

§ 2 Short introduction to international sales law

I. National and international sales law

- intern. business actors tend to prefer the application of the familiar law of their home state
- usually the applicable law is determined by the national "international private law"
 - in the European Union primarily by the Rome I Regulation, which, however, leaves room for the application of special international conventions
- the idea of a *worldwide unified international sales law* and its materialisation in the *United Nations Convention on Contracts for the International Sale of Goods* (CISG) of 1980

II. History, importance and applicability of the CISG

1) The making of the CISG

- prepared by UNCITRAL, drawing on the Hague Uniform Sales Law of 1964 but with new approaches; deliberated at and adopted by an intern. conference in Vienna in 1980

2) The importance of the CISG in history and today

- in force since 1988 (after ratification by 10 states)
- adopted by 80 states, including China
 - not by Vietnam or any other ASEAN member state except Singapore
- applies to 2/3 of the international trade

3) The applicability of the CISG

- see *Diagram 1*
- the basic idea: automatic application to international sales of goods instead of national sales law without the detour of the national international private law
 - a) The personal sphere of application (cf. art. 1(3))**
 - contracts between *anybody* without regard to nationality or civil/commercial character
 - b) The material sphere of application (art. 1(1), 2)**
 - aa) Contract of international sale of goods (art. 1(1))**
 - aaa) Contract of sale of goods**
 - PREVAILING OPINION: on delivery of goods in exchange for *money* (no countertrade agreements)
 - bbb) Between parties with places of business in different states**
 - must be recognisable from an objective point of view (cf. art. 1(2))
 - notion of "place of business" not defined in the CISG but interpreted in the jurisprudence in various contracting states
 - bb) No excluded sector (art. 2)**
 - c) The territorial sphere of application (art. 1(1), 2)**
 - CISG applies in *contracting and non-contracting states* in the following ways:
 - aa) Direct (autonomous) application, art. 1(1) lit. a**
 - bb) Indirect application (according to intern. private law), art. 1(1) lit. b**
 - excluded for some states by reservations under art. 95
 - "the law of a Contracting State" = its sales law (PREVAILING OPINION)

- cc) **Application through the parties' choice of law (according to agreement)**
 - only if allowed by the relevant international private law
- d) **The temporal sphere of application (art. 100)**
 - see different rules for the formation of the contract (Part II, see art. 100(1)) and the contract itself (Part III, see art. 100(2))
 - note that the CISG can also be applicable in non-contracting states
- e) **The right of the parties to opt out (art. 6)**
 - Problem: exclusion of the CISG if parties choose the law of a contracting state?

III. The interpretation of the CISG (art. 7)

- 1) **Autonomous interpretation with regard to the international character of the CISG**
 - no reference to concepts of national law (unless they have evidently influenced the terms or solutions in the CISG)
- 2) **Interpretation promoting the uniform application of the CISG**
 - the uniform application of the CISG as a precondition of its effectiveness
 - consideration of foreign literature and jurisprudence (→ see the UNCITRAL Digest of Case Law on the CISG)
 - consideration of the (not binding) opinions of the CISG Advisory Council (CISG-AC)
- 3) **Interpretation promoting good faith in international trade**
 - the principle of good faith as a global guiding principle of contract law

IV. Basic concepts of the CISG

- 1) **Limitation to the regulation of certain issues (art. 4 et seq.)**
 - this can lead to a complicated combined application of the CISG, international private law and national contract law
 - a) **Regulated issues**
 - the formation of the contract
 - the rights and obligations of the parties
 - b) **Important not regulated issues**
 - validity of the contract (in particular capacity to contract, unconscionability, threats, frauds, mistakes and errors)
 - validity of individual provisions (e.g. of standard terms) and usage
 - transfer of property (e.g. time of transfer, bona fide acquisition, rights of third parties)
 - product liability for death or personal injuries of persons (art. 5)
 - limitation periods (see Convention on the Limitation Period in the International Sale of Goods of 1974)
 - burden of proof
- 2) **Reference not only to the wording of the contract but also to agreed usage and established practices (art. 9)**
 - note the fiction of an implied agreement to international usage (art. 9(2))

3) Concepts governing the formation of the contract

a) Freedom from form requirements (art. 11 et seq., 96)

aa) The principle: *no requirement of writing or other forms* (art. 11)

- applies also to the modification or termination of the contract (art. 29)

bb) The exception: **Declarations of Contracting States on the written form under art. 96 (art. 12)**

b) Formation of the contract by offer and acceptance (art. 14 et seq.)

- both declarations of intentions must *reach* the other party (cf. art. 15(1), 18(2), 24)
- *offer* must be sufficiently definite and indicate intention to be bound (art. 14)
- offer may be withdrawn (art. 15(2)) or revoked (art. 16), acceptance may be withdrawn (art. 22)
- *acceptance* cannot be expressed by silence or inactivity (art. 18(1) phrase 2) and must reach the offeror within a reasonable time (art. 18(2) phrase 2, 3)
- a reply containing additions, limitations or other modifications does not constitute an acceptance but a counter offer (art. 19(1)), except if it does not materially alter the terms (art. 19(2, 3))

4) Concepts governing the obligations of the seller

a) The obligations of the seller (art. 30 et seq.)

aa) Delivery of the promised goods

aaa) Delivery of the goods (art. 30, 31 et seq.)

- = giving the buyer the means of taking possession of the goods
 - details usually regulated in the contract by the use of standard terms (INCOTERMS)
- on a fixed date, within a fixed period of time or within a reasonable time (art. 33)
- see detailed rules concerning the carriage of goods (art. 31 lit. a, 32 and, usually, in the contract)

bbb) Conformity of the goods to the contract (art. 35 et seq.)

