# BLOCK-3

# BUSINESS CONTRACTS

**Unit 5** **General Principles of Contracts**

**Unit 6** **International Contracts of Sale**

ignou
THE PEOPLE'S
UNIVERSITY

# UNIT 5 GENERAL PRINCIPLES OF CONTRACTS

**Objectives**

After studying this Unit, you should be able to:

- Identify different Sources of Mercantile Law
- Understand the process of Formation of Contracts
- Explain the completion of Contracts and Jurisdiction
- Appreciate essentials of Valid Contract and Performance of the Contracts
- Describe the consequences of Breach of Contract

**Structure**



## 5.1 INTRODUCTION

Every human being owes certain obligations to his family members and society. These obligations fall under the Law of obligations that covers rights and duties arising between the individuals which are collateral in nature. The concept of obligations existed since the ancient period where the word of mouth was considered to create a bond. In other words, people will never leave from their words i.e., promises. The concept of primary obligations is one of humanity's greatest moral inventions. Wherever the promises are breached they will be brought before the panch system for resolving the dispute between the parties.

The law that is applicable to mercantile transactions is called the mercantile law which includes General Contracts, Special Contracts and the law of Insolvency and Bankruptcy. This law relates to the rights and obligations arising out of mercantile transactions between traders or merchants. The movable property connected with mercantile is of two types namely ***Choose in possession*** and ***Choose in action***. If person 'A' had a ring on his hand which is stolen by a thief, 'A' is a person having ***choose in possession***. In other words, it means an Individual who had legal possession of any property of movable nature and physically visible.

Person 'A' can resist the thief from snatching and recover it in a court of law. Recovering the amount due on a promissory note is considered *as* ***choose in action***. This right of the payee or holder is not visible as compared to the ring. Further, it must also be noted that the law of Contracts is applicable even to non-mercantile transactions.

## 5.2 SOURCES OF MERCANTILE LAW

The main sources of Mercantile Law in England are: The Law of Merchant or *Lex Mercatoria;* Acts of Parliament or Statutes; Common Law of England and Principles of Equity. *Lex Mercatoria* is the set of customs and usages which are recognised and enforced between merchants and part of the *Common Law of England*. The second one is the sanction of the State and most superior and powerful source and it overrides any rule of Common Law of Equity. The phrase common law is used to denote the law that can be based on judicial pronouncements delivered from generations. King Henry II in 12th Century established the Common Law Courts or King's Courts which were also known as Chancery or Equity Courts. Equity courts were not bound to grant relief in every case, as it was always a matter in discretion and governed by certain maxims. There are two maxims which the courts of Equity act: "*he who seeks equity must do equity"* and *"he who comes to Equity must come with clean hands."*

Prior to the Indian Contract Act, 1872, the English Common Law with some modifications suited to Indian conditions for some time in the British India Courts. After the Establishment of courts at Madras, Bombay and Calcutta the Hindu Law and Mohmeddan law and the law of defendants are to be considered for the application of law.

The introduction of judicial system during the British India paved the way to introduce *a legislation* to *recognize and legalize* the *concept of obligations* and the practices among the people by the Contract Act, 1872. The principles of Law of contract are divided into four categories namely ***the formation of the contracts, content of contracts, excuses for non-performance, and enforcement of contracts.***[1]

## 5.3 FORMATION OF CONTRACTS

A contract is an ***agreement*** enforceable in a court of law. An agreement is a set of reciprocal promises between the parties to the contract. These set of promises arises from an ***offer*** and ***acceptance*** from the parties to the contract.

The contract may be express or implied i.e., it may be oral words or in writing and even inferred from the conduct of the parties.[2] It may be bilateral or unilateral contract. The former one refers to the involvement of two parties and the latter refers one party alone can perform without the other.

***Agreements:*** Two or more persons agree mutually to undertake to do or not do certain things through an agreement, for example, to deliver goods and to pay for them. This is not through a process of offer and acceptance.

***Offer:*** The offer is a proposal by the offeror to undertake to do or abstains from doing something provided the offeree will also undertake to do or abstains from doing something.[3] The offer contains two things namely *'an expression of a*

*willingness to be bound'* and *'a statement of what each party to the proposed agreement must do or not to do.'* The person making the proposal is said to be called as '*Promisor', 'Offeror,' or 'Proposer.*'[4] The offer is of two types namely *specific offer* and *General offer*. An offer to a specific person is specific offer and the offer to public at large is general offer. 'A''s offer to sell his watch to 'B' is specific and 'X' offer to pay Rs.1,000/- to one who finds his lost dog is the example of general offer.

***Acceptance:*** The person to whom the proposal is made signifies his assent thereto, the offer/proposal has been accepted and which raises a promise.[5] The person to whom the proposal is made or the person from whom the promisor seeks the assent is said to be called as '*Promisee'or 'Acceptor.*'[6]

*Example: When '**A'** signifies his willingness to sell his motor cycle for Rs.55,000/- to **B,** and **B** express his willingness to purchase for the said price, A is the proposer/ promisor or offeror and B is the promisee/acceptor.*

The proposal/offer/promise must possess the following characteristics:

1) **It must be intended and *capable of creating legal relationship between the parties* to give rise to legal consequences**: The set of promises rise between the parties must create legal relations. In the above example, if A does not deliver the vehicle after receiving the price or if B does not pay the price, the other party having right for breach of promise/obligation undertaken by the party in the offer/acceptance as the case may be. The set of promises between parties which are not capable of giving rise to legal relationship or those which are not enforceable in a court of law are called as social obligations/agreement. If a person makes a promise to his friend to take him to dinner at a restaurant and the other agrees and if the promisor failed to perform his obligation, the promise could not be enforceable in a court of law as it was a social obligation. In other words, the social obligations through set of promises are incapable of giving rise to create legal relations between the parties.[7]

2) **The terms of it must be *certain or capable of being certain*:** The terms of the offer must be certain i.e., without ambiguity or vagueness. In other words, the person to whom it was made must be in a position to understand and respond with his assent.

3) **It must be different from the following:**
   a) ***Quotation, catalogue, Auction, Tenders etc.:*** These are regarded as invitation to make an offer for a particular thing specified therein by the person who gave the quotation /catalogue. Calling for tenders and auctioning of goods also come under invitation to make offer.

   b) **Window displays at show rooms:** This is also considered as an invitation to make an offer by the showroom owner from the public.

   c) **Railway timetables:** Issuing of ticket by the Railway authorities against payment to a commuter is amounting to an offer but the time tables of the railways not regarded as an offer.

4) **It must be offered to an individual or to the public at large:** The offer is of two types namely specific offer and General offer. An offer to a specific

person is specific offer and the offer to public at large is general offer. A's offer to sell his watch to B is specific and X offer to pay Rs.1,000/- to anyone who finds his lost dog is the example of general offer.

5) **It must be communicated to the offeree:** The offeror is having obligation to communicate to the respective offeree within reasonable time and manner.

In order to convert a proposal into a promise, the acceptance must be absolute and unqualified.[8] It must be expressed in some usual and reasonable manner. If the acceptance is conditional the promisor can withdraw the proposal before the acceptance becomes absolute. Performance of the conditions of the offer or acceptance of any consideration for reciprocal promise which may be offered with a proposal is an acceptance of proposal.[9]

***Essentials of valid acceptance:***

1) The acceptance is not valid if it was communicated in the manner otherwise than mentioned in the offer. English law invalidates such acceptance. But Indian law[10] says that after receiving the acceptance in different manner, the receiver must inform the acceptor that your acceptance is not accepted unless and until it is communicated in the specified manner, failing which the proposer accepts the acceptance.

2) The offeror may waive the communication of an acceptance.[11]

3) Acceptance must be made before the offer lapses or revoked by the proposer.

4) It should be absolute in terms with the offer. Variation or addition of terms to the original offer is not valid acceptance. A statement of fact to an offer does not amount to acceptance.[12]

***Lapse or revocation or rejection of offer:*** The proposal of the offeror lapses on the death of the proposer and before the offeree accepts. There will be no contract in English law even the acceptance was made in ignorance of the death of the offeror. But under Indian law, there will be a valid contract except where the acceptance is made with knowledge of the death of the offeror.[13]This rule will be applicable in case of insanity of the offeror also.

If the offeree does not respond to the offer in the manner prescribed or within reasonable time there will be no contract. The term *'reasonable time'* is used in wider sense which varies from the circumstances of each case.

The offeror is at liberty to revoke the offer by communication at any time before the offeree makes the acceptance of it. Even if the offer is valid for a fixed term or period; the offeror can communicate the revocation of the offer before the offeree accepts.

The offeree can communicate his rejection to the offeror or he may make counter offer or he may accept with certain conditions.

## 5.4 COMPLETION OF CONTRACTS AND JURISDICTION

Generally, the contract completes when the acceptance of the offeree is posted or put in to transmission. It was made at the place where the acceptance is received

by the offeror. It was easy to determine the completion of contract when the parties negotiate in person. But it will be difficult to determine in case of negotiation by *post, telegram, telephone and mail,* etc. The contract in case of instantaneous contracts completes only when the communication of the acceptance is received by the offeror. In other words, the contract is said to be made at the place where the acceptance received but not at the place where it is transmitted.[14]

The United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on Electronic Commerce in 1996. As a result the Information Technology Act, 2000, governs the rules relating to the e-commerce contracts. The offeror and acceptor are substituted by expression s*originato*[15] and *addressee*. The electronic record sent by the originator may be received intact or it may vary. The addressee has to acknowledge the receipt of electronic record by communication automated or any mode or by conduct.[16] The contract completes where the principal place of business of the originator, in case of more than one place of business of originator or addressee the principal place of business of the originator or addressee and in case of no place of business his usual place of residence will be considered as the completion of the contract for the purpose of jurisdiction.[17]

## 5.5 ESSENTIALS OF VALID CONTRACT

Consideration, capacity to contract, free consent, and legality of consideration and object are some of the essentials of a valid contract. These are explained in detail below:

**1)** ***Consideration****:*

Consideration is one of the essential conditions for the validity of contract.[18] The essential condition for the enforceability of simple contacts is *consideration,* and the rule is expressed by the ***Latin maxim***: *ex-nudopacto non orituractio* which means out of nude pact no cause of action arises. It can be understood in the sense *quid pro quo.*

" A valuable consideration in the sense of the law may consist either some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, given suffered undertaken by the other."[19]

"An act or forbearance of one party or the promise thereof, is the price for which the promise of the other is brought and the promise thus given for value is enforceable."[20]

"When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promise to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise."[21]

The analysis of the above definitions says that the consideration may be executed or executory. In a contract to deliver a watch by A to B for Rs.100, A and B gained money and watch and in another stand point A and B lost watch and Rs.100, respectively. The law insists more upon the presence of the element of detriment to the promisee B and then the presence of benefit to the promisor A.

