

**The Legal Appropriation of the Kingdom of Thailand on The United Nations
Convention on Contracts for the International Sale of Goods 1980, 1989 (CISG)**

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A. INTRODUCTION

Due to advances in transportation and digital telecommunication infrastructure, international trade continues to increase sharply in globalization, especially within Association of Southeast Asian Nations (ASEAN). Nevertheless, each nation has tried to decrease legal impediments that may be still considerably distinguished. CISG was established to unify framework regarding cross-border trade and ratified already by various countries. Thailand is also more likely to have higher value of import and export each year and has a lot of international sale disputes. Some claim to adopt this convention. On the contrary, others argue that it may cause some risks to Thailand. This article will discuss benefits and drawbacks of the ratification of CISG. It will focus on three key issues of CISG that cover formation of contracts, obligations and remedies between sellers and buyers as well as passing of risks and damages. Then it will analyze and examine CISG by comparison with Thai laws and evaluate the legal appropriation of the Kingdom of Thailand on CISG.

B. CONTENTS

I The United Nations Convention on Contracts for the International Sale of Goods 1980, 1989

Generally, international trade resorts the following four sources:

(1) **Contract** is the major source of rights and duties of parties in cross-border transactions, unless it contradicts nation's law, public policy and international convention;

(2) **Domestic laws:** statutes and case laws handle sale of goods of each country.

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(3) **European Law** is the European Communities Act 1972² section 2; or

(4) **International Conventions:** United Nations Commission on International Trade Law (UNCITRAL) and International Institute for the Unification of Private Law make unified rules including CISG and UNIDROIT: Principles of International Commercial Contracts 2004 having 63 Member States including England.³

In fact, CISG took effect on 1 January 1988. It neither applies to all types of sales nor other contracts such as labor or services.⁴ In addition to this, it is not a foreign law but is part of domestic laws. This means that CISG overrides domestic laws if they are inconsistent. When CISG is silent or has gaps, domestic laws will apply. Furthermore, CISG applies to contracts of sale of goods between parties in different contracting States.⁵ CISG has been ratified currently approximately 78 nations by 24 Feb 2012 and has been adopted around 83 countries since 26 September 2014, but not including England. For instance, CISG will exercise if both German and China companies as vendor and purchaser respectively are Contracting States. For this case, CISG applies since parties do not exclude for choice of laws. If a French company (contracting state); however, makes a sale contract with a British company (non-contracting State), CISG cannot use for one of parties has its place of business in a non-contracting state through Art 1 (1)(a). Nonetheless, for this case CISG can apply according to Art 1(1)(b) because of private international law.⁶ A contracting state includes parties' places of business that are prominently based on corporation as well as places that most closely connects with contracts although such companies are independent distributor in different states. Furthermore, CISG will utilize unless excluded by parties.⁷ In other words, if parties expressly exclude CISG, sale contracts or domestic laws will apply.⁸ Moreover, in case CISG covers particular matters but it has gaps, UNIDROIT, not treaty or law but is soft law, can supplement CISG. If parties intend to exercise UNIDROIT, contractual clauses must be specified explicitly. For example, it is necessary to stipulate pursuant to CISG Article 8

² *R v Secretary of State for Transport, ex parte Factortame Ltd* (No.2) [1991] 1 AC 603, English courts indicates that European law overrides English law if they disagree.

³ Professor Dermot Cahill, 'Summary Content of International Business Transaction' (2015) 3, 8.

⁴ CISG Art 2, 3.

⁵ CISG Art 1 (1).

⁶ *Playcorp Pty Ltd v Taiyo Kogyo Limited* [2003] VSC 108.

⁷ CISG Art 6.

and UNIDROIT Article 4.3 for easier interpreting under such contract and pre-contract, including negotiations.⁹ This interpretation is wider than English law.

For CISG, it can be explored in more details below:

1. Formation of Contracts

1.1 Offer

Similar to other laws, an offer might be adequately definite and indicate offerors' intention to be bound by acceptance through specifying the following elements:¹⁰

- (1) parties: one or more specific persons, otherwise it may be viewed merely as an invitation which does not make the offer. Take an example, proposals to non-specific people via a catalogue or a webpage;¹¹
- (2) descriptions of goods;
- (3) quantities of goods;
- (4) times for delivery; and
- (5) prices of goods: If prices are not fixed expressly or implicitly, parties may be deemed to agree reasonable or market prices as a consideration of making the contract in Common law.¹² Conversely, in Civil law, prices are major element of formation of contracts. In this way, it may be contemplated as no contracts.

