

Critical Review of The ICC Model International Sale Contract

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1 **Critical Review of The ICC Model International Sale Contract,**
James M. Klotz*

2 The CISG was developed to give an international set of rules which would provide clarity to most international sales transactions. Its drafters created it in such a way as to be of mandatory application in certain circumstances, but also to be a discretionary legal code which parties could choose to apply to their contracts. Once that legal code was brought into existence (and received a modest acceptance), it was only a matter of time that drafters would look to creating standard contracts which incorporate that legal code.

3 In this laudable but never-ending quest for standardization in the international sale of goods, the ICC has just released the final draft of its Model International Sale Contract¹ (the “Model Contract”). The Model Contract has some strengths, and used correctly, can be of assistance to those drafting international sale of goods contracts. There are likely two user groups of Model Contracts – those who are unsophisticated but wish to incorporate a comprehensive solution to their transactions,² and those who have the required level of sophistication, and would ordinarily not resort to a Model Contract except to use it as a negotiation tool to convince the other party to accept a particular clause. This article is a critique of the Model Contract, and will attempt to identify the weaknesses and dangers

¹ICC Document No. 460-9/16 (Final text, with the modifications decided at the meeting of the Commission on 6 June 1997).

²These users may commit themselves to the Model Contract by including a statement such as the following in their contract:

1 “*This contract shall be governed by the ICC General Conditions of Sale (Manufactured Goods Intended for Resale).*”

*Klotz Associates, Barristers and Solicitors, Toronto, Canada. Author of *International Sales Agreements - An Annotated Drafting and Negotiation Guide*(Canada Law Book: Toronto, 1997).

to the first group of users, and identify the strategic aspects to the second group of users.

4 There are a myriad of different types of goods sold in international transactions. The Model Contract is limited to “manufactured goods intended for resale”. This presumably was designed to exclude those large vital goods produced for single users (which have a host of additional complexities), and to exclude such goods as commodities which have widely fluctuating values. It also was not designed for continuing supply arrangements. However, the subject matter is still one of enormous scope, and it cannot be imagined by anyone that a single standard contract could cover say, the sale of iron bolts, and also, say, computer modems. It was unlikely however that the drafters of the Model Contract intended it to be used in such a uniform manner, although, if the Model Contract catches favour, we may well find this occurring.³

5 The Model Contract is divided into two parts. The first, Part A, is essentially a checklist of specific conditions to an international sale; the second, Part B, is a list of General Conditions divided into 14 articles. The Model Contract comes with an Introduction which indicates that parties would normally use both parts, or simply incorporate Part B only. The default choice of law is intended to be the United Nations Convention for the International Sale of Goods (the “CISG”). The Model Contract contemplates the use of a “gap-filling” law to deal with those issues not covered by the CISG and also attempts to give the parties the opportunity to opt out of the CISG.

6 As a general comment, the checklist format of Part A of the Model

³For example, in the past year, the author has consulted on numerous trade transactions, all incorporating in one manner or another the “ICC Rules on Confidentiality and Non-Circumvention, ICC Publication #900”. Unfortunately, although these rules do not exist, the assumption was made by the contracting parties that such rules would be fair and reasonable to both sides.

Contract is an excellent tool for any lawyer to use when reviewing a proposed international sale transaction. The only caveat to such a checklist is the ease with which parties, at the same time as they check off which Incoterm they will use, what documents will be required and how payment is to be made, may also check off such items as “liquidated damages”, seller’s “limitation of liability” or seller’s “liability for retained non-conforming goods”. These provisions require tremendous consideration and should not be perfunctorily checked off. The essential prerequisite is undertaking the analysis required to measure the risk/reward ratio. If businesspersons use the Model Contract in a perfunctory manner, we may expect interesting lawsuits as the parties grapple with the unanticipated consequences of these actions, in the face of unforeseen circumstances.

7 As an overall comment, the Introduction makes the following statement (referring to limitations of liability) which identifies the overriding objection to a model contract:

8 “. . . the model contract provides for a limitation of the amount of damages that may be claimed . . . in order to reach a reasonable compromise between the buyer’s interest to claim the full loss caused by the seller’s breach and the seller’s interest to maintain his liability for damages within clearly foreseeable limits. **Since it is impossible to strike such a balance in standard terms for all types of products, the Working Party chose to state basic formulae in Part B . . . but expressly giving the parties an opportunity . . . to agree on a modification of such formulae.**” (*emphasis added*)

