Case Comment

All Quiet on the CISG Front: *Guiliani v. Invar Manufacturing*, the Battle of the Forms, and the Elusive Concept of *Terminus Fixus*

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Ever since Canada adopted the U.N. Convention on Contracts for the International Sale of Goods (the "CISG") in 1992, international sales practitioners have been waiting patiently for a body of determinative Canadian case law to develop. It continues to be a very long wait. The slow pace of development of the case law has been due, in large part, to the failure of litigants and judges to recognize that the CISG is the applicable law in numerous international contract disputes involving the sale of goods. The latest example, the recently reported case of *Guiliani v. Invar Manufacturing*[4] is a further manifestation of this failure. Not only is this case the latest disappointment in Canadian CISG jurisprudence, the case also begs the question: When is contract formation complete? At what point does the "battle of the forms" end, and contract consummation begin? Is there a specific point at which the contract is formed, or is the idea of *terminus fixus*[5] in contracts an elusive goal?

The facts are relatively straightforward in *Guiliani*, and could be categorized as a "battle of the forms" dispute involving $17 million of allegedly defective machinery. The Italian seller orally agreed to the essential terms of a sale of machinery with a Canadian buyer. The parties did not discuss a choice of law or jurisdiction provision. However, the Canadian buyer sent the seller a purchase order in January, 2005, stating that "the courts of Ontario shall have jurisdiction for all purposes".[6] It further stated that the "International Sale of Goods Act shall not apply". In

[4] 2007 WL 2758802, 2007 CarswellOnt 5922 (Ont. Sup. Ct. J.) [*Guiliani*]. Note that while the authors believe that the case citation spells the name of the plaintiff incorrectly (as most of the court documents in the case spell it "Giuliani"), the authors have chosen not to correct it for purposes of ease of case citation. Recently, the case has been appealed, and is under the case name of *Linamar Holdings Inc. v. IGM U.S.A. Inc.*, 2008 ONCA 256.

[5] The term *terminus fixus*, while not entirely original, has been coined by the authors to denote a specific, terminal point at which the contract is formed.

[6] Respondent's Factum at para. 18. The following is an excerpt from the Plaintiff's Factum:

> 18. In order to confirm Invar's purchase of the Giuliani machines, Jones followed his standard practice of giving Sprenger Invar's purchase order number 24906 over the telephone. Sprenger and Guccini both understood that, with the purchase order number, Invar was buying the Giuliani Machines. Thereafter, all documents regarding the purchase of the Giuliani Machines referenced that number. Although the actual purchase order was not issued until January 2005, that document did set out Invar's standard terms and conditions, as had been disclosed to Sprenger. These included that "the courts of Ontario

other words, the buyer also sought to exclude the application of the CISG. As is often the case in sales transactions, the parties attempted to include contractual terms that they deem most favourable to their interests. Not surprisingly, the Italian seller subsequently sent a standard form invoice which contained a provision on the reverse side requiring all disputes to be settled in Italy. A "Purchase Agreement Document" memorializing the orally agreed upon terms was signed by the buyer several weeks later after payment had been made on the invoice. The buyer commenced an action in Ontario, and the Italian seller sought to stay the action on the basis of the Italian contractual jurisdiction term and other factors.

The Court found that the essential terms of the contract were formed without reference to either the buyer's or the seller's standard form terms, such that there was no agreement on a governing jurisdiction. Accordingly, it held that it had *jurisdiction simpliciter* for the dispute.[7] In so doing, the Court does not appear to have examined the contract in light of the CISG. If the contract was formed as the Court found, and had the Court considered the CISG, it would likely have found that the contract was governed by the CISG by default. This case comment explores whether the same result would have occurred if the correct law, i.e. the CISG, had been applied. The short answer is: possibly, but not necessarily.

By its terms, the CISG does not apply to *all* international sales contracts. As a result, each agreement must be examined with reference to several important qualifications to its operation. In the *Guiliani* case, these qualifications are provided for in CISG Article 1. A thorough review of this article by the Court would have revealed the following key points:

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shall have jurisdiction for all purposes" and that the "International Sale of Goods Act shall not apply".

