

DiMatteo / Janssen / Magnus / Schulze

International Sales Law

A Handbook

Second Edition



DiMatteo / Janssen / Magnus / Schulze
International Sales Law

International Sales Law

A Handbook

edited by

Larry DiMatteo

André Janssen

Ulrich Magnus

Reiner Schulze

Second Edition

2021



Published by

Nomos Verlagsgesellschaft mbH & Co. KG, Waldseestraße 3–5, 76530 Baden-Baden, Germany,
email: vertrieb@nomos.de

Co-published by

Verlag C.H.Beck oHG, Wilhelmstraße 9, 80801 München, Germany,
email: bestellung@beck.de

and

Hart Publishing, Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, United Kingdom,
online at: www.hartpub.co.uk

Published in North America by Hart Publishing,
An Imprint of Bloomsbury Publishing 1385 Broadway, New York, NY 10018, USA

ISBN 978 3 8487 7801 0 (NOMOS Print)

ISBN 978 3 7489 2205 6 (NOMOS ePDF)

ISBN 978 3 406 77080 7 (C.H.BECK)

ISBN 978 1 5099 5323 3 (HART)

Second Edition 2021

© Nomos Verlagsgesellschaft mbH & Co. KG, Baden-Baden 2021. Printed in Germany.

This work is subject to copyright. All rights are reserved, whether the whole or part of the material is concerned, specifically those of translation, reprinting, re-use of illustrations, broadcasting, reproduction by photocopying machine or similar means, and storage in data banks. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to »Verwertungsgesellschaft Wort«, Munich, Germany.

Preface to the Second Edition

The first edition to this book was published in 2016. After very positive input from the publisher and colleagues, we decided to go forward with a second edition.¹ Over the five years since the first edition, a number of developments required an updating of the text. The new edition incorporates these major changes including the enactment of the new French Civil Code in 2016, the new and expanded edition of the UNIDROIT Principles of International Commercial Contracts (PICC) in 2016, the publication of INCOTERMS 2020, and the adoption of the first comprehensive Chinese Civil Code (CCC), which will come into force on 1 January 2021.

In addition, the book has been updated to include the constantly developing case law and the rapidly increasing literature on international sales law. The numbers of updates are too many to name but include recent events, such as a discussion of COVID-19 as a force majeure event, more in-depth discussion of agency law and additional sample or model clauses. The 'Additional Sources' section has been updated with references to new secondary sources and scholarship. Another change is that references to the Common European Sales Law (CESL) have been limited to those issues and topics where the CESL offers solutions to practitioners and scholars in resolving practical and theoretical problems.

The second edition's purpose is not only to refresh the contents of the earlier edition, but also to expand topical coverage. However, the limitations of a single volume book continue to require care in selecting the topics to be covered, among the myriad of issues relating to international sales transactions, especially given the vast number of specialized industries. In the end, the book attempts to balance the breadth and depth of coverage in order to provide an erudite single-volume text.

As can be seen from the list of contributors, there has been some changes in the circle of authors. We would like to thank the departing authors for their contributions to the first edition and welcome the new authors for bringing a fresh set of eyes to the evolving nature of international sales law. We are hopeful that practitioners, scholars, and students will continue to find the text a useful source on issues relating to transborder sales transactions. The editors' welcome constructive feedback and suggestions for the next edition. Please send your comments to André Janssen at andre.janssen@jur.ru.nl or Larry DiMatteo at larry.dimatteo@warrington.ufl.edu.

Finally, we hope you enjoy reading the new edition of our book!

November 2020,

Gainesville, Florida (USA)	Larry A. DiMatteo
Nijmegen, The Netherlands	André Janssen
Hamburg, Germany	Ulrich Magnus
Münster, Germany	Reiner Schulze

¹ Cf. Ahuja, *European Review of Private Law (ERPL)* (2017) 469–476; Fuglinszky, 83 *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* (2019) 192–199; Patti, *Annuario di diritto civile (AdC)* (2016) 360–363; Wollenweber, *Die Rezensenten* (2016), available at: <http://dierezensenten.blogspot.de>; somewhat critical however Schwenzer, 83 *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* (2019) 190–192.

Preface

This treatise and practitioner guide is the outcome of a meeting of international sales law scholars held 27–28 September 2013. The purpose of the meeting was to provide a foundation for writing a comprehensive book that would be useful to teachers, scholars, and students of international sales law, as well as to act as a single volume reference guide for the international transactional lawyer. The group members set out the ambitious goal of providing a comprehensive and practical treatise on the complex and broad area of international sales law. The contributors come from numerous countries and include in alphabetical order the following international sales law scholars: Orkun Akseli (Durham University Law School), Michael Bridge (London School of Economics and Political Science), Petra Butler (Victoria University of Wellington), Michel Cannarsa (Catholic University of Lyon), Giuditta Cordero-Moss (University of Oslo), Larry A. DiMatteo (University of Florida), Sieg Eiselen (University of South Africa), Edoardo Ferrante (University of Turin), Harry M. Flechtner (University of Pittsburgh), Christian Fleischmann (University of Bayreuth), Claire M. Germain (University of Florida), Rafael Ilescas Ortiz (Carlos III University of Madrid), André Janssen (City University of Hong Kong), Sörren Kiene (Brandt Rechtsanwälte), Qiao Liu (University of Queensland and Xi'an Jiaotong University), Ulrich Magnus (University of Hamburg), Burghard Piltz (Ahlers & Vogel), Willibald Posch (University of Graz), Séverine Sainter (University of Exeter), Martin Schmidt-Kessel (University of Bayreuth), Reiner Schulze (University of Münster), Lisa Spagnolo (Monash University), Bruno Zeller (University of Western Australia), and Wentong Zheng (University of Florida).

For the civilians, a restatement or digest is generally a clarification of existing legal rules and principles. However, restating and clarifying existing case law has also been the goal of private law codification in common law countries. Examples include the United Kingdom Sale of Goods Act 1979 and the Real Property Law Statutes found in American state laws. These statutes intended purpose is to clarify an often expansive and chaotic case law. This book, however, follows the lead of the American *Restatements of Law*, which provides a descriptive summary of existing law while at the same time reaching normative conclusions on divergent approaches or interpretations found across nation states and international legal instruments. The book attempts to transcend divergences in national and supranational sales laws in providing alternative and practical solutions to the issues most relevant to international sales transactions.

This restatement of international sales law, by necessity, employs a comparative law approach. But, the comparative analysis goes beyond the traditional nation-to-nation or legal tradition versus legal tradition analyses. Globalization and regionalization in the marketplace has resulted in the production of numerous regional and international hard and soft law instruments. Thus, the book's work is not so much that of harmonization as it is of synthesis of a plurality of sources.

The current undertaking samples legal rules from various legal systems and international instruments. At the same time, the legal analysis in the book is placed in the context of international sales practice. It seeks to educate on alternative legal approaches to sales contract issues in order to provide practical advice on how the international transactional lawyer should address these issues in their contracts.

In the end, the book's immersion of various legal instruments—United Nations Convention on Contracts for the International Sale of Goods (CISG), UNIDROIT Principles of International Commercial Contracts (PICC), Principles of European Contract Law (PECL), the proposal for a Common European Sales Law (CESL), German Bürgerliches

Preface

Gesetzbuch (BGB), Spanish Código Civil, French Code Civil, United Kingdom Sale of Goods Act 1979, American Restatement (Second) of Contracts, Uniform Commercial Code (UCC), and Chinese Contract Law—provides the base knowledge needed to understand the nuances of international sale law and to best represent business clients.

We would like to thank the sponsors that provided the funding for this endeavor: Levin College of Law (University of Florida), Warrington College of Business Administration (University of Florida), University of Florida Center for International Business Education and Research (CIBER), University of Florida Division of Research, and the Department of Management and Legal Studies at the Warrington College of Business. Finally, we kindly thank Aleksandra Socik and Jonathon Watson for their support in the preparation of this guide.

February 2016,

Gainesville, Florida	Larry A. DiMatteo
Hong Kong, China	André Janssen
Hamburg, Germany	Ulrich Magnus
Münster, Germany	Reiner Schulze

Contents

Preface to the Second Edition	V
Preface	VI
List of Contributors	XXXI
Abbreviations	XXXV

CHAPTER 1 INTRODUCTION

Larry A. DiMatteo, André Janssen, Ulrich Magnus and Reiner Schulze

A. What is International Sales Law?	1
B. Sources of International Sales Law: Why the CISG?	1
C. Commercial Practice, Business Custom and Trade Usage	3
D. Ambiguities and Gaps	5
E. Restatement Approach	7
F. International Transactional Lawyering	8
G. Drafting Approach	9
H. The Sales Contract	11
I. Electronic Contracting	11
J. Treatise's Coverage	13
K. Additional Sources	15

CHAPTER 2 LANGUAGE AND TRANSLATION ISSUES

Claire M. Germain & Larry A. DiMatteo

Part I: The Language of the Contract	16
A. Topics Covered	16
B. Introductory Note	17
C. Statement of Issues	17
D. International Sales Transaction	18
E. Sampling of Laws	18
I. CISG	18
II. UNIDROIT Principles of International Commercial Contracts	18
III. Common European Sales Law	18
IV. Principles of European Contract Law	19
V. Comment on PICC, CESL, and PECL Provisions	19
VI. National Laws	19
VII. Chinese Law	20
F. Commentary	20
I. PICC	23
II. Lessons Learned from Translations of Law	23
III. Plain Language Movement	24
G. Illustrations	25
H. Practitioner Tips & Contract Clauses	25
I. Drafting Considerations: Checklist	25
I. Best Practices: Lawyer-Translator	26
II. UNCITRAL Guide	27
J. Additional Sources	28

Contents

Part 2: Law Written in Multiple Languages	29
A. Topics Covered	29
B. Introductory Note	29
C. Statement of Issues	30
D. International Sales Transaction	30
E. Sampling of Laws	30
I. CISG	30
II. UN Vienna Convention on the Law of Treaties	30
III. Treaty of the European Union	31
F. Commentary	32
I. Evolution of Different Meanings within Legal Traditions	34
II. Problem of Superficial Transplantation	35
G. Practitioner Tips & Contract Clauses	36
H. Additional Sources	36

CHAPTER 3
PRECONTRACTUAL LIABILITY IN THE CIVIL LAW

Ádám Fuglinszky

Part I: Precontractual Conduct and Liability	39
A. Topics Covered	39
B. Introductory Note	40
I. Contractual Negotiations and the 'Grey Area' towards Final Agreement	40
II. Fundamental Principles: Contractual Freedom v. Good Faith in Negotiations	42
III. Evaluation of Precontractual Liability	43
IV. Classification of Precontractual Liability: Contract, Tort or <i>sui generis</i> ?	45
V. Didactic and Regulatory Approaches	47
C. Statement of Issues	56
D. International Sales Transactions	58
E. Sampling of Laws	58
I. CISG	58
II. UNIDROIT Principles of International Commercial Contract (PICC)	58
III. Principles of European Contract Law (PECL)	59
IV. German Bürgerliches Gesetzbuch	60
V. French Code Civil	62
VI. Spanish Código Civil	64
VII. Italian Codice Civile	64
VIII. Netherlands Burgerlijk Wetboek	65
IX. Chinese Law	66
X. Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Chinese Contract Law (prior to the New Civil Code)	66
F. Commentary	68
I. The CISG and Precontractual Liability	68
II. Precontractual Duties and Their Breach	71
III. Remedies	84
G. Illustrations	89
I. Enter or Continue Negotiations without True Intent to Conclude the Contract	89
II. Breaking off Negotiations	90
III. Duty of Information	95
IV. Confidentiality	96
V. Missing Planning Permission	97
H. Cross References & Additional Commentary	98
I. Practitioner Tips & Contract Clauses	98
J. Additional Sources (Bibliography)	98

Contents

Part II: Precontractual Instruments	99
A. Topics Covered	99
B. Introductory Note	100
I. Why Are Precontractual Instruments Needed?	100
II. What is a Precontractual Instrument?	101
III. Legal Effects of Precontractual Instruments	102
IV. Types of Precontractual Instruments	102
C. Statement of Issues	103
D. International Sales Transactions	104
E. Sampling of Laws	104
I. UNIDROIT Principles of International Commercial Contract (PICC)	104
II. Principles on European Contract Law (PECL)	104
III. French Code Civil	105
IV. Spanish Código civil	105
V. The Interpretation of the Supreme People's Court on Issues Concerning the Application of Law for the Trial of Cases of Disputes over Sales Contracts in Chinese Contract Law	105
F. Commentary	105
I. Agreement to Negotiate and to Negotiate in Good Faith	106
II. Provision on the Non-binding Character of Negotiations	106
III. Final Contract within the Discretion of One Party	107
IV. Exclusivity	107
V. Confidentiality	108
VI. Distribution of Costs and Limitation of Liability	109
VII. Dispute Resolution	109
G. Illustrations	110
H. Cross References & Additional Commentary	111
I. Practitioner Tips & Contract Clauses	111
I. Binding and Non-binding Parts	111
II. Confidentiality	112
III. Exclusivity	112
IV. Reallocation of Costs, Limitations of Liability	112
J. Additional Sources	113

