

RECENT DEVELOPMENTS IN INTERNATIONAL PURCHASING/CONTRACTING

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- **Overview:**
 - Convention on Contracts for the International Sale of Goods (CISG)
 - Benchmarking of International Terms of the Deal!
 - Resolution of International Disputes

- **Convention on Contracts for the International Sale of Goods (CISG)**
 - Over 74 countries (including the United States) have executed this treaty.

 - CISG applies to, and controls, the international sale/purchase of “goods,” (as defined) between firms/entities operating (places of business) in those countries that have signed the treaty.

 - Countries that account for over three-fourths of the world trade have signed the CISG!

International sales that are excluded from the CISG...

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

Distinction of CISG as compared to UCC include...

- Need not be a writing to find a contract! Trading protocols are strongly recommended to reflect when and if a contract is being formed!
 - A parol evidence rule is very limited in application, e.g. a court “may” consider “all relevant circumstances” including negotiations, trade usages, etc. in interpreting a contract. Having a fully integrated agreement, etc. may be desirable.
 - CISG offers may not be revoked if the offeree reasonably relies on the offer as being irrevocable.
 - Acceptance of offers is a little different under the CISG with no “Battle-of-the-Forms” language that is found in UCC 2-207.
 - A buyer may avoid the contract only if there has been a “fundamental breach,” i.e. “substantially deprive the buyer of what s/he is entitled to expect under the contract.” The UCC “perfect tender” (2-601) rule is not provided in the CISG! Examples of Impact?
 - Penalties verses Liquidated Damages under the UCC/local law.
- **Benchmarking of International Terms of the Deal!**
 - Annual survey by International Association of Contract and Commercial Managers www.iaccm.com
 - ISM and IACCM Benchmarking Report--2004.
 - 36 Significant Contract Provisions International Companies are using, or not using, in international contracts!

Benchmarking of International Terms of the Deal!

- Highlights from clauses...
 - Acceptance
 - Payment Provisions (Letters of Credit)
 - Warranties/(Performance Issues)
 - Delivery (Incoterms <http://www.iccwbo.org/incoterms/id3045/index.html>)
 - Indemnification
 - Insurance/Limitation of Liability
 - Termination
 - Delays/Force Majeure
 - Dispute Resolution
 - Language
 - Applicable Law/Jurisdiction

- **Resolution of International Disputes Through Arbitration**
 - PriceWaterhouseCooper Survey in 2008.
Finding that multinational companies are using arbitration rather than litigation in resolving international disputes and citing “greater flexibility, finality and confidentiality.”

Key items from PriceWaterhouseCooper Survey...

- Majority of corporations prefer arbitration for international contract disputes.
- Enforceability of arbitral awards important—
more than 75% of the value recovered
- Length of time and costs of International arbitration are seen as disadvantages.
- Overwhelming majority of arbitration cases are successfully resolved
- Settlements most frequently occur before the first hearing
- High degree of compliance with arbitral awards

References Include...

- For additional information on the CISG including text, guidance, questions/answers, cases, etc. go to <http://www.cisg.law.pace.edu>
- ISM and IACCM “Benchmarking Standard Contract Terms and Conditions (2004)” study included 5 reports
 - Administrative Terms <http://www.ism.ws/Files/tools/AdministrativeTerms.pdf>
 - Business Terms <http://www.ism.ws/Files/tools/BusinessTerms.pdf>
 - Financial Terms <http://www.ism.ws/files/Tools/FinancialTerms.pdf>
 - Intellectual Property / Data Production Terms
<http://www.ism.ws/Files/tools/IPTerms.pdf>
 - Legal Terms <http://www.ism.ws/Files/tools/LegalTerms.pdf>
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) is located at
<http://www.aaaonline.org/upload/Convention%20on%20the%20Recognition%20and%20Enforcement%20of%20Foreign%20Arbitral%20Awards.pdf>
- The 2008 PricewaterhouseCoopers sponsored research at the School of International Arbitration, Queen Mary, University of London is located at
http://www.pwc.co.uk/pdf/PwC_International_Arbitration_2008.pdf?utr=1
- Rumbaugh Newsletters: www.Rumbaugh.net

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