeror to be bound on acceptance.[21] Note that the CISG does not appear to recognise common law unilateral contracts but, subject to clear indication by the offeror, treats any proposal not addressed to a specific person as only an invitation to make an offer. Further, where there is no explicit price or procedure to implicitly determine price then the parties are assumed to have agreed upon a price based upon that "generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances".

Generally, an offer may be revoked provided the withdrawal reaches the offeree before or at the same time as the offer or before the offeree has sent an acceptance.[22] Some offers may not be revoked, for example when the offeree reasonably relied upon the offer as being irrevocable. The CISG requires a positive act to indicate acceptance; silence or inactivity are not an acceptance.

The CISG attempts to resolve the common situation where an offeree's reply to an offer accepts the original offer but attempts to change the conditions. The CISG says that any change to the original conditions is a rejection of the offer – it is a counter-offer – unless the modified terms do not materially alter the terms of the offer. Changes to price, payment, quality, quantity, delivery, liability of the parties and arbitration conditions may all materially alter the terms of the offer.

[21] Article 14.

[22] Articles 15, 16 (1).

Part III - Sale of Goods (Articles 25–88)

The CISG defines the duty of the seller, "stating the obvious"[23], as the seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract. Similarly, the duty of the buyer is to take all steps "which could reasonably be expected" to take delivery of the goods, and to pay for them.[24]

Generally, the goods must be of the quality, quantity and description required by the contract, be suitably packaged and fit for purpose. The seller is obliged to deliver goods that are not subject to claims from a third party for infringement of industrial or intellectual property rights in the State where the goods are to be sold. The buyer is obliged to promptly examine the goods and, subject to some qualifications, must advise the seller of any lack of conformity within "a reasonable time" and no later than within two years of receipt.

The CISG describes when the risk passes from the seller to the buyer[25] but it has been observed that in practice most contracts define the seller's delivery obligations quite precisely by adopting an established shipment terms[26] such as FOB and CIF.[27]

Remedies of the buyer and seller depend upon the character of a breach of the contract. If the breach is fundamental then the other party is substantially deprived of what it expected to receive under the contract. Provided that an objective test shows that the breach could not have been foreseen[28], then the contract may be avoided and the aggrieved party may claim damages. Where part performance of a contract has occurred then the performing party may recover any payment made or good

[23] Jacob Ziegel and Claude Samson 'Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods' (1981) Toronto 168-305.

[24] Article 53.

[25] Articles 66, 67, 68, 69, 70.

[26] *Supra Note* 23

[27] See International Commercial Terms (Incoterms).

[28] Article 25.

supplied[29]; this contrasts with the common law where there is generally no right to recover a good supplied unless title has been retained or damages are inadequate, only a right to claim the value of the good.[30]

If the breach is not fundamental then the contract is not avoided and remedies may be sought including claiming damages, specific performance and adjustment of price.[31] Damages that may be awarded conform to the common law rules in *Hadley v Blaxendale*[32] but it has been argued the test of foreseeability is substantially broader[33] and consequently more generous to the aggrieved party.

The CISG excuses a party from liability to a claim of damages where a failure to perform is attributable to an impediment beyond the party's, or a third party sub-contractor's control that could not have been reasonably expected. Such an extraneous event might elsewhere be referred to as force majeure, and frustration of the contract.

Where a seller has to refund the price paid then the seller must also pay interest to the buyer from the date of payment. It has been said the interest rate is based on rates current in the seller's State "...since the obligation to pay interest partakes of the seller's obligation to make restitution and not of the buyer's right to claim damages"[34], although this has been debated.[35] In a mirror of the seller's obligations, where a buyer has to return goods the buyer is accountable for any benefits received.[36]

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[29] Article 81.

[30] *Cf Doulton Potteries* v *Bronotte* (1971) 1 NSWLR 591 for example of damages as inadequate.

[31] Articles 45, 46, 47, 48, 50, 51, 52, 61, 62, 63, 65, 74, 75, 76, 77.

[32] (1854) 9 Exch 341.

[33] Jacob Ziegel and Claude Samson 'Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods' (1981) Toronto 168-305.

[34] Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat, UN Doc. A/CONF.97/5 (1979).

[35] Peter Schlechtriem, Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods (1st ed, 1986) 99

[36] Article 84 (2).

Part IV - Final Provisions (Articles 89-101)

The Part IV Articles, along with the Preamble, are sometime characterized as being addressed "primarily to States"[37], not to business people attempting to use the Convention for international trade. They may, however, have a significant impact upon the CISG's practical applicability,[38] thus requiring careful scrutiny when determining each particular case.

[37] Peter Winship, 'Commentary on Professor Kastely's Rhetorical Analysis' (1988) 8 Northwestern Journal of Law & Business 623, 628.

[38] Ulrich G. Schroeter, 'Backbone or Backyard of the Convention? The CISG's Final Provisions', in: C.B. Andersen & U.G. Schroeter (eds.), Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday, London: Wildy, Simmonds & Hill (2008), 425 at 426.

B.1 THE BASICS OF ELECTRONIC CONTRACTS

Electronic Contract (also referred to as E-contracts) is any kind of contract formed in the course of e-commerce by the interaction of two or more individuals using electronic means, such as e-mail, the interaction of an individual with an electronic agent, such as a computer program, or the interaction of at least two electronic agents that are programmed to recognize the existence of a contract. Traditional contract principles and remedies also apply to e-contracts.

Generally the basic forms of "E-Contracts" that a person comes across are:

- The Click-wrap or Web-wrap Agreements
- The Shrink-wrap Agreements
- The Electronic Data Interchange or EDI.

Click-wrap agreements are those whereby a party after going through the terms and conditions provided in the website or program has to typically indicate his assent to the same, by way of clicking on an "I Agree" icon or decline the same by clicking "I Disagree". These types of contracts are extensively used on the Internet, whether it be granting of a permission to access a site or downloading of software or selling something by way of a website.

Shrink-wrap agreements have derived their name from the "shrink-wrap" packaging that generally contains the CD Rom of software. The terms and conditions of accessing the particular software are printed on the shrink-wrap cover of the CD and the purchaser after going through the same tears the cover to access the CD ROM. Sometimes additional terms are also imposed in such licenses which appear on the screen only when the CD is loaded to the computer .The user always has the option of returning the software if the new terms are not to his liking for a full refund.[39]

[39] See David G. Post & Dawn C, Nunziato, Shrink-wrap Licenses and the licensing on the Internet, in Technology Licensing and Litigation (1997) at 519

Electronic Data Interchange or EDI is the structured transmission of data between organizations by electronic means. It is used to transfer electronic documents or business data from one computer system to another computer system, i.e. from one trading partner to another trading partner without human intervention.

