# CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

JOSEPH LOOKOFSKY





# **Convention on Contracts for the International Sale of Goods (CISG)**

### Joseph Lookofsky

This book was originally published as a monograph in the International Encyclopaedia of Laws/Contract Law.

General Editor: Roger Blanpain Associate General Editor: Michele Colucci Volume Editor: Jacques Herbots



Published by: Kluwer Law International PO Box 316 2400 AH Alphen aan den Rijn The Netherlands Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:

Aspen Publishers, Inc. 7201 McKinney Circle Frederick, MD 21704 United States of America

Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:

Stratton Business Park Pegasus Drive, Biggleswade Bedfordshire SG18 8TQ United Kingdom

Turpin Distribution Services Ltd.

Email: kluwerlaw@turpin-distribution.com

DISCLAIMER: The material in this volume is in the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The editor and the contributing authors expressly disclaim all liability to any person with regard to anything done or omitted to be done, and with respect to the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this volume. No reader should act or refrain from acting on the basis of any matter contained in this volume without first obtaining professional advice regarding the particular facts and circumstances at issue. Any and all opinions expressed herein are those of the particular author and are not necessarily those of the editor or publisher of this volume.

Printed on acid-free paper.

ISBN 978-90-411-4024-1

This title is available on www.kluwerlawonline.com

© 2012, Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Email: permissions@kluwerlaw.com

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

The Author	3
List of Abbreviations	15
Chapter 1. Introduction	17
<ul> <li>§1. INTERNATIONAL SALES AND THE CISG  I. The Law of Sales Under Domestic Law A. Sales Law as Contract Law B. Domestic Sales Law Applied to Domestic and International Sales II. International Sales Law: The CISG III. Convention Preamble: Objectives of Signatory States IV. Entry into Force: Initial Ratifications V. Subsequent Ratifications: Two-Thirds of World Trade VI. Major Significance</li> <li>§2. HISTORICAL PERSPECTIVE: THE HAGUE SALES CONVENTIONS AND THE CONFLICT OF LAWS I. Purely Domestic Sale Subject to Local Law II. International Sale: Problem of Selecting Applicable Law A. Limited Acceptance of ULIS/ULF B. Choice of Law Rules Determine Applicable Domestic Law C. Concrete Illustration D. The 1955 Hague Convention IV. After 1 January 1988: New CISG Regime Applies in Courts and Arbitral Tribunals</li> </ul>	17 17 17 17 17 18 18 18 18 19 19 19 20 20 20 20 21
Chapter 2. Convention Overview	23
§1. Convention Consists of 101 Articles: Parts I–IV	23
§2. PART I: SPHERE OF APPLICATION AND GENERAL PROVISIONS	23

	I. Sphere of Application A. Main Rules of Application	23 23
	Parties in Different Contracting States	23
	2. Convention Applies by Virtue of Private International Law	24
	B. Contracts for the Sale of Goods	24
	C. Validity Issues and Third-Party Rights Excluded	24
	D. Product Liability	25
	E. The CISG and Contractual Freedom	25
	II. General Provisions	25
	A. Interpretation	25
	B. Usages of International Trade	26
§3.	PARTS II AND III: STATES MAY RATIFY ONE OR BOTH	26
§4.	PART II: FORMATION OF CONTRACT	26
	I. Offer and Acceptance	26
	II. CISG Offer: Requirement of Definiteness	26
	III. When Offer Effective; Revocable versus Irrevocable Offers	26
	IV. Acceptance As Indication of Offeree's Assent	27
	V. Mirror-Image Rule and Battle of Forms	27
§5.	SALE OF GOODS: CISG PART III	27
	I. Obligations, Rights and Remedies	27
	II. Part III Provisions: Brief Overview of Chapters I–V	28
	III. Obligations of the Parties	28
	A. Obligations of the Seller	28
	B. Obligations of the Buyer	29
	IV. Remedies	29
	A. Supplementary Remedial Regime	29
	B. Enforceable Contracts and Remedies for Breach	30
	C. Three Basic Forms of Remedial Relief	30
	D. Relationship among Remedies	30
	E. Specific Performance as Primary Convention Remedy	30
	F. Monetary Compensation as Primary Remedy in Practice	31
	G. Avoidance and the Right to Terminate	32
	V. Passing of Risk	32
	VI. Anticipatory Breach	32
§6.	FINAL PROVISIONS: DECLARATIONS, ETC.	32
§7.	Overview of Chapters 3–6	33
Ch	apter 3. Convention Scope and General Provisions	34
§1.	SPHERE OF APPLICATION	34
	I. Internationality Under Article 1	34
	A. Parties' Places of Business in Different Contracting States	34