[7] The court went on to deal with *forum non conveniens*. See *infra*.

1) The CISG applies to contracts for the sale of goods where both parties' places of business are in different countries that have each adopted the CISG.[8] In this case, both Canada and Italy are signatories to the CISG.

2) The CISG does not cover all goods. For example, it excludes international consumer sales of "goods bought for personal, family or household use",[9] and it excludes certain specific kinds of sales such as sale by auction, and certain specific kinds of goods, such as stocks, electricity, ships, hovercraft, and aircraft.[10] Machinery, as in the *Guiliani* case, has not been excluded;

3) The CISG excludes sales of goods where the buyer supplies a "substantial part" of the "materials" necessary for production.[11] This provision applies generally to specialized situations, such as turnkey assembly operations, parent/subsidiary sales (where choice of law is not usually at issue). The facts of *Giuliani* do not suggest that this exclusion is applicable.

4) The CISG permits the parties to exclude its application if they wish.[12]

Each of these points requires further elaboration. The reference in Article 1(1)(b) of the CISG to the rules of private international law directs the domestic court to apply its own conflicts of law analysis to determine CISG applicability. In this sense, Article 1(1)(b) is not a choice of law rule *per se*, but rather an interpretative tool.[13] Pursuant to Article 1(1)(b), the applicable law

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[8] CISG, Article 1 states in part:

> (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
> (a) when the States are Contracting States [...]

[9] CISG, Article 2(a).

[10] CISG, Article 2(b)-(f).

[11] CISG, Article 3(1).

[12] CISG, Article 6.

[13] As Peter Schlechtriem remarks:

> States declaring a reservation under Article 95 are, however, (unlike states declaring reservations under Articles 92(2) and 93(3)) "Contracting States" in the meaning of Article 1(1)(a). If the parties to the contract […] have their places of business in the US, a Contracting (reservation)

for international sales contracts is to be determined by the conflict of laws rules, or on the basis of international treaties, or, alternatively, on the basis of a law chosen by the parties (choice of law).[14] Canadian courts generally apply the *lex loci contractus* in lieu of an *ex ante* agreement on choice-of-law.[15] Generally, if one of the parties is from a non-Contracting State, then the

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> State, and in Germany, a Contracting (non-reservation) State, a court in Canada has to apply the CISG, if its conflict rules refer either to German or US law.

Peter Schlechtriem & Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* 2d ed. (New York: Oxford University Press, 2005) at 26, §14, 37, §44 (footnotes omitted) [Schlechtriem/Schwenzer with attribution to contributing author]. Some commentators argue that the forum (contracting) state is indirectly bound by Article 95 and applicable declared reservations. *Cf.* Albert Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (Deventer: Kluwer Law and Taxation, 1989) at 78. *Cf.* John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3d ed. (The Hague: Kluwer Law International, 1999) at 50 §56, at para. 47.5.

[14] In Tribunal Cantonal Jura [Appellate Court] Nov. 3, 2004, Ap 91/04 (Switz.) the Court panel held:

> In the case of a sale of an international nature, the applicable law can be determined on the basis of internal laws of international private law which resolve conflicts of laws, that is to say, on the basis of the Swiss Federal Law on International Private Law of 18 December 1987 (LDIP), or on the basis of international treaties or alternatively on the basis of a law chosen by the parties (choice of law).

"Pace Law School CISG Database", online at <http://cisgw3.law.pace.edu/cases/041103s1.html> (date accessed: April 30, 2008). See also Handelsgericht des Kantons Zürich [Commercial Court], April, 26, 1995, HG 920670 (Switz.) "Pace Law School CISG Database", online at <http://cisgw3.law.pace.edu/cases/950426s1.html> (date accessed: April 30, 2008) and Henry Mather, "Choice of Law for International Sales Issues Not Resolved by the Convention" (2001) 20 J.L. & Com. 155 at 170 "Pace Law School CISG Database", online at <http://www.cisg.law.pace.edu/cisg/biblio/mather1.html> (date accessed: April 30, 2008).

