3.1 CISG Introduction & Applications

INTRODUCTION

- Ways to work out international transaction problem
  - An international sale of goods involves a contract by which a seller and buyer who are located in different countries agree that they will sell and buy certain goods for a price that is or can be determined under the contract.
    - N.B., this does not mean that goods dealt with under such a contract must cross international frontiers.
  - N.B. CISG and SGA only focuses on contractual relationship between seller and buyer.

- Documents in international sales
  - For the purpose of the Convention, documents can be goods.
  - Different types of documents
    - Contract of sale
    - Transport documents
    - Invoice
    - Inspection/quality certificate
    - Insurance
    - Finance documents
      - Letter of credit
      - Bill of exchange
  - Importance of documents
    - Evidence of contracts with third parties
      - For example, relating to transport or insurance = evidence of compliance
    - Symbol of possession of goods
      - Symbol of ownership — bill of lading serves as document of title: security interest
      - Sales in transit
    - Time of payment — payment on delivery of documents
  - Obligations relating to documents
    - Obligation to deliver documents
      - Seller must deliver documents to buyer (or bank);
      - Buyer (or bank) must pay upon delivery
    - Documents should comply exactly with contract and with each other
    - Possibilities for fraud on the documents
  - Electronic documents
    - Role of document in the age of the internet — electronic documents
    - Australia in process of acceding to UN Convention on Electronic Communications in International Contracts
    - Australia and States have legislation based on UNCITRAL Model Law on Electronic Commerce
      - The United Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly in 17 December 1966 to promote the progressive harmonisation and unification of international trade law.
    - Documents of title and negotiable documents — substitution with electronic documents? Dematerialisation?

- Overview of Sale of Goods
  - Legal regime
    - In a narrow sense, the legal frame work for international sale of goods in Australia includes merely the sale of goods legislation, the relevant provisions of the Competition and Consumer Act 2010 (Cth), the CISG, and the common law of contracts and commercial customs (such as Incoterms 2010).
    - Who has the power to regulate the international sale of goods in Australia?
      - The sale of goods is one of the areas where the state parliament have traditionally exercised their legislative power. Therefore, as far as international sale goods is concerned, both the federal and state parliaments can regulate the matter, but the federal legislation prevails wherever inconsistency arises.
        - Federal power comes from s 51 of the Constitution and s 109 regulates state legislation.
    - Can state sale of goods apply to a contract for the international sale of goods?
      - The state sale of goods legislation may apply to any contract for the international sale of goods, provided that it is not inconsistent with the relevant federal legislation. In deed, in circumstances where the CISG applies, the provisions of the sale of goods legislation may be excluded if they are inconsistent with the provisions of the Convention.
INTRODUCTION (CONT.)

- Overview of sale of goods (Cont.)
  - Legal regime
  - Transfer of property under the sale of goods legislation
    - Generally, when the property is transferred is determined by contract.
      - An express intention is seen when the parties include provisions in the contract of sale, explicitly stating when and how the property in goods passes to the buyer.
      - However, if the intention is not clear from the contract, since both the Incoterms and the CISG do not deal with passing of property at all, this area is reserved for the relevant domestic law.
      - Under the SOGA, property in goods passes to the buyer pursuant to either the express or implied intention of the parties.
    - An implied intention is seen when, reading the contract as a whole, the circumstances of the contract suggest the parties’ intention as to when and how to pass the property in goods: s 23, SOGA
      - In an “unconditional contract” (a contract that does not contain conditions for delivery of goods, passing of property, or for the validity of the contract) that does not reserve the “right of disposal” (the seller’s right under the sale of goods legislation to prohibit the buyer from selling or disposing of the goods concerned before full payment on the goods is made), for the sale of “specific goods” (goods that are identified, ascertained or distinguished form other similar goods at the time of the conclusion of the contract), which are in a “deliverable state” (ready for the buyer to take over as agreed in a contract of sale), the property in the goods passes to the buyer at the time of the conclusion of the contract — regardless of the time for payment and delivery. — in such a case, the buyer can be the legal owner of the goods even if they are in possession of the seller.
      - In a contract for the sale of specific goods, if the seller is required under the contract to do something to put the goods into a deliverable state, the property in the goods does not pass until the thing is done and the buyer has notice of it.
      - In a contract for the sale of specific goods in a deliverable state, if the seller is required under the contract of sale to do something (for example, to weigh, measure or test), or to ascertain the price of the goods, the property does not pass until the required thing is done and the buyer has notice of it.
      - If a contract is based on delivery “on approval” (which means that a contract is based on the approval of the buyer to or “sale or return”, the property in the goods passes to the buyer in three ways:
        - when the buyer accepts the goods expressly or implicitly by his or her conduct;
        - when the buyer fails to inform the seller of his rejection within the fixed time for return of the goods;
        - when the buyer fails to reject the goods delivered within a reasonable period of time, even though no time for returning the goods is fixed.
      - In a contract for the sale of “unascertained goods” (identical goods that can be replaced by each other for the purpose of meeting a contract description, such as wheat or wool of a particular brand, cars of a particular model, or oil of a particular specification) or “future goods” (which are to be made or to come into existence in the future) by description, the property in the goods passes to the buyer when the unascertained or future goods are “unconditionally appropriated to the contract” (which in general means that the goods have been identified, marked and delivered irrevocably to the seller), pursuant to the contract with the assent of the parties.
    - But note the rules for ascertaining parties’ intention can be modified or varied by express intention of the parties. This is evidenced by the use of the Incoterms.
      - For example, the FOB or CIF terms are those most commonly used in international sales. If CIF is adopted, the seller’s duties are examined in the context of the term. CIF cannot replace the rules for the passing of property because it does not deal with the issue. But the seller’s liability (for example, the liability to obtain an export licence or authorisation under A2) may be regarded as the thing that must be done by the seller before the property in the goods passes to the buyer under the SOGA.

