TOPIC 2 – SALE OF GOODS

Importance of Documents

- Documents (e.g. bill of lading) are security
- Payment is often made upon delivery of documents rather than delivery of goods
- A seller is obligated to deliver documents to the buyer (or bank) – then, the buyer (or bank) is obligated to pay upon delivery
- Documents must comply exactly with the contracts and with each other
- Possibility for hard copy documents to be falsified and forged – even easier for this to occur with electronic documents
    - *Aus in process of acceding to UN Convention on Electronic Communications in International Contracts
    - Aus shipping legislation allows for electronic documents
    - Issues if people sending around conflicting PDF documents, it is more difficult to determine what original terms were

Vienna Convention – Contracts on the International Sale of Goods (CISG)

- Aus position = statute incorporates the CISG directly; CISG has priority over other laws (e.g. s 6: prevails over *SOGA*)
- **Hierarchy of applicable law – if NSW law governs, law is determined as follows:
    - (1) Contract setting our intention of parties
        - Contract may modify CISG
        - If it says nothing, CISG will apply (as CISG prevails)
    - (2) CISG regime
        - To the extent it has not been excluded by the intention of the parties
    - (3) If CISG does not apply, Sale of Goods regime
    - (4) Fallback position = common law
        - To the extent it is not excluded by the statute
- CISG Articles are Schedule 1 in *Sale of Goods (Vienna Convention) Act 1986* (NSW)

(a) Part 1 CISG: Application

Art. 1	CISG applies to contracts of sale of goods between parties whose places of business are in different States: (a) when States are Contracting States; or (b) when rules of private international law lead to application of law of a Contracting State

- 'Contracting states' = must be party to the convention
- If one state is not a contracting state, could get around this with governing law clause – e.g. 'laws of NSW apply to this contract', which means CISG would apply

- If no governing law clause, then need to consider whose laws of private international law will be applied
- Must be sale of goods (i.e. not services)

Exceptions to CISG application

Art. 2	Convention does not apply to sales: (a) of goods for personal, family or household use, unless seller neither knew or ought to have known the goods were bought for such a use (b) by auction (c) on execution or by authority of law (d) of stocks, shares, investment securities, negotiable instruments or money (e) of ships, vessels, hovercraft or aircraft (f) of electricity
Art. 3	(1) Contracts for supply of goods to be manufactured/produced are sales unless party who orders good undertakes to supply substantial part of materials necessary for such manufacture or production. (2) Convention does not apply to contracts where preponderant part of obligation of party who furnishes goods consists in the supply of labour/other services.
Art. 4	Convention governs only formation of contract of sale/rights/obligations of seller and buyer arising from such a contract – in particular, it is not concerned with: (a) validity of contract or any of its provisions/usage (b) effect which contract may have on property in the goods sold
Art. 5	Convention does not apply to liability of seller for death or personal injury caused by the goods to any person.
Art. 6	Parties may exclude application of this convention, or derogate from/vary the effect of any provisions (subject to Art. 12).

(b) Formation of the Contract

Interpretation of Contract

Art. 7	(1) In interpreting 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 (2) Questions re matters not expressly settled in Convention are to be settled in conformity with general principles on which the Convention is based, or in the absence of such principles, in conformity with rules of private international law.
Art. 8	(1) Statements made/other conduct of party is to be interpreted according to their intent, where other party knew/could not have been unaware what that intent was. (2) If (1) not applicable, statements made/other conduct of party is to be interpreted according to understanding a reasonable person of same kind as other party would have had in same circumstances. (3) In determining intent + reasonable person's understanding, consideration is to be given to all relevant circumstances including: negotiations, practices which parties have established between themselves, usages, and subsequent conduct of parties.
Art. 9	(1) Parties are bound by any usage/practices to which they have agreed/established. (2) Parties are considered to have impliedly made applicable to their contract a usage of which parties knew/ought to have known, and which is widely known to international trade, and regularly observed by parties to contracts of the type involved in the particular trade concerned.