In 1996, the National Institute of Standards and Technology of the United States of America defined electronic data interchange as

> *"..The computer-to-computer interchanges of strictly formatted messages that represent documents other than monetary instruments. EDI implies a sequence of messages between two parties, either of whom may serve as originator or recipient. The formatted data representing the documents may be transmitted from originator to recipient via telecommunications or physically transported on electronic storage media. It distinguishes mere electronic communication or data exchange, specifying that in EDI, the usual processing of received messages is by computer only. Human intervention in the processing of a received message is typically intended only for error conditions, for quality review, and for special situations. For example, the transmission of binary or textual data is not EDI as defined here unless the data are treated as one or more d*
>
> *ata elements of an EDI message and are not normally intended for human interpretation as part of online data processing."*[40]

In other words, Electronic Contracts formed by way of EDI are contracts used in trade transactions which enables the transfer of data from one computer to another in such a way that each transaction in the trading cycle (for example, commencing from the receipt of an order from an overseas buyer, through the preparation and lodgement of export and other official documents, leading eventually to the shipment of the goods) can be processed with virtually no paperwork. Here unlike the other two there is

[40] Kantor, Michael; James H. Burrows, "Electronic Data Interchange (EDI)". National Institute of Standards and Technology; (1996), available at http://www.itl.nist.gov/fipspubs/fip161-2.htm, last accessed 24 March, 2011

exchange of information and completion of contracts between two computers and not an individual and a computer.

B.2 OFFER AND ACCEPTANCE IN ELECTRONIC CONTRACTS

Generally, a contract is formed when acceptance is communicated to the offeree. In face-to-face negotiation, this rule provided few problems. However, the development of methods of communicating over distances, and the associated reliability problems, the case often arises when the offeree has dispatched an acceptance which either is never received by the offeror or arrives after the expiry of the offer. The issue to be resolved in each case is whether the acceptance is communicated to the offeree when it was sent or when it arrives. Case law tends to distinguish between delayed forms of communication, such as mail and telegrams, and virtually instantaneous forms of communication, such as the telephone, telex and fax machine. The courts have yet to consider the electronic message.

Early case law saw the development of the "mailbox rule" for ordinary mail, wherein acceptance is deemed to be communicated to the offeree when it enters the postal system.[41] This rule has been extended to telegrams[42] and even couriers.[43] The offeror, however, is free to put conditions on the communication of the acceptance (e.g., offer must be received; must be by telephone).

In contrast to the "mailbox rule", acceptances communicated using instantaneous or virtually instantaneous means, such as the telephone[44], telex[45], and fax[46], are formed when the offeror receives the acceptance. These means are analogous to face-to-face

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[41] *Adams* v. *Lindsell* (1818), 106 E.R. 250 is usually credited with the development of the mailbox rule.

[42] *Stevenson Jacques & Co.* v. *McLean* (1880), 5 Q.B.D. 346; *Carow Towing Co.* v. *The "Ed McWilliams"* (1919), 46 D.L.R. 506 (Ex. Ct.); *Malady* v. *Jenkins Steamship Co.* (1909), 18 O.L.R. 251 (Div. Ct.)

[43] *Nova Scotia* v. *Weymouth Sea Products Ltd.* (1983), 149 D.L.R.(3d) 638 at 651;

[44] *Re Viscount Supply Co.*, [1963] 1 O.R. 640 (S.C.)

[45] *Entores Ltd.* v. *Miles Far East Corp.*, [1955] 2 Q.B. 327 (C.A.)

[46] *Joan Balcom Sales Inc.* v. *Poirier* (1991), 49 C.P.C.(2d) 180 (N.S. Co. Ct.)

communications; presumably both parties will be aware of any break in the connection and be able to take corrective action.[47]

There is little case law on acceptance by electronic message. On the one hand, some cases suggest the general rule is that the acceptance must be received by the offeror and that the mailbox rule is only a narrow exception.[48] On the other hand, receipt of electronic messages may not be instantaneous and since the mailbox rule has been extended to telegrams, it could be argued that it should be extended to electronic mail. Although some electronic message systems, such as private EDI networks, provide almost immediate transmission, anecdotal evidence suggests that Internet e-mail is inconsistent and could take minutes, or at times even hours to reach its destination.

Another justification for a mailbox-like rule for electronic mail is the offeror's role in delivery. While telexes and faxes are received at the recipient's location almost immediately after they are sent, some electronic mail systems use mail servers operated by third parties that are not located at the recipient's location. Even after receipt by the mail server, the recipient has to take steps to connect to their 'mailbox' on the mail server before the communication is complete. Since the offeror is partially responsible for ensuring delivery, it may not be appropriate to allocate the entire risk in the delivery of electronic mail to the offeree.

It is also quite possible that no simple rule will govern electronic messages. In a recent case involving telex communication, England's House of Lords seemed to be backing away from the application of a general rule:

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[47] Denning LJ in *Entores Ltd* v *Miles Far East Corpn* [1955] 2 QB 327

[48] Birkett L.J. in *Entores*, *Ibid*;

> *"The message may not reach, or be intended to reach, the designated recipient immediately: messages may be sent out of office hours, or at night, with the intention, or on the assumption, that they will be read at a later time. There may be some error or default at the recipient's end which prevents receipt at the time contemplated and believed in by the sender. The message may have been sent and/or received through machines operated by third persons. And many other variations may occur. No universal rule can cover all such cases; they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie."*[49]

As with the contract formality issue, EDI trading partners try to resolve the communication of acceptance rule in their trading partner agreement. The agreement may state that no document is legally binding until received, thereby eliminating the possibility of the "mailbox rule" being applied. The sender, therefore, bears the risk of transmission failure. However, this risk is reduced by provisions requiring recipients to promptly acknowledge receipt of any message as well as notify the sender of any communication it reasonably suspects is incomplete, inaccurate, corrupted in transmission, or not intended for him.

While much of the contract formation discussion revolves around the use of computer technology as a means of communication by contracting parties, a far more difficult issue is beginning to emerge with the automation of the contracting process itself.[50] Traditional contract doctrine centres on the requirement of a 'meeting of the minds'. The involvement of two or more people, negotiating either face-to-face or through some means of communication is an underlying assumption. However, modern technology is evolving with a goal of eliminating human involvement in transactions.

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[49] *Brinkibon Ltd. v. Stahag Stahl*, [1982] 1 All E.R. 293 (HL) at 296

[50] For a more thorough discussion see, Tom Allen, Robin Widdison, "Can Computers Make Contracts?", (1996) 9 Harv. J.L. & Tech. 25; Raymond T. Nimmer, Patricia Krauthouse, "Electronic Commerce: New Paradigms in Information Law" (1995) 31 Idaho L. Rev. 937;

How traditional contract doctrine will accommodate situations where the only 'minds' that meet are programmed computer systems is uncertain.

Interactive EDI is already beginning to emerge in business transactions. The following describes a possible interaction:

...a sending computer, on its own initiative, will make an offer to a recipient computer for the purchase of goods based on the sender's inventory needs. The recipient computer will accept the offer if the recipient has the quantity of product in stock. This two-way conversation between computers will further culminate in negotiations. One computer will make an offer to buy 100 widgets, and the other will respond with a counteroffer of 50 widgets due to a shortage in stock. The computer that made the original offer will thereafter decide on its own whether to accept the 50 widgets or reject the counteroffer and search for another vendor.[51]

In a fully automated system, human decisions are involved in creating the system and making it accessible; humans assent to the system, not specific transactions. Traditional contract doctrine looks at the intention of the parties surrounding the offer and acceptance of the specific agreement in dispute. As such, it is not clear whether people can be bound by offers or acceptances made by their computer on their behalf. They may have had no knowledge of, let alone intention to enter, a given transaction.

The main issue is one of attribution -- when do the actions of an agent become attributed to the principal. While agency law plays a role in attribution when using human agents, human judgements, such as voluntary assent and reliance, are major themes in this area of law. Therefore, the existing law of agency may not be very helpful in determining attribution with automated agents.

