

# **The United Nations Convention on Contracts for the International Sale of Goods (1980): Thailand's Perspectives**

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# Topics Presented

- Chronicles of Attempts by Thailand towards Ratification of the CISG
- Remarks on Whether to Adopt the CISG by Thailand
- Provisions of the CISG Conceptually Inconsistent with Thai Law and Needing Immediate Awareness by Thai Lawyers and Traders

# Chronicles of Attempts by Thailand towards Ratification of the CISG

- **First Move:** Resolution of the Council of Ministers of 30<sup>th</sup> December 1997 (Mandating Reform of International Trade Law of Thailand)
- **Next Moves:** Studies Conducted by the Ministry of Commerce and by the Office of the Council of State
- **More Recent Moves:** Study and Preparation of a Draft Law by the Office of the Law Reform Commission of Thailand
- **Current Move:** Consideration of the Draft by an *ad hoc* Committee at the Office of the Council of State

## First Move: Resolution of the Council of Ministers of 30<sup>th</sup> December 1997

- Approving the recommendation of the Ministry of Foreign Affairs for Revision and Reform of International Trade Law of Thailand
  - *Instructing the Office of the Council of States and the Ministry of Commerce to study preparation of law on international sale of goods along the lines of the United Nations Convention on Contracts for the International Sale of Goods (CISG)*

Next Moves:  
Studies by the Ministry of  
Commerce  
and the Office of the  
Council of State

## Studies by the Ministry of Commerce and the Office of the Council of State

- (1) **24<sup>th</sup> March 1998**: Appointment by the Ministry of Commerce of a **Committee** for Considering Revision and Reform of International Trade Law of Thailand Along the Lines of the CISG
- (2) **14<sup>th</sup> May 1998**: Appointment by the Office of the Council of State of a **Working Group** for Considering Reform of International Trade Law of Thailand
  - *Members from public agencies*
  - *Members from the private sector*
  - *Members from the Academia*

## Studies by the Ministry of Commerce and the Office of the Council of State (Continued)

- **23<sup>rd</sup> December 1998:** Cancellation by the Ministry of Commerce of its Appointment of the Committee for Considering Revision and Reform of International Trade Law of Thailand Along the Lines of the CISG, in the avoidance of duplication of work carried out by the Office of the Council of State

## Studies by the Ministry of Commerce and the Office of the Council of State (Continued)

- **17<sup>th</sup> August 2001:** Appointment by the Law Reform Commission (at the Office of the Council of State) of a Sub-committee in Charge of a **Study Project on International Sale of Goods Law**
- **18<sup>th</sup> September 2001:** Approval by the Council of Ministers of a Study Project on International Sale of Goods Law: to be Conducted by the Law Reform Commission (at the Office of the Council of State)





Study Project on  
“International Sale of Goods Law”  
Conducted by the Law Reform  
Commission (at the Office of the  
Council of State)

# Crucial Facts About the Study Project by the Office of the Council of State

- Funded by the Revolving Fund for the Law Reform
- **Purposes:**
  - *Exploring desirability of Thailand Joining the CISG*
  - *Studying international sales laws of CISG members and their approaches to the implementation of the CISG as domestic law*
  - *Studying amendment to existing law or preparation of new legislation in Thailand, where joining the CISG is found desirable.*

# Crucial Facts About the Study Project by the Office of the Council of State (Continued)

- Engaging researchers to conduct research on:
  - Foreign laws on international sales of goods
    - UK
    - USA
    - France
    - Australia
    - Singapore

December 2003
  - Desirability of reservations under the CISG

August 2006

## General Conclusions by Researchers

- **Compatibility with Domestic Rules:**
  - Thai law is, by and large, consonant with the rules in the CISG. Only certain provisions of the CISG have no parallel recognition in Thai law.
- **Adoption of the CISG:**
  - Almost all countries (as selected by the research project) have adopted the CISG, with a view to gaining international recognition amongst traders.

## General Conclusions of Researchers (Continued)

- **Forms of Transformation of the CISG as Domestic Law (in countries applying the “dualism” principle).**
  - 2 ways of transformation:
    - (1) Enacting an “Implementing Act”, annexing the original texts of the CISG to the Act. (In Thailand, this involves official translation of the texts of the CISG into the Thai language.)
    - (2) Drafting specific law with contents corresponding to those of the CISG.
  - Several countries (as selected by the Research Project) have pursued the track in (1) above.

