



**RESEARCH REPORT**

**CONTRACT LAW IN THAILAND: A PROPOSAL FOR REFORM  
OF THAI SALES LAW AS COMPARED WITH JAPANESE  
CONTRACT LAW AND CISG**

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Law as Compared with Japanese Contract Law and CISG

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### **ABSTRACT**

Currently in Thailand, there are no specific laws governing domestic commercial sales and international sales which apparently cause legal obstacles. The sales provisions provided in Thai Civil and Commercial Code (“TCC”) are the only set of Thai law applying to all types of sales which are distinct in nature. As Thailand and Japan share similar legal histories and backgrounds in following the Civil Law legal system originated in the Continental Europe, and Japanese Civil Code (“JCC”) was also the forerunner of TCC when the time of its first drafting in 1905, any revision made in JCC is of significance to TCC.

Additionally, Japan, but not Thailand, is also a member state of the United Nations Convention on Contracts for the International Sale of goods (“CISG”), or the 1980 Vienna Sales Convention which was designed to apply only to international commercial sales and is now worldwide accepted and gaining more and more popularity as the growing number of member states has been increasing and currently reaching 94 states.

JCC has just been revised, after no major intact during the last 120 years, in the part of law of obligations including contract, known as ‘the 2017 Reform’ which has become effective since 1<sup>st</sup> April 2020. This research is thus aimed to study (1) the significance of the revised JCC as guideline in developing Thai contract law regarding sales (2) the significance of CISG as guideline in developing Thai sales law, and (3) the significance of developing Thai contract law regarding sales by using the revised JCC and CISG as guidelines. In doing so, some significant aspects of JCC, which have been revised, are selected to made comparison with CISG and TCC in order to evaluate their compatibilities to use as guidelines in developing Thai sales law in the area needed.

It is highly expected that the result of this research will be a piece of vital information which can be used to develop Thai sales law by using the selected revised JCC and CISG as guidelines, where appropriate, in any form of (1) separating domestic commercial sales from non-commercial sales, (2) enacting a new law applying to domestic commercial sales, and (3) acceding to CISG with the enactment of a new Thai sales law applying specifically to international sales.

## **Acknowledgements**

This research has been inspired by a book, namely, 'The Japanese Civil Code: The Forerunner of Thai Civil and Commercial Code', and a research report on 'Japanese Commercial Code: The Compatibility with 1980 Vienna Sales Convention as Compared with Thai Civil and Commercial Code', both completed by the writer in 2015 and 2018 respectively. In the courses of working thereon, the writer has been kindly appointed as visiting scholar twice by Faculty of Law, Hokkaido University, Japan under kind recommendation and hospitality of Professor Hiroo Sono whom the writer has met and associated with as scholars under a number of activities and events regarding the United Nations Convention on Contracts for the International Sale of Goods (CISG) or, the 1980 Vienna Sales Convention for the past two decades.

As Thailand and Japan are close in term of legal background and relationship as aforesaid, the writer has thus always been interested in Japanese laws and decided to pursue another research on it after learning that Japan has just gone through a major revision on the law of obligations including contract, known as the 2017 Reform, which would become effective in 2020. After applying for the third time, the writer, with great appreciation, has been re-appointed as the same visiting scholar by Faculty of Law, Hokkaido University, Japan and, again, under kind recommendation and hospitality of Professor Hiroo Sono to conduct and accomplish this research starting in 2020. Unfortunately, due to the outbreak of the Covid 19 pandemic, the writer was not be able to travel to Japan again and has to adapt research methods and venue of collecting information on Japanese side mostly by means of electronic mails, online interviews and posts.

My sincere and special thanks thus are extended to Faculty of Law, Hokkaido University, Japan and Professor Hiroo Sono (particularly, the sending of a copy of his newly book, namely, 'Contract Law in Japan', Kluwer/2019, to the writer). This book is another main source of this research as there is a very few English language materials relating to the 2017 Reform available at this stage.

Last but not least, all of my researches, including the present one, have been partially and fully funded by Sripatum University, Thailand whereby my sincere and special thanks are also extended thereto, as well as, to my family, colleagues and friends whose enormous supports are always with me.

Asst. Prof. Dr. Jumpita Ruangvichathorn

## Table of Contents

Chapter		Page
1.	Introduction	
	Research Rational and Background	1
	Research Objective	4
	Research Question	4
	Research Hypothesis	4
	Research Scope	5
	Research Definition	5
	Research Significance	5
2.	Literature Review	7
	Background and development of TCC regarding contract law and sales	7
	Background and development of JCC regarding contract law and sales	10
	Background and development of CISG regarding sales law	14
	Conceptual Framework Significance of the revised JCC as guideline in developing Thai contract law regarding sales	17
	Significance of CISG's provisions as guideline in developing Thai sales law	22
	Conceptual Framework	28
3.	Research Methodology	29
	Research Method	29
	Data Collection	29
	Data Analysis	29

<b>Chapter</b>	<b>Page</b>
4. Data Analysis Result	31
Part 1: The result of the compatibility of the selected revised JCC regarding contract law including sales as guideline in developing TCC	31
Part 2: The result of the compatibility of the selected CISG regarding sales as guideline in developing TCC	33
Part 3: The result of the incompatibility of the selected TCC regarding contract law including sales and the significance of Thailand in developing Thai sales law	35
5. Conclusion, Discussion and Recommendation	36
Conclusion	36
Discussion	36
Recommendation	37
Bibliography	38
Appendix	40
United Nations Convention on Contracts for the International Sale of Goods	41
Curriculum Vitae	91

# Chapter 1

## Introduction

### Research Rational and Background

This research or this work, namely “Contract Law in Thailand: A Proposal for Reform of Thai Sales law as Compared with Japanese Contract Law and CISG” has been inspired by my previous research works regarding Japanese Civil Code (“JCC”), Japanese Commercial Code (“JCOMC”), Thai Civil and Commercial Code (“TCC”) and CISG during the course of my twice appointments as visiting scholar by Faculty of Law, Hokkaido University, Japan. CISG or the United Nations Convention on Contracts for the International Sales of Goods is a well-known product of the United Nations (UN), or known in other name as “Vienna Sales Convention”. Under this work, both CISG and the latest revised JCC (or, “2017 Reform”) which has just come into force on 1<sup>st</sup> April 2020, in the part of contract law and sale of goods will be used as comparative studies with Thai sales law. In Thailand, a reform of Thai sales law has long been called for following a number of criticisms of its inappropriateness to govern, particularly, domestic commercial sales and international sales. Thailand, additionally, has long been called for its accession to CISG as it is a member of UN and CISG, given the fact that it is now worldwide accepted with the growing number of member states, (currently 94 countries<sup>1</sup> globally), can potentially be used as a significant tool in developing Thai sales laws governing international sales.

Regarding Thai sales law, on the one hand, there is a so called ‘inefficiency of laws governing international sale transactions’ which reveals the obsolescence and inappropriateness of Thai sales law following a highly controversial Supreme Court Judgment No.3046<sup>2</sup> in 1994 (2537 B.E.<sup>3</sup>). This case indicates that the only set of Thai law which is available for a court to apply to a sale contract, whether it be domestic or international including civil (non-commercial) or commercial, is the Law of Sales (“Book

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<sup>1</sup> As of 24<sup>th</sup> September 2020, “UNCITRAL and UN reports that 94 States have adopted the CISG and Portugal is the latest state to have acceded to the CISG” (Online). Available: <https://iicl.law.pace.edu/cisg/page/cisg-table-contracting-states>, accessed at the latest stage of this work on 2<sup>nd</sup> June 2021.

<sup>2</sup> In the same year, there was also another case bearing similar facts and points of dispute which was decided by the court with the same result, i.e. the Supreme Court Judgment No. 3651/2537

<sup>3</sup> B.E. stands for Buddhist Era (starting from the year Lord Buddha passed away) which is 543 years prior to A.D. (Anno Domini/starting from the year Jesus Christ was born) (Online). Available: <https://www.shorteng.com/>.

III, “Specific Contract: Sales”) of TCC under which, according to its nature, is rather civil or non-commercial than commercial (and absolutely not international) because TCC was enacted long ago (the first one was in 1923 but, due to many criticisms, was repealed and replaced two years later by the present one which was in force in 1925 / see more details in Chapter 2) when commercial and international sales were obviously unknown to Thai society. This can be seen from the facts in the above Supreme Court Judgment No. 3046 starting when an international sale contract between Thai seller and foreign buyer was concluded via telex and the Thai seller was later sued by such the foreign buyer in Thai court after refusing to deliver goods

Thai court eventually decided in favor of the Thai Seller. This was because Section 456, Subsection 2 and 3 of TCC collectively provide that a contract of sale of movable property where the agreed price is 500 Thai Baht (THB) or upwards (this was amended in 1992 to be currently 20,000 THB) is not enforceable, unless, (1) there is some written evidence signed by the party liable, or (2) earnest is given, or (3) there is part performance. Accordingly, the Court ruled that any of these three requirements was not found even though the court did not deny that there was actually a concluded contract and a letter of credit was also come into play as the payment venue of this contract. These three requirements under Section 456 of TCC clearly reflect the nature of a sale that it is civil (or, non-commercial) not commercial and international which are conducted by merchants. Additionally, letter of credit was seemed to be left out regardless its long and important role in international trade.

Since then, such the Supreme Court Judgment No. 3046 has been subjected to vast criticism especially by law academics and, as a result, development of Thai sales law has been called for in various forms. In 2004 and 2005, for instance, the Government at the time set up a committee and a sub-committee respectively to principally work out whether or not Thailand should develop laws in this branch by separating laws governing non-commercial matters from commercial matters which include sales. This could mean (1) the separation of TCC into two codes (i.e. Civil Code and Commercial Code) similarly to many other countries in the Civil Law system including Japan, and (2) the separation of Civil Court and Commercial Court. One initial project in 2005 was the setting up of a working group responsible for the drafting of a new sales law applying only to international sales, namely “(Draft) Act on International Sales of Goods” and, not so surprisingly, such working group relied so much on the provisions of CISG and also gave opinion that Thailand should become a member state of CISG and without making any reservation. Later, this draft law was adjusted to be “(Draft) Act on Commercial Sales” and conceptually specified



therein that it also applies to international sales while Thailand is not yet joining any international law like CISG. However, this draft law has never been enacted into law and no other potential movements in developing Thai sales law, except for the decision to accede to CISG<sup>4</sup>, are clearly made. If Thailand accedes to CISG, Thailand will have another new law applying only to international sales and Thai courts do not need to turn back to Section 456 of TCC and such the new law is the law implemented from CISG which is international law and worldwide accepted as earlier mentioned. As well, Thai courts do not need to turn back to Section 456 of TCC if Thailand also separates laws governing civil (or, non-commercial) matters from commercial matters, including sales as above mentioned, or, at least, if not separating as such, to the writer, Thailand should consider enacting a new sales law applying specifically to domestic commercial matters and let alone Section 456 applies to civil or non-commercial matters.

On the other hand, JCC is close to TCC as it not only follows the same Civil Law Legal System originated from Roman Law which mainly used in Continental Europe but also was one of the predecessors of TCC at the time of its drafting more than one hundred years ago.<sup>5</sup> Any revision thereto will potentially be useful for Thailand both academically, which is the studying of legal principles, and, practically, which is the using as guidelines to develop its law in the area needed. A comparative study which is to be made with CISG will additionally be useful for this work as CISG is particularly focused on sale of goods which is the area where Thai law needs development. Given the fact that CISG is currently world-wide accepted, the studying of its related publications is also important and will be made throughout the course of this work. At the end, a conclusion leading to reasonable and possible one or more methods of developing Thai sales law will be proposed.

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<sup>4</sup> Just very recently that the writer has found out the clearer picture of Thailand's accession to CISG during an interview on 4<sup>th</sup> February 2021 with the Permanent Secretary of the Ministry of Justice regarding the development of Thai sales law in general, i.e. the Ministry of Justice is now supporting and co-working with the Ministry of Foreign Affairs in the process of acceding thereto.

<sup>5</sup> The drafting was reported to start in 1905 as the initiative of King Rama V to abolish the so-called 'Unfair Treaty' made with foreign powers as similarly to Japan. See more details in Chapter 2.