Once the offer reaches the offeree, this offer is effective.¹³ If the withdrawal reaches the offeree prior to or at the same time as the offer, that offer, irrevocable, may be withdrawn.¹⁴ However, the offer might not be revoked in these incidents: (a) if determining a fixed time of acceptance; or (b) the offeree has presented in dependence on the offer and it is reasonable for the offeree to hang on the offer as being irrevocable.¹⁵

⁸ *Perry Eng P/L v Bernold AG No.SCGRG-99-1063* [2001] SASC 15.

⁹ Bryan Mercurio, et al, *International Business Law* (Oxford University Press, 2010) 17.

¹⁰ CISG Art 14.

¹¹ Jason Chuah, *Law of International Trade* (Sweet and Maxwell 5thed, 2013) 182.

¹² CISG Art 55.

¹³ CISG Art 15(1).

¹⁴ CISG Art 15(2).

¹⁵ CISG Art 16.

1.2 Acceptance

The offeree's statement or other conducts indicating assent to the offer is an acceptance. Unlike Civil law, silence does not contribute acceptance¹⁶. When the acceptance is obtained by the offeror within the time stipulated in the offer, or if there is no time fixed in reasonable time, it is effective. An oral offer can be accepted by an oral acceptance. Unless the circumstances indicate otherwise, the oral offer might be recognized instantly.¹⁷ Written contract is thus not required. As the acceptance would have become effective, it can be withdrawn if withdrawal reaches the offeror before or concurrently.¹⁸

1.3 Counter-offer

CISG has traditional rules known as "mirror image" or "battle of form". That is to say, an acceptance adding, limiting, or modifying to the offer will generate a counter-offer.¹⁹ However, CISG allows some distortion of this rule. This means a reply containing additional or distinguished terms but not materially changing the offer will establish an acceptance unless the offeror rejects.²⁰ In contrast, if the acceptance comprises terms substantially adjusting the offer, this intended acceptance will be a counter-offer. The following lists of terms regarding price, payment, goods' quality and quantity, place and time of delivery, one party's liability to the other and disputes settlement that are much more likely to be considered as material alterations.²¹ A counter-offer also implies no contract.

Additionally, according to "last shot" principle, latest documents of the exchange of the offer and the counter-offer are documents controlling contractual terms, whereas "knockout" principle, merely matching terms, creates contracts.²² A noticeable example of this is in *Filanto, SPA v Chilewich International Corp*,²³ the Court held that owing to last documents of the exchange having an arbitration clause, parties are probably bound by arbitrating disputes in Moscow.

¹⁶ *Filanto, S.p.A. v Chilewich Int'l Corp.* [1992] US. D. Ct. N.Y.

¹⁷ CISG Art 18.

¹⁸ CISG Art 22.

¹⁹ Chuah, above n 12, 183.

²⁰ CISG Art 19(1), (2).

²¹ CISG Art 19(3).

²² *Powdered milk case* 2002.

²³ [1992] US. D. Ct. N.Y., the Australian case of *Conveyor Band*.

2. *Obligations and remedies of Sellers and Buyers*

2.1 Seller's duties are to deliver goods, documents and transfer properties.²⁴ CISG has no provisions managing transfer of properties and listing documents required. As a result, contracts seem to stipulate documents such as bill of lading, insurance policy and invoice.²⁵ Besides, delivery should occur under the fixed date or within reasonable time.²⁶ The choice of when to deliver will be sellers', unless circumstances show otherwise.²⁷ Sellers shall forward any production having quantities, qualities and descriptions and packages required by contracts. Let me give you an example, in Parma Ham case, ham was impaired, yet buyers could not examine within the fixed time. The court held that on account of latent defects, buyers were capable of proving lack of conformity with contracts in reasonable time. Therefore, buyers could obtain damages.

2.2 Buyer's duties are to pay prices and take delivery of goods or documents in accordance with contracts and legislations.²⁸ For example, in case buyers failed to open letter of credit, or to authorize a money transfer, sellers would be breached. This causes sellers to be entitled to withhold their obligations.²⁹ Conversely, purchasers may not give price at any specific time, unless sellers place either goods or documents controlling their disposition at buyers' disposal according to contracts and CISG.³⁰ Another interesting Swiss case is that parties agreed to pay 30% at time of order, at the completion of installation, and 10% after successful start-up of facilities. The Court found that in this case payment was made at a specific time. If contracts involve carriage of goods, sellers dispatching those goods will not be transmitted to buyers except against payment of the price. Likewise, buyers may not pay until they have chances to inspect goods for conformity. These provisions can, however, be excluded clearly in their contracts.³¹

²⁴ CISG Art 30.