9 What then is the purpose of the Model Contract? Surely if it is impossible to strike a balance in standard terms, then it can only be but an example of possible clauses to choose from. If this is the case then the result is flawed. Neither group will have a happy solution – the uninformed users of the Model Contract will have

an agreement which does not strike a balance between the buyer and seller; the informed users will not have a number of choices of clauses to choose from, but will rather have one flawed clause which must be modified. This makes the Model Contract more a rudimentary tool than a sophisticated solution. Perhaps a better result might have been obtained by providing multiple clauses for each issue which the parties could choose from, much in the manner of Part A. In the end however, the result would be a book rather than a model contract.⁴

The balance of this article reviews the primary issues which arise out of the Model Contract. Many of the flawed articles in the Model Contract can be remedied by simple revision. Some of these revisions are mandatory; others are simply drafting suggestions for improving the Model Contract.

Article A-8 – Checklist of Documents Provided by Seller

Article A-8 is a checklist of documents to be provided by the seller. The user is able to check off “insurance document”, “certificate of origin”, “certificate of inspection” and “other”. However, to a certain extent, many of these documents can be compared to buying an automobile – “what kind” is a very important question. Without specifying, the seller will provide the least expensive version.

For example, under Incoterms CIF the seller is responsible for purchasing only “free of particular average” insurance, which has the most limited type of recovery and is commensurately inexpensive. Most buyers on the other hand would prefer the goods to be insured on the basis of a “with average”, “all risks”, including “war

⁴For example, the author’s book, *International Sales Agreements – An Annotated Drafting and Negotiation Guide* contains over 380 sample clauses to an international sales agreement.

risks” policy.

14 With regard to the Certificate of Origin, the buyer may consider adding a warranty of the veracity of the Certificate along with an undertaking to notify the seller if the Certificate of Origin is ever investigated, as this may affect the buyer’s ability to export the goods into other countries at the preferential tariff rate.

15 A Certificate of Inspection can vary in a myriad of ways. It can be issued based on a sample inspection, a closed, or an open package inspection. By merely checking off the box on the Model Contract, the seller is unrestricted in the inspecting agency that is chosen, or the type of inspection undertaken. Such a Certificate of Inspection might be of far less value to the buyer than one which fulfills the buyer’s needs.

16 **Articles A-10 to A-12 - Limitations of Seller’s Liability**

17 Articles A-10, A-11 and A-12 are fill-in the blank provisions for limiting liability. Again these boxes give cause for concern because of the ease in which numbers can be filled in.

18 Presumably if the seller is savvy, it will recognize that its liability for delay or non-conformity should not exceed 100% of the cost of the goods. This would mirror the standard negation language that is found in most warranty clauses for the sale of goods. Rarely is this language negotiated.⁵ Here however, the subject of direct, indirect, special and consequential damages is clearly open to discussion.

⁵For example, a typical negation clause which North American lawyers would add to their standard sales agreement would be as follows:
 _1 “In no event shall the Seller be responsible for any direct, indirect, special or consequential damages, including loss of anticipated profits, loss of time or any other losses incurred by the Buyer in connection with the purchase, installation or operation or failure of the goods.”

By a simply marking an “x” in a box, a seller can expose itself to all the liabilities that it would ordinarily contract out of.

Article A-14

In the final text version of the Model Contract, Article 14(a) was added. This provision is intended to permit the parties to exclude the application of the CISG to the Model Contract by stating “This law is governed by the domestic law of _____ (country).”⁶ However, simply stating a domestic law may not be sufficient to exclude the CISG. To be sure, the contract drafter should modify Article 14(a) as follows:

“This Contract is governed by the domestic law of _____ (country). **The application of the CISG is expressly excluded.** ” (*emphasis added*)

Article A-15 - Dispute Resolution

Sophisticated contract drafters will spend time thinking about whether to utilize litigation or arbitration as a dispute resolution mechanism. If litigation is chosen, the drafter will then consider which court the dispute can be taken to and whether that court should be the only court to hear the matter.

The Model Contract in Article A-15 allows the parties to fill in the following blank: “in case of dispute the courts of _____ (place) shall have jurisdiction”. The contract drafter should consider whether this jurisdiction is to be exclusive or not. In an international sale, if litigation is clearly the dispute resolution mechanism, giving

⁶Presumably, this is a drafting error and the drafters intended to state “This contract is governed by the domestic law of _____.”

jurisdiction to one party's local court, but not exclusive jurisdiction, may not fulfill the needs of the parties.

