

A stylized world map in a light brown color serves as the background for the entire cover. The map is centered and shows the outlines of the continents. A dark blue rectangular box with a thin blue border is positioned in the center, containing the title and author information.

Understanding the **CISG**

Fifth (Worldwide) Edition

Joseph Lookofsky



Wolters Kluwer

Understanding the CISG

A Compact Guide to the
1980 United Nations Convention on
Contracts for the International Sale of Goods

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Preface

As was the case with previous Worldwide editions of *Understanding the CISG*, this fifth edition is designed for use by lawyers and law students in all of parts of the world, not least in the more than 80 'Contracting States' where the Convention on Contracts for the International Sale of Goods (CISG) is now in effect.

As of this writing, more than 3,000 CISG national court judgments and international arbitral awards have been reported. This compact Convention guide takes account of many of these precedents (listed in Appendix III), as well as the increasingly abundant CISG literature (a Table of Authorities and Abbreviations is set forth in Appendix IV).

Although CISG case law confirms that the Convention is often interpreted and applied in harmonious fashion, the CISG is not always understood by all arbiters and commentators in an identical way. This edition of *Understanding* continues to account for such anomalies, particularly insofar as they impact on merchants (and their lawyers) in the real CISG world. Once again, concrete illustrations are provided throughout to help clarify key aspects of important CISG rules.

As was the case with my work on the previous Worldwide editions of *Understanding* (as well as the American, European and Scandinavian editions which preceded them), I have strived to report and analyze CISG law in a concise and correct way. As for those errors and ambiguities which might remain, I hope that readers who find them will be kind enough to let me know.

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January 2017

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Chapter 1

Introduction and Overview

The rule-set popularly referred to as the ‘CISG’¹ is the 1980 United Nations Convention on Contracts for the International Sale of Goods. The CISG (also sometimes referred to as the Vienna Sales Convention)² contains the main rules which regulate the rights of buyers and sellers in connection with contracts for the international sale of goods.

The Convention, which entered into effect in 1988,³ is the first sales-law treaty to win acceptance on a worldwide scale.⁴ The more than eighty CISG Contracting States (Appendix I) account for more than three-fourths of all world trade,⁵ and the amount of money involved is enormous.⁶

The Convention, which applies by default in the international sales context, has also impacted on sales legislation at the regional and national levels.⁷ The importance of the Convention in the international arena is underlined by the thousands of reported decisions where the CISG has been held to apply,⁸ thus

-
1. Some say the four letters individually; some say the CISG-acronym as one word (with a ‘soft’ C).
 2. The Convention was finalized and approved at a diplomatic conference in Vienna in 1980.
 3. In the first eleven States to ratify: Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, United States of America, Yugoslavia and Zambia. *See* Appendix I *infra*.
 4. Regarding the ULIS and ULF Conventions, which preceded the CISG, *see* § 1.2 *infra*.
 5. As of January 2017, eighty-five States had ratified the CISG: *see infra* Appendix I and http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.
 6. In 2015, for example, goods valued at nearly USD 600 billion were traded between merchants in China and the United States alone. *See* <https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china>.
 7. *See* (e.g.) Article 2 of European Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. Regarding the impact of the CISG on (e.g.) domestic sales legislation in Scandinavia, *see generally* Lookofsky, *Scandinavian Experience*.
 8. *See* <http://www.cisg.law.pace.edu/cisg/text/casecit.html>. Relatively few of the thousands of CISG cases reported in ‘CISGW3’ (<http://cisgw3.law.pace.edu/>) involve transactions where the

evidencing the conduct of countless international traders who by default,⁹ or by express choice,¹⁰ regularly subject their sales contracts to the Convention regime.¹¹

Consider, for example, the numerous CISG decisions rendered by Chinese courts and arbitral tribunals.¹² These transactions confirm that Chinese merchants are quite comfortable with the level playing field which the Convention provides. The non-Chinese parties in such transactions also have good reason to accept the evenly balanced CISG rule-set, especially since Chinese merchants would hardly agree (without additional compensation) to buy or sell goods on the basis of a non-Chinese party's own domestic law.¹³

The main purpose of this chapter is to provide a brief introduction to the CISG: to sketch out its main field of application, as well as to highlight some key features of its substantive sales law rules. This chapter also aims to place the Convention within its larger 'transnational law' context: to relate the substantive content of the Convention to principles of juridical jurisdiction (international competence) as well as conflict of laws (private international law), since these related commercial topic-areas are also central to the resolution of international sales disputes.

§1.1 When Does the CISG Apply?

All CISG Contracting States now have (at least) two, essentially distinct sets of sales law rules.¹⁴ While domestic sales laws continue to apply in local transactions,¹⁵ courts in CISG Contracting States now regularly apply the Convention to cases involving international sales.

