THE ADOPTION OF THE UNITED NATIONS CONVENTION ON
CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

BY
MS. VALAIPAN PANNIAM

AN INDEPENDENT STUDY SUBMITTED
IN PARTIAL FULFILLMENT OF THE REQUIREMENT
FOR THE DEGREE OF MASTER OF LAWS
(BUSINESS LAW)

GRADUATE SCHOOL OF LAW
ASSUMPTION UNIVERSITY

DECEMBER 2008
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Independent Study Title : The Adoption of the United Nations Convention on Contracts for the International Sale of Goods
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Major : Master of Laws (Business Law)
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Faculty of Law, Assumption University approves this Independent Study as the partial fulfillment of the requirement for the Degree of Master of Laws.

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ABSTRACT

Thailand is one country in the world which mostly has its main income from the export of International sale of goods. As Thailand is such a dependent country, Thailand has its own law though there is no specific law in writing to govern the International Sale of Goods. As the United Nations Commission on International Trade Law UNCITRAL created the United Nations Convention on Contracts for the International Sale of Goods (CISG) for the purpose of International Sale of Goods, Thailand should be concerned with the adoption of the CISG.

Although the CISG is used and practiced as condition through International trade between the parties in many countries, it is accepted as the standard of International trade worldwide. However, the CISG also has the effect in negative directly to Thailand because of its provisions of law. Under the power of the UNCITRAL, the advantages are handled to members, especially, developed countries.

As Thailand has Civil and Commercial Code as the main law. It covers all necessary in detailed for all issues, including the sale contract. For International Trade and transaction, Thai merchants usually use International Commercial Terms (INCOTERMS), INCOTERMS2000, which is well known International transaction in vision of foreign merchants and investors. In addition, Conflict of law is usable when there are problems such as breach of contract between the parties arise. Therefore, the CISG is not necessary for Thailand.
ACKNOWLEDGEMENT

This independent Study would not have been completed without the support of many people. I would like to take this opportunity to express my gratitude to people who helped me in completing this independent research paper.

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Chapter 1
Introduction

A. Background and General Statement of the Problem

Thailand or the Kingdom of Thailand (Siam) has been practicing trade since the Sukhothai period, and Portugal was the first country to be the party under International trade in the Ayudhya period. After that Thailand has been a party to International Trade with many countries around the world. From an economic point of view, International Trade is an important part of Thailand's economy because Thailand mostly receives income and benefits from the export of goods to foreign countries around the world. As Thailand has been trading for a long time, Thailand can develop economy of exportation greatly. To govern International Trade to be successful with fairness and reach standard of universal, Thailand practices law under a codification system.

The Thai legal system is based on a civil law system, but also influence of common law. As Thailand reached successfully in promulgating of the written law codes, the Thai legal system was changed into a codification system. It is widely used in many European countries and known as the civil law system. There are Thai written law codes such as the Criminal Code, Civil and Commercial Code, Criminal Procedure Code, and Civil Procedure Code which were promulgated. For the Civil and Commercial Code, it covers all the matters of law including sales contracts.

Even though Thailand has no written law to govern International Sale of Goods, there is a written law in the Civil and Commercial Code (CCC) which has a specific law on sales contracts. In case a dispute occurs between two parties and the case goes to the court, Thai courts shall follow the procedures and make the decision by relying on the provisions of the CCC. The CCC is responsible for all cases under the Thai legal system. In case one party is Thai, place of business or doing business is in Thailand, or even sale contract is in Thailand; the CCC shall be applied following the procedures of the Civil Procedure under the Thai legal system.

The written law under the CCC, the provision of Book I, II, and III shall be applied to such International transactions. Under the provisions, it concerns such as
sale contract, duties, and responsibilities of the seller and the buyer, liability for
defect, prescription and so on. There are Thai laws related with International Trade
that shall be applied such as Conflict of Law, the Electronic Transactions Act B.E.
2544, and the Unfair Contract Terms Act B.E. 2540. However, less problems occurs
in International sale contract because of Lex Mercatorio such as International
Commercial Terms (INCOTERMS).

According to INCOTERMS, it is such sales contract which is accepted by
foreign merchants in the Western and the eastern part of the world. Even in Thailand,
it is used for purposes of International Trade and gives benefit in the practice by each
of trade term has its own identify and interpret the agreement for all responsibilities
and liabilities of both parties. Each party shall have understanding for their duties
therefore, there is less problem arising under a sale contract.

The United Nations Convention on Contracts for the International Sale
of Goods (CISG) has been hailed as the new law, Lex Mercatoria, customary rule for
International Trade. Although there are many countries that are members and practice
the CISG for International Trade purposes, it is unclear and defective. It is still in the
process of earning reorganization among the courts, practitioners, and merchants. In
addition, courts have not yet developed an understanding theory of the CISG and
courts should reach similar conclusions to be such standard and accepted practice
because there is no mechanism that would ensure the final resolution.

Although the CISG is such a new alternative that many countries practiced and
used as condition through International Trade between the parties, Thailand is not yet
a member. There are both advantages and disadvantages for Thailand to make the
decision to adopt and be a member of the CISG. There are such considerations as
following:

1. Although there is no specific law for International trade, Book III of the
Civil and Commercial Code (CCC) can cover all necessary issues such contracts for
the International Sales of Goods.

2. International Commercial Terms (INCOTERMS), INCOTERMS2000 is
well known International transaction in vision of foreign merchants and investors. It
also provides 13 trade terms.

3. Conflict of law is usable when there are problems such as when a breach
of contract between the parties arises.

To ensure that Thailand becomes more fairly and obviously concerning such dispute, the Thai government has set up the committee to draft a Bill for using its application for both domestic and International sale of goods contract. This bill is adapting from the CISG and combined with the principle of the CCC. This being the case, the Thai legal system and structure of this Bill shall be qualified to reach a standard of International Trade. It can ensure foreign merchants to be served equally and fairly when doing International Trade with Thailand. Therefore, there is no reason for Thailand to adopt for International Law to use in Thailand which would impact and effect to Thailand in negative.

B. Objectives of the Research

1. To study the principle and application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) for International Trade, including disadvantages in case Thailand ratifies and becomes a member under this convention.

2. To study the principle and application of sale under Civil and Commercial Code and advantages of using it for International Trade, including cases of International Trade under Thai court’s decisions.

3. To study the concept in each trade terms of INCOTERMS2000, and includes advantages of itself.

4. To study the principle and application law of contract for the International sale of Goods of England, French, and German


6. To determine and analyze whether or not the Thai legal system qualifies to justify fairly in case of problems on International Trade arising.
C. Hypothesis of the research

As United Nations Convention on Contracts for the International Sale of Goods (CISG) are such uniform rules on contract for International sale of goods which concerning general terms and conditions of the contract, there are 71 countries be members. However, the CISG is unfavorable according to the provision of law. For Thailand, the CCC is promulgated as own law; it is also concerns sale contract. It can be used for purposes such sale of goods. Additional, Thai merchants used INCOTERMS as traditional rules for International trade, and Conflict of law are also used. Therefore, it is not necessary for Thailand to adopt the CISG.

D. Research Methodology

This research paper will be analyzed and researched by the method of documentary research. It involves deep study of the United Nations Convention on Contracts for the International Sales of Goods (CISG), comparatives with Sales and Goods under the Civil and Commercial code (CCC), and related with International Commercial Terms (INCOTERMS 2000) including textbooks, journals, thesis, articles, documents and electronic information about the CISG and INCOTERMS 2000.

E. Scope of the Research

This research paper establishes a scope concerned about the consequences of Thailand to be a member and adopt the CISG by analyzing contract of law under Civil and Commercial Code and comparing with the CISG. It also looks at INCOTERMS 2000 which are International rules accepted by world trade. The scope is also to see the benefit of the Civil and commercial Code toward International Trade, and whether or not for Thailand to adopt the CISG.
F. Expectation of the Research


2. To know the principle and application of sale contract of Civil and Commercial Code (CCC).

3. To know the concept of International Commercial Terms, INCOTERMS2000.


5. To identify the problems of adoption the United Nations Convention on Contracts for the International Sale of Goods (CISG), and the solution of the problems.

G. Abbreviation

<table>
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Chapter 2
Thai Law and INCOTERMS

International sale of goods is a reciprocal contract which the parties have different place of business. Before the parties decide to enter into the contract, the parties shall agree to make the contract as agreement. At this point, there are many details which the parties should concern under the contract before the contract is made; for example, to identify the quality and quantity goods, price, the duties of the seller and the buyer, the delivery, the payment, and also necessary detail for contract.

As the contract between the parties is such International trade; therefore, there are many contracts are involved such as, Carriage of Goods by Sea, Marine Insurance, and International Payments; those are more complicated than Domestic law. It also includes applicable law.

As it is such international sale contract and the parties have different places of business in different countries, Carriage of Goods by Sea is involved. Most of merchants around the world prefer to add INCOTERMS as an agreement to be a part of the contract. Although INCOTERMS is not a kind of law, but it is such standard trade definitions most commonly used in international sale contracts. Devised and published by the International Chamber of Commerce, they are at the heart of world trade. The definitions of INCOTERMS are divided into 4 groups. There are 13 trade terms for merchants to choose. Each term has different details for duty of the seller and the buyer, risk, costs, and so on; which are described afterward in the part of INCOTERMS. This being the case, INCOTERMS are suited for International Trade, and it is in used for Carriage of Goods by Sea according to the distance. The parties may agree to select 1 of trade terms under INCOTERMS. As whatever the parties agreed about trade terms; the duty of the seller and the buyer, costs, and risk, shall follow such terms.


After entry into the contract and the seller and the buyer prepared the performance of the obligation to each other already, the payments take an important role to exchange with the goods. In the case of different place of business in different countries, the payment through a Bank is involved. There are four methods of the payments which are popular and credible: Letter of Credit, Bill of Collection, Open Account, and Consignment. However, Letter of Credit is the most popular.

“A letter of credit is a document issued mostly by a financial institution, used primarily in trade finance, which usually provides an irrevocable payment undertaking (it can also be revocable, confirmed, unconfirmed, transferable or others e.g. back to back: revolving but is most commonly irrevocable/confirmed) to a beneficiary against complying documents as stated in the Letter of Credit. Letter of Credit is abbreviated as a LC or L/C, and often is referred to as a documentary credit, abbreviated as DC or D/C, documentary letter of credit, or simply as credit as in the Uniform Customs and Practice for Documentary Credit (UCP 500 and UCP 600)\(^3\)

According to methods of letter of credit there are four parties; the applicant (buyer), the beneficiary (seller), Issuing Bank (bank which the applicant open L/C), and Advising Bank (bank which inform L/C to the beneficiary\(^4\)). At first, the applicant (buyer) and Beneficiary (seller) agreed to enter into the contract and agreed to use Letter of Credit as the method of payment. The applicant contacts to Issuing Bank to open L/C in his country, and Issuing Bank will open L/C through Advising Bank which is in the beneficiary’s country. Advising Bank will inform L/C to the beneficiary. If the beneficiary examines L/C in favor, the goods sold are sent to the carrier; the beneficial will offer document according L/C to Advising Bank, and Advising Bank will inform Issuing Bank to make the payment. After Issuing Bank paid money to Advising Bank, the applicant must do the payment to Issuing Bank for receive document. After the payment, the applicant examined document and can

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take the goods from the carrier by handle such document. At this point, the applicant (buyer) shall receive the goods from the beneficiary (seller).

However, International Trade under the contract does not run smoothly every time. It might cause some problems; such as breach of contract. In case of the problems such carriage of the goods, the responsibilities of the export and the import formalities, the costs, and the risk, if the parties selected one of trade terms under INCOTERMS, the liabilities are followed such that trade term.

On the other hand, the parties breach of contract in the matters which are not under the selected trade term, it would have such the dispute between the parties whether which law should be concerned. It is because the contract is made between the parties who have different places of business in different countries; therefore, laws to govern in both of countries are not the same and it would raise some problem between laws of two countries. This being the case, Conflict of law is concerned.