With automated transactions, another challenge for the courts is determining where the communication system ends and the legal agent begins. The challenge is separating responses that are part of the functional communication process, such as

[51] Quoted in Amy Cortese, "Call It E-Money Management", Business Week, June 12, 1995 at 72.

those acknowledging receipt of a message, from responses that are part of the contract formation process, such as an acceptance of an offer.

In a recent U.S. case, the court dealt with an automated order taking system. In holding that the order tracking was merely a functional acknowledgement of the order, the court stated "Such an automated, ministerial act cannot constitute an acceptance."[52] However, one can envision a more sophisticated system that verifies the identity of the orderer, checks the inventory level, allocates a portion of the inventory to fulfilling the order, and then issues the order tracking number. This is no less automated or ministerial, yet it may be in both parties' interests to consider it a legal acceptance.

In addressing the attribution issue in electronic contracting, the proposal focuses not on humans who make decisions on specific transactions, but on how risk should be structured in an automated environment. The object is to create default rules for attributing a message to a party. The party described in the message as the originator will be bound by the terms of the message if the message was authenticated using a procedure previously agreed to by the parties. This provision gives primacy to authentication procedures in trading partner agreements. In addition, a fault provision attributes the message to a party if the relationship between the wrongdoer and that party enabled the wrongdoer to gain access to and use the authenticating method.

[52] *Corinthian Pharmaceutical Systems Inc.* v. *Lederle Laboratories* (1989) 724 F. Supp 605 (S.D. Ind.)

2. ELECTRONIC CONTRACTS UNDER THE CISG

When Eastman Kodak accidentally placed a camera for sale on its United Kingdom (UK) website for £100 instead of £329, word spread within hours.[53] *Customers placed thousands of orders before the company could correct the error at great expense to Kodak. After informing customers of its mistake and stating that it would not fill the orders, Kodak faced a choice: honour the orders or cave to a lawsuit.*[54] *While Kodak tried to argue that the orders were simply bids to accept its offer for sale, the company overlooked the crucial fact that its website accepted and confirmed the orders forming an online contract. Kodak quickly succumbed to customer outrage and honoured the lower prices a data entry error that cost them US$2 million. When asked about the mishap and whether customers could have won their lawsuit, Kodak simply remarked:* ***"Internet trading is a grey area".***

Such complex sales situations on paper are the genesis behind the United Nations Convention on Contracts for the International Sale of Goods (CISG), the uniform sales law for two-thirds of nations participating in world trade, when most international transactions were completed without difficulty. The CISG is the uniform international law for the most basic transaction of international commerce - a contract. Today's information economy challenges traditional notions of both time and place because improved communication technology enables business to flow freely across borders, rising above spatial boundaries, facilitating an instantaneous ability to form paperless contracts.[55]

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[53] Jean Eaglesham, A Troubled Deal on the Internet, Financial Times London, Feb. 11, 2002

[54] Kodak argued that .all orders placed on our website legally constitute offers to purchase from us, just like taking goods to the till in a retail store. However, an alternative view exists. These transactions are offers to sell. A customer accepts the offer in the seller's preferred method of acceptance: placing the order.

[55] Carl Pacini et al., To Agree or Not to Agree: Legal Issues in Online Contracting, Bus. Horizons, Jan. 1, 2002, at 43

CHAPTER 2 – ELECTRONIC CONTRACTS UNDER THE CISG

The CISG's inception occurred over eighty years ago, and its finalized form was ratified over thirty years ago – at least a decade before electronic contracts became a practicable business solution.[56] The CISG deals with contracts that generally result from the exchange of concurrent declarations of intention by two or more persons. The process of contract formation is a process of communication. A simple definition in social sciences is that "communication is the effective transmission of a message."

At first glance, "effective" seems redundant – isn't a message only a message if it has been effected, i.e. transmitted? However, the fact that the CISG itself contains ten articles only dealing with contract formation indicates that the effective transmission of a message was not the easiest subject to cast into a set of rules, even at the time of the drafting of the Convention in 1980. Now, however, thirty years later, in times of global business and economy, communication has increased in complexity and almost gained the speed of light.

Today, the delivery of signed documents in an envelope by "snail mail" co-exists with the electronic transmission of electronic files containing not only typed letters, but also what is generally referred to as "multimedia messages." The law, including the CISG, has to adapt to this situation, and, in fact, it is able to do so. In Article 20, the Convention already contained a differentiation between instantaneous and non-instantaneous means of communication, with phone and telex being the means that make the message available on the addressee's side immediately, explicitly mentioned as instantaneous forms of communication. With e-mail and telefax[57] not counted among oral communication and matching telex in speed, this gives a first indication as to how electronic communication can fit into the system of the CISG.

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[56]Pace Law School Institute of International Commercial Law, Guide to Article 13: Comparison with Principles of European Contract Law (2002), at http://www.cisg.law.pace.edu/cisg/text/peclcomp13.html (last visited Jan. 31, 2004).

[57] *Internationale Jute Maatschappij* v. *Marín Palomares;* Available at http://cisgw3.law.pace.edu/cases/000128s4.html, last accessed 1st April, 2011

Opinion No. 1 on Electronic Communications under the CISG,[58] brought together by the International Sales Advisory Council (CISG-AC) composed of prominent experts, shows how the Convention's provisions on communication are valid for electronic communications as well as traditional communications. It should be noted that, in the near future, the United Nations Convention on the Use of Electronic Communications in International Contracts can be expected to be approved by the General Assembly of the United Nations and will supplement the CISG (and other conventions) with regard to electronic communications.

[58] CISG-AC Opinion no 1, Electronic Communications under CISG, 15 August 2003. Rapporteur: Professor Christina Ramberg, Gothenburg, Sweden; available at http://www.cisg.law.pace.edu/cisg/CISG-AC-op1.html, last accessed 1st April, 2011

A.1 THE OFFER AND ACCEPTANCE OF THE OFFER UNDER CISG

The basic concept of effective communication in contract formation is the concept of offer and acceptance. The CISG describes an offer as a sufficiently definite proposal to specified addressees, at least implicitly specifying the goods and the contract price.[59] With regard to an acceptance, this means that an offer can only be accepted by someone who it was specifically addressed to.[60]

As to the specific terms of an offer, Article 14 of the CISG calls for at least the goods and the price to be contracted for to be specified. In addition, most contracts contain many more terms and side obligations. Strictly speaking, in many cases the absence of any additional terms may constitute sufficient grounds for the addressee to have to doubt the actual will of the promissory to be bound by the proposal.[61]

Following the receipt of an offer, for a contract to be concluded, is the acceptance of the offer. Under the CISG, an offer can be accepted explicitly by statement, implicitly by conduct[62] or even by silence,[63] although not by it and must comply exactly with the offer.[64] The ideal case is a clearly worded offer which is unambiguously accepted in its entirety. However, the acceptance of an offer can be accompanied by more or less obvious additional terms or can be motivated by a different understanding of offered terms. This can lead to conflicting declarations in which case the legal consequences have to be determined.

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[59] CISG art. 14(1).

[60] According to Article 14(2) CISG, a general proposal not aimed at specific persons can only be considered an offer, if this is clearly indicated by the person making the proposal.