	B. Convention Application by Private International Law	35
	C. Article 95 Declaration	36
	D. Parties in Different States: Disregarded in Exceptional Cases	37
	E. Irrelevant Factors: Nationality, Civil-Commercial	37
TI	I. Transaction Must Be a Sale of Goods Within Articles 1–3	38
	A. Article 1: Sales, Goods (e.g., Computer Software), Etc.	38
	B. Sales Contracts Expressly Excluded: Article 2	39
	1. Consumer Sales	39
	2. Additional Exclusions	40
	C. Contract of Sale versus Contract for Services: Article 3	41
111	I. Issues Excluded From Convention Scope: Validity, Property and	41
111		42
	Delict  A. Contractual Validity & Domestic Law	43
	A. Contractual Validity & Domestic Law	44
	B. Delictual Obligations & Concurrent Remedies	46
	C. Convention Not Concerned with Property in Goods	46
	D. Product Liability	46
	1. Liability for Death or Personal Injury	40
	2. Damage to Buyer's Property Distinguished	47
	3. Competition between Convention and Domestic	17
	Delictual Rules	47
11	V. Freedom of Contract: Convention as Supplementary Regime	48
	A. Contracting Out	48
	B. Contracting In	50
§2. G	ENERAL PROVISIONS	50
	I. Convention Interpretation: Uniformity and Good Faith	50
I	I. Convention Interpretation: Matters Governed but Not Settled	54
	I. Interpretation of Statements by Parties	56
	A. Subject Matter of Article 8: Statements and Conduct	57
	B. Subjective and Objective Tests	58
	C. Due Consideration to All Relevant Circumstances	58
	D. Common Law Parol Evidence Rule and Article 8	58
Iz	V. Commercial Custom and Usage	60
	A. Express Agreement and Inter Partes Course of Dealing	60
	B. Implied Incorporation of Commercial Usage	60
7	V. Place of Business: Rules for Exceptional Cases	61
	I. No Writing Requirement for CISG Contract	61
	A. Relation to Formal Requirements Under Domestic Law	62
	B. Declarations in Derogation of Article 11	62
V	II. Definition of Writing	63
Chap	oter 4. Sales Contract Formation	65
81 T	HE OFFER	65
81. 1	I. Minimum Requirements	65
	A. Definiteness & Intention To Be Bound. Offer Addressed	0.
	to Specific Persons	6.5

B. Problem of Price-Gap	67
C. Invitation to Make Offers Distinguished	67
II. Time Offer Takes Effect; Right to Withdraw	68
III. Offeror's Right to Revoke	68
A. Revocability Is General Rule	69
B. Modification: Offer Indicating Irrevocability	69
C. Offer Fixing Time for Acceptance	70
D. Modification: Action in Reliance	70
IV. Effect of Rejection	71
§2. Acceptance Under Articles 18–22	71
I. Acceptance: Indication of Assent	71
II. Time Acceptance Takes Effect	
A. When Assent Reaches Offeror	72
B. Receipt Theory	72
C. Acceptance Within Time Fixed or Reasonable Time	73
D. Assent by Performance of Act	73
	73
III. Mirror-Image and Battle of Forms A. Introduction	74
	74
B. Non-matching Reply Is Rejection and Counter-Offer	74
C. Independent Communication Not Rejection	75
D. Limited Exception to Mirror-Image Rule	75
E. The Battle of Forms	75
1. Introduction	75
2. Materiality Test	76
3. Materiality Defined	76
4. Cases Not Resolved by Article 19	77
IV. Time Period for Acceptance: Default Rules	79
V. Official Holidays, Etc.	79
VI. Exceptions to Timely Acceptance Rule	80
A. The Rule and the Exceptions	80
B. Notification by Offeror Accepting Late Acceptance	80
C. Acceptance Timely in Normal Circumstances	80
VII. Withdrawal of Acceptance	80
§3. ACCEPTANCE EFFECTIVE; CONTRACT CONCLUDED	81
§4. Declaration of Intention: Definition of Reach	81
Chapter 5. Obligations, Risk and Remedies	82
§1. SALE OF GOODS: FIVE CHAPTERS IN CISG PART III	82
§2. General Provisions	82
I. Introduction	82
II. Avoidance and Fundamental Breach	82
A. Fundamental Breach Defined	82
I dildullicitul Dicucii Dellilou	