CHAPTER 4
PRE-CONTRACTUAL LIABILITY IN THE COMMON LAW

Larry A. DiMatteo

A. Topics Covered	114
B. Introductory Note	116
C. Statement of Issues	117
D. International Sales Transaction	118
E. Sampling of Laws	118
I. Principles of European Contract Law	119
II. Common Law of Contracts	119
III. American Restatement (Second) of Contracts	119
IV. American Uniform Commercial Code	119
V. Trade Secrets Law	120
VI. American Uniform Trade Secrets Act	120
VII. French Civil Code (Negotiations)	120
VIII. UNIDROIT Principles of International Commercial Contracts	121
IX. CCC	121
X. Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Chinese Contract Law (prior to New Civil Code)	121
XI. International Trade Usage	122

Contents

F. Commentary	122
I. Good Faith in Negotiations	122
II. Pre-contractual Instruments	126
III. Misrepresentation and the Duty to Disclose	143
IV. Breach of Confidentiality	144
G. Illustrations	146
Case of Promissory Estoppel	146
H. Cross References & Additional Commentary	147
I. Practitioner Tips & Contract Clauses	148
I. Good Commercial Practice	148
II. Benefits and Functions of a Well-Structured Preliminary Agreement	148
III. Sample Clauses	149
J. Additional Sources	150

CHAPTER 5
SCOPE OF CISG

Sieg Eiselen

A. Topics Covered	151
B. Introductory Note	152
C. Statement of Issues	153
D. International Sales Transaction	154
E. Sampling of Laws	154
I. CISG	154
II. CISG Advisory Council Opinions	155
III. INCOTERMS	156
IV. Principles of European Contract Law	157
V. Common European Sales Law	157
VI. UNIDROIT Principles of International Commercial Contracts	158
VII. German Bürgerliches Gesetzbuch and Handelsgesetzbuch	158
VIII. French Code Civil	159
IX. Spanish Código Civil	159
X. American Uniform Commercial Code	160
XI. English Sales Law	161
XII. Chinese Law	162
F. Commentary	162
I. CISG's Choice of Law Rules	162
II. Defining Sale of Goods	162
III. Mixed Sales	164
IV. Issues of Validity	164
V. Personal Injury	165
VI. Derogation from the CISG	165
VII. CISG and Other International Law Instruments	166
VIII. CISG and INCOTERMS	167
IX. CISG and National Laws	168
G. Practitioner Tips & Contract Clauses	172
I. Practitioner Tips	172
II. Model Clauses	173
H. Additional Sources	174

CHAPTER 6
JURISDICTION

Sieg Eiselen

A. Topics Covered	177
-------------------------	-----

Contents

B. Introductory Note	178
C. Statement of Issues	180
D. International Sales Transaction	181
E. Regional Regimes	182
F. Domicile, Residence or Place of Business of the Defendant	184
I. Introduction	184
II. Sampling of Laws	184
III. Comments	193
G. Agreement and Submission	198
I. Introduction	198
II. Sampling of Laws	198
III. Comments	203
H. Where the Cause of Action Arose	207
I. Introduction	207
II. Sampling of laws	207
III. Comments	210
I. Exclusion of Jurisdiction	215
I. Introduction	215
II. Sampling of Laws	216
III. Comments	224
J. Illustrations	230
I. Example 1	230
II. Example 2	230
K. Cross References & Additional Commentary	231
L. Practitioner Tips & Contract Clauses	231
M. Additional Sources	232

CHAPTER 7
CONTRACTUAL FORMALITIES

Sieg Eiselen

A. Topics Covered	234
B. Introductory Note	235
C. Statement of Issues	237
D. International Sales Transaction	237
E. Sampling of Laws	237
I. CISG	237
II. United Nations Convention on the Use of Electronic Communications in International Contracts	238
III. Principles of European Contract Law	238
IV. Common European Sales Law	238
V. UNIDROIT Principles of International Commercial Contracts	239
VI. German Bürgerliches Gesetzbuch	239
VII. French Code Civil	239
VIII. Spanish Código Civil	241
IX. United States	241
X. English Sales Law	243
XI. Chinese Law	243
F. Commentary	244
I. CISG Formalities	244
II. CISG and United Nations Convention on the Use of Electronic Communications	245
III. Modification of Contracts	246
IV. Uniform Commercial Code Formalities	249
V. Other Electronic Commerce Laws and Conventions	250

Contents

G. Illustrations	251
H. Cross References	252
I. Practitioner Tips & Contract Clauses	252
I. Practitioner Tips	252
II. Model Clauses	253
J. Additional Sources	253

CHAPTER 8
FORMATION OF CONTRACT

Reiner Schulze

A. Topics Covered	256
B. Introductory Note	256
C. Statement of Issues	256
D. International Sales Transactions	257
E. Sampling of Laws	257
I. CISG	257
II. UNIDROIT Principles of International Commercial Contracts	259
III. Principles of European Contract Law	260
IV. Common European Sales Law	261
V. German Bürgerliches Gesetzbuch	263
VI. French Code Civil	264
VII. Spanish Código Civil	265
VIII. American Uniform Commercial Code	266
IX. United Kingdom Sale of Goods Act 1979	266
X. English Common Law	266
XI. American Restatement (Second) of Contracts	269
XII. Chinese Law	272
F. Commentary	274
I. Agreement	274
II. Offer	281
III. Acceptance	285
IV. Specific Forms of Conclusions of Contract	290
G. Cross References	293
H. Practitioner Tips	294
I. Additional Sources	294

CHAPTER 9
INCORPORATION OF STANDARD TERMS

Ulrich Magnus

A. Topics Covered	296
B. Introductory Note	297
C. Statement of Issues	297
D. International Sales Transaction	297
E. Sampling of Laws and Commentary	298
I. CISG	298
II. UNIDROIT Principles of International Commercial Contracts	302
III. Principles of European Contract Law	304
IV. Draft Common European Sales Law	306
V. German Law	308
VI. American Uniform Commercial Code	311
VII. English Law	313
VIII. French Law	315

Contents

IX. Spanish Law	316
X. Chinese Law	317
XI. Comparative Conclusions	319
F. Illustrations	320
G. Cross References & Additional Commentary	320
H. Practitioner Tips	321
I. Additional Sources	321

CHAPTER 10
TRADE TERMS AND INCOTERMS

Ulrich Magnus and Burghard Piltz

A. Topics Covered	322
B. Introductory Note	323
C. Brief History of the INCOTERMS	323
D. The Nature of the INCOTERMS	324
E. Brief Description of Each Clause of the INCOTERMS	324
I. In General	324
II. Rules for Any Mode or Modes of Transport	325
III. Rules for Sea and Inland Waterway Transport	327
F. Important Differences Between 2010 and 2020 INCOTERMS	327
I. New Order and Horizontal Presentation	327
II. Explanatory Notes and Introduction	328
III. Changes in Substance	328
G. Coverage of the INCOTERMS	329
I. In General	329
II. Place of Delivery/Passage of Risk	330
III. Responsibility for Performance Aspects	330
IV. Responsibility for Costs	330
H. Application of the INCOTERMS	331
I. Express Reference in Contract	331
II. Indirect Reference in Contract	331
III. Application as Trade Usage?	332
IV. Consequences of Incorporation	333
V. Interpretation	333
VI. Relationship to CISG	333
VII. Inconsistent Contract Terms	334
I. Similar Trade Terms	334
J. Cross References & Additional Commentary	334
K. Practitioner Tips & Contract Clauses	334
I. Correct Incorporation	334
II. Derogation from Certain INCOTERMS Aspects	335
III. Best INCOTERM for ‘Outsourcing’	335
IV. Wrong Combinations	336
V. Time of Essence?	336
L. Additional Sources	336

CHAPTER 11
VALIDITY OF CONTRACT TERMS

Edoardo Ferrante

A. Topics Covered	337
B. Introductory Note	338
I. General Issues on Contractual Validity	338

Contents

II. Different Grounds for and Degrees of Invalidity	339
III. Mandatory Rules and Open Spaces for Party Autonomy	341
IV. The Consequences of Invalidity: from the ‘Black Hole’ to the ‘0’ or ‘No’- Consequence	342
C. Statement of Issues	343
D. International Sales Transaction	343
E. Sampling of Laws	344
I. CISG	344
II. UNIDROIT Principles of International Commercial Contracts	349
III. Common European Sales Law (CESL) and the ‘New’ European Sales Law	352
IV. Draft Common Frame of Reference (and Principles of European Contract Law)	356
V. National Laws	360
F. Commentary	360
G. Practitioner Tips	361
I. Balanced Contractual Relationships	361
II. Unbalanced Contractual Relationships	362
H. Sample Clauses	363
I. Additional Sources	364

CHAPTER 12
DELIVERY OF GOODS

Sörren Kiene

Part 1: Place and Manner of Delivery	366
A. Topics Covered	366
B. Introductory Note	366
C. Statement of Issues	366
D. International Sales Transaction	366
E. Sampling of Laws	367
I. CISG	367
II. UNIDROIT Principles of International Commercial Contracts	372
III. Principles of European Contract Law	372
IV. German Bürgerliches Gesetzbuch	373
V. French Code Civil	373
VI. Spanish Código Civil	374
VII. United Kingdom Sale of Goods Act 1979	375
VIII. American Uniform Commercial Code	375
IX. Chinese Law	376
F. Commentary	377
G. Illustrations	377
H. Cross References & Additional Commentary	378
I. Practitioner Tips	378
J. Sample Clauses	380
K. Additional Sources	380
Part 2: Time of Delivery	380
A. Topics Covered	380
B. Introductory Note	380
C. Statement of Issues	381
D. International Sales Transaction	381
E. Sampling of Laws	381
I. CISG	381
II. UNIDROIT Principles of International Commercial Contracts	382
III. Principles of European Contract Law	382

Contents

IV. German Bürgerliches Gesetzbuch	383
V. French Code Civil	383
VI. Spanish Código Civil	383
VII. United Kingdom Sale of Goods Act 1979	384
VIII. American Uniform Commercial Code	384
IX. Chinese Law	385
F. Commentary	385
G. Illustrations	385
H. Practitioner Tips	386
I. Sample Clauses	386
J. Additional Sources	387

CHAPTER 13
DELIVERY OF DOCUMENTS

Christian Fleischmann and Martin Schmidt-Kessel

A. Topics Covered	389
B. Introductory Note	390
C. Statement of Issues	390
D. International Sales Transaction	390
I. Typical Risks in International Sales Transaction and their Diffusion through the Delivery of Documents	390
II. Main Functions of the Delivery of Documents in an International Sales Transaction ..	391
III. Types of Documents	392
IV. Delivery of Documents in order to Fulfill the Seller's Obligations under a Contract for the Sale of Goods	394
V. Delivery of Documents in order to Allow for Payment under a Contract for the Sale of Goods	395
VI. Non-Conformity of the Delivered Documents: Documentary Breach	400
VII. Examples for Documents with Relevance in International Sales Transactions	403
E. Sampling of Laws	407
I. CISG and CISG Advisory Council Opinions	407
II. UNIDROIT Principles of International Commercial Contracts	408
III. Principles of European Contract Law	408
IV. German Bürgerliches Gesetzbuch	409
V. French Code Civil	409
VI. Spanish Código Civil	409
VII. American Uniform Commercial Code	410
VIII. United Kingdom Sale of Goods Act 1979	411
IX. Chinese Law	411
F. Commentary	412
I. CISG	412
II. UNIDROIT Principles of International Commercial Contracts	415
III. Principles of European Contract Law	416
IV. German Bürgerliches Gesetzbuch and Supplementary Laws	416
V. French Code Civil	417
VI. Spanish Código Civil	417
VII. United Kingdom Sale of Goods Act 1979	418
VIII. American Uniform Commercial Code	418
IX. Chinese Law	418
G. Illustrations	419
H. Cross References	420
I. Practitioner Tips & Contract Clauses	420
I. Resolving Issues under Documentary Credits	420
II. Electronic Delivery of Documents	420

Contents

J. Additional Sources 422

CHAPTER 14
CONFORMITY OF GOODS

Bruno Zeller

A. Topics Covered 423

B. Introductory Note 424

C. Statement of Issues 424

D. International Sales Transaction 425

E. Sampling of Laws 425

 I. CISG 425

 II. UNIDROIT Principles of International Commercial Contracts 426

 III. Principles of European Contract Law 426

 IV. German Bürgerliches Gesetzbuch 426

 V. French Code Civil 427

 VI. Spanish Código Civil 428

 VII. American Uniform Commercial Code 428

 VIII. United Kingdom Sale of Goods Act 1979 430

 IX. American Restatement (Second) of Contracts 430

 X. Chinese Law 431

F. Commentary 431

 I. Summary of Laws 431

 II. Conformity of Goods 435

 III. Implied Conformity of Goods 437

G. Illustrations 442

 I. Conformity of Description 442

 II. Conformity and Public Policies 442

 III. Conformity and the Governing Law 442

H. Cross References 442

I. Practitioner Tips & Contract Clauses 443

 I. Choice of Law 443

 II. Disclaimer of Warranties 443

 III. Disclaiming Warranty of Ordinary Purpose 444

J. Additional Sources 444

CHAPTER 15
SALES AND INTELLECTUAL PROPERTY RIGHTS

Wentong Zheng

A. Third-Party Rights and Claims Based on Intellectual Property 446

 I. Topics Covered 446

 II. Introductory Note 446

 III. Statement of Issue 446

 IV. International Sales Transaction 447

 V. Sampling of Laws 447

 VI. Commentary 449

 VII. Illustrations 449

 VIII. Cross References & Additional Commentary 450

 IX. Practitioner Tips & Contract Clauses 450

B. Warranty of Title 450

 I. Topics Covered 450

 II. Introductory Note 451

 III. Statement of Issue 451

 IV. Sampling of Laws 451

Contents

V. Commentary	452
VI. Illustrations	453
VII. Cross References & Additional Commentary	453
VIII. Practitioner Tips & Contract Clauses	453
C. Territorial Limitations on Seller's Obligation	454
I. Topics Covered	454
II. Introductory Note	455
III. Statement of Issue	455
IV. International Sale Transaction	455
V. Sampling of Laws	455
VI. Commentary	456
VII. Illustrations	456
VIII. Cross References & Additional Commentary	457
IX. Practitioner Tips & Contract Clauses	457
D. Limitations on Seller's Obligation: Seller's Knowledge	457
I. Topics Covered	457
II. Introductory Note	457
III. Statement of Issue	458
IV. Sampling of Laws	458
V. Commentary	459
VI. Illustrations	459
VII. Cross References & Additional Commentary	460
VIII. Practitioner Tips & Contract Clauses	460
E. Limitations on Seller's Obligation: Buyer's Knowledge	460
I. Topics Covered	460
II. Introductory Note	460
III. Statement of Issue	460
IV. Sampling of Laws	461
V. Commentary	462
VI. Illustrations	462
VII. Cross References & Additional Commentary	462
VIII. Practitioner Tips & Contract Clauses	462
F. Additional Sources	463

