

IMPLEMENTATION OF CONTRACT FORMATION STATUTE OF FRAUDS, PAROL EVIDENCE, AND BATTLE OF FORMS CISG PROVISIONS IN CIVIL AND COMMON LAW COUNTRIES*

Louis F. Del Duca

I. INTRODUCTION

Some delay and resistance in applying norms of a new legal order transplanted into a dissimilar legal order is a predictable phenomena recognized by comparative lawyers. The analysis which follows illustrates general acceptance of the United Nations Convention on Contracts for the International Sale of Goods (CISG)¹ norms by tribunals of ratifying states. However, instances of non-application or misapplication of CISG norms have occurred. Comfort can be taken from the fact that in many instances subsequent decisions of courts from the same country have properly applied the CISG norm in question.

II. STATUTE OF FRAUDS

Article 11 of the CISG states that “[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.”² Article 11 displaces domestic statute of frauds provisions that require contracts over a certain monetary amount to be evidenced by a writing in order to be enforceable.³ Implementation of Article 11 has of course been

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** Director, Center for International and Comparative Law and A. Robert Noll Professor, The Pennsylvania State University Dickinson School of Law. It is a pleasure to acknowledge the able research assistance of Kristin Schork, J.D. Candidate, The Pennsylvania State University Dickinson School of Law (2006).

1. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. No. 98-9, 1489 U.N.T.S. 3, 19 I.L.M. 668, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html [hereinafter CISG].

2. CISG art. 11, 1489 U.N.T.S. 61, 19 I.L.M. 674.

3. Some examples of domestic statute of frauds provisions are Section 2-201 of the Uniform Commercial Code in the United States (U.C.C. § 2-201 (2001)), Article 1341 of the French Civil Code (CODE CIVIL [C. CIV.] art. 1341), and Article 2721 of the Italian Civil Code (CODICE CIVILE [C. C.] art.

much smoother in countries where the national law, like Article 11's lack of form requirement, abolishes the writing requirement. However, in countries such as the United States, where a domestic statute of frauds provision for sale of goods transactions still exists, implementation of Article 11 was initially marred by non-application or misapplication of the CISG.

2721).

See also Franco Ferrari, *Writing Requirements: Article 11-13*, in *THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 206*, 211-12 (Franco Ferrari et al. eds., 2004).

U.C.C. § 2-201 states that:

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Section 2-606).

Article 1341 of the French Civil Code states that:

An instrument must be executed before notaries or under private signatures for all things exceeding the sum or value fixed by decree, even for voluntary bailments, and no evidence by witnesses against and outside the content of instruments is allowed, or as to what is alleged to have been said before, at the time, or after the instruments, even when it is a question of a lesser sum or value. All this is without prejudice to what is prescribed in the laws relative to commerce.

C. civ. art. 1341 (Fr.) (Law no. 80-525, 12 July 1980, Code Civil, 1 July 1994, at 246).

Article 2721 of the Italian Civil Code, "Admissibility; limitations with respect to value," states that:

Proof of contracts by witnesses is not admissible when the value of the subject matter exceeds five thousand lire. However, the court can admit proof by witnesses even beyond such limit, taking into account the character the parties, the nature of the contract, or any other circumstances.

C. c. art. 2721 (It.).

The majority opinion in *GPL Treatment, Ltd. v. Louisiana-Pacific Corp.*⁴ illustrates the failure of a United States court to apply Article 11 of the CISG. In *GPL*, a Canadian-based Seller sued a U.S. based Buyer for breach of an oral contract for sale of wood products.⁵ The majority opinion overlooked the clear applicability of the CISG under Article 1(1)(a) based on Seller having a place of business in Canada and Buyer having a place of business in the United States. Instead, it undertook a complicated application of Uniform Commercial Code (U.C.C.) Section 2-201(2), which provides that “failure to object to a confirmatory memorandum” of an oral contract for sale of goods within ten days after delivery of the memorandum may make the oral contract enforceable against the recipient of the confirmatory memorandum.⁶ The court concluded that the communication sent by Seller to Buyer after the alleged oral contract was entered into qualified as a confirmation of the oral contract which then became enforceable against the recipient who failed to object to its contents. The dissenting opinion concluded that application of the CISG would enable Seller to enforce the oral agreement because Article 11 of the CISG abolishes the statute of frauds requirement. Accordingly, the dissent concluded that the oral contract was enforceable even though it found Buyer’s response did not qualify as a confirmation of an oral contract of sale.

