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高等院校国际法专业双语课程案例教学规划教材

# 国际货物买卖法

（英文版）

陈剑玲 编著

对外经济贸易大学出版社

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# 前　言

国际货物买卖法是国际商法的一个重要分支，在国际商事交易中起着重要的作用。在所有国家，无论其法律传统或经济发展情况如何，货物销售都是国际贸易的支柱。在国际货物买卖法领域，最知名的国际公约是 1980 年由联合国国际贸易法委员会通过的《联合国国际货物销售合同公约(CISG)》（以下简称“《公约》”），对于该《公约》的研究向来都是国际货物买卖法中的重要课题，《公约》也被视为是国际贸易法核心公约之一。

《公约》的目的是为国际货物销售提供一个现代、统一、公正的制度，在买方利益和卖方利益之间作谨慎的平衡。《公约》还启发了各国的合同法改革。《公约》的通过为国际货物销售提供了现代、统一的法规，适用于在缔约国有营业地的当事方之间订立货物销售合同的情形，在这种情形下，《公约》将直接适用，从而避免了按照国际私法规则确定合同适用法的做法，大大提高了国际销售合同的确定性和可预测性。此外，《公约》为使商业交易具有确定性并降低交易成本作出了重要的贡献。

国际货物买卖法是对外经济贸易大学法学院的重点课程之一，其教学能够很好地融合国际经贸法律和外贸实务，对于培养从事国际经贸法律的实践人才具有重大实践意义。而且，国际货物买卖法尤其能够体现经贸大学法学院在双语教学上的特色，因为该课程最新的研究成果和背景资料基本上都以英文为主。带领学生直接阅读英文材料，能够帮助学生同时提高法律和英语水平，不仅能够促进学习效率的提高，而且对于学生将来从事国际经贸法律实务有很大的帮助。然而，国外关于国际货物买卖法和《公约》的英文原版教材大多都是建立在《公约》和其本国法律的对比之上，教材的本土化色彩很浓，其内容未必适合中国学生。因此，笔者在编写这本教材的时候，结合自己的实际教学经验，有意识地以中国学生的阅读视角和理解能力为出发点，在选取国际货物买卖领域内比较成熟的研究成果之余，加入相关的学习提示、思考题和经典案例，使得学生可以循序渐进地理解相关的专业知识。本书的目的不仅在于介绍国际货物买卖相关法律，而且可以作为合同法等法律英语的基础阅读教材，在原汁原味的英文指引下，了解相关法律原则和专业词汇。

因编者本人的专业和英语能力所限，书中错误和疏漏之处在所难免，请读者拨冗指正。

本书为对外经济贸易大学国家“211 工程”三期重点学科建设项目成果，项目号为 73400032。

陈剑玲

2011 年 8 月于对外经济贸易大学

# Table of Contents

# Chapter 1

# INTRODUCTION TO CISG

## Objective

1. 了解《公约》出台的历史背景
2. 熟悉和《公约》相关的几个法律文件
3. 熟悉《公约》的基本结构
4. 理解《公约》的基本目标
5. 理解《公约》的现实意义以及作用

## Key TERMS

CISG UNIDROIT ULFIS ULIS UNCITRAL

The United Nations Convention on Contracts for the International Sale of Goods—the CISG—has now gained worldwide acceptance. The CISG is in force in seventy-six member states[①] including both industrialized nations and developing states. It has been widely applied in international commercial transactions over the years. Thousands of decisions by state courts and arbitral tribunals have been reported so far; legal writing on the Convention is abundant. It is therefore fair to say that the CISG has in fact been one of the success stories in the field of the international unification of private law.

## *Section 1 History*

The CISG is the product of a diplomatic conference which was convened in Vienna from March 10 to April 11, 1980 by the Secretary-General of the United Nations, acting upon a resolution of the UN General Assembly from December 16, 1978. The efforts to achieve a uniform law for international sales—a pursuit with a history extending back to the year 1929

① 到 2011 年 7 月 8 日为止，CISG 已经有 76 个成员国，http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html，2011-7-8 访问。

and which is closely connected with the name of Ernst Rabel—thereby came to something of a conclusion.