## Some Remarks of the Working Group Following Its Perusal of the Research Conducted

- **Writing Requirement**

- Thailand should declare a reservation in response to the “Freedom-from-Form” conception under Article 11 of the CISG, as Thai sale law still subjects certain sales to the “writing” or “written evidence” requirement.


- **Modified Acceptance**

- The rule (as contained in Article 19, CISG) that a modified acceptance operates as an acceptance if the modified part does not materially alter the terms of the offer is too vague.

- **Interpretation of the provisions of the CISG**

- The Working Group doubted how to interpret some provisions of the CISG → See examples in the next slide.

## An Example of the Working Group's Doubt as to Interpretation of Provisions of the CISG

- The Working Group doubted whether, if the seller fails to perform any of his obligations, the buyer may exercise rights under Article 45 (1)(a) and (b) simultaneously.
  - *But, in fact, this doubt is a result of conceptual misunderstanding of the Working Group: see explanations in the next 3 slides.* 

# An Overview of Remedies Available to the Buyer: Article 45

## 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.



# Remedies Available to the Buyer

- Demanding specific performance (Article 46 (1))
- Demanding delivery of substitute goods (Article 46 (2))
- Demanding repair of the lack of conformity (Article 46 (3))
- Giving *nachfrist* notice demanding performance (Article 47)
- Claiming damages after a cure by the seller (Article 48)
- Avoiding the contract (Article 49)
- Demanding price reduction (Article 50)
- Exercising remedies in case of “partial non-performance” (Article 51)
- Refusing to take early delivery or excess quantity (Article 52)
- Claiming damages for any loss in general (Articles 74-77)

# The Buyer's Right to Claim Damages: General Characters

- The right to claim damages is the remedy that is **always available** to the buyer if a breach of contract has caused the buyer any damage.
- The right to claim damages can be invoked **along with any other remedy** in order to compensate for losses that occur despite that other remedy.
- The amount of damages, however, depends on the other remedy to which the buyer has resorted.
- The CISG lays down rules governing damages in articles 74-77.

# Remarks on Whether to Adopt the CISG by Thailand

- Thailand should adopt the CISG:
  - (1) Gaining confidence of foreign traders
  - (2) Unsuitability of certain provisions in Thai domestic law on sale e.g.
    - ✓ Modified Acceptances
    - ✓ Merchantability (Fitness for Purposes)
  - (3) On thorough perusal, most rules in the CISG do not substantially differ from Thai law.
    - ✓ Some rules not found in Thai law are indeed advantageous (e.g. the 'modified acceptance' provision)
    - ✓ Some rules by which Thai traders may be at disadvantage (e.g. loss of the right to rely on the lack of conformity – Art. 39) may simply be contracted out by Thai traders.

# Approaches to the Modified Acceptance

- **Traditional Approach:**



- **“Material Alteration” Approach**



# Approaches to the Modified Acceptance

## - Traditional Approach:

- Resorting to the *“mirror image”* rule
- Finding out who *‘fires the last shot’* (i.e. makes the last counter-offer). One who ‘fires the last shot’ wins the battle.
  - ✓ A contract is formed on the terms of the party who makes the last counter-offer, which is later accepted by the other.



# The “Modified Acceptance” Concept in the CISG

## ARTICLE 19

(1) A reply to an offer which purports to be an acceptance but contains additions, limitation 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.

# 'Material Alteration' Approach to the Modified Acceptance

## PARTY A's Proposals

- Clause 1
- Clause 2
- Clause 3
- Clause 4

## PARTY B'S Terms

- Clause 1 (as in A's proposal)
- Clause 2 (as in A's proposal)
- Clause 3 (as in A's proposal)
- Clause 4 (as in A's proposal)
- Clause 5 (additional term not materially altering the offer)

Acceptance (not a counter-offer)

**A contract is formed, with Clauses, 1,2,3,4 and 5.**

(But, certain jurisdictions use the 'knock-out' rule – holding that a contract is formed on both parties' identical terms.)

# “Merchantability” Notions



***Fitness for Purposes: Goods must be fit for purposes for which they are bought.***

- Ordinary Purposes:
  - ✓ The goods must be fit for the purposes for which such goods would ordinarily be used.
- Particular Purposes:
  - ✓ The goods must be fit for the purposes made known to the seller.



# Implied Terms as to “Merchantability” (Fitness for Purposes) in the CISG

- **Fitness for Ordinary Purposes**

- The goods are fit for the purposes for which goods of the same description would ordinarily be used: (Article 35(2) (a)).

- **Fitness for Particular Purposes**

- The goods are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract: (Article 35(2) (b)).