### **Research Objectives**

1. To identify the inappropriateness of current Thai contract law relating to sale of goods applying particularly to domestic commercial sales and international sales.
2. To study the revised JCC by focusing on contract law and sale of goods relevant to TCC which are found inappropriate according to issue 1 above.
3. To study sale of goods provisions under CISG and its related publications relevant to issues 2 and 3 above.
4. To make a comparative study relevant to issues 1-3 above.
5. To make a conclusion and propose reasonable and possible one or more methods of developing Thai sales law.

### **Research Questions**

1. To what extent the revised JCC regarding contract law and sale of goods can potentially be served as guidelines in developing Thai sales law.
2. To what extent the sale of goods provisions under CISG can potentially be served as guidelines in developing Thai sales law.
3. To what extent Thailand will benefit from the guidelines to be obtained from both the revised JCC and CISG in developing Thai sales law, principally, by way of (1) separating domestic civil or non-commercial sales from commercial sales, (2) enacting a new law applying to domestic commercial sales, and (2) acceding to CISG with the enactment of a new Thai sales law applying specifically to international sales.

### **Research Hypothesis**

1. The revised JCC regarding contract law and sale of goods, as far as JCOMC does not apply, is compatible with global practices and trade usages which are the basis of domestic commercial sales and international sales that Thailand needs development more than TCC.
2. TCC regarding sales is not compatible with domestic commercial sales and international sales because it was principally designed to apply to non-commercial sales, reflected by Section 465, Subsection 3, which is distinct in nature from domestic commercial and international sales and thus currently causes legal obstacle in Thailand.

3. The studying of the revised JCC and CISG will potentially be useful for Thailand in developing its sales law, principally, by way of (1) separating domestic commercial sales from non-commercial sales (2) enacting a new law applying to domestic commercial sales, and (3) acceding to CISG with the enactment of a new Thai sales law applying specifically to international sales.

### **Research Scope**

1. Studying on selected legal principles and provisions under the revised JCC and CISG relevant to the development of Thai sales law.

2. Studying on the development of Thai sales law by using selected legal principles and provisions under the revised JCC and CISG as guidelines.

3. Concluding on the development of Thai sales law and propose reasonable and possible one or more methods in the development hereof, principally, by way of (1) separating domestic commercial sales from non-commercial sales, (2) enacting a new law applying to domestic commercial sales, and (3) acceding to CISG with the enactment of a new Thai sales law applying specifically to international sales.

### **Research Definition**

JCC	means	Japanese Civil Code
TCC	means	Thai Civil and Commercial Code
JCOMC	means	Japanese Commercial Code
TCOMC	means	Thai Commercial Code
JPC	means	Japanese Procedural Code
TPC	means	Thai Procedural Code

### **Research Significance**

1. The compatibility of the revised JCC and CISG with global practices and trade usages which are the basis of domestic commercial sales and international sales that Thailand needs development as compared with TCC on the same aspects.

2. The incompatibility of TCC regarding sales with domestic commercial sales and international sales on the same aspects.

3. The development of Thai sales law by using the revised JCC and CISG as guidelines, principally, in the forms of (1) separating domestic commercial sales from non-commercial sales, (2) enacting a new law applying to domestic commercial sales, and (3) acceding to CISG with the enactment of a new Thai sales law applying specifically to international sales.

## Chapter 2

### Literature Review

With respect to the analysis of the revised JCC and its comparison with CISG regarding sales, the following research materials, including but not limited to, textbooks, articles and electronic data have been collected and used as guidelines to develop Thai sales law.

#### **Background and development<sup>1</sup> of TCC regarding contract law and sales**

The history of Thai legal system in the new era with a new capital called “Bangkok” begun in the reign of King Rama I (1782 – 1809) who revised the ancient laws of the previous capital, “Ayudaya” and re-composed them in the form of a law code called “Kot Mai Thra Sam Duang”<sup>2</sup> or “Law of the Three Great Seals”<sup>3</sup>. According to a profound Thai law academic<sup>4</sup> with regard to Thai legal system, two periods of which have been identified. Firstly, the Pre-modern law period which comprises (1) the Sukothai period (1238-1350), (2) the Ayudaya period (1351-1767) and (3) the Bangkok period before the reception of modern law (1767-1851). Secondly, the Modern law period begun after the reception of what is called ‘the modern western law’ (1851 onwards).

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<sup>1</sup> Principally referred from Ruangvichathorn, J. (2015). “The Japanese Civil Code: The forerunner of Thai Civil and Commercial Code”. *Sripatum University Press*.

<sup>2</sup> Ruangvichathorn, J., *ibid.*, p.7 (Also referred to Ruangvichathorn, J. (1996). Introductory Part of LL.M Dissertation on “English and Thai Approaches to Some Typical Remedy Clauses in International Sales Contracts Compared”, *University of Exeter, England*.

<sup>3</sup> Ruangvichathorn, J., *ibid.*, pp.7-8 (Also referred to Kraivixien, T. (1963). “Thai Legal History”, *49 Woman Law. J. 6*, p.9 and “Kot Mai” means law where “Tra Sam Duang” means three seals). His Excellency Tanin Kraivixien is a highly-respected Thai lawyer (LL.B, London & Barrister, Gray’s Inn) who once became a Thai Prime Minister during 1976-1977.

<sup>4</sup> Boonchalermvipas, S. (1997). “Development of Legal Systems in Asia: Experiences of Japan and Thailand”, *Proceedings of the International Symposium, 6-7 November 1997, Bangkok, Thailand, Organized by Faculty of Law, Kyushu University (Japan) and Faculty of Law, Thammasat University (Thailand)*, Prachoom Chomchai Editor, p. 111.

This work, however, focuses on the law of the new era whereby tremendous changes occurred in the second half of the 19<sup>th</sup> century. Turning back to Kot Mai Thra Sam Duang or the Law of the Three Great Seals mentioned above, this law was also known as “Law Code of 1805” and used for 103 years. The reigns of subsequent kings, i.e. King Rama II (1809-1824) and King Rama III (1824-1851) had little movements towards legislations. It was not until the reign of King Rama IV (1851-1868)<sup>5</sup> that Thai history arrived at a turning point under western influence during the latter half of the 19<sup>th</sup> century. During this reign, a series of treaties with European powers as well as the United States of America were concluded and thereby a system of ‘extraterritoriality’ was introduced.<sup>6</sup> In addition, during the last half of this nineteenth century, it was extremely dangerous for the people in Asia<sup>7</sup>, not only Thailand (or, known in ancient time as ‘Siam’) but also Japan, under western colonial powers whereby the abolition of the so called ‘unfair treaties’ or ‘unequal treaties’ had to exchange with the modernization of old laws, and in Thailand this process began in the reign of King Rama V (1868 - 1910).<sup>8</sup> The Penal Code was the first code which had been

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<sup>5</sup> Ruangvichathorn, J., *op. cit.*, p.8 In Japan, this is the same period as the fall of Tokugawa Shogunate which ruled the country for two and a half centuries, then in 1867, the Emperor declared that the imperial rule should be restored - the emergence of Meiji Japan. (Also referred to Hiroshi, O, (2009) “Japanese Law”, 3<sup>rd</sup> Edition, **Oxford University Press**, pp. 13-14) King Rama IV was also known in the name of “King Mongkut” whose personal life has been worldwide exposed as the King of Siam in 1951 Play and 1956 Film namely ‘The King and I’ or ‘Anna and the King of Siam’ based on the 1944 novel about Anna Leonowens, an English lady, who served in his Court from 1862-1867. (<http://en.wikipedia.org/wiki/Mongkut> , accessed on 10<sup>th</sup> August 2020)

<sup>6</sup> Ruangvichathorn, J.,*loc.cit.*

<sup>7</sup> Ruangvichathorn, J.,*loc.cit.* (Also referred to Boonchalermvipas, S. (1997). “The History of Thai Legal System” (English Version)”, **Proceedings of the International Symposium, 6-7 November 1997, Bangkok, Thailand, Organized by Faculty of Law, Kyushu University (Japan) and Faculty of Law, Thammasat University (Thailand)**, Prachoom Chomchai Editor, p. 118.

<sup>8</sup> Ruangvichathorn, J.,*loc.cit.* (Also referred to Boonchalermvipas, S. *ibid.* pp.118-119 and Boonchalermvipas, S. (2009)”, “The History of Thai Legal System” (Thai Version), **Winyuchon Publication**, 9<sup>th</sup> Edition, pp.137-138 which elaborated that the first country was Great Britain where In 1850, Sir John Bowring, came to Bangkok and later concluded an agreement with ‘Siam’ (Thailand’s former name) which provided for the opening of Siam’s trade to foreign trade meeting London’s chief conditions together with the provisions of extraterritoriality whereby the British citizens who committed crime in Siam were not subject to Siam’s courts (rather to its own court called ‘Consular Court’) on the ground that Siamese legal system was still uncivilized because of, for

promulgated in 1908 but the rest of the codes including TCC continued in process after the death of King Rama V in 1910, i.e. during the reigns of his two sons – King Rama VI (1910-1925) and King Rama VII (1925-1934). It was not until after the ‘Bloodless Revolution of 1932’ which overthrew the last absolute monarchy of Thailand during the reign of King Rama VII that Thailand successfully promulgated all major codes which last until present days with necessary amendments from time to time.<sup>9</sup>

The ‘extraterritoriality’ was a serious problem on the sovereignty of Thailand and undermined its very existence as an independent state because the nationals of the foreign Treaty Powers were removed from the Jurisdiction of the King’s courts of justice.<sup>10</sup> In other words, the Code of 1805 had been used for over 1 century before Thailand was politically forced<sup>11</sup> by

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instance, institutional problems, inefficient and lack of proper ordinance for investigations and collection of evidence by torture. In addition, apart from Great Britain, Siam had to enter into more 13 similar agreements with foreign nations including their colonial territories in a later stage in order to maintain the independency of the country while all other neighboring countries of Siam at that time became parts of Great Britain and French colonies, i.e. Burma (Myanmar) and Malaysia – Great Britain / all in Indo-China which are Vietnam, Laos, Cambodia – France). On Japan side, it was in 1853 that the door was coerced to open by an American Commodore Perry followed by the conclusion of a series of ‘Unfair or Unequal Treaties’. (Referred from Isogawa, N., (1997), “The Japanese Civil Code in the World of Legal Systems: Toward a Comparative Study on the Asian Civil Law”, in *Proceedings of the International Symposium on the Development of Legal Systems in Asia: Experiences of Japan and Thailand, organized by Faculty of Laws of Kyushu University (Japan) and Thammasat University (Thailand)*, 6-7 November 1997, Bangkok, Thailand, Phachoom Chomchai – Editor, p.152.

<sup>9</sup> Ruangvichathorn, J., *ibid.*, p.9 Twelve years after 1923, the whole work of codification including the Code of Civil Procedure and the Criminal Procedure was completed and came into force in 1935 during the reign of King Rama VIII who was the first monarch under the Constitution. (Referred from Boonchalermvipas, S. “The History of Thai Legal System (English Version)”, *op.cit.*, p. 120.)

<sup>10</sup> Ruangvichathorn, J., *loc.cit.*, (Referred from Kraivixien, T. *op.cit.*, p.10 which elaborated that “in response to the allegation that Thai law at the time was uncivilized, the abuses of the old system were dealt with in a succession of enactments. Torture as a means of extorting evidence and confession was done away with. Many of the ancient punishments were altered: flogging was completely abolished, and other severe forms of punishment were replaced by well recognized penalties.”

<sup>11</sup> Ruangvichathorn, J., *loc.cit.* Similarly to Japan, it was also recorded in Thailand that, at that time, Japan was the very first country which decided to solve this problem by employing a number of western advisors to revise

westerners to modernize the laws and that begun the codifying process in the reign of King Rama V as aforesaid. In respect of TCC, its very first parts, i.e. Book I and Book II which was called the ‘Old Text’ were promulgated in 1923, but subject to a number of suggestions for further improvement particularly from the judges who had studied the English common law, it was thus repealed and replaced by the ‘New Text’ which were drafted partly in lines with JCC<sup>12</sup> and came into force in 1925.<sup>13</sup>

Since then, TCC has never been put into any major revision or reform irrespective of many changes in Thai society, particularly, towards trade and commerce. Sales law (see the 1994 Supreme Court Judgment No.3046 as mentioned in Chapter 1), for instance, reflects largely non-commercial sale which undoubtedly was the nature of Thai society at the time of its drafting. Following such case law, there are movements proposing the separation of TCC into two codes, i. e. Civil Code and Commercial Code in order to overcome civil or non-commercial and commercial matters, including sales, more appropriately.