A. Thai Law

1. Conflict of Laws

The principle of Conflict of laws are such rules to use Civil law of one country to be such applicable law to enforce for both of the parties though there are such foreign facts included. In case one of the parties is Thai, Conflict of laws may be Thai law or Foreign law; it depends on the parties to choose. Under the Contract, sale contract, if there is such problem about the completion of contract between the parties who have different places of business in different countries, the court shall consider the dispute whether to use Thai law or foreign law as applicable law.

When Thai party agrees to make the contract with foreign party, Conflict of laws provides Choice of law and Choice of Forum for both of the parties for selection.

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Choice of law is a procedural stage in the litigation of a case involving the conflict of laws when it is necessary to reconcile the differences between the laws of different legal jurisdictions. The parties can select applicable law to make the decision when there are such disputes.

Choice of Forum is a forum selection clause in a contract points to two things. First, it determines the specific process by which parties agree expressly to litigate all disputes concerning a contract. The parties can select the court for making the decision when there are such disputes.

However, there is no Choice of Forum under Thai law. If a Thai party selected Choice of Forum, it is void but not the contract. A Thai party can select only Choice of law for the contract.

For Thai Conflict of laws which is about the contract, it shall follow the Conflict of Laws Act B.E.2481 (1938). It is divided into four parts: Formation of contract (Section 9), Ability of person (Section 10 paragraph 1), Fundamental of contract (Section 13), and Result of contract (Section 13).

However, fundamental of contract is quiet an important problem, and a Thai court has to make a decision through such problems: the contract between the parties is perfected or not, the declaration of intention of the parties, the objects of the contract, or even the effect of the contract. Therefore, applicable law to solve these matters shall follow the Conflict of Laws Act B.E.2481 (1938) Section 13.

“The question as to what law is applicable to the essential elements or effects of a contract is determined by the intention of the parties thereto. In case where such intention, express or implied, cannot be ascertained, if the parties have the same nationality, the law applicable is the law of common nationality of the parties. If the


parties have different nationalities, the law of the place where the contract is made shall govern.

Where a contract is made between persons at a distance, the place where the contract is deemed to be made is the place where the notice of the acceptance reaches the offeror. If such place cannot be ascertained, the law of the place where the contract is to be performed shall govern.

A contract shall not be void when made in accordance with the form prescribed by the law which governs the effects of such contract.¹⁰

In case of there is such the dispute, law which is applicable is law of country which the parties agreed the intention to use by choosing such law for enforcement as Choice of law at the time they made the contract, it can be the law of any country. If there is no such the intention, the nationality of the parties is concerned. If the parties have the same nationality, law of common nationality of the parties is applicable. If the parties have different nationalities, law for enforcement is law of the country which the contract is made. On the other hand, if the contract is made at a distance, the place where the contract is made is the place which the acceptance reached the offeror. If such place cannot be ascertained, the law of the country which the contract is performed is applicable¹¹.

This being the case, if one of the parties is Thai, and both of the parties agreed to use Thai law, The Civil and Commercial Code (CCC), is applicable; therefore, Thai law is applicable in case the dispute arises between the parties. On the other hand, if the parties agreed to use foreign law to be applicable, Thai law is not in use:

2. Civil and Commercial Code (CCC)

In Thailand, there is written law in the CCC which has specific law on sale contract: the provision of Book I, II, and III. Under the provision, it concerns the principle of law expressly in detailed. The explanations for sale under Book III of The CCC are as following:


a. Formation of contract

A contract is an agreement which binds the parties to it\textsuperscript{12}. The purpose of the contract is to cause the obligation between the parties, at least two persons. The agreement shall occur when the parties have a declaration of intention to establish a juristic act under the terms of the contract. The terms of a contract are its contents, and these determine the extent to which the parties are in agreement\textsuperscript{13}. According to Thai law, the contents of formation of contract are explained as following:

**Formal Requirement**

Formal requirement is expressed under the Civil and Commercial Book III. For a sale contract, it is obvious that a sale of immovable property, ships of five tons and over, floating houses and beast of burden, it must be made in writing registered by the competent official (Section 456 paragraph 1). An agreement to sell or to buy or such a promise to sell such property under Section 456 paragraph 1, it is not enforceable by action unless there be some written evidence signed by the party liable or unless earnest is given, or there is part of performance, (Section 456 paragraph 2). For a sale of movable property, it needs to apply as the contract if the agreed price is twenty thousand baht or upwards, (Section 456 paragraph 3).

**An Offer**

An offer is a declaration of intention expressly from the offeror to the offeree, to invite the offeree to enter into the contract. After the offeror send an offer to the offeree, an offer is binding on the offeror. Under Thai law it must be contained with important identification for the offeree to decide whether or not to make the acceptance.

**The Acceptance**

The Acceptance is a declaration of intention of the offeree, who received an offer, to accept and agree following an offer. If an offer made to person at present, the acceptance must be accepted there and then. In case an offer is made to a person at a


distance, Thai law used Theory of reception. Under Section 361 of The CCC, "A contract between persons at a distance comes into existence at the time when notice of acceptance reaches the offeror."

**Binding force of offer**

Under Thai law, offer to make a contract which has specific time for the acceptance, it cannot be withdrawn within such period, under the CCC Section 354. In case offer, under Section 355, for a person at distance and does not specify such a period for the acceptance, offer cannot be withdrawn within a time which notice of the acceptance might reasonably be expected.

b. Transfer of ownership and risk of loss

**Transfer of ownership**

**Specific goods**

For general principle of transfer of ownership under Thai law, when the offeree accepts, the contract is formed. Ownership of the goods is transferred from the seller to the buyer immediately without the condition or the time, (Section 458). In case of there is such condition of time, the goods sold shall be transferred from the seller to the buyer when the times has arrived, (Section 459).

**Unascertained goods**

Under Thai law, the ownership shall not transfer from the seller to the buyer unless the property is identified as specific goods; the goods have been numbered, counted, weighed, measured, selected, or identified as certain, (Section 460).

**The passing of risk**

Risk is transferred from the seller to the buyer the same time as transfer of ownership. Therefore, risk of the specific goods is transferred from the seller to the buyer immediately at the time contract is made. For unascertained goods, risk of the goods sold is transferred when unascertained goods are identified as specific goods.
c. Duty of the buyer and Duty of the seller

The seller has the duty to deliver the goods sold to the buyer, (Section 461). The buyer has the duty to take the delivery of the goods, and also make the payment to the seller, (Section 486).

d. Damage

Under Thai law Section 194, the creditor has the right to claim for the debtor's performance, it may consist of forbearance. Thai law, Section 222, the claim of damages is to compensate of damages in non-performance; the creditor may demand for compensation if damages has arisen in a circumstances which the debtor concerned foresaw or ought to have foreseen such circumstance. The CCC Section 150, “An act is void if its object is expressly prohibited by law or is impossible or is contrary to public order or good morals.” For non-performance, the debtor can set up the impossibility against the creditor for non-performance., the creditor can make a demand to the court for compulsory performance if the debtor did not perform the obligation (Section 213), and the debtor’s performance of an obligation shall be the whole property of the debtor including any money or other property due to the debtor by a third person, (Section 214); it is because the creditor is entitled to claim performance according to virtue of the obligation, (Section 194).

e. Force majeure and Frustration

If the performance becomes impossible which is under the responsibility of the debtor, the debtor has to compensate for damages because of non-performance. In case partial impossibility but the possible part is useless for the creditor, the debtor still has to compensate for non-performance, (Section 218). If the performance becomes impossible after the parties created the obligation but it is not the debtor’s fault, the debtor does not have to respond for his non-performance, (Section 219). According to a reciprocal contract, and the object of the contract is to transfer of ascertain goods but such the goods are lost or damaged without the debtor’s fault, loss and damage fall upon the creditor, (Section 370)\textsuperscript{14}.

f. Rescission and the Effects of termination

Under Thai law, there is a general rule as reciprocal contract. If the party (the debtor) does not perform the obligation, the other party (the creditor) has the right to rescind the contract according to the contract and the prescribing of law. Rescission under Thai law can be made by the declaration of intention to the other party, (Section 386). It can do by making a declaration of intention to the debtor when there is non-performance, by giving a reasonable period of time to the debtor. It the debtor does not perform the obligation within a reasonable period of time; the creditor can rescind the contract, (Section 387). In case of the obligation which has fixed time and the fixed time has passed, the creditor may rescind the contract without notice to the debtor, (Section 388). The parties shall return as the position before making the contract, it is the Effects of termination; the party also received damages, (Section 391).

g. Interpretation of contract

The problem of the interpretation of law is quiet important for enforcement of the law; if the interpretation does not follow to the intention of law, it would cause a wrong result. Therefore, to interpret the contract, the parties shall make clear for the same understanding under provisions of law carefully, especially, Section 150. The parties shall be concerned about the objects of the contract for not to be prohibited by law, is impossible, or is contrary to public order or good morals. It is to make the contract to be completed and enforceable.

Additionally, in case of there is no law under the CCC to enforce in any issue, there is General principle under the CCC to apply with. According to Section 4:

"The law must be applied in all cases which come within the letter or the spirit of any of its provision is applicable, the case shall be decided according to the local custom. If there is no such custom, the case shall decided by analogy to the provision most nearly applicable, and, in default of such provision, by the general principles of law."

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15 Ibid.
For Thai courts, the judge has the power to interpret law. As there are such the dispute arose between the parties, Section 4 under the CCC can be applied. It is according to the provision of the Civil and Commercial Code.

A Thai court has the duty to adjudicate the case though there is no the provision of law which is applicable to the case. It is according to Section 134 of the Code of Civil Procedure.

"In no case shall the court in which a case has been entered refuse to pronounce a judgment or order disposing of the case, on the ground that there are no provisions of law applicable to the case or that the provisions of law to be applied are obscure or incomplete"

Form this provision of law, it is obvious that the court has the power to apply and interpret law. If there is no provision of law applicable; local custom, similar provision and general principles of law shall be applied to the case respectively.

This being the case, it can be said that Thai legal system and the CCC reaches the standard of law and fairness for the parties under the contract.

B. INCOTERMS

1. Background and General Statement of INCOTERMS

International Commercial Terms or INCOTERMS are such International trade agreement. It is officially called "The Official ICC Rule for the Interpretation of Trade Terms". INCOTERMS is not law, it is rule to identify and interpret commercial terms. INCOTERMS are such world customs to make trade for countries to be easier; they are used worldwide to divide for the transaction costs and the responsibilities of the buyer and of the seller. Additionally, it includes the carriage of the goods, the responsibilities of the export and the import formalities, the costs, and the risk under the condition of the goods which locates in the transport process. However, Thai textbooks define the meaning of INCOTERMS in the difference.

"INCOTERMS are statement about agreement or trade terms which are the highest acceptation in the world. INCOTERMS are neither Domestic Law nor International agreement, but its gatherer the main of private commercial terms and bind both parties
under International sale contract since they specify explicitly or implicitly to use INCOTERMS as applicable.\textsuperscript{17}

“INCOTERMS are terms of standard terms to use under International sale contract which International Chamber of Commerce has provided. It is for the agreed parties to use INCOTERMS incorporation, and understand the rights and duties clearly and obviously between them without wasting time for negotiation and drafting a sale contract in some important issue which are already detailed in standard terms.”\textsuperscript{18}

“INCOTERMS are words in a way of International Commercial Terms.”\textsuperscript{19}

“INCOTERMS are rule for trade terms’ interpretation which their purpose is to set up a principle to be as International acceptance to interpret trade terms in International commercial terms. All those to improve problem such differ interpretations in countries, or at least to reduce such problem above.”\textsuperscript{20}

“INCOTERMS are International Commercial Terms which are gathered, compiled, and managed by International Chamber of Commerce for the parties under International sale contract to choose and make trade agreement that defined to be a part of sale contract. All those, it is for each party to know and understand the rights and duties to be followed correctly and clearly.”\textsuperscript{21}

\textsuperscript{17} Suthipol Thaweekarn, “Analysis of the relationship between Incoterms and International Sale of Goods”, Handbook of International Trade (Bangkok: Thai Bar Association), 129 (2545).

