

Table of Contents

Week 1

Introduction & Overview	Page 2
-------------------------------	--------

Week 2

Introduction to CISG	Page 10
----------------------------	---------

Week 3

Contract Formation	Page 18
--------------------------	---------

Week 4

Obligations of Parties	Page 28
------------------------------	---------

Week 5

Obligations of Parties II	Page 42
Examination and Notification under CISG (Non-Conformity)	Page 47

Week 6

Breach & Remedies CISG (Fundamental Breach)	Page 52
Applying the CISG	Page 63

Week 7

Conflict of Laws (Forum)	Page 66
--------------------------------	---------

Week 8

Resolve Dispute – Arbitration (NY Convention & Model Law)	Page 80
Resolve Dispute – Mediation	Page 87

Week 9

Carriage of Goods by Sea (Bill of Lading)	Page 90
---	---------

Week 10

Carriage by Sea – Carrier’s Liabilities (Damages, Protections)	Page 100
--	----------

Week 11

Carriage of Goods by Air	Page 110
Bills of Exchange	Page 115
Documentary Credit	Page 120

Week 12

Documentary Credit (Continue)	Page 122
Rights of Parties under D/C	Page 125

(blank)

Week 1

Introduction & Overview

THIS UNIT COVERS

Lecture 1- 6	The International Sales Law (CISG): From Formation to remedies...
Lecture 7-8	Overview of Conflict of Laws and Commercial Dispute Resolution, Commercial Arbitration
Lecture 9-10	Carriage of Goods and the Bill of Lading
Lecture 11-12	Trade Finance – esp. Documentary Letters of Credit
Lecture 13	Revision Class

Lecture 1 - Introduction and overview

- What is an “international commercial lawyer”?
 - A commercial lawyer is a facilitator/the wheels of INTERNATIONAL COMMERCE!
- Commerce is trade, but it has many ancillaries → there are so many other elements to take into account (postage, etc.)
 - Trade itself is at the heart of commerce
 - Commercial law is all about supporting the business of trade
 - Trade is a big and complex machine, we will examine some cogs and try to get you to appreciate the bigger picture...

Overview of lecture

- Defining “international commercial law”
- The teaching ethos
- What we will cover...
- Sources of international commercial law
- Key concepts of commercial law
- Defining “Commercial Sense”
- Multiplicity of Contracts
- Contextual knowledge and why it is vital

Is Commercial law about LAW or BUSINESS?

- It's BOTH!
- Q: Business is central to commercial law – and what is central to business?
- A: ££££ and \$\$\$\$ - It's all about profit/money!
- It's not about the consumers' protection, but about the businesses' protection

And what is “international”?

- International → crossing boundaries of national States, OR parties having their place of business in different States
- It deals with multiple jurisdictions and law systems → all international commercial lawyers are miniature comparative lawyers

The Key?

- To be a facilitating commercial lawyer, you must UNDERSTAND your trade AND your clients trade!
 - I.e. be business men/women

Key concepts of international commercial law

1. Party Autonomy
 - The parties are free to govern their agreement between them
 - I.e. the intention of the parties become crucial in understanding what was actually agreed
 - The contract rules
 - Very little mandatory law
2. NO PROTECTIONISM
 - a. Commercial parties are (theoretically) equal
 - i. We do not protect one party over the other
3. Commercial Sense
 - a. Understanding the BIGGER picture and understanding the logic
4. Internationalization
 - a. Everything is subject to shared international laws
5. Predominantly focussing on private law
 - a. Some public law (not covered in class)
6. Multiplicity of contracts
7. Contextual understanding vital to facilitate trade

Key ideologies of international commercial law

- In commercial law → very little mandatory law
 - Instead we focus on both:
 1. Party autonomy
 - I.e. allowing the parties to decide for themselves
 2. Commercially sound assumptions
 - Sometime statutory, but very rarely mandatory
- There are varying degrees of statutory laws determining the actions of the traders in different jurisdictions throughout the globe → but in all jurisdictions the importance of giving the businessmen free reign (within reason) are very strong
 - This means we need to rethink the sources of law in the context of commercial law
 - We need to define what is commercially sound

Questions to Consider

- What do we THINK law is?
- What is law in a commercial context?
- What do we mean by “law as a gap filler”?
- So why is Commercial Regulation different?
- Is commercial regulation domestic or international?

Sources of international trade law in the absence of mandatory law

- Party autonomy dictates:
 - The Contract (of sale, of shipping, of finance, etc)
 - Express and Implied Terms, including established usage
 - Otherwise applicable (non-mandatory) law
 - Common law, including its principles
 - Clarified customary law (such as UNIDROIT or PECL)
 - Non-clarified customary law
 - Non-legal standards
 - Such as quality, etc.