#### **Background and development<sup>14</sup> of JCC regarding contract law and sales**

Successively, Japanese legal system has been influenced mainly by Chinese, German and American Law. It is now, however, a ‘unique hybrid system’ by paying attention to variety of foreign systems and international legal instruments together with its own rich legal history. In the 7<sup>th</sup> century, a new imperial state introduced a codification system inspired by Chinese law to centralize power until Japan was re-unified again by Tokugawa Shogunate (1603-1867) whereby administrative laws were predominated in order to maintain national unity. However, concerning commercial issues, some detailed rules and precedents emerged in the area of loans, commercial notes and

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its laws together with Japanese legal scholars and this absolutely inspired Siam to achieve the same by employing foreign advisors, among others, was a Japanese jurist – Dr. Tokichi Masao who took part heavily in the draft of Penal Code and some in the subsequent Civil and Commercial Code. (Referred from Boonchalermvipas, S. “The History of Thai Legal System (Thai Version)”, *op.cit.*, pp. 207-211.)

<sup>12</sup> Ruangvichathorn, J., *ibid.*, p.10 (Also referred to Isogawa, N., *op.cit.*, p. 165.)

<sup>13</sup> Ruangvichathorn, J., *loc. cit.* (Also referred to Isogawa, N., *ibid.* and Boonchalermvipas, S. “The History of Thai Legal System (English Version)”, *op.cit.*, p. 120.)

<sup>14</sup> Principally referred from Sono H.(2019), *Contract Law in Japan*, Kluwer Law International B.V.



security interests but the laws were not available to citizens as ‘judiciable rights’.<sup>15</sup> In maintaining stability, the Shogunate also largely closed off Japan to the outside world until 1853 when an American navy (black) ship arrived to call for cross border trade. Subsequent political turmoil led to the ‘Meiji Restoration in 1868 and the new government promoted an even stronger imperial system and modernized legal system to revise ‘unequal treaties’ previously made by the late Tokugawa rulers with the US and European powers which included extraterritorial jurisdiction over their nationals in Japan.<sup>16</sup> The Meiji government was first attracted by French law but, ultimately, enacted six major codes drawing more on German law towards the end of the nineteenth century. These include (1) the Meiji Constitution promulgated by the Emperor in 1899, and (2) the Civil Code (Act No.89 of 1896).<sup>17</sup>

The 1896 Japanese Civil Code, or JCC was the first code dealing with contract-related provisions followed by the Japanese Commercial Code (Act No. 48 of 1899), or JCOMC which was even more heavily influenced by German law. JCOMC includes provisions on commercial transactions (now in Book II) relating to the following types of contracts:

- (a) Sales
- (b) Accounts Current or Netting
- (c) Anonymous Partnership
- (d) Brokerage
- (e) Commission Agencies
- (f) Freight Forwarding Businesses
- (g) Transportation Businesses
- (h) Deposits

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<sup>15</sup> Sono, H., *ibid.*, p. 23 (Also referred to Henderson, D.F. (1965) *Conciliation and Japanese Law: Tokugawa and Modern*, University of Washington Press.)

<sup>16</sup> In the case of Thailand and its extraterritorial jurisdiction issue, see above.

<sup>17</sup> Sono, H., *loc. cit.*, (Also cited that “[M]ajor parts of an earlier Civil Code inspired much more by French law, with the advice of Professor Gustave Boissonade from France, were passed in 1890 but never came into effect.” by referring generally to Ishikawa, H. (2013) “Codification, Decodification, and Redecodification of the Japanese Civil Code”, *10 U. Tokyo J.L. & Pol.* 61 and Mukai, K. & Toshihara, N. (1967) “The Progress and Problems of Compiling the Civil Code in the Early Meiji Era”, *1 Law in Japan* 25.)

These more specific provisions under JCOMC apply *in lieu* of corresponding JCC provisions (Article 1, JCOMC), for example, regarding sales, if:

(a) Transactions are commercial *per se* (including transaction to acquire for value movables, immovables or securities with the intention of transferring them for profit, or the transfer of them so acquired (Article 501, JCOMC).

(b) Transactions are commercial because effected as a business ( including manufacturing or processing for others, money-exchanging or other banking and insurance services (Article 502, JCOMC)

(c) Incidental commercial transactions carried out as a business ( Article 503, JCOMC) by a ‘merchant’ (defined in Article 4(1) as a person or entity effecting commercial transactions on its own behalf as a business).

According to Article 1(2), JCOMC, the order of the application is, if there is no provision in JCOMC, ‘commercial usage’<sup>18</sup> will apply, if not, JCC will apply. In addition, the priority of the provisions in JCOMC which are more specific over those in JCC have always been extended to provisions beyond the specific types of contracts listed in both laws prior to the latest revision of JCC (“the revised JCC” or “the 2017 Reform”), such as, the extinctive prescription period for claims. Previously, such extinctive prescription arising from commercial transaction was five years (former Article 522, JCOMC) while was ten years under JCC (former Article 167, JCC). This difference was however eliminated in the 2017 Reform when JCC adopted a shorter prescription by launching a dual prescription period for contractual claim, i.e. the length and commencement of the general prescription period are (1) five years for the time the obligee became aware that it can exercise the claim (Article 166(1)(i), or (2) ten years from the time the claim can be exercised (Article 166(1)(ii)) and such a claim is extinguished by the expiration of whichever period expires earlier. The 2017 Reform also deleted the prescription period for commercial claims that had been provided in JCOMC resulting which no distinction between civil and commercial claims with respect to prescription periods exists. To the writer, this reform is of significance in the case of

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<sup>18</sup>Sono, H., *ibid.*, p.30 (Also cited two examples by referring to Otori, T.(1971) “Shokanshuho [Commercial Customary Law]” in Seminar on Commercial Law (General Provisions and Commercial Transactions), p. 55 and Otori, T. et al., eds., *Seirinshoinshinsha*. & Taylor, V. (1993), “Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan”, *19 Melbourne U. L. Rev.*, p. 352.)

Thailand because it is clearly seen that the 2017 Reform was aware of the fact that commercial transaction also needs less prescription period than civil transaction and this should seriously be example for Thailand.

Likewise, the difference in the statutory interest rate prior to the 2017 Reform which applies, absent to the contrary of an agreement by the parties, between JCC (five percent per annum, Article 404) and JCOMC (six percent per annum, Article 514) has also been eliminated. The 2017 Reform has adopted a variable interest rate principle, i. e. starting from three percent per annum (but to be reviewed every three years after the 2017 Reform comes into force) and applied to both civil and commercial claims. To the writer, this is also another example for Thailand because the reason why the 2017 Reform adopted this principle may have been because the five percent per annum interest rate was not considered to be appropriate for non-commercial contracts. Thailand, surprisingly, has just also changed the rate of interest which, more or less, is based on the principle found under the revised JCC (see more details below).

The strict liability for latent defects regarding contracts of sale under JCC prior to the 2017 Reform (in the form of specific limitation periods provided in Articles 566(3) and 570) has also been revised to follow a provision in JCOMC (Article 526), i. e. the claim need not be lodged within one year of becoming aware of the non-conformity but the plaintiff must give notice of the discovered non-conformity within that period (i. e. one year period, Article 566 of the 2017 Reform). For sales between merchants, in particular, notification must be given 'immediately' after the buyer becomes aware of the non-conformity of the goods. There is also an absolute cut-off period of 6 months from the time of delivery (Art 526, JCOMC). This approach is also interesting for the case of Thailand because, to the writer, a contract of sale largely comes into play in the course of business and it rather bears commercial nature than non-commercial under which the obligation to give notice of non-conformity by the buyer (or 'the buyer's duty to notice') is very important and such notice should be served 'immediately' in the case of sales between merchants with the application of a cutoff period. In Thailand, apparently, there are not such principles under TCC as seen below.

Concerning the relationship between Japanese law and Thai law, there is a historical piece of information<sup>19</sup> here saying that ‘there were some discussions about incorporating updated versions of Commercial Code provisions related to contracts into the revised Civil Code’ and ‘[t]he 2017 Reform did not do so to a significant degree’. This refers to the so called ‘Thailand’s combined Civil and Commercial Code’ which was enacted in 1925 (TCC) under the co-drafting advice of a leading Japanese expert of civil law at the time’. The exact reason why Thailand adopted such a combined Civil and Commercial Code rather than separated them into Civil Code and Commercial Code as Japan did (although Thailand took JCC as one of its model at the time of TCC drafting), to the writer’s knowledge, is clearly unknown up to now. However, its consequences in not separating civil and commercial matters into two codes are seen in the above-mentioned case laws.

### **Background and development<sup>20</sup> of CISG regarding sales law**

CISG is an international sales convention, currently consisted of 94 member states. CISG is the product of UNCITRAL<sup>21</sup> which was adopted in a diplomatic conference at Vienna, Austria in 1980. Given the growing number of its member states, CISG has been renowned as widely accepted during the last three decades. As nine out of ten leading trade nations are currently its member states, “it can be estimated that about seventy to eighty percent of all international sales transactions are potentially governed by the CISG”,<sup>22</sup>

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<sup>19</sup> Hiroo, H., *ibid.*, p.31 (Also referred to Abe, M. and Nottage, L. (2012) “Japanese Law” in *Elgar Encyclopedia of Comparative Law*, Smits, J. ed., 2<sup>nd</sup> ed., Edward Elgar, p.462, and Nottage, L.(2019) “Comparative Law in and for Japan” in *Oxford Handbook of Comparative Law*, forthcoming (Reimann, M. and Zimmerman, R. eds., 2<sup>nd</sup> ed., Oxford University Press). And, to the writer, such the Japanese Expert would have been Dr. Tokichi Masao who was employed (between 1897-1913 during the Reign of King Rama V) as one of foreign legal advisors to reform Thai legal system including the codification of laws. (cited in Ruangvichathorn, J., *op.cit.*, p. 18.

<sup>20</sup> Principally referred from Ruangvichathorn, J. (2020) “The Harmonization of ASEAN Sales Law: A Comparative Study with Thai Sales Law and CISG,” *Thammasat Law Journal*, 49<sup>th</sup> Year, 1<sup>st</sup> Edition.

<sup>21</sup> United Nations Commission on International Trade Law, founded by the United Nations in 1966.

<sup>22</sup> Schwenger, I. & Hachem, P. (2009) “The CISG - Successes and Pitfalls”, *American Journal of Comparative Law*, Vol. 57, No. 2, p.457. (cited in Ruangvichathorn. J., *ibid.*, p.131.)

CISG is not the first attempt in harmonizing international sales law as the trade communities all around the world have long been facing problems concerning a so called 'governing law', or the application of a domestic sales law. Its history<sup>23</sup> began in 1926 after the International Institute for the Unification of Private Law ("UNIDROIT") was founded in Rome and in the same year of its inauguration in 1928, Ernst Rabel<sup>24</sup> proposed to work towards a unification of international sales law. Following a committee consisting of representatives from different legal systems was founded in 1930, the first draft of a uniform sales law was published in 1935 and in 1936. Professor Rabel later published the first volume of his seminal work "Das Recht des Warenkaufs" providing an analysis, the status quo of sales law on a broad comparative basis. However, in 1937, Professor Rabel was forced to emigrate from Berlin to the United States and World War II interrupted the unification efforts until they were resumed again in 1951 when the Dutch government held a diplomatic conference on the unification of sales law in The Hague by establishing a special commission to make further progress in the unification process. Such the commission had since met several times and finally presented a first draft on substantive sales law in 1956 followed by efforts to create a law applicable to the formation of international sales contracts until its first draft was presented in 1958, both of which were then distributed among governments.

In 1964, the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS) and the Uniform Law on the International Sale of Goods (ULIS) were finalized at The Hague but they did not fulfill the high hopes and expectations as only nine countries<sup>25</sup> became member states while important economic countries such as France and the United States did not participate, including many socialist and developing countries as they speculated that these uniform laws favored sellers from industrialized western economic countries. After UNCITRAL was established in 1966, it continued the work on the unification of sales law in 1968 by using both

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<sup>23</sup> Schwenger, I. & Hachem, P. *ibid.*, pp. 457-478. (cited in Ruangvichathorn, J., *ibid.*, p.140.)

<sup>24</sup> An Austria-born but American Scholar (1874-1955) – the founding Director of the Kaiser Wilhelm Institute for Foreign and International Private Law in Berlin & famous scholar in the field of sale of goods since 1928. (cited in Ruangvichathorn, J., *loc.cit.*)

<sup>25</sup> One of which is the UK – however, the reason why the UK has not yet become a member states of CISG is beyond the scope of this work. (cited in Ruangvichathorn, J., *ibid.*, p.141.)