- Further, Retention of title clause (Romalpa clause) is possible included under a contract of sale.
  - Where there is a retention of title clause, the issue is competing interest between different parties.
  - According to Personal Properties Securities Act 2009 (Cth), registered interest has higher priority.
  - Therefore, a retention of title clause may not help the seller if another parties get the interest registered under the PPSA.
  - Conclusion: it is important to include provision on the passing of property in the contract.

- Passing of risk
  - Passing of risk is subject to specific provisions under the CISG.
    - When a contract of international sale has incorporated an Incoterm, the passing of risk in such circumstances is determined by the detailed duties of the parties under the chosen term.

- Documents
3.1 CISG_Introduction & Applications

CISG GENERAL

- General
    - Effective in Australia from 1 April 1989.
  - Sale of Goods (Vienna Convention) Act in each State or Territory of Australia — i.e., incorporates into the law of the State or Territory provisions of the Vienna Convention

- Hierarchy of applicable laws
  - Generally speaking, in Australia the rules of general contract law apply to any contract of international sale, to the extent that no inconsistency arises between those rules and the provisions of CISG.
  - If NSW law governs the contract, law is determined as follows:
    - Contract setting out intention of parties — N.B., may modify or exclude CISG.
    - In the event that the relevant terms of the contract have not been expressly contemplated in the agreement, CISG acts as the “default rules” because “the provisions of the Convention have the force of law in NSW”: s 5 of the Sale of Goods (Vienna Convention) Act 1986 (NSW).
      - CISG regime (to the extent not excluded by intention of parties) — Contains following rules:
        - Formation of contract
        - Transfer of risk
        - Delivery of goods
        - Payment
        - Implied terms
        - Seller’s remedies
        - Buyer’s remedies

- When does the Convention apply?
  - CISG applies to any contract concluded between parties whose places of business are in different Contracting States: Art 1(1)
    - Places of business: Art 10
      - The fact that the parties have their places of business in different States must 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, otherwise it is to be disregarded: Art 1(2).
      - The nationality of the parties, the civil or commercial character of the parties or of the contract, is irrelevant: Art 1(3)
      - If a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, 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)
      - If a party does not have a place of business, reference is to be made to his habitual residence: Art 10(b).
    - States: Art 1
  - Countries must be contracting states, i.e., Members to the Convention: Art 1(a)-(b)
  - The time of contracting is also relevant for the application of the CISG: Art 100
    - Convention applies to the formation of a contract only when the the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting state: (1);
    - Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting states: (2).
  - In the absence of any express choice by the parties, the Convention may apply to a contract if only one of the parties is from a member country of the Convention: Case No 7197, Clout Case 104.
3.1 CISG_Introduction & Applications

