

## **Chapter 2**

### **Literature Review**

In respect of the analysis of TCOMC's compatibility with CISG (the United Nations Convention on Contracts for the International Sale of Goods or the 1980 Vienna Sales Convention) as compared with TCC as is the aim of this research, the following research materials, including but not limited to, textbooks, articles and electronic data have been collected and reviewed hereunder.

#### **Significance of Commercial Sales**

Commercial sales are commonly known as the sales in which '... goods must not be bought exclusively for a non-commercial or non-professional'<sup>1</sup>. It follows that there are differences between non-commercial or non-professional sales and commercial or professional sales. Or, one can thus gather that commercial sales are conducted professionally while non-commercial sales are not. And, it is not always the case that commercial sales have to be conducted between merchants and merchants but at least one side are merchants<sup>2</sup>. Given the fact that merchants come into play, commercial sales thus inevitably involve large scale of sales volume<sup>3</sup> and have impacts on any society economically. Different rules, in a certain extent, need to be designed and applied to them which have to be different from rules applying to ordinary non-commercial sales. As presented in this work, for instance, rules regarding (1) the duty of party receiving offer to contract to give notice of acceptance or refusal (TCOMC, Article 509) and duty of the party receiving offer to contract to take custody of goods (TCOMC, Article 510), (2) the right of retention between merchants (TCOMC, Article 521) and the duty to deposit and auction off of goods sold by the seller' (TOMC, Article 524), and (3) the right to cancel due to delay in performance in sales transaction if time is of the essence (TCOMC, Article 525). All of them are specifically vital for commercial sales in the course of doing businesses by merchants but are not relatively found in TCC as will be elaborated hereunder.

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<sup>1</sup> Ferrari, F. and Torsello, M., *loc.cit.*

<sup>2</sup> See the analysis of Article 1, JCOMC

<sup>3</sup> See 'Commercial Transactions' provisions in JCOMC, Articles 501, 502.

On the other hand, the above rules which apply to commercial sales under JCOMC are commonly found in CISG revealing their compatibilities as they were designed to apply only to commercial sales<sup>4</sup>. Given the fact that CISG, after nearly 4 decades in existence, is proven to be one of the most successful international convention ever ‘[t]he CISG has enjoyed enduring success and continues to do so – [i]t is further noteworthy that more and more small and developing countries are becoming Member States (including ... Vietnam) – [m]oreover, one can hardly fails to notice the growing abundance of academic research and analysis as published in commentaries, treatises, monographs, articles, etc. – [m]ore importantly, a vast number of decisions have been rendered on key aspects ... by State courts ... arbitral tribunals ... and more awards rendered by CIETAC tribunals are published.’<sup>5</sup> CIETAC<sup>6</sup> is a very good example that Thailand has to be well aware of CISG’s impact on international trade as we are the same Asian countries and it is another reason to support Thailand in deciding to adopt CISG apart from the previous reason regarding legal obstacles as will also be elaborated hereunder.

In term of CIETAC and according to Professor Hiroo Sono<sup>7</sup>, it is very interesting that ‘[t]he Asia Factor’ is raised therein as one of the reasons that implies why Japan adopted CISG whether they are ‘[c]hina is playing a major role’, ‘Increase in Japan’s trade with Asia’, and ‘CISG cases involving Japanese parties’. This is not only the case of Japan, any country including Thailand cannot avoid the same impact in terms of conducting international sale transactions in the present world.

### **Significance of Legal Obstacle in Thailand regarding Sales Law**

As a matter of fact that Thailand has only one set of sale provisions provided for in TCC and apply to both domestic commercial and non-commercial sales including international sales which are distinct in nature, Thailand needs to consider having other sets of laws applying hereto.

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<sup>4</sup> See Article 2, CISG in Appendix I

<sup>5</sup> Schwenger, I. (2016). “*Commentary on United Nations Convention on Contracts for the International Sale of goods (1980)*”. London: Oxford University Press, 4<sup>th</sup> Edition. p. V (PREFACE).

<sup>6</sup> Hiroo, S. (2008). “*Japan’s Accession to the CISG: The Asia Factor*”. In 20 Pace International Law Review. 105, 114, pp. 110-113

<sup>7</sup> Hiroo, S. *loc.cit.*

This is not a mere presentation of legal philosophy but already experienced by a real case law. In 1994, there was a highly controversial Supreme Court Judgment of Thailand (the first one is No. 3046 / B.E. 2537) exposing that only one set Thai sales law under TCC is available for a court to apply to any sale transaction which, according to its nature, is rather ‘civil’ or ‘non-commercial’ not ‘commercial’ including international. This case was a dispute of a sale contract between Thai seller and foreign buyer which was concluded via fax. The seller was sued by the buyer in Thailand after refusing to deliver goods. Thai court decided in favor of the seller because its Section 456, Sub-Section 3 conceptually provides that a contract of sale of movable property where the agreed price is 500 THB (now is 20,000 THB) or upwards is not enforceable unless (i) there is some written evidence signed by the party liable, or (ii) an earnest is given, or (iii) there is part performance and unfortunately none of these 3 elements were found therein.