\textsuperscript{18} Charan Pakdeethanakul, “Lesson 5: The Status and Enforcement of Incoterms under Thai law”, Handbook of International Trade (Bangkok: Thai Bar Association), 145(2545).


\textsuperscript{21} Kunchai Chongchakrapan, “International Trade Law,” Textbook and document for instruments project-faculty of law (Bangkok: Thammasat University), 91 (2550).
2. The History of INCOTERMS

According to the importance of International Trade, private sectors in many countries combined together as Trade Association and set up law for International trade which is called "Lex Mercatoria" in Latin, "Mercantile Law" in English, or "Droit des marchands."\textsuperscript{22}

INCOTERMS are International accepted commercial terms by mercantile law. It was developed in 1936 by the International Chamber of Commerce (ICC)\textsuperscript{23}. It is used to set rules for interpretation under commercial terms; the first version is called INCOTERMS1936. It is revised and added up many times afterward in 1953, 1967, 1976, 1980, 1990, and the latest version in 2000.

INCOTERMS2000 are revised according to three main important reasons as follows:

1) To endorse of Electronic Data Interchange or EDI.
2) To endorse new transportation systems: Containerization, Roll-on/Roll-off which in order to transfer goods to the premise without raising goods into the ship or by mechanical crane such as Container Freight Station (CFS)\textsuperscript{24}
3) Multimodal Transport\textsuperscript{25}.

In addition, INCOTERMS are not new in Thailand and in the Thai law system appeared Dika Court Decision No. 1770/2499: The parties agreed to use CIF in applicably for such dispute under International sale contract, and it has still appeared to another Dika Court Decision until now.

\textsuperscript{22} Pantip Kanchanachittra saisamutra, "explanation of International Trade," (Bangkok: Winyuchon Publishers), 41 (2538).


\textsuperscript{25} Recently, Thailand has Multimodal Transport Law into force specially, it is Multimodal Transportation of Goods Act B.E.2548, Promulgated in Government Gazette 12 section 61 a, July 27, 2005, 1.
3. The Need and Importance of INCOTERMS

The main purposes of INCOTERMS are to set International rule, to standardize, and to interpret trade terms which is used in case of International trade. Although INCOTERMS are not such law, but these are rules which can improve problem such difference of interpretations that involved with trade agreement in each countries, or at least to reduce such problem above. According to the parties in each country that might have different understanding to practice or to perform International trade, it would raise such dispute or litigation. It also wasting time and costing expenses. The objective of INCOTERMS is also to help the parties, the buyer and the seller, to settle such dispute. As INCOTERMS have been developed in forms which already allocate the rights and the duties of the buyer and of the seller, the parties do not have to consume much time to discuss the conditions in each issue. Once the parties agreed to make agreement to follow the selected trade terms, they shall recognize understanding and fulfill their obligations. To reduce problems and support International trade, ICC decided to publicize INCOTERMS to be rules to identify commercial terms clearly and correctly.

4. The Status of INCOTERMS

INCOTERMS are not such law, but these are rules for Interpretation of commercial terms which are publicizing by ICC. The status of INCOTERMS is private International organization; therefore, it is neither Domestic law nor International Law. It also cannot be forced to the contract directly. INCOTERMS can be enforced by following the contract when both parties made agreement clearly to use it for enforcement, incorporation, according to party autonomy.

5. The Usage of INCOTERMS

As INCOTERMS is not law, it is usages for adding under International sale contract, there are many facts between the parties to be defined such as the duty to deliver the goods from the seller to the buyer, the duty of insurance procurement, the place to deliver the goods to the buyer\(^\text{26}\). The duty to deliver the goods from the seller to the buyer

and insurance procurement during transaction are also very important, it is because those expenses are highly expensive. Moreover, the risk of loss of or damage are important for International transaction, it must be defined whether the buyer or the seller has the duty to take risks of loss of or damage, who will pay for the expenses, and when the risk of loss of or damage shall be transferred. It is because the goods may suffer some loss or damage during the transaction. Additionally, the payment of costs such as shipping, insurance, the formalities of exportation and importation, the payments of the rights and taxes are added. Such issues are called trade terms which are under INCOTERMS. Trade terms are the set of all responsibilities and obligations of the buyer and the seller in the contract and it also play a key role in other part of agreement.

This being the case, it would eliminate or reduce such arising problems for International Trade. International sale contract which the parties should know about. Therefore, INCOTERMS handles advantages in use as a sale agreement to be such the methods of sales transactions.

6. Description of the Use Trade Terms in INCOTERMS

The definitions of INCOTERMS are divided into 4 groups

1) The E-terms (EXW)
2) The F-terms (FCA, FAS, and FOB)
3) The C-terms (CFR, CIF, CPT, and CIP)
4) The D-terms (DAP, DES, DDU, DDP)

There are 13 trade terms in detailed as follows:

a) Ex-Work (EXW)

It means that the seller must deliver the goods the buyer at the seller's premise, or the named place such as the factory. Under this term, the buyer has to respond for all the risk of loss of or damage and costs to take the goods from the seller's premise; the seller has minimum obligation for the buyer. The buyer also responds for custom formalities, clearance for both export and import.
b) Free Carrier (FCA)

It means that the seller must deliver the goods to the first carrier which nominated by the buyer at the named place. Both the seller and the buyer shall define the named place exactly. If the buyer nominates a person rather than the carrier, the seller is deemed to deliver the goods to that person. In case delivery occurs at the sellers’ premise, the seller is responsible for loading the goods. If delivery occurs at other place, the seller is responsible for unloading. The seller responds for export formality, and the buyer responds for import formality. The risk of loss or damage and costs shall transfer from the seller to the buyer when the goods are delivered to the first carrier. This term may be used for the mode of transport, including multimodal transport.

c) Free Alongside Ship (FAS)

It means that the seller delivers to the buyer by placing the goods alongside of the ship at the named port of the shipment. The seller responds for export formality, and the buyer responds for import formality. The risk of loss or damage and costs shall transfer from the seller to the buyer when the goods are placed beside the ship. After the moment, the buyer shall respond for the goods. According to this term, it can be used only for sea and inland waterway transport.

d) Free On Board (FOB)

It means that the seller must deliver the goods to the buyer by passing the ship’s rail, on board of the ship, at the named port of shipment. The seller responds for export formality, and the buyer responds for import formality. The risk of loss or damage and costs shall transfer from the seller to the buyer when the goods are on board the ship. After the moment, the buyer shall respond for the goods. The seller also pays for loading the goods on board the ship.

e) Cost and Freight (CFR)

It means that the seller must deliver the goods to the buyer by passing the ship’s rail, on board of the ship, at the named port of shipment. The seller responds for export formality, and the buyer responds for import formality. The risk of loss or damage shall transfer from the seller to the buyer when the goods are on board the ship. According to Group C, the seller shall respond for International transport therefore, the seller shall pay
the costs and freight to transfer the goods to the named port of destination. According to
this term, it can be used only for sea and inland waterway transport.

f) Cost Insurance and Freight (CIF)

It means that the seller must deliver the goods the buyer by passing the
ship’s rail, on board of the ship, at the named port of shipment. The seller responds for
export formality, and the buyer responds for import formality. The seller shall pay the costs
and freight to transfer the goods to the named port of destination. The risk of loss or damage
shall transfer from the seller to the buyer when the goods are on board the ship. After the
moment, the buyer shall respond for the goods. In addition, the seller shall provide mariner
insurance and pay for the insurance premium. The buyer should note to require insurance
from the seller to get greater protection of the goods.

According to this term, it can be used only for sea and inland waterway
transport.

g) Carriage Paid To (CPT)

It means that the seller must deliver the goods the buyer to the first carrier
which is nominated by the buyer at the named place. The seller responds for export
formality, and the buyer responds for import formality. The risks of loss or damage pass
from the seller to the buyer when the goods are delivered to the first carrier. After the
moment, the buyer has to respond for the goods. The seller shall respond for the costs and
freight until the goods are transferred to the named port of destination.

Carrier under this term is a person under the contract of carrier, or to
perform of transport by rail, road, air, sea, and inland waterway, or by a combination of
such modes.

h) Carriage and Insurance Paid To (CIP)

It means that the seller must deliver the goods to the buyer to the first carrier
which nominated by the buyer at the named place. Both of the seller and the buyer shall
define the named place exactly. The seller responds for export formality, and the buyer
responds for import formality. The risks of loss or damage shall transfer from the seller to
the buyer when the goods are delivered to the first carrier. After that, the buyer bears the
risk of loss or damage. The seller shall respond for the costs of carriage until the goods are transferred to the named port of destination.

In addition, the seller shall provide mariner insurance and pay for the insurance premium to against the risk of loss or damage during the carriage of the goods.

Carrier under this term is a person under the contract of carrier, or to perform of transport by rail, road, air, sea, and inland waterway, or by a combination such modes. This term may be used for the mode of transport, including multimodal transport.

i) Delivered At Frontier (DAF)

It means that the seller must deliver the goods the buyer to the disposal of the buyer, the frontier, by unloading. The seller responds for export formality, and the buyer responds for import formality. The risks of loss or damage and costs shall transfer from the seller to the buyer when the goods delivered to the frontier by respond for unloading. The risks and costs of loading are the responsibility of the buyer.

Under this term, it is such International transport between the frontiers of counties by land. Therefore, there is no transport at the port.

j) Delivered Ex Ship (DES)

It means that the seller must deliver the goods to the buyer on board of the ship at the named port of destination. The seller responds for export formality, and the buyer responds for import formality. The risk of loss or damage and costs shall transfer from the seller to the buyer when the goods are delivered to the named port of destination before discharging.

According to this term, it can be used only for sea and inland waterway transport or multimodal transport at the port of destination on board of the ship.

k) Delivered Ex Quay (DEQ)

It means that the seller must deliver the goods the buyer on the quay at the named port of destination. The seller responds for export formality, and the buyer responds for import formality including taxes, duties, and charges. The risk of loss of or damage and costs shall transfer from the seller to the buyer when the goods are delivered to the named port of destination and discharge the goods on the quay. In addition, the seller shall pay for
discharge on the quay and the buyer respond to transport the goods from the port the buyer’s place.

1) Delivered Duty Unpaid (DDU)

It means that the seller must deliver the goods to the buyer on the quay at the named place of destination, the buyer’s factory.

The seller responds for export formality, and the buyer responds for import formality. In addition, the seller has duties for the payments of formalities, customs duties, taxes, and other charges. However, the buyer should clarify such duties under this term to the seller for payment and responsibility. The risk of loss or damage shall transfer from the seller to the buyer when the goods are with the buyer without unloading. The seller shall respond for the costs of carriage until the goods are transferred to the buyer.

According to this term, it can be used only for sea and inland waterway transport or multimodal transport at the port of destination on board of the ship or on the quay.

m) Delivered Duty Paid (DDP)

It means that the seller must deliver the goods to the buyer on the quay at the named place of destination, the buyer’s factory. The buyer responds for both export and import formalities including the payments of formalities, customs duties, taxes, and other charges for import. The buyer has maximum obligation. The risk of loss or damage shall transfer from the seller to the buyer when the goods are with the buyer without unloading. The seller shall respond for the costs of carriage until the goods are transferred to the buyer.

7. Validity

Although INCOTERMS have 13 trade terms for the parties for selection, only 1 term has been to be agreed upon explicitly and obviously in International sale contract. Therefore, it needs to be specified clearly in the contract that it is INCOTERMS2000 or some other earlier versions that used to apply. The parties, the seller and the buyer, shall know exactly what their rights and duties are. For reference of trade term, both parties must specify expressly which trade term shall use to enforce in the contract: “This contract is subjected to the INCOTERMS2000” or “Subjected to INCOTERMS2000” or “INCOTERMS2000” for example FOB, Bangkok Port (INCOTERMS2000). The detailed
INCOTERMS defined the rights and the duties of the buyer and the seller specifically: therefore, INCOTERMS can be used to enforce in International Sale of Goods Contract.
Chapter 3


According to the individual state have been made the overcome of the character of contracts on the International Sale of Goods, and there are some complicated problems arising from the conflict of law under domestic rules of civil and trade law: therefore, the uniform rules at the International Sale of Goods was required to be drafted.