The main rule regarding CISG application is Article 1(1)(a). According to this provision, a sales contract between parties whose main places of business are in

parties were held to have 'opted out' of the Convention (*infra* § 2.7) or where the CISG for other reasons was held not to apply.

9. Regarding application of the CISG 'by default' *see infra* § 1.1.
10. Regarding CISG application 'by choice' (express provision) *see infra* §§ 2.3 and 2.7.
11. Most of the CISG decisions reported are judgments rendered by national courts. Although a very large number of CISG disputes are resolved by international arbitral tribunals (*see infra* § 1.4), only a limited number of such awards are available to the public. The published arbitral awards rendered in China (*see n. 12 infra*) constitute a notable exception. *See also* the ICC awards reported at <http://cisgw3.law.pace.edu/cisg/text/casedit.html#icc>.
12. *See, e.g.*, the numerous Chinese judgments and arbitral awards reported at <http://www.cisg.law.pace.edu/cisg/text/casedit.html#china>. *See also* 'China' in Appendix III, *infra*.
13. Obviously, a contractual choice of non-Chinese domestic law would place the Chinese party in a clearly inferior position, both as regards contract drafting, as well as in the event of a subsequent dispute, litigation, etc.
14. CISG States with separate sales laws applicable to domestic 'consumer sales' have three sales laws (regarding CISG Article 2(a) *see infra* § 2.5).
15. I.e. where the buyer and seller have their places of business in the same State (*see infra* § 2.2). Such transactions are best described as 'domestic'; describing them as 'national' obscures the fact that the CISG is an integral *part* of the law of a Contracting State.

different CISG Contracting States – (e.g.) in the United States¹⁶ and in France¹⁷ – ‘automatically’ becomes subject to the treaty,¹⁸ i.e., by default.¹⁹

Illustration 1a: Merchant-buyer (B) in California orders 10 dozen designer dresses from seller-manufacturer (S) in France. S purports to accept the order by e-mailing a brief confirmation to B. Later, B refuses to accept the goods delivered, whereas S demands to be paid.

In a situation like this, the parties might end up having their dispute decided by either an American or a French court,²⁰ but since the United States and France are both CISG ‘Contracting States,’ all French and American courts are bound to apply CISG Part II to determine whether or not S and B have entered a sales contract. If, by application of the CISG rules on sales contract formation, the court in question determines that the parties have in fact made a contract, it must then use CISG Part III to determine the parties’ respective obligations,²¹ their rights and remedies for breach,²² the passing of risk,²³ etc.

The CISG field of application is not limited to sales between parties located in (different) Contracting States. By virtue of Article 1(1)(b), the courts in *most* – though not all – CISG States also apply the CISG to international sales contracts ‘when the rules of private international law [conflict-of-laws] lead to the application of the law of a [single] Contracting State.’²⁴ Consider the following example:

Illustration 1b: Merchant B in England orders 10 dozen down-insulated coats from manufacturer S in Canada. S accepts the order and ships the goods to B. Later, claiming that the goods shipped do not conform to the contract, B refuses to pay the price agreed.

If this dispute ends up in a Canadian court, that court might well apply the CISG to determine the rights of the parties, even though the United Kingdom is not (yet) a CISG Contracting State.²⁵

16. The Convention entered into effect in the United States in 1988. *See* Appendix I *infra*.

17. The Convention also entered into effect in France in 1988. *See id.*

18. This result follows ‘automatically’ from Article 1(1)(a), assuming the parties have not agreed to opt out of the Convention regime. *See infra* §§ 2.1, 2.1, 2.3, 2.4 and 2.7.

19. Provided the parties themselves have not taken affirmative action to opt out of the Convention: *see infra* § 2.6.

20. *See generally infra* § 1.4.

21. *See generally infra* Chapter 4.

22. *See generally infra* Chapter 6.

23. *See generally infra* Chapter 5.

24. The Article 95 declaration made by a few Contracting States (including, significantly, China and the United States) precludes CISG application by virtue of Article 1(1)(b): *see* §§ 2.4 and 8.7 *infra*.