Irrespective of the fact that the court did find the existence of the contract, i.e. there was a legally binding contract between the parties, but in the absence of any of these 3 elements, such contract could not be enforced by Thai courts. This case has since been the subject of criticisms and law reforms regarding sales have been seriously called for, at least, in 2 aspects. First, whether or not there should be a separation of Thai Civil and Commercial Code into two codes, i.e. civil or non-commercial and commercial code (including the separation of civil court and commercial court)<sup>8</sup> because its current Section 456 was clearly focused on civil or non-commercial sales conforming to Thai agriculture society not commercial by the time of its drafting some 100 years ago<sup>9</sup>. Second, whether or not there should be a separate sales law applying to an international sale contract because it bears similar nature as commercial sales either by enacting its own law<sup>10</sup> or becoming the

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<sup>8</sup> A Law Reform Commission under the Ministry of Justice was established in 2004 and one of its reform project was the drafting of a law governing domestic commercial sales and international sales by using CISG as model. Not surprisingly, there was a record that the sub-committee thereof was in favor of Thailand’s acceding to CISG but it was beyond its scope of work.

(Cited in Ruangvichathorn, J. “International Trade Law and Sales Convention”, *supra*, note 5)

<sup>9</sup> The first TCC came into force in B.E. 2466 (B.C. 1923) / B.E. stands for ‘Buddhist Era’ which is 543 years before Christ (B.C.)

<sup>10</sup> Ruangvichathorn, J. “International Trade Law and Sales Convention”, *supra*, note 5

contracting states of CISG<sup>11</sup>. Unfortunately, until present day, there is no development yet regarding Thai sales law and thus this situation is one of the significance of this research.

### **Japanese Sales Law as Compared its Compatibility with 1980 Vienna Sales Convention and Thai Sales Law**

Japan is a country that follows the Civil Law Legal System like countries in the continental Europe similar to Thailand. However, Japan separates civil and commercial matters, including sales, into two codes, i.e. Commercial Code and Civil Code while Thailand does not separate as such, i.e. having only one code applying to both civil and commercial matters including sales. This approach of JCOMC is in line with CISG as they both apply only to commercial sales which are commercial matters and to analyze its compatibility with CISG relevant provisions in JCOMC are to be examined. In the mean time, TCC shall also be compared during the analysis hereof as this is also the aim of this work.

JCOMC is a product of modernization policy since the Meiji Restoration (1868) which originated from the old Commercial Code enacted in 1890 on the basis of a draft prepared by a German advisor, Professor Hermann Roesler and later absorbed into the present Commercial Code (JCOMC) which was enacted in 1899.<sup>12</sup> According to Ryoyu Kita<sup>13</sup>, this was ‘because the Sino-Japanese war (1894-1895) motivated our first industrial revolution centering around the light industry with the result that the company system had to be modernized (remoulded into a genuine private law institution)’.

For more than 100 years up until now, JCOMC has been amended (big or small) from time to time, among them, 4 drastic revisions, all connected with wars, were made i.e. (1) the first one in 1911 after the Russo-Japanese War (1904-1905) and mainly on the company law in order to cope with Japanese 2<sup>nd</sup> industrial revolution inclining to the heavy industrial, (2) the second one in 1938 which was gradually influenced by the high- degree of Japanese capitalist economy before

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<sup>11</sup> *Ibid*, also cited therein the work of the Latest Law Reform Committee in proposing to the government to adopt CISG in 2015

<sup>12</sup> Kita, R. (1996). *“A Compendium of Japanese Commercial Law”*. KINDAIBUNGEISHA, Tokyo, Japan. p.17.

<sup>13</sup> Kita, R. *loc.cit*

the World War I (1914- 1918) where a big amendment of the company law aiming for both large enterprises and small to medium- sized enterprises, including the implantation of the Anglo-American rule of estoppel into the revised Commercial Code whereby the security of transactions may be solidified / for the benefit of the security of transactions, (3) the third one in 1950 after the defeat of World War II with the need for economic recovery by carrying out Americanization of the Limited Company Law aiming for the raising of capital, organizing of management and strengthening of individual shareholders, (4) the fourth one was enacted in 1981 intended to solidify self- control system and improve disclosure scheme of public companies corruption cases repeatedly occurring since 1979, together with the implementation therein of long contemplated plan for rationalization of shares, particularly the increase of par- value as a unit of share.<sup>14</sup> In sum, JCOMC, in its genesis and transition, has a nature distinct from the European counterparts (HGB or Code de Commerce) as it is closely connected with the four big wars experienced by Japan as above mentioned resulting which such four revisions are relatively in line with the modern company law not the modern nature as was the foundation of the old Commercial Code enacted in 1890.<sup>15</sup>

According to Ryoyu Kita,<sup>16</sup> as Article 1<sup>17</sup> of JCOMC which states (1) ‘[t]he business of Merchants, commercial transactions, and other commercial matters are governed by the provisions of this Code, except as otherwise provided by other laws, and (2) ‘[a] commercial matter not provided for in this Code is governed by commercial custom, and if there is no commercial custom, it is governed by the provisions of the Civil Code ...’, the priority application of laws applied to commercial matters are thus (1) JCOMC, (2) customary law (or “commercial custom”), and (3) JCC. In addition thereto, the application of JCOMC includes other special commercial laws