²⁵ Cahill, above n 3, 43.

²⁶ *Alpha Prime v Holland Loader* (C.A. NO 09-cv-01763-WYD-KMT.2010).

²⁷ CISG Art 33.

²⁸ CISG Art 60.

²⁹ *Doolim Corp v R Doll, LLC*, 2009 U.S. Dist. LEXIS 45366.

³⁰ CISG Art 58(1).

³¹ CISG Art 6, 58(2), (3).

2.3 Remedies for breach of contracts

Fundamental breach of contracts committed by one of parties causing detriment to other parties substantially will deprive them of what they have rights to expect under contracts, unless parties in breach do not foresee and a reasonable person of the same kind in same situations will not have foreseen such a result.³² The purpose of CISG does not need parties to walk away simply from contracts. Dissimilar to Common law, it has no such exception. Further, contracts are probably avoided by giving notice to other parties.³³

2.3.1 Remedies of buyers

If sellers fail to do their duties, buyers may³⁴:

(1) employ rights provided in articles 46 to 52 consisting of:

- requesting specific performance;³⁵
- delivering substitute goods if those goods are not complying with contracts;³⁶
- repairing lack of conformity;³⁷
- granting an reasonably additional period for performance, unless buyers has received

notices from sellers that they will not perform. However, buyers are perhaps not deprived of rights to claim damages for delay in performance;³⁸

- reducing price;³⁹
- Where sellers partially complete:
 - (a) sellers deliver only part of goods;
 - (b) sellers sends all goods but some are non-conforming;
 - (c) sellers hand over late or before the time of delivery;
 - (d) sellers submit more than agreed;

For (a) or (b), it is deemed as fundamental breach so buyers may avoid contracts;⁴⁰

³² CISG Art 25.

³³ CISG Art 26, 49, 51(2), 64.

³⁴ CISG Art 45.

³⁵ CISG Art 46(1).

³⁶ CISG Art 46(2).

³⁷ CISG Art 46(3).

³⁸ CISG Art 47.

³⁹ CISG Art 50.

⁴⁰ CISG Art 51.

For (c), buyers are potentially to take or refuse those deliveries because stored costs tend to be costly,⁴¹ or d) buyers seem to get or refuse to take excess quantities in that they need to pay if taking the extra quantity;⁴²

(2) claim damages according to articles 74 to 77:

- for any losses suffered by buyers and lost profit that is provided in Common law;⁴³ However, UNIDROIT's damages are wider than CISG such as reputation harm and have larger objective standard of the specified damages since they do not rely on the foreseeability. Hence, when parties intend to apply UNIDROIT, contracts may obviously be specified; or

- for recovering the difference between contract prices and prices in substitute transactions.⁴⁴

In this situation, buyers ought to take reasonable measure to mitigate losses, otherwise they may be reduced damages if they fail to do so.⁴⁵

(3) withhold performance of their obligations if it becomes clear that other parties do not execute essential part of their tasks.⁴⁶

2.3.2 Remedies of sellers

If buyers fail to perform their obligations, sellers might:⁴⁷

(1) exercise rights pursuant to articles 62 to 65:

- require buyers to pay prices, take delivery or perform other obligations;⁴⁸
- allow a reasonably additional period for performance by buyers, unless sellers have received notice from buyers that they will not carry out anymore. Nevertheless, sellers are not deprived of rights to claim damages for delay in performance;⁴⁹

(2) claim damages subject to articles 74 to 77;

⁴¹ *Bunge Corp v Tradax Export SA* [1981] 2 All ER.

⁴² CISG Art 52.

⁴³ CISG Art 74.

⁴⁴ CISG Art 75, 76.

⁴⁵ CISG Art 77.

⁴⁶ CISG Art 71.

⁴⁷ CISG Art 61.

⁴⁸ CISG Art 62.

⁴⁹ CISG Art 63.