		B. Substantial Detriment	83
		C. When Avoidance Declaration Effective	84
	III.	Delay or Error in Transmission	84
		Specific Performance	85
		A. Specific Performance and Forum Law	85
		B. Award of Specific Performance: Two-Step Process	86
	V.	Modification and Termination	86
		A. No Formal Requirements	86
		B. Relationship to Consideration Under Common Law	87
		C. Contract Requiring Written Modification or Termination	88
83	OBI	LIGATIONS OF THE SELLER AND BUYER'S REMEDIES FOR BREACH	89
30.		Introduction	89
		Summary of Seller's Obligations	89
	Ш	Delivery of the Goods and Handing Over of Documents	89
	111.	A. Introduction	89
		B. Place of Delivery	90
		1. Gap-Filling Rules	90
		2. Incoterms	90
		3. Contracts of Carriage: Delivery to First Carrier	90
		4. Cases Not Involving Carriage	91
		5. Notice of Consignment	91
		6. Place of Delivery and Jurisdiction	92
		C. Time of Delivery	93
		D. Contracts of Carriage: Documents	93
	IV	Conformity of the Goods and Third-Party Claims	93
	1 4.	A. Conformity of the Goods	94
		B. Distinction between Contractual and Delictual Claims	94
		C. Conformity With Express Contractual Requirements	
		(Description, Guarantee, Etc.)	94
		D. Supplementary Convention Obligations	96
		Supplementary Convention Congations     Introduction: Implied Obligations, Express Disclaimer,	
		Etc.	96
		2. Fitness for Ordinary Purposes	97
		3. Fitness for Particular Purposes	99
		4. Conditions and Warranties Under Domestic Law	
		Distinguished	100
		5. Sample or Model; Packaging	100
		E. Seller's Knowledge of Defect Irrelevant	101
		F. Caveat Emptor and Pre-contractual Inspection of Goods	101
		G. Disclaimer and Limitation of Liability	102
		1. Introduction	102
		2. Incorporation of Disclaimer	102
		3. Interpretation of Disclaimer	103
		4. Validity of Disclaimer	103
		5. Examples of the Application of Domestic Validity Rules	104
		6 Validity versus Substance	104

		7. Convention as Validity Yardstick	105
	H.	Time of Conformity Determination	106
		1. Introduction	106
		2. The General Rule	106
		3. Subsequent Non-conformity	107
	I.	Seller's Right to Cure Defects	108
		1. Cure in Context	108
		2. Article 37, Fundamental Breach and Avoidance	109
	J.	Notice of Non-conformity Required	109
		Examination of Goods	110
		Timely Examination	110
		2. Nature of Examination	111
		3. Contract of Carriage: Examination May Be Deferred	112
	L.		112
		to Notify	113
		1. The General Rule	113
		2. Notice of Discoverable Defects & Consequences of	113
		Failure to Notify	112
		3. Latent Defects Under Article 39(1)	113
	M	Absolute (Two-Year) Cut-Off Rule	117 117
		Application of Two-Year Rule to Latent Defects	117
		Express Contractual Cut-Offs and Periods of Guarantee	
	P.	Relation to Prescription Convention and Other Statutes of	119
	1.	Limitation	110
	$\cap$	Seller Aware of Defect	119
		Obligation to Deliver Goods Free of Third-Party Claims	120
	11.	1. Introduction; Article 41	121
		2. Third-Party Rights Distinguished	121
		3. Article 42: Claims Based on Industrial or Intellectual	122
			100
		Property 4. Seller's Knowledge of Third-Party Right or Claim	122
			123
		<ul><li>5. Buyer's Risk</li><li>6. Consequences of Failure to Notify</li></ul>	123
			124
	C	7. Seller Aware of Third-Party Right or Claim	124
	٥.	Excuse for Failure to Notify of Breach  1. Nature of the Exception	125
		1	125
	Da	2. Reasonable Excuse	126
C		medies for Breach of Contract by the Seller	126
		Introduction	126
		Performance, Avoidance and Damages for Breach	127
		No-Fault Liability Based on Breach	127
		Relationship among Remedies	127
		No Grace Period in CISG Context	128
	F.	Specific Performance	128
		1. Right to Require (Specific) Performance	128
		2. Specific Performance and the Duty to Mitigate	100
		Damages	129