25 With regard to arbitration, the Model Contract permits the drafter in Article A-15 to check off a box indicating "ICC arbitration" or "other". Article A-16 permits the drafter to set out the details of the "other" choice of arbitration. Arbitration provisions are also contained in Part "B", Article B-14, which is equally bland. In both of these clauses, the drafters of the Model Contract missed an opportunity to rectify an area of international contracting that is almost always inadequate. Seldom has any party to an international contract actually ever contemplated going to the ICC in Paris to arbitrate a dispute arising out of the agreement. Although there are many criteria to be considered in drafting an arbitration provision, the Model Contract should have included boxes permitting the parties to choose the location of the arbitration, the language of the arbitration and the number of arbitrators, at the very minimum.

26 Article A-1 - Parol Evidence

27 The essence of a contract in an international sale of goods is certainty as to rights and obligations of the parties. A "No Modification" clause is standard to most international sales agreements, so as to exclude the "parol evidence" rule of oral changes and modifications created by conduct of the parties.⁷ However, Article B-1.5, which tracks CISG language in Article 29(2)⁸, provides that a party may by its conduct, be precluded from relying on a contractual clause

⁷An example of such a clause is as follows:

_1 "None of the terms, conditions or provisions of this Agreement shall be held to have been changed, waived, varied, modified or altered by any act or knowledge of either party, their respective agents, servants or employees unless done so in writing signed by both parties."

⁸CISG Article 29(2):

_1 A contract in writing which contains a provision requiring any modifications or termination by agreement to be in writing may not be otherwise modified or

if the other party relies on such conduct. The drafter may wish to contemplate this provision carefully as this language leads to the opposite of certainty, particularly since only a trier of fact can determine whether a party's conduct was relied upon by the other. The drafter may wish to delete the "conduct" provision and replace it with a clause that clearly opts out of Article 29(2).⁹

Article B-2.1 - Describing the Goods

28

In describing the goods to be sold, Article B-2.1 is a dangerous provision to a buyer who does not carefully read the agreement. It provides that the only information about the goods that is of effect is that contained in the contract. This clause effectively negates the warranty given in the CISG for the goods to conform to the sample. While it is a great clause for a seller, a buyer will be disadvantaged if it does not attach to the agreement all those materials which the seller provided to it.

29

Article B-3 - Inspection Certificates

30

As discussed earlier, the boxes in Article A-8 allow the buyer to require an Inspection Certificate to be issued. Article B-3 provides that if the buyer is entitled to inspect the goods before shipment, reasonable notice must be given. Beware – this clause is unrelated to the Inspection Certificate in Article A-8, which is produced by the seller. Notwithstanding an unsatisfactory inspection by the buyer under Article B-3, the seller, unless there is further modification to

31

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 contract.

⁹For example, by using the following clause:

"The application of Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods is strictly excluded from this Agreement."

the agreement, could still ship the goods and obtain payment, if payment was arranged by letter of credit.

32 **Article B-5 - Letters of Credit**

33 Article B-5.3 deals with the issuance of a letter of credit. The Model Contract uses imprecise “traders” language requiring the buyer to issue a letter of credit by a “reputable” bank. Unfortunately, this term is not one which is well-known in the banking community.¹⁰ What is a reputable bank? For example, is the State Bank of China, known for not honouring its letters of credit in the past, a “reputable” bank?

34 All of these points are perhaps quibbles when compared to Articles B-10, B-11, B-12 and B-13.

35 **Article B-10 - Late Delivery, Non-Delivery, and Remedies Therefor**

36 Every draftsman struggles with the issue of late delivery and non-delivery. The Model Contract attempts to present one solution to this problem. If the parties recognize that it is but one possible choice, no harm is done (although most Model Documents are perceived to be answers rather than choices).

37 Article B-10.1 provides for a 0.5%/week penalty for late goods, to a maximum of 5% (that is, 10 weeks in total). If the buyer notifies the seller before the goods are 15 days late, the penalty runs from day one. If the buyer notifies the seller 15 days or later that the goods are late, the penalty runs from that date. In other words, the buyer loses out on a 1% reduction if it notifies the seller on day

¹⁰The author inquired of international legal counsel of several banks and was advised that “reputable bank” is not a bankers term.

15, rather than day 14. This clause thus contains a meaningless penalty provision. What difference should a day make – either the goods are late, or they are not.

Article B-10.3 provides that if the parties have not agreed to a “drop dead” date, the buyer can terminate the agreement after the expiration of a 10 week period – a very long period of time. Will buyers understand this? A two and a half month delay in delivery of manufactured goods for resale is a very long delay – much longer than a buyer would ordinarily agree to.