(3) withhold their performance if it becomes apparent that other parties do not achieve substantial part of their duties.⁵⁰

3. *Passing of Risks and Damages*

According to article 66 of CISG, after risks have passed to buyers, such buyers become liable for prices even if goods are lost or damaged in international sale of goods contracts. That is, losses of or damages to goods do not discharge buyers from their obligations to pay prices, unless losses or damages are due to any acts or omissions of sellers. Contrariwise, under English Law, risks pass along with properties. Take FOB and CIF as striking example, risks usually pass on shipment.⁵¹ When risks of losses or damages pass from sellers to buyers, it is of great importance. Contracts can apply CISG by stating when risks pass to other parties, or exercise trade terms in Incoterms to determine passing of risks. In the absence, CISG seems to govern passing of risks.⁵²

Under article 67 of CISG, “if contracts of sales are relevant to carriage of goods, and

- If sellers are not bound to hand in goods at particular places, risks pass to buyers when goods are surrendered to first carrier for transmission to buyers; or
- If sellers are bound to hand goods over to carriers at particular places, risks pass to buyers when goods are delivered to carriers at that place.

The fact is that sellers have authorities to keep documents controlling goods do not have an effect on passage of risks.

Under CISG, “if sellers use their own transportation, article 69 will apply as follows:

(1) risks pass to buyers when they take over goods or, if they do not do so in due time, from the time when goods are placed at their disposal, they might be considered as committing breach of contracts by failing to take delivery.

(2) If buyers are bound to take over goods at places other than places of businesses of sellers, risks pass when deliveries are due and buyers are aware of the fact that goods are placed at their disposal at that place.”

⁵⁰ CISG Art 71.

⁵¹ *The Sale of Goods Act 1979* section 20.

⁵² **Pace Law School Institute of International Commercial Law**, *Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods* (May 26, 1998) <<http://www.cisg.law.pace.edu/cisg/text/p23.html>> 39, 40.

In light of this, outcomes of passing of risks from sellers to buyers are not distinguished from those determined in English law.

II Comparative studies

1. Similarities and Dissimilarities between CISG and Thai Law

These days, Thailand's international trade volumes have been expanding enormously but it still does not have specific laws on contracts for international sale of goods and the basic Civil and Commercial Code (*the CCC*) as well as other laws apply. Legal problem is whether Thailand, civil law country, should adopt CISG or not. To address this issue, CISG can be analyzed in comparison to the CCC for the following three main aspects.

1. Formation of Contracts

(a) Under the CCC Section 456. "a sale of immovable property is void unless it is made in writing and registered by the competent official. The same rule applies to ships...". "An agreement to sell or buy any of aforesaid property is not enforceable by action unless there is some written evidence signed by parties liable, or unless deposit is given, or there is part performance". "The provisions of the foregoing paragraph shall apply to a contract of sale of movable property where agreed price is twenty thousand baht or upwards." In this regard, domestic sales of goods contracts estimated at or over Baht 20,000 have to be in writing, or unless deposit is given, or there is part performance, otherwise they are probably unenforceable. In Supreme Court Decision No 3046/2537: Thai court held that the international sale of goods contract between the parties is invalid because it has no evidence in writing. Therefore, buyers are unable to claim damages from sellers. This judgment is far more likely to be commented in public for it seems to appear that the CCC may be not suitable with international trade. Subject to CISG, writing is, on the contrary, not required for formation of international sale of goods contract.⁵³

(b) Regarding offer and acceptance, under the CCC section 359: An acceptance with additional, or other modified terms is viewed as a refusal or a new offer and CISG stipulates that modifications are counter-offer, unless they do not materially alter terms and are not objectionable to offerors. At this point, the CCC is identical with CISG that

⁵³ CISG Art 11.

contemplate those terms as counter-offer, or new offer. However, the CCC does not pay attention to whether such modifications are materially or not.⁵⁴

2. Obligations of Sellers and Buyers

(a) For parol evidence rule or (**PER**), under the Civil Procedure Code section 94: Where evidence in writing is required by legislation, oral evidence is not admissible instead of documentary evidence or for adding and varying its content, even opposing parties give consent. Conversely, CISG excludes this rule and permits all relevant details of evidence such as negotiating in pre contract for knowing intention of parties, although they contradict written documents.⁵⁵

(b) In relation to “delivery”, according to the CCC section 461: Sellers have obligations to deliver properties sold to buyers. In contrast, CISG article 30, sellers are under obligations to deliver goods and hand over documents. Consequently, the CCC does not mention the delivery of documents. Thus, CISG is more proper for international sale of goods that have required document such as bill of lading, certificate of origin, or quality than the CCC.⁵⁶

