

# Contents

<i>Preface</i>	<i>page xi</i>
<b>1 The CISG: history, methodology, and construction</b>	<b>1</b>
I The CISG as a set of commercial default rules	1
II The history and structure of the CISG	4
III CISG methodology and the limits of internationality	10
IV The homeward trend in interpretation	17
V Gap filling	20
<b>2 The scope of the CISG</b>	<b>24</b>
I Introduction	24
II The CISG’s application under Article 1(1)(a)	25
A The requirement of internationality	26
1 Contracting parties and their places of business	27
2 Multiple places of business	29
3 The limitation of apparent internationality	31
B Territorial limitations on Article 1(1)(a)’s scope:	
Article 93’s reservation	32
C The CISG’s application under Article 1(1)(b)	36
D Article 95 reservation: a problem of interpretation	38
III Other scope issues	43
A What is a sale of goods?	43
1 Bailment for services and Article 3(1)	46
2 Information technology and “goods”	49
3 Barter and other countertrade transactions	55
4 Service and hybrid contracts	60
5 Framework agreements: distribution and other contracts	62



B	Opting out of and into the CISG	65
1	Opting out	65
2	Opting in	73
IV	Excluded issues	75
A	Liability for personal injury	75
B	Article 4's limited range	75
C	Article 4(a) and (b)'s express exclusion: validity and title in the goods	78
<b>3</b>	<b>Contract formation</b>	<b>83</b>
I	Statute of frauds and Article 12	83
II	General rules of offer and acceptance	86
A	Effectiveness of the offer and acceptance	86
B	Revocation of an offer stating a time for acceptance	93
C	Battle of the forms and Article 19	94
1	The scope of Article 19	97
2	The incorporation of standard terms and conditions	98
D	Open terms	105
1	Price, quantity, and intent	105
2	The Article 55 conundrum	105
III	Contract modification	110
A	The "agreement" requirement	110
B	Good faith modification	112
C	Contractual restrictions on modifications	114
D	Opting out of Article 29(2)	117
<b>4</b>	<b>Implied terms and interpretation</b>	<b>119</b>
I	Trade usage, course of dealing, and course of performance	120
A	Identifying the usage	120
B	Incoterms as trade usages	123
C	Other trade usages	125
D	Ignorance of trade usage	127
E	The relationship among trade usage, course of performance, and course of dealing	128
II	Good faith in international trade	131
A	Good faith as an implied term	131
B	Good faith in the courts	137
C	Good faith as a default rule	145
III	Open terms	147
A	Open price terms	147
B	Open quantity terms	147
IV	Parol evidence and interpretation	149
A	The parol evidence rule: retention or rejection?	149
B	Contracting into the parol evidence rule	153



<b>5</b>	<b>Performance</b>	<b>155</b>
I	The delivery obligation	155
A	What constitutes delivery?	155
B	Time of delivery	159
C	Place and currency of payment	160
II	Examination of goods	163
A	“As short a period as is practicable”	163
B	Extent of examination	167
C	Giving notice of nonconformity	168
1	Time of giving notice	168
2	Specificity of the notice	170
3	Late notice and prejudice	174
D	Consequences of failure to give notice: contract and tort	175
E	The two-year cutoff period	178
F	Exceptions to buyer’s loss of rights	179
1	Seller’s knowledge under Article 40	179
2	Excuse of late notice under Article 44	181
III	Suspending performance	183
A	Anticipatory repudiation	183
B	Prospective nonperformance	184
1	After the conclusion of the contract	187
2	“Becomes apparent”	188
3	“Will not perform”	191
4	“Substantial part of its obligations”	191
IV	Avoidance and its consequences	193
A	General principles	193
B	Avoidance: grounds and requirements	195
1	Grounds of avoidance: fundamental breach	196
2	Notice of avoidance	197
C	Cure and fundamental breach	200
D	Grounds of avoidance: additional time for performance	205
<b>6</b>	<b>Liability for nonconformity</b>	<b>211</b>
I	Introduction	211
II	Requirements of conforming goods	212
A	The function of “warranties” of quality	212
B	Characteristics “required by the contract”	215
1	Extrinsic evidence to determine contract terms	216
2	Opinions and other representations not included as contractual obligations	217
C	Scope of nonconformity	219
D	Nonconformity or non-delivery?	220