CHAPTER 16

EXAMINATION AND NOTIFICATION OF NON-CONFORMITIES

André Janssen

A. Topics Covered	465
B. Introductory Note	465
C. Statement of Issues	467
D. International Sales Transaction	467
E. Sampling of Laws	468
I. CISG	468
II. CISG Advisory Council Opinion No. 1	469
III. CISG Advisory Council Opinion No. 2	469
IV. UNIDROIT Principles of International Commercial Contracts and Principles of European Contract Law	470
V. Common European Sales Law	470
VI. German Commercial Code (Handelsgesetzbuch)	471
VII. French Code Civil	471
VIII. Spanish Commercial Code (Código de Comercio)	472
IX. American Uniform Commercial Code	472
X. English Law	472
XI. Common Law of Contracts and the American Restatement (Second) Contracts	473

Contents

XII. Chinese Law	473
F. Commentary	476
I. Duty to Examine	476
II. Duty to Notify	481
III. Seller's Actual or Constructive Knowledge of Lack of Conformity under Article 40 CISG	490
IV. Reasonable Excuse of the Buyer under Article 44 CISG	491
V. Cut-off Period under Article 39(2) CISG	493
G. Cross References & Additional Commentary	494
H. Practitioner Tips & Contract Clauses	494
I. Modifications of the Duty to Examine	496
II. Modifications of the Duty to Notify	496
III. Avoidance of the Reasonable Excuse Problem	497
IV. Avoiding the Seller's Statements being Interpreted as Waivers	497
I. Additional Sources	497

CHAPTER 17
PERFORMANCE AND BREACH OF CONTRACT

Ulrich Magnus

A. Topics Covered and Introductory Note	501
B. Sampling of Laws and Commentary	501
I. CISG	501
II. UNIDROIT Principles of International Commercial Contracts	505
III. Principles of European Contract Law	508
IV. (Withdrawn) Draft Common European Sales Law	510
V. German Bürgerliches Gesetzbuch	514
VI. American Uniform Commercial Code	517
VII. English Law	519
VIII. French Code Civil	522
IX. Spanish Código Civil	524
X. Chinese Law	527
XI. Comparative Conclusions	530
C. Cross References	532
D. Practitioner Tips	532
E. Additional Sources	532

CHAPTER 18
ANTICIPATORY BREACH

Qiao Liu

Part I: Anticipatory Breach Warranting Suspension of Performance	535
A. Topics Covered	535
B. Introductory Note	536
C. Statement of Issues	536
D. International Sales Transaction	537
E. Sampling of Laws	537
I. CISG	537
II. UNIDROIT Principles of International Commercial Contracts	537
III. Principles of European Contract Law	537
IV. German Bürgerliches Gesetzbuch	538
V. French Code Civil	538
VI. Spanish Código Civil	538
VII. American Uniform Commercial Code	538
VIII. Chinese Law	539

Contents

F. Commentary	539
I. The Test of Anticipatory Breach	539
II. Stoppage in Transit	542
III. Suspension, Notice and Adequate Assurance	542
G. Illustrations	544
I. Defective Delivery to Others	544
II. Successive Contracts	545
H. Cross References & Additional Commentary	546
I. Cross References	546
II. Practitioner Tips and Contract Clauses	546
I. Additional Sources	546
Part 2: Anticipatory Breach Warranting Avoidance of Contract	547
A. Topics Covered	547
B. Introductory Note	547
C. Statement of Issues	548
D. International Sales Transaction	548
E. Sampling of Laws	549
I. CISG	549
II. UNIDROIT Principles of International Commercial Contracts	549
III. Principles of European Sales Law	549
IV. German Bürgerliches Gesetzbuch	549
V. French Code Civil	549
VI. Spanish Código Civil	549
VII. American Uniform Commercial Code	550
VIII. Chinese Law	550
F. Commentary	550
I. The Test of Anticipatory Breach	550
II. Duty to Give Notice and Adequate Assurance	554
III. Remedies following Avoidance	555
G. Illustrations	556
I. Time of the Essence	556
II. Delayed Loading	556
III. Cover and Damages	557
H. Cross References & Additional Commentary	558
I. Practitioner Tips & Contract Clauses	558
J. Additional Sources	558

CHAPTER 19
REMEDIES AND DAMAGES

Michael Bridge

A. Topics Covered	560
B. Introductory Note	560
C. Statement of Issues	561
D. International Sales Transaction	561
E. Sampling of Laws	562
I. CISG	562
II. UNIDROIT Principles of International Commercial Contracts	565
III. Principles of European Contract Law	566
IV. Common European Sales Law	566
V. German Bürgerliches Gesetzbuch	566
VI. French Code Civil	567
VII. Spanish Código Civil	568
VIII. United Kingdom Sale of Goods Act 1979	568

Contents

IX. American Uniform Commercial Code	569
X. American Restatement (Second) of Contracts	570
XI. Chinese Law	570
F. Commentary	570
I. Damages: Introduction	570
II. Compensation Principle	572
III. Interests Protected by a Damages Award	573
IV. Foreseeability	574
V. Establishing 'Loss' under CISG Article 74	579
VI. Substitute Transactions	586
VII. Current Price	589
VIII. Penalties and Agreed Damages	593
IX. Mitigation	596
X. Currency	600
XI. Interest	601
XII. Requiring Performance	605
XIII. Price Reduction	609
G. Cross References & Additional Commentary	610
H. Additional Sources	611

CHAPTER 20
AVOIDANCE FOR BREACH OF CONTRACT

Harriët N. Schelhaas and Harry M. Flechtner

A. Topics Covered	612
B. Introductory Note	613
C. Statement of Issues	615
D. Sampling of Laws	616
I. CISG	616
II. UNIDROIT Principles of International Commercial Contracts	618
III. Principles of European Contract Law	619
IV. American Uniform Commercial Code	619
V. The French Civil Code	620
VI. The German Civil Code	621
VII. Chinese Law	622
E. Commentary	623
I. Nature and Consequences of Avoidance	623
II. Grounds for Avoidance	631
III. Procedure to Avoid	638
IV. Restitution Following Avoidance	643
V. General Comments on CISG Avoidance and Similar Doctrines under Other Instruments and Law	649
F. Illustrations	650
I. Partial Non-Payment and Repudiation by Buyer, Divisible Installment Contract	650
II. Partial Non-Payment and No Repudiation by Buyer, Divisible Installment Contract ...	651
III. Single Delivery Contract, All Goods Non-Conforming	651
IV. Single-Delivery Contract, Some Goods Non-Conforming	654
V. Partial Repudiation by Buyer	656
G. Cross References & Additional Commentary	658
H. Practitioner Tips & Contract Clauses	658
I. Model Contract Clause: Grounds for Avoidance by Seller	658
II. Model Contract Clause: Grounds for Avoidance by Buyer	659
III. Model Contract Clause: Avoidance for Prospective Non-Performance	659
IV. Model Contract Clause: Restitution and Preservation of Goods Following Avoidance	660

Contents

V. Seller's Notice of Avoidance (Entire Contract)	660
VI. Buyer's Notice of Avoidance (Entire Contract)	661
I. Additional Sources	661

CHAPTER 21
RISK OF LOSS

Michael Bridge

A. Topics Covered	663
B. Introductory Note	663
C. Statement of Issues	663
D. International Sales Transaction	663
E. Sampling of Laws	664
I. CISG	664
II. Common European Sales Law	664
III. German Bürgerliches Gesetzbuch	665
IV. French Code Civil	665
V. Spanish Código Civil	666
VI. American Uniform Commercial Code	666
VII. United Kingdom Sale of Goods Act 1979	668
VIII. Chinese Law	668
F. Commentary	669
I. Meaning of Transfer of Risk	669
II. Allocation of Risk to the Seller	670
III. Risk Events	671
IV. Seller's Obligations and Risk	672
V. Risk Transfer in the CISG	674
G. Cross References	689
H. Practitioner Tips	689
I. Additional Sources	689

CHAPTER 22
EXCUSE: FORCE MAJEURE AND HARDSHIP

Larry A. DiMatteo

A. Topics Covered	691
B. Introductory Note	692
C. Statement of Issues	695
D. International Sales Transaction	695
E. Sampling of Laws	696
I. CISG	696
II. UNIDROIT Principles of International Commercial Contracts	705
III. Common European Sales Law	706
IV. Principles of European Contract Law	707
V. German Bürgerliches Gesetzbuch	707
VI. French Code Civil	708
VII. Spanish Código Civil	709
VIII. American Uniform Commercial Code	710
IX. English Sales Law	711
X. Common Law of Contracts	712
XI. American Restatement (Second) of Contracts	713
XII. Chinese Law	713
F. Commentary	715
I. Excuse-Hardship Distinction	715
II. Force Majeure and Principle of Good Faith	716

Contents

III. Hardship Provision	717
IV. Common Excuse Scenarios	720
V. Force Majeure and Hardship Case Study: Coronavirus Pandemic	721
G. Illustrations	723
I. Just-in-Time Contracting	723
II. Strike or Quarantine	723
III. Goods in Receivership	723
IV. Changed Circumstances before Offer and Acceptance	724
V. Suez Canal Closure	724
VI. Government Permission or Intervention	724
VII. Long-Term and Relational Contracts: Supply Contracts and Distributorships	725
VIII. Hardship in Arbitration	726
IX. Relationship between CISG Article 79 and Article 6	726
X. Is Force Majeure Narrower in the International Context?	726
XI. Related Provisions of Contract Terms	727
XII. Long-Term Contracting	727
XIII. Force Majeure Relating to Non-Performance or Partial Performance versus Delayed Performance	727
H. Cross References & Additional Commentary	728
I. Practitioner Tips	728
I. Drafting of Contract Clauses	728
II. Force Majeure Clause	729
III. Moving Beyond the Standard Force Majeure Clause	729
IV. Hardship Clause	732
V. Related Clauses	734
J. Additional Sources	735

CHAPTER 23

CONTRACT INTERPRETATION AND MERGER CLAUSES

Lisa Spagnolo and Larry A. DiMatteo

Part 1: Contract Interpretation	739
A. Topics Covered	739
B. Introductory Note	739
C. Statement of Issues	740
D. International Sales Transaction	740
E. Sampling of Laws	741
I. CISG	741
II. CISG Advisory Council Opinions	742
III. UNIDROIT Principles of International Commercial Contracts	742
IV. Principles of European Contract Law	743
V. German Bürgerliches Gesetzbuch	745
VI. French Code Civil	746
VII. Spanish Código Civil	748
VIII. American Uniform Commercial Code	748
IX. United Kingdom Sale of Goods Act 1979	749
X. American Restatement (Second) of Contracts	750
XI. Chinese Law	752
F. Commentary	754
I. Standard of Intent	755
II. Party Control over Rules of Interpretation	761
III. Description of Default Rules, Principles & Presumptions	764
IV. Stages of Interpretation and Construction Aids: Evidence of Intent	775
V. Supplementation	786
VI. Critique of Structures Used in Uniform Laws	788