A promise from one party to the other and a promise from the other to the former support the consideration. In other words, the reciprocity of promises between the parties establishes the consideration.

The absence of consideration makes the contract void.[22] This principle has certain exceptions recognized under the provisions of law. They are:

i) Where the contract reduced in to writing and registered and made out of natural love and affection between the parties standing in near relationship to each other.

ii) Where the contract is to compensate the person who voluntarily rendered services in past. In other words, past services rendered at the desire of the promisor constitute a valid consideration in India.[23] But under English law past consideration is not valid.

iii) Where a promise is made to pay a time-barred debt does not require a fresh consideration.

iv) Where a gift between the donor and donee is not affected for want of consideration if it is registered and attested by two witnesses.

Though consideration is necessary it need not be adequate. The adequacy and sufficiency of consideration is immaterial. It is said that pepper corn is sufficient for purchase of an elephant.

The consideration is to move from whom is the question to be determined for the enforceability of the contract. It must proceed or move from the promisee. Under English law a stranger to a consideration cannot sue. In other words, the promisee cannot sue the promisor if the consideration doesn't move from him. But under Indian law, a stranger to consideration can sue.

The rule stranger to contract cannot sue is the same both under English law as well as under Indian law. This principle was explained by the doctrine of *Privity of Contract.*[24] Under English law there are certain principles which are fundamental. A person who is a party to the contract can sue on it. This principle has certain exceptions recognized by the provisions of law, as stated hereunder:

a) Where a trust is created for the benefit of a party, the beneficiary can enforce it though he is a stranger to contract.[25]

b) Where there is an acknowledgement of liability or estoppel. For example, 'A' receives money from 'B' to pay it to 'C', 'A' admits to 'C' the receipt of this amount and liable to pay it to 'C'.

Apart from the above the Indian law recognizes two more exceptions:

c) A benamidar in whose name a property was registered is entitled to enforce though he is not a party to the contract.

d) In family arrangements such as maintenance or expenses for marriages of female members, the beneficiaries can sue though they are not party to the contract.

***Consideration and Discharge of Contract**:*

The doctrine of consideration is not extended to the discharge of contract. The reciprocal promises between the parties constitute consideration. Subsequently,

if both the parties agree not to enforce the contract also constitute consideration in India. But it is not so in English law. Till 1947 the law of England applied the doctrine of consideration not only to the formation of a contract, but also to its discharge. It was pointed out that a creditor *'might accept anything in satisfaction of his debt except a less amount of money'*[26] A canary or pepper corn may be accepted in full discharge of a debt, but a part payment of the debt cannot be accepted so as to operate as full discharge of the debt. The following are the exceptions to the rule in *Pinnel's* case.[27]

a) Under the scheme of composition if the debtor agrees to pay a portion of the debt discharges liability without application of the doctrine of consideration under English law.

b) In case a third party pays a part of the amount less than the amount due from the debtor discharges the debtor without application of the doctrine of consideration under English law.

c) The doctrine of estoppel or quasi-estoppel neutralized the rule in *Pinnel's* case.[28]

Under Indian law, a contract may be discharged by what is called *"an accord and satisfaction"* i.e., mutually agreed settlement.[29] The English law allows the delivery of horse against the payment of debt but not accept the delivery in future to discharge the debt. The part payment of debt is also not accepted as accord and satisfaction.

**2) *Capacity to Contract:***

There are certain persons in law who are incapable wholly or in part, of binding themselves by a promise or of enforcing a promise made to them. In mercantile contracts *lexloci contractus i.e.,* the law of the place will prevail whereas in case of land *lexsitus* i.e., the law of the place where the land situate will be applicable. The incapacity of a party to enter into a contract will arise in two ways namely, on account of status, or on account of mental deficiency. The former would occur on the grounds of political consideration and expediency, the latter is imposed to protect the interest of the disabled person.

The incapacity of a party is broadly divided into two;

***one*** which arises out of status of an individual for the following reasons:

a) Political or Civil status e.g., where the contracting party is a ruler of a foreign state, Ambassador or envoy or alien enemy, or a convict or a bankrupt.

b) Profession of the contracting person e.g., barrister

c) Incorporation

d) Marriage

The ***other*** which arises from mental deficiency (soundness of mind) of the person contracting in case of:

a) Minors

b) Insane persons

c) Idiots

d) Drunken persons

The person below the age of 21 is called as an infant as per the Infant Relief Act, 1874 under the Common Law and the person below the age of 18 is a minor as per the Family Reforms Act, 1969, under English law and Indian law respectively. He is a person who is not a major. The Infant Relief Act, 1874 which modified the Common Law of England allows an infant to enter into a contract for the following:

a) For necessaries

b) Beneficial contracts of service

c) Contracts involving recurring rights and duties e.g., an interest in property binding on him unless he rescind them either during infancy or within reasonable time of becoming a major

d) An isolated act or a contract to pay for goods supplied other than necessaries, were voidable and not binding on him unless he ratified them within reasonable time after attaining majority.

The law relating to infants/minor contracts is at present provided in Minor's Contract Act, 1987, under English law.

The Indian contract Act, 1872, provides that the contracting party must be a major.[30] A person becomes major on attaining the age of 18 years.[31] The provision of the Contact Act does not specify whether a minor's contract is void or voidable. The analogy of English law made such contracts as voidable and becomes valid by ratification on attaining majority. The *Privy Council* in *Mohori Bibi v. Dharmadas Ghose*[32] pointed out this erroneous view and held that a minor's contract is *void abintio.* There will be no question of avoiding it or ratifying it. Similar to English law the person supplying necessaries to minor is protected under Indian law.[33] The binding nature of a guardian contract on the minor is depending on the legal power of the guardian to enter into a contract or not. There will be no estoppel against a minor as both the parties are aware of the truth. The power to order restitution in India is wider than England. It was clear under Indian law that any benefit, even cash received, may be directed to be restored. But it must be shown that the minor or his estate derived some benefit therefrom.[34]

***Mutuality of mind****:* The parties to the contract must have *consensus-ad-idem*[35] which means mutuality of mind as to the subject matter of the contract. The lack of mutuality of mind makes the contract void. 'A' had two houses namely 'X' and 'Y'. 'A' enters into contract with 'B' to sell keeping 'X' house in his mind and 'B' entered into contract with 'A' by keeping 'Y' house in his mind. This results the contract void due to lack of *consensus-ad-idem* on the subject matter of the contract.

**3)** ***Free Consent:***

"The consent of the party to the contract is said to be free[36] if it is not caused by; coercion, undue influence, fraud, misrepresentation and mistake. These are explained hereunder:

**i)** ***Coercion****:*[37] "The committing, or threatening to commit, any act forbidden by the Indian Penal code, or the unlawful detaining, or threatening to detain, any property to the prejudice, of any person whatever, with the intention of

causing any person to enter in to an agreement." The term *duress* in English law defined as causing, threatening to cause, bodily violence or imprisonment, with a view to obtain the consent of the other party to the contract. *Coercion* in Indian law has a much wider connotation than *duress* in English law. The main distinction between *coercion* and *duress* as the first denotes the offense forbidden by Indian Penal Code whereas the latter confined only to bodily violence and imprisonment. The presence of *coercion* or *duress*in both Indian and English law was an invalidating element for the enforceability of contract.

**ii)** ***Undue Influence***:[38] This was also called as constructive fraud. It covers all the contracts where one party will be in a position to dominate the will of the other because of relationship while entering the contract. This influence can be presumed in existence among the following relationships:

a. Parent and child
b. Guardian and ward
c. Trustee and beneficiary
d. Spiritual master and Disciple
e. Lawyer and client
f. Doctor and patient

The contract between the parties with above relationship turns it voidable by presuming the existence of undue influence of the former against the other. It is the burden on the former party to prove that he was not in dominating position and that his position was not used to obtain the consent of the other.

**iii)** ***Fraud***:[39] The following acts of a party to a contract establish fraud while entering into a contract with the other:

a) the suggestion of a fact, of that which is not true by one who does not believe it to be true
b) the active concealment of a fact by one having knowledge or belief of the fact
c) a promise made without intention of performing it;
d) any other act fitted to deceive
e) any such act or omission as the law specially declares as fraudulent.

The mere silence on the part of party does not amount to fraud. But silence amount to fraud where there is a duty on the party to speak.

**iv)** ***Misrepresentation***:[40] A party may give his consent to enter into a contract because of misrepresentation of the other. These false statements or misrepresentations may be either inducing cause of contract. These statements may be called as innocent misrepresentation and willful or actionable misrepresentation which amounts to fraud.

A misrepresentation consists of the following ingredients:

a) Failure to disclosure of a fact
b) Such non-disclosure must relate to a fact not to an opinion
c) Such representation must be untrue
d) It must be material to influence the other to enter into a contract

Any representation made by a party with full knowledge of the fact that it is

not true, or without belief in its truth or recklessly, not caring whether it is true or false, it is said to be fraudulent. [41]

Whenever the consent of the party is obtained in the absence of free consent the contract is voidable at the option of the party whose consent is not free because of the presence of coercion, or fraud, or misrepresentation. The aggrieved party of such voidable contract had an option to continue the contract or rescind the contract[42] and entitled for damages. Further, the contract induced by undue influence can be set side or it is voidable at the option of the party whose consent was obtained by dominating the will of the aggrieved party.[43]

**v)** ***Mistake:***[44] While entering into a contract the parties to the contract may be under a mistake. This mistake may be as to a fact or law. Mistake of fact may be as to subject matter of the contract e.g., regarding the existence, quality or quantity etc.; nature of contract; person entering into contract. Mistake of law may be regarding foreign law, or ordinary law, law of our country, or private rights of the contracting parties. Another classification of these mistakes is bilateral and unilateral.