ULFIS and ULIS as its basis. The first draft of a uniform law was finalized in January 1976 and in 1978 UNCITRAL circulated a subsequent draft containing rules on contract formation as well as the substantive sales law among the governments of the UN members until between 10th March and 5th April 1980, delegates from sixty-two nations deliberated CISG at the Vienna Conference and thereby forty-two countries voted in favor of it. Finally, on 11th December 1986, the necessary number of ten ratifications (Article 99, CISG) was reached and CISG entered into force on 1st January 1988 with its six official languages i.e. Arabic, Chinese, French, English, Russian and Spanish. Back then, at the time of this referred Article<sup>26</sup>, CISG had seventy-two member states which included nine out of the ten leading trade nations in 2006 (except for the United Kingdom) and in 2008, eight out of the ten major trading partners of the United States of America were also its member states. And, within the ever increasing market of the European Union (“EU”), twenty-three out of the twenty-seven members are also member states of CISG with a huge development of international trade, e.g. between 2005 – 2006 there was a report stating that (1) some 18 million containers made over 200 million trips per year and there were also ships that could carry 15.000 20-foot equivalent units which was said to be cheaper to ship a bottle of wine from Australia to Hamburg than to bring it from Hamburg to Munich and (2) worldwide merchandise export trade amounted to USD 11.783 billion<sup>27</sup>.

CISG is divided into four parts, i.e. (1) Part I: rules on its sphere of application and general provisions, (2) Part II: rules on formation of contract, (3) Part III: rules on rights and obligations of the parties, and (4) Part IV: rules on ratification by contracting states or public international law provisions.<sup>28</sup> At the time of this referred publication<sup>29</sup>, it has been recorded that courts from 46 jurisdictions and arbitral tribunals rendered an approximate total of 2,500 decisions regarding CISG with more than 9,000 academic publications exist in 33 languages including numerous CISG’s conferences and other forms of its academic gatherings have been taken placed worldwide. Most importantly, the most tangible success of CISG is said to be its being used as

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<sup>26</sup> Schwenger, I. & Hachem, P., *loc.cit.* (cited in Ruangvichathorn, J., *loc.cit.*)

<sup>27</sup> Schwenger, I. & Hachem, P., *op.cit.*, p.461 (cited in Ruangvichathorn, *op.cit.*, p. 142.)

<sup>28</sup> Schwenger, I., Fountoulakis, C., Dimsey, M. (2012) “International Sales Law: A guide to the CISG”, **HART Publishing**, Introduction Part.

<sup>29</sup> *loc.cit.*

model by a number of domestic sales law legislators, e. g. (1) in Scandinavian countries: its modification of their domestic sales laws, (2) in Germany: its 2002 *Schuldrechtsreform* (Revision of the Law of Obligations), (3) in the Netherlands: its drafting of the Law of Obligations in their *Wetboek* (Civil Code), and (4) in many former socialist states in Eastern Europe such as Estonia, the Czech Republic and Croatia: their redevelopment of private and domestic sales and commercial laws.<sup>30</sup>

In addition, the drafting above of not only domestic sale laws, but also, a number of regional and international principles are guided by CISG, e. g. (1) the Principles for International Commercial Contracts launched by UNIDROIT in 1994 (“PICC”) or the “UNIDROIT Principles”, (2) the 2002 Principles of European Contract Law (“PECL”), and (3) the OHADA<sup>31</sup>, a union of 16 African states has also adopted its own common sales law in 1993 which is said to be exactly follows CISG.<sup>32</sup> Accordingly, Thailand is now in the close process of becoming CISG’s member states (see more details below).

### **Significance of the revised JCC<sup>33</sup> as guideline in developing Thai contract law regarding sales**

1. The extinctive prescription period for claim: its revision between JCOMC and JCC incorporated into the 2017 Reform

As mentioned above, the difference of extinctive prescription periods between JCOMC and JCC has been eliminated in the 2017 Reform. JCC generally follows the Civil Law’s tradition<sup>34</sup> of considering the extinguishment of claims as ‘a matter of substantive law’ not ‘a matter of procedural law’ like in the Common Law’s tradition. The rules on extinctive prescription was one major revision in the 2017 Civil Code Reform. In particular, it shortened the time that claims may possibly be extinguished by prescription from ten years to five years which is in line with the

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<sup>30</sup> *loc.cit.*

<sup>31</sup> ‘Organization for the Harmonization of Business Law in Africa’

<sup>32</sup> Schwenger, I., Fountoulakis, C., Dimsey, M., *loc. cit.* See also the proposal for ASEAN, cited in Ruangvichathorn, J. *supra.*, note 20.

<sup>33</sup> Mostly based on Hiroo, S., *supra.*, note 14.

<sup>34</sup> Hiroo, *ibid.*, pp. 30-31.

comparative trend of adopting a shorter limitation period<sup>35</sup> to promote the exercise of rights. In the case of Thailand, this approach is of significance because TCC adopts ten years as the general rule of extinctive prescription<sup>36</sup> which applies to both civil and commercial matters resulting which the revision of shortening extinctive prescription for commercial matters has been one rational<sup>37</sup> that Thailand has to seriously separate civil and commercial matters because ten years are criticized<sup>38</sup> to be too long for settling commercial deals. Regarding sales, however, TCC adopts specific extinctive prescription for one year in the case of the so called ‘Liability for Defect’ under Section 474 which states “[N]o action for liability for defect can be entered later than one year after the discovery of the defect.” To the writer, although this provision is suitable to tackle the obligation of the seller to deliver non-defective goods and applies to both civil and commercial matters but the writer has opinion that this Section 474 should be applied by focusing on the buyer’s duty to give notice similar to the 2017 Reform.

2. The statutory interest rate: its revision between JCOMC and JCC incorporated into the 2017 Reform

Prior to the 2017 Reform, as also mentioned above, there was a difference in the statutory interest rate which applies, absent to the contrary of an agreement by the parties, between JCC (five percent per annum, Article 404) and JCOMC (six percent per annum, Article 514). This difference has been eliminated by adopting a variable interest rate principle which starts from three percent per annum (but to be reviewed every three years after the 2017 Reform comes into force) and applied to both civil and commercial claims. In the case of Thailand, previously, there is only one

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<sup>35</sup> Hiroo, p. 160 (referred to R. Zimmerman, *Comparative Foundations of a European Law of set-off and prescription* 86 (Cambridge University Press 2010))

<sup>36</sup> Section 193/30 provides “[T]he period of prescription, which is not specifically provided by this law or other laws, is ten years”.

<sup>37</sup> For example, the prescription period of 10 years was applied because there are no specific prescription periods for disputes over letter of credit (Supreme Court Judgment No.266/2003) and carriage of goods by sea (Supreme Court Judgments, Nos 1583/1968, 1295/1973, 585/1978, 871/1982 and 166/1982. However, for carriage of goods by sea, the prescription period of 1 year is currently applied according to Section 46 of Carriage of Goods by Sea Act, B.E. 2534 (1991)

<sup>38</sup> *New Law Journal* (2005), “The Report on the Beginning of Separating Commercial Law from Non-Commercial Law in Thailand”, Srianusorn, M. Editor.



interest rate principle applied to all, i.e. seven and a half percent per annum, (Section 7, TCC which states “[W]hen interest is to be paid, and the rate is not fixed by a juristic act or by an express provision of law, it shall be seven and a half percent per year”). This principle, to the writer, is different from the new approach launched under the 2017 Reform whereby, a reduction of interest rate and a variable interest rate principle are introduced and applied to both civil and commercial claims alike. Thailand, however, has just also revised<sup>39</sup> to overcome current situations by reducing the rate to be three percent per annum but can be reviewed by the Ministry of Finance to be more or less than this rate every three years from the effective date of the revision (i.e. 11<sup>th</sup> April 2021). Such rate is, however, applied to both civil and commercial matters alike. Under this work, as a consequence, this issue will be focused less than others.

3. The strict liability for latent defects and the buyer’s duty of notice: its revision between JCOMC and JCC incorporated into the 2017 Reform

Under TCC, the only closest principles of strict liability for latent defects and the buyer’s duty of notice are Sections 472-474. They are, however, quite general which provide (1) in Section 472, first paragraph, that “[I]n case of any defect of the property<sup>40</sup> sold which impairs either its value or its fitness for ordinary purposes or the purposes for the contract, the seller is liable and in second paragraph that “[T]he foregoing provision applies whether the seller knew or did not know of the existence of the defect”, and (2) in Section 473 that “[T]he seller is not liable if (i) 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, (ii) the defect was apparent at the time of the delivery and the buyer accepts the property without reservation, (iii) the property was sold by public auction”, and (3) in Section 474 that “[N]o action for liability for defect can be entered later than one year after the discovery of the defect”. According thereto, it is apparent that there are no express principles for ‘latent defect’ and ‘the buyer’s duty of notice’. The buyer’s duty of notice, in particular, is very much distinct from JCOMC. To the writer, in the case of Thai law, it should consider including the buyer’s duty of notice in sales law whether it be non-commercial or commercial by blending it with the question of defective goods similar to Japan. In JCC, the strict liability for latent defects regarding contracts of sale prior to the 2017 Reform which was in the

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<sup>39</sup> Special Decree amending the Civil and Commercial Code, dated 9<sup>th</sup> April 2021.

<sup>40</sup> The word ‘property’ under TCC means both movable and immovable goods.

form of specific limitation periods provided in Articles 566(3) and 570) has also been revised to follow a provision in JCOMC (Article 526), i.e. the claim need not be lodged within one year of becoming aware of the non-conformity but the plaintiff must give notice of the discovered non-conformity within that period (i.e. one year period, Article 566 of the 2017 Reform) and currently the 2017 Reform does not distinguish<sup>41</sup> between latent defects and apparent defects anymore (which more or less is the principle already found in TCC, Section 472). TCC, therefore, should be revised only in Section 474 to provide that the claim need not be lodged within one year of becoming aware of the non-conformity but the buyer must give notice of the discovered non-conformity within one year thereof. This means such one-year period shall not be regarded as a limitation of bringing claims or ‘prescription periods’ but as a time limit to give notification of non-conformities. In addition, Thai law should also follow JCC whereby, as a consequence of the buyer’s failure of duty to give notice, the buyer shall lose<sup>42</sup> its right to all remedies if the buyer fails to give notice of non-conformities.

#### 4. Case law: its incorporating into the 2017 Reform

According to an analysis of Japanese case law by a Western scholar, i.e. Veronica Taylor who once introduced to the Western audiences the important role played by Japanese courts in developing the Civil Code’s general provision on good faith (Article 1(2)) to limit the scope for terminating long-term distributorship and franchise contracts<sup>43</sup>, together with the notion that commercial practices are often broadly referred to by Japanese courts when interpreting the Civil Code<sup>44</sup>.

As generally mentioned by Professor Sono that his current book<sup>45</sup> provides an analysis of contract law in Japan which was reformed in 2017. He began with the fact that the law of obligations, including contract law, in the Japanese Civil Code of 1986 or JCC had remained *largely*

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<sup>41</sup> Hiroo, S. (2021) Obtained from an interview via electronic mail made by the writer (due to Covid 19 pandemic that travelling aboard has been prohibited, interviews via electronic mail including other internet facilities have been put in placed).

<sup>42</sup> Sono, H. *op.cit.*, p.194.

<sup>43</sup> Taylor, V. *supra.*, note 18, cited in Sono, H. *op.cit.*, footnote 30, p.30, 36.

<sup>44</sup> Taylor, V., *loc.cit.*

<sup>45</sup> Sono, H., *op.cit.*, p 21

intact, (meaning - just minor revision<sup>46</sup>), for over 120 years until the coming of this 2017 Reform (similarly to TCC<sup>47</sup>). The 2017 Reform, however, covers only the law of obligations, not also the law of torts and the law of restitution. Thus, this 2017 Reform is basically a contract law reform that, after an extensive drafting process stretching over approximately eleven years, attempts to (1) modernize Japanese contract law, (2) incorporate *case law* developments into the Civil Code and (3) promote the global convergence of contract law.