On September 3, 1926, the International Institute for the Unification of Private Law (UNIDROIT) was founded in Rome; it was inaugurated on May 30, 1928. In the same year, Ernst Rabel proposed to work towards a unification of international sales law. On February 21, 1929, Rabel submitted his preliminary report on the possibilities of sales law unification. On April 29, 1930, a committee consisting of representatives from different legal systems was founded. The first draft of a uniform sales law was published in 1935. In 1936, Rabel published the first volume of his seminal work "Das Recht des Warenkaufs" providing an analysis, the status quo of sales law on a broad comparative basis. In 1937, however, Rabel was forced to emigrate from Berlin to the United States, and in the next couple of years, World War II interrupted any further unification efforts. These efforts were resumed in January 1951 when the Dutch government held a diplomatic conference on the unification of sales law in The Hague. The conference established a special commission to make further progress in the unification process. This commission met several times during the 1950s and presented a first draft on substantive sales law in 1956. In the same year, efforts to create a law applicable to the formation of international sales contracts were revived by UNIDROIT and a first draft was presented in 1958. Both drafts were distributed among governments. Their comments and suggestions concerning the 1958 draft were considered in the revised draft of 1963. The 1956 draft could not be revised in time before the 1964 Conference in The Hague.

In 1964, the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS) and the Uniform Law on the International Sale of Goods (ULIS) were drafted and finalized at The Hague. However, these first uniform sales laws did not fulfill the high hopes and expectations widely shared at the time. Although their practical relevance should not be underestimated, only nine countries became member states while important economies like France and the United States did not participate. Furthermore, socialist and developing countries perceived these uniform laws as favoring sellers from industrialized Western economies and thus stayed away from them as well.

On December 17, 1966, the United Nations Commission on International Trade Law (UNCITRAL) was established. The CISG is the child of UNCITRAL, which was set up in 1966 to promote "the progressive harmonisation and unification of the law of international trade."[①] One of the subjects to which at its first meeting, in 1968, it decided to give its attention was that of international sales. UNCITRAL continued the work on the unification of sales law from 1968 onwards, using the Hague Conventions as a basis. The first draft of a uniform law was finalized in January 1976. In 1978, UNCITRAL circulated a subsequent draft

① Barry Nicholas, The Vienna Convention on International Sales Law, http://www.cisg.law.pace.edu/cisg/biblio/nicholas2.html, 2011-7-8 访问。

containing rules on contract formation as well as the substantive sales law among the governments of the UN members.

Between March 10 and April 5, 1980, delegates from sixty-two nations deliberated the CISG at the now famous Vienna Conference. At its end, forty-two countries voted in favor of the Convention. On December 11, 1986, the necessary number of ten ratifications (Art. 99 CISG) was reached and the Convention entered into force on January 1, 1988 with its official languages being Arabic, Chinese, French, English, Russian, and Spanish. Austria, Germany, and Switzerland agreed on a German translation in 1982 but could not, however, agree on the terminology in all respects.

## *Section 2 Structure*

The CISG applies to contracts of sale of moveable goods between parties which have their place of business in different states when these states are contracting states (Art. 1(1) lit. (a) CISG) or when the rules of private international law lead to the application of the law of a contracting state (Art. 1(1) lit. (b) CISG). Certain types of contracts are excluded from its scope of application by virtue of Art. 2 CISG. For instance, most consumer sales will not fall under the CISG (cf. Art. 2 lit. (a) CISG).

With regard to the substantive issues, the CISG basically governs three areas: the conclusion of the contract, the obligations of the seller including the respective remedies of the buyer and the obligations of the buyer including the respective remedies of the seller. The CISG therefore provides both a substantial "law of sales" and a regulation of certain issues of the general law of contract, albeit limited to those international sales transactions which fall under its scope of application.