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<sup>14</sup> Kita, R. *op.cit.* pp. 18-19

<sup>15</sup> Kita, R. *loc.cit*

<sup>16</sup> Kita, R. *op.cit.* pp. 22-23 It is also mentioned herein that ‘[t]he reason why the Civil Code as a written law shall apply posterior to the commercial customary law as an unwritten law is because in the private law system, the Civil Law is a general law while the commercial customary law is a special law (*Lex specialis derogate legi generali*); not because the said application recognizes the alternative effect of the customary law upon the written law, constituting an exception to the rules of Art. 2’ which states ‘[e]xcept as otherwise provided by any law or ordinance, this Code shall apply to commercial transaction effected by public juristic persons’.

<sup>17</sup> English Translation – Ministry of Justice 18/12/2560 (Japanese Law Translation-[Law text]-Commercial Code. (Online). Available: <http://www.japaneselawtranslation.go.jp/law/detail>.

applying prior to it, e.g. Unfair Competition Prevention Law, Securities Transaction Law, Mortgage Debentures Trust Law, Banking Law, Insurance Business Law, and Corporate Reorganization Law, together with, other commercial autonomous laws applying even prior to, e. g. articles of Incorporation, rules concerning board of directors, etc. This is a vital reference that JCOMC is not entirely independent from JCC but is beyond the scope of this work.

From the above, some interesting aspects of JCOMC which matter this work have been found. Firstly, the reason why Japan separates codes regarding civil and commercial matters into two codes, i.e. Civil Code and Commercial Code might have been influenced by the German because the first draft of the old Commercial Code in 1890 followed German tradition in separating as such. Secondly, irrespective of such German influence, the present Commercial Code with its four major amendments have been adjusted to Japan's own business practices and needs, not to any legal evolutions whereby the study on it by foreigners might not be easy to understand thoroughly. Lastly, JCOMC is not entirely independent from JCC despite being separate codes as mentioned above.

In JCOMC, the provisions concerning 'Sales Transactions' which is the main focus of this work are provided in Chapter II of Part II ('Commercial Transactions') consisting of five Articles, i.e. Article 524 – Article 528. Interestingly, the above four major amendments of JCOMC did not include sales, i.e. the provisions of 'Sale Transactions' have not been subjected to those revisions and thus are current ones until present day.

However, the understanding of JCOMC's application to Sales Transactions has to begin with JCOMC's general principles applying to all of its transactions as provided in Part I ('General Provisions') particularly Chapter I ('General Rules' – Articles 1-3) and Chapter II ('Merchants' – Articles 4-7), as well as, the general provisions of Part II ('Commercial Transactions') itself as provided in Chapter I ('General Provisions – Articles 501- 523). Some of which that are deemed significantly relevant to this work shall be analyzed and compared with CISG and TCC, leaving the rest as N/A ('non-applicable').

#### Part I 'General Provisions'

##### Chapter I 'General Rules'

## Application

### Article 1

(1) The business of Merchants, commercial transactions, and other commercial matters are governed by the provisions of this Code, except as otherwise provided by other laws.

(2) A commercial matter not provided for in this Code is governed by commercial custom, and if there is no commercial custom, it is governed by the provisions of the Civil Code (Act No. 89 of 1896).

Article 1(1) states the application of JCOMC which explicitly focuses on what is called ‘commercial transactions’ or ‘commercial matters’ (including sales, see Article 501 (i), (ii)) that are conducted by merchants (the definition of which is under Article 4). This reveals the separation of commercial sales, i.e. sales by merchants in the course of their ordinary businesses from non-commercial sales which are not conducted by merchants and are under the application of JCC. This is the key difference from TCC whereby only one set of sale provisions is provided for and apply to both domestic commercial and non-commercial sales including international sales which are distinct in natures and thus logically needs different set of rules as above mentioned. This approach or principle of JCOMC is in line with CISG whereby Article 2 (a) states that CISG ‘does not apply to sales of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use’ which means CISG applies only to ‘commercial sales’ not ‘non-commercial sales’ irrespective of no indication of the words ‘Merchants’, ‘commercial transactions’ and ‘commercial matters’ as in JCOMC. Article 1(2) is another scenario of JCOMC’s application where other laws or JCC would come into play as above mentioned.

### Commercial Transactions by Public Corporations

Article 2 Commercial transactions conducted by public corporations are governed by the provisions of this Code, except as otherwise provided for by other laws and regulations.

Under Article 2, ‘Commercial Transaction’ is the key word and its provisions are specifically provided in Part II ‘Commercial Transactions’ starting from Article 501 to Article 683 (in terms of sales, specific provisions are provided in Articles 524-528). In TCC, the term ‘commercial transaction’ (in term of sales) is not specifically provided therein which might be because TCC applies both to commercial and non-commercial sales. In CISG, even there is no stipulation as

such, CISG clearly provides in its Article 2 that it ‘does not apply to sales of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use’ as above mentioned, thus making JCOMC in line with CISG.

#### Transactions Constituting Commercial Transactions for One Party

##### Article 3

(1) If an act constitutes a commercial transaction for one of the parties, this Code applies to both parties.