BUT if there IS mandatory law?

- There is no freedom when mandatory law is applied
- Mandatory Law:
 - Negates party autonomy completely
 - Limits of contractual freedom → found at the barriers of mandatory law
 - Luckily, there is very little of it in commercial law at an international level
 - E.g. Implied terms in SGA via UCTA (but see Art 26), Section 11.3 COGSA
 - Arguably there is comparatively less mandatory law in common law jurisdictions like Australia
 - “Laissez faire”
 - BEWARE the scariest of them all → PUBLIC POLICY

Gapfilling Law

- Gapfilling → Supplements (enhances) party autonomy
- Overruled by:
 - Mandatory Law → overrules EVERYTHING
 - Intent
 - Trade Practices
- MOST commercial regulation is gapfilling
 - I.e. Not mandatory
 - E.g. CISG (Art 6), SGA, CAA (“unless otherwise agreed”)
- STILL beware → PUBLIC POLICY

Commercial regulations and sources - 2 areas of law

- **Private Law**
 - Deals with the relations between individuals or institutions → rather than relations between these and the state
 - The regulations of the agreements between the parties
- **Public Law**
 - Deals with the relations between individuals and the state
 - Makes a framework within which our agreements can function.

Internationalization of Law

- Everything we are studying in this class is part of international private law
- Internationalisation → the growing tendency of corporations to operate across national boundaries
- Different forms of uniform commercial laws → CISG, CAA (MAL), COGSA (HVR), UCP600
- But it operates at **domestic** levels
 - STILL beware → PUBLIC POLICY
 - Even in arbitration

Bottom Up/Top Down Discussion

- “...does globalization of the underlying flows suggest a need for unification of private law at least in the business sector? If so, should this basically be an autonomous (bottom-up) or imposed (top-down) process?”

Commercial “morality”

- Morality → principles concerning the distinction between right and wrong or good and bad behaviour
1. Good Faith
 2. Reasonableness
 - (Reasonable person)
 3. Right to reasonable perceptions
 - (The reasonable appearance of something)
 4. Trade expectations and customs included
- **BUT** there is no Universality in commercial morality
 - I.e. different countries have different cultural moralities
 - E.g. India believes that it is immoral to charge interest rates on loans, whereas other countries don't, etc.
 - We have different trade standards in different parts of the world

PACTA SUNT SERVANDA vs Impediments

- Pacta Sunt Servanda → Contracts must be obeyed
- Remedies, when there is a breach of contract, does not always include monetary remedies → can also include remedies which include forcing someone to perform according to the value of the monetary remedy
 - Unless there are certain impediments/hindrances that make it unreasonable for anyone to expect a person to have performed a contract
 - E.g. force majeure, hardship, lawful impediments, etc.

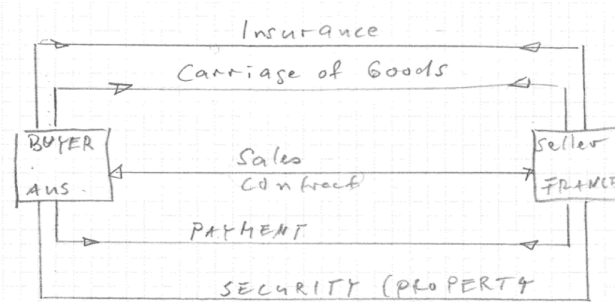
Defining “Commercial Sense”

- The importance of party autonomy (independence) renders the contract terms paramount (most important) to the interpretation of a contract, and usage is an extension of this autonomy
- Moreover, these contract terms must be viewed in the light of what the parties could reasonably be expected to have wanted to agree in the light of commercial reality → this commercial reality is sometimes referred to as “commercial sense”
- Commercial sense is about appearances and about context
 - E.g. seller wanting to drain the water from the engines due to water expanding and bursting engines when it's freezing cold → Judge ruled that due to the seller having buckets with him, there are no reasonable grounds to suspect that he would have left had the buyer had not told him to leave → The buckets were an indications that he wanted to drain the engines
- See Lord Goff in “Commercial contracts and the Commercial Courts” [1984] L.M.C.L.Q. 382 at 388

Multilayered contracts

- These contracts are fundamentally interrelated → they are co-dependant (one does not work without the other) and are connected
- Contracts → the law that governs the party's legal relationship
- “International trade” → does not comprise of just ONE contract for the sale of goods, but a whole bundle of contracts regulating various aspects of trade
 - Trade is not a straightforward over-the-counter transaction where goods are exchanged for cash payment on the spot → although the sale of goods is a significant element in trade → it is not the only important aspect
 - Several contracts come into existence and are co-dependant with each other
 - Sales contract
 - Shipping
 - Other transport contracts
 - Finance issues
 - Insurance