In order to solve such problem, rules for International Sale of Goods should be drafted by reaching the specific character of International economy and all states should be treated equally under the same rules.

The unification of sales law firstly started in the 1920s. Afterwards, it adopted a diplomatic conference, Uniform law on the International Sale of Goods and uniform law on the Formation of Contracts for the International Sale of Goods. As the conference for drafting new convention by UNCITRAL, 1964 Hague Sales Convention and 1964 Hague Formation Convention can be enforced for contracting states since 1972. However, it was not interested as much, it entered to force between few States such as Belgium, Gambia, Britain, Israel, Italy, Luxembourg, the Netherlands and San Mario. This being the case, the unification of law obtained the conflict of law or of substantive law. It is clear that to make law for International economy is really difficult and impossible to reach a global level.27

In 1967, to make the Hague Formation Convention to be accepted by nations, United Nations Commission on International Trade Law (UNCITRAL) set up committees which were representatives who came from nations. The committee concerned for The Hague Formation Convention because there were many differences such as law and economy. Therefore, the new convention was drafted and succeeded in 1978.28

According to the adoption of the CISG in Vienna in 1980 and the earlier adoption in New York of the 1974 Limitation convention, the International community of States can solve problems for the International economy by using the principle of peaceful, equal treatment, and make compromise. Anyways, a compromise cannot reach every issue in respect. Therefore, the limits of compromise solutions are such the way of the unification of law. To be treated equally, both of the parties who are involved with commercial trade must identify the rights and obligations clearly.

After the conference for exception the drafting of International contract in Vienna in 1980, the CISG can be enforced after 1 year after there are at least 10 countries who adopted this convention according to the provisions of law under Article 99 paragraph 1. On December 21, 1986, there were 10 countries ratified the CISG. Therefore, the CISG can be enforced to the contracting states since January 1, 1988. At the end of July, 2008: there are 72 countries who have adopted and are members of the CISG.29

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28 Ibid.

29 CISG : Table of Contracting States, http://www.cisg.law.pace.edu/cisg/countries/entries.html (last visited December 2, 2008). “Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Japan, Kyrgyzstan, Latvia, Lesotho, Lithuania, Luxembourg, Mauritania, Mexico, Moldova, Mongolia, Montenegro, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saint Vincent and the Grenadines, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Uganda, Ukraine, United States of America, Uruguay, Uzbekistan, Venezuela, Zambia.”
2. The Explanation of the CISG

The explanation for Sale under the CISG is divided into 4 parts as following:

1) Sphere of Application and General Provisions (Article 1 to Article13);
2) Formation of the contract (Article 14 to Article 24);
3) Sale of Goods (Article 25 to Article 88); and
4) Final Provisions (Article 89 to Article 101).

a. Sphere of Application and General Provisions

Chapter I Sphere of Application

According to the subject of the CISG, it is such the Contracts for the International Sale of Goods. Under this convention, it can be enforced in a case of International sale contract where the parties have different places of business in different states. The parties shall know that both of them have different places of business before making the contract, according to Article 1 under this convention. Moreover, states of each party must be a member of the UNCISG. Otherwise, this convention shall not be applied to such contract.

Although the provisions of this convention are used for International sale of goods, it does not apply to a sale such as any kinds of securities, ship and vessels, hovercraft of aircraft, electricity, or even the goods for personal or households, (Article 2). It is because this convention is intended for a sale of goods in commercial, and avoids the conflict of consuming law in their own contracting states to use for International purposes.

Under the provisions of law under Article 4, it set up a principle of confinement that this convention cannot be enforced in case of the completing of contract or usages and transfer of ownership; it depends on conflict of law in each country. Additionally, the parties in the contract may agree the exception of all rules or some part of rules under the CISG, or the parties can use such usages for the interpretation of the contract.

Chapter II General Provisions

Under Article 9, it set up a principle to protect the parties in developing countries, which are contracting states, to follow practice or ordinary usages which
has been used for International trade.

A sale contract under the CISG, under Article 11, the contract need not be concluded or evidenced in writing nor it is subject to any other requirement as to form. The contract may be proved by any means, including witnesses. It may cause some problems for the parties because there is no written evidence in the contract. However, the parties of contracting states can set such preservation, for example an agreement requires the contract to be made in writing, (Article 96). Telegram and telex are defined as written evidence under Article 13. Therefore, the parties who use telegram or telex for a sale purposes, it can be used as written evidence of the contract.

To make the CISG to be universal for contracting states, Article 7 of the CISG set up a principle to prevent the court to use domestic law for International trade. When there is the dispute arising, the parties can solve such problem by using general principles of the CISG in forced. If there is no rule under this convention to be forced, the parties can use law which is close and compatible to be forced.

b. Formation of the contract

According to Article 14 of the CISG, the declaration of intention shall be an offer when the declaration of intention is sufficiently definite, and the offeror declares his intention to be bound in case of the acceptance. An offer which is sufficiently definite must indicate the goods and determine the price expressly or implicitly fix clearly. An offer shall become effective and it is binding between the parties when the acceptance reaches to the offeree. Although an offer is irrevocable, it cannot be withdrawn or revoked if an offer reaches the offeree before or at the same time, (Article 15).

For the effectiveness of an offer under the CISG, an offer can be withdrawn or revoked anytime if the contract still does not come into existence, or when the offeree still does not send the acceptance to the offeror, which is Anglo-American law. Under this convention, there are many exceptions which are in contrast

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in practicing way. However, an offer cannot be revoked if it indicates in an offer that this offer cannot be changed, not only by stating a fixed time for the acceptance but also otherwise. Additionally, if offeree has reason to rely or believe that an offer is irrevocable, an offer is revocable, (Article 16). Although an offer is revocable or irrevocable, it is terminated and cannot bind the other party if the offeree refused an offer. It is under Article 17.

For the acceptance, Article 18, it is binding on the parties and the contract occurred when the acceptance from the offeree reached the offeror in a fixed period. In case of there is no such period, the acceptance must reach the offeror within a reasonable time, it depends on the communication between the parties in the contract. If the intention of the offeror which the parties agreed among themselves is usages, the offeree may perform an act such as dispatch the goods or the payment of the price.

Additionally, an offer which is made to a person who is at present, the acceptance must be accepted only there and then. However, silence or inactivity does not in itself amount to acceptance.

Under Article 19 of the CISG, the acceptance which has additions, limitations, or modifications; is deemed to refuse an offer, and it becomes a new offer. If the offeree makes the acceptance by adding additions, limitations, or modifications which are not an important part of the contract, the contract becomes the existence and is effective following the acceptance except the offeror refused the acceptance by oral or notice to the offeree in hurry. If the adding of the acceptance are related about the methods of the payment, the price, quality and quantity of the goods, place to delivery, the extent of the party’s liability to other party, or even the settlement of disputes; it is such importance part of the contract which the offeree cannot be added in the acceptance as a new offer.

In case the offeror did not fix a period of time for an the acceptance, the CISG provides for the acceptance which arrived to the offeror out of time, it is

31 Cecila Carrara & Joachim Kuckenburg, Remarks on the manner in which the Principles of European Contract Law may be used to interpret or supplement Article 18 of the CISG, available at http://www.cisg.law.pace.edu/cisp/text/peclcomp18.html (last visited December 3, 2008).
deemed to be effective if the offeror informs by oral or dispatch a notice to the offeree without delay. Although the acceptance arrived to the offeror out of time but it arrived in a period that ought to arrived in due time, the acceptance is deemed to be effective. Exception, the offeror notice to the offeree without delay that the acceptance arrived delay, the acceptance is not effective, under Article 21 of this convention.

For the acceptance, the offeree may withdraw the acceptance if the withdrawal from the offeree reaches the offeror before or at the same time as the acceptance of an offer. It is deemed that the acceptance is not effective according to Article 22.

When the acceptance of an offer is concluded, the contract becomes effective. It is also binding on the parties in the contract according to Article 23. For an offer, the acceptance or any act of the intention for the purpose under this convention; it would reach to the other party when it is made orally, or delivered by any other means to the other party, his place of business, mailing address, or habitual residence of other party in case there is no such place of business or mailing address, under Article 24 of the CISG.

c. Sale of Goods

Chapter I General Provision

This part of the convention is related to the sale of goods separate from formation of the contract, it has the definition and general provision. The importance of this part is a fundamental breach of contract under Article 25. A fundamental breach of contract is a case of causing damage to the other party which the object of the contract is unsuccessful, unless the party who is in breach of the contract would not anticipate and a reasonable person in the same in the same circumstance would not have foreseen such result. According to breach of contract, it is derived from Anglo-American law system. The result of practicing of those is as same as non-performance under law system in Europe.

In case there is such reason to make the contract cease to be binding; for example the performance becomes impossible in consequence of a circumstance, or the conditions to make the contract comes to the end in other manner. The CISG prescribe the protection of dispute such the end of the contract in Article 26. According to this Article, the contract shall not come to the end automatically, but it
shall come to the end when the other party notices to the party that the contract ceases to be binding under a declaration of avoidance.

Additionally, the result of notice which the part noticed to the other party in the contract, the CISG prescribes the exception about a declaration of intention is in consequence when it reached the other party. When the contract is performed, there is reason for the other party to have the obligation to make notice, and notice is sent to the other party in due time; the other party cannot assert that notice comes late, or has any mistake or loss of notice; as such assertion cannot make the other party to lose the rights in notice. It is the provision under Article 28.

For the exception of specific compulsory performance, it is used in only the contracting states which operate under the Common Law system. In case of contracting states which does not have specific compulsory performance, the court of such contracting states is not bound for specific compulsory performance to the creditor, (Article 28). However, the creditor has the right to claim for performance of the obligation from the debtor, it is not the right under specific compulsory but the rights to claim for damages.

Chapter II Obligations of the seller

Unless otherwise agreed, the seller is obliged to deliver the goods or tender delivery conforming to the contract as to type, quantity and quality at the time or within the period of time agreed, and if nothing was agreed, within reasonable time, by handing the goods over to the buyer or placing then at his disposal at the place where the seller carries on business related to the contract, as under Article 30.

Section I Delivery of the goods and handing over of documents

For the place of delivery of the goods and hand over of documents, the provisions of the CISG prescribed expressly in Article 31. In case of the parties did not agree any particular place for delivery and the contract involved carriage of the goods, the seller has the duty to deliver the goods in hand of the first carrier. If the goods are such specific goods, or unidentified goods which to be manufactured, the

seller must deliver the goods to the buyer at the buyer’s disposal. Otherwise, the seller must deliver the goods to the buyer at the buyer’s disposal at the seller’s place of business in the time of making the contract.

Under Article 32, the seller hands over the goods to the first carrier, and is also binding to provide the carriage of the goods including all necessary contracts involved with carriage of the goods and transfer the goods to the buyer in appropriate circumstances. If there is no insurance for carriage of the goods in the contract, the seller must provided all necessary insurance information in detail which are advantages for the buyer to make insurance during carriage of the goods, if the buyer requested.

The time for the seller to deliver the goods to the buyer is under Article 33. The seller must deliver the goods to the buyer at a fixed date which is determined between the parties in the contract. The goods must be delivered in hand of the buyer in a period of fixed date according to the contract, unless circumstance, indicate that the buyer shall choose the date. Otherwise, the seller must deliver the goods in hand of the buyer in due time after making the contract.

For documents, if the parties did not agree in the contract to hand over documents related to the goods, the seller must hand over documents to the buyer at the time and place of disposal as following in the contract, (Article 34).

As cooperation between the provisions of the CISG and The Hague, it is obviously that the CISG is expressly and clearly. The parties can understand it easily.

Delivery according to the provisions of the CISG, it does not define the definition of the word “definition” as in The Hague. Therefore, delivery under this provision is to deliver the possession. When the seller delivers the goods, the risk shall pass from the seller to the buyer and the seller does not has the liabilities for risks of loss of or damage of Article 66 to Article 69. If a case a fundamental breach of contract is committed by the seller such as delivery of the defective goods, the seller shall be liable for remedies to the buyer according to Article 70 of the provisions of this convention.

