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# Contract Rights and Enforcement in the United States

Stanley McDermott III



Sarah J. Sterken



DLA Piper Rudnick Gray Cary US LLP

Every day countless international purchase-and-sale contracts covering a myriad of commodities touch the United States or give rise to questions of US law. This article provides a broad view of enforcement rights in respect of physical sale contracts in the US with a particular emphasis on New York law. New York has the most developed body of commercial law in the US and its courts have the widest experience adjudicating complex commercial disputes. New York law is therefore often incorporated into international commodities contracts throughout the US and overseas as well. For parties considering the law that should govern their international sales contract, New York law together with New York courts and arbitral forums are a feasible and attractive option.

As explained below, parties to international sales contracts can derive significant advantage from choosing New York law as the governing law even when the underlying transaction may have little or nothing to do with New York. In addition courts in New York are open to parties to international sales contracts who, though remote from the US, have chosen New York law and agreed to the jurisdiction of the courts in New York. Parties have the added advantage of provisional remedies to aid the enforcement of contractual rights. Finally, a principal reason for choosing US law and in particular New York law is the flexibility that is a hallmark of commercial law in the US.

### CISG v. UCC

Though the US is a signatory of the Vienna Convention on Contracts for the International Sale of Goods (“CISG”), the most extensive law relevant to purchase-and-sale contracts in the US is the Uniform Commercial Code (“UCC”), enacted in each of the fifty States with minor variations save for Louisiana (due to its civilian heritage). And even though CISG has been subscribed by many of the world’s leading international trade partners (but not the United Kingdom), the UCC, because of its extensive body of commercial rules, is commonly favoured in the US as the law governing international purchase-and-sale contracts.

There are significant differences between CISG and the UCC, especially concerning contract formation, and the UCC regulates the rights and obligations of buyers and sellers more specifically and comprehensively. Among other things the UCC does not require mirror-image confirmations of contract terms before a contract is formed. A contract is formed when the parties have agreed on main terms even though the confirmations sent by the parties may

vary considerably. In such cases additional terms are construed as proposals for addition to the contract and become part of the contract unless they materially alter it. Under the UCC a sale contract also does not fail for indefiniteness even though one or more terms are left open if on the facts the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. Also, unlike the UCC, CISG does not address the effect the contract may have on title or security in the goods sold, a matter left to local law, or issues concerning the validity of the contract or any provisions of the contract.

The UCC is also considerably broader in scope, including articles that address important issues such as warehouse receipts, bills of lading and other documents of title, and secured transactions concerning third parties. Each section of the UCC is accompanied by an Official Uniform Comment illuminating the purpose and effect in the light of the Code viewed as a whole. These articles are integrated with the purchase and sale provisions and provide a largely seamless and comprehensive body of law relevant to transactions in goods.

In the US therefore parties frequently prefer to be governed by the UCC, to avoid the patchwork of inconsistencies between CISG and the UCC, and to take advantage of the UCC’s wider reach. But because CISG is codified as paramount Federal law, it takes precedence over the UCC. CISG will therefore apply as a matter of US law to contracts between buyers and sellers located in the numerous countries that have ratified CISG unless the parties expressly provide otherwise. To that end CISG authorises parties to opt out of its application, and sophisticated buyers and sellers in the US often exercise that option. To do so, however, it is not sufficient for the contract simply to state, for example, that it will be governed by the laws of New York (because US treaties are part of the law of New York). This can be a pitfall for the unwary seller or buyer. Parties seeking to exclude CISG must state so expressly in the contract and specify the law that will control.

### Choosing a State’s Law

CISG aside, commercial law in the US is governed largely by State rather than Federal law. (Insolvency and reorganisation issues, however, remain subject in large part to Federal bankruptcy law.) Parties choosing the law to govern their contracts therefore incorporate into the contract the laws of a particular State. The choice-of-law clause

typically excludes the conflict-of-laws rules of the chosen State to make sure the chosen law is not displaced by conflict-of-laws rules that if applied would lead to the application of the laws of a different State having a closer connection to the parties or the contract.

