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**THE UN CONVENTION ON CONTRACTS FOR THE
INTERNATIONAL SALE OF GOODS (CISG)**

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INTRODUCTION

As commercial transactions extend beyond national borders, it becomes increasingly common for subrogation professionals to find that a potentially responsible party resides in a country other than the United States. For example, a restaurant fire may occur in New York, caused by a defective oven that was sold and manufactured by a company located in France. If recovery entails litigation in a U.S. court, the plaintiff may not necessarily be able to rely on the provisions set forth in the Uniform Commercial Code (the "U.C.C."), as the defendant doing business in another country may assert defenses that do not mirror those provided in the U.C.C.

This Alert discusses the United Nations Convention on Contracts for the International Sale of Goods, commonly referred to as "CISG." CISG is an international agreement that is applicable to contracts for the international sale of goods between parties whose places of business are in different countries.¹ We highlight two issues in CISG that are relevant to subrogation actions against parties doing business in a foreign country: 1) a requirement that the buyer provide timely notice of the nonconformity of the goods to the seller, and 2) the statute of limitations under CISG.

APPLICABILITY OF CISG TO A DISPUTE

CISG has three general requirements in order to apply to an international commercial transaction: (1) there must be a contract of sale,² (2) the contract must be for goods,³ and (3) the contract must be between parties whose place of business are in different "contracting

1. The full English text of CISG is available on the internet at either http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods.html or <http://www.cisg.law.pace.edu>.
2. It should be noted that CISG does not require that the contract for the sales of goods be in the form of a writing. See CISG, Article 11. The contract is not subject to any requirement as to form and can be proven by any means. *Id.*
3. Unlike the U.C.C., CISG does not contain a section defining the term "goods." In fact, as a general matter, CISG does not define terms in the same way as the U.C.C. often does with specific sections devoted to definitions.

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states.” in regard to the example noted in the introduction, the United States and France have both adopted CISG, and are therefore both “contracting states” for purposes of CISG.

Although at first glance one might think that the country of incorporation or nationality of the contracting parties determines CISG’s applicability, it is actually the specific places of business of the buyer and the seller that are the key determining factors regarding CISG’s applicability. That is, CISG’s applicability is based on the locations of the place of business of the buyer and the seller. It even appears that it could apply to domestic companies if their places of business are in different “contracting states.”

Next, it should be noted that CISG governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from the contract. CISG does not cover the validity of the contract or its terms; it does not cover the contract’s effect on the property in the goods sold; and it does not cover the liability of the seller for death or personal injury caused by the goods to any person.

Furthermore, as with the U.C.C., there are certain types of sales contracts that are not covered by CISG, such as sales of consumer goods, ships, aircraft, and electricity. CISG also does not apply to contracts in which the preponderant part of the seller’s obligations consist of supplying labor or other services, or in which the buyer supplies a substantial part of the materials necessary for the manufacture of the good.

The parties can modify the rules set forth by CISG or agree that CISG does not apply at all. “The exclusion of the Convention would most often result from the choice by the parties of the law of a non-contracting State or of the domestic law of a contracting State to be the law applicable to the contract.” *See* CISG, UNCITRAL Secretariat Explanatory Note 12. One commentator on CISG suggests that CISG applies automatically to transactions for the international sale of goods where the conditions of CISG have been met unless the parties specifically exclude CISG’s application. *See Applying the CISG: Guides for Business Managers and Counsel*, John P. McMahon, Esq., Pace Law School Institute of Internal Commercial Law, CISG Database (November 16, 2006), at Sec. B(2).⁴

CISG’S NOTICE REQUIREMENT

Similar to the U.C.C., CISG sets forth certain conditions that both the buyer and the seller must perform during the course of the transaction and in connection with the contract for sale. One such condition is a requirement that the buyer examine the goods and provide notice to the seller if they do not conform. The examination requirement appears to be the first step in the analysis as to whether the buyer gave proper notice to the seller that the goods did not conform, and provides that the buyer must examine the goods “within as short a period as is practical in the circumstances.” Article 38 of CISG sets forth this examination requirement:

(1) The buyer must examine the goods, or cause them to be examined, **within as short a period as is practical in the circumstances.**

4. http://cisgw3.law.pace.edu/cisg/guides.html#*.

(2) If the contract involves the carriage of goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him, and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

[Emphasis added].

In connection with the examination requirement, Article 39 must be considered, as it may be viewed as being similar to a two-year statute of limitations for bringing an action against a seller. It provides that the buyer must notify the seller of the nonconformity of the goods **within two years** from the date of delivery of the goods to the buyer. If the buyer does not do so, he loses the right to rely on a lack of conformity of the goods. Article 39 provides in full:

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity **within a reasonable time after he has discovered it or ought to have discovered it**.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof **at least within a period of two years from the date on which the goods were actually handed over to the buyer**, unless this time-limit is inconsistent with a contractual period of guarantee.

[Emphasis added].

This provision, however, must be read in conjunction with Article 38's requirement that the buyer also examine the goods "within as short a period as is practical in the circumstances," which appears to place another condition precedent on the buyer for bringing a claim for nonconformity of the goods.

Although Article 39 appears to provide the seller with a defense based on the buyer's failure to provide timely notice of nonconformity of the goods, CISG does offer some relief to the buyer in Articles 40 and 44. In Article 40, CISG states that "the seller is not entitled to rely on articles 38 and 39 if "the lack of conformity relates to facts of which he knew or could not have been unaware *and* which he did not disclose to the buyer." (Emphasis added). Article 44, a catch-all provision benefiting the buyer, states that "notwithstanding the provisions of paragraph (1) of article 39. . . the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a *reasonable excuse for his failure to give the required notice*." (Emphasis added).

STATUTE OF LIMITATIONS

Articles 38 and 39 of CISG could operate as a period of limitations to bar claims for nonconformity if the buyer did not provide notice within two years of delivery of the goods. Unlike the U.C.C., however, CISG does not contain a specific "statute of limitations provision" setting forth the time within which a buyer must bring a cause of action against the seller. As a result, certain disputes may also be covered by the U.N. Convention on the Limitation Period in the International Sale of Goods, which is commonly referred to as the "Limitations

Convention.”⁵ The applicability of the Limitations Convention to a particular dispute depends in part on whether the countries involved have adopted the Convention. In regard to the example noted in the introduction, the United States has adopted the Limitations Convention but France has not.

The Limitations Convention is meant to “determine when claims of a buyer and a seller against each other arising from a contract of international sale of goods or relating to its breach, termination or invalidity can no longer be exercised by reason of the expiration of a period of time.” *See* Limitations Convention, Article 1(1). Article 8 of the Limitations Convention specifically states that “The limitation period shall be four years,” and Article 9 states that “the limitation period shall commence on the date of which the claim accrues.” There are also various Articles in the Limitations Convention addressing tolling of the limitations period, *see* Limitations Convention, Articles 13-23, but the limitations period cannot be tolled beyond ten years, *see* Limitations Convention, Article 23.

CONCLUSION

“What law governs” and “what is the statute of limitations” are basic, preliminary questions that must be resolved before a dispute is placed into suit. When the dispute arises from an international commercial transaction between parties doing business in different countries, CISG should be considered by subrogation professionals analyzing and resolving such issues. For additional research materials regarding this important theory of liability, please feel free to contact any Subrogation attorney at Cozen O’Connor.

5. The full English text of the Limitations Convention is available on the internet at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_limitation_period.html.