**CISG GENERAL (Cont.)**

- **Application of the CISG (Cont.)**
  - **When does the Convention apply (Cont.)**
    - The parties have not excluded or derogated from the application of the Convention: Art. 6.
      - This include explicit derogation and implicit derogation.
    - **Derogation by trade terms (particularly Incoterms):**
      - Shipping terms developed by practice;
        - Codification issued by ICC: current version Incoterms 2010, must be referred to as “Incoterms 2010”.
      - Terms of sales contract, NOT contract of carriage;
      - **Must be a term included in contract by agreement.**
      - Can be modification/exclusion of the provisions of CISG.
  - **Where the Convention does not apply to:**
    - Contracts where sales of goods brought for personal, family or household use, unless the seller neither knew nor ought to have known that the goods were bought for such use, at any time before or at the the conclusion of the contract: Art 2(a);
    - Sales by auction: Art 2(b);
    - Sales on execution or otherwise by authority of law: Art 2(c);
    - Sales of stocks, shares, investment securities, negotiable instruments or money: Art 2(d);
    - Sales of ships, vessels, hovercraft or aircraft: Art 2(e);
    - Sales of electricity: Art 2(f);
    - **Contracts for the supply of goods to be manufactured or produced, if the buyer undertake to supply a substantial part of the materials necessary for such manufacture or production:** Art 3(1);
      - In Oberlandesgericht Köln (3), a German case, a Swiss market research institution contracted with a German company to write a market report was held not to be a contract that can be covered by the CISG.
    - **Mixed contracts where the preponderant part of the obligation of the seller consists in the supply of labour or other services:** Art 3(2)
    - The validity of the contract (a) and the effect the contract may have on the property in the goods sold (b): Art 4(1)
      - CISG only governs the formation of the contract and the rights and obligations of the seller and the buyer arising such a contract.
      - CISG does not cover validity or transfer of the property — i.e., Convention does not cover any legal issue concerning the effect of passing of property under a contract.
    - The liability of the seller for death or personal injury caused by the goods to any person: Art 5.
- **Ways to interpretation**
  - **Interpretation of CISG**
    - In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade: Art 7(1);
      - In Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd (1), when discussing the amount of damages and which damages are allowable the court referred to domestic common law cases which is in breach of article 7 CISG.
    - Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law: Art 7(2).
  - **Interpretation of contract**
    - Statements made by and other conduct of party A are to be interpreted according to his intention where party B knew or could not have been unaware what that intention was: Art 8(1);
    - If Art 8(1) is not applicable, statements made by and other conduct of party A are to be interpreted according to the understanding that a reasonable person in the position of party B would have had in the same circumstances: Art 8(2);
    - In determining the intent of party A or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties: Art 8(3).
    - The parties are bound by any usage agreed and by any practices established between themselves: Art 9(1);
    - The parties are bound by international usages impliedly applicable to particular trade unless otherwise agreed: Art 9(2).
      - Incoterms is considered as incorporated into CISG as internationally widely recognised trade usages: Cedar Petrochemicals Inc v Dongbu Hannong Chemical Ltd (2).
FORMATION OF A CONTRACT

- **Formality of a contract:** Art 11
  - A contract of sale under CISG:
    - Need not be concluded or evidenced in writing;
      - However, the contract must be in writing if a party has its place of business in a contracting state that has made reservations under art 96: Art 12.
      - Art 96 allows a state whose legislation requires contracts to be concluded or evidenced by writing to exclude the operation of Arts 11 or 29, or Pt II (which do not require a contract to be made or evidence in writing), where any party has his place of business in that State.
      - N.B., the reservation does not automatically affect the validity of a contract concluded by a party having a place of business in the state, if the law of that state does not govern the contract in question.
    - Not subject to any requirement as to form;
    - May be proved by any means, including Witnesses — admission of extrinsic evidence.
  - Offer
    - What is an offer: Art 14(1)
      - An offer must be “sufficiently definite” and indicate the intention of the offeror to be bound in case of acceptance: Art 14(1).
      - Whether it is “sufficiently definite” is determined by a consideration of the following three indicators:
        - The description of the goods;
        - their quantity or determinable quantity; and
        - their price or determinable price.
      - However, where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned: Art 55.
    - Offer vs. an invitation to make an offer: Art 14(2)
      - A proposal cannot be an offer if it is directed to the general public, unless the person making the proposal expressly states otherwise in the proposal.
    - Effective offer
      - The time that an offer becomes effective is the time when the offer reaches the offeree: Art 15(1)
        - Meaning of reach — an offer/acceptance/or any indication of intention reaches the addressee when it is: Art 24
          - made orally to him;
          - delivered by another means to him personally;
          - delivered to his place of business or mailing address; or
          - if he does not have place of business or mailing address, is delivered to his habitual residence.
      - N.B., Art 24 allows the parties to use any means of communication to make or to accept an offer.
      - N.B., Art 15 suggests that the time at which the offeree receives an offer, rather than the time at which the offeror dispatches the offer, is crucial. The offeror has no legal liability under an irrevocable offer until the offer reaches the offeree.
    - Withdraw an offer
      - An offeror can withdraw any offer, even if it is irrevocable, as long as the withdrawal reaches the offeree before or at the same as the offer: Art 15(2).
      - Therefore, an offer will not become effective if made by a letter but withdrawn by a fax or oral statement that reaches the offeree before or at the same time as the offer arrives.
  - Revocation of an offer
    - General rule — A revocable offer can be revoked at any time before acceptance, but the revocation must reach the offeree before the offeree dispatches an acceptance: Art 16(1).
    - Art 24 which allows the use of any means of communication, is relevant.
3.2 CISG_Formation of a Contract