Section II Conformity of the goods and third party claims

The duty of the seller is to deliver the goods which are of the quantity,
quality and description according to the contract. The seller also has the duty to contain or packages the goods in the manner which is agreed in the contract (Article 35).

In addition, the seller has to be liable for the defect of the goods during the risk transfer from the seller to the buyer, the time to deliver of Article 66 to Article 69. The seller shall respond for damage which happened, it is the seller’s fault though it appeared after delivery. Including the responsibility for the liabilities in case of the seller agreed to provide insurance of Article 36. However, the seller may agree to be exempted from the liabilities which are defined in Article 79.

The buyer must examine or provide for the examining the sold goods without delay. In case the seller has the duty to deliver the sold goods to the buyer or the first carrier, or to the first carrier to transfer to the buyer, by the seller should know that the buyer does not have any chance to examine the goods. Therefore, the buyer has the duty to examine the goods when they have arrived at the destination according to the provisions of Article 38.

Under Article 39, the buyer must notice a lack of conformity of the goods within a reasonable time since the buyer knew or ought to know a lack of conformity. If the buyer neglected by not noticing a lack of conformity of the goods within the due time, the buyer did not lose the right immediately. Mostly, it is enacted for industrial countries and under The Hague. If the cause to notice lack of conformity of the goods is delayed because its not the buyer’s fault. The buyer still has the rights to reduce the price of the goods or claim for damages, but not for loss of profit as under Article 44. However, the buyer does not loss the right to notice a lack of conformity of the goods, if the buyer gives notices to the seller within two year from the date which the goods are handed over to the buyer according to the provisions of Article 39 paragraph 2.

For the liability of eviction, it is as same as the liability of a lack of conformity of the goods. Under the CISG, there is special provision for the eviction because of third person for incorporeal objects or intellectual property. This convention defines that the seller must liable for the eviction in particular that the third party knew or ought to know such the right during the contract is being made, and limit liable for the eviction according to law of country where the buyer has place of business or where the buyer shall sell the goods or the goods are in use for another
purpose which already knew to make the contract only, the provisions of Article 42 of the CISG.

Section III Remedies for breach of contract by the seller

In case of the seller breach of contract, the buyer can force for the rights according to Article 45 as follows:

a) The buyer had the rights to require the seller to perform the obligations as under Article 46 subparagraph 1.

b) In case the goods are such thing in species or kind, and delivery caused the defect which is a fundamental breach of contract. If the buyer does not want to terminate the contract, the buyer may require the seller to deliver the goods in the same kind and category for remedy according to the contract when the buyer notices the defect of the goods to the seller.

c) The buyer may require the seller to remedy to repair the lack of conformity, unless it is unreasonable in a circumstance, Article 46 subparagraph 3.

d) The seller also has the right to claim for damage and perform his obligations if it cause inconvenience to the buyer. Anyways, the rights of the seller mentioned shall come to an end if the buyer terminates the contract according to Article 48.

e) The buyer can terminate the contract if the seller commits a fundamental breach of the contract, or the seller did not deliver the goods in a fixed period of time though the buyer had fixed a due time for delivery, Article 49.

f) In case the seller delivers the goods not as desired; the buyer has no right to terminate the contract if it is not a fundamental breach of contract by the buyer fixed a due time for the seller to perform his obligations which may occur in Article 47. If the seller did not perform his obligations within the period so fixed and the buyer did not terminate the contract, the right of the buyer to terminate the contract is extinguished as Article 49.

g) Under Article 50, the buyer also has the rights to reduce the price if the goods do not conform to the contract\textsuperscript{33}.

\textsuperscript{33} Peter Huber & Alastair Mullis, The CISG, (Sellier: European law publishers) 180 (2007).
Apart from the rights for the specific compulsory performance, the rights to perform his obligations, and the rights to reduce the price of the goods; the buyer also has the rights for damages under Article 74 to Article 77.

Chapter III Obligations of the buyer

The main duties of the seller are prescribed under Article 53, "the buyer must pay the price for the goods and take delivery of them as required by the contract and this convention."

Section I Payment of the price

For the duty of the buyer to pay the price of the goods, it shall include other involved duties to comply with the formalities which are directly to the buyer according to the buyer's obligation under Article 54, such as to exchange money and open the letter of credit. In case the parties, the seller and the buyer, made an agreement but did not determine the price expressly or implicitly; therefore, the price of the goods shall be determined as the sold goods under comparable circumstances in the trade at the time of the contract between the parties are made according to the provision of Article 54. For the place to pay the price is the seller's place of business. If the price shall be paid when the documents or the goods handed, the place to pay the price is at such place, under Article 57. If there is such the dispute between the parties, the seller can sue the buyer to pay the price in the country where the seller has their place of business.

If there is no such an agreement for specific time to pay the price between the parties, the provision of this convention handles advantages for the buyer. In case of the delivery by the handing over the documents or bill of lading, the buyer has the duty to pay the price when the documents are handed over. Moreover, the buyer has the right to examine the goods before the payments, (Article 58).

Section II Taking the delivery

Under Article 60, the duty of the buyer to take the delivery, it covers the duty to do all the acts reasonable for the seller to deliver the goods. Anyways, the provision of law does not define the time for the buyer to take delivery of the goods from the seller. This being the case, the buyer must take delivery from the seller without delay since the time that the seller delivered the goods according to the contract. Therefore, the buyer has to
provide the seller in good time with all the information necessary for performing his obligations under the contract.\footnote{Ibid}

Section III Remedies for breach of contract by the buyer

The right to enforce the claims in case of buyer breaches of the contract, it is as same as the right of the buyer when the seller breaches of the contract which is the seller has the right to enforce the buyer to pay the price, take the delivery, terminate the contract, or claim for damages according to the provision of Article 61.

The seller has the right to terminate the contract when the buyer does not perform the obligation by payment the price of the goods; it is because the payment is the essence of the contract. Or when the buyer does not pay the price thought the seller defined a fix period of a reasonable time for the buyer to make the payment, (Article 64).

If the buyer did not define the form, measurement or other features expressly of the goods according to the contract, or did not define it within a reasonable time fixed by the seller. The seller has the right to make the specification of the goods by himself, according to the Article 65.

Chapter IV Passing of risk

According to Passing of Risk under the provisions of the CISG, there is such problem whether the seller or the buyer shall take the risk. Under Article 66, it provides that the buyer is bound to pay the price of the goods to the seller when the risk transferred from the seller into the hand of the buyer though there is the risk of loss or damage.

In case of a general sale contract which includes carriage of the goods, the risk shall transfer from the seller to the buyer immediately when the seller transferred the goods to the first carrier. If the seller is bound to deliver the goods to the particular place such as an agreement under INCOTERMS, the risk shall transfer from the seller to the buyer when the seller delivered the goods in hand of the first carrier at such place. Moreover, the goods must be clearly identified to the contract during the transactions, under Article 67.

The risk of the sold goods during the transaction, it shall transfer from the
seller to the buyer immediately since the contract is made without the consideration of the
time to deliver the goods; if there is a circumstance to indicate that the parties have the
intention for the risk to be transferred from the time the goods were handed over to the first
carrier who gave bill of lading, the risk shall transferred since that time. Additionally, the
seller knew or ought to have known of loss or damage of the goods at the time of making
the contract, the risk transferred to the seller according to Article 68 of the provisions of the
CISG.

In case of the seller already provided to deliver the goods according to the
order of the buyer and the goods are already defined, but the buyer failed to take delivery of
the goods. The risk shall transfer to the buyer since the buyer failed to take delivery of the
goods\textsuperscript{35} according to Article 69 of this convention.

However, if the seller commits a fundamental breach of the contract, the
buyer has the right to enforce the seller such as the right to take the performance from the
buyer, the right to terminate the contract, and the right for claims and remedies under
Article 70.

Chapter V Provisions common to the obligations of the seller and of the
buyer

Section I Anticipatory breach and installment contracts

If the party cannot perform the obligation because of a lack of ability, no
security, or the expectation of the acts express that the party cannot perform the obligation;
the other party may delay to perform won obligation. In case of the seller already
transferred the sold goods already, the seller can withhold the sold goods by not to the
buyer according to the provision of Article 71. Anyways, such the right shall come to the
end if the buyer gives security according to the provision of Article 72.

Section II Damages

Before the time to perform the obligation, it is clear that the party shall
breach of contract in essence of the contract or breach of contract from time to time; the
other party can terminate the contract. In addition, if breach of contract in essence of the
contract may cause effects to be disadvantage for the purpose of the party, the other party

\textsuperscript{35} Ibid.
can terminate the contract or only specific condition in the future, according to Article 72 and Article 73.

The provision of law for damages is quite important. For damages in the contract, remedies from breach of contract are not only a sum equal of the loss, but also those suffered by the other party as a consequence of the breach. However, damages must not exceed the loss which the party foresaw or ought to have to foreseen at the time before making the contract according to the provision of Article 74.

Section III Interest

In case the parties fail to pay the price, or arrears; the other party has the right to receive interest, and does not lose the right to claim for damages. It is under the provision of Article 78.

Section IV Exemption

The CISG sets up a principle in case there is no responsibility occurring after the creation of the obligation because of such uncontrolled circumstance of the party who must perform the obligation and that part cannot anticipate during making the contract, Article 79. This provision prescribes expressly about the performance becomes impossible in consequence of a circumstance which is not the creditor's fault.

For the exemptions of the liability, the parties may make an agreement to exempt the liability of a third person whom has engaged to perform the obligation under the contract. To such an agreement, it can be use for the both parties, according to the provision of Article 79.

Section V Effects of avoidance

The provisions of the CISG prescribe effects of avoidance in detail under Article 81 to Article 84. Each party under the contract must return objects or money which they had received from the performance of the obligation, the payment, including interest. However, the right to terminate the contract shall not affect the right to claim for damages.

Section VI Preservation of the goods

This part is rules for the preservation of the goods which one of the party posses the goods for advantage of the other party, especially the duty to preserve the goods
and to sell the goods if necessary.

d. Final Provisions

This convention, the CISG, is open for every country to sign at the meeting of the United Nations Conference on Contracts for the International Sale of Goods to be such member until the date September 30, 1981 at the Headquarter of the United Nations, New York. The CISG can be enforced for International Trade when there are at least ten contracting states to ratification, the acceptance or approval for state.

For the preservation to this convention, it can use only some part such as Formation of the contract, Sale of Goods which of about the written evidence for Formation of the contract and Sphere of Application which is the provision of law under Article 1 (1) (6).

For contracting states which already ratified, accepted, or approved the CISG, any contracting states which make a declaration under this convention may that the state will not be bound to the 1964 Hague Sale convention by notifying the Government of the Netherlands. It is to eliminate the problem of double agreement which have affected.

B. Comparison on the Law on Contract International Sale of Goods in Various Countries

International trade is quiet important for countries around the world. The evolution of International trade comes from usages, customary law, and general principles of law by merchants. It is called Lex mercatoria\textsuperscript{36} or Mercantile law.

International trade is the International sale of goods which includes transportation from country to country: therefore, International sale of goods is differing from domestic sale of goods. As there are two kinds of legal systems which are in use for nations: Civil law and Common law system. Therefore, each country does practice in different legal law for International trade. It would raise some problem such for International trade in differentiate such as formation of contract, transfer of ownership, the duties of the seller and the buyer, risk of loss, Damages, rescission, interpretation of law, and so on. In case of

conflict of law, under International sale goods, the court shall look through law on conflict of law and make decision by consideration according to law which is related closely to the case. The contract under International sale of goods should be more concern by parties, because the fundamental of the contract is related to formation.

As the difference between International trade and domestic trade, sale contract which is related to more than two countries shall bedifferent. It would cause conflict of law; to solve this problem is using law of conflict of law, or the parties may agree for choice of law to enforce the contract.

At the present, all countries around the world always have traded all goods both tangible and intangible across the country since World War II. We called it as “International Trade.” Normally, each country will have their own law to control their trade in order to protect their country from any harm. The parliament also creates the law that stimulates the trade over the other countries.

To solve problem when there is such disputes arose between the parties in different countries, there are such corporation between countries to set up Uniform Law for International trade such as Uniform Custom and Practice for Documentary Credits (UCP500), UNCITRAL, and United Nation Convention on Contracts for International Sale of Good (CISG).\(^{37}\) However, INCOTERMS2000 is the most popular for merchants.