- Consider the diagram which follows:



Back to "The Key"

- To be a facilitating commercial lawyer → you must UNDERSTAND your trade AND your clients trade
- CONTEXTUAL understanding of commercial regulation
 - What do you need to know?
 - For SALES:
 - Understand the goods, the industry practices, the multiplicity of contracts and the role of the sales contract.
 - Example: Crude Oil trade practices
 - For DISPUTE RESOLUTION:
 - Understand your clients needs, their interests, the technicalities of the dispute, the other party's perspective.
 - I.e. your client will emotionally go crazy, but you need to calm them down and look at the situation as a whole according to your client's needs and the from the third party's perspective.
 - Example: The P-52 Lockplate case
 - For TRADE FINANCE:
 - Understand the role of banks, their vital function, their perspectives.
 - Example: The Paribas v Santander case
 - Why it is best to NOT have banks assume liability?
 - The case is about the buyer's bank giving money to the seller's bank in exchange for goods. The buyer fraudulently runs away with the goods without paying back his bank. The buyer's bank then wants the money back from the seller's bank, which in reality isn't the seller's bank's problem.
 - Banks run on a credit when dealing with transactions (i.e. they will always run transactions on risks).
 - Question:
 - There is a buyer who wants to buy rice from a seller.
 - Whose problem is it if the buyer can't pay?
 - From a law point of view, it's the buyer's problem that they can't pay, but from a Business point of view, the seller wants that business and money, so it's the seller's problem.
 - The seller will try help the buyer on a deferred payment from banks.
 - For SHIPPING:
 - Understand the nature of carriage, the perspectives of the carrier, the MAGNITUDE of the transport elements.

(blank)

Week 2

Introduction to CISG

Lecture 2 - Introduction to the CISG

Overview of today

- Understanding the Genesis of the CISG
- Knowing the basic traits of the CISG
- Knowing the sphere of application of the CISG (Art 1)
- Knowing the limitations in scope of the CISG (Arts 2-5)
- A Student Presentation of case from the borderlines...
- Understanding the Declarations of the CISG (Arts 92-96)
- Understanding the hierarchy of the CISG (Art 6 & 9)
- Understanding Gapfilling in the CISG (Art 7)
- Challenges to interpretation and uniformity (Arts 8 & 7)
- Another student presentation, this time on uniform application...

Reading

- Essential:
 - The Practitioners' Guide to the CISG
 - The Convention itself, and information at www.cisg.law.pace.edu → You MUST familiarise yourself with this database
- Additional:
 - On History: Garro, "Reconciliation of Legal Traditions in the UN Convention on Contracts for the International Sale of Goods", 23 International Lawyer 443-483 (1989), available at: <http://www.cisg.law.pace.edu/cisg/biblio/garro1.html>
 - On Uniformity: Andersen, "Defining Uniformity in Law", Uniform Law Review 2007-1, p. 5-55
 - On Interpretation: Zeller, "Four-Corners - The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods", available at: <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>

WHAT IS the CISG?

- A SHARED law for international sales → applies to Australia and 83 other states
- Formed as an international convention, which States then **ratify** and make it part of their domestic law
 - I.e. it's an international convention which becomes the national law of a state for international sales
- It then governs private commercial relationships as sales law

Where does it come from?

- History of the CISG Part 1:
 - 1920's:
 - Attempts to harmonise sales law (Prof. Ernst Rabel and UNIDROIT since 1930's), uniform laws sought to promote cross-border trade.
 - 1964:
 - Hague Convention approving the ULF (Uniform Law on the Formation of Contracts for the International Sale of Goods) and ULIS (Uniform Law on the International Sale of Goods).