The Convention is divided into four parts:

(1) The first part (Art. 1-13 CISG) contains rules on its sphere of application (Chapter I, Art. 1-6 CISG) and a number of general provisions (Chapter II, Art. 7-13 CISG).

(2) The second part (Art. 14-24 CISG) deals with the formation of the contract.

(3) The third part (Art. 25-88 CISG) is by far the most comprehensive part of the Convention. It is entitled "Sale of Goods" and provides the actual "sales law" of the Convention. It is subdivided into five chapters:

Chapter I (Art. 25-29 CISG) contains some general provisions which may be relevant throughout the entire sales law, in particular the definition of the notion of "fundamental breach" which will be relevant in particular as a precondition for the right to avoid the contract (Art. 49, 64, 72 CISG).

Chapter II (Art. 30-52 CISG) deals with the obligations of the seller. After a general rule in Art. 30 CISG, Section I (Art. 31-34) deals with the delivery of the goods and the handing over of documents. Section II (Art. 35-44 CISG) deals with the conformity of the goods and

with third party claims.

Finally, Section III (Art. 45-52 CISG) contains the core element of every sales law, the buyer's remedies for breach of contract by the seller. Art. 45(1) CISG provides: "If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: (a) exercise the rights provided in Art. 46 to 52 CISG; (b) claim damages as provided in Art. 74 to 77 CISG." This means that the buyer can resort to the following remedies: performance (Art. 46 CISG), including substitute delivery (Art. 46(2) CISG) and repair (Art. 46(3) CISG); avoidance of the contract (Art. 49 CISG); reduction of the purchase price (Art. 50 CISG); damages (Art. 45 lit. (b), 74 ff. CISG). There are several specific provisions for installment contracts (Art. 73 CISG) and for cases of anticipatory breach of contract (Art. 72 CISG) which do, however, not create new remedies, but rather modify the existing remedies. The most defining feature of the system of remedies in the CISG is that it aims at keeping the contract alive as long as possible in order to avoid the necessity to unwind the contract. The prime consequence of this is that termination of the contract will only be available as a remedy of last resort: It will usually require that the breach committed by the seller was a fundamental one (Art. 49(1) lit. (a), 25 CISG); in cases of non-delivery, the buyer may also terminate the contract after having fixed an additional period of time ("Nachfrist", Art. 47 CISG) without success (Art. 49(1) lit. (b) CISG).

Chapter III (Art. 53-65 CISG) has a similar structure: Art. 53 CISG states the buyer's obligations in a general way, Section I (Art. 54-59 CISG) deals with the obligation to pay the price, Section II (Art. 60 CISG) deals shortly with the obligation to take delivery and Section III (Art. 61-65 CISG) governs the seller's remedies for breach of contract by the buyer. The structure of the seller's remedies is similar to the structure of the buyer's remedies.

Chapter IV (Art. 66-70 CISG) deals with the passing of risk and is closely linked to the buyer's obligation to pay the price.

Chapter V (Art. 71-88 CISG) contains provisions common to the obligations of the seller and of the buyer. Section I (Art. 71-73 CISG) deals with anticipatory breach and installment contracts. Section II (Art. 74-77 CISG) contains the extremely important rules on damages; this section is closely linked to Section IV (Art. 79-80 CISG) which governs the exemptions from the strict liability for damages that the Convention imposes on the parties. Section III (Art. 78 CISG) contains a short (and fragmentary) rule on interest. Section V (Art. 81-84 CISG) governs the effects of an avoidance of the contract and Section VI (Art. 85-88 CISG) deals with the preservation of the goods.