If the agreement is terminated due to failure to deliver, Article B-10.4 allows the buyer an extra 10% in liquidated damages (in addition to the 5% late penalty) for a total of 15%. However, Article B-10.5 states “The remedies under this article are *exclusive* of any other remedy for delay in delivery or non-delivery”. What does this mean?¹¹ Does it mean that the buyer can still sue the seller for its damages above the 15%, or does it mean that the 15% is the total damage claim? Whatever the answer is, it is drafted inadequately.

Article B-11 - Non-Conformity of the Goods

41 While reflecting an admirable attempt at addressing a thorny issue, the provisions contained in Article B-11 relating to non-conformity of the goods, are filled with difficulties. In the broad sense, parties to the international sales transaction seldom turn their attention to the complications caused by non-conformance of the goods. The seller usually attempts to limit its obligation to repairing or replacing the goods under its warranty provisions. The buyer attempts to reserve the right to obtain a reduction in price if it accepts the rejected goods or return the goods for complete refund. These are

¹¹The author received differing answers from lawyers in six countries as to what the phrase “exclusive of” meant.

the competing interests.

42 The solution provided by Article B-11.1 gives the buyer a right to an abatement for “minor” discrepancies. However, Article B-11.2 requires the buyer to give notice of the discrepancy to the seller within 15 days from the date when the buyer discovers or ought to have discovered the non-conformity, and at the very least within 12 months from the date of arrival of the goods at the agreed destination”.

43 This clause is problematic for at least two reasons. The first is “what notice is sufficient”? The Model Contract language in Article B-11.2 does not match the language of the CISG Article 39(1)¹² which requires the buyer to notify the seller of the “nature of the non-conformity”. This CISG clause has already been the subject of at least two cases on the subject of what notice of non-conformity is sufficient. These CISG cases indicate that mere notice of non-conformity is insufficient – the notice must specify the nature of the non-conformity. One case held that merely stating non-conformity on the basis of “poor workmanship and improper fitting” of the goods, in this case shoes, is insufficient [¹³ The other case held that the fact that the goods, cheese, were frozen and not described in the contract was not sufficient reason for not examining the goods and discovering an infestation [¹⁴ While the Model

¹²CISG, Article 39(1):

“1 The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

¹³Parties Unknown, Landericht MÄ?Ä¼nchen I (17 HKO 3726/893) 3 July 1989 ; Published in German:Praxis des Internationalen Privat-und Verfahrensrechts (IPRax) 1990, 316; Case 3, Case Law on UNCITRAL Texts (CLOUT), United Nations. A German buyer notified the seller within eight days of delivery of “poor workmanship and improper fitting” of the goods. The court held that the buyer lost the right to rely on non-conformity of the goods since the notifications did not specify precisely the defect in the goods.

¹⁴*Fallini Stefano and Co. S.N.C. (Italy) v. Foodik B.V. (Netherlands):*

Contract language in Article B-11.2 does not require the notification of the nature of the non-conformity, this is an area in which legal counsel would be wise to advise the buyer to make the notification as detailed as possible, to avoid any possible “gap-filling” by the CISG.

The second problem with this clause is the expiration period of twelve months from the date “of arrival” of the goods, which is similar to CISG Article 39(2)¹⁵ (although the CISG provides for two years). However, the phrase “of arrival” is not a CISG term. In CISG Article 39(2) the phrase is “date actually handed over to the buyer”. Is this the same as “arrival”? There will however be CISG cases on the wording in Article 39(2) which ultimately can be relied upon with more accuracy than “on arrival”. The clause should be revised to reference “on delivery” – a well-known concept in the Incoterms as the point at which risk of loss passes.

The seller in Article B-11.3 is given a number of options in the event that the buyer notifies the seller of non-conformity in accordance with Article B-11.2 but does not “elect to retain” the goods. Unfortunately, the Model Contract does not identify how or when this “election” takes place. Does the buyer have one week, one month or one year to decide? Further, this clause entitles the buyer to liquidated damages as in Article B-10.1 (0.5%/week for a maximum of 10 weeks) for delay from the time of notification of the non-

Rechtbank Roermond 900336 19 December 1991 . Excerpts published in Dutch: Nederlands Internationaal Privaatrecht (NIPR) 1992, 394. Reported on in English: [1995] UNILEX, D.91-14 (Transnational Juris Publications, Inc.); Case 98, Case Law on UNCITRAL Texts (CLOUT), United Nations. A delivery of rotten Italian cheese was rejected by a Dutch buyer. The court held that the reasonableness or the time of giving notice depends on the nature of the goods.