(1) *Conformity under art. 35(1)*

- with regard to quantity, quality, description, container and packaging

(2) *Conformity under art. 35(2)*

- (a) Fitness for the ordinary purpose of such goods (lit. a)
- (b) Fitness for the purpose made known to the seller (lit. b)
- (c) Correspondence to a sample/model (lit. c)
- (d) usual or adequate container and packaging (lit. d)

(3) *Freedom from rights or claims of third parties (art. 41 et seq.)*

- note: the *buyer must examine the goods* within a short period (art. 38) and *notify the lack of conformity or the rights or claims of third parties* within a reasonable time (art. 39, 43)

bb) Handing over of documents (art. 30, 34)

cc) Transfer of the property in the goods (art. 30)

- according to the law applicable under the rules of international private law

b) Remedies of the buyer for breach of contract by the seller (art. 45 et seq.)

• see *Diagram 2*

aa) Right to performance (art. 46(1))

• buyer may fix an additional period of time for performance (art. 47)

bb) Right to delivery of substitute goods (art. 46(2))

• only in cases of sale of generic [not individual] goods

• only if lack of conformity constitutes fundamental breach of contract (cf. art. 25)

• only as long buyer can reconstitute goods unchanged (art. 82)

cc) Right to repair (art. 46(3))

dd) Right to price reduction (art. 50)

ee) Right to retention of performance (art. 58, 71)

• retention of payment (art. 58(1, 3), 71) or other obligations (art. 71)

ff) Right to *avoidance of the contract* (art. 49, 72)

• only as long as buyer can reconstitute goods unchanged (art. 82)

aaa) for *fundamental breach* (art. 49(1) lit. a)

bbb) for *anticipatory fundamental breach* (art. 72)

ccc) for *non-delivery within an additional period of time* (art. 49(1) lit. b)

gg) Remedies after avoidance

aaa) Right to restitution of payment (art. 81(2))

bbb) Right to interest on the payment (art. 84(1))

hh) Right to damages (art. 45(1) lit. b, 74 et seq.)

• does not presuppose fault on behalf of the seller but is excluded in case of impediments beyond the seller's control (*force majeure*, art. 79)

• includes compensation for loss of profit (art. 74 phrase 1)

• limited to compensation for foreseeable loss (art. 74 phrase 2)

• no compensation for avoidable loss (art. 77)

5) Concepts governing the obligations of the buyer

a) The obligations of the buyer (art. 53 et seq.)

aa) Payment of the price (art. 53, 54 et seq.)

• including the necessary steps and formalities for the money transfer (art. 54)

• interdependence of delivery and payment (art. 58)

- buyer not bound to pay before he has had an opportunity to examine the goods (art. 58(3))

bb) Taking delivery of the goods (art. 53, 60)

• not if goods do not conform with the contract in such a way that this constitutes a fundamental breach of contract (cf. art. 49(1) lit. a, 25)

• art. 60 reflects an inherent general principle of cooperation

b) Remedies of the seller for breach of contract by the buyer (art. 45 et seq.)

• see *Diagram 3*

aa) Right to performance (art. 62)

• except if seller has resorted to a remedy incompatible with this requirement (avoidance of the contract (art. 64) or fixing of an additional period of time for performance (art. 63))

- includes right to interest if payment is due (cf. art. 78)
- seller may fix an additional period of time for performance (art. 63)
- bb) Right to retention of performance (art. 58, 71)**
 - retention of the handing over or carriage of goods or documents (art. 58(1, 2), 71) or of other obligations (art. 71)
- cc) Right to avoidance of the contract (art. 64, 72)**
 - aaa) for *fundamental breach* (art. 64(1) lit. a)
 - bbb) for *anticipatory fundamental breach* (art. 72)
 - ccc) for *non-payment or non-taking delivery within an additional period of time* (art. 64(1) lit. b)
- dd) Remedies after avoidance**
 - aaa) Right to restitution of goods and documents (art. 81(2))
 - bbb) Right to accounting for benefits derived from the (delivered) goods (art. 84(2))
- ee) Right to damages (art. 61(1) lit. b, 74 et seq.)**
 - does not presuppose fault on behalf of the buyer but is excluded in case of impediments beyond the buyer's control (force majeure, art. 79)
 - no compensation for avoidable loss (art. 77)

6) The concept of fundamental breach of contract

- see presentation of DƯƠNG BẢO TRUNG

a) The relevance of a fundamental breach of contract

- condition for the right of avoidance (cf. art. 49(1) lit.a, 51(2), 64(1) lit. a, 72, 73)
- condition for the right to delivery of substitute goods (art. 46(2))
- other consequences (see, for example, art. 70)

b) The notion of fundamental breach of contract

aa) Breach of a contractual obligation

bb) Fundamentality of the breach (art. 25)

- aaa) Detriment to the other party
- bbb) Substantial deprivation of the other party of what he is entitled to expect
 - frustration of the purpose of the contract
 - often a problem in case of late delivery or non-conformity of goods
- ccc) Foreseeability of this result (by the party in breach)

7) Concepts governing risk allocation

- after passing of risk buyer must pay price also in case of loss or damage not caused by seller (art. 66)
- usually, risk passes when buyer takes over the goods (art. 69(1))
- if contract involves carriage, risk passes with handing over to the first carrier (art. 67)
- if goods are sold in transit, risk passes with conclusion of the contract (art. 68)

V. Bases of claims, pleas and defenses under the CISG

- see *Diagrams 2 and 3*