A mistake of fact in the minds of both the parties negatives the *consensus ad idem* and the contract in such cases is void. Where both parties to an agreement are at mistake as to a matter of fact essential to the agreement, the agreement is void.[45] This will come under the classification of bilateral mistake.

In case of unilateral mistake, i.e., where only one party to a contract is under a mistake, the contract, generally speaking, is not valid. A contract is not merely voidable because it was caused by one of the parties to it being under mistake as to a matter of fact.[46]

A contract is not voidable because it was caused by mistake as to any law in force in India but a mistake as to a law not in force in India has the same effect as a mistake of fact.[47]

**4)** ***Legality of Consideration and Object***:

Apart from the above essentials for the formation of a valid contract ***the legality of consideration and object***[48] is must. The unlawful agreements may be classified as follows:

1) *Illegal*-where the agreement is contrary to the statute law

2) *Immoral*- where it is opposed to public morals e.g., agreement for illicit cohabitation, or separation between husband and wife

3) *Opposed to public policy*- where the agreement is forbidden as conflicting with the well-being of the state e.g., agreements tending to the abuse of legal process, agreements in restraint of trade, agreements in restraint of marriage, agreements in restraint of parental rights, etc.

Where a part of consideration or object of an agreement is unlawful the agreement is void. In case of non-separation of the unlawful part from the agreement the total transaction will be void. The rule applicable to separate the unlawful and lawful part is known as *blue pencil rule.* In such cases the lawful part which

separated by drawing blue pencil lining from the unlawful part can be enforceable.[49.] A contract without consideration is said to be void with certain exceptions;[50]

a) Every agreement in restraint of marriage of any person, other than a minor is void.[51]

b) An agreement in restraint of trade is void with an exception where goodwill is sold or as per the provisions of the Partnership Act, 1932.[52]

c) Any agreement in restraint of legal proceeding is void with an exception of arbitration agreement.[53]

d) Where the meaning of an agreement is not certain, or capable of being certain are void,[54]

e) Agreement by way of wager is void.[55]

f) The performance of the contract is depending on the happening or non-happening of an event at a future date is called as contingent contract.[56] If the happening of the event is impossible the contract becomes void.[57]

g) The enforcement of a contingent contract is possible before the impossibility of its occurrence.[58] The promise of A to pay B a sum of money if B marries C. C marries D. Marriage between B and C is impossible during the life time of A makes the agreement void.[59]

h) The contingent contract to do or not to do within a specified becomes void after the expiry of the time.[60]

i) Any agreement contingent on impossible events is void.[61]

## 5.6 PERFORMANCE OF THE CONTRACTS

Both the parties to the contract either perform, or offer to perform their respective promises until such performance is dispensed with or excused under any provisions of this Act or any other law in force. Even the death of one of the party makes his legal representatives liable unless the intention of the parties to the contract differs.[62] The promisee's non-acceptance of offer of performance of the promisor, the promisor is not responsible for the performance, nor does he lose his rights under the contract subject to the following conditions:[63]

a) The offer must be unconditional.

b) It must be made at a proper time and place, and in the circumstances that the person to whom it is made must have a reasonable opportunity to ascertain that the person is able and willing to do i.e., accept

c) If it is the delivery of anything to the promisee, he must have an opportunity of seeing the delivered thing which the promisor is bound by his promise to deliver.

In case of anticipatory breach of contract by the promisor, the promisee may put an end to the contract, and sue for damages immediately though he had a right to keep open the contract until the performance is actually due.[64] Keeping the promise alive may lead the promisor to take advantage of supervening circumstances.

The performance may by the person who makes the promise, the promisor or his representatives may employ a competent person to perform depending on the intention of parties to the contract.[6] If the performance from the third person is accepted by the other party, later the promisee can't enforce against the promisor.[7]

When the promise is made jointly, it is to be performed by all such joint promisors during their living and after the death any of them, his representative jointly with surviving promisor. After the death of the last survivor, the representatives must fulfill the promise jointly. This is subject to a contrary condition of the contract.[67] The promisee may compel one of the joint promisor to perform in the absence of express agreement to the contrary. On such performance by one of the promisor he can compel the other promisor to contribute. In an occasion where one of the promisor failed to contribute the remaining promisors has to share the loss of contribution.[68]This is also subject to a contrary appears in the language of the contract. The release of the joint promisor from performance does not discharge the other from liability. There is a point of difference in English law and Indian law. In India, they are presumed to be jointly and severally liable.[69] When a party makes a promise to two or more persons, the right to claim the performance rests between him and them, with them during the life time of the parties and on the event of death of either party, between the representative and survivor/ representative as the case may be, with joint promisee or survivor/representative or representatives.[70] This is subject to a contrary condition of the contract.

***Time and Place of Performance:***

When the promisor has to perform without the application of the promisee, and no time is specified in the contract to perform, the performance must be done within reasonable time. What is reasonable time is a question of fact?[71] When the time is specified but no application to be made by the promisee, the promisor may perform it any time during the usual hours of business on such day, and the place at which the promise ought to be performed.[72] It is the duty of the promisee to make the application for performance on certain day to be at proper time and place during the usual hours. What is proper time and place is a question of fact?[73] It is the duty of the promisor to make an application to the promisee as to the time and place to perform when a promise is to be performed without application.[74] The promisee may prescribe or sanction the manner, the time and place of performance.[75]

***Performance of Reciprocal Promises:***

In case of existence of reciprocal promises, the promisor needs to perform only when the promisee is ready or willing to perform his part of promise in the contract.[76] The reciprocal promises are to be performed as per the order specified in the contract, in the absence of such specification of order they must be performed in the order of the transaction requires.[77] The party preventing the other ready to perform his part of the reciprocal promise, the contract becomes voidable at the option of the party so prevented; he is entitled for compensation for loss because of non-performance of the contract.[78] The order of the performance of the reciprocal promises in the sequence as specified. The non-performance does not entitle the performance of the reciprocal promise and must make compensation to the other party for any loss because of his non-performance of the contract.[79] The performance to do a thing at or before specified time has to be performed accordingly. Failing which the contract becomes voidable in case the contract specifies the time is essence of the contract. The intention of the

contract does not specify time as essence of contract, the contract is not voidable and the promisee is entitled for compensation for any loss because of non-performance of the contract.[80] If the promisee agreed the acceptance of performance by the promisor other than at the agreed time, he can't claim damages for the delay in performance. However, he is entitled for compensation if he gives notice to the promisor of his intention to do so at the time of acceptance.[81]

## 5.7 DOCTRINE OF FRUSTRATION OR AGREEMENT TO DO AN IMPOSSIBLE ACT

The agreement between two parties to do an impossible act itself is void. A contract may also void because of an event which makes the performance of promise impossible or unlawful after the completion of the contract. Any person who makes promise to perform by knowing it to be impossible or unlawful is liable to pay compensation to the promisee that is not aware of impossibility or unlawful nature of the contract at the time of arriving it.[82] This is known under the doctrine of frustration. This will be applicable in two classes of cases:

1) Where a supervening event makes the performance of a contract impossible
2) Where a supervening event or events have frustrated the object of both the parties and the changing circumstances the promise fails to be performed.

The dislocation of business in the wake of the first and second World Wars brought before courts a large number of 'frustration cases' and it has now been recognized the term 'frustration' includes the cases of 'impossibility' as well as the 'frustration of adventure.'

***Supervening impossibility**:*

The very object of the subject-matter relating to the contract disappears; the contract is discharged by frustration on the ground of destruction of subject matter. A contract is also considered as frustrated in case of non-occurrence of expected events. The musician who failed to perform a concert due to illness as agreed in a theatre was held to be frustrated and so discharged by supervening impossibility.[83] The requisitioning of land by government for military purposes from the contract of sale of land by a company which undertook to construct drains and roads on the land to make it suitable for residential purpose is not considered as supervening impossibility as it was a temporary interruption and does not discharge the parties from the performance of the contract.[84]

***Supervening Illegality:***

The contracts entered with the enemy nationals prior to the outbreak of war are suspended during the war and revived after restoration of peace only if it is not a continuous mutual duty between the parties. The changes in law also make the contract unlawful and the performance of the contract impossible. The judiciary expressed different theories for the judicial basis on the subject. The *implied theory* propounded by *Viscount Simon* says that no term could be implied to put an end to the contract in those circumstances.[85] According to the *disappearance theory,* if the foundation of the contract disappears either by the destruction of the subject-matter or by reason of interruption of performance, it must be regarded as frustrated. In case of *Just and reasonable solution theory,* even the express term in the contract render the performance impossible, and the contract purporting

to be alive, courts may hold the parties discharged from liability under the doctrine of frustration.

***Doctrine of frustration limitations:***

The party who himself responsible for frustration can't invoke the doctrine. This doctrine is not applicable to leases. In England, this doctrine is not applicable to the contract of sale of land as the buyer becomes the equitable owner of the property. In India, there is no equitable estate as such and so the doctrine is applicable even to contracts for sale of immovable property.[86]

When there are two sets of reciprocal promises between the parties, one is legal and the other is illegal based on the circumstances, the legal one becomes a valid contract and the other is a void agreement.[87] In case of alternative promise, the legal one can be enforced and the other is void.[88]

## 5.8 APPROPRIATION OF PAYMENTS

When the payment is made by the debtor, the payment has to be remitted by the creditor towards the amount outstanding as suggested by the debtor.[89] If the debtor not specified to which debt the payment is to be adjusted, the creditor had a right to pay even the time-barred debt also.[90] Neither the debtor or creditor appropriated the payment made by the debtor; the payment must be adjusted towards the first debt which is outstanding between the creditor and the debtor.[91] The above rules for the appropriation of payments are known as *Rule in Clayton's case*.