¹⁵CISG, Article 39(2):

“1 In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

conformity to the date of supply of substitute goods (not to exceed 5%). It thus appears that the buyer has a small monetary incentive to delay making its “election”.

46 Under Article B-11.3 the seller has 10 weeks to either replace or repair the goods or to reimburse the buyer the price paid for the non-conforming goods. By Article B-11.4, the buyer has to notify the seller at the expiry of this 10 week period of its intention to terminate the agreement, in which case the seller gets an additional five days to perform. These provisions are not typical of non-conformity provisions that get negotiated in the real-life international sale of manufactured goods.

47 Articles B-11.5 and B-11.6 provide for liquidated damages of an additional 10% in the event that the contract is terminated pursuant to B-11.3 or B-11.4, or if the buyer elects to keep the defective goods. However, Article B-11.7, like Article B-10.5 provides that these remedies are “exclusive of any other remedy for non-conformity”.

48 This view of liquidated damages is troubling. Traditionally, liquidated damages represent an attempt by the parties to limit or pre-set the damage that either will suffer in the event of a breach of the agreement. Having both a liquidated damage award and a court or arbitration action in addition will likely leave the arbitrators or Court confused as to how to award damages for the breach.

49 **Article B-12 - Cooperation Between the Parties**

50 Article B-12.1 requires the buyer to “inform the seller of any claim made against the buyer by its customers or third parties, concerning the goods delivered or intellectual property rights related thereto”. When does this clause expire? Does it ever expire? The seller may wish to limit its notice giving, and hence record-keeping obligations. Additionally, the drafters likely intended to

add the phrase “which may give rise to rights to the buyer against the seller”, so as to limit the amount of contact between buyer and seller.

Similarly, Article B-12.2 provides that the seller “will promptly inform the buyer of any claim which may involve the product liability of the buyer”. This clause obligates the seller unreasonably. Is the seller obligated to notify every buyer of its goods whenever it is sued for product liability? Presumably a prudent seller would limit this obligation significantly.

Article B-13 - Force Majeure

51 Article B-13 addresses the issue of force majeure. While the wording of the Model Contract is sparse, most of the provision is reasonable. However, Article B-13.4 provides that if the force majeure lasts for more than six months either party may terminate without notice. A six month period is, in most instances, much too long to force a buyer (in most force majeure cases) to wait for goods. The drafter should consider reducing this period to no more than three months, if not less.

Clauses That Are Missing

52 Although the Model Contract refers in its provisions to the giving of notice, no notice provision is stated. Sometimes it is these simple provisions which are the most critical. How notice is given can be particularly important in an international contact. In fact many of the cases which have been reported in the past few years have had some aspect of irregular notice.

53 Under CISG Article 27,¹⁶ the sender may rely on notice if the notice is given by “means appropriate in the circumstances, even though

¹⁶CISG, Article 27:

there is a delay or error in the transmission of the communication". For example, a fax which is sent but is not received. A well-drafted notice clause will avoid this event.

57 The notice clause should also specify which language notices must be in. For example, in one CISG case [¹⁷ a German sock buyer concluded four contracts with an Italian seller, in the Italian language. Following delivery, but before payment, the seller assigned its payment claims to an Italian bank, and gave notice to the buyer, written in French and English. Not understanding either language, the buyer paid the seller, who went bankrupt shortly thereafter. The Italian bank successfully claimed further payment from the buyer. The court noted that as Italian law gave no specific rules on the "language risk", the court relied on the CISG and found that the parties may either use the language agreed upon or customarily practised between them. If the parties have neither agreement nor practice between themselves as to which language is to be used, the circumstances of the case must decide.

58 There are numerous other clause missing from the Model Contract. These include for example acceptance by facsimile, assignment, "entire agreement", reference to agents' fees, intellectual property provisions, and the myriad of specifics to the various existing clauses which relate to the subject goods, which, although not vital, will greatly improve the likelihood of each party's understanding of its rights and obligations.

59 In conclusion, the Model Contract is a good example of an inter-

¹ Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

¹⁷ *Parties Unknown*, [8 February 1995] Oberlandesgericht Hamm (Germany) (11 U 206/93); *Praxis des Internationalen Privat-und Verfahrensrechts (IPRax)* 1996, 197; Case 132, Case Law on UNCITRAL Texts (CLOUT), United Nations.

national sales agreement – one which should be added to the lawyer's quiver of drafting aids. However, on its own, there will be few transactions to which this agreement will fit without serious consideration and revision. Proceed with caution.

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