



Understanding the

CISG

Fifth (Worldwide) Edition

Joseph Lookofsky



DJØF Publishing Copenhagen

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A Compact Guide to the
1980 United Nations Convention on
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To Daniel

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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/casecit.html#icc>.
12. *See, e.g.*, the numerous Chinese judgments and arbitral awards reported at <http://www.cisg.law.pace.edu/cisg/text/casecit.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.