[15] In *Canada (Attorney General) v. Nalleweg*, [1998] 165 D.L.R. (4th) 606 at 612-613 (Alta. C.A.), Clark, J.A. held that:

> [I]t is proper that any disputes arising out of that contract be governed by the lex loci contractus. The proper law of the contract is the system of law which has the closest and most real connection to the contract: See Kenton Natural Resources v. Burkinshaw (1983), 47 A.R. 321 at 329 (Q.B.); 243930 Alberta Ltd. v. Wickham (1990), 73 D.L.R. (4th) 474 (Ont. C.A.); Castel, J.G., Canadian Conflict of Laws, 3rd ed. (Toronto: Butterworths, 1994) at 559.
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> [...] To determine which jurisdiction is most closely connected with the contract, the place of contracting, place of performance, residence or place of business of the parties, and the subject matter of the contract are all important factors.

See also, *Barclay's Bank plc v. Inc. Inc.* (1999), 78 Alta. L.R. 101 (Q.B.) at para. 36.

The most recent iteration of the *lex loci contractus* can be found in J.G. Castel and Janet Walker, *Canadian Conflict of Laws*, 6th ed. (Markham: LexisNexis Butterworths, 2005) vol. 2 at 31-5 to 31-7:

> If the parties have not expressed their choice, they may, nevertheless, have demonstrated it with reasonable certainty in a number of different ways […] [i]f the parties have agreed that the court of a particular place shall have jurisdiction over the contract, there is a strong inference that the law of that place is the proper law. Other factors from which the court have been prepared to infer the intentions of the parties as to the proper law are the *legal terminology in which the contract is drafted, the form of the documents involved in the transaction, the currency in which payment is to be made, the use of a particular language, the connection with a preceding transaction, the nature and location of the subject matter of the contract, the residence (but rarely the nationality) of the parties, the head office of a corporation party to the contract,* or the fact that one of the parties is a government [...] Where the parties have not expressed a choice as to the proper law and no such

CISG will not apply, unless the contract specifies that the CISG applies (a choice of law provision) or where the rules of private international law (conflicts of law) lead to the CISG's application. If the proper law of contract (the "*lex loci contractus*") is in a Contracting State, then the CISG will apply by default, subject to a limited number of reservations available. For example, if a contract between an Ontario company and an English company (a non-Contracting State) specifies that the "laws of Ontario shall apply", then the CISG will apply, unless it is expressly excluded. Conversely, if the contract specifies that "English law shall apply" then the English Sale of Goods Act, 1979 would apply.[16] This is, of course, subject to Article 95, which allows a Contracting State to make a Declaration that it will not be bound by Article 1(1)(b).[17] The Supreme Court of Canada's own recognition of "the precedence to the principle of the autonomy of the parties"[18] is reflected in Article 6 of the CISG which provides: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions".[19]

> choice can be inferred from the circumstances of the case, the proper law of their contract is the system of law with which the transaction has the *closest and most real connection*. The court does not seek to find some presumed or fictitious intention of the parties, but rather holds the contract to be governed by the system of law with which, in all the circumstances it is most closely and really connected. Whilst firm rules cannot be laid down, the court will look to such factors as the *place of contracting, the place of performance, the place of residence, or business of the parties, and the nature and subject matter of the contract*. When the place of contracting is the same as the place of performance, the court may find it difficult to determinate that any other law is the proper law of the contract [emphasis added, citations omitted].

[16] Sale of Goods Act 1979, c. 54, as amended by: Sale of Goods (Amendment) Act 1994, c.32; Sale and Supply of Goods Act 1994, c.35, Sale of Goods (Amendment) Act 1995, c.28, and The Sale and Supply of Goods to Consumers Regulations, 2002, 2002 No. 3045.

[17] Article 95 of the CISG provides:

> Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) or article 1 of this Convention.

To date, Article 95 Declarations have been made by China (PRC), Czech Republic, Singapore, Slovakia and the United States.