In sharp contrast to the murky decision in *GPL*, the court in *Calzaturificio Claudia*⁷ cleanly recognized the applicability of CISG under the “places of business in different contracting states” rule.⁸ *Calzaturificio Claudia* involved a contract for a sale of shoes between an Italian manufacturer and a United States Buyer. Applying Article 1(1)(a) of the CISG, the court stated that the CISG was applicable “because the contractual relationship between the seller, an Italian shoe manufacturer, and a buyer, a United States corporation, did not provide for a choice of law. . . .” Applying Article 11 of the CISG, the court rejected Buyer’s argument that in the absence of a written contract or any purchase order setting forth the terms of the parties’ sales transaction no enforceable agreement existed between Buyer and Seller. The court concluded that “unlike the U.C.C., under the CISG a contract need not be

4. *GPL Treatment, Ltd. v. Louisiana-Pacific Corp.*, 894 P.2d 470 (Or. Ct. App. 1995), CLOUT Case No. 137 [Court of Appeals of Oregon, United States, 12 Apr. 1995].

5. *Id.*

6. U.C.C. § 2-201, see text *supra* note 3.

7. *Calzaturificio Claudia s.n.c. v. Olivieri Footwear Ltd*, No. 96 Civ. 8052 (HB) (THK), 1998 WL 164824, at *3 (S.D.N.Y. Apr. 7, 1998) (not reported in Federal Supplement).

8. CISG art. 1(1)(a), 1489 U.N.T.S. 60, 19 I.L.M. 671.

evidenced by a writing . . . and is not subject to any other requirement as to form.”⁹

The court also noted that under Article 8(3) of the CISG, a contract may be proved by any means and any evidence that may bear on the issue of formation is admissible.¹⁰ This provision frees CISG contracts from the limits of the parol evidence rule and any evidence that may bear on the issue of formation is admissible. The court stated: “Consequently, the standard U.C.C. inquiry regarding whether a writing is fully or partially integrated has little meaning under the CISG and courts are therefore less constrained by the four corners of the instrument in construing the terms of the contract.”¹¹

Proper application of Article 11 of the CISG is further illustrated by *Jose Luis Morales y/o Son Export, S.A. de C.V. v. Nez Marketing*, where COMPROMEX, the Mexican Commission for the Protection of Foreign Commerce, held enforceable an oral agreement for the sale of twenty-four tons of garlic between a Mexican Seller and a California Buyer.¹² Article 11 of the CISG was applicable to the transaction because the parties had places of business in different contracting states (i.e., states that had ratified the CISG). Relying on the second sentence of Article 11 of the CISG, which states that the oral contract “may be proved by any means,” the court ruled that the invoice sent to Buyer and the documents of carriage were sufficient evidence of the contract’s existence.

In another interesting case, a German court applying the CISG held enforceable an oral contract between a German Buyer and a French Seller, noting that “a contract of sale . . . may be proved by any means, including witnesses.”¹³ The court utilized order forms that contained the signatures of

9. *Calzaturificio Claudia*, 1998 WL 164824, at *5.

10. CISG art. 8(3), 1489 U.N.T.S. 61, 19 I.L.M. 673.

11. *Calzaturificio Claudia*, 1998 WL 164824, at *6 (citing Larry A. DiMatteo, *International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability, L=(II)*², 23 SYRACUSE J. INT’L L. & COM. 67, 108 (1997)).

12. *Jose Luis Morales y/o Son Export, S.A. de C.V. v. Nez Marketing*, Comisión para la Protección del Comercio Exterior de México (COMPROMEX), Mexico, 4 May 1993, available at <http://cisgw3.law.pace.edu/cases/930504m1.html>. For another example of proper application of Article 11 by a United States court, see *Chateau des Charmes Wines Ltd. v. Sabaté USA Inc.*, 328 F.3d 528 (9th Cir. 2003), United States Court of Appeals for the Ninth Circuit, 5 May 2003, available at <http://cisgw3.law.pace.edu/cases/030505u1.html> (see discussion *infra* Part IV (Battle of Forms)).

