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Manufacturer's Corner: Highlighting Some Important Distinctions Between UCC Article 2 and CISG

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If you're like many manufacturers who sell internationally, your standard terms and conditions provide that the UN Convention on Contracts for the International Sale of Goods ("CISG") does not apply to your transaction. But, maybe they don't, or maybe your disclaimer is ineffective (it happens a lot). In those instances, it's important to understand where CISG differs from Article 2 of the Uniform Commercial Code, which typically covers sales of goods within the United States.

A recent case highlights two critical distinctions in the approaches those bodies of law take to the contract formation process.[1] In the interest of simplifying things, here is a condensed summary of what happened. A mining services company based in Australia wanted to buy mining equipment from a Colorado manufacturer (there's the CISG hook). To put it nicely, the contract formation process was not entirely clear: the parties exchanged e-mails, offers and counteroffers, purchase orders and term sheets.

The manufacturer claimed the parties reached an agreement, and a subsequent purchase order by the Australian company was a confirming memorandum that contained additional terms. Under Article 2, those additional terms would only become part of the parties' agreement if they did not materially alter the agreement already reached. The manufacturer contended the additional terms did materially alter the agreement, and so they were not part of the agreement.

The Australian company, on the other hand, argued successfully that CISG applied. Under CISG, unlike Article 2, "[a] reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer." Thus, the Australian company argued its purchase order was effectively a counteroffer, and that the manufacturer accepted it through performance.

Because it concluded CISG applied, the Court declined to rule in the manufacturer's favor as a matter of law. Critically, however, it also could not rule in the Australian company's favor as a matter of law (and not just because it wasn't asked to). Unlike Article 2 which looks strictly to the parties' objective manifestations of contractual intent, or on course of dealing and the like, CISG permits an inquiry into *subjective* intent. And, because the parties' negotiations were so convoluted, the Court noted it could not resolve that issue as a matter of law.

Thus, we are left with two points to consider when you find yourself in a situation in which CISG may apply. The first is that confirming memoranda play an entirely different role under CISG than under Article 2, and a completely different contract may form under the same set of facts when CISG applies rather than Article 2. The second is that determining the terms of a contract can be far more difficult under CISG than under Article 2, because the former permits consideration of subjective intent rather than simply consideration of what the parties said to one another and how they acted in prior dealings. Both issues must inform whether you should attempt to exclude CISG in your terms and conditions, and how you should conduct your negotiations in any instance in which CISG may apply.

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[1] *Orica Australia Pty. Ltd. v. Aston Evaporative Services, LLC*, 2015 WL 4538534 (D. Colo. Jul. 28, 2015).

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