Art. 10	For purposes of this Convention: (a) if party has more than 1 place of business, the place that has closest relationship to contract/its performance, having regard to circumstances known by parties at any time before or at conclusion of contract (b) if party does not have a place of business, reference is to be made to habitual residence
Art. 11	Contract of sale need not be concluded/evidenced by writing; not subject to any requirement as to form – may be proved by any means, including witnesses. **But, subject to reservation under Art. 12 for contracts in writing*
Art. 12	Any provision of Art. 11, 29, or Part II that allows contract/its modification/ termination by agreement/any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has their place of business in a Contracting State which has made a declaration under Art. 96 – parties may not derogate from or vary the effect of this article.

Formation of Contract

STEP 1: METHOD OF COMMUNICATION	
Art. 20	(1) A period of time for acceptance fixed by offeror in telegram/letter starts from moment telegram handed in for dispatch/from date shown on letter or envelope. A period of time for acceptance fixed by offeror by phone/telex/other means of instantaneous communication starts from moment offer reaches offeree. (2) Official holidays/non-business days are included in calculated a period. But, if notice of acceptance cannot be delivered to offeror on lady day of period because the day falls on official holiday/non-business day, the period is extended until the first business day which follows.
Art. 21	(1) Late acceptance is effective if without delay the offeror orally informs the offeree/dispatches a notice to that effect. (2) If letter/other writing containing late acceptance shows it was sent in such circumstances that if transmission had been normal it would have reached offeror in due time, late acceptance is effective as acceptance, unless, without delay, offeror orally informs offeree he considers the offer as having lapsed/dispatches notice to that effect.
	Electronic Transactions Act s 13 – Time of Dispatch: (1) Time of dispatch of electronic communication (EC) is: (a) time when EC leaves info system under control of originator/party who sent it on behalf of originator, or (b) if EC has not left ingo system under control of originator/party who sent it on behalf of originator, the time when EC is received by addressee [i.e. where parties exchange EC through same info system] (2) ss (1) applies even if place where info system is located may be different from place where EC is taken to have been dispatched under s 13B.
	Electronic Transactions Act s 13A – Time of Receipt: (1) Unless otherwise agreed between originator and addressee of EC: (a) time of receipt of EC is time when EC becomes capable of being retrieved by addressee at electronic address designated by addressee, or (b) time of receipt of EC at another electronic address of addressee is time when both: (i) EC has become capable of being retrieved by addressee at that address, and (ii) addressee becomes aware EC was sent to that address

	(2) For purposes of ss (1), unless otherwise agreed between originator and addressee, it is assumed that EC is capable of being retrieved by addressee when it reaches addressee's electronic address. (3) ss (1) applies even though place where info system is located may be different from place where EC is taken to have been dispatched under s 13B.
	Electronic Transactions Act s 13B – Place of Dispatch and Place of Receipt: (1) Unless otherwise agreed by originator and addressee of EC: (a) EC is taken to have been dispatched at place where originator has place of business, and (b) EC is taken to have been received at place where addressee has place of business (2) For purposes of ss (1) to an EC: (a) party's place of business is assumed to be location indicated by party, unless another party demonstrates the party making indication they do not have place of business at that location (b) if party has not indicated place of business and has only one place of business, it is assumed that that place is party's place of business (c) if party has not indicated place of business and has more than 1, the place of business that has closest relationship to underlying transaction, having regard to circumstances known/contemplated by parties at any time before or at conclusion off transaction (d) if party has not indicated place of business and has more than 1, but ss (c) does not apply, it is assumed party's principal place of business is party's only place of business (e) if party is natural person and does not have place of business, it is assumed party's place of business is their habitual residence (3) A location is not a place of business just because it is where equipment/tech supporting an info system used by party are located, or, where info system may be accessed by other parties. (4) Sole fact that party makes use of domain name/email address connected to a country does not create presumption its place of business is located in that country.
STEP 2: OFFER	
Art. 23	Contract is concluded at moment when acceptance of offer becomes effective in accordance with provisions of this Convention.
Art. 24	An offer, declaration of acceptance, or any other indication of intention 'reaches' addressee when made orally or delivered by any other means to him personally, to his place of business or mailing address (or to habitual residence if no place of bus.)
Art. 14	(1) A proposal for concluding contract addressed to 1 or more specific persons constitutes an offer if it is sufficiently definite and indicates intention of offeror to be bound in case of acceptance. It is sufficiently definite if indicating the goods and expressly or implicitly fixing/making provision for determining quantity and price. (2) A proposal except one addressed to 1 or more specific persons is considered merely an invitation to make offers, unless contrary is clearly indicated by person making proposal.
Art. 15	(1) Offer becomes effective when it reaches the offeree. (2) Even if irrevocable, offer may be withdrawn if withdrawal reaches offeree before or at same time as the offer. **Must **distinguish** between withdrawing and revoking – can withdraw before it reaches offeree, after that it must be revoked.*