13. *Landgericht Memmingen, Germany*, 1 Dec. 1993, available at <http://cisgw3.law.pace.edu/cases/931201g2.html>. See also *Oberlandesgericht München, Germany*, 8 Mar. 1995, available at <http://cisgw3.law.pace.edu/cases/950308g1.html>.

the parties and the testimony of two witnesses to conclude that a valid contract had been entered into.

Article 11's lack of requirement as to form extends to signature requirements.¹⁴ In a dispute between a German Seller and a Swiss Buyer over the purchase price of equipment, a Swiss court found an unsigned fax ordering the equipment sufficient to constitute a proposal to conclude a contract.¹⁵ The court decided that a signature was not necessary because Article 11 of the CISG abolishes any requirement as to form. All that was necessary was Buyer's binding intention to purchase the equipment.

Article 11's general principle of freedom from form requirements is also reflected in Article 29 of the CISG, which allows parties to modify or terminate a contract, as long as the contract is not a written contract with a provision requiring that any modifications or terminations be in writing.¹⁶

A. Derogation From Article 11 Per Private Agreement

Parties may derogate from Article 11's freedom from form requirements, and require that statements take a particular form in order to have effect.¹⁷ Article 6 of the CISG states that "[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."¹⁸

B. Derogation From Article 11 Per Articles 12 and 96

Article 12 of the CISG allows countries whose national laws contain formal writing requirements to make an Article 96 reservation, whereby reserving states do not subscribe to Article 11's lack of form requirements. Article 12 of the CISG provides:

14. Ferrari, *supra* note 3, at 207.

15. CLOUT Case No. 330 [Handelsgericht des Kantons St. Gallen, Switzerland, 5 Dec. 1995], available at <http://cisgw3.law.pace.edu/cases/951205s1.html>.

16. CISG art. 29, 1489 U.N.T.S. 64, 19 I.L.M. 677. See also Ferrari, *supra* note 3, at 207-08. Article 29 of the CISG states:

(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

17. Ferrari, *supra* note 3, at 214.

18. CISG art. 6, 1489 U.N.T.S. 60, 19 I.L.M. 673.

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention.¹⁹

Article 96 of the CISG provides:

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.²⁰

Argentina, Belarus, Chile, Hungary, Latvia, Lithuania, the Russian Federation and the Ukraine have all made Article 96 reservations.²¹ Estonia had previously made an Article 96 reservation, but withdrew that reservation on March 9, 2004.²² The People's Republic of China has also declared that "it did not consider itself bound by sub-paragraph (b) of paragraph (1) of article 1 and article 11 as well as the provisions in the Convention relating to the content of article 11."²³

There has been some inconsistency between tribunals of different member states in determining whether the form requirements of a state that has made an Article 96 reservation will apply to a dispute when one party has its place of business in a reserving state. One view is that if one or more parties has a relevant place of business in a member state that has made an Article 96 reservation, then the contract must be evidenced by writing.²⁴ The other view holds that when one party has its place of business in a state that has made an Article 96 reservation, the form requirements of the reserving state will only apply if a choice of law analysis determines that the reserving state's laws

19. CISG art. 12, 1489 U.N.T.S. 61, 19 I.L.M. 674.

20. CISG art. 96, 1489 U.N.T.S. 76, 19 I.L.M. 693-94.

21. United Nations Commission on International Trade Law, *Status of Conventions and Model Laws*, 38th Sess., U.N. Doc. A/CN.9/583 (9 May 2005) [hereinafter *Status of Conventions*], available at www.unictr.org/en/commissions/sessions/34th.html.

