The neutral choice

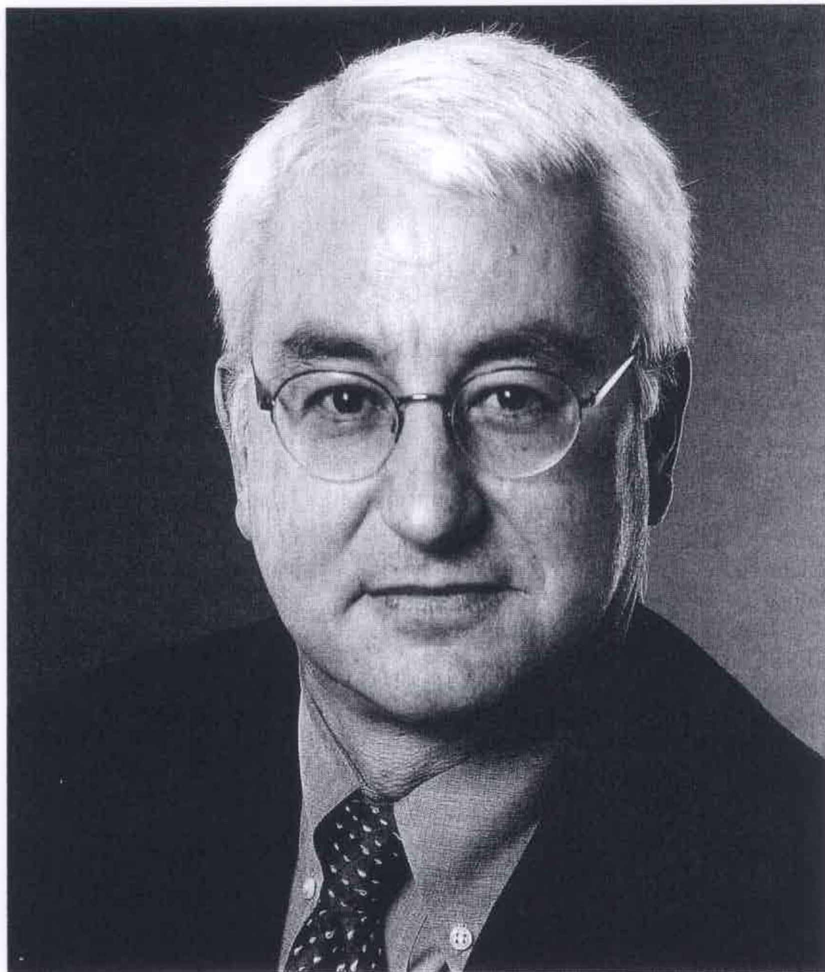
Michael G Davies of Vedder, Price, Kaufman & Kammholz in New York, looks at common pitfalls when using the UN Convention on Contracts for the International Sale of Goods (CISG)

A GERMAN oil trading company agrees to sell a cargo of gasoline to a Canadian buyer, to be transported by vessel from Hamburg to New York. The essential terms of the deal - namely price, quantity, quality and delivery - are agreed and written up in an exchange of written confirmations. As is not uncommon, the buyer and seller do not agree on what law governs their contract.

The cargo arrives in New York and is tested for quality by the buyer's inspecting firm, which finds that it fails to meet contract specifications. The parties attempt to resolve their dispute but fail to do so. Lawyers are hired, threatening letters are exchanged and the parties prepare for litigation.

One of the lawyers' first tasks will be to determine what law governs the parties' rights and obligations. There are a number of possibilities. In the absence of agreement, should you look to New York's Uniform Commercial Code, as the place where delivery was made? Or should the law of Germany, the seller's domicile, apply? Or Canadian law? In fact, none of these countries' laws apply. Instead, the little-known provisions of the United Nations Convention on Contracts for the International Sale of Goods (CISG) control.

The CISG entered into force on January 1, 1988, and today boasts 63 signatory nations. Its rules, unless the parties agree otherwise, apply to all issues of contract formation and performance of international contracts for the sale of goods between merchants of signatory nations. It does not apply where the preponderant part of the parties' obligations consists of supplying labour or other services.