[61] Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat, Official Records, at 20, U.N. Doc. A/CONF.97/5 (1979)

[62] *Geneva Pharmaceuticals Tech. Corp.* v. *Barr Laboratories, Inc.*, 789 F. Supp. 1229 (S.D.N.Y.2002).

[63] *Filanto S.p.A.* v. *Chilewich Int'l Corp.*, 201 F. Supp. 2d 236 (S.D.N.Y. 1992), CLOUT Case No. 23 [14 Apr. 1992]

[64] Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat, Official Records, at 24, U.N. Doc. A/CONF.97/5 (1979)

The CISG itself contains the necessary provisions for solving such conflicts. Article 19(1) of the CISG stipulates that, generally, a declaration of acceptance containing terms in conflict with the offer is to be understood as a rejection of the offer and, at the same time, as a new offer in its own right. However, Article 19(2) of the CISG limits the general provision of Article 19(1) by stipulating that non-material changes or additions do not prevent the declaration's classification as an acceptance. To prevent such changes from becoming part of the contract, the initial offeror has to immediately object to those alterations either orally or by "dispatching a notice." According to the CISG-AC Opinion No. 1, the term "oral" includes electronically transmitted sound and the term "notice" includes electronic communications in general. Article 19(3) of the CISG then gives a non-exhaustive list of terms which, in any case, have to be seen as material alterations. Those include, for example, price, payment, quality and quantity of the goods. Such changes lead to the acceptance constituting a new offer.

A.2 THE CONCEPT OF A MESSAGE TO "REACH" A PERSON

Under Article 15 of the CISG, an offer becomes effective when it "reaches" the offeree and can be withdrawn only if the withdrawal "reaches" the offeree before or simultaneously with the offer. Without further explanation, determining the meaning of "reaching" a person can be a difficult undertaking. However, for the classic forms of communications, the CISG contains a provision addressing exactly this problem. Article 24 of the CISG defines a message to have "reached" the addressee if it has been made orally to him or delivered by any other means to him personally to his place of business or to his mailing address. As today's means of electronic communications did not exist at the time of the drafting of the CISG, the CISG does not contain a definition for the "reaching" requirement of e-mails and other electronic communications. The CISG-AC Opinion No. 1 clearly states that the "place" of an e-mail has to be understood in a functional rather than a physical way. Therefore, the message could be on any server in the world and still have reached the addressee's place of business as long as he would have been able to retrieve it. Consequently, for an e-mail to "reach" the addressee, it is enough for the e-mail to enter the addressee's server. It is not important if the addressee has actually read it, or maybe even could not read it due to technical problems, as it is within the addressee's "sphere of influence" to provide for adequate means to ensure that his internal communication functions satisfactorily.[65]

However, according to the CISG-AC's opinion, the addressee of an electronic message has to have somehow consented to receiving such communications and, more specifically, to receiving them in that format and to that address. Explicit consent is not necessary and contract interpretation,[66] as well as practices and usages,[67] may help in determining the existence of such consent.

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[65] CISG-AC Opinion no 1; available at http://www.cisg.law.pace.edu/cisg/CISG-AC-op1.html, last accessed 9th April, 2011

[66] CISG art. 8

A.3 THE CONCEPT OF "WRITING" OF A CONTRACT UNDER CISG

Generally, the CISG, in Article 11, grants complete freedom of forms. For the conclusion of a contract, i.e. offer and acceptance, it contains no formal requirements. However, several countries have declared reservations to this provision and the CISG mentions the concept several times.[68] Therefore, it is necessary to understand the concept, especially in regard to electronic communications.

With time, the CISG has remained unchanged, including one remarkably important yet surprisingly overlooked article that defines a contractual writing: Article 13.

Article 13 describes an international sales contract writing in the following manner: "[f]or the purposes of this Convention 'writing' includes telegram and telex." Accordingly, the term writing deems telegram and telex as acceptable contracting methods, but remains silent on computer-based contracts, such as electronic data interchange (EDI), the Internet, click-wrap and shrink-wrap agreements, and e-mail. As a result, the CISG, the seminal convention governing international sales, contains a vital gap by remaining silent on electronic or computer-based contracts in international sales transactions. This gap questions legitimacy of twenty-first century commercial contracting methods that international commercial parties bound by this Convention currently rely on to facilitate their transactions.

At the time of its drafting, the Convention's notion of written communication was extended to cover the fastest means of document transmission then available: telegram and telex. No telefax was mentioned, and, of course, no e-mail. As has been briefly mentioned, e-mail and telefax, being means of instantaneous communication, could be compared to telex in this regard.

Opinion No. 1 now extends the notion of "writing" as follows: "The term 'writing' also includes any electronic communication retrievable in perceivable form." In its

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[67] CISG art. 9

[68] CISG arts. 11, 12, 13, 21, 29, 96.

comment to Article 13, the Advisory Council says that the prerequisite of "writing" is fulfilled as long as the electronic communication is able to fulfill the same function as a paper message, i.e., that it can be saved (retrieved) and understood (perceived).

B. ELECTRONIC CONTRACTS UNDER ARTICLES OF THE CISG

This paper shall now examine whether various Articles of the CIGS can be applied to Electronic Contracts by looking into Article's origination, placement, and interpretation in light of modern business practices. The paper argues that although the CISG does not explicitly recognize electronic contracting methods in its definition of writing, they are acceptable by virtue of the convention's intent, purpose, and support from its articles.

Article 13 states of the CISG states: "For the purposes of this Convention 'writing' includes telegram and telex." Article 13 was written much prior to when computer-based contracting became en vogue. To understand how Article 13 functions within the CISG, this part of the paper uncovers Article 13's drafting and legislative history to fully define terms and usage and to view its purpose and connection with other CISG articles.

Though Article 13 defines *writing*, it does not interpret declarations or statements made by transacting parties, either expressly or implicitly.[69] In fact, a contract does not have to be "concluded or evidenced by writing" at all – the CISG has no form requirements.[70] Contract writings under the CISG may be proven by "any means, including witnesses."[71]

Form requirements were purposely excluded from the CISG to give parties greater flexibility in contracting with each other and to account for oral agreements and modern means of communication.[72] This also avoids conflict with States' domestic form requirements, which are often stricter.

[69] Article 8 of the CISG

[70] Article 11 of the CISG

[71] *Id.*

[72] Peter Schlechtriem, Uniform Sales Law–The UN Convention On Contracts For The International Sale Of Goods 17-20 (Manzche Verlags 1986), available at http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html (last visited April. 2, 2011).

If the CISG has no form requirements, then why does Article 13 exist at all? Article 13 was added to act as a supplementary definition to two other articles on acceptance: Article 21(2) "letter or other writing containing a late acceptance", and Article 29(2) "a contract in writing which contains a provision requiring any modification or termination by agreement to be in writing...." Article 13's purpose was to emphasize that telex and telegram are acceptable methods of contract modification,[73] even though the CISG does not have form requirements. Article 13 was included to ensure that telex and telegram are media that will always satisfy a writing requirement because they are explicitly mentioned. Telex and telegram were singled out at the time of drafting (late 1970s) as suitable methods to facilitate communication speed. Contract modifications often necessitate quick decisions; telex and telegram were two newly available methods to do so.