Contents

G. Illustrations	789
I. Meaning and Legal Effect; Validity and Invalidity	789
II. Trade Usage versus Literal Meaning	789
III. Sliding Scale Rates and Commissions	789
IV. Warranties and Notice of Non-Conformity	790
V. Integrated Agreements	790
VI. Additional Terms	790
H. Practitioner Tips & Contract Clauses	790
I. Entire Agreement or Merger Clause	790
II. No Oral Modification Clause	791
I. Cross References	792
J. Additional Sources	792
Part 2: Merger Clauses	793
A. Topics Covered	793
B. Introductory Note	793
C. Statement of Issues	794
D. International Sales Transaction	794
E. Sampling of Laws	794
I. CISG	794
II. CISG Advisory Council Opinion No. 3	795
III. UNIDROIT Principles of International Commercial Contracts	795
IV. Principles of European Contract Law	795
V. Common European Sales Law	795
VI. German Bürgerliches Gesetzbuch	796
VII. French Code Civil	796
VIII. Spanish Código Civil	797
IX. United Kingdom Sale of Goods Act 1979	797
X. American Uniform Commercial Code	797
XI. American Restatement (Second) of Contracts	797
XII. Chinese Contract Law	798
F. Commentary	798
I. Civil Law and 'Agreement in Fact'	798
II. Common Law and Sanctity of Written Contract	799
III. Convergence of Civil and Common Laws	800
IV. Extent of Exclusion Provided by Merger Clause	800
V. Contextual Interpretation and the Ordering of Evidence	801
VI. Scope of Merger Clause	801
VII. Merger Clause as a Standard Term	802
VIII. Merger Clause and Arbitration	802
IX. CISG and Merger Clauses	802
X. Nonreliance Clauses	804
G. Illustrations	804
H. Cross References	805
I. Practitioner Tips & Contract Clauses	805
I. Choice of Law	805
II. Commercial Practice	806
III. Narrow and Broad Merger Clauses	806
IV. Enhancing the Enforceability of a Merger Clause	806
V. Order of Preference Clause and Incorporation by Reference	807
VI. Sample Clauses	807
VII. Nonreliance Clauses	808
J. Additional Sources	808

Contents

CHAPTER 24
PRODUCTS LIABILITY

Michel Cannarsa

A. Topics Covered	809
B. Introductory Note	810
C. Statement of Issues	812
D. International Sales Transaction	813
E. Sampling of Laws	814
I. CISG	814
II. UNIDROIT Principles of International Commercial Contracts	814
III. Consumer Sales Directive	814
IV. Directive Concerning Contracts for the Sale of Goods	815
V. EU Products Liability Directive	816
VI. American Restatement (Third) of Torts – Products Liability	816
VII. Chinese Law	817
VIII. United Kingdom Sale of Goods Act 1979	817
IX. French Code Civil	817
X. American Uniform Commercial Code	817
F. Commentary	818
I. Direct Producers’ Contractual Liability for Defective Products to Ultimate Consumer	818
II. Non-Contractual Producers’ Liability for Defective Products to Ultimate Consumer ..	825
III. Remedies and Defenses	831
IV. Seller’s Right of Redress against Producer and Allocation of Liability in the Chain of Distribution	834
V. Product Safety and Recall Rules	836
G. Cross References & Additional Commentary	837
H. Practitioner Tips & Contract Clauses	838
I. Additional Sources	838

CHAPTER 25
ASSIGNMENT, DELEGATION AND THIRD-PARTY RIGHTS

N. Orkun Akseli

Part I: Assignment and Delegation	840
A. Topics Covered	840
B. Introductory Note	840
C. Statement of Issues	840
D. International Sales Transaction	841
E. Sampling of Laws	841
I. CISG	841
II. UNIDROIT Principles of International Commercial Contracts	841
III. Principles of European Contract Law	842
IV. Common European Sales Law	842
V. German Bürgerliches Gesetzbuch	842
VI. French Code Civil	843
VII. Spanish Código Civil	843
VIII. American Uniform Commercial Code (UCC)	843
IX. United Kingdom Sale of Goods Act	844
X. Common Law of Contracts	845
XI. American Restatement (Second) of Contracts	845
XII. Chinese Law	845
F. Commentary	846
I. ‘Assignment’ Defined and Distinguished from Similar Transactions	846

Contents

II. Validity of an Assignment	848
G. Practitioner Tips & Contract Clauses	861
H. Additional Sources	862
Part II: Contracts for the Benefit of Third Parties/Third Party Rights	862
A. Topics Covered	862
B. Introductory Note	862
C. Statement of Issues	863
D. International Sales Transaction	863
E. Sampling of Laws	863
I. CISG	863
II. UNIDROIT Principles of International Commercial Contracts	863
III. Principles of European Contract Law	864
IV. Common European Sales Law	864
V. German Bürgerliches Gesetzbuch	864
VI. French Code Civil	864
VII. Spanish Código Civil	865
VIII. American Uniform Commercial Code	865
IX. United Kingdom Sale of Goods Act	866
X. Common Law of Contracts	866
XI. American Restatement (Second) of Contracts	866
XII. Chinese Law	866
F. Commentary	867
I. The Basis of Third Party Claims in Contracts for the Benefit of Third Parties	867
II. Exemption Clauses for the Benefit of Third Parties	872
III. Modification/Variation and Revocation of the Contract for the Benefit of Third Parties	873
IV. Defences Available to the Promisor Against the Beneficiary	874
V. Remedies Available to the Promisee	874
G. Practitioner Tips & Contract Clauses	875
H. Additional Sources	876

CHAPTER 26
DEFENSES

Francesco Paolo Patti and Willibald Posch

A. Topics Covered	877
B. Introductory Note	878
C. Statement of Issues	879
D. International Sales Transaction	879
E. Sampling of Laws	880
I. CISG and the Convention on the Limitation Period in the International Sale of Goods	880
II. UNIDROIT Principles of International Commercial Contracts	881
III. Principles of European Contract Law	883
IV. Common European Sales Law	884
V. German Bürgerliches Gesetzbuch	886
VI. French Code Civil	886
VII. Spanish Código Civil	889
VIII. Restatement (Second) of Contracts	889
IX. Chinese Law	890
F. Commentary	891
I. Defects in Consent	891
II. Mistake	893
III. Fraud (Deceit)	899

Contents

IV. Threats or Duress and Undue Influence	903
V. Unfair Exploitation	905
VI. Failure to Co-operate and Breach of the Duty of Good Faith	907
VII. Contributory Negligence	909
VIII. Limitation Period	911
IX. Set-Off	914
G. Cross References & Additional Commentary	916
H. Additional Sources	917

CHAPTER 27
AGENCY AND DISTRIBUTION AGREEMENTS

S  verine Saintier

A. Topics Covered	919
B. Introductory Note	920
C. Statement of Issues	922
D. International Sales Transaction	923
E. Sampling of Laws	924
I. UNIDROIT Principles of International Commercial Contracts	924
II. Principles of European Contract Law	925
III. Principles of European Law on Mandate Contracts	926
IV. EU Commercial Agency Directive	926
V. German B��rgerliches Gesetzbuch and German Handelsgesetzbuch	928
VI. French Code civil and French Code de Commerce	928
VII. English Common Law	929
VIII. US Restatement (Third) of Agency	931
IX. Chinese Law	932
F. Commentary	934
Part 1: Agency	934
I. Mandate and Agency: Scope and Preliminary Definitions	934
II. External Relationship: Principal-Third Party	935
Part 2: Commercial Agency and Distribution Agreements	947
I. Commercial Agency Revisited	947
II. Commercial Agents and Distributors	949
III. Competition Law Issues	949
IV. Agents and Distributors: Definitions and Scope	950
V. General Obligations of the Parties and Duty of Good Faith	953
VI. Ending the Contract	955
VII. Non-Competition Clauses	958
VIII. Drafting International Distribution Agreements: Practitioner Tips	959
G. Illustrations	963
I. Commission Agency	963
II. Changing the Products	964
III. Termination and Notice	965
H. Cross References & Additional Commentary	966
I. Practitioner Tips	966
I. Agency Agreements	966
II. Distribution Agreements	967
III. Good Faith	967
J. Additional Sources	967

Contents

CHAPTER 28
LONG-TERM CONTRACTS: INSTALLMENT AND SUPPLY CONTRACTS

Larry A. DiMatteo and Giuditta Cordero-Moss

A. Topics Covered	969
B. Introductory Note	969
C. Statement of Issues	970
D. International Sales Transaction	971
E. Sampling of Laws	972
I. CISG	972
II. UNIDROIT Principles of International Commercial Contracts	972
III. Principles of European Contract Law	973
IV. Common European Sales Law	973
V. German Bürgerliches Gesetzbuch	973
VI. French Code Civil	974
VII. Spanish Código Civil	975
VIII. American Uniform Commercial Code	976
IX. United Kingdom Sale of Goods Act 1979	976
X. English Common Law	977
XI. American Restatements (Second) of Contracts	978
XII. Chinese Law	978
XIII. Summary of Law in Relation to Long-Term Contracts	979
F. Commentary	981
I. Common Sales Clauses and Long-Term Contracts	981
II. Price Escalation Clauses	986
III. Renegotiation Clause	988
G. Illustrations	990
I. Collaborative Strategic Contracting	990
II. Force Majeure as Surrogate Renegotiation Clause	991
H. Cross References & Additional Commentary	991
I. Practitioner Tips & Contract Clauses	991
I. Indexing	991
II. Price Adjustments and Hardship	992
III. Gross Inequities Clause and Market Reopener Clauses	992
IV. Strategic Use of Recitals	992
V. Defining Material and Minor Breaches	993
VI. Long-Term Just-in-Time Contracting	993
VII. Brexit and Long-Term Contracts	994
J. Additional Sources	995

CHAPTER 29
POST-CONTRACT: CONTINUING OBLIGATIONS & RIGHTS

Larry A. DiMatteo

A. Topics Covered	997
B. Introductory Notes	998
I. Post-Contractual Obligations	998
II. Law and Practice	999
C. Statement of Issues	1000
D. International Sales Transaction	1000
E. Sampling of Laws	1000
I. CISG	1001
II. UNIDROIT Principles of International Commercial Contracts	1002
III. Principles of European Contract Law	1002
IV. Common European Sales Law	1002

Contents

V. German Bürgerliches Gesetzbuch	1003
VI. German Handelsgesetzbuch	1004
VII. French Code Civil	1004
VIII. Spanish Código Civil	1004
IX. American Uniform Commercial Code and English-American Common Law of Contracts	1005
X. United Kingdom Sale of Goods Act 1979	1007
XI. Common Law of Contracts	1007
XII. American Restatement (Second) of Contracts	1007
XIII. Chinese Law	1007
E. Commentary	1009
I. Warranties and Representations	1010
II. Confidentiality	1017
III. Intellectual Property Rights Protection	1022
IV. Competition Restrictions	1024
V. Post-Contract Obligations in Foreign Representation, Commercial Agency, and Distribution Contracts	1027
G. Cross References & Additional Commentary	1032
H. Practitioner Tips & Contract Clauses	1032
I. Continuing Nature of Post-Contract Obligations: Survivability Clause	1032
II. Confidentiality Provisions	1032
III. Severance of Post-contractual Obligations and Ancillary Clauses	1033
IV. Ownership of Data	1033
V. Intellectual Property Indemnities	1033
VI. Products Liability Insurance	1033
VII. Duty to Prevent Waste	1034
I. Additional Sources	1034

CHAPTER 30
CHOICE OF LAW

Petra Butler

A. Topic Covered	1036
B. Introductory Note	1036
C. Statement of Issues	1037
D. Choice of Substantive Law	1038
I. Introduction	1038
II. Choice of Law in Litigation	1038
III. Choice of Law in Arbitration	1056
IV. Parties Included Choice of Law Clause in their Contract – Limits	1064
E. Cross References & Additional Commentary	1068
F. Matters to Consider	1068
I. Interpretation of the Choice of Law Clause	1068
II. Procedural/Substantive Question	1069
III. Burden of Proof	1069
G. Sample Clauses	1070
UNIDROIT Principles of International Commercial Contracts	1070
H. Additional Sources	1071
Index	1073

List of Contributors

Orkun Akseli

Associate Professor in Commercial Law at Durham University. His publications include *International Secured Transactions Law: Facilitation of Credit, International Conventions and Instruments* (Routledge 2011); *Financial Regulation in Crisis? The Role of Law and the Failure of Northern Rock* (with J. Gray) (Edward Elgar 2011); *Availability of Credit and Secured Transactions in a Time of Crisis* (CUP 2013); *Experiencing the Unfair Commercial Practices Directive* (with W. van Boom and A. Garde) (Ashgate 2014).

Michael Bridge

Michael Bridge is an Emeritus Professor of Law at LSE. He was an undergraduate and postgraduate student at LSE before starting his academic career. Before coming to the LSE in 2007, he held chairs in law at McGill University, the University of Nottingham and UCL, and was Dean of the Faculty of Laws at UCL. He has been a visiting Professor at the Universities of Leeds, Malaya, Hong Kong, Melbourne, Sydney and Auckland and at Monash University. In 2013, he was elected a Fellow of the British Academy. In 2014 he was called as a Bencher of the Middle Temple, and in 2017 made a QC (honoris causa).

Petra Butler

Professor at Victoria Wellington University in New Zealand and she was a Holgate Fellow at Grey College, Durham University. Her publications include: Commentary on Articles 53 to 60 CISG in *Commentary on the CISG* (C.H. Beck/Hart/Nomos 2018) and *UN Law on International Sales* (co-authored with Peter Schlechtriem, Springer 2009).

Michel Cannarsa

Michel Cannarsa is a Professor and the Dean of the Catholic University of Lyon Law School. His areas of research are International and European Law, Commercial Law, Comparative Law, Consumer Law, the Law of Obligations and Legal Translation.

Giuditta Cordero-Moss

Giuditta Cordero-Moss is a Professor at the Department for Private Law, University of Oslo, Norway, in charge of International Commercial Law, International Commercial Arbitration and Private International Law.

Larry A. DiMatteo

Huber Hurst Professor of Contract Law & Legal Studies at the Warrington College of Business Administration at the University of Florida, as well as an Affiliated Professor of Law at the Levin College of Law. His books include: L. DiMatteo ed, *International Sales Law: A Global Challenge* (CUP 2014) and L. DiMatteo & Martin Hogg eds, *Comparative Contract Law* (OUP 2015).