[18] *Grecon Dimter Inc. v. J.R. Normand Inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, 255 D.L.R. (4th) 257 at 271, 336 N.R. 347, J.E. 2005-1369 [cited to D.L.R.] [*Grecon*]. See also, Antonin I. Pribetic, "The (CISG) Road Less Travelled: *GreCon Dimter Inc. v. J.R. Normand Inc.*" (2006) 44 Can. Bus. L.J. 92.

[19] CISG, Article 6.

Had the court correctly applied the CISG, the conflict of laws analysis would have taken on a different jurisdictional complexion. With regard to *jurisdiction simpliciter*, had the defendant's "choice of jurisdiction" clause (contained on the reverse of IGMI's invoice dated April 1, 2004) been determined to be a "material" term in the international sales contract, then the issue before the court would have been whether the plaintiff should be bound by it. Indeed, the motions judge accepted that it was as an "exclusive jurisdiction" clause in favour of the Italian courts, albeit concluding that it did not form part of the "essential terms of the contract".[20] This would have shifted the burden of proof to the plaintiff to show "strong cause"[21] why it should not be bound by the forum selection clause.[22] The key difference between the *forum non conveniens* and "strong cause" tests is that "the presence of a forum selection clause [...] is sufficiently important to warrant a different test, one where the *starting point* is that the parties should be held to their bargain".[23]

Article 6 enshrines two of the CISG's key principles—party autonomy and contractual primacy. Thus, the parties are free to exclude or "opt-out" of the CISG altogether. Alternatively, subject to Article 12,[24] the parties may derogate from or vary the CISG's provisions, or partially "opt-in" to the CISG. The ability of parties to exclude, vary or derogate from the CISG's provisions reflects the realities of the twenty-first century international trade and commerce or the modern *Lex Mercatoria*.[25] In fact, the Supreme Court of Canada has itself recently

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[20] *Giuliani*, at paras. 7 and 9.
[21] *The "Eleftheria"*, [1969] 1 Lloyd's Rep. 237 (Adm. Div.).
[22] *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450, 224 D.L.R. (4th) 577 at para. 19 per Bastarache J. (McLachlin C.J. and Gonthier, Iacobucci, Major, Binnie and LeBel JJ. concurring).
[23] *Ibid.*, at para. 21.
[24] Where one of the parties is from an Article 96 reservation state and thus domestic rules as to form prevail over Articles 11, 20 and Part II of the CISG. See CISG, Article 12.
[25] For a discussion of the historical antecedents of the CISG evolving from the traditional and modern *lex mercatoria* (also known as the "law merchant"), see Peter J. Mazzacano, "Canadian Jurisprudence and the Uniform Application of the U.N. Convention on Contracts for the International Sale of Goods" in *Pace Review of the Convention on Contracts for the International Sale of Goods (CISG) 2005-2006*, ed. Pace Int'l L. Rev. (Munich: Sellier European Law Publishers, 2006) 85 at 93-101.

reaffirmed "the precedence to the principle of the autonomy of the parties"[26] in the context of international sales transactions. Whether or not the parties *should* exclude the CISG is largely a normative issue, albeit the Preamble to the CISG firmly entrenches the CISG's goals of uniformity and certainty, which are clearly superior to any parochial and inconsistent domestic sales laws.[27] Where the CISG otherwise applies under Article 1(1)(a) or 1(1)(b) and is not excluded under Articles 2-5, the parties may mutually exclude[28] the CISG by (i), expressly stating that the CISG does not apply *and* (ii), choosing an alternate governing law.[29] Canadian courts have generally held that the governing law clauses were effective in excluding the CISG's application. However, such clauses must be drafted with the utmost care, since terms such as referring to the "law of the seller's place of business" or "the laws of Germany" may lead to ambiguity and unintentional application of the CISG by default under Article 1(1)(b).[30]

The prevailing view of most commentators is that the CISG allows for implicit derogation.[31] However, some CISG decisions, mostly from American courts, have held to the

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[26] *Grecon*, *supra* note 18.