Given New York's historic importance as a centre of national and international commerce, New York is often viewed to have the most developed body of commercial law applicable to commercial contracts, including international sale contracts. For that reason parties seeking to incorporate US law into their contracts frequently agree that the contract will be governed by New York law (without regard to its conflict-of-laws rules). Doing so incorporates into the contract both the UCC as enacted in New York and all other common law and statutory rights and obligations existing under New York law. Even where a contract incorporates customary commodity-specific trading rules, the choice of New York law will still serve as a useful gap filler to accommodate unforeseen events or determine ancillary issues not expressly agreed by the parties.

Under conventional choice-of-law rules courts in the US will usually enforce a choice-of-law clause provided the chosen law has a reasonable relationship to the transaction in question. When the chosen law, however, is not readily connected to the contract, then doubts may arise as to whether the chosen law will in fact be applied.

To dispel such uncertainty, New York has by statute authorised parties to any contract concerning transactions in excess of \$250,000 to provide for New York law whether or not the contract bears a reasonable relation to New York. That is a green light to foreign parties seeking the advantages of New York law provided the transaction has the requisite value.

### Choosing the Forum

**Judicial Forums.** In addition to specifying the governing law parties frequently choose the judicial forum in which disputes will be adjudicated (or the arbitral forum as the case may be). Such forum selection clauses are presumptively valid unless a party can show that enforcement would clearly be unreasonable and unjust in the circumstances. New York has also dispelled any doubt concerning the efficacy of such forum selection clauses by providing by statute that any person may maintain an action in New York courts against foreign corporations so long as the contract in question includes a New York choice-of-law clause, involves a transaction in excess of \$1 million, and provides that the foreign corporation agrees to submit to the jurisdiction of New York courts. That combination of New York choice-of-law and choice-of-forum clause authorises parties to international contracts having the requisite \$1 million value to enforce the contract in New York courts even though the contract otherwise has nothing to do with New York. While that New York forum statute does not govern actions in US Federal courts, Federal courts in New York will generally enforce a consensual choice-of-forum clause when the parties have chosen New York law to govern the contract and doing so would not be unreasonable or unjust. While the \$250,000 minimum for choice-of-law clauses and \$1 million minimum for choice-of-forum clauses is a bit anomalous, the effect is that a New York court could potentially dismiss a contract action governed by New York law if the transaction does not have a reasonable relation to New York

and the value of the transaction is less than \$1 million (though depending on the circumstances it would not be required to do so).

Care should be taken, however, to ensure that the chosen forum is the sole and exclusive forum for the adjudication of claims. Otherwise the forum will be viewed as optional, and the parties would be free to sue in other jurisdictions. The chosen forum can be either a State or a Federal court, but parties should also be mindful of the jurisdictional differences between State and Federal courts. Federal courts, though often preferred to State courts, have limited jurisdiction. That jurisdiction does not extend, for example, to claims by one foreign corporation against another foreign corporation. Such claims would have to be asserted only in a State court, and the forum selection clause should be worded accordingly lest it fail of its purpose.

**Arbitration.** New York is also a recognised centre for international arbitration. Federal and State courts in New York and elsewhere summarily enforce arbitration agreements in international sale contracts calling for arbitration in New York. The Federal Arbitration Act includes both the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Inter-American Convention on International Commercial Arbitration. The choice of a New York arbitral forum is enforceable regardless of the value of the transaction or the amount in controversy.

### Provisional Remedies

Disputes inevitably provoke concern that losses will be satisfied and an interest to see that future judgments or awards are adequately secured while enforcement proceedings are pending. Given existing limitations on Federal law, there is greater latitude for prejudgment security under State law. While the UCC itself does not address the right to prejudgment security, many States provide statutory rights of prejudgment attachment for security purposes, though the grounds for obtaining such relief are not uniform. In New York, for example, the property of foreign corporations can be attached prior to judgment provided the company has not formally qualified to do business in the State.