Thailand still is not a CISG member yet. This is because the CISG Law does not benefit Thailand much; however, Thailand has created another law which adapt from CISG law using with Thai civil code and commercial code in order to smooth Thailand trade.

However, it is interesting to know more about English Law, French law, and German law. It also offers a comparison of law for the contract (a sale contract) in differences. It is explained in detailed as the follows:

1. **Formation of Contract**

   As International trade differs from domestic trade, therefore, form of contract in each country is different and it would cause conflict of law between the parties. A contract is an agreement which binds the parties to it.\(^{38}\) The purpose of the contract is to cause the

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\(^{38}\) Robert Upex & Geoffrey Bennett *Davies on Contract*, p. 1.
obligation between the parties, at least two persons. The agreement shall occur when the parties have a declaration of intention to establish juristic act under the terms of the contract. The terms of a contract are its contents, and these determine the extent to which the parties are in agreement\(^{39}\). However, formation of contract should contain the following:

a. Formal Requirement

As people enter into the contract, formal requirement is important. For International sale of goods, the requirements of the form for people to accomplish. Under the form, it included all necessary details to such evidence for the parties. It also can be used to set up the dispute when there are such problems arise between the parties.

Formal requirements have been required for the contract since the Roman period. The law of sales is based upon the Roman law, in its later stage as modified by the praetors and by legislation. In the Roman law a sale meant originally only a barter; but the introduction of coined money converted the consideration of the purchaser into price (pretium) as distinguished from the article of sale (merx) contributed by the other\(^{40}\).

Under the English law system, it has Statute of Frauds, 1677 as formal requirement at present. It also assign that to form some kinds of contracts must be made in writing, it is because original purpose of it is to prevent frauds and perjury to prove in the court. Some kinds of the contract must be in form including consideration. If the contract is not formed in writing as deed or seal as law required, it is not qualified as the perfected contract.

According to the contract under French law, it divides the contract into two kinds. First, it is the contract which must be made in form. The contract which violates the formation, it is void. Second, it is the contract which must have evidence. Otherwise, it cannot be enforce in the court. Additionally, under the contract, it shall include “causa” or cause. Cause is the undertaking by the other party to perform the obligation which that part

\(^{39}\) W T Major & Christine Taylor, Contract, p. 68.

is required to perform according to the contract. In case of an obligation without cause or with a false cause, or with an unlawful cause, may not have any effect, (Article 1131).

To interpret German law following Civil Code, it is harsh to make the contract become effective and can enforce to the other party. Some types of contract which is not being formed as formal requirements, it is void. For example, for formation of contract for alienation of piece of land to be perfected, the contract must have evidence in writing and registration to transfer of ownership of the land. Otherwise, the contract is invalid though the party can prove that both of them are entity to the contract. In addition, there is such exception under German law. The contract is perfect and binding if the parties transfer ownership and payment subsequently. As German law have many kinds of the contract; therefore, the parties should know formation of contract and formal requirements before making the contract.

b. Offer
An offer is a declaration of intention to the third person to know the objective of the offeror expressly.

According to offer, it should have the intention to be bound. Under common law and civil law system, both of them are in different. Under common law, offer shall identify clearly by containing with quantity, quality, and specified and certainly of price. Otherwise, it would be qualified as invitation to treat which is not offer, and it does not bind to the party. In contrast, civil law system, it interprets expressly that offer must be contained with important identification enough for the offeree to make an agreement: circulation of price, catalogues, advertisements for sale, and display of goods. It is as same as German law.

c. The acceptance
The acceptance is a declaration of intention of the offeree, who received an offer, to accept and agree following an offer. The acceptance must be coincided to the important objective of an offer, and it must arrive to the offeror in a fixed period of time.

For the time when the acceptance becomes effective, it is when the contract is formed. There are two way to form the contract: The contract which is formed between people who are at present (face-to-face) and the contract which is formed between people who are at a distance.
At a present (face-to-face)

According to acceptance under English law, it must be communicated to the offeror. For example, conversation by verbal at present (face-to-face), telephone, telex or fax; Brinkinbon Ltd case is an example concerning communication by fax. The acceptance must be an unqualified expression of an agreement to the offer or if there is any addition, it will be classified as a counter offer. The offeror has the right to accept or reject it. In addition, English law has specific rule for the contract to be completely perfect and can be enforce between the parties such as consideration for bargain. Consideration can be anything of value, which each party to a legally-binding contract must agree to exchange if the contract is to be valid\(^1\). Without consideration, the parties cannot enforce to each other to follow the contract.

French law, the contract is formed when the acceptance must be communicated; it is similar to English law. To make the contract with a person at a distance, French law combines Theory of reception which the contract occurs when the acceptance reached the offeror; and Theory of expedition which the contract is occurred when the acceptance is sent to the offeror. It means that the contract is effective when the offeror. For the practice, both of theories are in use. In case if there is such dispute, the court shall case-by-case, in depends on the court.

Under German law, an offer at a present may only be accepted immediately. This also applies to an offer made by one person to another using a telephone or another technical facility, (Article 147).

At a distance

Under English law, the acceptance becomes effective when the letter, stamped properly and addressed, has been posted provided the parties did not intend otherwise. The court applied theory of expedition; such Holwell Securities Ltd. V. Hughes 1974\(^2\) case, and Adam V. Lindsell 1818\(^3\)

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\(^1\) Consideration Under English Law, available at [http://www.en.wikipedia.org/wiki/Consideration

To make the contract with a person at a distance, French law has two theories.

a) Theory of reception - the contract occurs when the acceptance reached the offeror

b) Theory of expedition - the contract occurs when the acceptance is sent to the offeror.

Finally, the court made the decision on January 7, 1981 in favor of Theory of expedition; the contract formed by the offeree's sending the acceptance.

German law, the contract for a person at a distance occurs when the acceptance reached the offeror. The acceptance takes effect when it is communicated to the offeror. In case the late acceptance of an offer is considered to be a new offer; and the acceptance with expansions, restrictions or other alterations is deemed to be a rejection combined with a new offer, (Article 150).

d. Binding force of offer

For the common law system, English law said that the contract is bound between the parties whether the offeror will define a specific period or not, it is not bound to the offeror and it can be revoked anytime except there is such consideration for offer, or offer is followed by deed.

According to the civil law system, French law has no Juristic Act as German law, offer is binding to the offeror before there is the acceptance, the offeror can revoke offer any time until there is acceptance from the offeree; however, there are exception which the offeror cannot revoke the offer as follows:

a) The offeror agreed that offer shall be bound within a definite period.

b) The offeror asked the offeree for a reply immediately.

c) In case there is no definite period of the acceptance, the offeror cannot revoke the offer during a reasonable period of time.

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Under German law\textsuperscript{44}, offer is binding to the offeror, but it shall be only an invitation to treat if the offeror defined obvious in an offer that it is not binding an offer (freibeibend). The offeror cannot withdraw offer except the offeror has qualified that an offer cannot be bound, it will not bind to the offeror, (Article 145). An offer is expired if the offeree refused, or there is no acceptance from the offeree within a good time, (Article 146). If there is determined a period of time for the acceptance from the offeror, the acceptance may only take place within this period, (Article 148).

2. Transfer of ownership and risk of loss

Normally, transfer of ownership and risk of loss are related, risk shall be transferred together with ownership of the goods sold. Anyways, it does not mean that every country will accept this rule, some countries, practice another concept and following another rule which are described as follows:

a. Transfer of ownership

According to the goods there are two kinds of goods under International sale of goods: specific goods, and unascertained goods.

Specific goods

For transfer of ownership under German law, it derived from Roman law; the goods shall be transferred from the seller to the buyer when there is conveyance including payments. Additionally, German law practice Principle of Abstraction. It means that the parties shall make the contract to perform the obligation separately from the contract for transfer of ownership. In an agreement and delivery, the transferring of the goods at the delivery point, if the seller delivers the goods completely and the buyer already receives the goods on hand. Suddenly, the goods belong to the buyer according to Article 929(1), “For the transfer of the ownership of a movable thing, it is necessary that the owner delivers the thing to the acquirer and both agree that ownership is to pass. If the acquirer is in possession of the thing, agreement on the transfer of the ownership suffices.” In an agreement concerning an unregistered ship: although the seller has assigned the unregistered ship to deliver goods to the buyer in other countries. And the goods are already

\textsuperscript{44} Article 145-148 of German Civil Code.
delivered to the hand of the buyer, so the property in goods already transferred to the buyer according to the law, (Article 929(a)).

Under French law, ownership of specific goods shall be transferred from the seller to the buyer when both of the parties agreed to make the contract for qualified the goods and price in detail, without delivery and payments. Under French law Article 1583, ownership of the sold goods shall be transferred to buyer when the parties made an agreement for the goods to be as ascertained goods (specific gods) in detailed and price, though such the goods are not delivered yet.

English law formally used the principle of delivering of property to transfer of ownership for specific goods. Since the 15th century, it had changed the system of transfer of ownership to be as French law.\(^{45}\)

Unascertained goods
As unascertained goods are such the goods which are bound to be counted, weighed, measured or do some other act or thing with reference to the goods for the purpose to ascertain the price.

Under English law; unascertained goods shall be transferred from the seller to the buyer when the seller prepared the goods in a deliverable state according to the buyer’s purpose, except there is an agreement otherwise.

Under French law, unascertained goods shall be transferred from the seller to the buyer when the goods are specific as individualization. The goods sold must be weighed, numbered or measured to be such ascertained goods according to Article 1585.

Under German law, Article 812, the contract of sale is separate from the contract to transfer of the ownership of the goods. If the contract is void, ownership of the goods that already are transferred is valid, and it does not effect to such void. When ownership of the goods passed from the seller to the buyer, the seller has to claim it back because of the provision of unjust enrichment.

On the other hand, English law and French law are the same for transfer of ownership. In case the contract is void, ownership of the goods cannot be transferred from the seller to the buyer, and both of the parties have to return their position as the time before

\(^{45}\) The Sale of Goods Act Section 17 and Section 18.
entry into the contract. The seller is still the owner of the goods, and also has to claim back the goods by using the right of ownership.

b. The Passing of risk

Risk of loss is a term used in contract law to refer to the liability of a carrier, borrower or user of property or goods, or an insurance company to compensate if there is damage or loss. Between the time that the contract is made and the time it is fully performed, goods identified in the contract may be lost, stolen, damaged, or destroyed. Risk of loss law determines whether the buyer or seller is financially responsible for the loss.

Although risk shall be transferred together with ownership of the goods sold, many countries have their own law which is different from others. Under Roman law, risk of loss or damage shall transfer from the seller to the buyer when the contract of sale was perfected; it means that there is such agreement between the seller and the buyer for goods, price, and quality without any condition.  

It is transferred though there is no delivery.

Passing of risk under English law

For English law, risk of loss or damage shall be transferred at the same time as specific goods, except if the parties agreed otherwise. English law is as same as Roman law, under The Sale of Good Act section 17 and section 18. It means that the contract of sale is perfected and completed without delivery. In case of unascertained goods, the goods shall be transferred from the seller to the buyer when the goods are ready in appropriated as deliverable state without any condition, following the buyer’s defined terms under the contract.

Passing of risk under French law

Under French law, risk of loss or damage is as same as English law, risk of loss of or damage shall be transferred at the same time as specific goods, when the contract is perfected, except if the parties agreed otherwise. In case of generic goods, risk of loss or damage shall be transferred from the seller to the buyer when

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there are specified specific goods, (Individualization). For the goods sold to be ascertained goods, the goods shall have been weighed, counted or measured (Article 1585).

Passing of risk under German law

Under German law, risk of loss or damage of specific goods shall be transferred from the seller to the buyer when the goods are delivered to the buyer, any risks occur to the products such as broken, loss, destroyed while on delivery, the risk will belong to the buyer immediately and all expenses which occur after that the buyer must take all responsibility, (Article 446). In case of generic goods under Article 812, of loss or damage shall be transferred from the seller to the buyer when the seller has done what is necessary on his part to supply such a thing.