(c) With respect to “period of prescription”, under the CCC section 193/30: The period of prescription that is not provided by law is ten years. Yet, CISG has no provisions in relation to period of prescription. As a consequence, parties in international sale of goods contract may be prosecuted at any time or no time-limit. It should be kept in mind that this concept may make over-obligated burden to parties.⁵⁷

3. Passing of Risks and Damages

The CCC has no provisions of passing of risks for sale contracts so general provisions such as section 370 to 372 might be applied. More specifically, risks pass along with properties.⁵⁸ Nevertheless, CISG separates risks from properties by stipulated in Article 67

⁵⁴ Pacharida Vechaosodsakda, *Thesis: The Exclusion on The United Nations Convention on the United Nations Convention on Contracts for the International Sale of Goods (1980)* 2011, 108.

⁵⁵Jr Murray, *CISG: Opt Out, Or Not? CISG In A Nutshell* (4 June 2010), 7-9 <<http://www.mhandl.com/content/cisginanutshell>>.

⁵⁶ Vechaosodsakda, above n 66, 120.

⁵⁷ Ibid, 130, 131.

⁵⁸ Vechaosodsakda, above n 153, 154, 176.

and 69. As a result, CISG establishing especially for the application of international sale of goods is perhaps more fit.

2. Advantages and Disadvantages of CISG

In Thailand, some suppose it is suitable to adopt this convention. Others, on the contrary, argue that it may lead to some troubles to our nation. This part will discuss the benefits and drawbacks of the ratification of CISG.⁵⁹

There are a number of significant arguments in favor of CISG.

First of all, CISG may offer unification and simplification on international business transaction. We can see that up to now CISG has been ratified around 78 countries by 24 Feb 2012 and has been adopted about 83 countries since 26 September 2014, particularly the U.S and most European nations. What's more, approximately six official languages such as Arabic, Chinese, English, French, Russian and Spanish might be used for CISG. This attribute can avoid technical terms of scholars or businessmen, which may be prone to various interpretations and makes it easier to understand instead. Furthermore, it reduces the complexity, cost and time consuming of legal hurdles dealing with international trade and disputes. It also seems appeared to be fair between Civil and Common law regarding rights and obligations of parties so CISG can be regarded as neutral and certain approach. Moreover, CISG has flexibility.⁶⁰ For instance, parties can exclude in whole or part of CISG by virtue of Article 6, if they do not need to apply. It, additionally, help to avoid tricky issues. Take the outstanding sample of Supreme Court Decision No 3046/2537. It may be criticized for unsuitable usage of domestic law towards international sales of good perhaps affects the flow of free trade. For this reason such as this, it is undoubted why a larger numbers of countries around the world continue to adopt CISG.

Despite these benefits; however, it is also important to recognize significant dangers associated with CISG. Firstly, there are no stare decisis for CISG so lack of legal standard might occur. It depends on each domestic court understanding and applying CISG so new set

⁵⁹ Tithiphan Chuerboonchai, *International Sales Law: CISG and Thailand*, (1 June 2006) <http://www.cisg.law.pace.edu/cisg/biblio/chuerboonchai.html>.

⁶⁰ Dr. Suthipon Thaveechaiyagarn, 'The Third World Perspective on the U.N. Convention on Contracts for the International sale of Goods' (2007) *Journal of Central Intellectual Property and International Trade Court* 279.

of rules tends to be inconsistent and unfamiliar with. Besides, due to diverse culture, economy, and society in interpretation, the objective of the simplification and uniformity of this convention seems to be threatened. Another disadvantage is that although CISG uses six official languages, certain countries do still not comprehend clearly. It, therefore, may bring about uncertainty, a lot of costs and time consuming. These dangers are a genuine cause for concern and tend to dominate the debate about the virtues of CISG.

C. CONCLUSION

In conclusion, the international trade has become grown up vastly in Thailand in globalization, particularly within ASEAN countries. However, from the consequences of Supreme Court Decision No 3046/2537, it perhaps reflects that Thailand's domestic sales laws may be improper for cross-border trade. From my perspective, if well managed, it can be argued that pros of the adoption of CISG outweigh cons as examined reasons above. In light of this, the legal appropriation of Thailand might be the adoption of CISG, or alternatively drafting new specific Thai law pertaining to such transaction for preparation of this era, as well as ongoing research should be encouraged further in order to generate higher flow of free trade and fair trade simultaneously.