

THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE
INTERNATIONAL SALE OF GOODS (“CISG”), LECTURE I:
PURPOSES, BACKGROUND, HISTORY, NATURE, SCOPE AND APPLICATION

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I. The CISG: **the most successful commercial law treaty in history.**

1. To date, ratified, approved or acceded to by 71 States representing extraordinary economic, geographic and cultural diversity.
2. These 71 Contracting States account for well more than two-thirds of global trade.

II. **The Purpose and Approach of the CISG**

A. The purposes of the Convention are to “contribute to the removal of legal barriers in international trade and promote the development of international trade” (Preamble to the CISG).

B Means to these ends: establishing “uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems” (Preamble to the CISG – emphasis added).

1. Specifically, the Convention contains rules of substantive law governing the rights and obligations of parties to contracts for the international sale of goods – i.e., “international private law,” addressing such matters as the conclusion of a contract for sale, the seller’s obligation to deliver, the quality of goods required, the buyer’s obligation to pay, remedies for breach, exemption from liability based on unforeseen circumstances (*force majeure*), and the like. Significant substantive aspects of the CISG are addressed in Lecture II.
2. As the Preamble indicates, the Convention’s rules are intended to embody an *international* consensus on acceptable sales rules, reflecting the economic, social and legal diversity of the world community.
3. Perhaps even more fundamentally, the Convention’s rules, as the Preamble indicates, are intended to be uniform in all States that become parties to the CISG (and even in States that do not).

III. **Background: the choice of law issue** in international sales transactions.

- A. Before the advent of the CISG (and still, when it does not apply), parties to every international sale had to face the question: what law applies to this transaction? The answer would most likely be, the domestic sales law of one of the parties.
- B. Resulting transactions costs – uncertainty as to the applicable law, one party at a disadvantage by having to work with “foreign” law, opportunistic behavior (race to the courthouse), bargaining costs, otherwise beneficial exchanges lost over disagreements on the issue.
- IV. **History:** the advantages of eliminating – or at least ameliorating – the choice of law issue have long been recognized.
- A. One approach – standardize choice of law rules (Principles of Private International Law) on an international basis by treaty.
1. The Hague Convention on the Law Applicable to International Sales of Goods (1955) (see http://www.hcch.net/index_en.php?act=conventions.text&cid=31)
 2. Does not address all the problems/transactions costs noted above.
- B. Alternative approach – standardize substantive sales rules on an international basis by treaty.
1. The idea is to create a uniform international sale law regime familiar to and accepted by the international commercial community, and thereby address more of the problems of the choice-of-domestic-law approach.
- C. Work on the substantive international sales law approach was taken up by UNIDROIT (International Institute for the Unification of Private Law) in the 1930’s.
1. After interruption by World War II, the work culminated in 1964 in the approval of two companion conventions containing substantive law for international sales transactions: The Uniform Law on the Formation of Contracts for the International Sale of Goods (“ULF”) dealt with issues of contract formation; the Uniform Law for the International Sale of Goods (“ULIS”) dealt with the parties’ rights and obligations once an international sales contract was formed.
 2. These conventions were ratified by and entered into force in nine States (mostly, but not entirely, Western European States), but by the late 1960’s it was clear the treaties would not attract the broad acceptance required to achieve their purposes.

D. The processes of UNCITRAL offered the prospect of producing a uniform international sales law text that could achieve widespread acceptance by countries representing the range of global economic, social and cultural conditions, and the work of producing such a text was taken up by it in 1969.

1. The Working Group established by UNCITRAL started with the texts of ULF and ULIS, and produced a draft of a single unified substantive sales law convention that combined rules on contract formation as well as the rights and obligations of parties to a formed international sales contract.

2. In 1980 a diplomatic conference was convened in Vienna with participation by a diverse group of 62 States and contributions from important non-governmental organizations that focus on international commercial law.

3. At the diplomatic conference, after extensive discussion and not insignificant modification to the draft text, the final text of the CISG was unanimously approved, and the Convention was opened for signature and ratification by individual States.

4. By late 1986 the requisite number of States had ratified the CISG, and it went into force in 11 States on 1 January 1988.

5. Since that time the Convention has continued to attract adherents. As noted earlier, 71 States are currently party to the CISG, which has been the governing law in many thousands of transactions involving billions of dollars in goods. The Contracting States constitute an extraordinarily diverse group of nations – large and small, developed and developing, with domestic economies that are market-oriented and government-directed, located on every inhabited continent, and with a remarkable variety of legal, linguistic, political and cultural traditions.

a. Up-to-date ratification information, including information on declarations/reservation that Contracting States have made, is available on the UNCITRAL website at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980_CISG_status.html.

V. The CISG's **sphere of application** (Article 1(1)).

A. The Convention applies to transactions that meet three requirements.

1. The transaction must constitute a contract (or an allegedly-formed contract) for the sale of goods; thus contracts for services or for the sale of

property other than “goods” are not governed by the CISG.

a. “Goods” (not defined in the Convention) encompass tangible property capable of delivery. The term thus excludes real estate and purely intangible rights, but includes, e.g., raw materials, commodities, finished goods, machinery, etc....

i. Sales of “goods to be manufactured or produced” (specially-manufactured goods) are within the scope of the CISG “unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production” (Article 3(1)).

ii. In the case of contracts entailing both the supply of goods and the provision of services (so-called hybrid sale-service contracts), the Convention will not apply if “the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services” (Article 3(2)).

iii. Questions have arisen as to whether a contract for software is a sale of goods within the meaning of the CISG or is a license of intangible rights beyond the scope of the Convention. Should the answer depend on the particular circumstances of the transaction, such as whether the software was specially manufactured for the buyer, or whether it was embodied on a diskette or other object resembling traditional “goods”?

b. Transactions that involve goods but that are not sales – e.g., leases of goods, use of goods purely as collateral for financial credit – are not covered.