25. As of this writing (*see* Appendix I *infra*); *see also infra* § 1.4. Regarding Article 1(1)(b) *see infra* § 2.4.

In view of the Convention's broad acceptance and wide range of application, lawyers, judges, and arbitrators engaged in international sales transactions – not to mention commercially minded academics and their students – should become familiar with the most important CISG rules. Given the steadily growing body of (readily accessible) CISG case law,²⁶ we now have the means to understand how the Convention is being applied day-to-day in practice, by national courts and by arbitral tribunals around the CISG world.²⁷

§1.2 Brief Historical Perspective; CISG Ratification and Implementation

The CISG is not the first uniform sales law: the ULIS and ULF treaties date back to 1964.²⁸ But because these pre-CISG efforts met with only limited success,²⁹ most national courts, when confronted with an international sales dispute (involving questions of contract formation, parties' obligations, remedies for breach, etc.) in a pre-CISG context, were obliged to make a choice-of-law determination to decide which domestic sales law to apply. Consider this example:

Illustration 1c: In 1987 (i.e., before the CISG entered into force) French seller (S) and California buyer (B) make a contract for the sale of 10 dozen designer dresses. When B fails to pay on time, S sues for the price in a French court.

In this pre-CISG situation, the French court (assuming had it juridical jurisdiction)³⁰ would first have applied its own rules of private international law (PIL) to determine which country's domestic sales law to apply, and these PIL rules would probably have dictated the application of French substantive sales law to decide the merits of this case.³¹ But if a California court (with juridical jurisdiction) had been confronted with the same pre-CISG situation, it might well have reached a different result as to the applicable sales law, because it would have picked the applicable sales law by applying its own (very different, Californian) choice-of-law (PIL) rules.³²

26. See generally *infra* § 2.9.

27. Regarding Convention interpretation under Article 7(1), see *infra* § 2.8.

28. The Uniform Law for the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) were signed at The Hague in 1964.

29. The ULIS and ULF were ratified by only nine States: Belgium, Gambia, (West) Germany, Israel (ULIS only), Italy, Luxembourg, the Netherlands, San Marino, and the United Kingdom.

30. See generally *infra* § 1.4.

31. France is a party to the 1955 Hague Convention on the Law Applicable to the International Sale of Goods (Corporeal Movables). The main Hague default rule is that the 'seller's law' applies (Article 3). Regarding the interplay between this rule and CISG Article 1(1)(b) see § 2.4 *infra*.

32. For a comparison of European and American choice-of-law rules, see Lookofsky & Hertz, *Transnational Litigation*, Chapter 3.2.2 and 3.3.2. See also *infra* § 1.4.

So, before the CISG took effect, there was no assurance that the different conflict-of-law (PIL) rules applied by courts in France and California would lead to the application of the same sales law. Now, however, the situation with respect to *international* sales contracts has changed completely. As regards such contracts, France and California now have the *same international sales law*, so there is usually no need for the application of any choice-of-law (PIL) rule in a situation like this.³³

Indeed, by ratifying the CISG treaty, France, the United States, and all other Contracting States have entered a ‘contract among nations,’ and the courts in these States are bound (by public international law) to uphold that supranational contract and to apply the Convention rules to all transactions within the treaty’s scope.

§1.3 CISG Parts I–IV: A Nutshell Overview

The CISG contains a total of 101 articles, and these rules are organized into four main Parts (I–IV). The substantive core of the Convention is located in Part II on ‘Formation of the Contract’ and in Part III on the ‘Sale of Goods.’ Part I contains important provisions which tell us when and how to use the substantive rules in Parts II and III. The ‘Final Provisions’ in Part IV regulate, among other things, the making of ‘reservations’ to various CISG rules.³⁴

CISG Part I contains provisions which delimit the Convention ‘Sphere of Application,’ including (e.g.) the ‘internationality’ requirement; the Part I rules also help delimit the concept of ‘goods.’³⁵ In addition, Part I contains a set of ‘General Provisions,’ including important rules for the interpretation of the Convention text, as well as for the interpretation of contracts which are subject to the Convention regime.³⁶

Part II of the Convention regulates the formation of international sales contracts. Under the CISG, offers are generally revocable until an acceptance is dispatched, unless the offeror indicates that the offer is irrevocable or the offeree has had reason to rely thereon.³⁷ To a large (but not complete) extent the CISG retains the traditional ‘mirror image’ rule which means that a contract is formed only if the offer and acceptance match in every respect; this feature is particularly significant within the context of a ‘battle of forms.’³⁸

Although CISG Part II regulates the contract formation process, the Convention does not generally regulate contract validity. Therefore, to determine whether a

33. See CISG Article 1(1)(a); see also *infra*, text with note 39 and § 2.3 with note 17.

34. See *infra* § 8.4.

35. See generally *infra* Chapter 2A.

36. See generally *infra* Chapter 2B.

37. For details see *infra* § 3.6.

38. See *infra* § 3.8.

party to a CISG contract has a ‘defense’ to enforcement such as fraud or mistake, we need to look outside the CISG.³⁹