- 1967:
 - ULF and ULIS fails as it was too “Western”, only nine States ratified them. UNCITRAL (United Nations Commission on International Trade Law) put together a working group to draw up two new conventions on formation and substantive law in international sales.
- History of the CISG Part 2:
 - 1980:
 - Working Group has combined ULF and ULIS to make one global convention: the CISG. 62 States participated in approving conference, including important international organisations (such as World Bank, EC, UNIDROIT).
 - 1988:
 - The CISG enters into force after its obligatory ten signatories.
 - 2016:
 - The UN treaty section reports that the CISG has – as of March 2016 - been ratified in 84 countries, labelling it the most successful uniform international law to date. See http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html
- Why is the history important?
 - Compromises:
 - Obviously, with such a lengthy diplomatic drafting, the CISG is very much a compromise between very varied legal systems of various states. And that is what it was meant to be – considering why its antecedents, the ULF and ULIS, failed.
 - These compromises inevitably lead to problems:
 - As the convention is detached from a single, coherent legal system, general principles can be difficult to discern as some rules appear out of context.
 - At times, “uncomfortable” solutions have been reached, where the least objectionable solution is adopted instead of the more natural. This assessment is, of course, subjective.
 - Provisions have sometimes been left open as no agreement could be reached, allowing the filling of these gaps to become irregular and non-uniform in the conventions application, despite Art. 7.
 - For more information on the legal compromises, see Alejandro Garro “Reconciliation of Legal Traditions in the UN Convention on Contracts for the International Sale of Goods”, 23 International Lawyer 443-483 (1989), available at: <http://www.cisg.law.pace.edu/cisg/biblio/garro1.html>

Internationality & Uniformity

- A child of compromise, the CISG is meant to express a truly global law of sales.
- Its preamble/preliminary reminds us of its goal to achieve uniformity in sales.

CISG Map of the World:



Structure of the CISG - at a glance

- Preamble:
 - Clearly states the intention to promote uniformity in trade and to remove barriers of International Trade.
 - Also made to promote world peace.
- The CISG contains 4 main parts:
 - Part I:
 - General Rules of the Convention
 - **Arts 1-5** concern the application → they explain the definition of sales and the exclusion of certain sales
 - **Arts 6 & 9** → explain the hierarchy
 - The 3 C's → Contract, Custom, Convention
 - **Arts 7-8** → the interpretation and gap-filling
 - Part II:
 - Formation of Contract
 - Offer, acceptance, revocation
 - In essence it is Uniform Law Formation (ULF)
 - Part III:
 - Substantive Rules → obligations of the Buyer and the Seller, non-conformities, delivery, notices, remedies for breach, etc.
 - Part IV:
 - Rules of ratification and entry into force, including the reservations
 - NOTE → the reservations are significant

Scope of Application

- Party Appointed:
 - Parties may freely appoint the CISG to be the rules governing their contract.
 - This is also done by nominating a CISG state in an international sales contract.
- Appropriate law (Rarely happens):
 - CISG appointed by an arbitrator.
 - Recap: an independent person or body officially appointed to settle a dispute.
- **Art 1(1)(a)**
 - **CISG automatically applies** → when a sale is concluded between a buyer and a seller with places of business in two different CISG-States
 - Places of business → **Art 10**
 - CISG states → states which include the CISG
- **Art 1(1)(b)**
 - Where Conflict rules/Private International Rules (PIL) appoint the law of a CISG State in a case of international sales → law appointed is CISG
 - However, reservation in **Art 95**, see below

Excluded from the CISG application:

- **Art 2(a)-(c)**
 - CISG does **not** apply to:
 - a. Sale of goods bought for personal, family or household use
 - Unless the seller did not know (or ought to have known) that goods were bought for any such use, at any time before or at the conclusion of the contract
 - b. Sale by auction
 - c. Sale on execution or otherwise by authority of law
 - d. Sale of stocks, shares, investment securities, negotiable instruments or money
 - e. Sale of ships, vessels, hovercraft or aircraft
 - f. Sale of electricity
- **Art 4-5**
 - CISG does **not** concern itself with:
 - i. Validity of contracts
 - ii. The effect which the contract may have on property in goods sold
 - iii. Product liability of seller for death or personal injury caused by the goods
- **Art 2(d)-(f), Art 3**
 - Exclusions of certain specific goods:
 - Ships, aircraft, electricity, property, plus contracts for which labour is the predominant portion.
 - *Remember → CISG covers sale of **goods**, not services, therefore labour is excluded.*
 - Predominant labour?
 - The question is whether we pay for the labour or the goods which comes as a result of the labour.
 - So is SOFTWARE goods?
 - Main question → whether we have possession of software and whether goods need to be tangible in order to be defined as goods.
 - Possession?
 - Yes, we can have possession over software.
 - Tangible?
 - It need not be tangible to have possession/be a good.
 - **Case HG980472 (Feb 2, 2000)** → they decided that software is defined as a good due to both countries constituting the CISG

Declarations/Reservations I

- Whole idea → tailor-make a flexible convention to make different states happy
- Illustrates the relationship between PUBLIC law and PRIVATE law
 - The State decision will affect the nature of the private law instrument
- It's a problem with re-uniformity → so ALWAYS CHECK if a State has made declarations