22. *Id.*

23. *Id.*

24. Ferrari, *supra* note 3, at 213 (citing The High Arbitration Court of the Russian Federation, 16 Feb. 1998, available at <http://cisgw3.law.pace.edu/cases/980216r1.html>; Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, available at <http://www.law.kuleuven.ac.be/int/tradelaw/WK/1995-05-02.htm>).

apply to the dispute.²⁵ In a case involving a dispute between a Hungarian Seller and an Austrian Buyer, the Supreme Court of Austria held that because Austrian law governed the dispute, Hungary's Article 96 reservation under the CISG was inapplicable.²⁶ Austria is a party to the CISG and did not make an Article 96 reservation.²⁷ Therefore, according to Article 11 of the CISG, the contract was not subject to form requirements.²⁸

The Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry has also held that if the applicable law is that of a state which has made an Article 96 reservation under the CISG, then the domestic law formal writing requirements of the reserving state should apply.²⁹ In a dispute between a Russian Seller and a Cypriot Buyer, the Tribunal determined that because Russian law was applicable, and because Russia had made an Article 96 reservation under the CISG, Article 162 of Part 1 of the Civil Code of the Russian Federation, which requires international commercial contracts to be in writing, was applicable.³⁰ The Tribunal then went into an analysis of whether the writing requirement had been met, concluding that it had.³¹

The Ukraine ratified the CISG with an Article 96 declaration. Many international contract cases in the Ukraine are heard by the International Arbitration Court (IAC) at the Ukrainian Chamber of Commerce and Industry (UCCI).³² In Case No. 108II/99, a dispute between a Polish Buyer and a Ukrainian Seller, the IAC found that numerous fax communications between the parties satisfied both Article 11 of the CISG and Article 154 of the Ukrainian Civil Code's writing requirement.³³ Poland had ratified the CISG without an Article 96 reservation.

25. See Oberster Gerichtshof, Austria, 22 Oct. 2001, *available at* http://www.cisg.at/1_7701g.htm, translation *available at* <http://cisgw3.law.pace.edu/cases/011022a3.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 30 May 2000, translation *available at* <http://cisgw3.law.pace.edu/cases/000530r1.html>; see also High Arbitration Court of the Russian Federation, 20 Mar. 2002, translation *available at* <http://cisgw3.law.pace.edu/cases/020320r1.html>.

26. Oberster Gerichtshof, Austria, 22 Oct. 2001, translation *available at* <http://cisgw3.law.pace.edu/cases/011022a3.html>.

27. *Id.*

28. *Id.*

29. Tribunal of International Commercial Arbitration of the Russian Federation, 10 June 1999, translation *available at* <http://cisgw3.law.pace.edu/cases/990610r1.html>.

30. *Id.*

31. *Id.*

32. Tatyana V. Slipachuck & Per Runeland, *Kiev: From Zero to 800 Cases Per Year in Less Than 10 Years*, 11 AM. REV. INT'L ARB. 585 (2000).

33. *Id.* at 601.

In a dispute over allegedly defective fruit sold by an Argentinean Seller to a Mexican Buyer, COMPROMEX ruled in *Conservas La Costena S.A. de C.V. v. Lanin San Luis S.A. & Agroindustrial Santa Adela* that the CISG was applicable and that Argentina had effectively exercised its reservation right under Article 96 of the CISG to make Article 11 inapplicable.³⁴ COMPROMEX nevertheless decided that despite the inapplicability of Article 11, a contract of sale was concluded between the parties under Argentina law because of the exchange of documents, payment under the letter of credit, the parties' course of conduct, and the Argentinean Seller's own admissions. COMPROMEX concluded that there was, therefore, no need for the parties to draft a formal contract and that a different interpretation would be in conflict with the general principles of the CISG.

C. Derogations From Article 11 Per Reservations on Part II of the CISG

Article 92(1)³⁵ gives a ratifying state the right to declare that it will not be bound by Part II ("Formation of Contract") or by Part III ("Sale of Goods") of the CISG. Denmark, Finland, Norway, and Sweden declared as part of their ratification that they would not be bound by Part II.³⁶ Despite a ratifying state's decision to opt-out of Part II of the CISG, enforceability of an oral contract has been achieved by utilizing Part III of the CISG. For example, although Finland has opted out of the provisions of Part II ("Formation of Contract") of the CISG,³⁷ by applying Articles 53 (buyer's obligation to pay the price) and 62 (seller's right to require the buyer to pay the price) of Part III ("Sale of Goods") of the CISG, a Finnish Seller, who had not signed the contract, prevailed over a German Buyer who had accepted delivery of the goods.³⁸ In this case, the Finnish Seller sold 3000 tons of electrolyt nickel/copper cathodes to a German Buyer for approximately 17 million U.S. dollars. Buyer signed the written contract, and the goods were delivered, but Buyer did not pay. The court applied the CISG because the parties had their

34. Comisión para la Protección del Comercio Exterior de México (COMPROMEX), Mexico, 29 Apr. 1996, available at <http://cisgw3.law.pace.edu/cases/960429m1.html>.