The two foregoing paragraphs concurrently co-exist each other and reveal that the 2017 foresaw the importance of case law development and included therein. For example, as contracts with standard terms are commonly used in businesses whereby terms are unilaterally set by one of the parties, i.e. a business, while the other party, typically a consumer, cannot negotiate or change the terms and just simply required to accept those terms on the so-called ‘take it or leave it’ basis. In Japan, such contracts have been regulated by the courts that a contract with standard terms is formed when a party gives blanket consent to the contract as a whole. And, specific consent does not need to be given to each individual terms after a party has read them resulting which a party’s failure to read the standard terms does not prevent such a contract from being formed. However, when the 2017 Reform included this so-called standard form transaction therein, its Article 548-2(2) provides that the consumer shall be deemed not to have given consent to any terms of a standard form transactions agreement that restricts his or her rights or aggravates his or her obligations if it considered to be detrimental solely to his or her interests contrary to good faith as set forth in Article 1(2) of JCC in light of the method and circumstances of the transaction and socially accepted ideas. As a consequence, such terms will not be part of a contract because they are considered to be outside the scope of the consumer’s consent, or, in other words, not all standard terms will be effective. Another example that the writer is interested in is the ‘liability during negotiation’ issue under which case law applying JCC has recently become particularly extensive regarding information duties even though it was not finally included in the 2017 Reform but can potentially tell the future development of case law regarding pre-contractual liability in Japan. Following a 2004 ‘high profile’ contract law litigation, i.e. UFJ Holdings and Sumitomo Trust &

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<sup>46</sup> The writer’s view.

<sup>47</sup> The writer’s view.

Banking<sup>48</sup>, the trend is case laws recognize that a party is entitled to actual damages in reliance on ‘inducement’ or ‘trust’ made by the other party during negotiations. And, more recently, judgements upholding pre-contractual liability for breaches of information duties are also found in respect of franchisors, suppliers of investment products, etc.

To the writer, this approach may be different from other countries in the Civil Law legal system, including Thailand, that are not in the system of the so-called ‘judge-made’ law, i.e. the Common Law system where judges are usually making new laws to fill existing gaps by resorting to variety of sensible and reasonable interpretations. In the Civil Law system, on the contrary, any new law or its amendment has to be made through legislation mostly in parliaments resulting which judges may not focus on ‘thinking outside the code provisions’, only clinging to provisions of codified laws and wait until they are formally amended. The Japanese courts, under this wider practice, by blending the two systems together should be example for others including Thailand.

### **Significance of CISG’s provisions as guideline in developing Thai sales law**

1. The extinctive prescription period for claim and the buyer’s duties to examine the goods and give notice of non-conformity

Under CISG<sup>49</sup>, the closest principle of prescription period for claim is the rule of notice of non-conformity under which Article 39 provides that “(1) [T]he 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

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<sup>48</sup> Supreme Court, 30 Aug. 2004, Minshu 58-6-1763 (Cited in Hiroo, S. *op. cit.*, p.66). In this case, as the negotiations to possible sale of trust banking business of UFJ Holdings to Sumitomo Trust & Banking which did not result in a contract had no prior agreements that could give rise to injunction or damages proceedings, case law and commentators came to recognize that a party should be liable to compensate for the actual damages incurred by another in reliance on strong ‘inducement’ of the former that a contract would be concluded, or the trust is betrayed.

<sup>49</sup> To the writer’s understanding, CISG does not deal with some internal matters, i.e. leaving them to be governed by domestic laws, including prescription period for claims, as impliedly from its Article 4 which provides “[T]his Convention governs only the formation of the contract of sales and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold.”

lack of conformity within a reasonable time after he has discovered or ought to have discovered it. (2) [I]n any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.”

According to CISG Advisory Council Opinion<sup>50</sup>, the period for giving notice under Article 39 commences when the buyer discovered or ‘ought to have discovered’ the lack of conformity. And, the buyer ‘ought to have discovered’ the lack of conformity upon the expiration of the period for examination of the goods under Article 38<sup>51</sup> or upon delivery where the lack of conformity was evident without examination. Therefore, unless the lack of conformity was evident without examination of the goods, the total amount of time available to give notice after delivery of the goods consists of two separate periods, i.e. (1) the period for examination under Article 38, and (2) the period for giving notice under Article 39. In sum, CISG requires these two periods to be distinguished and kept separate although the facts of the case would permit them to be combined into a single period for giving notice.

Considering the question of ‘reasonable time for giving notice’, such CISG Advisory Council Opinion states that the reasonable time for giving notice after the buyer discovered or ought to have discovered the lack of conformity varies depending on the circumstances. In some cases, while notice should be given the same day, a longer period might be appropriate in others. No fixed period should be considered as reasonable time for giving notice. Circumstances, however, are the matters such as the nature of the goods, the nature of the defect, the situation of the parties and relevant trade usages. Last but not least, the notice should include information available to the

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<sup>50</sup> Referred from [www.cisgac.com](http://www.cisgac.com).

<sup>51</sup> Article 38 is the so called ‘the buyer’s duty to examine the goods’ under CISG and it provides that “(1) [T]he buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. (2) [I]f the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination. (3) [I]f the goods are redirected in transit or re-dispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or re-dispatch, examination may be referred until after the goods have arrived at the new destination.”

buyer either it be the detail of a lack of conformity, or only its lack of conformity whereby a notice that describes the symptoms is enough to specify the nature of the lack of conformity.

To the writer, the above principles are consistent with those under JCC and they should be served as guidelines for developing Thai law.

## 2. The statutory interest rate

Under CISG, Article 78 provides that “[I]f a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under Article 74.” This is the only CISG’s provision dealing directly with interest and is supplemented by Article 84<sup>52</sup> which applies in cases where the contract has been avoided and obligates the seller to pay interest on the purchase price to be refunded. Accordingly, Article 84 provides in its subsection one which principally relates to this issue that “(1) [I]f the seller is bound to refund the price<sup>53</sup>, he must also pay interest on it, from the date on which the price was paid.” However, both Articles 78 and 84 do not provide for a uniform interest rate due to historical reason at the time of CISG’s drafting whereby the question of whether an obligation to pay interest should be established under CISG was strongly debated.<sup>54</sup> The interest rate has to impliedly fall on the application of CISG, Article 4 as mentioned once above, i. e. leaving to domestic laws. For example, the Belgium court decided in one case<sup>55</sup> that “[A]ccording to Article 78 CISG ..., since the interest rate is not determined ..., it is determined by the *lex contractus*, in casu Belgian law.”

Although the statutory interest rate is not fixed in CISG but this issue under CISG can still help indicating that the proper and suitable interest rate provided in any domestic law, including

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<sup>52</sup> Schwenger, I., Fountoulakis, C., Dimsey, M., *op.cit.*, p.573

<sup>53</sup> To the writer’s understanding, this Article 84 (1) is the result from CISG’s principle of ‘Effects of Avoidance’ provided in its Articles 81-84 whereby Article 81(2) states “[A] party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first part has supplied or *paid* under the contract. If both parties are bound to make restitution, they must do it.”

<sup>54</sup> Schwenger, I., Fountoulakis, C., Dimsey, M., *loc. cit.* For examples, (1) Islamic countries, due to religious law, were against a general duty to pay interest, and (2) many states objected to the application of the interest rate existing at the creditor’s place of business.

<sup>55</sup> *Hof van Beroep Antwerpen* (Belgium), 24<sup>th</sup> April 2006, cited in Schwenger, I., Fountoulakis, C., Dimsey, M., *op.cit.*, p.575

JCC and TCC, is of important as it will finally be applied by a court or other tribunal, such as arbitrator, in deciding a case before it. To the writer, this conforms to recent revision made under JCC and TCC as already mentioned.

### 3. The strict liability for latent defects

Under CISG, the principle of strict liability for latent defects is much clearer than JCC and TCC, i.e. Article 36 thereto provides that “(1) [T]he seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time, and (2) [T]he seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

Article 36, CISG deals with<sup>56</sup> the time at which a lack of conformity must have existed in order for the seller to be held responsible. While paragraph (1) sets the general rule whereby a seller is liable for any lack of conformity existing at the time that the risk in the goods passes to the buyer, paragraph (2) restates the rule found in most domestic legal systems whereby the seller is also liable for any lack of conformity subsequently appearing due to a breach of the seller’s obligations including a guarantee given to the buyer.

This Article 36, however, relates to Article 38 above whereby such CISG Advisory Council Opinion indicates that the period for examining for ‘latent defect’ commences when signs of the lack of conformity become evident. To the writer, all as mentioned above, should be served as guidelines for developing Thai law.

### 4. Case law and its compilation

As mentioned above, in 2012, there was a record that courts from 46 jurisdictions and arbitral tribunals have rendered an approximate total of 2,500 decisions regarding CISG (accessible through CISG online website ([www.cisg-online.ch](http://www.cisg-online.ch)) and UNCITRAL website (“CLOUT”)). Moreover, due to CISG has been gaining importance globally there is an adoption of the Willem C Vis International Commercial Arbitration Moot Competition held in the week before Easter every year in Vienna whereby students from all around the world present themselves with a CISG

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<sup>56</sup> Schwenger, I., Fountoulakis, C., Dimsey, M., *op.cit.*, pp. 288-290

problem as the basis of their legal trainings. In 2012, such moot competition represented its 21<sup>st</sup> year and was joined by 280 universities from 67 countries with the collaboration of over 700 world's top legal practitioners adjudicating the students' performances. And, its sister, i.e. the Willem C Vis International Commercial Arbitration Moot Competition (East) held in Hong Kong every year was in its 10<sup>th</sup> year in 2012, both of which have largely made rapid developments in the form of producing learning materials towards this area of law. To the writer, benefits derived from such case laws' activity and their compilations are of great importance for Thailand as guideline in developing its sales law by making legal research and analyzing therefrom.

For example: legal research and analyst form case law under CISG, Article 36 regarding 'strict liability for latent defects' is as follows:

(1) The writer has already mentioned above that (I) the principle of strict liability for latent defects under CISG is *much clearer* than JCC and TCC, i.e. Article 36, CISG provides that "(1) [T]he seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, *even though the lack of conformity becomes apparent only after that time*, and (2) [T]he seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics, and (II) the only closet principles of strict liability for latent defects under TCC are Sections 472-473. They are, however, quite general which provide (1) in Section 472, first paragraph, that "[I]n case of any defect of the property sold which impairs either its value or its fitness for ordinary purposes or the purposes for the contract, the seller is liable, and in second paragraph that "[T]he foregoing provision applies whether the seller knew or did not know of the existence of the defect", and (2) in Section 473 that "[T]he seller is not liable if (i) 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, (ii) the defect was apparent at the time of the delivery and the buyer accepts the property without reservation, (iii) the property was sold by public auction". According thereto, it is apparent that there are no express principles for 'latent defect' under which Thai law should revise TCC to make it clearer by looking through the analysis from CISG's case law below.



(2) Examples of possible questions to be started with:

(2.1) Discuss the case in which Article 36(1) or (2) CISG could come into play.

(2.2) Describe and analyze the distinction between Article 36(1) and 36(2) of CISG.

(2.3) Describe some of the usual guarantees that manufacturer give

(3) Bundesgerichtshof (Germany), 2 March 2005, CISG-online 999<sup>57</sup>

Summary of Judgement – At the decisive point in time of the passing of the risk- here: at the time of the delivery of the goods at the Seller’s Belgium domicile to the first forwarding agent (Art 67, first sentence, CISG) in April 1999, there was neither the suspicion of a harmful dioxin contamination of the pork, nor, more importantly, had the relevance ordinances yet been enacted in Belgium, Germany and the EU. This circumstance, however, does not contradict the goods’ lack of conformity with the contract as assumed by the lower courts; that is so because the non-conformity is already given, as expressly clarified in Art 36(1), last clause, CISG, at the point in time the risk passes if it already exists at the point in time but only later becomes apparent, i. e. if it is a hidden defect. Exactly, this was the case here, insofar as it relates to the deliveries made on 15 and 27 April 1999, according to the invoice, the meat in question was processed and frozen on 3 March 1999. The suspicion of dioxin contamination harmful to health existed for all pigs slaughtered between 15 January and 23 July 1999. The meat was, to the extent it was still in Belgium, confiscated for precautionary reasons; it was only to be sold if, by 31 August 1999, at the latest, by tracing the origin of the goods or through lab analysis, the suspicion of the dioxin contamination was dispelled *vis-à-vis* the responsible control authorities. To the extent the suspicion proved to be true, meat already exported was supposed to either be destroyed abroad or shipped back to Belgium, where it would also be confiscated and destroyed. It is undisputed that the Seller failed to produce proof of the absence of dioxin as required by it.