If the seller has been requested from the buyer to deliver the goods to the other place which is not stated in the agreement, all risks and all responsibilities belong to the buyer after the seller has moved the goods to the carrier or the forwarder. And if the buyer pleads to the seller to do according the buyer’s need without any strong reasons and it does not perform according to the contract. The buyer must take all risks and take all responsibility if the damage occurs to the products, (Article 447). For the place to deliver the goods; it is the seller’s place of business, (Article 300).

3. Duty of the buyer and Duty of the seller

After the parties enter into the contract, the seller and the buyer have the duty according to the agreement. In general, the duty of the seller and the buyer under the contract in every country are the same. The seller has the duty to perform the obligation to the buyer such as prepare the goods sold properly as agreed in the contract to the seller. The buyer has the duty to take delivery and make payment to the seller.

4 Damages

Damages refer to the money paid or awarded to a claimant (England), or plaintiff (US) following a successful claim in a civil action.

Under a common law country such as England, damages are such the award of damages or remedy for breach of contract which the claimant has the right to claim. For damages under the contract, the creditor has the right to claim for damages from the debtor as money in case of the other party breach of contract, it is called “Specific performance.” It is an order of the court which requires the debtor to perform a specific act, usually what is stated in a contract. Reasons that the court of England decides money is for the award of damages because the court considers that money is fairness or the goods sold are unique.

Under the rule of English law, there are two types of the award of damages as follows:

1) Damages from breach of contract in general

   Reliance - It is damages which the creditor reliance to receive from the debtor according to the contract. For example, damages from the buyer who trust the seller that he will receive the goods sold, or the seller confident that the buyer shall perform the obligation.

   Restitution – it is such the situation which both of the parties shall return to the former situation. For example, the seller has to return the payment to the buyer, or the buyer returns the good to the seller because of breach of contract.

2) Consequential damages

   Loss of expectation – it occurs when there are such loss suffered and profit derived from breach of contract. The court of England sets up the principle of Hadley V. Baxendale that damages are such ordinary course of thing, or damages are in contemplation of both parties. It means that damages must be directness and remoteness of the parties.

Damages under French law are similar to English law, except specific performance which the creditor can force the other to execute the engagement when it can

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50 Ibid.
be possible, or rescind the contract and claim for damages, (Article 1184). For types of damages, it is similar to English law. Damages from such loss suffered and profit derived, this type of damage shall be in contemplation of both parties during entry into the contract. Additionally, it shall be damages immediately and directly from breach of contract: a debtor is liable only for damages which were foreseen or which could have been foreseen at the time of the contract, where it is not through his own intentional breach that the obligation is not fulfilled, (Article 1150).

Under German law, there is a general rule for remedies according to Article 241, “the effect of an obligation is that the creditor is entitled to claim performance from the debtor. The performance may consist of forbearance.”

For Specific performance, it is interpreted under Section 883-890 of the Civil Procedure. For example, the bailiff has the power to attach movable property from the debtor and hand over it to the creditor. For immovable property, the bailiff has the power to expel the debtor out of the disputed land and hand over the possession to the creditor.

The action in damages under German law can be classified into three principles as the follows:

a) Impossibility of performance

Under German law, the fault should be considered at first whether who did fault. If the debtor caused impossibility of performance, the debtor shall liable for damages: the right to demand damages in the case of a reciprocal contract is not excluded by withdrawal, (Article 325). If it is not the debtor’s fault, the debtor does not have to be liable for the default, and also has the right to claim for damages, (Article 324). If it is neither party’s fault, the debtor does not have to be liable to the creditor.

b) Delay in performance

If the debtor is at fault because the debtor cannot perform the obligation according to the creditor’s purposes; the creditor has the right to rescind the contract and deserve damages.

51 Ibid.
c) Positive breach of contract

The creditor has the right to receive damages from person or property because of the debtors' positive breach of contract.

5. Force majeure and Frustration

According to entry into the contract, the object of the contract is one of the most important parts for the contract to be completed and perfected. The object is the subject matter between the parties in the contract. It is the obligation created by an agreement of the parties, which the parties have to perform the obligation to each other according to the contract. The object of the contract must be objectively determined to its definition. The object in each kind of the contract is quiet different, it depends on what kind of contract it is. Under a sale contract, the subject matter of the contract is the parties intend to deliver the goods in exchange for the price of it.

For Impossibility under the contract, quantity and quality of the goods must be specified by the contract. Otherwise, it should be decided by the court according to the interpretation under law of each kinds of the contract. Under Roman law, the contract is void if it is impossible, Imposible nulla Obligation.

As English has no provision of Impossibility, the court decided the case by interpretation of the contract. Under the Sale of Goods Act, Article 6, "where there is a contract for the sale of specific goods and the goods without the knowledge of the seller have perished at the time the contract is made then the contract is void."

In case the performance becomes impossible as a consequence of a circumstance, frustration, and the debtor cannot perform the obligation to the creditor as agreed, which is not the debtor's fault, but it is because there is an event which effect to perform the obligation radically different. Therefore, the debtor does not have to be liable for the obligation. Such this case, the court decided that the contract is terminated. In addition, an event under English law which cause the performance to be impossible, it must be unforeseeable and highly probable that it would be.

For French law, unless given a more specific definition in the contract, is an event which is external to the parties and which is unforeseeable, irresistible and insuperable; it must fully prevent the fulfillment by the party under the contractual
obligations. The debtor must file a request to the court for the court to make a decision it as force majeure. The court has the power to decide the case has retrospective effect to the first entry into the contract or terminate the contract.

French law has the principle of cause estrapere. It is when the performance becomes impossible because of third person if it is not the creditor’s fault or third person’s fault, the debtor shall be relieved from the obligation. In case of the debtor’s fault, the debtor might be relieved from the obligation wholly or partly, depending on the creditor’s fault.

Under German law, it follows the principle of “pacta sunt servanda”, to keep the promise; and the principle of “clausula rebus sic stantibus”, the parties are binding along as the circumstance does not change. In case the circumstance had changed, the debtor is not liable for such the performance.

6. Rescission and the Effects of termination

When the contract is formed, it is binding both the parties and the parties have to perform the obligations to each other. For rescission of contract, one party cannot rescind of the contract by himself. When the party breach of contract, the other party has the right to rescind the contract and ask for damages.

Under English law, the party can rescind the contract according to the expression in the contract. Moreover, rescission can occur if one of the parties breaches the contract such terms of contract or condition, or a fundamental of the contract. The other party does not have to perform the obligation which is the object to enter into the contract.

For condition, the court of England realized that such important condition may be defined expressly in the contract, it is defined by law, or it decided by the court.

For a fundamental breach of the contract under English law, it must impact to the root of the contract such as the contract of installment of the seller. Defect one of delivery or default to pay one of payments; it shall be considered whether it is breach of


fundamental of the contract or not, it must be considered from an act of the parties that he desires to comply following the contract or not. If the party does not desire to comply with the contract, the other party can rescind the contract.

English law does not have the principle of "exception non adimpleti contractus"\textsuperscript{55}, the party may refuse to perform the obligation until the other party performs or intend to perform his obligation. However, the court of England shall consider case by case to ensure whether the breach of contract is of such an important condition or fundamental breach of the contract, which the other party may cause the other party to rescind the contract.

According to synallagmatic (reciprocal contract) under French law, the parties have the right and the duty to perform to each other. If one of the parties does not perform the obligation, the other party has the right to rescind the contract and ask for damages. In case the party desires rescission, he has to bring the case to the court for decision of rescission. The court of France shall consider the breach of contract’s circumstance and effect of damage, except in case of the parties defined clearly in the contract that the party may rescind without suing the case to the court and beforehand notice.

Rescission and asking for damages under German law are different from French law in many points.

a) Before rescission, the debtor is in default by warning in writing form the creditor; except having fixed time to perform the obligation in calendar, the debtor is in default without warning. In case the debtor neglects such warning, the creditor has the right to rescind the contract without suing to the court.

b) When the debtor is in default, the creditor has the right to refuse performance of the obligation and ask for damages from the debtor; the creditor does not have to rescind the contract, (Section 284-286). In some case, the creditor has the right to rescind or ask for damages from non-performance; for example, performance of the obligation is impossible because of the debtor's default.

\textsuperscript{55} Article 1184 of French Civil Code, Article 320 of German Civil Code, and Section 369 of the Civil and Commercial Code of Thailand.
7. Interpretation of contract

For interpretation of International sale of goods is important. Both of the parties must understand the law in detail, and have ability to interpret law of contract for the same understanding before making the contract. The parties also should agree to the basics and methods which have been practiced for International trade, it makes business run smoothly. To interpret the contract and law, the parties should be concerned about customary rules or the usages or formal custom for International trade which merchants knew or ought to know, it would help the parties to reduce the dispute. In case such a dispute arises between the parties, interpretation of contract is in need to find the result. Finally, honest and fairness are required for both parties which can bring as long run business.
Chapter 4
Analysis of the CISG

Thailand is one of developing country which located in Southeast Asia, and the place where International business transaction. Thailand’s economy depends on International trade. As the growth of Thailand’s economy come from trade between countries, Thailand has been traded with other countries, import and export as International sale of goods, not only in Asia but also America, Europe, Canada, and Africa. Therefore, it is necessary for International to govern by rules which is suited for International trade and is accepted by nations. Rules which are effective for International trade should be fair; it is to make International trade to be fair for both parties. It must be easy for the same understanding and the same meaning; it is because the contractors are not the same nationalities and languages. To reach acceptable terms for countries, rules shall be stable and standardized. Moreover, rules shall be at the same conditions and has been practiced for period to make it realistic and convincing.

As many countries have practiced International trade for long time, International trade is quite important for every country. To do International trade, a sale contract, with other countries; there are many important issues which the parties under a sale contract shall concern in detail. Rules to use for International trade is a part to make a sale contract to be possible and to make the parties to follow the conditions under the settled rules. To set up rules for International trade is not easy. By now, there are no exact rules to govern International trade directly though some organization tries to set it up for nations to use. The CISG is an example of International law for International trade; however, it is not perfect and also has some defects. To be such perfect law for International law, it does not only have the rights and the duties of the buyer and the seller, but it should be cover a sale contract in detailed in case of there are problems or dispute arise between the parties. Therefore, to choose law for International trade is quite important for countries around the world.

Thailand is also one country in the world which concerns International trade; it is because Thailand’s business depends on exporting the goods to others. In contrast, Thailand is also importing the goods from many countries. It can be concluded that the Thai economy is related to International trade. Therefore, Thailand should be concerned about
International trade by selecting laws which suit, are convenient, and applicable for Thailand. It also must be fair for the other party under International trade.

This being the case, UNCITRAL did set up the uniform rules as the convention for International trade. The United Nations Convention on Contracts for the International Sale of Goods, CISG, is first come into force in 1988. It is such the method that nations used for International trade. The CISG is applicable to International sale of goods, it regulates the formation of the contract, the resulting rights and obligations of the seller and the buyer and the remedies in cases of breach of contract. Thereby, there are two-third of countries around the world who adopted the CISG.

A. The advantages of adoption the CISG

To adopt the CISG, there are such advantages for Thailand. To be a member of the CISG will lead Thailand to the standardized and be accepted by foreign countries. The Thai economy will become wide and greatly for expand the trade. It would be easier to negotiate International trade with many countries. In favor of Thai law, there are in some principles under the CISG which are similar to the Thai legal system. It would support Thailand to adopt the CISG as follows:

1. Formation of the contract

   For formation of contract between Thai law (Section 361) and the CISG (Article 18 (2)), it is similar, the contract shall occur when the acceptance from the buyer reached to the seller.

   Civil and Commercial Code Section 361, “A contract between persons at a distance comes into existence at the time when the notice of acceptance reaches to the offeror.”

   The CISG Article 18, “A statement made by or another conducts of the offeree indicating assent to an offer is an acceptance.”

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The provision of law under Article 19 Paragraph 1 of the CISG\textsuperscript{57}, and Section 359 Paragraph 2\textsuperscript{58} under the Civil and Commercial code are also similar which an offer with additions, restrictions, or other modifications, it is such the refusing of an offer and become a new offer.