			3. Specific Performance Limited by Forum Law	129
			4. Require Delivery of Substitute Goods	130
			5. Right to Demand Re-delivery Limited by Forum Law	132
			6. Buyer's Right to Require that Seller Remedy	
			Non-conformity (Cure)	132
		G.	Nachfrist Warning: Fixing an Additional Performance Period	133
			Seller's Right to Cure After the Delivery Date	135
			1. Introduction	135
			2. Relation between Cure and Avoidance Under Article 49	135
			3. Proposals and Notice by Seller Regarding Cure	136
		I.	Buyer's Right to Avoid for Seller's Breach	137
			1. Avoidance for Fundamental Breach	137
			2. Declaration of Avoidance	140
			3. Relationship to Cure; Avoidance as to Part	141
			4. Avoidance for Non-compliance with <i>Nachfrist</i> Notice	142
			5. Limitations Regarding Goods Delivered	142
			6. Consequences of Avoidance	142
		J.	Proportionate Reduction in Price	143
			Partial Non-conformity and Remedies for Breach	144
			Avoidance: in Part or in Full	144
		M.	Delivery Before the Date Fixed	144
			Delivery of Excess Quantity	145
84	OBI	JG	ATIONS OF THE BUYER AND SELLER'S REMEDIES FOR BREACH	145
3			roduction	145
			mmary of Buyer's Obligations	145
			yment of the Price	146
			Introduction	146
			Steps to Enable Payment of the Price	146
			Contract with Open Price Term	146
			Price Fixed by Weight	149
			Place of Payment; Jurisdiction	149
			Time of Payment	150
			Contracts Involving Carriage	151
			Buyer's Right to Inspect Before Payment	151
			Payment Due without Request or Formality	152
	IV.		king Delivery	152
			emedies for Breach of Contract by the Buyer	153
		A.	Introduction	153
		В.	Performance, Avoidance and Damages for Breach	153
		C.	No-Fault Liability Based on Breach	154
		D	. Relationship among Remedies	154
		E.	No Grace Period in CISG Context	154
		F.		155
			1. Right to Require (Specific) Performance	155
			2. Other Convention Limitations	155
			3. Specific Performance Limited by Forum Law	156

G. Nachfrist Warning, Fixing an Additional Performance Period H. Avoidance	156
	157
<ol> <li>Seller's Right to Avoid for Buyer's Breach</li> <li>Declaration of Avoidance</li> </ol>	157
	158
<ul><li>3. Avoidance for Non-compliance with <i>Nachfrist</i> Notice</li><li>4. Limitations Regarding Goods Delivered</li></ul>	158
5. Consequences of Avoidance	159
I. Seller's Right to Supply Specifications	159
1. Seller's Right to Supply Specifications	159
§5. Passing of Risk	160
I. Introduction	160
II. Legal Effect of the Passing of Risk	160
III. Use of Trade Terms (CIF, C&F, FoB, FaS, CPT, CIP, Etc.)	162
IV. Contracts Involving Carriage: The CISG Gap-Filling Rule	163
V. Goods Not Identified to the Contract	165
VI. Goods Sold in Transit	165
VII. Passage of Risk in Other (Non-carrier) Cases	166
VIII. Buyer to Take Goods at Seller's Place of Business (Ex Works)	166
IX. Buyer to Take Goods at Another Place	167
X. Identification Required	167
XI. Seller's Fundamental Breach: Affect on Risk	168
§6. Provisions Common to the Parties' Obligations	168
I. Introduction	168
II. Anticipatory Breach and Instalment Contracts	168
A. Introduction	168
B. Right to Suspend Performance: Generally	169
C. Goods Dispatched: Stoppage in Transit	170
D. Notice. Adequate Assurance of Performance	171
E. Right to Avoid for Prospective Fundamental Breach	171
F. Damages for Prospective Fundamental Breach?	172
G. Notice. Adequate Assurance of Performance	172
H. Instalment Contracts: Avoidance for Fundamental Breach	172
III. Damages for Breach	173
A. Introduction	173
B. CISG Liability: Basis, Extent and Exemptions	173
C. Expectation Protection: the General Rule	174
C2. Attorneys' Fees as Damages under Article 74?	176
D. Foreseeability and Certainty as Limitations	177
E. The Contract/Cover Differential	179
F. No Cover if Seller's Supply Exceeds Demand	181
G. The Contract/Market Differential	182
H. Mitigation: No Recovery for Avoidable Loss	182
I. Interest	184
J. Liability Exemptions for Failure to Perform	186
1. Introduction	186
2 Freedom of Contract and the Gan-Filling Rule	187