(4) Guide line for Thai law

As (1) TCC does not expressly states in principle under its Section 472 that ‘the seller is still liable *even though the lack of conformity becomes apparent only after that time*’, and (2) exception given in its Article 473(1), to the writer, is relatively subjective which may be subjected to diverse interpretation and might even more difficult to apply in the case of latent defect. TCC, therefore, should consider making a revision, at this particular point, conforming to CISG resulting

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<sup>57</sup> Cited in Schwenzler, I., Fountoulakis, C., Dimsey, M. *ibid.*, p.289, 290

which, with such an express provision i. e. ‘ *even though the lack of conformity becomes apparent only after that time* ’, a court or tribunal is directed to hold the seller responsible for ‘ latent defect ’ as seen in the decision made in the above CISG case if all required facts cannot be proved otherwise by the seller.

### **Conceptual Framework**

From the materials presented above, the review of the revised JCC’s selected provisions regarding contract law including sales, together with the review on the same aspects under CISG, and the comparison thereof made with TCC is the focus of this work in order to propose the development of Thai sales law in the future.

## **Chapter 3**

### **Research Methodology**

#### **Research Method**

##### **Research Tool**

This research utilizes the study of the following materials as research tools which are:

1. Significance of developing Thai contract law regarding sales.
2. Significance of the revised JCC as guideline in developing Thai contract law regarding sales.
3. Significance of CISG's provisions as guideline in developing Thai sales law.

##### **Research Procedure**

1. Studying all collected materials.
2. Examining the accuracy and creditability of all collected materials before reviewing.
3. Discussing and conferring with appointed advisor before concluding.

#### **Data Collection**

1. TCC : collected from relevant publications in the forms of text books, articles, electronic data, etc.
2. JCC : collected from Faculty of Law, Hokkaido University, Japan (online only due to the outbreak of Covid 19 pandemic) in the forms of text books, articles, electronic data, etc.
3. CISG : collected from relevant publications in the forms of text books, articles, electronic data, etc.

#### **Data Analysis**

1. Selecting provisions and/or legal principles of the revised JCC regarding contract law including sales and analyzing their compatibilities as guideline in developing Thai contract law regarding sales.
2. Selecting the same aspects under CISG and analyzing their compatibilities as guideline in developing Thai sales law.

3. Concluding the significance of Thailand in developing sales law by using the above selected JCC and CISG as guidelines.

## Chapter 4

### Data Analysis Result

As this research is aimed to study (1) the significance of the revised JCC as guideline in developing Thai contract law regarding sales (2) the significance of CISG as guideline in developing Thai sales law, and (3) the significance of developing Thai contract law regarding sales by using the revised JCC and CISG as guidelines, its data analysis results are thus divided into three following parts.

Part I: The result of the compatibility of the selected revised JCC regarding contract law including sales as guideline in developing TCC.

Part II: The result of the compatibility of the selected CISG regarding sales as guideline in developing TCC.

Part III: The result of the incompatibility of the selected TCC regarding contract law including sales and the significance of Thailand in developing Thai sales law.

#### **Part I: The result of the compatibility of the selected revised JCC regarding contract law including sales as guideline in developing TCC**

##### 1. The extinctive prescription period for claim

JCC is found to be compatible with the present trend of contract law including sales, being the basis of domestic commercial sales and international sales that Thailand needs development, more than TCC. Given the facts presented in Chapter 2, the difference of extinctive prescription periods between JCOMC (five years) and JCC (ten years) has been eliminated in the 2017 Reform (or, 'the revised JCC') and the rules on extinctive prescription was one major revision therein. The 2017 Reform shortened the time that claims may possibly be extinguished by prescription from ten years to five years which is in line with the comparative trend of adopting a shorter limitation period to promote the exercise of rights. Therefore, in the case of Thailand, this approach is of significance because TCC adopts ten years as the general rule of extinctive prescription which applies to both civil and commercial matters resulting which the revision of shortening extinctive prescription for commercial matters is one reason raised in the campaign of

separating civil and commercial matters in Thailand because ten years are criticized to be far too long for settling commercial deals.

Regarding sales, however, TCC adopts specific extinctive prescription for one year in the case of the so-called ‘Liability for Defect’ under Section 474 which states “[N]o action for liability for defect can be entered later than one year after the discovery of the defect.” To the writer, although Section 474 may be suitable to tackle the issue of liability for defect, particularly for commercial matters which needs speedy process, it should not be applied as the time limit on extinctive prescription but as the time limit on the buyer’s obligation to give notice of non-conformity which is not found under TCC similar to another revision made in 2017 Reform (see below).

## 2. The statutory interest rate

JCC is found to be compatible with current situations more than TCC before 11<sup>th</sup> April 2021 which is the effective date of Thailand’s revision over its statutory interest rate. After the starting of this work, Thailand, similarly to Japan (see details in Chapter 2), has also revised to overcome the situations by reducing the statutory interest rate to be three percent per annum but can be reviewed by the Ministry of Finance to be more or less than this rate every three years from the effective date of the revision (i.e. 11<sup>th</sup> April 2021), and such rate is applied to both civil and commercial matters alike. Under this work, as a consequence, this issue can be concluded that Thai law, to such an extent, has gone through a development which conforms to global trend as made in JCC.

## 3. The strict liability for latent defects and the buyer’s duty of notice

JCC is found to be compatible with global practices, such as CISG, and trade usages which are the basis of domestic commercial sales and international sales that Thailand needs development more than TCC. Given the facts presented in Chapter 2, under JCC, the strict liability for latent defects regarding contracts of sale prior to the 2017 Reform which was in the form of specific limitation periods provided in Articles 566(3) and 570 has also been revised to follow a provision in JCOMC (Article 526), i.e. the claim need not be lodged within one year of becoming aware of the non-conformity but the plaintiff must give notice of the discovered non-conformity within that period (i.e. one year period, Article 566 of the 2017 Reform) and currently the 2017 Reform does not distinguish between latent defects and apparent defects anymore.

Under TCC, as the only closet principles of strict liability for latent defects and the buyer's duty of notice are Sections 472-474 which are quite general and there are no express principles for 'latent defect' and 'the buyer's duty of notice', the including of the buyer's duty of notice in sales law whether it be non-commercial or commercial by blending it with the question of defective goods similar to Japan is of significant. Therefore, Section 474 has to be revised to provide that the claim need not be lodged within one year of becoming aware of the non-conformity but the buyer must give notice of the discovered non-conformity within one year thereof. This means such one-year period shall not be regarded as a limitation of bringing claims or 'prescription periods' but as a time limit to give notification of non-conformities. Moreover, Thai law has to follow JCC whereby, as a consequence of the buyer's failure of duty to give notice, the buyer shall lose its right to all remedies if the buyer fails to give notice of non-conformities.

#### 4. Case law: its compilation

Last but not least, given the facts presented in Chapter 2 relating hereto, Japanese laws including JCC are found to be opened up to blend the decisions of courts, or known as 'judge-made laws' into its traditional 'codified laws'. This approach may be different from other countries in the Civil Law legal system including Thailand but benefits are certainly gained. In developing Thai laws, therefore, authorities concerned have to consider this practice in Japan as one of their guidelines too.

## **Part II: The result of the compatibility of the selected CISG regarding sales as guideline in developing TCC**

1. The extinctive prescription period for claim and the buyer's duties to examine the goods and give notice of non-conformity

Following Part I above, CISG, if compared with JCC, is found to be even more compatible with global practices and trade usages, being the basis of domestic commercial sales and international sales that Thailand needs development, more than TCC. Given the facts presented in Chapter 2, under CISG, the closest principle of prescription period for claim is the rule of notice of non-conformity under Article 39 which basically provides that (1) the 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 a reasonable time after he has discovered or ought to have discovered it, and (2) the buyer loses the right to rely on a lack of

conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee. As similar principles have also been made in the revised JCC, these principles have to be considered in developing Thai laws too.

#### 2. The statutory interest rate

As presented in Chapter 2, even though Articles 78 and 84, CISG deals with circumstances that one party is entitled to interest on the other party, they still do not provide for a uniform interest rate due to historical reason at the time of CISG's drafting resulting which the statutory interest rate is not fixed in CISG and left for domestic laws. However, this indicates that the proper and suitable interest rate provided in any domestic law, including JCC and TCC, is of important. Further, it certainly conforms to recent revision made under JCC and TCC given the facts that they have just gone through the revision of their statutory interest rates to overcome current situations which is a good trend for all.

#### 3. The strict liability for latent defects

Following Part I above, on the same principle, CISG is found to be even much clearer than JCC and TCC respectively. Given the facts presented in Chapter 2, this can be seen in CISG, Article 36, first paragraph, which provides that the seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time. As a result, a court decision in one case is clearly seen to have followed this provision as it paves way for a court or tribunal to be able to hold the seller responsible for a lack of conformity which even does not exist at the time when the risk passes to the buyer but becomes apparent after that time if the seller cannot prove otherwise. This Article 36, however, relates to Article 38 whereby the CISG Advisory Council Opinion indicates that the period for examining for 'latent defect' commences when signs of the lack of conformity become evident. Thailand, therefore, has to consider taking all of these principles as example in revising TCC to be much clearer and more effective.

#### 4. Case law: its compilation

As also presented in Chapter 2 relating to the system of CISG's case law compilation which is certainly useful and can be used in variety purposes. In developing Thai sales laws, for instance, has to consider making use of information obtained therefrom as much as possible.



**Part III: The result of the incompatibility of the selected TCC regarding contract law including sales and the significance of Thailand in developing Thai sales law**

1. The ‘incompatibility’ - given all aspects presented in Part I and II above, the revised JCC and CISG, in comparison with TCC, are found to be more compatible with global practices and trade usages than TCC, except for, the statutory interest rate issue in which Thai law has just gone through a revision which is in line with the present trend found in JCC. The issues of extinctive prescription period for claim and strict liability for latent defects under TCC, accordingly, are still found not to be compatible with global practices and trade usages and thus needs revisions as mentioned. Case law and its integration into codified law is another issue that Thai legal culture is not so familiar with.

2. The ‘significance of developing Thai sales law’ - given all aspects presented in Part I and II above, the revised JCC and CISG, in comparison with TCC, are found to be more compatible with domestic commercial sales and international sales than TCC. It is of significant, therefore, that Thailand adds these aspects, where appropriate, in the developing of its sales law as proposed in Item 3, Chapter 1, ‘Research Significant’ as follows:

(1) revising the provisions of extinctive prescription period for claim and strict liability for latent defects, and

(2) integrating more case laws in codified laws.

## **Chapter 5**

### **Conclusion, Discussion and Recommendation**

Following the aims of this research as to study (1) the significance of the revised JCC as guideline in developing Thai contract law regarding sales (2) the significance of CISG as guideline in developing Thai sales law, and (3) the significance of developing Thai contract law regarding sales by using the revised JCC and CISG as guidelines, its conclusion, discussion and recommendation are thus presented hereunder.

#### **Conclusion**

In sum, with respect to the revised JCC and CISG, they are found to be compatible with global practices and trade usages which are the basis of domestic commercial sales and international sales that Thailand needs development, both in substances and practices, more than TCC. Particularly, on the aspects of the extinctive prescription period for claim, the strict liability for latent defects and the buyer's duty of notice, the statutory interest rate (that has just been recently revised in Thailand with similar trend adopted in the revised JCC), as well as, their utilization and compilation of case laws.

Given the fact that TCC is found to be incompatible, particularly, with domestic commercial sales and international sales which, not only, is due to the insufficiency of laws applying to those 3 types of sales, i. e. civil or non-commercial, commercial and international, but also, their incompatibilities in accommodating those three different types of sales which are primarily distinct in natures. In the course of this work, the writer has thus found the significances of the revised JCC and CISG, on the above aspects, and their utilization as guidelines in developing Thai sales law.

#### **Discussion**

Throughout the course of this work, the writer has come across a number of valuable legal materials under the revised JCC and CISG which suggest that they can be used as guidelines in developing the existing Thai laws regarding sales which are found to be insufficient and

compatible to accommodate all types of sales currently practiced in Thailand. This work, with great expectation, can be potentially used in the development of Thai sales law in the future.

### **Recommendation**

The recommendation of this work is the development of Thai sales law by using the selected revised JCC and CISG as guidelines, where appropriate, in either form of (1) separating domestic commercial sales from non-commercial sales, (2) enacting a new law applying to domestic commercial sales, and (3) acceding to CISG with the enactment of a new Thai sales law applying specifically to international sales.

