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CISG AND INTERNATIONAL SALES: SHOULD YOUR BUSINESS OPT OUT?

If your company buys or sells products, you may be subject to a unique set of laws governing the sale of goods under Article 2 of the Uniform Commercial Code ("Article 2"), a uniform set of laws that has been adopted in almost every state, subject to variation depending on the state. Normally, parties to a contract can agree to be governed by the laws of a certain state, including that state's Article 2, pursuant to a choice of law provision. If the parties do not agree on governing law beforehand, the court will determine which state's laws should apply. However, if the other party to your contract is not based in the United States of America ("U.S."), your contract may automatically be governed by an entirely different set of rules under the CISG – a situation in which parties often unknowingly find themselves, and which could have unintended consequences for your contract.

What is the CISG?

The CISG stands for the "United Nations Convention on Contracts for the International Sale of Goods". It is a treaty that has been ratified by 97 countries (including the U.S.) as of the date of this publication and, like Article 2, is intended to provide a uniform set of laws to govern the sale of goods. Unlike Article 2, which applies to U.S.-based companies, it applies to companies that are based out of separate countries.

The CISG applies to any contract for the sale of goods between at least two companies whose principal places of business are in differing countries. When these conditions are met, the CISG's application is automatic because the CISG is a self-executing treaty that supersedes state law, even if your contract states that a certain state's laws will govern, and even if both parties have a presence in the U.S. To circumvent the CISG's application, parties must affirmatively and expressly "opt-out" of the CISG by stating that the parties agree it will *not* apply to the contract.

Should You Opt Out of the CISG?

There are a few reasons why being governed by the CISG could put your company at a disadvantage, and why a state's Article 2 may be a better choice for your contract. First, attorneys across the U.S. are generally unfamiliar with the provisions of the CISG. U.S. courts also lack a repository of prior case law interpreting the CISG in comparison to Article 2. This case law, called precedence, provides attorneys and parties guidance when negotiating contracts and navigating contractual disputes. Uncertainty as to the CISG's provisions means additional time (and attorneys' fees) required to research and analyze the CISG, whether during the drafting process or after a dispute has arisen. Finally, the CISG conflicts with generally-accepted U.S. contract principles in several ways. For example, customary rules of evidence for contracts interpreted under U.S. state law do not apply under the CISG [1].

Nevertheless, there may be times when the CISG is an appropriate compromise or to your advantage – for instance, if the other party insists on being governed by the laws of another country, or when a contract requires mandatory arbitration, as U.S. attorneys and arbitrators may be more likely to understand the CISG than the laws of a particular nation. The CISG also allows parties to opt out of certain portions of the CISG instead of opting out wholesale, so parties can pick and choose which provisions they want to apply to their contract [2].

JAH Can Help

Determining governing law is crucial to contract interpretation, and companies can find themselves in a bind if they do not preemptively opt out of the CISG. **The corporate attorneys at JAH** are here to help with your contracts, from negotiating to execution. **Click here to contact a member of our Corporate Group of you are in need of assistance**.

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[1]By way of illustration, the CISG has no equivalent to Article 2's statute of frauds, parol evidence rule, or perfect tender rule. The CISG also requires courts to consider the parties' subjective intent when interpreting a contract, in contrast to Article 2. *See, e.g.*, CISG art. 8(1), 8(2).

[2]*See* CISG art. 6.