Art. 16	(1) Until contract is concluded, an offer may be revoked if revocation reaches offeree before he has dispatched an acceptance. (2) However, offer cannot be revoked if: (a) if it indicates, whether by stating fixed time for acceptance or otherwise, that offer is irrevocable (e.g. if open for 14 days, cannot revoke on 15th day if already accepted) (b) if it was reasonable for offeree to rely on offer as being irrevocable and the offeree has acted in reliance on the offer
	Example of offer: o *Chateau des Charmes Wines v Sabate USA*: oral contract for supply of corks, seller sent invoices with forum selection provisions; HELD: contract formed orally and provision in invoices was attempt to materially change the terms which were not agreed to by the buyer. o *Castel Electronics*: seller sent order to buyer; buyer sent pro forma invoices; HELD: the invoices were acceptance not an offer, as there was prior conduct and agreement on the terms before the order was sent.
STEP 3: ACCEPTANCE	
Art. 17	An offer, even if irrevocable, is terminated when a rejection reaches the offeror.
Art. 18	(1) Statement made by/other conduct of offeree indicating assent is an acceptance. Silence of inactivity does not in itself amount to acceptance. (2) Acceptance becomes effective at moment indication of assent reaches offeror. Acceptance is not effective if indication of assent does not reach offeror within time he has fixed, or if no time fixed, within a reasonable time, due account being given to circumstances of transaction, including rapidity of means of communication employed by offeror. Oral offer must be accepted immediately unless circumstances indicate otherwise. (3) But, if by virtue of offer or as result of practices which parties have est. between themselves/of usage, the offeree may indicate assent by performing an act, such as one relation to dispatch of goods or payment of price, without notice to the offeror, acceptance is effective at the moment the act is performed, provided act is performed within period of time laid down in preceding paragraph.
Art. 22	Acceptance may be withdrawn if withdrawal reaches offeror before or at same time as acceptance would have become effective.
STEP 4: COUNTEROFFERS	
Art. 19	(1) A reply to offer which purports to be acceptance but contains additions, limitations, or modifications is a rejection of offer and constitutes a counter-offer. (2) But, a reply to offer which purports to be acceptance but contains additional or different terms which do not materially alter the terms constitutes an acceptance, unless offeror, without undue delay, objects orally/dispatches a notice re the discrepancy. If he does not object, terms of contract are the terms of offer with modifications contained in the acceptance. (3) Additional/different terms relating to price, payment, quality and quantity of goods, place and time of delivery, extent of one party's liability to the other, or the settlement of disputes are considered to alter the terms of the offer materially. **Negotiated terms prevail over standard terms; ambiguous terms should be construed against the provider*.
	CISG Advisory Opinion No 13 [*not binding]: For determining whose standard form/terms apply – must be reference to inclusion, terms clear/understandable by reasonable person, not strange to reas. person, etc.