[27] The Preamble to the CISG states in part that the

> development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States […] [and] the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.

[28] Schlechtriem: Schlectriem/Schwenzer, Art. 6, at 85, §6.

[29] *Ibid*. at 85, §7.

[30] As Prof. Schlechtriem observes:

> If the law of a Contracting State is chosen without other qualifying terms specifying which rules are meant, as for instance the mere reference to "German law," it is long established -- and such was already the case with respect to the Hague Convention on International Sales [ULIS] -- that such a reference includes the application of CISG as part of the chosen law. Regard for the choice of law of a Contracting State as a selection of the CISG, to the extent the scope of the CISG fits the transaction, is also the prevailing international practice [citations omitted].

Peter Schlechtriem, "Uniform Sales Law in the Decisions of the *Bundesgerichtshof*" in *50 Years of the Bundesgerichtshof [Federal Supreme Court of Germany] A Celebration Anthology from the Academic Community*, "Pace Law School CISG Database", online at <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem3.html> (date accessed: April 30, 2008) [Schlechtriem-Bundesgerichtshof].

[31] Schlechtriem-Bundesgerichtshof, *ibid.*; Jacob S. Ziegel and Claude Samson, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods* "Pace Law School CISG Database", online at <http://www.cisg.law.pace.edu/cisg/text/ziegel4.html> (date accessed: April 30, 2008);

contrary. In *Asante*, the court held that where parties seek to apply a signatory's domestic law in lieu of the CISG, they must affirmatively opt-out of the CISG.[32] In *Valero Marketing & Supply Company v. Greeni Oy & Greeni Trading Oy*, where an agreement to include a provision that New York law governed failed to specifically exclude application of the CISG, the court held that the CISG remained applicable.[33] In *B.P. Oil International, Ltd. v. Empresa Estatal Petroleos De Ecuador* the court held that "if the parties decide to exclude the [CISG], it should be expressly excluded by language which states that it does not apply".[34] In *Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd.*, the court concluded that a contract stating the agreement shall be governed by the laws of Canada did not exclude the CISG.[35] As Prof. Kritzer observes: "[s]ubject to an overstatement ('if the parties decide to exclude the [CISG], it should be *expressly* excluded by language which states that it does not apply'), this is consistent with the holding of courts of other jurisdictions […]

Schlechtriem: Schlectriem/Schwenzer, Art. 6 at 82-92; Michael Joachim Bonell & Fabio Liguori, excerpt from "The UN Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law - 1997 (Part 1)" (1997) 2 Unif. L. Rev. 385 "Pace Law School CISG Database", online at <http://www.cisg.law.pace.edu/cisg/text/libo6.html (date accessed: April 30, 2008); Joseph Lookofsky, "*In Dubio Pro Conventione*? Some Thoughts About Opt-Outs, Computer Programs and Preëmption Under The 1980 Vienna Sales Convention (CISG)", (2003) 13 Duke J. Comp. & Int'l L. 263 at 270-274, online at <http://www.law.duke.edu/shell/cite.pl?13+Duke+J.+Comp.+&+Int%27l+L.+0263> (date accessed: April 30, 2008); Peter Winship, excerpt from "Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners" (1995) 29 Int'l Law. 525 "Pace Law School CISG Database", online at <http://www.cisg.law.pace.edu/cisg/text/winship6.html> (date accessed: April 30, 2008).

[32] *Asante Technologies v. PMC-Sierra*, 164 F. Supp. 2d 1142 (N.D. Cal. 2001) also "Pace Law School CISG Database", online at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010727u1.html> (date accessed: April 30, 2008).

[33] *Valero Marketing & Supply Company v. Greeni Oy & Greeni Trading Oy*, 373 F.Supp.2d 475 at 482 (D.N.J. 2005) also "Pace Law School CISG Database", online at <http://cisgw3.law.pace.edu/cases/050615u1.html> (date accessed: April 30, 2008) [*Valero Marketing v. Greeni Oy*], rev'd and remanded on other grounds: 2007 WL 2064219 (3rd Cir. 2007) also "Pace Law School CISG Database", online at <http://cisgw3.law.pace.edu/cases/070719u2.html> (date accessed: April 30, 2008): "We do not perceive a conflict between the CISG and New York law on the issue of whether the September 14 Agreement is valid and binding" (at fn. 7 per Barry, Fuentes and Jordan, Circuit Judges).

