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Beware and aware of those international treaties!

By Lynne R. Ostfeld

Practitioners thinking to do any international work need to understand that more is involved than speaking another language in order to deal with the other party, the other attorney, and the other court system.

A starting point is to know whether the "other" is in a common or civil law system, or whether they are subject to sharia. Or, is it a system that takes something from all of these? Civil law systems do not use case law precedence so that decisions of other courts have little predictive value for the court in which your case is being, or might be, heard. How much does culture and custom play a part? In at least Japan, Norway and Germany the parties are expected to resolve differences out of court as often as not, and good faith negotiating before a contract is executed is required in Germany.

What about international agreements that supersede national laws, or which cover points not otherwise addressed?

Two treaties of importance are the United Nations Convention on Contracts for the International Sale of Goods ("CISG")¹ and the United Nations Convention on the Use of Electronic Communications in International Contracts.² The former is in force and the latter is pending.

The CISG was finalized in 1980 and came into force in 1988. It applies to contracts for the sale of goods between parties whose places of business are in different States when the States are Contracting States. It does not apply to consumers. It governs the formation of the contract and does not generally get into the validity of the contract or liability for harm caused by the products. Parties to an international contract can exclude application of the CISG or any of its provisions. A sales contract under the CISG need not be in writing.

Although sophisticated and experienced attorneys can be ignorant of the existence of the CISG, they best not plead that ignorance, or the inapplicability of the CISG to a disputed contract, because U.S. courts have dealt with a variety of issues brought under it.

Courts have looked at whether certain States were signatories or not and, therefore, whether parties doing business in those States were covered by the CISG.³ They have looked at whether strict liability and negligence claims were preempted by the CISG.⁴

Because the CISG can apply to a contract, unless excluded, it is important to look at contract formation from both the point of view of the CISG as well as the U.C.C. and even local law. The CISG applies the mirror-image rule to terms which materially alter the terms of the offer while the U.C.C. does not.⁵ The CISG does not have a statute of frauds.⁶ Also, the CISG does not have a parol evidence rule but allows contract formation to be governed by statements showing what a party's known or expected intent was, what a reasonable person would have understood, and the practices between the parties.⁷

The United Nations Convention on the Use of Electronic Communications in International Contracts ("E-Contract")⁸ was adopted by the U.N. General Assembly on November 23, 2005. It has been ratified by two nations, Honduras and Singapore, and will go into

force when a third nation ratifies it. It applies to the use of electronic communications in connection with the “formation or performance of a contract between parties whose places of business are in different States.”⁹ It does not apply to most personal matters, financial transactions, or documents related to the transfer and delivery of goods.¹⁰

As with the CISG, parties may exclude this treaty from applying to a contract and may change any of its provisions. Singapore included a declaration that basically excludes its application to real estate transactions and estate planning documents.

Parties do not need to use or accept electronic communications but their agreement to do so may be inferred from their conduct.¹¹

Several provisions that may seem a bit unusual and worth paying attention to concern the transfer and receipt of the communications. In Article 10, the time of dispatch is when the communication leaves an information system and the time of receipt is when it becomes “capable” of being retrieved. Without more, there does not seem to be a requirement that a person has actually seen the communication for it to be effective and binding. In Article 12, there are provisions that provide for enforceability of a contract even if no natural person reviewed or intervened in the action carried out, but that it was done only by automated message systems.

In anticipation of errors and the difficulty of correcting them when communication is with an automated message system, Article 14 provides that a natural person may withdraw an electronic communication in which an input error was made under certain circumstances. The first is that the initiator notifies the other party of the error as soon as possible after having learned of it, and the second is that this initiator has not benefited from the goods and services received from the other party.

To conclude, any attorney involved with an international transaction needs to be aware of treaties such as these and make a determination if he or she will accept or exclude their provisions. Failure to do so in advance could result in their applicability to the contract, possibly to the client’s detriment. ■

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1. <www.cisg.law.pace.edu/cisg/text/treaty.html>. Further resources on this treaty can be obtained at <www.cisg.law.pace.edu/>. The ABA Section of International Law and Practice published in 1990 *The Convention for the International Sale of Goods: A Handbook of Basic Materials*, edited by Daniel Barstow Magraw and Reed R. Kathrein, but this may now be out of print.

2. <www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html>.

3. Gregory M. Duhl, *International Sale of Goods*, 65 *Bus. Law* 1313, 1313-1314 (2010) (discussing cases treating the issue of whether Hong Kong was a signatory after China advised the U.N. that it would not extend the CISG to Hong Kong).

4. *Id.*, at 1315-1316.

5. *Id.*, at 1317.

6. *Id.*

7. Art. 8, CISG

8. <www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html>.

9. Art. 1.

10. Art. 2.

11. Art. 8.

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