(2) If two or more persons form one of the parties and an act constitutes a commercial transaction for any one of them, this Code applies to all of them.

This Article 3 also relates to the matter of ‘commercial transaction’ by focusing on the parties involved whereby JCOMC shall apply even if the commercial transaction is committed by only one side of the parties. This helps for the question of certainty which is not specifically found in CISG and TCC. In CISG, however, it is not necessary to stipulate as such because CISG clearly provides in its Article 2 that it ‘does not apply to sales of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use’ as above mentioned which means CISG applies only to commercial sales (but on the assumption that such sales are conducted by merchants to merchants, not by merchants to mere consumers). In TCC, it might be of the same reason that TCC does not apply only to commercial sales, so no indication as such is made.

#### Chapter II ‘Merchants’

##### Definitions

##### Article 4

(1) The term "Merchant" as used in this Code means a person in the business of conducting commercial transactions in its own name.

(2) A person in the business of selling goods at a store or other similar facility or a person engaged in the mining business is deemed to be a Merchant even if that person is not in the business of conducting commercial transactions.

Merchant is another key word to differentiate commercial sales from non-commercial sales as Article 4 (1) above clarifies that commercial transactions, including sales (see Article 501 (i), (ii)), are conducted by persons called merchants. Similarly to what mentioned above, this approach is different from TCC because Thailand has only one set of sales provisions applying to both commercial and non-commercial sales so no indication as such is made. However, JCOMC is in line with CISG which applies only to commercial sales and even no specific reference to the word 'merchant' is used therein (on the same reason that CISG clearly provides in its Article 2 that it 'does not apply to sales of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use' as above mentioned) which means that CISG applies only to commercial sales no matter what the word 'merchant' is stipulated therein or not.

#### Commercial Registration of Minors

##### Article 5

If a minor carries out a business referred to in the preceding Article, this must be registered.

#### Commercial Registration of Guardians

##### Article 6

(1) If a guardian carries out a business referred to in Article 4 on behalf of a ward, this must be registered.

(2) A limitation on a guardian's authority of representation may not be asserted against a third party in good faith.

#### Petty Merchants

##### Article 7

The provisions of Article 5, the preceding Article, the following Chapter, Article 11, paragraph (2), Article 15, paragraph (2), the first sentence of Article 17, paragraph (2), Chapter V, and Article 22 do not apply to a petty merchant (meaning a Merchant with an asset value as provided by Ordinance of the Ministry of Justice that does not exceed the amount prescribed by Ordinance of the Ministry of Justice, for assets that the Merchant uses for its business).

Articles 5-7 clearly reveal the concern of JCOMC on the certainty of types of persons performing commercial sales. These articles are not certainly found in TCC because it does not only deal specifically with commercial sales as mentioned earlier. However, all details regarding types of persons provided in JCOMC are not found in CISG which might be because JCOMC is domestic sales but principally it is still in line with CISG because they apply only to commercial sales even though no specific references as such are made in CISG.

## Part II 'Commercial Transactions'

### Chapter I 'General Provisions'

#### Transactions Absolutely Regarded as Commercial Transactions Due to Their Nature

##### Article 501

The following actions are commercial transactions:

(i) an action through which a person seeks to acquire for value a movable, real property, or a negotiable instrument of value from whose transfer the person wishes to profit, or an action through which a person seeks to transfer an object so acquired;

(ii) an action through which a person seeks to make an acquisition for value in order to form and perform on a contract to supply a movable or negotiable instrument of value acquired from another person;

(iii) a transaction conducted on an exchange;

(iv) an action involving a bill, note, or other commercial instrument.

Under Article 501, which is the key article identifying activities (or actions) absolutely regarded as 'commercial matters' and are subject to the application of JCOMC (whereby activities

relating to sales are provided in sub-articles (i)<sup>18</sup> and (ii)<sup>19</sup>). Therefore, if any sale is committed by a person regarded as a merchant under Article 4(1) and (2) above, it is also regarded as a commercial matter and is subject to the application of JCOMC. Again, this approach is different from TCC as discussed above and also makes JCOMC in line with CISG where it applies only to commercial sales even no specific reference to the word ‘commercial matters’ is stipulated therein.

#### Transactions Regarded as Commercial Transactions If Conducted as Business

##### Article 502

The following actions are commercial transactions only if they are taken as a part of business; provided, however, that this does not apply if the action is taken by a person that manufactures a product or engages in labor for the sole purpose of earning wages:

- (i) an action through which a person seeks to acquire for value or rent from another person a movable or real property from whose rental to another person the person wishes to profit, or an action through which a person seeks to rent to another person property so acquired or rented;
- (ii) an action relating to manufacturing or processing undertaken for another person's benefit;
- (iii) an action relating to the supplying of electricity or gas;
- (iv) an action relating to transportation;
- (v) undertaking a contract for work or labor;
- (vi) an action relating to publishing, printing, photography, or filming;
- (vii) a transaction at an establishment at which it is intended for customers to gather;
- (viii) exchanging money or making another banking transaction;
- (ix) providing insurance;
- (x) undertaking a deposit;
- (xi) an action relating to brokerage or intermediation;

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<sup>18</sup> ‘It is a purchase to gain a margin by buying goods at a lower price and later selling them at a higher price which includes buying raw or processed materials and turning them into worked-up goods or manufactured articles and later sell them as products.’ (Kita, R. *op.cit.* pp. 30-31)

<sup>19</sup> ‘It is a sale or to make a contract to sell goods a higher price in order to gain a margin by buying and delivering them at a lower price.’ (Kita, R. *loc.cit.*)

(xii) undertaking the role of agent for a commercial transaction;

(xiii) undertaking a trust.