Michael G Davies

Can application of the CISG affect the parties' rights? Absolutely. The CISG can radically change the way in which a dispute is litigated and decided, particularly for those from common law countries. In particular, under the CISG, the importance of written agreements

is strikingly diminished, all oral agreements are enforceable and past negotiations and oral statements may be used to override a contract's written terms. For example, under the US Uniform Commercial Code, contracts for the sale of goods valued at over $500 must, with few exceptions, be in writing to be enforced. The CISG, however, specifically provides that no written contract is necessary. As Article 11 of the CISG states:

'A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.'

In those cases where the parties put down their agreement in writing, many jurisdictions prohibit the parties from attempting to contradict the unambiguous written terms of a contract in the event of a dispute. In the US this doctrine is known as the 'parol evidence rule' and is embodied in the Uniform Commercial Code. The rule is designed to protect the integrity of written agreements and prohibits the consideration of any prior agreements or contemporaneous oral arrangements that contradict the written terms.

The CISG, however, adopts a more flexible approach to the interpretation of written contracts than many business people are used to. In fact, the CISG largely does away with the protections of the parol evidence rule. Even in a case where a written agreement clearly sets forth the parties' intent, the CISG allows you to consider evidence that contradicts the written terms. As Article 8(3) of the CISG provides:

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

How this more flexible approach to contracts works in the real world is well illustrated by a 1998 Florida case. In MCC-*Marble Ceramic Center Inc v Ceramica Nuova D'Agostino SpA*, an American plaintiff sued an Italian defendant for breach of contract. The parties had reached an oral agreement and recorded the terms on the Italian firm's order form, which also contained pre-printed terms and conditions on the back. The president of the American company signed the form. The front of the contract stated directly below his signature as follows:

'[T]he buyer hereby states that he is aware of the sales conditions stated on the reverse and that he expressly approves of them with special reference to those numbered 1-2-3-4-5-6-7-8.'

Among the conditions printed on the contract was the requirement that any complaints of defects in the merchandise be made in writing within ten days of delivery. Although the American firm later claimed that the goods were defective, it failed to submit a

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written complaint within the required ten days. It was therefore barred by the contract's written terms from claiming for defects. Nevertheless, the American firm claimed in court that the parties never intended the terms and conditions printed on the signed order form to apply. In support, it submitted sworn statements to the court stating that it did not intend to be bound and that the Italian firm was aware of that intent.

The lower court looked to the terms of the written agreement, applied the parol evidence rule and dismissed the American company's claim on the ground that allegations contradicting the agreement's unambiguous terms could not be considered. The appeals court, however, reversed the lower court and held that, because the case was governed by the CISG, the American company was entitled to a trial. As the court held:

'The district court's decision rests on pre-printed contractual terms and conditions incorporated on the reverse of a standard order form that MCC's president signed on the company's behalf. Nevertheless, we conclude that the CISG, which governs international contracts for the sale of goods, precludes summary judgment in this case because MCC has raised an issue of material fact concerning the parties' subjective intent to be bound by the terms on the reverse of the pre-printed contract. The CISG also precludes the application of the parol evidence rule, which would otherwise bar the consideration of evidence concerning a prior or contemporaneously negotiated oral agreement.'

How then should parties to an international sales transaction approach the issues raised by the CISG? Clearly, they must first address the pros and cons of the treaty before deciding whether or not they want its terms to apply. While some of the CISG's provisions may seem onerous in one set of circumstances, they may be perfectly appropriate in another. Also, the CISG can be seen as a 'neutral' choice of law where the parties are from different nations and hesitate to agree on the law of the other party's country. If, however, both parties want to avoid the application of the CISG, they should do so very clearly. To be safe, one should state explicitly in writing that the CISG does not apply. Or, if only some provisions of the CISG are deemed unacceptable, the parties can agree in writing to opt out of specific provisions.

There is no question that the CISG now plays a substantial role in international commerce. Regardless of whether or not they ultimately choose to have the CISG control, parties to international transactions should enter into contracts with their eyes open as to the effect the CISG can have upon their business dealings. They should not have to discover only when they end up in court that, unbeknownst to them, all their rights and obligations will be determined under the CISG's rules.

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William J. Honan
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