(4) The fourth part of the Convention (Art. 89-101 CISG) contains final provisions which deal in particular with the details of ratification etc., with possible reservations against certain parts or provisions of the Convention and with the entry into force of the Convention.[①]

① Peter Huber, Some Introductory Remarks on The CISG, http://www.cisg.law.pace.edu/cisg/biblio/huber.html, 2011-1-4 访问。

## *Section 3 Objectives*

Two paragraphs of the preamble to the Convention set out the objectives of the CISG: "Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States, being of the opinion that the adoption of uniform laws which govern contracts for the international sale of goods and take into account the different social, economic and legal systems should contribute to the removal of legal barriers in international trade and promote the development of international trade."

The process of preparation of the draft Convention and the generally unanimous support for its provisions at the widely representative diplomatic conference which adopted it strongly suggest that those purposes have been achieved. That appears to be further confirmed by the subsequent acceptance of the Convention. The substantive rules are acceptable to and accepted by civil and commonlaw jurisdictions, developed and developing countries, capitalist and socialist economies, and exporters and importers of agricultural and mineral primary products and manufactured goods. This is not a case of uniformity for the sake of uniformity. Rather the world trading community has made the practical judgment that this uniform law will facilitate international trade.

To be acceptable the Convention must also take account of the special characteristics of international sale of goods contracts, especially the distances involved, the costs of transportation, the involvement of intermediaries, and the long term that many are to operate. One consequence is an emphasis in the Convention on the preservation of the contract notwithstanding default or other noncompliance. This means that the remedies (especially those available to buyers) are extended beyond those normally available under some domestic laws.

The Convention recognizes in major ways that the parties to such contracts may for good reason wish to exercise broad contractual freedom. Article 6 enables them to exclude the application of the Convention and to derogate from or vary the effect of any of its provisions (with a limited exception if local law requires contracts covered by the Convention to be in writing). That means that if a trader wishes to have its national law applied—and the other party can be persuaded—the new rules in the Convention do not apply to the extent of that agreement. The very significant role of trade usages and practices between the parties is also expressly recognised by the Convention. In the absence of such agreements between the parties, the uniform rules do however apply.[①]

① THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: NEW ZEALAND'S PROPOSED ACCEPTANCE (1992), http://www.cisg.law.pace.edu/cisg/wais/db/articles/newz2.html, 2011-1-4 访问。

A major element in the successful application of the rules to remove legal barriers and promote international trade is their uniform interpretation. The Convention takes a first step in the direction of avoiding divergent national interpretations by emphasizing the international character of the rules, uniformity of application, the observance of good faith, and the application of the general principles underlying it. Another important feature of the Convention is its very limited use of technical legal terms and concepts. It is said to have the characteristics of simplicity, practicality and clarity. It is free of legal shorthand, free of complicated legal theory and easy for business people to understand. It is written in their language.[①]

## *Section 4 Influence*

Over the last two decades, the CISG has also proven to be a decisive role model not just on an international level but also for domestic legislators. When the first set of the UNIDROIT Principles of International Commercial Contracts (PICC) was launched in 1994, they closely followed the CISG not only in its systematic approach but also with respect to the mechanism of remedies. The same holds true for the Principles of European Contract Law (PECL) published in 1999 and the EC Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees.

Finland, Norway, and Sweden took the coming into force of the CISG in their countries on January 1, 1989 as an opportunity to enact new domestic sale of goods acts which rely heavily on the CISG, albeit without its Part II (i.e., the provisions on formation of contracts). With the end of the Cold War and the collapse of the former Soviet Union, the young Eastern European states also looked to the CISG when formulating their new civil codes. This holds true not only with regard to the Commonwealth of Independent States (CIS) but also for the Baltic states among which Estonia is the most prominent example. Nowadays, China is of course hugely important for international trade, and the Contract Law of the People's Republic of China of March 15, 1999, also follows the CISG closely. Finally, the modernization of the German Law of Obligations was strongly influenced by the CISG from its very beginnings in the 1980s. Although the final legislation that entered into force on January 1, 2002 had lost much of that initial spirit, it still betrays the influences of the basic concepts of the CISG.