35. CISG art. 92(1), 1489 U.N.T.S. 76, 19 I.L.M. 692. Article 92(1) states:

A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

36. *Status of Conventions*, supra note 21.

37. *Id.*

38. CLOUT Case No. 134 [Oberlandesgericht München, Germany, 8 Mar. 1995], available in *German* at <http://www.cisg-online.ch/cisg/urteile/145.htm>.

places of business in contracting states, Germany and Finland. Apparently concluding that since the goods had been delivered to Buyer and Buyer had signed a writing evidencing the existence of a contract, the contract was enforceable despite the absence of a written contractual agreement (citing Article 11 of the CISG). A comparable result would be reached under the part performance provisions of the U.C.C. Section 2-201(3)(c).³⁹

D. Derogations From Article 11 Per Certain International Conventions

Some international conventions override CISG Article 11's lack of a writing requirement.⁴⁰ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) requires arbitration clauses to be in writing.⁴¹ The UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles) contain an abolition of statute of frauds requirements in Article 1.2 (no form required) which states: "[n]othing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses."⁴² Unlike the CISG, which does not specifically include a mandatory rule provision, Article 1.4 (mandatory rules) of the UNIDROIT Principles provides that "[n]othing in these Principles shall restrict the application of mandatory rules, whether of national, international

39. U.C.C. § 2-201(3)(c) states:

A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable . . . with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2-606).

40. Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 *Nw. J. INT'L L. & BUS.* 299, 324 (2004).

41. DiMatteo, *supra* note 40, at 324; Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II, June 10, 1958, 21 *U.S.T.* 2517, 330 *U.N.T.S.* 3, 38, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConven.html [hereinafter *The New York Convention*]. Article II (1-2) of *The New York Convention* states:

(1) Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

(2) The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

42. UNIDROIT Principles of International Commercial Contracts art. 1.2 (2004), available at <http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf> [hereinafter *UNIDROIT Principles*].

or supranational origin, which are applicable in accordance with the relevant rules of private international law.”⁴³

In *Filanto, S.p.A. v. Chilewich International Corp.*, the United States District Court for the Southern District of New York applied both the CISG and The New York Convention in determining whether an arbitration clause referenced in communications from Buyer, a United States corporation, to Seller, an Italian corporation, was binding on the parties.⁴⁴ In concluding that The New York Convention’s requirement of an “agreement in writing” had been met, the court found that Seller’s failure to object to the clause “in light of the parties’ extensive course of prior dealing between the parties”⁴⁵ constituted acceptance, pursuant to Articles 18(1)⁴⁶ and 8(3)⁴⁷ of the CISG.

In a case between a German Buyer and a Finnish Seller, a German court determined that the writing requirement of Article II(2) of The New York Convention⁴⁸ had not been met because the parties had not signed the agreement containing the arbitration clause, and because Seller had not received the standard form containing the arbitration clause.⁴⁹ Therefore, the court decided the case instead of referring it to arbitration.

III. PAROL EVIDENCE

In *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D’Agostino, S.P.A.*,⁵⁰ an American Buyer brought an action against an Italian Seller of tiles for breach of contract. Seller counterclaimed seeking damages for non-payment. The Eleventh Circuit Court of Appeals stated that since the parties had their place of business in different contracting states (the United States for Buyer and Italy for Seller), Article 1(1)(a) of the CISG governed. The court also considered evidence of the parties’ subjective intent that certain terms of their written agreement were not applicable. It ruled that the U.C.C. parol

43. UNIDROIT Principles, *supra* note 42, at art. 1.4.

44. *Filanto S.p.A. v. Chilewich Int’l Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992), CLOUT Case No. 23 [United States District Court for the Southern District of New York, 14 Apr. 1992].

45. *Id.* at 1240.