While Article 501 identifying the absolute nature<sup>20</sup> of activities regarded as ‘commercial transactions’, Article 502, which is broader, identifying the non-absolute<sup>21</sup> nature as such, i.e. only activities provided therein (if for sales are in sub-article (i)) which are conducted as business are regarded as ‘commercial transactions’.

This approach of JCOMC can be regarded as too complicated because it could lead to the question of overlapping with Article 501. Again, it is different from TCC as discussed above and thus is not found therein. For CISG, the exception of the general application of Article 501 which states ‘provided, however, that this does not apply if the action is taken by a person that manufactures a product or engages in labor for the sole purpose of earning wages’, even makes JCOMC more in line with CISG as CISG, Article 3 similarly provides that ‘(1) [c]ontracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production, (2) [t]his Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services.’

#### Auxiliary Commercial Transactions (N/A)

##### Article 503

(1) An action taken by a Merchant for the benefit of its business is a commercial transaction.

(2) The actions of a Merchant are presumed to be done for the benefit of its business.

#### Agency for Commercial Transactions (N/A)

##### Article 504

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<sup>20</sup> It is called ‘absolute commercial business’, and even if a non-trader (or a non-merchant) ‘effects any of them only once.’ (Kita, R. *loc.cit.*)

<sup>21</sup> It is called ‘commercial transaction, if effected as a business’ (Kita, R. *loc.cit.*).

Even if the agent for a commercial transaction conducts the transaction without representing that it is doing so on behalf of the principal, the actions of the agent are binding on the principal; provided, however, that if the other party does not know that the agent is conducting the transaction on behalf of the principal, these provisions do not preclude the other party from demanding that the agent perform on the transaction.

Entrustment of Commercial Transactions (N/A)

Article 505

A person entrusted with a commercial transaction may take actions that the person is not entrusted with taking, to the extent that this does not conflict with the main purpose of the entrustment.

Special Provisions on Reasons for Expiration of Authority to Represent Based on Entrustment with Commercial Transactions (N/A)

Article 506

A person's authority to represent a principal based on the person's entrustment with a commercial transaction does not terminate upon the death of the principal.

Offers to Contract between Merchants in Direct Communication

Article 507

If Merchants are in direct communication with each other and the party receiving an offer to contract does not immediately accept it, the offer ceases to be valid.

Offers to Contract between Merchants at Distance

Article 508

(1) If Merchants are at a distance from each other and the party receiving an offer to contract not specifying a period for acceptance does not issue notice of its acceptance within a reasonable period of time, the offer ceases to be valid.

(2) The provisions of Article 523<sup>22</sup> of the Civil Code apply *mutatis mutandis* to a case are referred to in the preceding paragraph.

Duty of Party Receiving Offer to Contract to Give Notice of Acceptance or Refusal

Article 509

(1) Having received an offer to contract that is in its line of business from a person with which it has regular dealings, a Merchant must issue notice of its acceptance or refusal of the offer to contract without delay.

(2) If a Merchant neglects to issue a notice as referred to in the preceding paragraph, it is deemed to have accepted the offer to contract referred to in that paragraph.

Duty of the Party Receiving Offer to Contract to Take Custody of Goods

Article 510

If, along with the offer that a Merchant receives for a contract that is in its line of business, the Merchant also receives goods, it must store those goods at the expense of the offeror, even if it refuses the offer; provided, however, that this does not apply if the value of the goods is insufficient to compensate for the costs of the storage, or if the Merchant will suffer damage from the storage.

Articles 507 – 510 concern the formation of contract under JCOMC which has four scenarios. Only two scenarios are found in TCC, i.e. (1) immediately or direct (Article 507), (2) at a distance (Article 508), but not the other two, i.e. (1) duty of the party receiving offer to give notice or refusal (Article 509 / ‘regular dealings’) and (2) duty of the party receiving offer to take custody of goods (Article 510 / ‘receiving goods’). According to the duty of the party receiving offer to give notice or refusal under Article 509, it is understandable that it is common nature of dealings between merchant on regular basis and has to be provided therein for the avoidance of doubt unlike TCC which is not only focused on commercial sales. Similar reason and the absence in TCC can also be applied to the duty of the party receiving offer to take custody of goods under Article 510. This clearly reveals that TCC does not accommodate common dealings of commercial sales, i.e. regular sales and regular practices by merchants respectively.

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<sup>22</sup> Article 523 provides ‘[T]he offeror may deem a delayed acceptance to be a new offer.’

CISG, on the other hand, accommodates all these 4 scenarios. The first three scenarios are provided generally in Article 18<sup>23</sup>, and even with more specific details in Article 20<sup>24</sup>, 21<sup>25</sup>, 24<sup>26</sup>.