Sieg Eiselen

Professor Eiselen is a Professor in Private Law at the University of South Africa. He is the Secretary for the CISG Advisory Council. His CISG work includes: Co-author of Volume 4 and 5 with Albert Kritzer in Kritzer, et al, *International Contract Manual: Guide to the Practical Application of the United Nations Convention on the International Sale of Goods* (Springer 2008).

List of Contributors

Edoardo Ferrante

Professor in Private Law at the University of Turin, Italy, School of Law ('Dipartimento di Giurisprudenza'). He has been a fellow, researcher and guest at the Centre for European Private Law at the University of Münster, Germany. He has written numerous articles on and provided commentary on the most discussed topics of the current European private law and international sales law e.g. the Italian national report in DiMatteo (ed), *International Sales Law: A Global Challenge* (CUP 2014).

Harry M. Flechtner

Professor emeritus at the University of Pittsburgh, School of Law. His publications include the 4th edition (Kluwer 2009) of *John Honnold's Uniform Law for International Sales under the 1980 United Nations Convention*.

Christian Fleischmann

Ass. jur. Christian Fleischmann is a Research Assistant at the Chair of Civil Law, Intellectual Property and Commercial Law (Civil Law VIII) – Prof. Dr. Ruth Janal, LL.M. at the University of Bayreuth and member of the Research Center for Dispute Resolution, Mediation and Arbitration (BayCDMA).

Ádám Fuglinszky

LL.M. (Heidelberg) PhD (Hamburg) is ordinary Professor of civil law and comparative law at Eötvös Loránd University (ELTE) Law School, Budapest, Hungary. His research interests are contract and tort law (in a comparative perspective), European private law, consumer contract law, legal transplants and mixed legal systems. Besides his books and commentaries he published several papers on Articles 74 and 79 CISG as legal transplants in the recodification processes of civil law in Central and Eastern Europe and on comparative law in general (RabelsZ, ERCL, JICL, ZEUP).

Claire Germain

Emeritus Prof. Germain was the Clarence J. TeSelle Professor of Law, Associate Dean for Legal Information at the Levin College of Law, University of Florida; Professor of Law, Emerita, Cornell Law School; and *Chevalier* (Knight), French Legion of Honor recipient. She has served as president of the American Association of Law Libraries, and Chair, Law Libraries Section, International Federation of Library Associations. Her books include the award-winning *Germain's Transnational Law Research* (Transnational Publishers 2006). She is an elected member of the International Academy of Comparative Law. Her scholarship focuses on comparative law, French law, and global legal research.

André Janssen

André Janssen is a chair Professor at Radboud University Nijmegen, The Netherlands. André Janssen is respectively was a visiting scholar/Professor at the Universities of Leuven, Oxford, Turin, Lyon (Catholic University), Verona, and at the Chinese University for Political Science and Law in Beijing and at the City University Hong Kong.

Sörren Kiene

Sörren Kiene is a lawyer working at BRANDI Rechtsanwälte in Germany. His field of work focuses on international sales law (mainly CISG), distribution and agency law and correlated litigation and arbitration issues. In 2014 Sörren Kiene has also been admitted as Solicitor of England & Wales. His publications mainly focus on aspects of the CISG. He has been a lecturer at the University of Applied Sciences in Bielefeld and continues to

List of Contributors

lecture at the Academy of Justice of North Rhine-Westphalia (*Justizakademie des Landes NRW*).

Ulrich Magnus

Professor Magnus was formerly a Professor of Law at the University of Hamburg; Chair for Civil Law, Private International Law and Comparative Law. He was previously a Judge at the Court of Appeal of Hamburg and Director of the International Max-Planck-Research School for Maritime Affairs.

Francesco Paolo Patti

Francesco Paolo Patti is an Associate Professor for Private Law at the University Bocconi in Milan.

Burghard Piltz

Partner of Ahlers & Vogel Rechtsanwälte, Hamburg, practicing as legal counsel and as arbitrator in international commercial law with emphasis on international sales. Honorary Professor for international law at University of Bielefeld since 1997.

Willibald Posch

Professor emeritus for Austrian Civil and International Private Law at the University of Graz, Austria. He was the Austrian Member of the Commission on European Contract Law.

Severine Saintier

Dr Séverine Saintier is an Associate Professor in commercial law at the School of Law at Exeter University. She is the director of the LLM programme as well as co-director of the Centre for Commercial and Corporate Law. She has written widely on issues of agency and commercial agency alike and is currently working on the second edition of the monograph *Commercial Agents and the law* (Routledge 2005, co-written with JP Scholes).

Harriet N. Schelhaas

Harriet N. Schelhaas is a full Professor at Erasmus University Rotterdam, The Netherlands.

Martin Schmidt-Kessel

Martin Schmidt-Kessel has a Chair for German and European Consumer Law, Private Law and Comparative Law at the University of Bayreuth. He is also the Director for the Centre for Consumer Law at the University of Bayreuth and Speaker of the Interdisciplinary Research Priority Field on Innovation and Consumer Protection of the University Bayreuth. Since 2007 he also undertakes regular teaching and research fellowships at the Università degli Studi di Verona. In 2014 he became Associate Member to the International Academy of Comparative Law.

Reiner Schulze

Reiner Schulze held a Chair in German and European Civil Law at the University of Münster, School of Law and was the Director of the Centre for European Private Law. He has published extensively in the field of contract law with books including *European Contract Law* 3rd edn (co-written with Fryderyk Zoll, C.H. Beck/Hart/Nomos 2021), *Common European Sales Law: Commentary* (C.H. Beck/Hart/Nomos 2012); *Bürgerliches Gesetzbuch Handkommentar* (C.H. Beck, 10th ed. 2019).

List of Contributors

Lisa Spagnolo

Lisa Spagnolo lectures at the Faculty of Law at Monash University, Australia. Her publications include papers on the CISG in the *Journal of Private International Law*, *Melbourne Journal of International Law*, and *Temple International & Comparative Law Journal* and *CISG Exclusion and Legal Efficiency* (Kluwer 2014). She was Rapporteur for the CISG-AC Opinion No. 16 on Article 6.

Qiao Liu

Dr. Qiao Liu is Professor at the City University of Hong Kong School of Law. His previous posts include Associate Professor at the TC Beirne School of Law, University of Queensland (Australia); Lee Ka Shing Visiting Professor at McGill University Faculty of Law; specially appointed Tengfei Adjunct Professor at Xi'an Jiaotong University School of Law (China). Professor Liu is an Honorary Professor at the TC Beirne School of Law, University of Queensland (Australia) and holds a Visiting Professorship at Xiamen University School of Law (China).

Wentong Zheng

Wentong Zheng is a Professor of Law at the University of Florida Levin College of Law. His research has appeared in *UCLA Law Review*, *Georgetown Law Journal*, *Notre Dame Law Review*, *Stanford Journal of International Law*, *Michigan Journal of International Law*, *University of Pennsylvania Journal of International Law*, and the *Minnesota Journal of International Law*.

Bruno Zeller

Dr. Bruno Zeller is a Professor of Transnational Law at the University of Western Australia, Australia, Adjunct Professor, School of Law, Murdoch University – Perth, Fellow of the Australian Institute for Commercial Arbitration, Panel of Arbitrators – MLAANZ, Visiting Professor Stetson Law School, Florida, and Humboldt University Berlin.

CHAPTER 1 INTRODUCTION

Larry A. DiMatteo, André Janssen, Ulrich Magnus and Reiner Schulze

A. What is International Sales Law?	1
B. Sources of International Sales Law: Why the CISG?	3
C. Commercial Practice, Business Custom and Trade Usage	9
D. Ambiguities and Gaps	16
E. Restatement Approach	21
F. International Transactional Lawyering	26
G. Drafting Approach	28
H. The Sales Contract	34
I. Electronic Contracting	37
J. Treatise's Coverage	42
K. Additional Sources	47

A. What is International Sales Law?

The above question is a bit of a misnomer. The answer is that there is no one sales law, but many sales laws. Sales law is found mostly at the domestic level at least in its hard law versions – national contract and sales law, including those countries that have adopted the United Nations Convention on Contracts for the International Sale of Goods (CISG). If one expands the definition of international sales law to include soft law instruments, then numerous other ‘laws’ would have to be considered in any comprehensive study of the subject. Soft law instruments may be divided into two groups – traditional *lex mercatoria* defined as business usages, customs and practices, as well as more comprehensive rules of law, such as the UNIDROIT Principles of International Commercial Contracts (PICC) or the Principles of European Contract Law (PECL).

This single volume treatise takes a comprehensive approach for the benefit of practitioners (lawyers, advocates, and solicitors), scholars, and students. However, in order to stay within the confines of a single volume, choices had to be made. Two organizational tools were implemented. First, the CISG was used as the ‘core document’. Second, a representative sample of national sales laws is provided, as well as transnational soft law instruments, including, the traditional *lex mercatoria*. The best example of the latter source of law is the International Chamber’s INCOTERMS manual. This coverage is a necessity due to the INCOTERMS universal acceptance in international trade and the importance of trade terms in international sales transactions (see Chapter 10 on “Trade Terms”).

B. Sources of International Sales Law: Why the CISG?

As stated above, in cases where the CISG covers a topic, an extended commentary is presented. However, samplings of national and soft laws are also provided as a means of comparison and where the CISG lacks coverage of an issue. The need for a comprehensive approach is echoed by the words of *Sir Roy Goode*:

The conception of sources of commercial law governing international transactions is much broader, ... encompassing the so-called lex mercatoria and a variety of forms of soft law, including model laws, legislative guides, contractually incorporated uniform rules, trade terms promulgated by international

Chapter 1 Introduction

*business organizations and international restatements prepared by scholars from different legal families and jurisdictions.*¹

- 4 This broader approach is necessitated by the fact that the CISG is not a comprehensive sales law instrument and that parties still often seem to opt-out of its application. *Filip de Ly* in *Sources of International Sales Law* notes:

*[T]he CISG did not envisage a complete harmonization of international sales law. Rather, it took a realistic stand as to compromising the perceived need for unification with the constraints stemming from different factors, which made the unification effort difficult and overall unfeasible if not limited in scope. Diversity was, thus, inherent in the effort in the first place and the CISG did not raise false hopes or unwarranted expectations.*²

- 5 A harmonized international sales law has been an elusive quest for the better part of the 20th century. After lengthy deliberations the CISG was adopted on January 1, 1980. The main rationale for the adoption of such a law was the alleviation of the obstacle to trade represented by private international law (conflict of laws). *EA Farnsworth* discusses the problems presented by private international law and its 'solution' (contract clauses):
- The uncertainty of the recognition of choice of law and forum selection clauses ('*not every foreign court will conclude that it is ousted from jurisdiction by such clause[s].*³) and the
 - problem of getting to know of even proving the content of the chosen law in a foreign court.
- 6 Despite the issues of comprehensiveness and opting-out, any attempt to understand international sales law must begin with an understanding of the provisions and applied meanings of the CISG. It is the singular international hard law instrument that has heavily influenced the harmonization of (international) sales law – either directly through adoptions as national law⁴ or indirectly as a model for the revision of national sales law or the EU *acquis communautaire*.⁵ In the sense of hard law, the CISG will automatically apply in many instances unless the contracting parties expressly exclude its application in a choice of law clause.⁶ In the early years since the CISG came into force, many practitioners chose to summarily exclude its' application. Unfortunately, there is little evidence to show that these were educated decisions.⁷ In fact, surveys have shown that international law practitioners and national courts are overwhelmingly not knowledgeable of the substantive provisions of the CISG. Intentional ignorance of the CISG by practitioners who simply opt-out through a choice of law clause is a mistake; practitioners who routinely exclude the CISG without being informed of its provisions are not doing their clients' a service and conduct malpractice. For example, when representing an exporter-seller it may be in the best interest of the client to choose

¹ Goode, Rule, Practice, and Pragmatism in Transnational Commercial Law, 54 *Int'l & Comp LQ* (2005) 539, 541.

² de Ly, 'Sources of International Sales Law: An Eclectic Model', 25 *J L & Com* (2005-06) 1, 11.

³ Farnsworth, 'The Pitfalls of Making International Contracts (Exporting)', 4 *No Carolina J Int'l L & Com Reg* (1978) 97, 101.

⁴ Most major trading nations have adopted the CISG as part of their domestic law including, Brazil, Canada, China, France, Germany, Italy, Japan, Mexico, Russian Federation, Spain, and United States.

⁵ By a significant degree, the CISG has influenced or is influencing the enacted or proposed national sales law revisions of France, Germany, Japan, Peoples' Republic of China, Spain, and The Netherlands. Cf. Janssen & Ahuja, 'Legal Laboratory CISG: A Successful Hybrid between Common Law and Civil Law?', 25 *Vindobona Journal of International Commercial Law and Arbitration* (VJ) (2017) 129, 146.

⁶ Article 6 CISG.

⁷ See Spagnolo, *CISG Exclusion and Legal Efficiency* (2014).