**Contracts which need not be performed:**

The original contract between the parties need not be performed in case of *novation, rescission and alteration* of such contract. If the parties agree to substitute a new contract instead of the original one, or to rescind or to make an alteration of the contract, the parties to the original contract need not perform the obligations therein.[92] The promisee is at liberty to dispense with performance of the promisor wholly or partly or extend the time of performance or may also accept instead of it any satisfaction which he deems just.[93] When a person having the option of rescinding the voidable contract, exercises his option to rescind the other party need not perform his part of promise in the contract.[94] Further, the party rescinding receives any benefit under voidable contract is liable to restore the benefit to the other. When a contract becomes void afterwards, the party deriving benefit or advantage of such contract is under obligation to restore it.[95] In case of rescission of a voidable contract, the party exercising the option must communicate the rescission of contract in the same manner as followed for communication of the revocation of the proposal.[96]The neglect or refusal of the promisee to afford the reasonable facilities for the performance of the promisor, the promisor is excused for the non-performance caused thereby.[97]

**Of certain relations resembling those created by contract:**

These are also called as *implied contracts or quasi-contracts or Constructive contracts* which are created by lawyers and judges, based on certain equitable considerations. The early common Law of England had only two kinds of remedies: contractual and delictual. The absence of contract, the remedy could only be in tort. *Quasi* is a *Latin* term which means *'as if.'* In quasi contracts, there will be no actual contract between the parties but the law attributes to a

particular situation consequence which is similar to that of a contract. Action of account is the early quasi-contractual liability. This was available against Bailiffs, receivers and guardians who had to account for money kept with them. The 14th and 15th century extend to every case where money is paid to the defendant by a third party to the use of plaintiff. The underlining principle to determine the liability of the defendant is unjust enrichment at the expense of plaintiff. The equity courts applied the principle of preventing unjust enrichment in evolving the concept of trust.

There is no exact definition of a quasi-contract given anywhere even in the Contract Act. Those given by Dr. Winfield[98] and Dr. Jenks[99] may be accepted in the absence of a better one. 'A' delivers goods to 'B' without any contract either expressly or in writing. 'B' consumed the goods delivered by 'A'. The obligation of 'B' to pay 'A' the price arises from his promise implied by his conduct. This kind of contract is called a tacit contract. Similarly, if 'A' delivers to 'C' assuming him to be 'B', and 'C' consumed them, the obligation of 'C' to pay compensation to A for their value. This is quasi or implied contract.

The following are the examples of quasi-contract:

1) ***Action for money had and received***:[100] This was based on the equitable principle that no person shall enrich himself at the expense of the other. Even the payments made under mistake of law may be recovered. The payment made under coercion is also recoverable under this principle.

2) ***Money paid to plaintiff for use of defendant***:[101] Where tenant A pays the taxes due from his landlord B to C in order to protect his possession from being processed against in execution of B's debt. In such cases, there is an obligation on B to repay the amount paid for his benefit. The enforcement of obligation under this head depends on two conditions namely the payment must be bonofide to protect his interest and it should not be a voluntary one.

3) ***Quantum meruit***:[102] The person derived benefit from an act of another has to compensate the other even there is no contract or invalid contract. This was based on the principle of *quantum meruit* which means '*as much as he deserves.'* The compensation is subject to the face that the delivery of goods is not made gratuitously and the defendant enjoyed the benefit.

4) ***Obligation of finder of last goods***:[103] Though there is no contract between the finder and looser of the last goods the finder is having an obligation to return the goods find to the owner as a bailee.

5) ***Necessaries supplied to a person incapable of contracting***:[104] This will discuss the contractual liability of a minor or lunatic to whom the necessaries are supplied which are suited to his condition of life. The person supplied necessaries entitled only to the property of the incapable party but he can't make him personally liable for the dues of the supply.

## 5.9 CONSEQUENCES OF BREACH OF CONTRACT

Any party who is responsible for breach of contract is liable to pay damages/ compensation to the other party who suffers loss because of non-performance by the other. In other words, the party aggrieved by the default of performance of

the other's obligation leads to breach of contract and entitles him for compensation. There were two remedies available in case of breach of contract by a party.

1) ***Common Law Remedy, i.e, damages***: The remedy of damages, therefore, only tries to evaluate in terms of money, the loss which a party sustains as a result of breach of contract.

2) ***Equitable Remedy, i.e., specific performance of contract, injunction, rectification and cancellation, etc.:*** Keeping in mind that Specific performance is not available in every case, subject to several limitations; there is no other alternative for courts than to award damages which, of course, is available in every case.

***Measure of damages is the value of performance of the contract to the plaintiff, and not what it costs the defendant to perform it.***

There are four kinds of damages:

**A)** ***General, or ordinary, or substantial damages***:[105]These are the damages which are to be paid as a consequence of breach of contract. In other words, it means the natural following consequences out of breach.

**B)** ***Special damages***:[106]These are the damages which are to be paid for the loss of the profit in case of breach of contract of sale by the buyer. In other words, it was a kind of damages which are to be paid on account of usual or extra ordinary circumstances of the case.

**C)** ***Vindictive, or Punitive or Exemplary damages:*** These are awarded with a view to punish the defendant. Generally, vindictive damages are not awarded in case of contracts, but will be awarded in actions in tort. But they may be awarded in contracts like breach of contract to marry and the breach of payment of the customer to honor the cheque.

**D)** ***Nominal damages:*** These are paid in case of technical violation but no substantial loss. Proof of damage necessary even for claiming nominal damages.

The English law on the question of damages is laid down in *Hadely v. Baxendale*.[107] The following are the rules relating the award of damages for breach of contract:

1) The injured party is to be placed in the same financial position as if the contract has been performed.

2) Damages which are fair and reasonable arising from breach of contract can be recovered.

3) Damages which are contemplated in the contract at the time of contract[108] can be recovered though they are not naturally arising. These are called as liquidated damages.

4) Damages which will not fall under 2 or 3 above, but arise of special circumstances called special damages are not recoverable, unless they are brought to the notice of the other party before the contract is made.

5) It is the duty of the aggrieved party to minimise the damages.

6) It should not be more than agreed amount of the damages.

7) The injured is not disentitled to damages because of difficulty to assess them.

8) Vindictive or exemplary damages can't be awarded, except for the breach of contract of marriage.

9) The party rightfully rescinding the contract on the non-performance of the other is entitled to compensation,[109]

## 5.10 SUMMARY

The law that is applicable to mercantile transactions is called the mercantile law which includes General Contracts, Special Contracts and the law of Insolvency and Bankruptcy. This law relates to the rights and obligations arising out of mercantile transactions between traders or merchants. Prior to the Indian Contract Act, 1872, the English Common Law with some modifications suited to Indian conditions for some time in the British India Courts.

A contract is an agreement enforceable in a court of law. An agreement is a set of reciprocal promises between the parties to the contract. These set of promises arises from an offer and acceptance from the parties to the contract. The contract may be express or implied i.e., it may be oral words or in writing and even inferred from the conduct of the parties. It may be bilateral or unilateral contract. Generally, the contract completes when the acceptance of the offeree is posted or put in to transmission. It was made at the place where the acceptance is received by the offeror. It was easy to determine the completion of contract when the parties negotiate in person.

Consideration, capacity to contract, free consent, and legality of consideration and object are some of the essentials of a valid contract.

The agreement between two parties to do an impossible act itself is void. A contract may also void because of an event which makes the performance of promise impossible or unlawful after the completion of the contract.

## 5.11 SELF ASSESSMENT QUESTIONS

1) Discuss the origin and sources of Mercantile Law.

2) Explain the formation of contract.

3) Describe the completion of contract and jurisdiction.

4) What are the essentials of a contract?

5) Briefly give a not on the capacity of party to the contract.

6) Critically analyze "a contract without consideration is void."

7) When consent is said to be free?

8) Differentiate valid, void and voidable contracts.

9) Elucidate the performance of the contract and the reciprocal promises.

10) 'Time is not the essence of contract.' Comment.

11) How is the doctrine of frustration applicable in a contract?

12) Define the applicability of rule in Clayton's case for the appropriation of payments.

13) State the contracts which need not be performed or discharge of contract.

14) Enumerate the obligations which resemble the contracts under the head quasi-contracts.

15) Mention the consequences of the breach of contract.

## 5.12 FURTHER READINGS/ REFERENCES

***Books:***


1) J.C.Smith, 1976, *Legal Obligation,* University of London, TheAthlone Press

2) Stefen Smith, *Atiyah's Introduction to the Law of Contract,* CLARENDON LAW SERIES 6thedition Oxford Press.

3) J.Beaston, A.Burrows, J. Cartwright, *Anson's Law of Contract,* 29th edition, Oxford press.

4) Michael Frumton, Chesire & Fifoot's Law of Contract, 14thedition, Lexis Nexis Butterworths.

5) Richard Stone, *Contract Law,* The Cavendish Q & A Series, 2nd edition, Cavendish Publishing Limited

6) Ewan McKendrick, *Contract Law,* Palgrave Law Series, 5th edition

7) Prof.G.C.V.SubbaRao, *Law of Contracts* I & II 11th edition , Narendra Gogia & Company.

8) E.Venkatesam, 1969, *Hand Book on Contracts and Negotiable Instruments,*7th edition .M.L.J.Office, Madras.

9) Anirudh Wadhwa, Mulla, *The Indian contract Act,* 15th Edition, Lexis Nexis

10) Dr. Avatar Singh, *Contract Act and Specific Relief Act,* 12th Edition, EBC Publishers.

11) Dr. R. K. Bangia, *Indian Contract Act,* 15th Edition, Allahabad Law Publishers.

12) Dr. V. Kesava Rao, *Contract I Cases and Materials,* Lexis Nexis Students' Series.


***References:***


[1] Atiyah's Introduction to the Law of Contract,6thEdn Oxford University Press at p.29

[2] Section 9 of the Indian Contract Act, 1872.

[3] Sec.2(a) of the Indian Contract Act, 1872 "when one person signifies to another his willingness to do abstain from doing anything, with a view to obtaining the assent of that other to such abstinence, he is said to make a proposal."