3. Requirements for Exemption and the Burden of Proof	187
3a. Hardship: Governed by CISG or Domestic Rules?	192
4. Non-performance Due to Failure of Third Person	194
5. Duration of Exemption	196
6. Notice of Impediment	196
7. Exemption Applies Only as Regards Damages	197
8. Non-performance Caused by Other Party	197
IV. Effects of Avoidance	198
A. Introduction	198
B. Release from Obligation	198
C. Damages for Breach, Arbitration Clauses, Etc.	199
D. Restitution	199
E. Buyer's Obligation to Return Goods in Condition Received	200
F. Exceptions to the Return-of-Goods Rule	200
G. Retention of Other Remedies Notwithstanding	201
H. Accounting for Interest and Other Benefits Received	202
V. Preservation of the Goods	202
A. Introduction	202
B. Seller's Duty to Preserve Goods on Buyer's Behalf	202
C. Buyer's Duty to Preserve Goods on Seller's Behalf	203
D. Deposit in Warehouse; Sale of Goods Preserved	203
Chapter 6. Final Convention Provisions	205
§1. Overview	205
§2. SIGNATURE, RATIFICATION, ENTRY INTO FORCE	205
§3. RELATIONSHIP TO 1955 HAGUE CONVENTION	205
§4. Reservations	206
I. Introduction	206
II. Article 92 Declarations	207
III. Contracting States with Territorial Units	209
IV. States Having Closely Related Legal Rules	209
V. Private International Law and Article 1(1)(b)	210
VI. Preservation of Formal Requirements	211
§5. RELATIONSHIP TO ULF/ULIS	212
§6. CONTRACT FORMATION: ENTRY INTO FORCE	212
§7. SIX AUTHENTIC TEXTS	212
Appendix	213

Selected Bibliography	215
Index	221



## **Convention on Contracts for the International Sale of Goods (CISG)**

### Joseph Lookofsky

This book was originally published as a monograph in the International Encyclopaedia of Laws/Contract Law.

General Editor: Roger Blanpain Associate General Editor: Michele Colucci Volume Editor: Jacques Herbots



Published by:

Kluwer Law International PO Box 316 2400 AH Alphen aan den Rijn

The Netherlands

Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:

Aspen Publishers, Inc. 7201 McKinney Circle

Frederick, MD 21704

United States of America

Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd.

Stratton Business Park Pegasus Drive, Biggleswade

Bedfordshire SG18 8TQ

United Kingdom

Email: kluwerlaw@turpin-distribution.com

DISCLAIMER: The material in this volume is in the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The editor and the contributing authors expressly disclaim all liability to any person with regard to anything done or omitted to be done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this volume. No reader should act or refrain from acting on the basis of any matter contained in this volume without first obtaining professional advice regarding the particular facts and circumstances at issue. Any and all opinions expressed herein are those of the particular author and are not necessarily those of the editor or publisher of this volume.

Printed on acid-free paper.

ISBN 978-90-411-4024-1

This title is available on www.kluwerlawonline.com

© 2012, Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Email: permissions@kluwerlaw.com

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

### The Author



Joseph Lookofsky is Professor of Law at the University of Copenhagen in Denmark.

Professor Lookofsky was born in New York, USA. He received his B.A. in Economics from Lehigh University in 1967 and his J.D. from New York University School of Law in 1971. He became a member of the New York State Bar that year and worked as an attorney for United Artists Corporation, specializing in contract and copyright law.

In 1973 Professor Lookofsky married a Dane and moved to Denmark where he became a consultant to Danish Advocates. In 1981, upon completion of the regu-

lar five-year law programme at the University of Copenhagen, he received the *cand.jur.* degree.

In 1981 Professor Lookofsky became a Fellow (*stipendiat*) at the University of Copenhagen Law Faculty; he became a full-time member of the Law Faculty in 1982. In 1989 – upon publication and defence of his thesis 'Consequential Damages in Comparative Context' – he was awarded the *dr.jur.* degree.

In 1992 Professor Lookofsky was appointed to his present chair in Private and

Commercial Law (Formueret).

Professor Lookofsky's published works (in Danish and English) cover such topics as Danish contracts and sales law, international contracts and sales, private international law, comparative commercial law and international commercial arbitration. He is in charge of the Copenhagen Law Faculty's required BA-level course in European & International Commercial Law. He is also responsible for related upperlevel (MA) elective courses. In 1998 Professor Lookofsky was named Teacher of the Year (Årets Underviser) at the Copenhagen Law Faculty.

Professor Lookofsky has served as an arbitrator in international commercial disputes and as a consultant and expert for Danish advocates. He has lectured on the CISG and other international commercial topics for the Danish Bar Association (*Advokatsamfund*), the Duke University Law School in North Carolina, the University of Bologna (Facoltá di Giurisprudenza), the Albert-Ludwigs-Universität in Freiburg (Institut für Ausländisches und Internationales Privatrecht), the Duke University Summer Institute in Transnational Law, and the Cornell-Paris I (Sorbonne) Summer Institute of International & Comparative Law.

Professor Lookofsky is Secretary General of the Danish Committee for Comparative Law (Association Internationale des Sciences Juridiques).

### The Author