2. The contract of sale must be international, defined as between parties located in different States. Purely domestic transactions are outside the scope of the CISG.

a. It is the location of the parties, not their nationality, that determines whether the transaction is “international” (Article 1(3)).

b. Entities with places of business in different States are deemed to be located at the place of business that has the closest relationship to the contract and its performance (Article 10).

c. A contract is beyond the scope of the CISG if the fact that it was international was not apparent to the parties at the time the

contract was concluded (Article 1(2)).

3. The contract must have one of two specified alternative relationships to the Convention.

a. Either each party is located in a Contracting State to the CISG (Article 1(1)(a)), or

b. the rules of Private International Law (i.e., the choice-of-law or conflict-of-law rules of the tribunal hearing a dispute) lead to the application of the law of a Contracting State (Article 1(1)(b)).

i. This latter alternative, however, does not apply for States that have declared they are not bound by it, as permitted by Article 95. Several States have made such declarations.

ii. As the number of Contracting States has increased (currently, there are 71 Contracting States), more and more transactions are covered by the first alternative (Article 1(1)(a)) – both parties are located in Contracting States – and application of the CISG via Private International Law (Article 1(1)(b)) has decreased in significance.

B. Consumer sales, however, are not governed by the Convention even if they meet these requirements (Article 2).

1. Furthermore, the CISG “does not apply to the liability of the seller for death or personal injury caused by the goods to any person” (Article 5).

2. Also excluded from the Convention are sales “by auction,” sales “on execution or otherwise by authority of law,” sales of “stock, shares, investment securities, negotiable instruments or money,” sales of “ships, vessels, hovercraft or aircraft,” and sales of “electricity” (Article 2).

C. Even where a transaction would otherwise be governed by the CISG, the parties to the contract can agree to opt out of its application in favor of other law or to vary virtually any of its provisions (Article 6): party autonomy is a fundamental principle of the Convention.

VI. Application of the Convention raises certain special issues if it is to function as a source of uniform international sales law.

A. No special courts or tribunals were established for the CISG: it is

interpreted and applied by regular courts and arbitral tribunals with jurisdiction over the disputes in which it is applicable. There is no single final arbiter of the meaning of the Convention – no “Supreme Court of the CISG.”

B. This leads to the danger that the Convention will become non-uniform in practice because of non-uniform interpretation of its rules: for example, lawyers, judges and arbitrators are not immune from the tendency to project onto the Convention the (non-uniform) domestic sales law with which they are familiar (a tendency called the “homeward trend”).

C. To counter this danger, Article 7(1) of the CISG mandates that those interpreting the Convention have regard for “its international character” and “the need to promote uniformity in its application” (as well as the need to promote “the observance of good faith in international trade”).

D. There is consensus that, to comply with this mandate, those who interpret the Convention – judges, arbitrators, government officials, practicing lawyers, business people – need access to information on how the Convention is interpreted and applied throughout the world.

E. In response, a remarkable research infrastructure has evolved – an infrastructure currently unique to the CISG, but undoubtedly representing a template for what must develop in other areas if the promise of uniform international law is to be realized. This research infrastructure, consisting mainly of resources available free of charge through the World Wide Web, provides access to court and arbitral decisions applying the CISG from around the world, and to commentary on the Convention by a global community of scholars. Some of its main components are described here:

1. UNCITRAL, the producer and sponsor of the CISG, has created “CLOUT” (Case Law on UNCITRAL Texts), featuring abstracts (summaries) in the six U.N. languages of decisions applying the CISG and other UNCITRAL-sponsored texts from tribunals around the world. The collection of summaries is available (free of charge) in and can be searched using the UNCITRAL website – go to http://www.uncitral.org/uncitral/en/case_law.html.

2. A variety of databases, often sponsored by academic institutions and available free of charge, focus on the CISG and related international commercial law. For English-speakers these resources are particularly rich, and include the following:

- a. The CISG database maintained by the Institute of International Commercial Law at Pace University School of Law, <http://www.cisg.law.pace.edu>, contains information on and, frequently, full English translations of a large number of CISG

decisions (currently over 2000) by courts and arbitral panels located in (currently) over 35 different States; the site also includes a vast bibliography of scholarly commentary on the Convention (often available in full text through the website), *travaux préparatoires* materials, and much additional information on the Convention – including links to similar websites maintained in other languages (“The Autonomous Network of CISG Websites”).

b. UNILEX, a database sponsored by the Centre for Comparative and Foreign Law Studies in Rome (available at <http://www.unilex.info>), contains *inter alia* an extensive bibliography covering the CISG, and English summaries (as well as the original text) of a large number of CISG decisions from many different States. (UNILEX also includes similar information for the UNIDROIT Principles of International Commercial Contracts).

3. As a guide through the vast case-law resources available through these various sources, UNCITRAL has created (and made available on its website, *gratis*, in the six U.N. languages) the UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods (go to http://www.uncitral.org/uncitral/en/case_law/digests.html), which provides an article-by-article textual summary of decisions applying the CISG.