III	Fitness of goods for their ordinary uses	222
A	Compliance with regulatory standards in the jurisdiction of use	225
B	The scope of “ordinary use”	228
C	Average quality, reasonable quality, or merchantable quality	229
IV	Fitness of goods for any particular purpose known to the seller	232
A	Scope and justification	232
B	The scope of “particular purpose”	234
C	Proving reliance on a particular purpose	235
V	Conformity to samples and models	236
VI	Relationship between Article 35(1) and Article 35(2)	239
VII	The requirement of adequate packaging	242
A	The “usual” manner of packaging	243
B	“Adequate” packaging	245
C	Relationship of packaging requirements to risk of loss	247
VIII	Article 35(3)’s limitation on liability	247
A	“Could not have been unaware”	247
B	The limited application of Article 35(3)	250
C	Nonconformity involving fraud	252
IX	Obligations to deliver goods free from third-party rights and claims	253
A	Conflicting rights and claims to the goods	253
B	Conflicting rights and claims based on industrial property or intellectual property	256
X	Disclaimers of liability for nonconformity	257
XI	Burden of proof for nonconformity	262
<b>7</b>	<b>Risk of loss</b>	<b>269</b>
I	Consequences of passing the risk of loss	269
A	“Act or omission” of the seller	271
B	Loss or damage	275
II	Contracting for passage of risk: Incoterms rules	276
III	Risk of loss rules under the CISG	279
A	The residual rule of Article 69	279
1	Risk of loss without third-party transportation	279
2	Risk of loss when buyer obtains goods from party other than seller	281
B	Passage of risk in transportation cases	283
1	Shipment contracts	283
2	Transportation to a particular place	284
C	Risk of loss of goods sold in transit	286
1	Conclusion of the contract	286
2	Retroactive transfer of risk to the ultimate buyer	286
IV	Burden of proof in risk of loss cases	288
V	Effect of breach of contract on risk of loss	290



<b>8</b>	<b>Exemption from performance</b>	<b>293</b>
I	Introduction: legal consequences of changed circumstances	293
II	An impediment beyond the control of the party seeking exemption	295
	A The scope of "impediment"	295
	B "Beyond his control"	297
	C "Hardship" as an impediment	302
	D Hardship exemption: case law and assessment	306
III	Impediments and defective goods	315
	A The availability of exemption	315
	B Judicial treatment of delivery of defective goods	318
IV	Foreseeability of the impediment	320
	A The foreseeability standard	321
	B Finding foreseeability	322
V	Avoiding the impediment and overcoming its consequences	325
VI	Article 79(2): failure of a third party to perform	327
	A The narrow construction of "third party"	328
	B Third parties covered by Article 79(2)	330
VII	Reliance on Article 79 by buyers	331
VIII	Effects of satisfying the Article 79 exemption	332
	A Effects on rights of parties	332
	B Effect of exemption on payment clauses	334
IX	Burden of proof in exemption cases	335
X	Contracting around Article 79	336
<b>9</b>	<b>Remedies</b>	<b>338</b>
I	Non-avoidance-based remedies	339
	A Article 74's general rule for recoverable loss	339
	1 The limitation of foreseeability	340
	2 Calculation of loss under Article 74	345
	3 Consequential and incidental damages	346
	4 Burden of proof	347
	5 Lost profits and the standard for recovery	348
	6 Lost volume sellers	351
	7 Litigation costs	352
	8 Interest	355
	B Reduction of the price	359
	1 Conditions of price reduction	361
	2 Calculation of price reduction	363
	3 Price reduction to zero: worthless goods	364
	4 Damages versus price reduction	366
	5 Evaluation	368



C	Specific relief	369
1	Article 28's limitation on specific relief	371
2	Specific relief in arbitration	375
II	Avoidance-based remedies	377
A	Substitute performance measure: Article 75	378
B	Article 75's requirements	379
C	Market price measure: Article 76	383
1	"Taking over" the goods	385
2	Establishing current price	387
D	Restitution following avoidance	388
1	The place and costs of restitution	390
2	The benefits of restitution of goods	394
III	Remedy stipulations, remedy limitations, and damage exclusions	395
	<i>Appendix 1 The United Nations Convention on Contracts for the International Sale of Goods</i>	401
	<i>Appendix 2 CISG status table</i>	429
	<i>Table of cases</i>	433
	<i>Subject matter index</i>	445