[4] Sec.2(c) of the Indian Contract Act, 1872

[5] Sec.2(b) of the Indian Contract Act, 1872

[6] Supra note 2

[7] Lord Atkin Balfour *v.*Balfour 1919 (2) KB 571

[8] Section 7 of the Indian Contract Act,1872

[9] Section 8 of the Indian Contract Act,1872

[10] Section 7(2) of the Indian Contact Act, 1872

[11] Carlil*v.* Carbolic Smoke Ball co. *(1893) 1 Q.B 256*

[12] Harvey *v.*Facey 1893 AC 552

[13] Section 6(4) 0f the Indian Contract Act,1872

[14] Lord Denning in Entores*v.* Miles Far East Corporation 1955 2QB 327; see also BhgawandasKedia*v.*Giridharilal AIR 1966 SC 543

[15] Section 11 of the Information Technology Act,2000

[16] Section 12 of the Information Technology Act,2000

[17] Section 13 of the Information Technology Act,2000

[18] Section 10 of the Indian Contract Act, 1872

[20] As per Sir Frederick Pollock approved by House of Lords

[21] Section 2(d) of the Indian Contract Act,1872

[22] Section 25 of the Indian Contract Act,1872

[23] Supra 20

[24] Dunlop Pneumatice Tyre Compay*v.* Selfridge& Company 1915 Ac 847

[25] Under English law Rights of Third Parties Act,1999.

[26] Pinnel's case 1602 77 ER 237

[27] Central London Property Trust Ltd. *V.* High Trees House Ltd 1947 KB 130 ; see also Foakes*v.* Beer 1884 9AC 605

[28] *ibid*

[29] Section 63 of the Indian Contract Act,1872.

[30] Section 11

[31] The Indian Majority Act, 1875

[32] ILR 1903 (30) Cal.539 (PC)

[33] see quasi- contract under Sec.68 of the Indian Contract Act,1872

[34] Section 33 (1) of the Specific Relief Act,1963

[35] Section 13 of the Indian Contract Act,1872

[36] Section 14 of the Indian Contract Act,1872

[37] Section 15 of the Indian Contract Act,1872

[38] Section 16 of the Indian Contract Act,1872

[39] Section 17 of the Indian Contract Act, 1872

[40] Section 18 of the Indian Contract Act, 1872

[41] Supra note 38

[42] Section 19 of the Indian Contract Act, 1872

[43] Section 19-A of the Indian Contract Act,1872

[44] Sections 20,21,22 of the Indian Contract Act, 1872

[45] Section 20 of the Indian Contract Act,1872

[46] Section 22 of the Indian contract Act, 1872

[47] Section 21 of the Indian Contract Act,1872

[48] Section 23 of the Indian Contract Act, 1872

[49.] Section 24 of the Indian Contract Act,1872

[50] See supra note 22

[51] Section 26 of the Indian Contract Act,1872

[52] Section 27 of the Indian Contract Act,1872

[53] Section 28 of the Indian Contract Act, 1872

[55] Section 30 of the Indian Contract Act, 1872

[56] Section 31 of the Indian Contract Act, 1872

[57] Section 32of the Indian Contract Act, 1872

[58] Section 33of the Indian Contract Act, 1872

[59] Section 34 of the Indian Contract Act, 1872

[60] Section 35 of the Indian Contract Act, 1872

[61] Section 36 of the Indian Contract Act, 1872

[62] Section 37 of the Indian contract Act, 1872

[63] Section 38 of the Indian Contract Act,1872

[64] Section 39 of the Indian Contract Act,1872

[65] Section 40 of the Indian Contract Act,1872

[66] Section 41 of the Indian Contract Act,1872

[67] Section 42 of the Indian Contract Act,1872

[68] Section 43 of the Indian Contract Act, 1872

[69] Section 44 of the Indian Contract Act, 1872

[70] Section 45 of the Indian Contract Act, 1872

[71] Section 46 of the Indian Contract Act, 1872

[72] Section 47 of the Indian Contract Act,1872

[73] Section 48 of the Indian Contract Act, 1872

[74] Section 49 of the Indian Contract Act, 1872

[75] Section 50 of the Indian Contract Act, 1872

[76] Section 51 of the Indian Contract Act, 1872

[77] Section 52 of the Indian Contract Act,1872

[78] Section 53 of the Indian Contract Act, 1872

[79] Section 53 of the Indian Contract Act, 1872

[81] Section 55 of the Indian Contract Act, 1872

[82] Section 56 of the Indian Contract Act, 1872

[83] Robinson *v.* Davidson 1871 LR 6 Ex.269

[84] SatyabrataGhose*v.*MugneeramBasngur AIR 1954 SC 54

[85] Crickelwood Property and Investment Trust Ltd *v.* Leighton's investments Trust Ltd 1945 AC 221

[86] Supra note 82.

[87] Section 57 of the Indian Contract Act, 1872

[88] Section 58 of the Indian Contract Act, 1872

[89] Section 59 of the Indian Contract Act, 1872

[90] Section 60 of the Indian Contract Act, 1872

[91] Section 61 of the Indian Contract Act, 1872

[92] Section 62 of the Indian Contract Act, 1872

[93] Section 63 of the Indian Contract Act, 1872; see also Pinnel's case at Consideration.

[94] Section 64 of the Indian Contract Act, 1872

[95] Section 65 of the Indian Contract Act, 1872

[96] Section 66 of the Indian Contract Act, 1872

[97] Section 67 of the Indian Contract Act, 1872

[98] "as liability not exclusively referable to any other head of law imposed on a particular person to pay money to another , on the ground of unjust benefit."

[99] "a situation in which law imposes upon one person, on grounds of natural justice, an obligation similar to that which arises from true contract, although no contract, express or implied, has in fact been entered into by them."

[100] Section 72 of the Contract Act, 1872

[101] Section 69 of the Contract Act, 1872

[102] Section70 of the Contract Act, 1872

[103] Section71 of the Contract Act,1872

[104] Section68 of the Contract Act, 1872

[105] Section 73 of the Contract Act, 1872

[106] *ibid*

[107] 1854 9Ex. 341

[108] Section 74 of the Indian Contract Act,1872

[109] Section 75 of the Indian Contract Act, 1872

# UNIT 6 INTERNATIONAL CONTRACTS OF SALE

**Objectives**

After studying this unit you should be able to:

- Explain the meaning and relevance of the Contracts for International Sale of Goods
- Understand the historical background of the Contracts for International Sale of Goods
- Discuss the Applicable Law And Rules for International Sale of Goods
- Describe the different Model Contracts And Clauses Contracts for International Sale of Goods

**Structure**



## 6.1 INTRODUCTION

The Liberalisation, Privatisation and Globalisation (LPG) wiped out the boundaries amongst countries and made the world as a global village. There were different substantive laws relating to contracts in different legal systems which will conflict in legal scenario. It paves the way for thinking of uniform laws comfortable to both the parties from different countries when they enter into contract with flexibility and without bias.

The transactions of sale at the international level are considered to be the backbone of international trade through international contracts. The contracts are regarded as international contracts when the parties to the contract are coming from two different States (Countries).[1] More flexible definitions are possible, such as contracts with "significant connections with more than one State," 'involving a choice between the laws of different States', or 'affecting the interests of international trade.'[2] As described in the Hague Principles, one approach to identifying a contract as "commercial" may be where "each party is acting in the

exercise of its trade or profession." (Hague Principles, Article 1(1)). Another approach is found in the United Nations Convention on Contracts for the International Sale of Goods (CISG), which limits its scope to commercial matters by excluding, for example, consumer contracts, such as those for "goods bought for personal, family or household use" (CISG, Article 2(a)).[3]

There were two important questions which are vital to be answered when a dispute arises between two parties in an international commercial contract. They are:

1) Where the dispute of the parties is to be heard i.e., seat of settlement of dispute?
2) What are the law or rules that govern the contract i.e., choice of law by the parties?

Answers to the above questions are to be made by the parties to an international contract where they opted an 'arbitration Clause' in their contract with an intention to avoid the litigation in the local legal system and the application of the substantive law of countries to which the parties belonging. International commercial arbitration may be particularly popular because, unlike court proceedings, there is a single nearly comprehensive regime for enforcement of foreign arbitral awards. [4]

## 6.2 HISTORICAL BACKGROUND

The differences in laws are the by –products of different histories, philosophies and worldviews, uniformity is often difficult to achieve. One of the major challenges faced by an international contract of sale is the diversity of legal systems. The conflict of laws exacerbated world-wide because of the global supply chains and contractual networks which operates across the globe. The 20th century focuses on uniform framework to tackle the situation of the diversified legal system. Before the Second world war *Ernst Rabel* suggested the possibility of uniform sales law to the Institute for the Harmonisation of Private Law. In 1930, the UNIDROIT initiated the project to prepare a law unifying the substantive rules governing international sales contracts under the auspices of the League of Nations. In 1935, the Commission of European Scholars under the leadership of *Rabel* prepared a preliminary Report. Though the Second world war interrupted the work, it was resumed in 1951 in the Hague Conference. In 1964, two conventions namely Uniform Law on the International Sale of Goods (ULIS) and Uniform Law on the Formation of Contracts (ULF) unifying the law of international sale of goods were adopted and came into force in 1972. These are still not widely recognised outside Western Europe as instruments of international harmonisation. The establishment of UN Commission for International Trade Law in 1968 paved the way to draft a new unified sales law. The final draft of the Convention on the International Sale of Goods (CISG) approved by the General Assembly of UN in 1980 and came into operation on 1st January 1988.

The CISG is now supported by number of Conventions like the UN Convention on the Limitation Period in the International Sale of goods, the 1983 Geneva Convention on Agency in the International Sale of Goods, the 2005 Convention on the Use of Electronic communications in International Contracts, the 1983Uniform Rule on Contract Clauses for an Agreed Sum Due upon Failure of Performance. 94 countries ratified and acceded to the Convention as of 2020. The CISG is the best example of unification of private law till date.

There are no statistics available to prove the success of the CISG in developing international trade. The ratification does not mean the unification of international sales law effectively; it provides the contractual parties with a useful or efficient regulatory framework.