Article 13 also links to the proper acceptance of an offer, as described in Article 20.[74] Here, Article 13's mention of telex and telegram make two salient points in Article 20. First, a telegram equates to a letter to convey that the period of time for acceptance begins from the moment the telegram is handed in for dispatch, the letter sent, or if no date is listed, the date on the envelope. Second, telex compares to the telephone or "other means of instantaneous communication," which fixes the acceptance period starting from the time the offer reaches the offeree. Article 13's specific inclusion of these two writing media – telex and telegram – is thus complemented by Article 20, which expounds on assent methods to accommodate new forms of communication.

Because the CISG specifically excludes mention of electronic contracting, a question is left unanswered: are electronic contracts valid in international commercial sales? If the CISG is outdated, States would violate this treaty by forming electronic contracts

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[73] Ulrich G. Schroeter, Interpretation of "Writing": Comparison between provisions of CISG (Article 13) and counterpart provisions of the Principles of European Contract Law (Pace Law School Institute of International Commercial Law Jul. 2002), at http://www.cisg.law.pace.edu/cisg/text/peclcomp13.html#er (last accessed April. 3, 2011).

[74] Article 20(1) states: A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

via e-mail, EDI, or the Internet. This part of the paper thus evaluates electronic contracting under Article 13 to reveal that it is an organically acceptable method of international commercial contractual agreement, uniquely worded by the drafters to contemplate future commercial communications improvements. It also explores other CISG articles to establish electronic contracting acceptability.

1. Application of Article 13 Electronic Contracts:

One obvious instance of a provision that was outdated from the moment the CISG came in to force is Article 13. It mentions the telex - nobody uses a telex anymore - but it doesn't mention the fax or other recently developed means of communication.

Article 13, indeed, fails to reflect important features of modern day business practices. However, this does not mean that Article 13 and the entire CISG is a statutory piece of legislation that has largely petrified the law. Consequently, this section examines the intent and purpose of the CISG to demonstrate that it naturally extends its boundaries for a *writing* to include issues not conceived by the drafters.

Article 13's affirmation of electronic contracting is also supported by other Convention articles. The articles' connections magnify the drafters' original intent to promote growing international trade, encourage active contracting, and harmoniously co-exist with states' domestic laws.

As noted earlier, Article 11, defining form, does not impose any official *writing* requirements, which reinforces Article 13's flexibility. This means that even oral contracts in person or via telephone are valid under the CISG. The lack of writing requirements creates benefits within the CISG. For example, it facilitates confidence in oral agreements, such as telephone sales orders which are evidenced by a purchase order number. Facsimile and telex status, widespread commercial methods of contracting or modification, also need not be questioned. Lastly, writing requirements often interfere with the "necessary speed of commercial transactions."[75] Therefore, excluding formal writing requirements facilitates international trade - the very purpose of the CISG.

[75] Alejandro M. Garro, Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods, 23 INT.L LAW. 443, 448 (1989), available at http://www.cisg.law.pace.edu/cisg/text/garro11,12.html (last visited Mar. 26, 2011).

The term *writing*, however, is not intended to fix the term's outer limits. Modern business communication and contracting methods include a multitude of electronic media: e-mail, EDI, and the Internet, which are not rooted in paper form. However, they are the ideal contracting tools because they enable distant parties to collaborate, negotiate and communicate more easily, reducing the time and effort involved. It could be argued, therefore, that by virtue of the outer limits interpretation, electronic communication would not pose a more serious problem to the CISG than either telex or telegram. Although the medium for the contract is changing, the business principles behind the transaction are not. Yet electronic contracts become questionable because they do not exist in a formal paper-based medium known to traditional contracts. The key concern with new electronic contract forms is a readable record - whether parties have the ability to create or retain a copy of the contract. However, these concerns are resolvable because agreements formed by e-mail, EDI or over the Internet may be stored and printed as evidence, if required. This makes them as enforceable as other agreements.

If the drafters included telex and telegram to account for the often quick decision needed to modify a contract, then including rapid methods of initial agreement are consistent with the drafters' intent.

EDI, the computer-to-computer automatic transmission of standard forms, falls within Article 13's scope because contracts are initially required to develop the technical connections necessary to facilitate EDI. Parties agree beforehand on the types of documents and technical standards they will send to each other, enabling the automatic exchange of information. These prior arrangements are evidence of parties' intent to contract.[76] The "store and forward" EDI function, which collects messages from the sender and sends them to the mailbox of the recipient, allows for readability and printing, if desired.

[76] Ulrich G. Schroeter, Interpretation of "Writing": Comparison between provisions of CISG (Article 13) and counterpart provisions of the Principles of European Contract Law (Pace Law School Institute of International Commercial Law Jul. 2002), at http://www.cisg.law.pace.edu/cisg/text/peclcomp13.html#er

E-mail functions in a comparable manner to fax because e-mail can result in a printable record. Although messages and attachments, such as contracts, are sent between recipients electronically, messages are stored in the systems of both the sender and recipient. These messages are easily accessed and printed. Therefore, e-mail fulfils the Article 13 standard for writing as a standard format and for Article 21(2) and 29(2) modifications. Signature issues are irrelevant because form is not required under the CISG. If parties choose to require a signature, a signature line or other mark may be included to satisfy this requirement.

2. Article 20(1):

Article 20's provision for fixed acceptance periods also specifies how telegrams, letters, telexes, telephones or other means of instantaneous communication are handled. The acceptance period for telegrams and letters begins at the point when it is handed in to dispatch, or from the date shown on the letter or envelope, depending on which is available. An acceptance via a phone call, telex, or other instantaneous measure begins when the offer reaches the offeree. The important distinction drawn from Article 20 supporting Article 13 is the combination of media in each specific fixed acceptance period. Telegrams are included with letters as non-instantaneous means of communication, whereas telex, phone calls, and other means are instantaneous. Because e-mail, EDI, and the Internet provide instantaneous means of communication, their acceptance periods are also fixed when the communication reaches the recipient under Article 20. If these measures satisfy Article 20 criteria precisely in the same manner as the cited methods, then they should be viable options for creating a contract under Articles 11 and 13.

3. Article 12 and 96:

Articles 12 and 96 also support a liberal interpretation of Article 13. Combined, they permit a State to exclude Article 11, which stipulates freedom of contract form, by substituting its own domestic laws on writing.[77] Article 96 stipulates that States reserve the option of declaring that Article 11's lack of freedom of form does not apply where any party has his place of business in that State. States invoking this reservation could dictate writing requirements, which must be agreed upon by both contracting parties, though States need not have reserved in order to impose a writing requirement. However, Article 6 allows for variance of CISG provisions, as long as they do not act contrary to the intent of the treaty. To this end, parties may choose to impose an electronic contracting requirement just as easily as a paper requirement. One of the key reasons Article 11 allows freedom of form is not to bias modification methods in favour of one party.[78]

[77] States may exclude the Convention altogether if they contract for this upfront and if the parties domestic sales law is the .same or closely related.

[78] See Pace Law School Institute of International Commercial Law, at http://www.cisg.law.pace.edu (last visited Mar. 29, 2011). The Pace Law School website is the foremost Internet authority on CISG. It is the first Website used as a source in a US [sic] international commercial law judgment.

Camilla Baasch Andersen, Furthering the Uniform Application of the CISG: Sources of Law on the Internet, 10 PACE INT.L L. REV. 403, 407 (1998); see also UNILEX, Contracting States, at http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13351&x=1 (last visited Mar. 26, 2011).