There is also a variety of State laws affording rights to security in aid of arbitration. New York has recently amended its arbitration law to extend to international commercial arbitrations the same provisional remedies hitherto available in domestic arbitrations. That includes pre-award attachments or injunctions on the grounds an award might otherwise be rendered ineffectual.

### Features of US Commercial Law

Hallmarks of US commercial law, as noted, are flexibility and freedom of contract. The rules prescribed by the UCC are not rigid and can be varied by agreement except for the few areas specifically carved out in the Code. The parties are free to decide for themselves issues such as passage of title and risk of loss to suit the circumstances at hand. UCC rules also operate as gap-fillers and guideposts, without strait-jacketing the parties' agreement on essential rights and obligations. In addition US courts often construe contract rights expansively provided doing so is consistent with the

apparent intent of the parties. While the parties cannot disclaim the general obligations of good faith, diligence, reasonableness and care, they are free to determine the standards by which the performance of those obligations will be measured (provided the standards themselves are not manifestly unreasonable). The UCC is also written in a manner that makes it possible for the law embodied in the Code to be developed by the courts in the light of unforeseen circumstances and new commercial practices.

**The Entire Agreement.** The UCC also takes a broad view of the parties' contract viewed in the light of the parties' entire relationship. The goal is to enforce the true intent of the parties, not frustrate that intent by an overly rigid construction of contract terms. A contract is defined to mean the total legal obligation which results from the parties' agreement. The agreement in turn is defined to mean the bargain of the parties in fact, as found in the wording of the contract or by implication from other circumstances including among other things course of dealing, usage of trade, and course of performance. The measures and background for contract interpretation and enforcement are set by the commercial context, which may explain, supplement and modify even the wording of a final contract. The UCC pointedly rejects the premise that contract wording has the meaning required by legal rules of construction rather than the meaning arising out of the commercial context in which it was used.

Thus under the UCC a course of dealing between the parties and any relevant usage of trade can give particular meaning to, and not only supplement but also qualify, the express terms of the contract. While course of dealing, strictly speaking, is confined to conduct between the parties prior to the particular contract, the provisions on course of performance provide that conduct of the parties acquiesced to without objection during contract performance may also be relevant to determining the parties' true rights and obligations. In this manner the UCC considerably expands the contract to include matters that were mutually understood and acted upon by the parties, but which may not have been expressly set forth within the four corners of the contract. To that end the parties' course of performance is also relevant to show the waiver or modification even of express contract terms that are inconsistent with the parties' actions. By applying such rules US courts avoid an excessively narrow or formalistic construction of contract terms at odds with the parties' true intent and history.

**Good Faith.** While the UCC rule that every contract or duty imposes an obligation of good faith in its performance or enforcement does not afford a basis for imposing contractual obligations not otherwise agreed, or for restraining the exercise of valid contractual rights, it can operate to restrain abusive actions that do not rise to the level of an actual breach of contract. Good faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. The good faith standard, for example, prevents a party from seeking to escape performance on the original contract terms by demanding modifications without a legitimate commercial reason for doing so.

**Adequate Assurance of Performance.** While space does not permit mention of the many liberal features of the UCC, one rule to note is a party's right to demand adequate assurance

of performance. For countless reasons parties frequently grow concerned as to whether their counterparties remain willing and able to perform under the contract. In such cases the UCC provides a flexible, effective remedy.

Under the UCC a contract imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party, the other may demand in writing adequate assurance of due performance. Until receiving such assurance the other party may suspend future performance unless doing so would be commercially unreasonable.