C. Commercial Practice, Business Custom and Trade Usage

the CISG or not expressly exclude it as applicable law. There are a number of pro-seller rules that a client would likely be inclined to take advantage of – the fundamental breach rule that forces the buyer to receive even substantially defective goods,⁸ the right to demand time extensions for deliveries beyond the delivery date in the contract⁹ and the strict duties placed on the buyer to examine and to notify of any non-conformity of the delivered goods.¹⁰ Without knowledge of these provisions, a practitioner may be acting against the client's best interests by excluding the CISG as applicable law. This disservice is especially acute given that the CISG is primarily a set of voluntary default rules that only come into play if there is an ambiguity or gap in the contract. The CISG expressly states that contracting parties may derogate from the CISG by simply incorporating contrary terms into their contracts.¹¹ Therefore, the savvy international transactional practitioner could chose the CISG to take advantage of its pro-buyer, pro-seller, or 'neutral' provisions, while inserting contract terms that pre-empt the application of 'unfriendly' provisions found in the CISG.

In the end, the CISG is a good starting point, but, as noted above, it does not comprehensively cover the entire range of issues that are pertinent to international sales transactions.¹² Gaps in coverage in the CISG have been distinguished as 'internal' and 'external' gaps.¹³ Internal gap is a bit of a misnomer as well since these are cases where the question in issue is within the scope of the CISG, but the CISG fails to provide a specific rule. In these cases, in the first place resort should be to CISG case law and numerous quality commentaries and other scholarly materials to examine the 'general principles' on which the Convention is based. The true 'external' gaps are those areas of sales or contract law that the CISG expressly or implicitly fails to cover, such as, pre-contractual liability, products liability, assignment and delegation of rights and duties, capacity, validity, and legality.

Due to the non-comprehensiveness of the CISG, the book offers a selection of various national laws and international legal instruments, which allows for a comparative law approach in order to show some of the commonality and divergences in sales laws. This sampling of laws is intended to enhance the reader's knowledge base on how different legal systems treat the traditional issues of sales law. The countries' laws reviewed include the laws of China, England (United Kingdom), France, Germany, Spain, and the United States.

C. Commercial Practice, Business Custom and Trade Usage

The CISG recognizes the importance of commercial practice, trade usage, and business custom (*lex mercatoria*) as a source of commercial law. Article 9(2) CISG reads:

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

This provision has generated a debate over the meaning of its terms: (1) how does a court or tribunal determine if a party 'ought to have known'? (2) What is sufficiently

⁸ Article 25 CISG.

⁹ Articles 47, 48 & 63 CISG.

¹⁰ Articles 38 et seq CISG.

¹¹ Article 6 CISG.

¹² Articles 4 & 5 CISG.

¹³ Article 7(2) CISG.

Chapter 1 Introduction

‘international’? (3) What is the threshold measure of ‘widely known’? Is a regional usage or custom international enough? By international is a trade usage or custom in the two countries of the contracting parties sufficient? Is a party not in the trade or a new entrant to the trade responsible for knowing the relevant usage and customs at the time of entry? Is a trader doing business in a foreign country responsible for knowing the usage and customs widely observed in that country? An Austrian court took a very liberal view of the admissibility of trade usage and custom due to its importance to daily commercial practice:

*Art. 9(2) CISG does not mean that, in the future, purely national or local usages can find no application for the interpretation and supplementation of contracts without an explicit reference by the parties. One can still presume an exception for usages, which are in force at certain stock markets, trade fairs or deposit sites, as long as the usage is also regularly observed there in the trade with foreigners. Furthermore, the possibility does not seem to be excluded that a foreign tradesman, who is constantly active in another country and has already formed a number of transactions there, is bound by possible national usages.*¹⁴

- 11 Sir Roy Goode notes that the importance of trade usage in international transactions is a normal outcome in the era of free and expanding trade. There has been, for a while an increasing movement away from domestic international trade law to what has become known as ‘transnational commercial law.’ This, according to Goode, is that body of law that ‘result[s] from the harmonisation or convergence of national laws, whether by international convention, conscious or unconscious judicial parallelism, uniform rules.’¹⁵ This idea of a transnational commercial law is borne out by the widespread adoption of the CISG, EU incursions into private law, increased specialization and professionalization of trades (more uniform international trade usage), and the use of the CISG as a model in the reforming of national laws. Goode defines transnational commercial law as follows:

*Transnational commercial law is conceived as law which is not particular to or the product of any one legal system but represents a convergence of rules drawn from several legal systems or even, in the view of its more expansive exponents, a collection of rules which are entirely anational and have their force by virtue of international usage and its observance by the merchant community. In other words, it is the rules, not merely the actions or events that cross national boundaries.*¹⁶

- 12 The sampling of laws in this Treatise reflects the commonality of rules found across legal systems and especially across soft law instruments.
- 13 The phrase ‘ought to know’ indicates that actual subjective knowledge of trade usage is not needed; such knowledge will be imputed to a party through an objective standard. In determining what the contracting parties ‘ought’ to have known, the legal literature takes a broad view of the admissibility of evidence of trade usage. In the scenario of a new entrant to the market, one asserts that widely known is an independent, objective determination that trumps the subjective lack of understanding of a new entrant and that not all members of a trade need be aware of the usage.¹⁷
- 14 In sum, it is always important to remember, that whether the applicable law is the CISG or a domestic law, practices developed between businesspersons in individual industries and business-types play a powerful role in international business transactions. What seems to be a clear contract term, with a clear dictionary and legal meaning, may

¹⁴ Appellate Court Graz 9 November 1995, English translation available at <http://cisgw3.law.pace.edu/cases/951109a3.html#cx>.

¹⁵ Goode, *Commercial Law in the Next Millennium* (1998), p. 88.

¹⁶ Goode, ‘Usage and its Reception in Transnational Commercial Law’, 46 *Int’l & Comp LQ* (1997) 1, 2.

¹⁷ Magnus, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG)* (17th edn. 2018) Article 9 CISG paras 21 et seq.

D. Ambiguities and Gaps

in fact be trumped by an alternative meaning taken from outside of the contract (trade usage and technical meaning). For example, when goods are sold 'as is' the common and legal meaning is that the seller is disclaiming any implied warranties of quality. Thus, the buyer takes the goods and assumes any costs related to defects within the goods.

'As is' clauses do not disclaim the implied warranty of title. However, a properly worded clause may disclaim defects in title. But, even the generally accepted disclaimer of quality implied by the 'as is' term can be questioned. If a very high percentage of the goods prove to be defective, then the question of misrepresentation may be raised:

Even in 'as is' practice, the seller has a duty to act honestly and reasonably. One gauge of such dishonesty is the representation of quality implied by the price charged. If the 'as is' price is half of the normal price (assuming no salvage value for defective goods and 90 percent of the goods prove to be defective), then it can be argued that the seller had misrepresented the quality or value of the goods and therefore a serious downward adjustment of the price paid by the buyer is in order.¹⁸

Filip de Ly concludes that 'even a fully-disclosed, selfish version of a practice is subject to the requirements of honesty, reasonableness, and fairness, especially because more than a fair price was paid by the 'as is' purchaser.'¹⁹ This argument may be considered weak in dealings between sophisticated parties or where the buyer had a right of inspection, but it does make a valuable point. Trade usage and common legal meaning generally are powerful elements of contract interpretation, but they are also subject to nullification in a given context. 15

D. Ambiguities and Gaps

Numerous contract disputes resolved by arbitrators or judges often entail the over-coming of an ambiguity via interpretation or the filling in of a gap in order to 'salvage' the contract. But, at its most rudimentary level, interpretation and gap-filling are the ways of picking a winner or a loser. Gap here is broadly defined and includes cases where the issue (obligation or risk allocation) in dispute is not provided for in the contract or the contract includes an 'open term' ('consensual gap'). An ambiguity, although technically not a gap, requires to seek clarification outside of the written contract as if there was a gap. Of course there are other reasons for a contract dispute, where one party argues that a provision is ambiguous when in fact the arbiter determines it has a clear meaning or where liability is not contested but the amount of damages is in dispute. 16

Different approaches are found in the Common Law and Civil Law jurisdictions in relation to dealing with contractual ambiguities and gaps. In respect of the latter, the interpretation of the contract by an arbitrator and judge is often particularly broad. For example, § 157 of the German Civil Code provides that contracts are to be interpreted as required by good faith, in consideration of customary practice; § 133 of the German Civil Code stipulates that the interpretation of a declaration of intent requires the ascertainment of the true intention rather than adhering to the literal meaning of the declaration. Moreover, case law and doctrine have developed the 'supplementary interpretation of contracts': if a contract contains an intentional or unintentional gap that cannot be filled by dispositive legal provisions, the judge or arbitrator is to determine the parties' 'hypothetical intent' in order to fill the gap. Ascertaining such intent necessitates an enquiry into the manner in which fair and reasonable parties would have regulated the matter in 17

¹⁸ Kozolchyk, 'Drafting Commercial Practices and the Growth of Commercial Contract Law', 30 *Arizona J Int'l & Comp L* (2013) 423, 426.

¹⁹ de Ly (n 2), p. 426.

Chapter 1 Introduction

accordance with good faith; in so doing the judge must particularly consider the purpose of the contract and balance the interests of each party.

- 18 Despite the different theoretical approaches, the judge or arbitrator in a Common Law jurisdiction can probably often come to similar results if he or she considers that filling in gaps is almost never truly due to a contract's silence. The contract as a whole (textual) and the type of contact (contextual) serve as guides in the filling in the 'technical gaps' at issue. In the words of US Supreme Court Justice *Stephen Breyer*, there is 'no such answer' that a contract is 'truly silent' – for if 'it doesn't say, you try to figure it out.'²⁰ Justice *Anton Scalia* supports Breyer's supposition in stating: 'I really don't understand what it means to say that the contract does not cover it. (...). If the contract is silent, either the court or the arbitrator has to decide, what is the consequence of that silence, in light of the background, in light of implied understandings.'²¹ Still, under the Common Law, there is the belief that certain types of gaps can prove to be fatal. In such cases, the Common Law rule is that the contract fails due to indefiniteness and it is not appropriate for the court to make a contract for the parties (hypothetical bargain). But, courts concluding that the parties' intended to enter a contract, and in many cases have begun performance, can 'recognize' that omitted terms are simply not 'fully specified obligations' making the contract not sufficiently indefinite to deny a party's day in court. In contrast, arbitrators do not have such a burden and often can draw from a more abundant amount of sources. Alternatively, there may be a greater array of default rules in international transactions if arbitrators look not only to national law, but also international soft law.²² Therefore, they are often more willing and able to fill in so-called 'fatal gaps.'²³ This Treatise provides numerous sample clauses and practitioner's tips in the hope that fewer gaps will appear in international sales contracts.
- 19 The problem of gaps is often the product of the unknowingness or uncertainty of future events. However, a good contract drafter, although not any more prescient than other humans, can provide strategic clauses that provide a means to deal with such uncertainty. For example, contracts often incorporate general clauses (example: renegotiation clause) that diminish the existence of contractual gaps: Almost all areas can be covered under a contract 'using blanket clauses to cover those [events or issues], which are not foreseeable' and in such a case an arbitral tribunal would not be 'faced with the task of gap-filling, but rather with that of interpreting and applying [concretization] the contractual regulations in an equitable manner.'²⁴ Outside of general clauses, the next order of gap-filling comes from the default rules of sales law, some of which act like blanket clauses, such as the duty of good faith, duty to cooperate, excessive unfairness (hardship), and so forth.
- 20 Another issue is one of evidence. No matter how detailed a contract there is always room (divergence) between the party's agreement or intent and the written contract: 'experience shows that despite – sometimes sophisticated and detailed – written agreements, the parties in addition expressly agree on oral terms and intend them to outlast the execution of the written agreement.'²⁵ The CISG recognizes the nonsensical imposition of rules that serve to exclude clearly probative extrinsic evidence from a contract dispute

²⁰ *Oral Argument, Stolt-Nielsen S.A. v Animalfeeds Int'l Corp.*, 2009 WL 4662509, as paraphrased by Rau, "Gap-Filling" by Arbitrators, Energy Center Research Paper No. 2014-03, available at https://repositories.lib.utexas.edu/bitstream/handle/2152/28755/2014_06_Gap-Filling-by-Arbitrators.pdf?sequence=2.

²¹ *Id.*

²² DiMatteo, 'Principle of Fair and Equitable Decision-making in International Contract Arbitration and its Affinity to International Soft Law', 1 *Chinese J Comp L* (2013) 1.

²³ Kröll, 'Contractual Gap-Filling by Arbitration Tribunals', 3 *IntALR* (1999) 9, 13.

²⁴ Nicklisch, 'Agreement to Arbitrate to Fill Contractual Gaps', 5 *J Int'l Arb* (1988) 35, 41.

²⁵ Müller, *Protecting the Integrity of a Written Contract* (2013), p. 1.

E. Restatement Approach

resolution. In fact, international contract law instruments generally reject the parol evidence rule and allow for the unrestricted admissibility of extrinsic evidence for the purpose of interpretation.²⁶ Again, commercial arbitrators are less constrained by formal rules and are more adept at using trade usage and soft law instruments in their quest for a fair and equitable decision. In reality, despite a lack of ‘protective rules’ (parol evidence rule, textual interpretation), the written contract, complete on its face, still, at the minimum is strong probative evidence or acts as a rebuttal presumption of the parties’ agreement. Outside of the formalities and interpretive rules provided by law, contracts are commonly protected from contradiction or change by ‘voluntarily’ agreed upon clauses, such as the ‘merger clause’ and the ‘no oral modification clause.’²⁷ In reality, these are standard boilerplate terms that parties are unaware of (no oral modification) or understand (merger clause). The parties often believe that they are not bound by such terms in the fast-paced world of business – where changes in performance obligations are common and the parties need to react quickly to a change of circumstances through oral communications.