[34] *B.P. Oil International, Ltd. v. Empresa Estatal Petroleos De Ecuador*, 332 F.3d 333 (5th Cir. 2003).

[35] *Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd.*, 2003 Westlaw 223187 (N.D. Ill. 2003) also "Pace Law School CISG Database", online at <http://cisgw3.law.pace.edu/cases/030129u1.html> (date accessed: April 30, 2008).

However, there is nothing in either the language of the CISG or its legislative history to require that such an exclusion must be *express*".[36]

It is apparent on the face of the facts that the disputed contract was subject to the application of the CISG. Once it had been determined that the CISG applied, the Court in Giuliani would have noted that several CISG provisions would have been applicable. Notably, these are the contract formation rules in Articles 14-19, the intentions of the parties in Article 8, and the contract modification rule in Article 29.

It is not uncommon for a contract to be formed by exchange of various documents, such as purchase orders which are accepted or confirmed through the exchange of forms containing conflicting small print terms. The CISG does not contain any particular rules on the incorporation of standardized terms of business into an agreement. Although the CISG follows the basic common law rule that changes to the fundamental terms of the offer will constitute a counter-offer,[37] Article 19(2) permits a reply containing differing or additional terms which do not "materially affect" the offer, to constitute an acceptance, unless the offeror quickly objects, either "orally" or by writing. If no such objection is given, the terms of the contract are the terms of the offer with the non-material modifications contained in the acceptance.[38] In other words, the small print terms of an acceptance or order confirmation can be binding unless promptly

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[36] Albert H. Kritzer, "Editorial Remarks, *American Mint LLC v. GOSoftware, Inc.*" "Pace Law School CISG Database", online at <http://cisgw3.law.pace.edu/cases/060106u1.html> (date accessed: April 30, 2008) (emphasis added).

[37] CISG, Article 19 (1): "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 counter-offer".

[38] CISG, Article 19(2):

> However, a reply to an offer which purports to be an acceptance but contains additional or different terms which 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. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

objected to, or unless they constitute material changes to the offer, or purchase order, with respect to price, quality or dispute resolution. This leads to the "battle of the forms".

Current CISG jurisprudence favours the "*last shot principle*",[39] namely the last person to send his form is considered to control the terms of the contract and therefore the person who wins the battle. This can lead to a different result than under the U.S. approach, known as the "*knock-out rule*",[40] or under Lord Denning's approach as to agreement on all material points, as stated in *Butler Machine Tool v. Ex-Cell-O*[41] as quoted by the Court in *Guiliani*.[42]

There are many CISG cases that provide examples of the *last-shot rule*. For example, in one case a French seller of doors sent the German buyer a confirmation letter which had the seller's standard terms printed on the back.[43] One of those conditions required the buyer to notify the seller of defects within a short period of time. A German court found that the seller's confirmation letter was a counter-offer that was implicitly accepted by the buyer`s conduct when

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[39] Maria del Pilar Perales Viscasillas, "Battle of the Forms and the Burden of Proof: An Analysis of BGH" (2002) 6 Vindobona J. Int'l Com. L. & Arb. 217.

[40] § 2-207. Additional Terms in Acceptance or Confirmation.
(1) 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.
(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
(a) the offer expressly limits acceptance to the terms of the offer;
(b) they materially alter it; or
(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
(3) 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.

[41] [1979] 1 All E.R. 965 (C.A.).

[42] *Ibid*. at 968-969:
In many of these cases our traditional analysis of offer, counter-offer, rejection, acceptance and so forth is out-of-date [....] The better way is to look at all of the documents passing between the parties and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points, even though there may be differences between forms and conditions printed on the back of them.