46. CISG art. 18(1), 1489 U.N.T.S. 62.

47. CISG art. 8(3), 1489 U.N.T.S. 61. *See infra* text accompanying note 52.

48. The New York Convention, *supra* note 41, at art. II(2), 21 U.S.T. 2519, 330 U.N.T.S. 38.

49. CLOUT Case No. 134 [Oberlandesgericht München, Germany, 8 Mar. 1995], *available in German* at <http://www.cisg-online.ch/cisg/urteile/145.htm>. *See discussion supra* Part II. C.

50. *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D’Agostino, S.P.A.*, 144 F.3d 1384, 1392-393 (11th Cir. 1998), CLOUT Case No. 222 [United States Court of Appeals for the Eleventh Circuit, 29 June 1998].

evidence rule⁵¹ does not apply to cases involving the CISG, citing Article 8(3) of the CISG which 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.⁵²

The parol evidence issue was erroneously addressed in the case of *Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*⁵³ In *Beijing*, the court somewhat cavalierly stated that “[w]e need not resolve [the] choice of law issue [of whether Texas law or the CISG is applicable], because our discussion is limited to application of the parol evidence rule (*which applies regardless*).”⁵⁴ In that case, a Chinese Seller contracted with a U.S. Buyer for the sale of weight-lifting equipment. After a dispute as to the performance of the contract, the parties entered into a modified written assignment for payment. Buyer refused to pay the amount claimed by Seller, alleging that at the time of the modified written agreement two contemporaneous oral agreements relating to Seller’s obligation to deliver the goods had been concluded. Erroneously concluding that the CISG and the Texas law of parol evidence were the same and that both would require exclusion of parol evidence, the court ruled in favor of Seller. Since both China and the United States are contracting parties to the CISG and Seller had a place of business in China and Buyer had a place of business in the United States, the CISG was applicable under the “place of business” standard of Article 1(1)(a) of the CISG. The provision of Article 8(3) of the CISG requiring consideration of all relevant circumstances including negotiations would therefore appear to have required the court to permit the introduction of the oral evidence regarding the two contemporaneous oral agreements.

51. See U.C.C. § 2-201, *supra* note 3.

52. CISG art. 8(3), 1489 U.N.T.S. 61, 19 I.L.M. 673.

53. *Beijing Metals & Minerals v. American Bus Ctr., Inc.*, 993 F.2d 1178 (5th Cir. 1993), CLOUT Case No. 24 [United States Court of Appeals for the Fifth Circuit, 15 June 1993], *available at* <http://cisgw3.law.pace.edu/cases/930615u1.html>.

54. *Id.* at 1183 (emphasis added).

IV. BATTLE OF FORMS

The CISG initially makes most “acceptances” with different or additional terms a counteroffer rather than an acceptance.⁵⁵ It does not explicitly contain the U.C.C. concept of “expression of acceptance,” which has the same effect as an acceptance.⁵⁶ However, the CISG in substance has the practical effect of compromising between the old common law “mirror image” approach and the U.C.C. approach to contract formation, which merely looks to agreement on essential terms.

Under the CISG, a reply to an offer that purports to be an acceptance but which contains additions, limitations, or other modifications is initially classified as a rejection of the offer and constitutes a counteroffer. By itself, this would appear to negate the “expression of acceptance” rule of U.C.C. Section 2-207(1).⁵⁷ However, the CISG’s apparent absolute negation of this counteroffer approach in Article 19(1) of the CISG⁵⁸ is softened by the immediately following language in Article 19(2) of the CISG,⁵⁹ which by implication adopts an “expression of acceptance” type approach. This language states that a reply to an offer that purports to be an acceptance but contains additional or different terms that do not “materially” alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect.⁶⁰ If the offeror does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.⁶¹ This movement in the direction of permitting a contract to be created on the basis of agreement on essential terms is in turn altered by the immediately following provision, which states:

Additional or different terms relating among other things to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party’s liability to the

55. CISG art. 19(1), 1489 U.N.T.S. 62, 19 I.L.M. 675.

56. U.C.C. § 2-207(1) provides:

A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

57. *Id.*

58. CISG art. 19(1), 1489 U.N.T.S. 62, 19 I.L.M. at 675.

59. CISG art. 19(2), 1489 U.N.T.S. 62, 19 I.L.M. 676.

60. *Id.*

61. *Id.*

other or the settlement of disputes are considered to alter the terms of the offer materially.⁶²