## Article 35 (2)

(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 judgment;

**Does section 472 of the Civil and Commercial Code establish the “merchantability” notion?**

**Section 472.** In case of **any defect** in the property sold which impairs either its value or **its fitness for ordinary purposes, or for the purposes of the contract**, the seller is liable.

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

# Article 35 (2)(a) and (b) of the CISG and section 472 of Thailand's CCC Compared

## Article 35 (2)(a) and (b), CISG

- Fit for the purposes for which goods of the same description would ordinarily be used
- Fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract

## Section 472, CCC of Thailand

- “any defect in the property sold which impairs either its value or its fitness for ordinary purposes or for the purposes of the contract...”

## Provisions of the CISG Conceptually Inconsistent with Thai Law and Needing Immediate Awareness by Thai Lawyers and Traders

- “Cure” of Any Lack of Conformity (see slides 30-33.)
- Buyer’s Loss of Right to Rely on a Lack of Conformity in case of failure to give the seller notice of the Lack of Conformity (see slides 34-35.)
- Partial Avoidance (Termination) of the Contract
  - *Article 51 (Avoidance Following Partial non-performance) See Slides 36-37.*
  - *Article 73 (1) (Avoidance of A Single Instalment in Case of an Instalment Contract) See Slide 38.*

# The Seller's Right to Cure a Lack of Conformity

- Cure Before the Date for Delivery (in case of the seller's early delivery) → Article 37
- Cure After the Date for Delivery → Article 48

Generally, the seller's proposal to cure prevents the buyer's exercise of the right to terminate (avoid) the contract. → \*\*\**'PRESERVATION OF THE CONTRACT'*\*\*\*

# Cure Before the Date for Delivery

## 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.**

# Cure After the Date for Delivery

## 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.**



# Consequences of the Seller's Exercise the Right to Cure

- Once the seller exercises the right to cure the lack of conformity, the buyer may **NOT**:
  - (1) exercise the right to avoid the contract.
    - **Reasons Advanced:**
      - ✓ *The provision of the right to cure by the seller is an attempt to “preserve the contract”.*
      - ✓ *(With respect to avoidance on the ground of a fundamental breach): When a cure is possible, the lack of conformity in question is NOT a fundamental breach.*
  - (2) claim a reduction of the price.

# Buyer's Loss of Right to Rely on a Lack of Conformity

- The buyer is required to notify the seller of the lack of conformity in question.
  - **Rationales:**
    - ✓ *To give the seller the information needed to determine how to proceed in general with respect to the buyer's claim*
    - ✓ *To facilitate the seller's exercise of the right to cure the lack of conformity contended by the buyer.*
- **Consequence of failure to give notice**
  - The buyer *loses the right to rely on the lack of conformity of the goods.* [right to claim damages, right to demand a repair, right to reduce the price, right to avoid the contract]

# 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.

# The Buyer's Exercise of Remedies in case of "Partial Non-Performance"

## 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.

- **Coverage:** 2 cases of "partial non-performance"
  - The seller delivers only a part of the goods.
    - e.g. The seller delivers only 900 tons of rice when the contract requires 1,000 tons.
  - Only a part of the goods delivered is in conformity with the contract.
    - e.g. The seller delivers 1,000 tons of rice (the required quantity) but only 900 tons conform to the contractual quality.

## The Buyer's Exercise of Remedies in case of "Partial Non-Performance" (continued)

- **Consequence:** The buyer may apply remedies only to the missing part or the non-conforming part.
- **Example:**
  - *The contract requires the seller to deliver 1,000 tons of jasmine rice.*
  - *The seller has delivered only 900 tons of jasmine rice.*
  - *The buyer has given nachfrist notice demanding the seller to deliver 100 missing tons within one month.*
  - *At the expiration of the 1-month additional period, the seller now fails to tender delivery.*
  - ***The buyer may rely on article 49 (1)(b) to avoid the contract only in respect of the missing 100 tons. → The rest of the contract remains intact.\*\*\****
- **Remark:** In essence, it is "***partial avoidance***", which is not available in domestic laws of many jurisdictions.

# Avoidance as to a Single Instalment in an Instalment Contract

- The CISG entitles a party to declare a contract avoided as to a single instalment if the other party commits a fundamental breach in respect of that instalment.

Art. 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.”



ขอบคุณครับ

Thank you

Merci



Arigatou (ありがとうございます。)

Kamsahamnida (감사합니다)

Xie Xie (谢谢)

See you electronically at [pinai@tu.ac.th](mailto:pinai@tu.ac.th)