The reason for its popularity is probably based on the CISG's unique features: an independent legal language and a transparent structure unfettered by any historical path dependencies. These features also help the CISG become a "neutral law" favored by the international transaction parties. The text of the CISG is not only available in six authoritative languages, it also has been translated into numerous others. Court decisions, arbitral awards as

① Professor Sono, The Vienna Sales Convention: History and Perspective in the Dubrovnik Lectures 1, 7 [1986].

well as scholarly writings, are either written or at least translated into today's lingua franca of international trade, namely English. They are readily accessible not only in various books and journals but also on several websites. The abundant number of legal materials available makes it reasonable to expect that judges and arbitrators have access to the requisite information and will be able to apply the CISG in a predictable fashion. In addition, better accessibility of the CISG saves time and costs, and it makes the outcome of cases more predictable. These are the main advantages of the CISG when compared to the application of domestic laws.

## Explanatory Notes

《联合国国际货物销售合同公约》(以下简称《公约》)是由联合国国际贸易法委员会主持制定的，1980 年在维也纳举行的外交会议上获得通过，并于 1988 年 1 月 1 日正式生效。

《公约》的目的是为国际货物销售提供一个现代、统一、公正的制度。因此，《公约》为使商业交易具有确定性并降低交易成本作出了重要的贡献。

在所有国家，无论其法律传统或经济发展情况如何，销售合同都是国际贸易的支柱。因此《公约》被视为国际贸易法核心公约之一。

《公约》是二十世纪初开始进行的立法工作的成果。这项法规在买方和卖方的利益之间作了谨慎的平衡。它还启发了各国的合同法改革。

《公约》的通过为国际货物销售提供了现代、统一的法规，适用于在缔约国有营业地的当事方之间订立了货物销售合同的情形。在这些情形下，《公约》将直接适用，从而避免了按照国际私法规则确定合同的适用法，大大提高了国际销售合同的确定性和可预测性。

此外，有的国际货物销售合同的情形是，国际私法指明一缔约国的法律为适用法，或者由合同当事各方作出选择，无论其营业地是否位于一缔约国，《公约》也可适用。在后一种情形下，《公约》提供了一套中性规则，由于其跨国性质和广泛提供的解释性材料，很容易得到接受。

最后一点，中小型企业以及位于发展中国家的贸易商在谈判合同时，获得法律意见的机会通常较少。因此，因合同中与适用法有关的问题没有得到充分处理而造成的问题对他们影响较大。这些企业和贸易商也可能是较弱的合同当事方，可能难以确保维持合同均衡。因此，《公约》中公平而统一的制度自动适用于其范围之内的合同，对这些商家是特别有益的。

《公约》管辖私营企业之间的国际货物销售合同，不适用于对消费者的销售和服务销售，以及某些特定类型货物的销售。它适用于营业地位于不同缔约国的当事方之间的货物销售合同，或者适用于国际私法规则指定适用一缔约国法律的情形。它还可因当事方的选择而适用。与国际货物销售有关的某些问题，如合同的有效性以及合同对所售货物上的所有权的影响，不在该《公约》的范围之内。

《公约》全文共101条，分为四个部分：（1）适用范围；（2）合同的成立；（3）货物买卖；（4）最后条款。第二部分述及通过交换要约和接受而订立的合同的拟订问题。第三部分述及合同当事各方的义务。卖方的义务包括按照合同规定的数量和质量交付货物和相关单据，以及转让货物的所有权。买方的义务包括支付价款和收取所交付的货物。此外，这一部分还提供了违约救济的通用规则。受害方可要求另一方履约、赔偿损失，或在重大违约的情形下废除合同。补充规则对风险移转、预期违反合同、赔偿损失以及免于履约加以规范。《公约》对合同的形式自由留有余地，各国可提出声明，要求采用书面形式。

《公约》仅适用于国际交易，其适用范围内的合同可免于诉诸国际私法规则。在《公约》适用范围之外的国际合同，以及服从于有效选择的其他法律的合同，将不受《公约》的影响。单纯的国内销售合同也不受《公约》影响，而仍由国内法规范。[①]

## Exercises

1. 简述《公约》对国际货物买卖法律领域所产生的影响。
2. 简述《公约》的基本立法目标。
3. 简评《公约》结构设置的合理性和完整性。

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1. Peter Huber, Some Introductory Remarks on The CISG, http://www.cisg.law.pace.edu/cisg/biblio/huber.html.