Part III of the Convention contains the substantive rules of greatest practical significance for international export and import transactions. These ‘Sale of Goods’ rules define the parties’ obligations, rights and remedies for breach. The key to the CISG seller’s proper performance is the delivery of the right goods at the right time and place, i.e., as required by the terms of the contract between the parties and the CISG supplementary (default) rules. Unless otherwise agreed, the goods do not conform to the contract unless they are both fit for ordinary purposes and for any particular purpose made known to the seller at the time of contracting.⁴⁰ The buyer’s obligations relate not only to timely payment, but also to timely acceptance of the goods.⁴¹

The Convention ties the passing of risk to the last significant act by which the seller completes delivery. In general, accidental loss of the goods after the risk has passed to the buyer does not discharge the buyer’s obligation to pay the price. Although the CISG does not make a formal distinction between specific and generic sales (as do some – e.g., European – domestic sales laws), the risk will not pass to the buyer unless the goods have been ‘identified’ to the contract.⁴²

Every breach of a CISG obligation gives rise to one or more CISG remedies for breach. The main remedial categories are specific performance, avoidance of the contract, and damages. Compared with some (e.g., American) domestic sales laws, the CISG provides for specific performance on a rather generous scale. However, no court is bound to enter a judgment for specific performance unless that court would do so under its own (domestic) law applicable to similar contracts of sale not governed by the Convention.⁴³

Under the Convention, the right to avoid (terminate) the contract is generally conditioned upon a showing of a ‘fundamental’ breach. In cases of delay and non-delivery, however, the CISG also permits an injured party to avoid upon the other party’s failure to perform after an additional time (a so-called *Nachfrist*) of reasonable length has been set for performance. The CISG rules which regulate the subject of anticipatory breach are in some respects closely related to the right of an injured party to avoid (terminate) by reason of the other party’s fundamental breach.⁴⁴

As regards damages for breach, the CISG deals with both the basis and the measure of liability. In contrast with the fault (*culpa*) principle which prevails under the domestic law of many Civil law jurisdictions, the Convention provides

39. For details see *infra* § 3.10. See also § 2.6 and Chapter 7.

40. Chapter 4B *infra*.

41. Chapter 4C *infra*.

42. See Chapter 5 *infra*.

43. See Article 28. For details see *infra* § 6.5.

44. See *infra* §§ 6.10, 6.11, 6.24, 6.26.

an injured party with protection of its expectation interest on a no-fault basis. Nevertheless, the Convention rules regarding liability ‘exemptions’ provide a limited safety valve applicable in situations involving *force majeure*, etc.⁴⁵

Because of the practical significance of contractually ‘agreed’ remedies, as well as the validity-concerns sometimes associated with significant departures from the well-balanced CISG default scheme, liability limitations and disclaimers deserve special attention.⁴⁶ The last chapter of this book deals with the LPISG Convention which provides a uniform four-year statute of limitations for the commencement of legal actions involving international sales.⁴⁷

§1.4 **The CISG in Transnational Perspective: Substance, Procedure and Conflict of Laws**

As is the case with domestic sales statutes, the Convention provides the means whereby courts decide the ‘merits’ of sales contract disputes; for this reason, the CISG rules are rightly characterized as ‘substantive’ (as opposed to procedural) in nature. If, for example, the seller commits a breach, and the buyer – perhaps after the parties’ failure to reach an amicable settlement – reacts to that breach by commencing a legal action against the seller, the CISG provides the buyer with (substantive) remedies to help right the wrong and thus determine the outcome of the case.

In contrast with such rules of substance, rules of procedure determine how the dispute resolution game is played. Within the international commercial arena, procedural rules which define the juridical jurisdiction of national courts often assume special significance. If, for example, the buyer cannot bring an action in her own State, because the courts of that State lack jurisdiction to adjudicate an action brought against the foreign seller concerned, the buyer might well decide to simply relinquish her claim rather than undertake the expense, inconvenience and uncertainty of a trip and trial abroad.

Without attempting to catalog all jurisdictional rules which might have practical relevance, a few examples might help to illustrate the issues and procedures involved. A Federal or State court in New York, for example, can exercise juridical jurisdiction over a non-domiciliary in an international sales case, *inter alia*, if the parties’ sales contract contains a choice-of-forum clause which expressly confers jurisdiction on that court. In the absence of such a forum clause, the court will have jurisdiction if the ‘long-arm’ statute enacted by the New York State legislature provides a basis of jurisdiction in such circumstances,⁴⁸ provided

45. See *infra* §§ 6.19, 6.32.

46. See *infra* Chapter 7.

47. The key features of the UN Convention on the Limitation Period in the International Sale of Goods are discussed in Chapter 9 *infra*.

48. See Lookofsky and Hertz, *Transnational Litigation*, Chapter 2.5.1.