**FORMATION OF A CONTRACT (CONT.)**

- **Offer (Cont.)**
  - Revocation of an offer (Cont.)
    - The general rule of revocation does not apply to an irrevocable offer: Art 16(2)
      - An offer can be irrevocable either expressly or by implication
        - An expressly irrevocable offer contains terms that suggest a fixed time for acceptance or an undertaking not to revoke the offer before a fixed or determinable time: (a)
        - An implicitly irrevocable offer is established by an inference of irrevocability drawn from the circumstances involved; the offeree must have reasonably relied on this inference.
  - Rejection of an offer
    - A rejection becomes effective when the rejection reaches the offeror: Art 17.
      - This indicates that the offeree is able to accept the offer or withdraw the rejection if the acceptance or withdrawal of the rejection reaches the offeror before the rejection.
    - An acceptance which contains terms substantially different from the offer is a rejection of the original offer and constitutes a counter offer: Art 19(1).
      - A counter offer is a reply that ‘contains additions, limitations or other modifications’ to the terms relating to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party’s liability to the other or the settlement of disputes.
      - Modification of a contract to include a forum selection clause was a material alteration: *Château de Charmes Wines v Sabate* (4).
      - Where there is a counter offer, no agreement has been reached unless the counter offer is accepted: 2004 Belgian case (6).
  - Offeree’s Response to an offer
    - Under the CISG, an offeree can respond to an offer in five different ways:
      - an acceptance: Art 18(1)
      - a modified acceptance: Art 19(2)
      - an acceptance with modifications that are not materially different from the terms of the offer: Art 19(1)
      - a counter offer: Art 19(1)
      - a rejection: Art 17
    - Silence (no response): Art 18(1)
      - Which amounts to rejection in most circumstances but may be regarded as acceptance in special circumstances: 18(3).

- **Acceptance**
  - Manner & Time of acceptance
    - An acceptance becomes effective only when the indication of the statement or conduct was received by the offeror either within a fixed time or a reasonable time: Art 18(2).
    - Rules to calculate the starting point of the fixed period: Art 20(1)
      - If an offer is made in the forms of a letter or a telegram, the period begins from the date of dispatch or from the date shown on the letter/envelope; but
      - if an offer is made by any means of instantaneous communication, the period begins from the moment the offer reaches the offeree.
    - Any official holidays or non-business days are included in calculating the period unless the last day of the fixed period is an official holiday or non-business day: Art 20(2) — i.e., the period is extended until the first business day which follows.
    - Reasonable time should be determined by taking into account the circumstances of the transaction, and the means of communication employed by the offeror (only).
    - An oral offer must be accepted immediately unless the circumstances indicate otherwise: Art 18(2).
  - NB, a late acceptance may be accepted at the offeror’s option: Art 21.
    - A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to the effect that he or she regards the late acceptance as effective: Art 21(1)
    - On the other hand, an acceptance that has been delayed by errors in transmission is nevertheless effective, unless the offeror informs the offeree without delay that the late acceptance is ineffective: Art 21(2).
      - Errors in transmission refers to ‘if its transmission had been normal it would have reached the offeror in due time’.
      - Onus on the offeror who fails to comply with Art 21(2) to prove that there is no reasonable inference in the late acceptance that its delay in arrival was caused by an error in transmission.
3.2 CISG_Formation of a Contract

FORMATION OF A CONTRACT (CONT.)

- Acceptance (Cont.)
  - Manner & Time of Acceptance (Cont.)
    - But silence or inactivity 'does not in itself amount to acceptance': Art 18(1).
      - However, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offerer, if the parties have adopted this practice in their prior dealing: Art 18(3).
        - The acceptance is effective at the moment the act is performed within a fixed time or a reasonable time: Art 18(3).
  - Withdrawal of an acceptance
    - An acceptance is regarded as having been withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance: Art 22.
      - Art 24 which allows the use of any means of communication, is relevant.
- Conclusion of Contract
  - When a contract is concluded
    - A contract is concluded at the moment when the acceptance of an offer becomes effective in accordance with Arts 18 (acceptance), 19(2) (modified acceptance) and 21 (late acceptance): Art 23.
  - Note, the validity of the contract is not regulated by CISG: Art 4
    - This means that the formation of a contract under CISG does not necessarily lead to enforcement of the contract, if the validity of the contract or its terms are questionable under the relevant domestic law.