4. Article 7:

The observance of good faith in international trade and gap-filling requirement embodied by Article 7 is perhaps the most compelling support of Article 13's natural extension to include electronic contracting methods within its definition of writing. The CISG's principles are expected to endure and to embrace the gamut of transactions and conditions that will arise in a diverse and developing international economy. Because the CISG was created to facilitate commerce across a variety of political, legal and socio-economic systems, thus requiring a different level of detail than domestic legislation, frequent changes by legislative adjustment are unrealistic. Article 7 recognizes that uniform international law is difficult to achieve, must be interpreted with sensitive regard for its special character and purpose, and is meant to adapt and grow in light of new circumstances.[79]

Article 7(1) asserts that the Convention should be interpreted to promote uniformity and the observance of good faith in international trade. Good faith applied in the CISG is not a general requirement but an interpretation principle that holds a reasonableness standard to those acceptable in trade. Article 9 advances this standard by establishing that parties give notice regarding trade customs or usages widely known in international trade so they can apply to contracts and their formation. International business customs and usages are always evolving; therefore, the terrain to which the CISG is applied will change, along with CISG interpretations. Electronic commerce is transforming how international trade participants (including governments) conduct business; thus, electronic contracting is an international business custom. It does not alter the substance of business contracts so much as it alters the process of

[79] John O. Honnold, Uniform Law For International Sales Under The 1980 United Nations Convention, viii (3d ed. 1999). John O. Honnold is the Schnader Professor of Commercial Law Emeritus at the University of Pennsylvania, Secretary, UNCITRAL, and Chief, U.N. International Trade Law Branch, 1969-1974, a member of the Convention committee and a drafter of the CISG. This tongue-and-cheek comment alludes to the complexity created by computer-based contracts because they are paperless and virtually instant.

agreement.[80] Therefore, a narrow construction of the CISG would make it inapplicable to grounds it once covered and affect its future applicability and longevity.

Article 13 of the Vienna Convention[81] also lends support to an expansive interpretation of writing in Article 13. It proclaims that a treaty is supposed to be interpreted within the ordinary meaning of its own terms in their context and in the light of its object and purpose. A Convention that creates obligations between States for contracting in international sales is naturally subject to its purview.

The necessary complement to the good faith inclusion is the gap-filling measure provided for in Article 7(2), which governs matters not expressly settled in the CISG. Such matters must be developed from the general principles of the Convention, or by virtue of the rules of private international law if general principles are absent. Thus, matters governed by the Convention, such as formation or writings, turn to the Convention itself to provide meaning and solutions or look to private international law to resolve discrepancies.

Combined, the two paragraphs of Article 7 convey that general CISG principles should be applied to new situations, as it would have been difficult and extraneous to the purpose of a uniform code to anticipate every detailed scenario. Article 13's *writing* definition would, therefore, naturally include electronic forms of contracting because to do so is consistent with the purpose of the Convention and falls neatly within the gap-filling provision of Article 7. Furthermore, Article 13 lies within Part II (General Provisions) of the CISG, which specifically lends itself to a broader interpretation.

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[80] Donnie L. Kidd, Jr. & William H. Daughtrey, Jr., Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions, 26 RUTGERS COMPUTER & TECH. L.J. 215, 217 (2000)

[81] Vienna Convention on the Law of Treaties, 1969

5. Shrink-Wrap and Click-Wrap Agreements:

Internet-based agreements, such as those executed via click-wrap, are also valid under Article 13. Click-wrap agreements enable a party to interact with the document by pushing a button to affirm the contract of sale. Parties have similar capabilities for printing out and recording a copy of the click-wrap document. Parties who agree to web-based sales contracts in a commercial context almost certainly have pre-arranged terms of the transaction, similar to EDI, and have established this method as a custom.

Shrink-wrap agreements are a form of electronic contracting which could pose a challenge to automatic inclusion under Article 13. Shrink-wrap agreements are affirmed by silence or inaction because the user does not have to take any active measure to demonstrate acceptance.[82] The CISG expressly prohibits acceptance by silence or inactivity, per Article 18.[83] However, a solution to this problem exists within the CISG. If the Buyer and Seller agree to transact business this way through a shrink-wrap agreement, their respective intent to contract is established. Since the Buyer needs to give his or her acceptance to this method of contracting, he or she takes an active part in assenting to the offer. Therefore, the exclusion of agreements by silence or inaction would not apply.

In summary, Article 13's articulation of two now outdated writing media does not result in the exclusion of electronic contracting. Article 13's purpose and scope, supported by other articles, and the Convention's intent to expand global trade through uniform contracting principles reveal that these new methods are organically acceptable. That the Convention has yet to be updated to reflect electronic forms of contracting is a testament to the uniformity and flexibility of the Convention to smoothly adapt to novel circumstances in changing times.

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[82] Marcus G. Larson, Comment, Applying Uniform Sales Law to International Software Transactions: The Use of the CISG, Its Shortcomings, and a Comparative Look at How the Proposed UCC Article 2B Would Remedy Them, 5 TUL. J. INT.L & COMP. L. 445, 466 (1997).

[83] Silence or inactivity does not in itself amount to acceptance.

C. MAKING THE CISG AND ARTICLE 13 SUBJECT TO DOMESTIC LEGISLATION

Unless the CISG is the domestic law of a State, domestic rules are generally not evaluated in a CISG dispute. Recall, the purpose of the CISG is to provide a neutral choice of law for different contracting States. However, they may be relied upon for contract *writing*, under Article 11, which allows States to require domestic *writing* form.[84] This is accomplished by Article 12 and 96 reservations, which allow the writing requirement to apply to contract formation and modification (Article 29). Therefore, parties who are subject to the CISG could require electronic contracts, paper contracts, or remain silent on the issue. In this case, all methods would be acceptable. For example, a U.S. seller could require a German buyer to conform to the requirements of U.S. law, which includes electronic contracting as an acceptable writing. Here, domestic laws favour a liberal interpretation of Article 13 because U.S. legislation gives equal weight to electronic contracts as paper contracts.[85] Each State, however, has its own domestic contract laws. Therefore parties must specify the choice of law when engaging in international sales. If the CISG is chosen, as is common to avoid a battle of the forms, electronic contracts are acceptable contract writings. The complexity of domestic law underlies the purpose of the CISG: to create uniformity for international sales contracts. Merchants should feel confident that when applying the CISG to international sales contracts, Article 13 evaluation will favour electronic contracts. Merchants can further rely on the U.N. Model Laws on Electronic Commerce and Electronic Signatures and, in many states, domestic legislation for support.

[84] Bernard Audit, Lex Mercatoria And Arbitration, (Thomas E. Carbonneau ed., rev. ed. Juris Publishing 1998) 184 n.48, available at http://cisgw3.law.pace.edu/cisg/biblio/audit.html (last visited Apr. 7, 2011).

[85] However, States could just as easily invoke the same reservations to exclude electronic contracts. If parties choose to do so, CISG principles would not be violated because these changes were subject to a pre-ratification declaration.