[43] Oberlandesgericht [OLG] Saarbrucken [Provincial Court of Appeal] Jan. 13, 1993, 1 U 69/92 (F.R.G.) "Pace Law School CISG Database", online at <http://cisgw3.law.pace.edu/cases/930113g1.html> (date accessed: April 30, 2008).

he received the goods. This Court's reasoning was: When forms are used, the rules of the Convention also apply; consequently, any variation of those forms would be a counter-offer. Such a counter-offer would most certainly be accepted through some type of act of performance.

If the conflicting terms are "material", what then? The CISG does not comprehensively define what terms are "material", but rather gives a non-inclusive list of price, payment, quality and quantity, place and time of delivery, liability and dispute settlement.[44] There have been several CISG cases which have confirmed that a dispute settlement clause is a material term, and hence a counter-offer.[45] However, the net result is the same as if the term was not material, provided that the other party commences performance. In most common-law jurisdictions, and under the CISG,[46] although silence is not acceptance, partial performance is generally sufficient to acknowledge acceptance.[47]

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[44] CISG, Article 19:

> (3) 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 other or the settlement of disputes are considered to alter the terms of the offer materially.

[45] For example, *Valero Marketing v. Greeni Oy*, *supra* note 40 and Cass. civ. 2e [Supreme Court], 16 July 1998, *Les Verreries de Saint Gobain v. Martinswerk*, Bull. Civ. 1998.I.176, No. 252 (Fr.) "Pace Law School CISG Database", online at <http://cisgw3.law.pace.edu/cases/980716f1.html> (date accessed: April 30, 2008).

[46] CISG, Article 18:

> (1) 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.
> (2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.
> (3) 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 the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

[47] For example, *Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc.*, 2006 WL 1009299 (W.D. Wash. 2006) "Pace Law School CISG Database", online at <http://cisgw3.law.pace.edu/cases/060413u1.html> (date accessed: April 30, 2008), where the court held that an exclusionary clause was enforceable "because Plaintiff paid the price for the goods and opened the package where the exclusionary clause was prominently displayed on top in red. (Article 18(3): "assent by performing an act, such as one relating to the dispatch of the goods or payment of the price […]"; Article 18(1): an additional term can be accepted by "conduct by the offeree indicating assent"). Some cases have gone even further than requiring part performance. See also, Oberlandesgericht [OLG] Koln [Provincial Court of Appeal], Feb. 22, 1994, 29 U 202/93 (F.R.G.) "Pace Law School CISG Database", online at

The consequence thus is to determine whether or not the Canadian buyer had notice of the seller's terms, and if so, whether the buyer had an obligation to object to those terms.[48] To do so, CISG Article 8(3)[49] instructs the court to give "due consideration 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."[50] Under this Article, query whether the Canadian buyer in *Guiliani* had a duty to object promptly to the conflicting terms.

A further query relates to trade practice. CISG Article 9 binds the parties to any practices between themselves, for example, their past business conduct, and implies to their contract any trade usages that they "ought to have known" about in their particular trade.[51] The Court in *Guiliani* would have been obliged to make this inquiry.

<http://www.cisg.law.pace.edu/cases/940222g1.html> (date accessed: April 30, 2008). In this case, a German buyer of rare wood claimed the goods were defective and refused to pay. The Nigerian seller examined the wood delivered and offered to take it back in order to market it. The buyer neither refused this offer nor claimed damages or replacement of the defective wood. In rejecting the seller's claim for payment, the German Court of Appeal held that, under certain circumstances, in accordance with CISG Article 18, the buyer's silence could be interpreted as a declaration of acceptance of the seller's offer to terminate the contract of sale.