## BIBLIOGRAPHY

- Abe, M. & Nottage, L. (2012). **“Japanese Law”**. in Elgar Encyclopedia of Comparative Law, Smits, J. ed., 2<sup>nd</sup> ed., Edward Elgar.
- Boonchalermvipas, S. (1997). **“Development of Legal Systems in Asia: Experiences of Japan and Thailand”**. Proceedings of the International Symposium, 6-7 November 1997, Bangkok, Thailand, Organized by Faculty of Law, Kyushu University (Japan) and Faculty of Law, Thammasat University (Thailand), Prachoom Chomchai Editor.
- \_\_\_\_\_. (1997). **“The History of Thai Legal System” (English Version)**. Proceedings of the International Symposium, 6-7 November 1997, Bangkok, Thailand, Organized by Faculty of Law, Kyushu University (Japan) and Faculty of Law, Thammasat University (Thailand), Prachoom Chomchai Editor.
- \_\_\_\_\_. (2009). **“The History of Thai Legal System” (Thai Version)**. Winyuchon Publication, 9<sup>th</sup> Edition.
- Ishikawa, H. (2013) **“Codification, Decodification, and Redecodification of the Japanese Civil Code”**. 10 U. Tokyo J.L. & Pol. 61.
- Isogawa, N. (1997). **“The Japanese Civil Code in the World of Legal Systems: Toward a Comparative Study on the Asian Civil Law”**. in Proceedings of the International Symposium on the Development of Legal Systems in Asia: Experiences of Japan and Thailand, organized by Faculty of Laws of Kyushu University (Japan) and Thammasat University (Thailand), 6-7 November 1997, Bangkok, Thailand, Phachoom Chomchai, Editor.
- Kraivixien, T. (1963). “Thai Legal History”, 49 **Woman Law**. J.6.
- Mukai, K. & Toshitani, N. (1967). “The Progress and Problems of Compiling the Civil Code in the Early Meiji Era”, **1 Law in Japan 25**.
- Nottage, L. (2019). **“Comparative Law in and for Japan” in Oxford Handbook of Comparative Law, forthcoming** (Reimann, M. and Zimmerman, R. eds., 2<sup>nd</sup> ed., Oxford University Press).

- Otori, T. (1971). **“Shokanshuho [Commercial Customary Law]”**. in Seminar on Commercial Law (General Provisions and Commercial Transactions).
- \_\_\_\_\_. et al., eds., Seirinshoinsha & Taylor, V. (1993). **“Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan”**. 19 Melbourne U. L. Rev.)
- Ruangvichathorn, J. (1996). Introductory Part of LL.M Dissertation on “English and Thai Approaches to Some Typical Remedy Clauses in International Sales Contracts Compared”, **University of Exeter**.
- \_\_\_\_\_. (2015). “The Japanese Civil Code: The forerunner of Thai Civil and Commercial Code”. **Sripatum University Press**.
- \_\_\_\_\_. (2020) “The Harmonization of ASEAN Sales Law: A Comparative Study with Thai Sales Law and CISG,”Thammasat Law Journal, 49<sup>th</sup> Year, 1<sup>st</sup> Edition.
- Sono, H., Nottage, L., Pardieck, A., Saigusa, K. (2019). Contract Law in Japan. **Kluwer Law International B.V.**
- Schwenzer, I. & Hachem, P. (2009). “The CISG - Successes and Pitfalls”, **American Journal of Comparative Law**, Vol. 57, No. 2.
- \_\_\_\_\_. Fountoulakis, C., Dimsey, M., (2012). **“International Sales Law: A guide to the CISG”**. HART Publishing.
- Zimmerman, R. (2010). **Comparative Foundations of a European Law of set-off and prescription 86**. Cambridge University Press.

## **APPENDIX**

## **APPENDIX**

**United Nations Convention on Contracts for the International Sale of Goods**

## **United Nations Convention on Contracts for the International Sale of Goods**

### **PREAMBLE**

*The States Parties to this Convention,*

Bearing in mind the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

*Have agreed as follows:*

### **Part I. Sphere of application and general provisions**

#### **CHAPTER I. SPHERE OF APPLICATION**

##### *Article 1*

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.



(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

#### *Article 2*

This Convention does not apply to sales:

(a) 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;

(b) by auction;

(c) on execution or otherwise by authority of law;

(d) of stocks, shares, investment securities, negotiable instruments or money;

(e) of ships, vessels, hovercraft or aircraft;

(f) of electricity.

#### *Article 3*

(1) Contracts 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) This 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 labour or other services.

#### *Article 4*

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold.

*Article 5*

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

*Article 6*

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

## CHAPTER II. GENERAL PROVISIONS

*Article 7*

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

*Article 8*

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

#### *Article 9*

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

#### *Article 10*

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

#### *Article 11*

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

*Article 12*

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

*Article 13*

For the purposes of this Convention “writing” includes telegram and telex.

**Part II. Formation of the contract***Article 14*

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

*Article 15*

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

*Article 16*

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

*Article 17*

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

*Article 18*

(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.

*Article 19*

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

*Article 20*

(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.

*Article 21*

(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.

*Article 22*

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

*Article 23*

A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

*Article 24*

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, 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.

### **Part III. Sale of goods**

#### **CHAPTER I. GENERAL PROVISIONS**

##### *Article 25*

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

##### *Article 26*

A declaration of avoidance of the contract is effective only if made by notice to the other party.

##### *Article 27*

Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

##### *Article 28*

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.



*Article 29*

(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

**CHAPTER II. OBLIGATIONS OF THE SELLER***Article 30*

The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

**Section I. Delivery of the goods and handing over of documents***Article 31*

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) if the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer;

(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place—in placing the goods at the buyer's disposal at that place;

(c) in other cases—in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

#### *Article 32*

(1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

#### *Article 33*

The seller must deliver the goods:

- (a) if a date is fixed by or determinable from the contract, on that date;
- (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
- (c) in any other case, within a reasonable time after the conclusion of the contract.

#### *Article 34*

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents,

if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

## **Section II. Conformity of the goods and third-party claims**

### *Article 35*

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity.

### *Article 36*

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

*Article 37*

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

*Article 38*

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

*Article 39*

(1) The 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 a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.

*Article 40*

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

*Article 41*

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

*Article 42*

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) in any other case, under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

#### *Article 43*

(1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

#### *Article 44*

Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

### **Section III. Remedies for breach of contract by the seller**

#### *Article 45*

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

(a) exercise the rights provided in articles 46 to 52;

(b) claim damages as provided in articles 74 to 77.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

#### *Article 46*

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

#### *Article 47*

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

*Article 48*

(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

*Article 49*

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(b) in respect of any breach other than late delivery, within a reasonable time:

(i) after he knew or ought to have known of the breach;



(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

#### *Article 50*

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

#### *Article 51*

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

#### *Article 52*

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

### **CHAPTER III. OBLIGATIONS OF THE BUYER**

#### *Article 53*

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

#### **Section I. Payment of the price**

#### *Article 54*

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

#### *Article 55*

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

*Article 56*

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

*Article 57*

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

- (a) at the seller's place of business; or
- (b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

*Article 58*

(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

*Article 59*

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

**Section II. Taking delivery**

*Article 60*

The buyer's obligation to take delivery consists:

- (a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and
- (b) in taking over the goods.

**Section III. Remedies for breach of contract by the buyer**

*Article 61*

(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:

- (a) exercise the rights provided in articles 62 to 65;
- (b) claim damages as provided in articles 74 to 77.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

*Article 62*

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

*Article 63*

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

*Article 64*

(1) The seller may declare the contract avoided:

(a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:

(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) in respect of any breach other than late performance by the buyer, within a reasonable time:

(i) after the seller knew or ought to have known of the breach; or

(ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

*Article 65*

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

**CHAPTER IV. PASSING OF RISK**

*Article 66*

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

*Article 67*

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is

bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

#### *Article 68*

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

#### *Article 69*

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

*Article 70*

If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

**CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER  
AND OF THE BUYER**

**Section I. Anticipatory breach and instalment contracts**

*Article 71*

(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 credit-worthiness; 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*

(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*

(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.

## **Section II. Damages**

#### *Article 74*

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

*Article 75*

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

*Article 76*

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

*Article 77*

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

### **Section III. Interest**

#### *Article 78*

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

### **Section IV. Exemptions**

#### *Article 79*

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

*Article 80*

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

**Section V. Effects of avoidance**

*Article 81*

(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

*Article 82*

(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) The preceding paragraph does not apply:

(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;

(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or

(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

*Article 83*

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.

*Article 84*

(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

(a) if he must make restitution of the goods or part of them; or

(b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

**Section VI. Preservation of the goods**

*Article 85*

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such

steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

*Article 86*

(1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination 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. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.

*Article 87*

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*

(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.

#### **PART IV. FINAL PROVISIONS**

##### *Article 89*

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

##### *Article 90*

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.

##### *Article 91*

(1) This Convention is open for signature at the concluding meeting of the United Nations Conference on Contracts for the International Sale of Goods and will remain open for signature by all States at the Headquarters of the United Nations, New York until 30 September 1981.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

#### *Article 92*

(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

(2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

#### *Article 93*

(1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.



(4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

#### *Article 94*

(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

#### *Article 95*

Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.

#### *Article 96*

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification

or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

*Article 97*

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under article 94 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

(5) A withdrawal of a declaration made under article 94 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

*Article 98*

No reservations are permitted except those expressly authorized in this Convention.

*Article 99*

(1) This Convention enters into force, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under article 92.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

(3) A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(4) A State party to the 1964 Hague Sales Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part II of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Sales Convention by notifying the Government of the Netherlands to that effect.

(5) A State party to the 1964 Hague Formation Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part III of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(6) For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the 1964 Hague Formation Convention or to the 1964 Hague Sales Convention shall not be effective until such denunciations as may be required on the part of those States in respect of the latter two Conventions have themselves become effective. The depositary of this Convention shall consult with the Government of the Netherlands, as the depositary of the 1964 Conventions, so as to ensure necessary coordination in this respect.

*Article 100*

(1) This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.

(2) This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1) (b) of article 1.

*Article 101*

(1) A Contracting State may denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at Vienna, this day of eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

II. explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods

This note has been prepared by the Secretariat of the United Nations Commission on International Trade Law for informational purposes; it is not an official commentary on the Convention.

### **Introduction**

1. The United Nations Convention on Contracts for the International Sale of Goods provides a uniform text of law for international sales of goods. The Convention was prepared by the United Nations Commission on International Trade Law (UNCITRAL) and adopted by a diplomatic conference on 11 April 1980.

2. Preparation of a uniform law for the international sale of goods began in 1930 at the International Institute for the Unification of Private Law (UNIDROIT) in Rome. After a long interruption in the work as a result of the Second World War, the draft was submitted to a diplomatic conference in The Hague in 1964, which adopted two conventions, one on the international sale of goods and the other on the formation of contracts for the international sale of goods.

3. Almost immediately upon the adoption of the two conventions there was widespread criticism of their provisions as reflecting primarily the legal traditions and economic realities of continental Western Europe, which was the region that had most actively contributed to their preparation. As a result, one of the first tasks undertaken by UNCITRAL on its organization in 1968 was to

enquire of States whether or not they intended to adhere to those conventions and the reasons for their positions. In the light of the responses received, UNCITRAL decided to study the two conventions to ascertain which modifications might render them capable of wider acceptance by countries of different legal, social and economic systems. The result of this study was the adoption by diplomatic conference on 11 April 1980 of the United Nations Convention on Contracts for the International Sale of Goods, which combines the subject matter of the two prior conventions.

4. UNCITRAL's success in preparing a Convention with wider acceptability is evidenced by the fact that the original eleven States for which the Convention came into force on 1 January 1988 included States from every geographical region, every stage of economic development and every major legal, social and economic system. The original eleven States were: Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, United States, Yugoslavia and Zambia.

5. As of 1 September 2010, 76 States are parties to the Convention. The current updated status of the Convention is available on the UNCITRAL website.<sup>1</sup> Authoritative information on the status of the Convention, as well as on related declarations, including with respect to territorial application and succession of States, may be found on the United Nations Treaty Collection on the Internet.<sup>2</sup>

6. The Convention is divided into four parts. Part One deals with the scope of application of the Convention and the general provisions. Part Two contains the rules governing the formation of contracts for the international sale of goods. Part Three deals with the substantive rights and obligations of buyer and seller arising from the contract. Part Four contains the final clauses of the Convention concerning such matters as how and when it comes into force, the reservations and declarations that are permitted and the application of the Convention to international sales where both States concerned have the same or similar law on the subject.