Despite this broad coverage of what constitutes a “material term,” making the response to an offer a counteroffer under the CISG, some cases involving “non-material” additional or different terms have been reported. An example of a non-material modification is found in a German case in which a German Buyer had ordered goods from an Italian Seller.⁶³ Seller replied in a writing that included a provision calling for all claims of defect to be made within thirty days. When Buyer alleged that the goods were non-conforming and refused to pay the entire purchase price, the court held that the additional term in Seller’s acceptance requiring notification of defect within thirty days had become a part of the contract because the offer had not been materially altered.⁶⁴

Even the addition or alteration of terms that under CISG Article 19(3) are stated to materially alter the terms of an offer and therefore create a counteroffer may not necessarily be held to do so. CISG Article 19(3) provides that: “[a]dditional or different terms relating . . . [to] the settlement of disputes are considered to alter the terms of the offer materially.”⁶⁵ In *Filanto v. Chilewich*, Seller (offeree) claimed that its response to Buyer’s offer, which contained an objection to the incorporation of an arbitration clause in Buyer’s offer, constituted a counteroffer.⁶⁶ The District Court for the Southern District of New York held otherwise. Citing CISG Articles 18(1) and 18(3),⁶⁷ it found that Seller’s conduct and delay of five months in replying to Buyer’s offer indicated its intention to accept it. The court held that Seller was under a duty to notify Buyer in a timely fashion of its objection to the arbitration terms due to the parties’ extensive prior dealings. The court also noted that Seller had begun its performance under the contract by shipping

62. CISG art. 19(3), 1489 U.N.T.S. 63, 19 I.L.M. 676.

63. CLOUT Case No. 50 [Landericht Baden-Baden, Germany, 14 Aug. 1991].

64. *Id.*

65. CISG art. 19(3), 1489 U.N.T.S. 63, 19 I.L.M. 676.

66. *Chilewich International*, 789 F. Supp. at 1229.

67. CISG art. 18(1), 1489 U.N.T.S. 62, 19 I.L.M. 675, provides: “A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.” CISG art. 18(3), 1489 U.N.T.S. 62, 19 I.L.M. 675, provides:

However, if by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment that act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

part of the goods, and Buyer had issued a letter of credit naming Seller as beneficiary to cover part payment of the goods during the five-month delay period.

Unlike the U.C.C., the CISG does not address the question of what happens when conflicting offers and acceptances are exchanged, performance nonetheless begins, and problems then arise.⁶⁸ Because the CISG does not provide an answer in such cases, recourse will have to be to general principles of the CISG and private international law to resolve such questions.⁶⁹

In *Chateau des Charmes Wines Ltd. v. Sabaté USA Inc.*,⁷⁰ applying Article 11 of the CISG, the Ninth Circuit U.S. Court of Appeals held oral agreements enforceable in the purchase of wine corks by a Canadian wine company from a French cork company acting through its wholly owned California subsidiary. It ruled that forum selections clauses which were later included in invoices by Seller were not part of the agreement. The court found that the CISG was applicable under Article 1(1)(a) of the CISG because Canada, France, and the United States were all contracting states.⁷¹ It also ruled that the contract of sale became complete and binding when “the oral agreements as to the kind of cork, the quantity, and the price” were reached, and did not include forum selections clauses which were contained in the invoices subsequently forwarded.⁷² Citing Article 19(3) of the CISG, the court concluded that the forum selection clauses in Seller’s invoices were not part of the oral agreement and, therefore, constituted an attempt to materially alter the oral agreement.⁷³

68. U.C.C. § 2-207(3) provides:

Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

69. CISG art. 7(2), 1489 U.N.T.S. 61, 19 I.L.M. 673, states:

Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based, or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

70. *Chateau*, 328 F.3d at 528.

71. *Id.* at 530.

72. CISG arts. 11, 14, 18, 23, 1489 U.N.T.S. 61-63, 19 I.L.M. 674-676.

73. *Chateau*, 328 F.3d at 531; CISG art. 19(3), 1489 U.N.T.S. 63, 19 I.L.M. 676, *see supra* text of article accompanying note 64.