E. Restatement Approach

International legal practice draws from many different sources. For example, courts and especially arbitrators may draw from different hard and soft law sources. International transactional lawyers may also use such sources as references in the drafting of contracts. By doing so, they invariably affect ‘real world’ commercial practice. This Treatise also draws on numerous laws and provides both descriptive (law interpretation) and prescriptive (best practice) guidance. 21

International commercial law, whether drawn from hard or soft law instruments, is inherently a reflection of domestic laws. The 2008 financial crisis demonstrated the interconnectedness of the world’s economy. The era of free trade has seen the reduction of many barriers to expanding wealth through the vehicle of exporting-importing of goods and services. Both qualitative (lower tariff rates) and quantitative (quotas) barriers to trade have been greatly diminished. The result has been a greater realization of the specialization of labor envisioned by *Adam Smith* and other philosophers. With the removal of artificial barriers to trade, countries are generally freer to undertake the production of things that they are most efficient at producing for export and meeting the rest of their needs through international trade. 22

However, we do not live in a world of a fully functional free trade regime, that is, barriers remain or even stronger having a comeback as the Chinese-US trade war illustrates. Countries still have a long way to progress in the harmonization of standards (safety, health, environmental, and so forth); the divergence of which continue to restrict the free flow of goods and services. Another barrier is based on the essential function that law, especially contract law, plays in facilitating international business transactions. The necessity for the use of conflict of law or private international law rules produces unwanted uncertainty to transborder transactions. National courts use their own conflicts of law rules to determine the applicable substantial law to be applied to a dispute and at times selecting a law to the surprise of one or both of the parties. The use of a choice of law clause, although common, fails to provide absolute certainty that a court will actually apply the chosen law. The court may decide not to apply the choice of law in 23

²⁶ *Id.* at 1.

²⁷ *Id.* at 2.

Chapter 1 Introduction

cases where they determine the law is not closely connected to the dispute or where the provisions of the chosen law contravene public policies of the forum court.

- 24 Because of the uncertainty caused by private international law or conflict of laws and the barrier presented by the numerous discrepancies found across national contract and sales laws the goal of a harmonized international sales law took shape. In the early 20th century, most notably in the work of *Ernst Rabel*,²⁸ a greater recognition of the need for a uniform international sales law came into focus. The culmination of numerous starts and failures in crafting a functional harmonized law of sales was the adoption of the CISG in 1980 and its subsequent entry into force on January 1, 1988.
- 25 This Treatise takes a ‘CISG plus’ approach to international sales law by focusing on its provisions while providing other legal sources to allow a comparative analysis. The other sources become especially important in areas in which the CISG is silent. The ‘restatement approach’ includes elements of the ‘is’ and the ‘ought.’ It primarily describes the law as it is, but where there are alternative rules or approaches, the restatement approach provides analysis and suggests the better approach. These suggestions include illustrations, sample clauses, and practitioner tips on how best to deal with such issues within the confines of the contract. The terms legal treatise and restatement of law are interchangeable terms. The goal of the American Restatements is given as the distilling of commonly held legal rules, recognition of trends in the law, and recommendations as to what an interpretation of the rules ‘should be.’ The difference with the current undertaking is that the American Restatements deal with discrete areas of law and involve a review of the law of a single legal system. Thus, the goals of the current project are less ambitious than those of the American Restatements. The current Treatise is simply an attempt to inform readers of the general principles and areas of international sales law. However, given the diversity of the legal sources used, it retains the twin elements of the American Restatements – the ‘is and ought’ of international sales law.

F. International Transactional Lawyering

- 26 Legal systems have rules of conduct or ethical codes that regulate the practice of law, though these rules are not uniform in their views of the appropriate role of lawyers. However, it is universally held that a licensed lawyer or attorney should render competent counsel. The American Bar Association’s Model Rules of Professional Conduct Rule 1.1 on the lawyer’s duty to maintain competence in her field states: ‘[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice.’²⁹ The complete disregard of a full understanding of the substantive rules of the CISG by an international transactional lawyer (by a perfunctory opting-out) is not within the spirit of Rule 1.1. As noted previously, competent legal practitioners should educate themselves on the law before making a decision on whether or not to opt-out the CISG.
- 27 The second element in transactional lawyering worth mentioning is the skewed view of the other party’s lawyer as an adversary. American legal education buttresses this view of the adversarial nature of legal representation, which may work well in the American model of litigation, but is a poor approach in the area of transactional

²⁸ Rabel, *Das Recht des Warenkaufs, Eine rechtsvergleichende Darstellung*, two volumes (1936 and 1957).

²⁹ Model Rules of Professional Conduct Review 1.1 cmt. 8 (2012) (defining competence); see also *Resolution Amending the Model Rules of Professional Conduct*, Am Bar Ass’n, http://www.americanbar.org/content/dam/abadminstrative/ethics_2020/2012hodannualmeeting_105_a_filedmay-2012.authcheckdam.pdf.

G. Drafting Approach

law.³⁰ In several Civil Law jurisdictions, lawyers are, at least in theory, accustomed to a different perspective because good faith and fair dealing play a central role in their domestic law in relation to pre-contractual negotiations, conclusion, and execution of contracts. However, the function of such concepts in domestic law and in domestic practice may be (though this may vary in the latter), that a transactional lawyer cannot solely consider the other party or its counsel as an adversary. She must be more strategic in her approach to the negotiation and drafting of contracts. The adversarial model of drafting sees the lawyer's job as using its clients bargaining power to draft as one-sided a contract as possible. The contract is viewed as an opportunity to gain as many rights for its client and to allocate as many risks or duties as possible to the other party. This is the wrong approach if the client's primary interest is to ensure satisfactory performance and outcome rather than posturing itself to be able to more easily declare a breach and seek legal recourse. If the client's goal is the actual performance of the contract and the preservation of the contractual relationship, then a different approach is needed. If that is the goal, then the job of the transactional attorney is to draft a contract that advances client interest, which includes the mutual interests shared with the other party. The international sales contract, especially long-term, relational ones, need to be more than a simple listing of rights and duties, it should also include deal-preserving provisions. The end goal of contract drafting should be the preservation of the contract relationship rather than a pedantic enforcement of contract rights. This is most important in international transactions where the finding of a trustworthy and reliable foreign party to do business is more difficult, and, hence, the contract should focus on the preservation of that relationship over the allocation and enforcement of rights-duties in a single transaction.

G. Drafting Approach

Even though this is not a treatise on contract drafting, the book provides numerous contract clauses and practitioner tips. It is important to understand that these are provided for purposes of illustration and not as 'model' terms. The actual terms should be a product of context – type of transaction; type of goods; countries of export-import; applicable law; choice of forum or arbitration clause; characteristics of the parties; discrete versus relational nature of the transaction; and relative bargaining power, sophistication, and informational assets of the parties. 28

One issue of drafting peculiar to international contracting is whether or not to use legal terminology or legalese in the contract. There are two viewpoints on the use of legal language. First, the use of 'magic' legal words or phrases is appropriate if they actually simplify the contract.³¹ This would be the case of phrases that are universally known and provide a shortcut to conveying the intended meaning of the parties. The classic example would be the use of INCOTERMS in which a three-letter acronym is inserted into the contract. That acronym replaces at least a few pages of text that lawyers would need to draft. Without such a short-cut, the drafting lawyer would need to allocate risk of loss, transfer of title, costs of transport, cost of insurance, costs of 29

³⁰ The distinction between transactional and litigation lawyers is captured in the English legal system's designations of solicitors and barristers. Often the barrister is hired by a solicitor and may or may not have fiduciary duties toward the solicitor's client. See Macgregor, Definition and scope of agency law, in: DiMatteo & Hogg (eds), *Comparative Contract Law: British and American Perspectives* (2015).

³¹ Johnson, *Say the Magic Word: A Rhetorical Analysis of Contract Drafting Choices* (2015), available at http://scholars.law.unlv.edu/facpub/897/?utm_source=scholars.law.unlv.edu%2Ffacpub%2F897&utm_medium=PDF&utm_campaign=PDFCoverPages.

Chapter 1 Introduction

loading and off-loading of goods, procurement of export licenses, processing of import documents, payments of tariffs and fees, and so forth. The key to the use of such trade terms is that they are universally accepted and understood. Another example, at least in Common Law, is the insertion of a 'time of the essence clause' to signal that the delivery date fixed in the contract is a firm and material term. However, the magic words of a given legal system should be avoided in the international sales context, unless a phrase is clearly defined.

- 30 Again the primary goal of the Treatise is to provide an analysis of different substantive laws relating to issues relevant to international sales transactions. There are some areas of great importance that are not covered in the text, but two will be mentioned here – use of definitions and recitals. The use of recitals or statements of fact and definitions are common in international contracts. The definitions section generally appears very early in the contract, however, sometimes definitions are dispersed throughout the document. It seems that the best strategy is to place the definitions of 'general terms' at the front of the contract so that the reader is educated at the beginning on the intended meanings of certain words. More particularized terms that only appear in a given part of the contract should be defined at the beginning of the specific coverage area and whose meaning is restricted to that area. This way the word or term would have a specific or technical meaning for the specific provisions and a general meaning when used elsewhere in the document.
- 31 The point here is that the time spent drafting clear definitions, especially the defining of words and terms, is time well spent. Given the dangers of translation errors, various levels of foreign language skills, and cross-cultural misunderstanding, the provision of detailed definitions goes a long way in preventing disputes based upon different interpretations of words or misunderstandings of the rights and obligations of the contracting parties.
- 32 Good contract drafting places a premium on clarity and commonality of meaning. The best way to perform this task is to provide precise definitions of terms, especially technical terms and those terms that may be foreign to one of the parties. Precise definitions, when possible, should be used in place of terms like 'reasonable', 'to be determined', 'as needed', and so forth. The drafting attorney should always ask what is reasonable. What is a reasonable time to provide notice? What is a reasonable time for terminating a contract? What is a reasonable time for the buyer to provide product specifications to the seller?
- 33 The use of recitals is common in contract practice in some Common Law countries, but in many countries the use of recitals is not commonplace. The recitals are found at the front of the contract to describe the context and the matter to be covered by the contract. Recitals are signaled often by antiquated phrases like 'Whereas' or "Now therefore'. Some courts have held that recitals are not part of the contract. Two points are important to understand. First, recitals should be avoided unless the practice of recitals is common in the law of the country where the contract is to be interpreted and enforced. It is also good practice to 'repeat' the recitals where appropriate elsewhere in the contract, to guard against the problem of courts not recognizing recitals as part and parcel to the contract. Second, it is best to keep recitals as concise and clear as possible. They should act as an introduction to the contract; they should not provide information or representations not central to the contract. Recitals are representations that if proved to be false could provide a ground for a cause of action in misrepresentation or fraud.

I. Electronic Contracting

H. The Sales Contract

It was once said that: *'An oral contract is not worth the paper it is written on.'*³² This is especially true in the area of international contracts due to the greater likelihood of misunderstanding due to language and cultural differences. *EA Farnsworth* has argued that generally the language of an international contract should be English because of its widespread use.³³ He also recommends that if the contract is written in more than one language then an express provision should state that even though both language versions are original contracts the English version controls in case of conflict (of course he was giving this advice to American practitioners, but an argument can be made that English is the logical choice because of its common use in international business transactions). A further discussion of language issues can be found in Chapter 2 (Language and Translation).

Another problem with sales contracting is the contract generally consists of two separate instruments that make up the offer and acceptance, such as price quotations, pro forma invoices, purchase orders, written confirmations, commercial invoices, and so forth. This leads to the infamous battle of the forms scenario and its tandem of questions: (1) has a contract been formed despite conflicting standard terms? And (2) if a contract is concluded, what are the terms of the contract given the conflicting terms? The problematic nature in the exchange of forms scenario is demonstrated by the American Uniform Commercial Code's § 2-207, long regarded as one of the most poorly drafted provisions of the UCC. It has spawned an endless number of scholarly commentaries and resulted in three approaches in the state court systems – first shot rule, second or last shot rule, and the knock-out rule.

The simplest method of avoiding the battle of forms scenario, but uncommon in practice, is to use a single 'model contract' (example: ICC model contracts for sales of good and commercial agency) that both parties sign eliminating the threat of conflicting terms. Given the impracticality of the use of model forms, *EA Farnsworth* suggests the insertion in the offer of a provision demanding that the other party accept by signing and returning the offer. The issues and problems of the exchange of standard forms will be discussed in Chapter 8 (Formation of Contract) and Chapter 9 (Standard Terms).

I. Electronic Contracting

This Treatise does not contain a Chapter dedicated to electronic contracting, although issues of electronic contracting are referred to sporadically in the text. This decision was made for the reason of scarcity of space and, more importantly, because the internet is viewed here as a means of communication that does not change the substantive rules of international sales law. Instead, we have elected to provide a brief discussion of e-contracting here. During the drafting of the CISG, the internet was yet to be created and the use of electronic or e-commerce or digital tools in general was just beginning. The closest predecessor to e-commerce was the use of Electronic Data Exchange (EDI) to facilitate transactions in established business relationships. Article 13 CISG only refers to telegrams and telex and shows that the CISG does not have a 'digital mindset'. However, the CISG's acceptance of these types of electronic technologies that existed at the time indicates that the new technologies should also be recognized within

³² Goldwyn, reprinted in: Bartlett, *Familiar Quotations* (14th ed. 1968), p. 967.