Between merchants the reasonableness of grounds for insecurity and the adequacy of assurance are determined according to objective commercial standards and the obligation to act in good faith. A failure to provide adequate assurance of due performance within a reasonable time not exceeding thirty days constitutes a repudiatory breach that the other party can choose to accept. In accordance with customary contract principles, if the repudiation is not accepted as final then it can be retracted and the contract rights reinstated. The right to demand adequate assurance of performance does not interfere with a seller's right to stop delivery or reclaim goods upon learning of a buyer's insolvency. The right to adequate assurance of performance has become part of the common law in New York in order to promote predictability, definiteness, and stability in commercial dealings and expectations, and applies to long-term commercial contracts that are not subject to the UCC.

**Remedies.** Finally, the UCC takes a broad view of remedies as well. The UCC directs that contractual remedies shall be liberally administered so that the aggrieved party may be put in as good a position as if the other party had fully performed the contract. While such make-whole remedies are to be liberally administered, the parties nonetheless retain considerable freedom to determine the scope of available remedies. For example, while the UCC authorises buyers but not sellers to recover consequential damages, the parties can exclude consequential damages from the contract. Parties are also free to liquidate breach-of-contract damages provided the sum agreed is reasonable in the light of the anticipated or actual harm caused by the breach. Similarly, sellers are free to exclude warranties, including any implied warranty that the goods are merchantable or fit for any particular purpose. In addition, parties choosing New York law do not expose themselves to the risk of punitive damages because punitive damages are not recoverable breach-of-contract damages under New York law.

While specific performance is not generally favoured as a breach-of-contract remedy in common law jurisdictions, the UCC seeks to further a more liberal attitude in connection with the specific performance of sale contracts and authorises specific performance where the goods are unique or "other proper circumstances" exist. While the factors constituting proper circumstances are not specified, the inability of a buyer to cover, for example, is said to be strong evidence of circumstances that would justify specific performance. Specific performance is therefore a potential though not a certain remedy in compelling circumstances, and in such cases the courts would have the power to grant appropriate prohibitory and mandatory injunctions to ensure the specific performance remedy would not be lost.



### Stanley McDermott III

DLA Piper Rudnick Gray Cary US LLP  
1251 Avenue of the Americas  
New York, New York 10020  
USA

*Tel:* +1 212 835 6290  
*Fax:* +1 212 835 6001  
*Email:* stanley.mcdermott@dlapiper.com  
*URL:* www.dlapiper.com

Stanley McDermott III has a widespread national and international litigation and arbitration practice and is co-chair of the Firm's International Trade and Transport practice. Mr. McDermott's practice includes the arbitration and litigation of international contract, shipping, and insurance disputes. He has handled numerous arbitration proceedings before the International Chamber of Commerce, the American Arbitration Association, and other internationally recognised arbitral organisations in the United States and the United Kingdom. He has substantial experience handling significant commercial litigations before numerous Federal and State courts throughout the United States, and regularly advises international trading companies on both contentious and noncontentious matters. Mr. McDermott is also a qualified solicitor in the United Kingdom, and frequently advises international clients concerning cross-border litigations in courts in the United States and other countries.



### Sarah J. Sterken

DLA Piper Rudnick Gray Cary US LLP  
1251 Avenue of the Americas  
New York, New York 10020  
USA

*Tel:* +1 212 896 2995  
*Fax:* +1 212 884 8595  
*Email:* sarah.sterken@dlapiper.com  
*URL:* www.dlapiper.com

Sarah Sterken concentrates her practice in international litigation and arbitration, focusing on public international as well as private international law. She has represented foreign clients in U.S. litigation in a variety of matters, including international trade disputes before the Court of International Trade and claims brought under the money laundering provisions of the Patriot Act. She has experience with international arbitration under a variety of rules, including ICSID, AAA/ICDR, the ICC, and the Society of Maritime Arbitration. She also has appellate experience, including matters before the U.S. Court of Appeals for the Second Circuit, the Federal Circuit and the U.S. Supreme Court.



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