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<sup>23</sup> Article 18 provides:

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, 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 offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

<sup>24</sup> Article 20 provides:

(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

<sup>25</sup> Article 21 provides:

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

<sup>26</sup> Article 24 provides:

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention “reaches” the addressee when it is made orally to him or delivered by any other means to him personally,

The last one is separately provided in Chapter V - 'Provisions Common to the Obligations of the Seller and of the Buyer' whereby its Section 4 - 'Preservation of the Goods' deals specifically with the obligation of both the seller and the buyer to preserve goods sold<sup>27</sup> in the course of their business. This also reveals the compatibility of JCOMC with CISG which are based on commercial matters, but not TCC.

Joint and Several Liability for Obligations among Multiple Parties (N/A)

Article 511

(1) When two or more persons assume an obligation by way of an action that constitutes a commercial transaction for any one or all of them, they assume that obligation jointly and severally.

(2) If there is a guarantor and an obligation arises from a commercial transaction by the principal obligor or the guarantee constitutes a commercial transaction, the principal obligor and the guarantor assume the obligation jointly and severally, even if they have assumed the obligation by way of separate actions.

Claim to Remuneration (N/A)

Article 512

When a Merchant takes an action for another person that is within the scope of the Merchant's

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to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

<sup>27</sup> On part of the buyer are (1) under Article Article 85 which provides that if the buyer delays in taking delivery of the goods and the seller has reasonably done something to preserve them, the seller 'is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer', and (2) under Article 86 which provides that If the buyer has received the goods and even intends to reject them, he 'must take such steps to preserve them as are reasonable in the circumstances' and 'he is entitled to retain them until he has been reimbursed his reasonable expenses by the seller', and even if 'goods dispatched to the buyer have been placed at his disposal ... and he exercises the right to reject them, he must take possession of them on behalf of the seller provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense' unless 'the seller or a person authorized to take charge of the goods on his behalf is present at the destination.'

Claim to Interest (N/A)

Article 513

(1) If money is lent between Merchants, the lender may claim statutory interest (meaning interest at a statutory interest rate as set forth in the following Article; the same applies hereinafter.

(2) If a Merchant pays money on behalf of another person within the scope of the Merchant's business, the Merchant may claim statutory interest for the period beginning on the date of the payment.

Statutory Interest Rate for Commercial Matters (N/A)

Article 514 (N/A)

The statutory interest rate applicable to obligations arising from commercial transactions is six percent per annum.

Exclusion from Application of Prohibition on Use or Disposal of Thing Pledged by Contract (N/A)

Article 515

The provisions of Article 349 of the Civil Code do not apply to a pledge created to secure an obligation arising from a commercial transaction.

Place for Performance of Obligations (N/A)

Article 516

(1) If the place where an obligation arising from a commercial transaction is to be performed cannot be specified owing to the nature of the transaction or the manifestation of the intentions of the parties, the delivery of a specific thing must be effected at the place where the thing is at the time of the transaction, and any other obligation must be performed at the current place of business of the obligee (or at the domicile thereof, if the obligee has no place of business).

(2) Debt instruments payable to order and debt instruments payable to bearer must be paid at the current place of business of the obligor (or at the domicile thereof, if the obligor has no place of business).

Presentation of Debt Instruments Payable to Order and Delay in Performance of Obligations (N/A)

Article 517

The obligor of a debt instrument payable to order or to bearer is responsible for any delay after the time that the debt becomes due and the bearer demands performance on the obligation by presenting the instrument of the debt, even if a term has been set for performance on the obligation.

Manner of Exercising One's Rights in Event of Loss of Negotiable Instruments of Value

Article 518 (N/A)

If the holder of a negotiable instrument of value whose purpose is to allow the delivery of money or any other such thing or to allow the delivery of a negotiable instrument of value loses the negotiable instrument of value and files a petition for public notification as prescribed in Article 114 of the Non-Contentious Cases Procedure Act (Act No. 51 of 2011), the holder may have the obligor of the negotiable instrument deposit the subject matter of the obligation, or may provide reasonable collateral and have the obligor perform the obligation in line with the intent of the negotiable instrument.

Manner of Negotiating Negotiable Instruments of Value; Bona Fide Acquisition

Article 519 (N/A)

(1) The provisions of Article 12, Article 13, and Article 14, paragraph (2) of the Bills and Notes Act (Act No. 20 of 1932) or the provisions of Article 5, paragraph (2) and Article 19 of the Checks Act (Act No. 57 of 1933) apply mutatis mutandis to the negotiation of a negotiable instrument of value whose purpose is to allow the delivery of money or any other such thing or to allow the delivery of a negotiable instrument of value, depending on the nature of the negotiable instrument of value.

(2) The provisions of Article 21 of the Checks Act apply mutatis mutandis to the acquisition of a negotiable instrument of value whose purpose is to allow the delivery of money or any other such thing or to allow the delivery of a negotiable instrument of value.

Trading Hours (N/A)

Article 520

If trading hours for Merchants are fixed by laws and regulations or custom, obligations may be performed and performance of obligations may be demanded only during those trading hours.