The CISG is based on the principle of party autonomy. The parties are at liberty to adopt or exclude the applicability of the principles laid down thereon in the CISG. The ratifying State may ratify in total or with certain restrictions which creates un-certainty to the fact that the Convention is a unifying law on international sale of goods. This creates gaps in the provisions of the Convention.

In interpretational disputes, the national courts and arbitral tribunals have to take the international character and the uniformity in its application and the observance of good faith in international trade into consideration. The CISG does not specify or state a list what these principles are and, consequently, they have to be deduced from the other provisions of the Convention through a process of analogy. The judge may venture outside the four corners of the CISG and settle the matter in conformity with the applicable law. It is clear that the CISG does not unify the law of international sales in an exhaustive manner but instead operates in a supplementary and symbolic relationship with national law, trade usage, party autonomy and other international instruments of harmonisation.

## 6.3 APPLICABLE LAW AND RULES

### I) Conventions

In some international sale contracts, the law applicable to a contract will be provided for in a Treaty. The United Nations Commission on International Trade Law (UNCITRAL) has created three treaties that provide the applicable rules governing certain contracts.

**a) United Nations Convention on Contracts for the International Sale of Goods (CISG):**

The United Nations Convention on Contracts for the International Sale of Goods is the most widely adopted treaty providing substantive contract rules.[5] The CISG's scope is limited to commercial contracts for the cross-border sale of goods[6] Successful implementation of the CISG requires more countries to adopt it and parties to use it. Courts and arbitral tribunals must interpret the CISG in a uniform manner and not through the lens of domestic laws.[7]

**b) The Convention on the Limitation Period in the International Sale of Goods:**

The Convention on the Limitation Period in the International Sale of Goods (the "Limitation Convention") is a sister treaty to the CISG. Originally adopted in 1974, it was amended in 1980 in order to operate seamlessly with the CISG.[8] The Limitation Convention applies to the same types of international sales contracts as the CISG with the same scope of application,[9] but its substantive provisions deal solely with limitation or prescription, providing a sort of statute of limitations for international sales disputes. The general period of limitation provided in the Limitation Convention is four years.[10]

Till date, there are 30 State parties to the Limitation Convention whereas 84 State parties in the CISG's. As is the case with the CISG, parties may opt out of its provisions.[11] The rules of uniform interpretation for the Limitation Convention generally mirror those found in the CISG.[12]

**c) United Nations Convention on the Use of Electronic Communications Convention in International Contracts:**

The United Nations Convention on the Use of Electronic Communications in International Contracts [13] is a much more recent Treaty than the CISG or Limitation Convention. Adopted in 2005, it currently has seven State parties. The purpose of the treaty is to remove any legal obstacles to the use of electronic communications in international contracting, creating certainty for contractual parties that contracts and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents.

The scope of the Electronic Communications Convention is broader than that of the other UNCITRAL Treaties in that it is not limited to sales contracts, although it is still aimed at only commercial contracts. Contractual parties may, of course, opt out of its provisions.[14] Like the Limitation Convention, the rules of uniform interpretation for the Electronic Communications Convention mirror those found in the CISG,[15] making the same general categories of research resources relevant.

**II) National Laws**

Parties may also choose national laws to apply to their international commercial contracts. The party with greater bargaining power may insist on its national laws, or parties may instead choose the law of a third State, usually one considered to have a well-developed law with regards to commercial transactions.

*English law* is frequently used in international transactions, in particular with reference to reinsurance, charter parties, and sea trade, among other areas.[16] Parties may select *Swiss law* because of the perception that Switzerland's political neutrality makes this a neutral law. Nonetheless, political neutrality may not always be the best guide as to the suitability of a chosen law for a specific transaction.[17] The ICC International Court of Arbitration 2013 Statistical Report mirrors the 2010[18] survey and also indicates frequent choice of *German* and *French law*.[19] When considering these types of surveys, it is important to recall that, generally, the choice of law of any CISG State will also include the CISG unless the Convention's application is clearly excluded by the parties.[20]

**Soft Law and Trade Usages**

There are many international texts and standards that may be chosen by traders to govern their contracts. These rules may be referred to variably as "rules of law," "soft law" or "trade usages," [21] but they are connected by their use in international contracting and potential direct application by arbitral tribunals. Even otherwise binding texts, such as the CISG, may fall into this category when chosen by parties to apply to their contracts without reference to a specific State law[22]. Like arbitral tribunals[23], State courts may recognize and apply these rules, but, depending on the relevant domestic law, they may do so simply as a set of rules that are considered to be part of the contract and not overriding any

mandatory law.[24] The Hague Principles, where followed, may serve to further legitimize some of these sources. The Hague Principles, in Article 3, allow for the law chosen by contracting parties to be "rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise," specifically naming the CISG, the UNIDROIT Principles, and the Principles of European Contract Law (PECL) in the accompanying commentary. A few of the more prominent texts and standards generally discussed in this category of "rules of law," "soft law" or "trade usages" are as follows:

**UNIDROIT Principles**

*The* UNIDROIT Principles of International Commercial Contracts (the "UNIDROIT Principles") were first finalized by UNIDROIT in 1994 and revised in 2004 and 2010. UNIDROIT continues to revise the Principles as appropriate, currently considering revisions meant to deal with specific aspects of long-term contracts. While following the CISG's approach in many instances, the UNIDROIT Principles are a set of general rules for international commercial , addition, they are able to cover areas that the drafters of the CISG were not able to agree upon, such as validity, agency, and assignment, among others. Also unlike the CISG, the UNIDROIT Principles are not a binding text and will generally only be applied where chosen by the parties or through application by an arbitral tribunal with the authority to do so.[25]

Significantly, the UNIDROIT Principles contain rules of interpretation almost identical to CISG,[26] making case law and academic writings of great use in interpreting the Principles. In addition, the UNIDROIT Principles have a built-in commentary that gives detailed guidance.

The advantage of Principles of International Commercial Contracts (PICC) is that they do not favour one particular domestic system of contract law or even legal system but rather provide a neutral set of rules that combine the best practices from legal systems around the world. The UNCITRAL on its' endorsement of the 2010 PICC stated that these Principles and the CISG principles are complementary relationship and that PICC can be used to interpret and supplement the convention.[27] The 2015 *Hague principles on choice of law in International Commercial Contracts,* which were adopted by the Hague Conference on Private International Law might trigger welcome change.[28]Continuously improved since their first inception in 1983, the PICC have been described as a 'restatement of international contract law'[29] The PICC could function as a new *lex mecatoria.*

***Lex mercatoria***

The *lex mercatoria* has been described as "a synthesis of generally held and generally accepted commercial principles that may be expected to be applied to contracts among the major trading nations."[30] There is a controversy[31] surrounding the *lex mercatoria* and, in particular, the specifics of its content,[32]but arbitral tribunals can, nonetheless, where authorized, apply these principles.[33] Certainly, the content of the *lex mercatoria* may be informed by or, in fact, contain the content of international instruments, such as the CISG and the UNIDROIT Principles.[34] For an example of a contract clause containing choice of such broad principles, consider the United Nations General Conditions of Contract, which state, with regard to dispute settlement, that "the decisions of the arbitral tribunal shall be based on general principles of international commercial law."[35]

***Incoterms***

In the specific area of delivery of goods, the International Chamber of Commerce (ICC) has developed a set of rules governing trade terms that describe the obligations of buyers and sellers and supplement any other rules governing the contract. The terms are in combination of three letters. One example is FOB, standing for "Free on Board", and the Incoterms rules cover who bears the risks and obligations when the seller has contracted to deliver goods in this way, namely "on board the vessel nominated by the buyer at the named port of shipment or procures the goods already so delivered."[36]The Incoterms come with instructions as to how parties can incorporate them in their contracts. There have been many versions of the rules, and the most recent are the Incoterms 2010 and 2020. They were first published in 1936. Incoterms 2010 defines 11 rules. They are upgraded as per the trade practices.

***The Uniform Customs and Practice for Documentary Credits (UCP 600)***

This was another creation of International Chamber of Commerce for the convenience of international trade. The Uniform Customs and Practice for Documentary Credits, 2007 revision UCP 600, is the soft-law instrument for regulating letters of credit, a common payment method in international transactions. The contract must indicate the application of UCP 600 towards the credit document. It contains rules specifically for electronic records.

## 6.4 MODEL CONTRACTS AND CLAUSES

International contracts refer to a legally binding agreement between parties, based on different countries, in which they are obligated to do or not to do certain things. International contracts may be written in a formal way. Most businesses create contracts in writing to make the terms of agreement clear, often seeking legal counsel when drafting important contracts. Contracts can cover all aspects of international trade, although the most commonly used are:

International Sale Contract

International Distribution Contract

International Agency Contract

International Sales Representative Contract

International Supply Contract

International Manufacturing Contract

International Service Contract

International Strategic Alliance Contract

International Joint Contract

International Franchise Contract

Model contracts are particularly useful for preparing international business transactions, but they are often expensive. The International Trade Centre offers for free online its Model Contracts for Small Firms and Legal Guidance for Doing International Business. The ICC offers (for purchase) an array of model contracts for international transactions, including an influential model for sales contracts.

The contracts are the products of some of the finest legal minds in the field of international commercial law. They are constructed to protect the interests of all

the parties, combining a single framework of rules with flexible provisions allowing the parties to insert their own requirements.

Arbitration institutions and rules typically offer model clauses that can be useful for incorporating an ***arbitration clause*** in a contract. For example, the model clauses of the Arbitration Institute of the Stockholm Chamber of Commerce, the LCIA, and the International Centre for Dispute Resolution.

Choice of law clauses can be found in the model contracts mentioned above, but there are also other sources. UNIDROIT, for example, has prepared Model Clauses for the use of the UNIDROIT Principles of International Commercial Contracts. Some arbitration institutions also offer model choice of law clauses. For example, the clauses from the Chinese European Arbitration Centre.

The ICC *Confidentiality Agreement* is the latest in a series of widely used model contracts published by the International Chamber of Commerce.