2. Barry Nicholas, The Vienna Convention on International Sales Law, http://www.cisg.law.pace.edu/cisg/biblio/nicholas2.html.

3. Ingeborg Schwenzer, Pascal Hachem, The CISG—Successes and Pitfalls, http://www.cisg.law.pace.edu/cisg/biblio/schwenzer-hachem.html.

① http://www.uncitral.org/uncitral/zh/uncitral_texts/sale_goods/1980CISG.html, 2011-6-8 访问。

# Chapter 2

# SPHERE OF APPLICATION

## Objective

1. 掌握《公约》的适用范围
2. 理解《公约》排除特定交易的主要理由
3. 掌握国际私法规则和《公约》适用之间的关系
4. 理解当事人意思自治和《公约》适用之间的关系
5. 了解对《公约》的间接适用作出保留的国家

## Key TERMS

private international law　place of business　goods　sale

## *Section 1　The International Character of the Transaction*

### 1. Parties' Places of Business in Different Contracting States

**<Related Article>**

*Article 1*

*(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; or*

*(b) when the rules of private international law lead to the application of the law of a Contracting State.*

*(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.*

*(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of*

*this Convention.*

The Convention applies only to international contracts. Hence, the Convention has to provide basic criterion that distinguishes international contracts from merely domestic ones. According to Article 1(1), the CISG applies to contracts of sale of goods between parties whose places of business are in different States. Formation and execution may occur within a single State, even if that State is not a Contracting State.

Even though the Convention refers several times to the concept of 'place of business', it does not provide a definition of what is meant by that term. According to a widely accepted opinion, place of business means a permanent and regular (stable) place for the transacting of general business. There has to be a real connection of the party with the place in question; a fictitious registration is not sufficient. The term 'place of business' does not include, however, a temporary place of sojourn during, for example, ad hoc negotiations, or the place where only preparations for the conclusion of the single contract have been made.

If a party has more than one place of business, the location which has 'the closest relationship to the contract and its performance' prevails, 'having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract' (Art. 10(a)). For the cases where one party has no business place at all, the Convention refers to the habitual residence of that party (Art. 10(b)).

According to Article 1(2), the parties must have entered into an international contract consciously; if there is a lack of awareness with regard to the international character of the contract, the Convention does not apply and the contract is governed by domestic rules. The criterion that has to be applied in order to determine whether the international character of the transaction has been dissimulated or not is an objective one: one must refer to what a party knew or ought to have known by observing the required attention in the concrete circumstances (i.e., if a payment has to be effected abroad or if authorizations for foreign exchange are necessary).The fact that the other party's place of business is in a different State must be recognizable no later than at the time of the formation of the contract.

Article 1(2) addresses in particular the case of an undisclosed foreign principal. If, for example, a Swiss agent does not inform a buyer, whose place of business is also in Switzerland, that he represents a seller having its place of business in Canada, the sale will not be governed by the Convention but rather by the Swiss Code of Obligations.[①]

### 2. Convention Application by Private International Law

The CISG can be applicable even when one or both of the contracting parties do not have their place(s) of business in a Contracting State where the rules of private international law

① Christophe Bernascon, The Personal and Territorial Scope of the Vienna Convention on Contracts for the International Sale of Goods (Article 1), http://cisgw3.law.pace.edu/cisg/biblio/bernasconi.html, 2011-4-5 访问。