D. THE UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE

The U.N. Model Law on E-commerce originated to further progress and harmonize international trade by including electronic transactions within the scope of international contracts, to accommodate increasing usage. The Model Law identifies paper as the main obstacle for electronic commerce-based legislation, because of physical writing requirements. The Model Law ensures legal security in the context of the widest possible use of automated data processing in international trade. However, the Model Law legitimizes electronic communications without disturbing international or domestic paper-based legislation.[86] Its articles apply to any kind of data message used in commercial activities. It directly addresses legal obstacles posed by terms, such as writing, signed (or signature), and original, to include electronic contracting. Overall, the UNCITRAL Model Law is perhaps the comprehensive answer to omitted parts of the CISG, such as Article 13, because it directly addresses writing issues to resolve contracting concerns, including offer, acceptance, consideration and modification.

[86] Jeffrey B. Ritter & Judith Y. Gliniecki, International Electronic Commerce and Administrative Law: The Need for Harmonized National Reforms, 6 HARV. J.L. & TECH. 263, 263 (1993)

1. Main Components of the UNCITRAL Model Law:

Specifically, the Model Law sets forth that electronic communication should not be denied legal effect "solely on the grounds that it is in the form of a data message."[87] Legal effect includes "due evidential right."[88] Instead of directly equating electronic documents to paper documents, the Model Law regards data messages as a "functional-equivalent," by isolating basic functions of paper-based form requirements and explaining data messages to meet these requirements. Offer, acceptance, and any part of contract formation are acceptable by means of data message.[89] Distinct from the CISG, writing is delineated to include data messages if the information can be accessed for subsequent reference.[90] It specifies the validity of data messages used as electronic signatures, assuming the signer and his assent can be identified reliably. Data message originality is also addressed to account for imagery and integrity. Time and place of data message dispatch regulate offer and acceptance.[91] Dispatch time is set at the time the sender loses control over the data message in the information system, unless otherwise agreed upon by parties.

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[87] Article 5

[88] Article 9(2)

[89] Article 11(1)

[90] "Data message" means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy;

[91] Article 15

2. Application to the CISG:

The scope of the Model Law is intentionally broad, to give the widest possible application to electronic communications to facilitate its increasing international use. The framework purposefully does not set forth every electronic contracting contingency. Instead, it defines key terms with open-ended wording to include enough guidance for States to apply terms as best fitting circumstances. The open-ended choice is based on the functional-equivalent approach toward electronic communications. Model Law drafters believe that "electronic records can provide the same level of security as paper and, in most cases, a higher degree of reliability and speed, especially with respect to the identification of the source and content of the data.[92]

Perhaps more importantly, the Model Law advises that it can be a tool to interpret existing international Conventions that create legal obstacles. Its media neutral approach to electronic commerce methods as paper-alternatives to communication, storage and authentication reflects the United Nation's recognition of them as international trade customs. Although it has been established above that computer-based contracts are acceptable under the CISG, the Model Law also fills the electronic contract gap in Article 13 if states incorporate Model Law provisions into their legislation or create similar legislation themselves. The CISG Article 96 reservation allows States to make a declaration in accordance with Article 12 to require that sales contracts be concluded in or evidenced by writing as required by domestic legislation.[93] For example, a seller in Australia could specifically require its Romanian buyer to use electronic contracts or assume that these means are acceptable because of existing domestic legislation.

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[92] This assumes that .a number of technical and legal requirements are met.. Some of the reasons paper-based contracts are a concern include the following: legibility, alteration, copy, authentication, and acceptability in courts.

[93] Annotated Text of CISG, at http://cisgw3.law.pace.edu/cisg/text/e-text-96.html#commentar (last visited Jan. 26, 2004), derived from Albert H. Kritzer, Guide To Practical Applications Of The United Nations Convention On Contracts For The International Sale Of Goods (Kluwer Law 1994).

Although the Model Law is not a compulsory piece of legislation, UNCITRAL efforts to provide international recognition for paperless contracts are influential over States whose laws do not equally protect or are silent on electronic contracts. U.N. efforts have not stopped at the Model Law on Electronic Commerce. In 2001, UNCITRAL adopted model laws on electronic signatures: UNCITRAL Model Law on Electronic Signatures.[94] It reinforces the signature principles of the Model Law on E-commerce to help States build reliance and achieve harmonization on digital marks for legal effect as a functional-equivalent to handwritten signatures.[95]

[94] U.N. Model Law On Electronic Signatures, U.N. Doc.A/56/588, U.N. Sales No. E.02.V8 (Uncitral 2001)

[95] Making Rules for Electronic Commerce, ICCWBO, at http://www.iccwbo.org/home/news_archives/1997/making_rules.asp_(Last accessed Apr. 09, 2011).

E.UNCITRAL and Online Sales

The electronic marketplace, which has opened the door to international business-to-consumer transactions on an unprecedented scale, provides enormous benefits. For consumers, it offers 24-hour access to sellers around the globe; for businesses, it offers access to a worldwide market. For both business and consumers, it offers tremendous efficiencies. This online marketplace also has created challenges; among them, how best to resolve disputes involving cross-border consumer transactions. Consumers must be confident that they will have access to redress for problems arising in the online marketplace. In many instances, consumers face unique difficulties in resolving problems arising out of online transactions, such as language and cultural differences, inconvenience and expense that may result from the distance between the parties, and problems with litigation, including difficulties in establishing jurisdiction, determining the applicable law, and enforcing judgments. In addition to facing similar burdens, businesses must determine where they could be subject to jurisdiction and which laws might apply to them, which could significantly increase the cost of doing business online.

The FTC has held two workshops on these and related issues. The first, in June 1999, explored questions related to core consumer protections; online disclosures that consumers need to feel safe when shopping online, jurisdiction, applicable law, and the roles of the private sector and international bodies in addressing consumer protection issues. The findings from this workshop informed the OECD voluntary Guidelines on Consumer Protection in Electronic Commerce, which were issued in December 1999. The Guidelines encouraged industry, government and consumers to work together to develop inexpensive, easy-to-understand and acceptable ADR mechanisms. The FTC's Bureau of Consumer Protection issued a report on this first workshop in September 2000.The second workshop, on ADR for online consumer transactions, was sponsored jointly with the Department of Commerce in June 2000.

A consensus emerged at these workshops about the need to develop and implement ADR programs to resolve online consumer disputes. Outstanding issues include whether ADR programs should be governed by minimum legal standards for fairness

and effectiveness, whether ADR programs should be binding and/or mandatory for the consumer, whether results of particular ADR programs should be confidential, and what rules of decision should apply to ADR programs. At our workshops, certain private sector organizations, including the Transatlantic Consumer Dialogue and the Global Business Dialogue on Electronic Commerce, have made specific recommendations on these issues.

Although ADR programs will reduce the number of online disputes that result in litigation, some litigation is inevitable. Such cases will likely raise the question of which court has jurisdiction over a dispute. Currently, in cases involving contractual disputes, U.S. courts generally allow consumers to sue out-of-state businesses in consumers' home courts; however, in some domestic consumer contract cases, courts have upheld choice-of-forum clauses designating the business' home court as the applicable forum. It is unclear how U.S. courts would treat a clause designating a foreign forum in a consumer contract, as U.S. courts have not directly addressed this issue.

For several years, FTC staff has expressed concerns about the use of choice-of-forum clauses in consumer contracts concluded over the Internet. At the same time, FTC staff recognizes industry's legitimate concerns about the potential for increased costs associated with litigating disputes around the world.

The Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, which is currently being negotiated by the Hague Conference on Private International Law, offers one possible international resolution of this jurisdiction issue. The Convention, if ratified, would create jurisdictional rules governing international lawsuits and provide for recognition and enforcement of judgments by the courts of signatory countries. Article 7 of the draft Convention contains jurisdiction rules for international consumer contracts. It provides that:

> 1. A plaintiff who concluded a contract for a purpose which is outside its trade or profession, hereafter designated as the consumer, may bring a claim in the courts of the State in which it is habitually resident, if

a) The conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that State, in particular in soliciting business through means of publicity, and

b) The consumer has taken the steps necessary for the conclusion of the contract in that State.

2. A claim against the consumer may only be brought by a person who entered into the contract in the course of its trade or profession before the courts of the State of the habitual residence of the consumer.

3. The parties to a contract within May, by an agreement which conforms to the requirements of Article 4, make a choice of court -

a) If such agreement is entered into after the dispute has arisen, or

b) To the extent only that it allows the consumer to bring proceedings in another court. For disputes arising from cross-border consumer contracts, the court in the consumer's home country will have jurisdiction over the foreign business, regardless of the court designated in a choice-of-forum clause.

At this point, it appears that significant competing policy interests are involved, which warrant further study of Article 7.

The Public Forum:

The morning discussion will focus on recommendations on ADR for online consumer transactions proposed by the Transatlantic Consumer Dialogue and Global Business Dialogue on Electronic Commerce. The purpose of this session is to foster a dialogue between business and consumer groups and work toward finding common ground on outstanding issues related to ADR.

The afternoon discussion will focus on Article 7 of the Preliminary Draft Hague Convention as it relates to cross-border business-to-consumer disputes arising from online transactions. The purpose of this session is to inform U.S. Government views on Article 7 of the Preliminary Draft Hague Convention in preparation for several upcoming meetings, including an electronic commerce experts committee meeting in

Ottawa, Canada at the end of February, and the upcoming two-part Diplomatic Conference during 2001-02 to finalize the draft Convention.

3. CONCLUSION

In summary, it can be seen that the CISG, while being more than thirty years old and, of course, not directly dealing with modern means of communication, has not become outdated by the massive changes that have shaped the landscape of today's means of communication. The CISG itself provides a flexible framework of provisions for the conclusion of contracts by any form of communication and can be interpreted, without resorting to farfetched explanations, to include classic forms of communication as well as electronic media.

Because the CISG is the foremost authority on international sales, the absence of computer-based contracts in the definition of contract writing could theoretically leave a significant legal gap in the commercial certainty and predictability of international sales. Electronic contracts have both complicated and facilitated international sales transactions with faster and easier methods of conducting business: even one person with a computer and an Internet connection can become an agile global competitor.

This paper has argued that although CISG's Article 13 does not explicitly mention electronic contracting methods as acceptable forms of writing, they are organically included in the CISG by way of Article 13's history and legislative intent, relationship with other articles and scope implied through precedent. Businesses, legal practitioners, and justice systems alike should understand the CISG's capacity, which provides for an expansive scope to develop with the global marketplace, without additional revision. International and domestic legislation is constantly modernized to account for electronic communications to ensure certainty and predictability in commercial transactions, which additionally supports Article 13's inclusion of electronic contracting through reservation or international commercial custom. Accordingly, the United Nations Convention on Contracts for the International Sale of Goods remains an enduring code, flexibly adapting to new trade customs while retaining uniform principles to assist international sales, that earned its adoption by two-thirds of nations engaged in global trade.

It can therefore be assumed that the CISG will be able to adapt to future changes just as well. In addition, the upcoming United Nations Convention on the Use of Electronic Communications in International Contracts will hopefully provide for a set of supplementary rules, establishing mandatory provisions with regard to new means of communication and further increasing the CISG's adaptability for future changes in business reality.

THE INDIAN ASPECT

India is one of the countries that, despite having participated in the 1980 Vienna Diplomatic Conference which debated the various Articles of the CISG, chose not to ratify this Convention. Nevertheless, the CISG may still apply to an Indian contracting party even though India itself is not a party to the Convention. First, it is possible that one of the parties entering into a contract with the Indian party will be from a Contracting State whose laws will apply by virtue of laws of private international law. These laws may well be the CISG. Secondly, an Indian party may well have his place of business in a Contracting State and he may have entered into an agreement with a party whose business is also in a Contracting State. In such a case, too, the CISG will apply. Thirdly, the CISG may also apply in cases where none of the parties have their place of business in Contracting States because the parties chose CISG as the applicable law. This is in consonance with the principles of private international law.

India's ratification of the CISG would mean that the CISG, and not the well-understood rules of the Indian Sale of Goods Act 1930 ('1930 Act'), would govern the rights of Indian buyers and sellers, when trading internationally.[96] The 1930 Act is modelled on the English Sale of Goods Act of 1893. India's trading community and its legal advisers, assisted by well-developed case law, can predict with some precision the probable outcome of a course of action in the buying and selling of goods. For India, adopting the CISG would be advisable only if the advantages of doing so outweigh the disadvantages. Space consideration prevents full discussion of them; however, the following paragraphs discuss some important ones.

[96] Subject to reservations that may be made.

Advantages of Ratification:

First, the CISG achieves simplification and the unification of the law relating to international sale of goods. Second, over two-thirds of the countries have ratified the CISG. Third, eminent scholars' commentaries help in the unified interpretation and application of the CISG. Fourth, the decisions rendered on different provisions of the CISG and collected in the Case Law on UNCITRAL Texts ('CLOUT') and elsewhere encourage the belief that in due course, there will be greater uniformity in interpretation and application of the CISG. And finally, fifth, the CISG superseded the Uniform Law on the International Sale of Goods ('ULIS'), which itself took many years to be formulated. The ULIS was not very successful, but the CISG has removed many of its shortcomings. Growing international trade requires that the CISG be used to bolster the trading community's confidence

Disadvantages of Ratification

Among the disadvantages, firstly there would be a legal uncertainty caused by introducing a new set of rules of sale. The legal uncertainty would be caused by broadly formulated rules containing many undefined and new terms which have to be developed in the international arena by courts and arbitral tribunals without any hierarchy and no principles of stare decisis. The CISG is not comprehensive. It does not concern itself with the validity of the contract, i.e. with the issues of illegality, misrepresentation or fraud relating to the contract. Also, the CISG uses imprecise language for a common law lawyer. Courts of different countries, partly due to imprecise language, have interpreted provisions of the CISG inconsistently, further hindering the object of uniformity and simplification.

Article 49 of the CISG states: "The buyer may declare the contract avoided (1) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) In case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with the clause of article 47 or declares that he will not deliver within the period so fixed."

The CISG thus deprives the buyer of his statutory right under the domestic law to reject the goods when they do not conform to the quantity or quality. The Indian trading community and their legal advisers would find the departure in the CISG rules troubling because of the imprecise language of the CISG and introduction of the 'fundamental breach' concept (in Article 49).[97]

To conclude, India's international traders and their legal advisers must assess if the CISG meets the Indian standards and if it is suitable for the Indian way of trade. A

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[97] The term 'fundamental breach' is defined in Article 25 of the CISG as one which: 'results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.'

good contract law is one that enables the buyer and the seller to approach their lawyer requesting him to predict, as far as possible, what a court would do if a dispute were to arise. The more predictable is the outcome, the better the contract law. Ultimately, the CISG would be a good contract law for India only if it turns out that it meets the above standards.

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