The ICC *Force Majeure Clause2003* and the ICC *Hardship Clause 2003* are the examples of the model readymade clauses to be inserted by the parties in their International Commercial contract.

## 6.5 ASSESSMENT OF SALE OF GOODS BY TRANSFER OF PROPERTY WITH CERTAINTY AND FLEXIBILITY

The transfer of property takes place when the contract is concluded even the delivery and payment of price happens subsequently. This principle was adopted by French law by Code Civil of 1804. The same appears in English rule set out in Sale of Goods Act (SOGA), 1893. The other system of transfer of property is stipulated by the delivery which was seen in German Law and Australian Law; the former talks of abstract delivery and the latter with casual delivery. The transfer of property i.e., the ownership belongs to the realm of general formulas, while the solutions of the various practical problems belong to the realm of operational rules. Thus, it is observed that even legal systems with contrasting general formulas can share identical operational rules.

When questions emerge from the perspective of the ownership, the judge must refer to the domestic law applicable according to the usual rules of conflict. The absence of precise rule in the CISG is not a loophole; it was a deliberate choice by the drafters to leave it the judge to decide as it was a highly sensitive aspect in the sale of goods. This facilitated the adoption of CISG by divergent legal systems that adopt one solution or the other for domestic sales.

A certain degree of certainty is attributed to the sale laws that guarantee the maximum predictability of the solutions asked by the judges and arbitrators. This implies that legal rule must be as precise as possible and must avoid loopholes, generic directive for the parties or interpretation gapes for the decision of cases. On the other hand, any sale law that contains general clauses, such as the good faith principle, binding the contracting parties to behaviour, whose legitimacy is decided after the event by Judge or arbitrator, is considered flexible. In particular, the English law considered a bulwark of certainty, and German law is considered as very flexible. The former does not have an obligation to act in

good faith, while the latter, good faith and reasonableness permeate the entire spectrum of contract relationships. The tension between certainty and fairness is solved by the CISG principles.

## 6.6 CISG INFLUENCE ON INDIVIDUAL NATIONAL SYSTEMS

It was noted by the scholars that CISG is having impact regarding both sales of goods, obligations law and contractual law generally on the numerous legal systems.[37] Its' influence on individual legal systems may be felt by the courts, by doctrine, by legal practice and law-makers. The Dutch judges used the CISG principles in interpreting the national law regarding the formation of contract, breach of contract and non-conformity of goods sold.

The Scandinavian countries except Denmark revised their national Sale of Goods Acts in line with the most of the principles of CISG: Finland in 1988, Norway in 1989, Sweden in 1991, and Iceland in 2000.

The CISG influenced the Europe by the Law of Obligations Act in 2002 which is the identical transposed binding's nature of usages and practices, the objective interpretation of the declaration of intent, the freedom of form, the mitigation of harm and the prohibition of abuse of rights[38]. The Tokelu Islands has adopted the rules of the CISG as domestic law both for the sale of goods and for general contract law. The largest economy, China, the CISG has essentially become part of domestic law. The Contract Law 1999 was amply supported by CISG rules. The drafters of new Chinese Civil code were able to find in the CISG a very important resource of rules both for the sale of goods and the contract law in general.

In some legal systems reforms in the national laws have begun or have been suggested. New Zealand Sale of Goods Act, 1908 is the example of this reform. The largest economy in Africa, Nigeria though not ratified the CISG; Nigerian Law Reform Commission began to consider a reform of the Sale of Goods Act, 1893[39]. It reproduces the old English law on sale of goods and now there is a call for the reform to take the CISG as model law[40].

Japan didn't ratify the CISG for a long period. The scholars noted that CISG rules are arguably better than the Japanese sales law[41]. The on-going reform[42] of the Japanese law of obligation could raise the level of reception of CISG principles and rules in the Japanese legal system. The Turkey new Code of Obligations deeply reformed the contract law which was, based on the Swiss model adopted in 1920[43].

Seventeen central African countries who are currently the members of the Organization for the Harmonization of business law in Africa (OHADA) intended to remedy the legal and juridical uncertainty that exists among the signatory states. In 1997 they adopted a uniform law governing commercial law which was modified and modernised in 2010. This regulates all the sales of goods between companies, and excludes the sales to consumers. With French culture they adopted the CISG principles to domestic sale of goods, including several rules deriving from English Common Law.

## 6.7 REGIONAL EFFORTS

*The preamble to CISG states that*: The adaptation 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.

The European Commission proposed a new uniform law on the sale of goods, intending to solve the problems arising from this diversity of national contract laws. The Common European Sales law (CESL) governs sales to both consumers and businesses. The CESL would then offer a new choice between the legal systems that the parties can make freely; any national law either of EU members or of other states.

The Association of Southeast Asian Nations (ASEAN) approved the ASEAN Trade in Goods Agreement. These treaties expand the free trade area beyond the borders of the community of ASEAN countries, and envisage the gradual implementation of the free circulation of goods between ratifying state, elimination of customs and protectionist barriers. However, these treaties do not contain rule to be applied to the international trade contracts, but are limited to encouraging strong regional standardisation.

The UNCITRAL and The Hague have recently established regional centres that offer a significant opportunity to promote the various private international law instruments, including those relating to international contract law.[44] In the light of the importance of the issue, efforts by the UNCITRAL Secretariat are welcome to explore other means of promoting and maintaining uniformity in the interpretation of the CISG. The Secretariat recently proposed the establishment of a system of national centres of expertise in the field of commercial law that go beyond the current national correspondent system of Case Law on Uncitral Texts (CLOUT).

According to the Secretariat, the system would

a) Collect, analyse, and monitor national case law related to UNCITRAL texts

b) Report the findings to UNCITRAL, and

c) Address the need of the judiciary to better understand the internationally prevailing application and interpretation of UNCITRAL standards and achieve effective cross-border co-operation.[45]

Resources are the biggest obstacle to such a proposal as noted by the Secretariat.

**Cooperation:**

The UNCITRAL and its sibling operations, UNIDROIT and the Hague Conference should continue to coordinate and cooperate on all matters regarding the international contract law in order to ensure that the organisations' agendas remain complimentary. The UNIDROIT and UNCITRAL have recently supported consideration of joint collaboration between the two organisations on substantive law projects as suggested by US[46]. These two may consider a joint project on long-term contracts.

Naturally evolving harmonisation through progressive interpretation and the use of existing instruments will continue to ensure that harmonisation is workable

and feasible. The CISG and PICC working together, have been remarkably successful in addressing the needs of commercial players in international commerce. There are more practical, positive and forward-looking alternative that build on the existing platform of the CISG and the PICC. The UNCITRAL must continue its efforts to assist States in maintaining uniform interpretation and implementation of the CISG.

**Battle of forms:**

Battle of the forms is one of the unresolved legal problems to which different counties' courts have their own approach. There are three main approaches in the literature as to the battle of forms; domestic approach, last shot rule and knock-out rule. The last shot rule and knock-out rule are in competition with each other. The courts are required to answer two questions; **a.** Is there a valid contract between the parties? **b.** If yes, which terms of the standard forms are the parts of the contract? The CISG has not given uniform answers to solve the arisen disputes.[47] The battle of forms dilemma can't be resolved by single formula as there are different situations of collusion and the various positive behaviours of the parties.

The CISG is not concerned with validity of contract. Which standard terms should be incorporated into the contract shall be solved by the applicable domestic law.[48] The courts are required to look to the general principles of the CISG first, before recourse to domestic law. Domestic approach is not widespread as this is inconsistent with the main reason with the existence of CISG, namely unification of the sales law.

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. The traditional common law rule namely the 'mirror image ' rule , which produces the last shot rule in order to answer to the battle of forms issue. The last shot rule 'treats every statement made with reference to confliction standard terms as a rejection of the earlier offer, combined with counteroffer.[49] In other words, the contract is concluded on the terms of the final form used, without being objected by the other party.[50] The conflicting standard terms knock each other out and the provisions of CISG are applied instead of them. The courts are to find the actual or deemed consensus of the parties based on their negotiations in respect of the essential elements of transaction.

The aforesaid analysis of the battle of the forms makes it clear that knock-out rule is supported by scholars and cases, because of advantages such as conformity with the intention of the parties to the business, balanced and fair approach, supportive approach to the contract validity issue, and providing uniform application of the Convention by referring to its provisions in case of knock –out terms.

## 6.8 COVID-19 PANDEMIC AND ITS IMPACT ON THE PERFORMANCE OF INTERNATIONAL SALE OF GOODS CONTRACT

A *force majeure* clause in international sale of goods contract relives a party from performing its contractual obligations when certain circumstance beyond its control arise, making performance inadvisable, commercially impracticable, illegal or impossible.

The CISG Article 79 provides that "(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 impediment into account at the time of conclusion of the contract or to have avoided or overcome it, or its consequences"

The treatment of impediment under CISG is different from the treatment under common law. Generally, four conditions must be satisfied to assert the *force majeure* protection under the CISG:

1) The impediment must be *beyond the party's control*
2) The impediment is *unforeseeable* at the time the contract was signed.
3) The impediment and its consequences could not be reasonably *avoided* or *overcome.*
4) The *non-performance* of the party is the result of the impediment.

Under Article 2 of the Uniform Commercial Code (UCC) of US a seller may be excused from delay or non-delivery of the goods if performance has been made *impracticable* by either:

1) The occurrence of an event *"The non occurrence of the which was a basic assumption on which contract was made"* or
2) Good faith *compliance* with *foreign* or *domestic government regulation*

The Common law doctrines of frustration and impossibility may be invoked, but they have higher threshold to overcome.

Predating the Covid-19 pandemic, well known examples such contractual arrangements are found in model clauses issued by International Chamber of Commerce (ICC), namely ICC's 2003 *force majeure* clause, and the ICC's Hardship clause. This has changed with the ICC's 2020 Hardship clause which suggest three different legal consequences in the event of failed renegotiations, any of which the parties can choose when concluding the contract;

1) The termination of the contract by one of the parties,
2) The termination of the contract by a Judge (or Arbitrator) or
3) finally, the adjustment or termination of the contract by a Judge (or Arbitrator)

To combat uncertainties for future crises like COVID-19, it is therefore advisable to negotiate individual contractual clauses pertaining to *force majeure* and hardship in order to determine the desired distribution of contractual risk in advance[51].