## **Part one. Scope of application and general provisions**

### **A. Scope of application**

7. The articles on scope of application indicate both what is covered by the Convention and what is not covered. The Convention applies to contracts of sale of goods between parties whose places of business are in different States and either both of those States are Contracting States or the rules of private international law lead to the law of a Contracting State. A few States have availed themselves of the authorization in article 95 to declare that they would apply the Convention only in the former and not in the latter of these two situations. As the Convention becomes more widely adopted, the practical significance of such a declaration will diminish. Finally, the Convention may also apply as the law applicable to the contract if so chosen by the parties. In that case, the operation of the Convention will be subject to any limits on contractual stipulations set by the otherwise applicable law.

8. The final clauses make two additional restrictions on the territorial scope of application that will be relevant to a few States. One applies only if a State is a party to another international agreement that contains provisions concerning matters governed by this Convention; the other permits States that have the same or similar domestic law of sales to declare that the Convention does not apply between them.

9. Contracts of sale are distinguished from contracts for services in two respects by article 3. A contract for the supply of goods to be manufactured or produced is considered to be a sale unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for their manufacture or production. When the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services, the Convention does not apply.

10. The Convention contains a list of types of sales that are excluded from the Convention, either because of the purpose of the sale (goods bought for personal, family or household use), the

nature of the sale (sale by auction, on execution or otherwise by law) or the nature of the goods (stocks, shares, investment securities, negotiable instruments, money, ships, vessels, hovercraft, aircraft or electricity). In many States some or all of such sales are governed by special rules reflecting their special nature.

11. Several articles make clear that the subject matter of the Convention is restricted to formation of the contract and the rights and duties of the buyer and seller arising from such a contract. In particular, the Convention is not concerned with the validity of the contract, the effect which the contract may have on the property in the goods sold or the liability of the seller for death or personal injury caused by the goods to any person.

### **B. Party autonomy**

12. The basic principle of contractual freedom in the international sale of goods is recognized by the provision that permits the parties to exclude the application of this Convention or derogate from or vary the effect of any of its provisions. This exclusion will occur, for example, if parties choose the law of a non-contracting State or the substantive domestic law of a contracting State as the law applicable to the contract. Derogation from the Convention will occur whenever a provision in the contract provides a different rule from that found in the Convention.

### **C. Interpretation of the Convention**

13. This Convention for the unification of the law governing the international sale of goods will better fulfil its purpose if it is interpreted in a consistent manner in all legal systems. Great care was taken in its preparation to make it as clear and easy to understand as possible. Nevertheless, disputes will arise as to its meaning and application. When this occurs, all parties, including domestic courts and arbitral tribunals, are admonished to observe its international character and to promote uniformity in its application and the observance of good faith in international trade. In particular, when a question concerning a matter governed by this Convention is not expressly settled in it, the question is to be settled in conformity with the general principles on which the Convention



is based. Only in the absence of such principles should the matter be settled in conformity with the law applicable by virtue of the rules of private international law.

#### **D. Interpretation of the contract; usages**

14. The Convention contains provisions on the manner in which statements and conduct of a party are to be interpreted in the context of the formation of the contract or its implementation. Usages agreed to by the parties, practices they have established between themselves and usages of which the parties knew or ought to have known and which are widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned may all be binding on the parties to the contract of sale.

#### **E. Form of the contract**

15. The Convention does not subject the contract of sale to any requirement as to form. In particular, article 11 provides that no written agreement is necessary for the conclusion of the contract. However, if the contract is in writing and it contains a provision requiring any modification or termination by agreement to be in writing, article 29 provides that the contract may not be otherwise modified or terminated by agreement. The only exception is that a party may be precluded by his conduct from asserting such a provision to the extent that the other person has relied on that conduct.

16. In order to accommodate those States whose legislation requires contracts of sale to be concluded in or evidenced by writing, article 96 entitles those States to declare that neither article 11 nor the exception to article 29 applies where any party to the contract has his place of business in that State.

## **Part two. Formation of the contract**

17. Part Two of the Convention deals with a number of questions that arise in the formation of the contract by the exchange of an offer and an acceptance. When the formation of the contract takes place in this manner, the contract is concluded when the acceptance of the offer becomes effective.

18. In order for a proposal for concluding a contract to constitute an offer, it must be addressed to one or more specific persons and it must be sufficiently definite. For the proposal to be sufficiently definite, it must indicate the goods and expressly or implicitly fix or make provisions for determining the quantity and the price.

19. The Convention takes a middle position between the doctrine of the revocability of the offer until acceptance and its general irrevocability for some period of time. The general rule is that an offer may be revoked. However, the revocation must reach the offeree before he has dispatched an acceptance. Moreover, an offer cannot be revoked if it indicates that it is irrevocable, which it may do by stating a fixed time for acceptance or otherwise. Furthermore, an offer may not be revoked if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

20. Acceptance of an offer may be made by means of a statement or other conduct of the offeree indicating assent to the offer that is communicated to the offeror. However, in some cases the acceptance may consist of performing an act, such as dispatch of the goods or payment of the price. Such an act would normally be effective as an acceptance the moment the act was performed.

21. A frequent problem in contract formation, perhaps especially in regard to contracts of sale of goods, arises out of a reply to an offer that purports to be an acceptance but contains additional or different terms. Under the Convention, if the additional or different terms do not materially alter the terms of the offer, the reply constitutes an acceptance, unless the offeror without

undue delay objects to those terms. If he does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

22. If the additional or different terms do materially alter the terms of the contract, the reply constitutes a counter-offer that must in turn be accepted for a contract to be concluded. Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or settlement of disputes are considered to alter the terms of the offer materially.

### **Part three. Sale of goods**

#### **A. Obligations of the seller**

23. The general obligations of the seller are to deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention. The Convention provides supplementary rules for use in the absence of contractual agreement as to when, where and how the seller must perform these obligations.

24. The Convention provides a number of rules that implement the seller's obligations in respect of the quality of the goods. In general, the seller must deliver goods that are of the quantity, quality and description required by the contract and that are contained or packaged in the manner required by the contract. One set of rules of particular importance in international sales of goods involves the seller's obligation to deliver goods that are free from any right or claim of a third party, including rights based on industrial property or other intellectual property.

25. In connection with the seller's obligations in regard to the quality of the goods, the Convention contains provisions on the buyer's obligation to inspect the goods. He must give notice of any lack of conformity with the contract within a reasonable time after he has discovered it or ought to have discovered it, and at the latest two years from the date on which the goods were

actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.

### **B. Obligations of the buyer**

26. The general obligations of the buyer are to pay the price for the goods and take delivery of them as required by the contract and the Convention. The Convention provides supplementary rules for use in the absence of contractual agreement as to how the price is to be determined and where and when the buyer should perform his obligations to pay the price.

### **C. Remedies for breach of contract**

27. The remedies of the buyer for breach of contract by the seller are set forth in connection with the obligations of the seller and the remedies of the seller are set forth in connection with the obligations of the buyer. This makes it easier to use and understand the Convention.

28. The general pattern of remedies is the same in both cases. If all the required conditions are fulfilled, the aggrieved party may require performance of the other party's obligations, claim damages or avoid the contract. The buyer also has the right to reduce the price where the goods delivered do not conform with the contract.

29. Among the more important limitations on the right of an aggrieved party to claim a remedy is the concept of fundamental breach. For a breach of contract to be fundamental, it must result in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the result was neither foreseen by the party in breach nor foreseeable by a reasonable person of the same kind in the same circumstances. A buyer can require the delivery of substitute goods only if the goods delivered were not in conformity with the contract and the lack of conformity constituted a fundamental breach of contract. The existence of a fundamental

breach is one of the two circumstances that justifies a declaration of avoidance of a contract by the aggrieved party; the other circumstance being that, in the case of non-delivery of the goods by the seller or non-payment of the price or failure to take delivery by the buyer, the party in breach fails to perform within a reasonable period of time fixed by the aggrieved party.

30. Other remedies may be restricted by special circumstances. For example, if the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A party cannot recover damages that he could have mitigated by taking the proper measures. A party may be exempted from paying damages by virtue of an impediment beyond his control.

#### **D. Passing of risk**

31. Determining the exact moment when the risk of loss or damage to the goods passes from the seller to the buyer is of great importance in contracts for the international sale of goods. Parties may regulate the issue in their contract either by an express provision or by the use of a trade term such as, for example, an INCOTERM. The effect of the choice of such a term would be to amend the corresponding provisions of the CISG accordingly. However, for the frequent case where the contract does not contain such a provision, the Convention sets forth a complete set of rules.

32. The two special situations contemplated by the Convention are when the contract of sale involves carriage of the goods and when the goods are sold while in transit. In all other cases the risk passes to the buyer when he takes over the goods or from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery, whichever comes first. In the frequent case when the contract relates to goods that are not then identified, they must be identified to the contract before they can be considered to be placed at the disposal of the buyer and the risk of their loss can be considered to have passed to him.

### **E. Suspension of performance and anticipatory breach**

33. The Convention contains special rules for the situation in which, prior to the date on which performance is due, it becomes apparent that one of the parties will not perform a substantial part of his obligations or will commit a fundamental breach of contract. A distinction is drawn between those cases in which the other party may suspend his own performance of the contract but the contract remains in existence awaiting future events and those cases in which he may declare the contract avoided.

### **F. Exemption from liability to pay damages**

34. When a party fails to perform any of his obligations due to an impediment beyond his control that he could not reasonably have been expected to take into account at the time of the conclusion of the contract and that he could not have avoided or overcome, he is exempted from the consequences of his failure to perform, including the payment of damages. This exemption may also apply if the failure is due to the failure of a third person whom he has engaged to perform the whole or a part of the contract. However, he is subject to any other remedy, including reduction of the price, if the goods were defective in some way.

### **G. Preservation of the goods**

35. The Convention imposes on both parties the duty to preserve any goods in their possession belonging to the other party. Such a duty is of even greater importance in an international sale of goods where the other party is from a foreign country and may not have agents in the country where the goods are located. Under certain circumstances the party in possession of the goods may sell them, or may even be required to sell them. 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 and must account to the other party for the balance.

#### **Part Four. Final clauses**

36. The final clauses contain the usual provisions relating to the Secretary- General as depositary and providing that the Convention is subject to ratification, acceptance or approval by those States that signed it by 30 September 1981, that it is open to accession by all States that are not signatory States and that the text is equally authentic in Arabic, Chinese, English, French, Russian and Spanish.

37. The Convention permits a certain number of declarations. Those relative to scope of application and the requirement as to a written contract have been mentioned above. There is a special declaration for States that have different systems of law governing contracts of sale in different parts of their territory. Finally, a State may declare that it will not be bound by Part II on formation of contracts or Part III on the rights and obligations of the buyer and seller. This latter declaration was included as part of the decision to combine into one convention the subject matter of the two 1964 Hague Conventions.

#### **Complementary texts**

38. The United Nations Convention on Contracts for the International Sale of Goods is complemented by the United Nations Convention on the Limitation Period in the International Sale of Goods, 1974, as amended by a Protocol in 1980 (the Limitation Convention). The Limitation Convention establishes uniform rules governing the period of time within which a party under a contract for the international sale of goods must commence legal proceedings against another party to assert a claim arising from the contract or relating to its breach, termination or validity. The amending Protocol of 1980 ensures that the scope of application of the Limitation Convention is identical to the one of the United Nations Convention on Contracts for the International Sale of Goods.

39. The United Nations Convention on Contracts for the International Sale of Goods is also complemented, with respect to the use of electronic communications, by the United Nations

Convention on the Use of Electronic Communications in International Contracts, 2005 (the Electronic Communications Convention). The Electronic Communications Convention aims at facilitating the use of electronic communications in international trade by assuring that contracts concluded and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents. The Electronic Communications Convention may help to avoid misinterpretation of the CISG that might occur, for example, when a State has lodged a declaration mandating the use of the traditional written form for contracts for the international sale of goods. It may also promote the understanding that the “communication” and/or “writing” under the CISG should be construed so as to include electronic communications. The Electronic Communications Convention is an enabling treaty whose effect is to remove those formal obstacles by establishing the requirements for functional equivalence between electronic and traditional written form.



## CURRICULUM VITAE

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