[48] See *Filanto, S.p.A. v. Chilewich International Corp.* 789 F. Supp. 1229 (S.D.N.Y. 1992). This is commented on by Ronald A. Brand & Harry M. Flechtner, "Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention" (1993) 12 J.L. & Com. 239. In this case, a New York middleman agreed to sell shoes to a Russian buyer pursuant to a master agreement that required disputes to be arbitrated in Moscow. To fulfil the agreement, the middleman entered into sub-agreements with an Italian shoe seller. The Italian seller commenced suit in a New York court to recover the price of shoes shipped but not paid for. The New York middleman was successful in taking the position that its contract with the Italian seller incorporated the Russian master agreement by reference, and thus was subject to arbitration in Moscow. The court held that the middleman's offer, which incorporated the Russian master agreement by reference, had been accepted by the Italian manufacturer's failure to respond promptly. The court noted that although under CISG, Article 18(1), silence is not usually acceptance, pursuant to CISG, Article 8(3), the course of dealing between the parties created a duty on the part of the seller to object promptly and that its delay in objecting constituted acceptance of the New York middleman's offer.

[49] CISG, Article 8(3):

> 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.

[50] *Ibid.*

[51] CISG, Article 9:

Pursuant to CISG Article 29[52] a contract may be modified or terminated by the mere agreement of the parties (and even if the agreement contains a "No Modification Except in Writing" clause, a party may by its conduct, be precluded from relying on the clause if the other party relies on such conduct). Accordingly, the Court in *Guiliani* perhaps should have considered whether the provision of the invoice by the Italian seller containing the modifying terms, and the subsequent payment of that invoice, constituted a modification of the contract that the Court found already existed. In other words, was there a *terminus fixus* with the contract?

Unfortunately for the Italian seller, the limited CISG jurisprudence relating to terms contained on invoices is not supportive. In one recent case[53] involving a Belgian seller of pitted cherries to a German buyer, the facts were similar to those of *Guiliani*, in that the seller's standard terms were neither attached to its offer nor in a subsequent communication from the seller. The Court found it to be irrelevant that the standard terms were printed on the reverse side of each invoice that was sent to the buyer, holding that for the valid incorporation of standard terms of business there must be a reasonable possibility for the recipient to gain awareness at the time of conclusion of the contract.[54] The Court also noted that a subsequent

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> (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
> (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

[52] CISG, Article 29:

> (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.

[53] Landgericht [LG] Neubrandenburg [District Court] Aug. 3, 2005, 10 O 74/04 (F.R.G.) "Pace Law School CISG Database", online at <http://cisgw3.law.pace.edu/cases/050803g1.html> (date accessed: April 30, 2008).

[54] A similar result was found in *Chateau des Charmes Wines Ltd. v. Sabate USA Inc*., 328 F.3d 528 at 531 (9th Cir. 2003) in which an agreement failed where there was no indication that the other party accepted or agreed to the other party's unilateral new terms.

reference to standard terms of business was not sufficient (as it might otherwise be in German domestic law).

Consideration of the CISG provisions to the facts in the *Guiliani* case would have made for interesting reading, and would have obliged the Court to look at the factual circumstances of the case in a different light. Whether the outcome would have been the same ultimately would have depended on the facts of the case, but at first blush, the facts appear to support an argument for the inclusion of the seller's standard terms as contained on its invoice. Perhaps this issue will receive further light as the case moves through the Ontario legal system.

Unfortunately, the results at the Ontario Court of Appeal were equally disappointing—at least for the CISG. Counsel for the appellants/defendants did not refer to the CISG in their submissions, and instead relied solely on domestic contract jurisprudence on the issues of contract formation and jurisdiction.[55] After a brief recess, the court indicated to counsel for the respondents that the justices did not need to hear any additional submissions, and ruled in favour of the plaintiffs/respondents.[56] The court saw no error in the reasons of Harvison Young J., and deemed her decision to be "extremely well-reasoned".[57] A written endorsement followed a few days later—again, with no reference to the CISG.[58]

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[55] *Linamar Holdings Inc. v. IGM U.S.A. Inc.* (2 April 2008), Toronto C47829 (Oral argument, appellant) (Ont. C.A.). Note the change in the case name.
[56] *Ibid.*, (Oral decision of the court).
[57] *Ibid.*
[58] *Linamar Holdings Inc. v. IGM U.S.A. Inc.*, 2008 ONCA 256.