Declarations/Reservations II

- When a reservation is relevant → CISG will **not** apply
- Reservations which may prohibit the application of the CISG:
 - **Art 93**
 - The CISG may not extend to all the territories of a Federal State
 - **Art 94**
 - The CISG may not apply between sister States/States who reciprocally agree this
 - **Art 95**
 - The CISG cannot apply through Art 1(1)(b), only 1(1)(a) → *MOST applied declaration*
- Reservations which limit/restrict the application of the CISG:
 - **Art 92**
 - Where either Part II or Part III is excluded. This reflects the fact that the CISG is a “double-convention”, embodying both the ULF (formation) and ULIS (substantive regulations), and it is possible to ratify only one aspect. CAUSED SO MUCH TROUBLE – now – luckily – not in place anywhere.
- Reservations which alter the content of the CISG:
 - **Art 96**
 - Where **Art 11** on oral contracts can be made inapplicable → requiring writing
 - Only reservation with domestic legal prerequisite
 - It requires a state to have domestic law that does not respect oral contracts
 - see China’s removal of declaration

Internationality and Uniformity in **Art 7**

- BIG problem → how do we share an international sale law?
- The Convention creates textual uniformity → but only Courts can create applied (actual) uniformity
- CISG case law illustrates HOMEWARD TRENDS in interpretation and application

A good approach – the jurisconsultorium

- Jurisconsultorium → we have to share sources and cases from different countries to look at what should be done internationally in order to form uniformity
- **Rheinland Versicherungen v Atlarex case**
 - Pretty much, a seller sold rubber for shoe soles to the buyer. The soles did not last as long as expected. The buyer sued the seller, but because the buyer raised the problem, they had the burden of proof for proving that they don't last that long. They lost because they could not prove this.

CISG Hierarchy

- **Art 6**
 - NO Mandatory Law in the CISG
 - “Parties can opt out in part or in full” → mandatory law/public policy of a domestic court may not always LET parties do this
- **Art 9**
 - Trade/Commercial Customs supersede the CISG
 - Two kinds:
 1. Established in industry practise
 - I.e. when one of the parties have industry practise not to accept oral contracts, then that precedent will supersede the CISG
 - So they will have to expressly agree whether oral or no oral
 2. Established between the parties
 - E.g. when a company has always ordered the maximum quantity and suddenly don't order the maximum, then they are in violation of the practice established between the two parties
- CISG Hierarchy – the 3 C’s (always in this order):
 1. CONTRACT
 - i. Most important
 2. CUSTOM
 - i. Whether established between the parties or in the trade
 3. CONVENTION

Gapfilling and Interpretation in the CISG

- Recap → Gaps in contract and custom will be filled with the CISG, hence we call it a “gapfiller”
- But what about gaps in the CISG?
 - Unique situation as convention/law, it does not exist as a cog in a single legal system
 - We thus distinguish between Exterior and Interior gaps
 - Exterior → solved with otherwise applicable law (usually domestic law)
 - External are things not cover by the convention but that was never really meant to be there
 - To safeguard uniform application, interior gaps have **Art 7** for matters “Governed by the convention, but not settled by the convention”
 - Situations where the problem is widely covered by the law, but does not specifically solve the situation
 - Solved using GENERAL PRINCIPLES → only go to otherwise applicable law if no general principle exists

- General Principles of the CISG

- Identified by Peter Schlechtriem as one of the single most problematic issues of the CISG.
 - Intangible, undefined.
- Extrapolated from the Conventions provision – the “spirit of the CISG”
- Include communication, full compensation, mitigation, etc.
- See General Principles of the CISG - Generally Impenetrable? In Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday, Wildy, Simmonds & Hill Publishing (March 2008) 13-33 available at: <http://www.cisg.law.pace.edu/cisg/biblio/andersen6.html>

Interpretive Ideals

- So because the General Principles are too complex and aren't used much in court, it leaves us with **Art 7 & 8**

2. **Art 7** → requires us to interpret the CISG with the respect to:

- Internationality
- Uniform application
- Regard for good faith
- Very hard to discern what that actually means because of every state/country having their own ideas of how they define these terms
 - Clearly subject to HOMEWARD TREND interpretation

1. Interpretations of Acts and Omissions

- **Art 8**
 - The acts of a party are to be interpreted in accordance with the way a **reasonable person** would interpret them in the same circumstances.
 - The provision does not specify which jurisdiction this reasonable person should stem from → considering the span of culture and traditions of the CISG, this reasonableness can vary immensely
 - Consider knowledge of local trade customs → who decides what which party should reasonably have known?
 - Art 8 applies reasonableness to the entirety of the Convention