Right of Retention between Merchants

Article 521

If performance is due on a claim arising between Merchants from an action that constitutes a commercial transaction for both parties, the obligee may retain an object or negotiable instrument of value belonging to the obligor that the obligee has gained possession of in the commercial transaction with the obligor, until the claim is satisfied; provided, however, that this does not apply if the parties have manifested a different intention.

Extinctive Prescription in Commercial Matters (N/A)

Article 522

Unless otherwise provided for in this Code, a claim arising from a commercial transaction is extinguished by prescription if not exercised for five years; provided, however, that if a period of prescription shorter than five years is provided for in other laws and regulations, those provisions prevail.

Article 523 Deleted

In respect of Sales, specific provisions are thereafter provided in Part II, Chapter II 'Sales Transactions' as follows.

Depositing and Auctioning Off of Object of Sale by Seller

Article 524

(1) If, in a sales transaction between Merchants, the buyer refuses to receive or is unable to receive the object of the sale, the seller may deposit the object or put it up for auction after demanding that the buyer receive the object within a reasonable period of time. In such a case,

once the seller deposits the object or puts it up for auction, the seller must issue notice of this to the buyer without delay.

(2) If the price of an object is likely to decline for reasons such as damage, the seller may put it up for auction without making the demand referred to in the preceding paragraph.

(3) If a seller puts the object of a sales transaction up for auction pursuant to the provisions of the preceding two paragraphs, the seller must deposit the proceeds of the auction; provided, however, that this does not preclude the seller from appropriating all or part of the proceeds to cover the purchase price.

The provisions regarding ‘Right of Retention between Merchants’ under Article 521 and ‘Depositing and Auctioning Off of Object of Sale by Seller’ under Article 524 are significantly vital for commercial sales. Under CISG, similar obligations additionally to Article 85 and 86 as mentioned above which are based on commercial matters are also provided therein<sup>28</sup>.

Under TCC, even though there are similar provisions provided therein<sup>29</sup>, lacks of particular commercial practices between merchants are found if compared with JCOMC above, i.e.

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<sup>28</sup> Article 87 provides:

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

Article 88 provides:

(1) A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

(2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

<sup>29</sup>Which are:

Section 468 ‘When there is no time clause for payment of the price, the seller is entitled to retain the property sold until the price is paid.’

‘retaining negotiable instrument’ (JCOMC, Article 521), ‘depositing the goods’ (JCOMC, Article 524 (1)), ‘putting the goods up for auction without issuing notice to the buyer’ (JCOMC, Article 524 (2)). This also reveals another set of the incompatibility of TCC with commercial matters and international sales because CISG, according to preceding paragraph, accommodates similar provisions to JCOMC.

Cancellation Due to Delay in Performance in Sales Transaction If Time Is of the Essence  
Article 525

In a sales transaction between Merchants in which, due to the nature of the sale or the manifestation of intention of the parties, the purpose of the contract cannot be achieved unless the obligation is performed at a specified date and time or within a fixed period of time, if one of the parties fails to perform the obligation before the date and time or period passes, the other party is deemed to cancel the contract unless it immediately demands that the non-performing party perform the obligation.

This provision principally conforms to the nature of commercial sales where, in the course of business, time is of the essence. Although primary remedy of CISG and TCC follow the Civil Law principle whereby ‘specific performance’ is adopted rather than ‘claiming damages’ which is the primary remedy of Common Law legal system<sup>30</sup> resulting which cancellation of contract is not primarily preferable under CISG and TCC, CISG (but not TCC) does provides the provisions allowing cancellation which also conform to JCOMC in Chapter V - ‘Provisions Common to the Obligations of the Seller and of the Buyer’ whereby its Section 1 - ‘Anticipatory

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Section 469 ‘Even though there is a time clause for payment, if the buyer becomes bankrupt before delivery, or was bankrupt at the time of sale without the knowledge of the seller, or impairs or reduces security given for payment, the seller is entitled to retain the property sold, unless the buyer gives proper security.’

Section 470 ‘When the buyer is in default, the seller who retains the property under the foregoing sections can, instead of using the ordinary remedies for non-performance, notify the buyer in writing to pay the price and incidental charges, within a reasonable time to be fixed in the notice.’

If the buyer fails to comply with the notice, the seller can sell the property by public auction.

Section 471 ‘The seller shall deduct from the net proceeds of the public auction what is due to him for the price and incidental charges and deliver forthwith any surplus to the buyer.’

<sup>30</sup> Ruangvichatron, J. “International Trade Law and Sales Convention”, *supra*, note 5

Breach and Installment Contracts',<sup>31</sup> deals specifically with circumstances that contracts might be cancelled before original time period. This also reveals the compatibility of JCOMC with CISG which are based on commercial matters, but again not TCC.

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<sup>31</sup> Article 71 provides:

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

- (a) a serious deficiency in his ability to perform or in his creditworthiness; or
- (b) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

Article 72 provides:

(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

Article 73 provides:

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

### Inspection of Property by Buyer; Notice of Defects

#### Article 526

(1) In a sales transaction between Merchants, upon receiving the object of the sales transaction the buyer must inspect it without delay.