## 6.9 SUMMARY

In business-to-business international transactions, it would appear that the market is operating affectively on that differences in contract law do not pose a serious obstacle to cross-border trade. The conventions, the national laws, soft laws and trade usages, Unidriot principles, *lex Mercatoria,* incoterms, UCP 600, model contracts and clauses, CISG, PICC, Uncitral principles will help to overcome the obstacles faced by the parties in their cross-border trade through international contracts of sale of goods.

## 6.10 SELF ASSESSMENT QUESTIONS

1) Explain the importance and significance of international contracts.
2) Discuss in detail the law and rules applicable to international contracts
3) Write a note on the historical back ground of the international sale of goods contracts.
4) Analyse the assessment of sale of goods by transfer of property with certainty and flexibility.
5) Make a brief note on CISG influence on individual national systems
6) Elucidate the regional efforts and cooperation in unifying the sales law.
7) Critically evaluate the methods of battle of forms.
8) Discuss the unforeseen circumstances which resulted the non-performance by a seller in an international contract of sale.

## 6.11 FURTHER READINGS

1) Michael J. Dennis, Modernizing and harmonizing International Contract law: The CISG and the UNIDROIT Principles continue to provide the best war forward, Unif.L.Rev.Vol.19,2014,114-151
2) Jurgen Basedow, Some conflict-of-Laws Perspectives on the European Banking Union,Texas Inernational Journal Vol.54:2 p.245
3) Kamal Huseynli, different Aproaches to conflicting Standard Terms under the United Nations Convention on Contracts for the International Sale of Goods, BAKU State University Law Review, vol.2. Issue 2, May 2016 p.197
4) J Cotzee, A Pluralist Approach to the Law of International Sales,PER/PELJ 2017(20) p.1
5) Angelo Chianale, The CISG As a Model Law: A Comparative Law Approach, Singapore Journal of Legal Studies(2016) 29-45
6) Phillip Hellwege, Understanding Usage in International Contract Law Harmonization,Vol.66 The American Journal of Comparative Law,127-171
7) Marija D. Mijatovic,The Currentness of the UNIDROIT Principles of International Contracts-Effects of bottom –up method of Law Harmonization
8) Luca G. Castellani, Review: LRethinking Choice of Law in Cross-Border Sales, NJCL2019/1
9) Petra Butler, Book Review: UNIDROIT Principles of International Commercial. Contracts
10) IEckart Broderman, Book Review:UNIDROIT Principles of International Commercial. Contracts
11) Andre Janssen and Christian Johannes Wahnschaffe, COVID-19 and international sale contracts: unprecedented grounds for exemptions are business as usual? Uniform Law Review, 2021 February 2, published online 2021 Feb 2. doi: 10.1093/ulr/unaa026.

## *References:*


1 see United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (the "CISG"), Article 1(1); Principles on Choice of Law in International Commercial Contracts (2015) (the "Hague Principles"), Article 1(2)).

2 Preamble Comment UNIDROIT Principles of International Commercial Contracts 2010

3 Cyril Emery , International Commercial Contracts, Published in March 2016

4 governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention") with 156 State parties

5 (Vienna, 1980, the "CISG")

6 see CISG, Part I, Articles 1-5

7 Renaud Sorieul et al., *Possible Future Work by UNCITRAL in the Field of Contract Law: Preliminary Thoughts from the Secretariat*, 58 Vill. L. Rev. 491, 500 at n.25 (2013) (citing John O. Honnold, *The* Sales *Convention in Action—Uniform International Words: Uniform Application?*, 8 J.L. & Com. 207, 208 (1988)).

8 References in this text are to the amended Convention unless stated otherwise.

9 see Limitation Convention, Articles 1-6

10 Limitation Convention, Article 8

11 Limitation Convention, Article 3(2)

12 Limitation Convention, Article 7

13 New York, 2005-the "Electronic Communications Convention"

14 Electronic Communications Convention, Article 3

15 Ibid, Article 5.

16 *See, e.g.*, Giuditta Cordero-Moss, International Commercial Contracts: Applicable Sources and Enforceability 137 (2014); Gerhard Dannemann, *Common Law-Based Contracts under German Law*, *in* Boilerplate Clauses, International Commercial Contracts and the Applicable Law 62, 63 (Giuditta Cordero-Moss ed., 2011).

17 Ingeborg Schwenzer & Christopher Kee, *International Sales Law – The Actual Practice*, 29 Penn St. Int'l L. Rev. 425, 440-441 (2011).

18 2010International Arbitration Survey:Choices in International Arbitration

19 *2013 Statistical Report*, 25 ICC Int'l Ct. of Arb. Bull., no.1, 2014 at 5, 13.

20 A few States have made declarations under CISG, Article 95, including the United States, indicating that they will not be bound by Article 1(1)(b). With regard to choice of law, it should be noted that courts and arbitration tribunals have generally found that, for the purposes of considering which law should apply when parties have generically chosen the law of a CISG State, the CISG forms part of the law of that State and will apply unless the parties have excluded its application or have specifically referred to the domestic law of the State, for example, by identifying the particular code in

question. UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods Art. 6, paras. 9-17 (2012).

21 *See, e.g.*, Cordero-Moss, *supra* note 16, at 31.

22 see section 3.1.1

23 see section 2.2

24 Consider, for example, the UCP 600 (see section 3.3.4). While very widely used and applied, State courts have, in some instances, overridden the UCP 600 with State law despite party choice to be governed by its provisions. Cordero-Moss, *supra* note 16, at 64-68.

25 Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts 4-6 (2013).

26, Article 7, (UNIDROIT Principles, Article 1.6)

27 Report of the United Nations Commission on International Trade Law, 45th Session UN Doc A/67/17 (2012)

28 These principles were endorsed by UNCITRAL at its 48th session. Report of the *United Nations Commission on International Trade Law,* 48th Session Un Doc/A70/17(2015)

29 Michael Joachim Bonell "The Law governing International Commercial Contracts: Hard law Versus Soft law" in collected courses of the Hague Academy of International law (Brill Leiden-2018) vol 388

30 William F. Fox, International Commercial Agreements and Electronic Commerce 31 (5th rev. ed. 2013).

31 Regarding the customary, trade practice and normative understanding of contractual terms in the international sales contracts with regard to dispute between the parties to an international sales contract.

32 Ingeborg Schwenzer et al., Global Sales and Contract Law (3d ed. 2012)at 49-50

33 *ibid*

34 *See, e.g.*, Alexis Mourre, *Applications of the Vienna International Sales Convention in Arbitration*, 17 ICC Int'l Ct. of Arb. Bull., no.1, 2006 at 43, 49; Schwenzer, *supra* note 27, at 49-50.

35 The term that was used in an international sales contract keep in view the meaning of the term as per customary, trade practice or normative understanding of the said term.

36 Incoterms 2010: ICC Rules for the Use of Domestic and International Trade Terms 87 (2010).

37 *Cf* Franco Ferrari, ed, The CISG and its Impact on National Legal Systems (Munich: Sellier European Publishers 2008); Peter Schlechtriem, "Basic Structures and General Concepts of the CISG as models for harmonisation of Law Obligations" (2005) 10 Juridica Int'l. 27

38 *Cf* Irene Krull, "Reform of Contract Law in Estonia: Influences of Harmonisation of European Private Law" (2008) 14 Juridica Int'l 1 22.

39 At a workshop on 2nd September 2014, the Nigerian Law Reform Commission began to consider a reform of the Sale of Goods Act, 1893 though CISG was not ratified by Nigeria.

40 *Cf* Nkiruka Maduekwe, "The CISG and Nigeria: is there a Meeting Point" (2009/10) 14 CEPMLP Ann. Rev., online.

41 *Cf* Noboru Kashiwagi, "Accession by Japan to Vienna Sales Convention (CISG)" (2008) 25 J Japan L 207 at page 214.

42 Ibid.

43 The New Code (Article 208) follows the solution of the CISG (arts. 67, 68) regarding risk of accidental destruction and deterioration of the goods sold. The old code connected the passage of risk with the conclusion of the contract where as risk and benefit on the goods sold in the new code pass to the buyer at the moment of the transfer of possession.

44 See UN Information Service, New UNCITRAL Regional Center for Asia and the Pacific opens Republic of Korea, Press release UNIS/L/159(26 January 2012); see Hague Permanent Bureau, Report on the Activities of the New Regional Offices of Latin America and the Pacific, Doc Information no 1(March 2013)

See Unicitral Secretariate, Technical Cooperation And Assistance Un Doc A/CN.9/775(May2013) Para 11.

45 See Renaud Sorieul, Emma Hatcher and Cyril Emery, "Possible Future work by UNICITRAL in the field of Contract Law: Preliminary Thoughts from the Secretariat" 58 VillanovalLaw Review 491, 505

46 US proposal on *UNCITRAL Future Work* (n 10) 4-5; UNIDROIT Governing Council, 92nd Session (n 133) para 35.

47 See Larry A. Dimatteo et.al., The interpretive turn in International Sales law: An Analysis of Fifteen years of CISG Jurisprudence, 24Nw.J.Intl & Bus.299, pp.349-357(2004)

48 Freancois Vergne, The "Battle of the Forms" Under the United Nations convention on Contracts for the International Sale of Goods, 33 Am.J. Comp. L 233 pp.256-257(1985)

49 Andre Corterier, A Peace Plan for the Battle of the Forms, 10 Int'l Trade & Bus.L.Rev.195 p .197 (2006)

50 Peter Huber, Standard Terms under the CISG, 13 Vinodnona Journal of International Commercial law & Arbitration 123, p.129( 2009)

51 Andre Janssen and Christian Johannes Wahnschaffe, COVID-19 and international sale contracts: unprecedented grounds for exemptions are business as usual? Uniform Law Review, 2021 February 2, published online 2021 Feb 2. doi: 10.1093/ulr/unaa026.