³³ Farnsworth, 'The Pitfalls of Making International Contracts (Exporting)', 4 *No Carolina J Int'l L & Com Reg* (1978) 97, 97–98.

Chapter 1 Introduction

the scope of Article 13 CISG. Thus, the CISG might not have a ‘digital mindset’, but it has at least an ‘open mindset’ to cover some digital age problems. Nation-states have passed statutes to deal directly with the use of electronic means in the formation of contracts. For example, a majority of US states have adopted the Uniform Electronic Transactions Act (UETA).

- 38 Due to the influence of EU directives, the domestic laws of the EU member states require that commercial parties satisfy a number of duties in order to create an enforceable (consumer) contract through electronic means. § 312i(1) of the German Civil Code for example lists a number of duties relating to electronic business dealings. The entrepreneur (seller) must ‘provide the customer with reasonable, effective and accessible technical means with the aid of which the customer may identify and correct input errors prior to making his order; notify the customer clearly and comprehensibly of information specified in the statutory order under Article 246 c of the Introductory Act to the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuch] in good time prior to sending his order; confirm receipt of the order without undue delay by electronic means for the customer; and make it possible for the customer to retrieve the contract terms including the standard business terms when the contract is entered into and save them in a form that allows for their reproduction.’ Other national laws of EU member states foresee similar provisions.
- 39 Other harmonization instruments developed at the international level include: UNCITRAL’s Model Law on Electronic Commerce (1996)³⁴ and Model Law on Electronic Signatures in 2001.³⁵ In 2001, the CISG-Advisory Council was formed and in 2003 it published its first Opinion – Opinion 1: ‘Electronic Communications under the CISG.’ Subsequently a more comprehensive international model law was adopted – the 2005 UN Convention on the Use of Electronic Communications in International Contracts, which entered into force March 1, 2013.³⁶
- 40 Chapter 7’s coverage of formalities will provide a fuller discussion of electronic contracting in that area. For now, we can say that most domestic laws, for purposes of writing and signature formalities, recognize electronic records as equivalent to the written form and accept electronic signatures, attestation, confirmation, and attribution (uniqueness of every person’s e-mail address) as sufficient to constitute a legal signature. Although technological advancements and the ubiquitous nature of the internet have created new products (informational commodification), they have not been a real obstacle to the formation of contracts under the CISG. In fact, they have provided parties greater flexibility in the formation of contracts, revocation of offers, the modification of contracts, and the ability to provide prompt notice as required under various CISG provisions. This is as it should be since an underlying principle of the CISG is the elimination of formalities in the formation of contracts. However, it is important to note that technology continues to shape the process of exporting and importing in such areas as the tracking of the movement of goods through the use of radio-frequency identification (RFID) tracking chips.³⁷ Tracking chips can be affixed to cargo pallets to allow a multitude of parties (sellers, buyers, freight forwarders, customs officers) to be instantaneously informed of the:

³⁴ Text available at www.uncitral.org/uncitral/uncitral_texts/electronic_commerce.html.

³⁵ Text available at www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_signatures.html.

³⁶ See Eiselen, ‘Integration of the UN Electronic Communications Convention and the United Nations Convention on Contracts for the International Sale of Goods’, in: Schwenzer, Atamer & Butler (eds), *Current Issues in the CISG and Arbitration* (2014), pp. 145–65.

³⁷ They are based upon the wireless use of electromagnetic fields to transfer data, for the purposes of automatically identifying and tracking tags attached to objects.

J. Treatise's Coverage

*unit counts of merchandise in the boxes, the geo-location of the boxes, the sealed condition of the containers, the integrity of the hold in the cargo ship and, with all of that information, the projected time of arrival, unloading and transfer velocity, duration of ground transport, and the sufficiency of the crews and personnel scheduled at each location through which the goods will move. Any adverse changes in any conditions, including increased headwinds the cargo ship captain must navigate, are immediately inputted into the data flows, enabling all of the schedules, workloads, and related cost impacts to be instantly calculated and, if suitable, allocated among the different parties.*³⁸

Technology has enhanced the means to construct and transmit business records and information in digital forms. It also now plays a significant role in just-in-time contracting and the evolution of network contracting. In the end, the transactional lawyer cannot avoid recognizing the role of new technologies on the supply chain. The lawyer will likely need to draft contract terms that take these technologies into account. In some cases, technological advancements may require the lawyer to *'work as part of a corporate team that includes information architects, security managers, records managers, auditors, and financial executives, as well as business operations managers.'*³⁹ This is merely an extension of an old idea that law and the representation of clients is a lifelong learning experience! 41

J. Treatise's Coverage

This Treatise's goal is to provide in a single volume a review of laws, issues, and contract terms related to the international sale of goods. It aims to provide a single reference book for the practitioner, academic, and student. It draws and synthesizes a wide range of materials from hard and soft law instruments, international and national legal instruments, and from practice. The practice material focuses on the legal practice of an international transactional lawyer, but will also look to commercial practice in general. Its approach is international, comparative, and cosmopolitan in nature. International in its use of core materials such as the CISG, the PICC, the PECL, and to a lesser extent the proposed and subsequently withdrawn CESL (reference only if it contains a diverging and innovative approach). It is comparative in that it reviews differences between the Civil Law and Common Law approaches to certain issues through a sampling of national laws. It is cosmopolitan in nature in that it seeks to go well beyond an analysis of what 'the' law is or what it should be, but to offer options to the lawyer that can be utilized in the interest of different clients. The book, thusly, is descriptive, normative, and ultimately agnostic in its presentation. 42

The Chapters, more or less, follow in general a 'template,' which is to be explained here. It is important for the reader to understand the template and its constituent parts before reading the book. This is due to the fact that the table of contents does not repeat the template for each of the Chapters, but, instead, lists the substantive issues found in the commentary, illustrations, and practitioner tips of each Chapter. The template includes the following parts: (1) description of the 'Topics Covered'; (2) an 'Introductory Note'; (3) 'Statement of Issues' (to be covered in the Chapter); (4) the role or uniqueness of the topic in the 'International Sales Transaction'; (5) 'Sampling of Laws'—the following laws or materials have been singled out for coverage when appropriate: (i) CISG, (ii) CISG Advisory Council Opinions, (iii) PICC, (iv) PECL, (v) Proposed CESL (as said before reference only if it contains a diverging and innovative approach), (vi) German 43

³⁸ Ritter, 'Designing and Constructing Commercial Agreements in the 21st Century', 26 *St Thomas L Rev* (2014) 506, 506.

³⁹ *Id.* at 509.

Chapter 1 Introduction

Bürgerliches Gesetzbuch (BGB), (vii) French Code civil, (viii) Spanish Código civil, (ix) Anglo-American Common Law of contracts, (x) American Uniform Commercial Code (UCC), (xi) UK Sales of Goods Act, (xii) American Restatement (Second) of Contracts, (xiii) Chinese Law (with the main focus on the new Chinese Civil Code, the CCC), and (xiv) Chinese Supreme Court Interpretations;⁴⁰ (6) 'Commentary' beginning with applicable CISG case law and then applying the above listed laws (especially, when the CISG does not cover a certain issue or area of contract law), offering generic differences between Common Law and Civil Law, indicating general international commercial practice, and offering a 'best view' of the issues; this analysis is intended to be descriptive, comparative, and evaluative; (7) 'Illustrations' offer examples of law in practice, ferrets out tangential issues, and gives hypothetical examples; (8) 'Cross References' to other Chapters in the book, related contract clauses, and additional commentary; (9) 'Practitioner Tips & Contract Clauses', and (10) 'Additional Sources' for further study. Again, while the above template remains mostly consistent throughout the Treatise, the substantive issues covered are found in the 'Detailed Table of Contents.' However, it has to be stressed that the contributors of this Treatise were completely free to derogate from the presented template in form and content when their topics were not best presented by the template.

- 44 The Treatise attempts to be comprehensive given the practical constraints of page limitations, covering the entire contractual timeline from the negotiation phase to post-contractual obligations. It begins with the preliminary, but important, topic of the role of language in the writing and interpretation of international legal instruments and contracts (Chapter 2), before proceeding to the issue of pre-contractual liability. This area covers duties relating to the negotiation of a contract and the use of preliminary instruments. The later issue seeks to define the line between negotiation and contractually binding agreement. Since Civil Law and Common Law diverge here two separate Chapters are offered (Chapter 3 from a Civil Law perspective and Chapter 4 from a Common Law perspective). The next group of Chapters relate in some way to the conclusion or formation of contracts and their contents, expressed or implied: Chapter 5 reviews the 'Scope of the CISG' and Chapter 6 deals with 'Jurisdictional Issues'; Chapter 7 reviews 'Contractual Formalities'; Chapter 8 analyzes the rules relating to the 'Formation of Contract'; Chapter 9 examines the incorporation and enforceability of 'Standard Terms'; Chapter 10 discusses the vital role played by 'Trade Terms and INCOTERMS'; and Chapter 11 examines the doctrines and principles that determine the 'Validity of Contract Terms'.
- 45 The next group of Chapters relate to the performance phase of the contract: Chapter 12 reviews the duty related to the 'Delivery of Goods'; Chapter 13 does a similar examination relating to the 'Delivery of Documents'; Chapters 14 and 15 examine issues of conformity and warranties; Chapter 14 covers 'Conformity of Goods' and Chapter 15 'Sales and Intellectual Property Rights' (warranty of title); Chapter 16 reviews the buyers obligations relating to the 'Examination of Goods and Notice of Non-Conformities'; Chapter 17 delineates where performance ends and breach begins – 'Performance and Breach of Contract'; Chapter 18 examines the particular case of 'Anticipatory Breach'; and finally, Chapter 22 examines exemption from liability for lack of performance provided by the excuse doctrines: 'Excuse: Impossibility and Hardship.'
- 46 Another group of Chapters deal with the allocation of liability and remedies: Chapter 19 examines 'Remedies and Damages'; Chapter 20 covers the right to 'Avoidance of

⁴⁰ The Interpretations of the Chinese Supreme Court remain in principles applicable also after the enactment of the new CCC, unless they have been copied into it or are contradicting with one of its provisions.

K. Additional Sources

Contract'; Chapter 21 examines the crucial determination of when there is a passage of the 'Risk of Loss' from the seller to the buyer; and Chapter 24 discusses the issue of 'Products Liability'. The rest of the Chapters discuss other important areas of contract and sales law including: 'Contract Interpretation' (Chapter 23); 'Assignment, Delegation and Third-Party Rights' (Chapter 25); 'Defenses' (Chapter 26); 'Agency and Distribution Agreements' (Chapter 27), as well as, the unique issues presented by 'Long-Term Contracts: Installment and Supply Contracts' (Chapter 28); and 'Post-Contract: Continuing Obligations & Rights' (Chapter 29), which covers issues of warranties, confidentiality, covenants not-to-compete, and other post-contract restrictions. The book concludes with a discussion of the issues of 'Choice of Law' (Chapter 30).

K. Additional Sources

Adams, *A Manual of Style for Contract Drafting* (4th edn. 2018); Adams & Cramer, *Drafting Contracts in Legal English: Cross Border Agreements Governed by US Law* (2013); Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd edn. 2009); Bridge, *The International Sale of Goods* (4th edn., 2018); Bridge, *The Sale of Goods* (3rd edn. 2014); Burnham, *Drafting and Analyzing Contracts* (4th edn. 2016); Burns & Edwin Peel (eds), *Contract Terms* (2007); Cordero-Moss, *International Commercial Contracts* (2014); Davies & Snyder, *International Transactions in Goods* (2014); DiMatteo, *International Contracting: Law and Practice* (4th edn. 2016); DiMatteo (ed) *International Sales Law: A Global Challenge* (2014); Eidson, *Contract Drafting: Powerful Prose in Transactional Practice* (3rd edn. 2019); Fontaine & de Ly, *Drafting International Contracts* (2nd edn. 2009); Fox, *International Commercial Agreements and Electronic Commerce* (6th edn. 2018); Garner, *Legal Writing in Plain English* (2nd edn. 2012); Garner, *The Elements of Legal Style* (2nd edn. 2002); Gillette & Walt, *The UN Convention on Contracts for the International Sale of Goods: Practice and Theory* (2nd edn. 2016); Goode et al., *Transnational Commercial Law* (2nd edn. 2015); Klotz, *International Sales Agreements: An Annotated Drafting and Negotiating Guide* (3rd edn. 2018); Kröll, Mistelis & Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG): Commentary* (2nd edn. 2018); Müller, *Protecting the Integrity of a Written Contract* (2013); Schulze (ed), *Common European Sales Law (CESL)* (2012); Schlechtriem & Schwenzler (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn. 2016); Shippey, *International Contracts: Drafting the International Sales Contract* (4th edn. 2009); Stark, *Drafting Contracts, How and Why Lawyers Do What They Do* (2nd edn. 2014); Vagts, Dodge & Koh, *Transnational Business Problems* (6th edn. 2019); Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd edn. 2015); Whincup, *Contract Law and Practice: The English System with Scottish, Commonwealth and Continental Comparisons* (5th edn. 2006). 47