(2) In a case prescribed in the preceding paragraph, if the buyer, as a result of the inspection under the provisions of that paragraph, discovers a defect or shortfall in the quantity of the object of the sales transaction, it may not cancel the contract nor demand a reduction of the purchase price or compensation on the grounds of that defect or shortfall unless it immediately issues notice of the defect or shortfall to the seller. The same applies if the object of a sales transaction has a defect that is not immediately obvious which the buyer discovers within six months.

(3) The provisions of the preceding paragraph do not apply if the seller had knowledge of the defect or the shortfall.

### Storage and Depositing of Object of Sale by Buyer

#### Article 527

(1) In a case prescribed in paragraph (1) of the preceding Article, the buyer must store or deposit the object of the sales transaction at the expense of the seller, even if the buyer cancels the contract; provided, however, that if the object is likely to be lost or damaged, the buyer must put it up for auction with the permission of the court and store or deposit the proceeds from the auction.

(2) A case in which a person seeks the permission referred to in the proviso to the preceding paragraph is subject to the jurisdiction of the district court having jurisdiction over the locality of the object of the sales transaction referred to in that paragraph.

(3) Once the buyer puts the object of a sales transaction up for auction pursuant to the provisions of paragraph (1), it must issue notice of this to the seller without delay.

(4) The provisions of the preceding three paragraphs do not apply if the seller's and buyer's places of business (or) their domiciles, if they do not have places of business) are located within the limits of the same municipality.

Article 528 (N/A)

The provisions of the preceding Article apply to goods delivered by the seller to the buyer which are different from the goods ordered, and also applies to any part of the goods delivered by the seller to the buyer which exceeds the quantity of goods ordered.

Articles 526-527 above are also specific obligations applied to the parties involving in commercial sales, i.e. inspection, notice of defect, storage and depositing of goods sold.

CISG accommodates all these four obligations, i.e. (1) 'Inspection' as Article 38 clearly states that '[the] buyer must examine the goods ...' similarly to JCOMC, or even 'cause them to be examined ...', (2) 'Notice of Default' as even more strict as provided in Article 39 that a buyer 'loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within reasonable time after he has discovered it...', and (3), (4) 'Storage' and 'Deposit' in the same obligation to preserve goods as mentioned earlier as provided in Article 87 that [a] party who is bound to take steps to preserve the goods may deposit them in a warehouse...

In TCC, there are no specific provisions providing that the buyer 'must' inspect the goods sold. There are only general provisions applying to 'defect'<sup>32</sup> situation with no duty to issue a notice to the seller and the allowed period to claim within 1 year not 6 months as JCOMC. This reveals

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<sup>32</sup> Section 472 provides:

In case of any defect in the property sold which impairs either its value or its fitness for ordinary purposes, or for the purposes of the contract, the seller is liable.

The foregoing provision applies whether the seller knew or did not know of the existence of the defect. Section 473 provides:

The seller is not liable in the following cases:

(1) If the buyer knew of the defect at the time of sale, or would have known of it if he had exercised such care as might be expected from a person of ordinary prudence.

(2) If the defect was apparent at the time of the delivery, and the buyer accepts the property without reservation.

(3) If the property was sold by public auction.

Section 474 provides:

No action for liability for defect can be entered later than one year after the discovery of the defect.

that TCC has not been designed for commercial sales which need specific obligations of the parties as in JCOMC including ‘storage’ and ‘depositing the goods sold by the buyers’.<sup>33</sup>

### **Conceptual Framework**

From the materials presented above, the review of the compatibility of JCOMC’s selected sales provisions with CISG and compare the same with TCC is the focus of this work in order to propose the development of Thai sales law in the future.

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<sup>33</sup> There are similar provisions regarding ‘depositing’ but not ‘storage’ and provided in BOOK II ‘Obligations’ not BOOK III ‘Specific Contracts’ - ‘Sales’ as follows:

Section 331 ‘If the creditor refuses or is unable to accept performance, the person performing may be discharged from the obligation by depositing for the creditor’s benefit the thing forming the subject of the obligation. The same applies, if the person performing without fault on his part, cannot ascertain the right or identity of the creditor.’

Section 332 ‘If the debtor is bound to perform only after the counter-performance has been effected by the creditor, he may make the right of the creditor to receive the thing deposited dependent upon counter-performance by the creditor.’

Section 333 ‘A deposit must be made to the deposit office or the place where the obligation is to be performed.’

If there are no special provisions by law or regulations as to the deposit offices, the Court must, on application of the person performing, designate a deposit office and appoint a custodian of the thing deposited.

The depositor must without delay give notice of the deposit to the creditor.

Section 334 ‘The debtor has the right to withdraw the thing deposited. If he withdraws it, the deposit is deemed never to have been made.’

Note: Under TCC, if there are no specific provisions in ‘Sales’, resorts are to made to general provisions in ‘Juristic Acts’, ‘Obligations’, or ‘Contracts’.

The right of withdrawal is barred:

- (1) If the debtor declares to the deposit office that he waives his right of withdrawal.
- (2) If the creditor declares his acceptance to the deposit office.
- (3) If the deposit has been ordered or confirmed by the Court and the fact is notified to the deposit office.