2. The duties of the seller and the buyer

The buyer has the duties to take the delivery of the goods sold and pay the price according to the contract; it is under Civil and Commercial Code Section 486, and The CISG Article 53. The duties of the seller under Thai law and the CISG are similar. It is to deliver the goods sold to the buyer, under Civil and Commercial Code Section 461, and Article 30 under the CISG.

For the defect, Thai Civil and Commercial Code Section 472 and the CISG Article 70, are also similar that the seller must be liable for detects.

3. Damages

For breach of contract, the CISG is in favor of Thai law; under Thai law and the CISG prescribed that the parties who breach of contract shall liable for damages. Under Civil and Commercial Code, the creditor can make a demand to the court for compulsory performance if the debtor did not perform the obligation (Section 213), and the debtor's performance of obligation shall be the whole property of the debtor including any money or other property due to the debtor by third person, (Section 214); it is because the creditor is entitled to claim performance according to virtue of the obligation, (Section 194). For damages under Article 74 of the CISG, it consists of some of equal of the loss including loss of profit, but shall not exceed the loss which the party in breach foresaw or ought have foreseen at the time of conclusion of the contract, and that party should have known or ought to have known the result of breach of contract according to the facts and matters.

\textsuperscript{57} “A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer.”

\textsuperscript{58} “An acceptance with additions, restrictions or other modifications is deemed to be a new offer.”
4. Force majeure and Frustration

Thai law and the CISG have the same principle of Frustration. Under Thai law and the CISG is also the same principle. Under Civil and Commercial Code, reciprocal contract to transfer specific thing and such thing is loss or damaged by a cause which is not the debtor’s fault, the loss or damages falls upon the creditor, (Section 370). If the performance becomes impossible in a circumstance of the debtor’s responsibility, the debtor shall compensate the creditor for any damage because of the non-performance. In case of partial impossibility, the creditor may refuse if possible part of performance is useless, and the creditor also has the right to demand compensation, (Section 218). The debtor is relieved to perform the obligation after the creation of the obligation, if the performance becomes impossible in a circumstance which is not the debtor’s responsibility, and the debtor is impossible to perform the obligation, (Section 219).

As same as the CISG, if the party can prove that the failure to perform the obligation is without his control and could not in reason respect or avoid its consequences, the party is not liable, (Article 79).

5. Rescission and the Effects of termination

In case of the declaration of avoidance, rescission, under the CISG, the buyer has the right to rescind the contract if the seller failed to perform the obligation which is fundamental of contract, the seller did not deliver the goods within the additional period of time, (Section 49); the buyer also has the right to claim for damages. In case the buyer breached the contract, the seller can also rescind the contract if the buyer failed to perform the obligation which is fundamental of the contract, or the buyer did not take the delivery or pay the price within the period so fixed, (Section 64). For the effect of termination of the contract (Effects of avoidance), the CISG expressly provides under Article 81 to Article 84, each of the parties must return property or money in reason for the performance including interest. Additional, the party still has the right to claim for damages after the declaration of avoidance.

For Thai law, the part can rescind the contract as following: the other party did not perform the obligation within a reasonable period which is fixed by the party (Section 387), the nature of the object or the parties declaration of intention can be accomplished if the performance due within such fixed period and such time has passed, the other party can rescind the contract, (Section 388).
6. Interpretation of contract

For interpretation of contract, and usages and practices; the CISG and Thai law is quite similar. In case of the interpretation under the contract, it shall be interpreted according to general principles in good faith, or flowing for usages between the parties. Under the provision of law Article 9, “the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.” Civil and Commercial Code of Thailand Section 368, “Contracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration.”

B. The disadvantages of adoption the CISG

According to unfavorable, there are also the disadvantages in case of adoption the CISG as follows:

1. Formation of contract

Although some principles are likely similar, there are some differences between the CISG and Thai law. The CISG can apply for commercial purpose only, and not for a sale of ship, vessels, aircraft, shares, bonds etc: the provisions of law under Article 2. Unlike the Civil and Commercial code of Thailand, it covers all types of sales. Under section 456:

“A sale of immovable is void unless it is made in writing and registered by the competent official. The same rule applies to ships or vessels of six tons and over, to steam launches or motor boats of five tons and over, to floating houses and the beasts of the burden.

An agreement to sell or to buy any of the aforesaid property, or a promise of sale of such property is not enforceable by action unless is some written evidence signed by the party liable or unless earnest there is given, or there is partial performance.

The provisions of the forgoing paragraph shall apply to a contract of sale of movable property where the agreed price is twenty thousand baht or upwards.”

This section has given many advantages for a sale contract for the parties. From this section, there are many loopholes for the provisions of law under the CISG. It shall be explained as follows.
A sale contract under the CISG is not compact, there are such loopholes accordingly the provisions of law. Under the provision of law Article 11, “A contract of sale need not be concluded in or evidenced by writing and is not subject to the other requirements as to form. It may be proved by any means including witnesses.”

A sale contract under the CISG does not need to be made in form nor have such written evidence. A sale contract may be made by verbal or proved by any means or witnesses; it is in used and is enforced. This can be concluded that a sale contract which applied the CISG is not well enough for the purpose of International sale of goods. It would cause the problems whether a sale contract is made or can be enforced or not, because there is no form of a sale contract. To be such a good sale contract, it shall be made by written evidence for elimination and reducing contradiction between the parties when there are such disputes or problems arise.

In case the parties made an agreement to make a sale contract without written evidence, the problem shall arise if one party delivered some amount of the goods to the other party but the other party cancelled a sale contract. Such this problem, the party who delivered the goods does not have written evidence to prove for a sale contract, and it is also hard for the party to prove by means or witnesses. Unlike the Civil and Commercial code of Thailand, under section 456 prescribes that the parties shall make a sale contract in written evidence if the cost is more than twenty thousand baht. This being the case, such written evidence can be used as evidence to show the court and it can be proved easily. It means that the Civil and Commercial code is more compact that the provisions of law under the CISG.

Formation of the contract under the CISG still has some confliction; it is between the provision of law Article 14 and Article 55. Under Article 14, the declaration of intention shall be an offer when the declaration of intention is sufficiently definite and it declares that an offeror declares his intent expressly to be bound when the acceptance reaches the offeror. The offer which is sufficiently definite must indicate the goods and determining the price expressly or implicitly fix clearly. According to Article 55, if there is no determine the price expressly or it is implicitly fixed between the parties, the parties shall determine the price as sold goods under comparable circumstances in the trade concerned when the partyied agreed to make the contract.
For party autonomy according to the provision of law Article 6 under this convention, “the parties may exclude the application of this convention or, subject to article 12, derogate from or vary the effect of any of its provisions.” It prescribed that the parties may exclude only some part or the whole part of the principle and application under the CISG for a sale contract. It would cause such problems for the parties. As the provisions of law of the CISG has many rules and details, the parties may confuse and misunderstand some part of the application if they agreed to use only some part of the application for a sale contract. This convention is also hard to understand because the interpretation is not in detail. It is not easy for the party who currently applied the CISG as International sale contract. For this reason, the Civil and Commercial code is more suitable for Thai contractors to make a sale contract. Otherwise, the contractors should select International law or usages such INCOTERMS which is well known and worldwide accepted in many countries.

The principle of Party autonomy under the Civil and Commercial code is better than the CISG. Under section 151 of the Civil and Commercial code, “An act is not void on account of its differing from a provision of any law if such law does not relate to public order or good moral”, the parties have freedom for the declaration of intention unless such law relates to public order or good morals. Unlike the CISG, the parties may exclude the application for making a sale contract, but it is not concerned whether it would relate to public order or good morals or not. If a sale contract which is against public order or good morals, it shall be void under Thai law.

Additional, formation of contract under the CISG under Article 4, it does not concern about the validity of the contract or of its provisions or of any usages, and transfer of ownership of property sold. Although the complete of a sale contract is invalid, a sale contract is still able to be enforced by the parties. In contrast, a sale contract under the Civil and Commercial code shall not be effective if a sale contract is invalid, not complete, which a sale contract cannot use to enforce to the other party.

2. The duties of the seller and the buyer

Time for liability for defect between them is not the same. Under Civil and Commercial Code Section 474, time for liability for defect is entered later than one year after the discovery of the defect. For the provision of law of the CISG Article 39 paragraph
2, time for liability for defect is within a period of two years from the date on which the goods were actually handed over to the buyer.

For the price of the goods, there is such issue to determine whether a sale contract has occurred already or not. The provision of law Article 14 said that the price must be agreed expressly or implicitly fix clearly before making a sale contract, but the provision of law Article 55 prescribes that the price is agreed after the decision to make a sale contract.

3. Risk of loss

In case passing of risk between Thai law and the CISG is different. It is prescribed under the CISG Article 66 to Article 70. Under Article 67, and risk of loss shall be transferred from the buyer to seller when the seller handed the goods over to the first carrier. In case there is carriage of the goods involved in the contract such as particular place, ownership and risk of loss or damages shall be transferred from the buyer to seller when the seller handed the goods over to the first carrier to that place. In addition risk does not pass until the goods are clearly identified in the contract.

Unlike Thai law, Civil and Commercial Code, ownership of the goods shall be transferred from the seller to the buyer when both of them entered into the contract, (Section 458). In case of unascertained goods, ownership and risk of loss of or damages shall not be transferred from the seeker to the buyer unless the goods have been numbered, counted, weighed, measured, or select or identified, (Section 460).

4. Damages

Although the provision of law under the CCC and the CISG are similar, the party shall receive damages. However, if the other party failed to perform the obligation the party who failed to perform the obligation, must make the notice to the other party for its effect, otherwise, he still has to respond for damages if the notice did not arrive to the other party within a reasonable time. Unlike Thai law, the party who failed to perform the obligation does not have to make the notice to the other party.

The text of CISG was written by legal practitioners who sought to weave an integrated legal system on International sales transactions from the threads of a multitude of
legal systems with rich histories and varying philosophies underpinning contract law and economic theory.\(^{59}\)

The CISG has such loophole under the provision of law. There are such principles under the CISG which are not in favor for Thai law; there are such principles as follows:

5. Rescission and the Effects of termination

In addition, to the declaration of avoidance under the CISG, it shall not be effective unless if made by the notices to the other party. (Article 26); unlike the CCC under Thai law, rescission can be made by the declaration of intention to the other party. (Section 386), it does not have to give notice.

6. Interpretation of contract

The CISG set up a principle to prevent the court to use domestic law for International trade: the contract according to the provision of Article 7 paragraph 1, “In the interpretation of this Convention, regard is to be had to its International character and to the need to promote uniformity in its application and the observance of good faith in International trade.” It is the interpretation of itself, and paragraph is use to settle for all questions where the disputes arise between the parties. However, this Article does not explain explicitly. Therefore, the interpretation shall be guided by three considerations: the Convention’s International character, the need to promote uniformity and the observance of good faith in International trade.\(^{60}\)

The Convention’s International character, the CISG should be interpreted explicitly and clearly when the International character is complicated. The interpretation also would be reasonable and accepted by nations. To promote uniformity of the CISG is also very important. Although the judgments are made by human, each judge also has individual’s points of views and reasons. In the same case, the judge might have opinions


\(^{60}\) Ibid.
People also have different approaches and views of judgments; some agree, but some do not. To promote and to prove the uniformity, to show that the CISG is such applicable law, any judge or arbitrator will have to consider previous decisions on the matter not only of his own country but of any other country’s courts or arbitral tribunals.\(^{61}\)

Even though judge or arbitrator will consider previous decisions from many countries to be guidelines for accomplishment and make the judgments become universal and are accepted by nations, the judgments might not be trusted by many countries. It is because the CISG has been used for twenty years, there are only few court’s decisions of cases appears. There are also only few previous decisions and cases to be accomplished when the disputes between the parties occur. International case law is accessed through a database on the internet, such as the website of UNICTRAL which provides the ‘CLOUT’ database, the ‘Unilex’ page\(^{62}\) accesses for the UNITED Nations Commission on International Trade Law, the CISG-website of the Pace University\(^{63}\), and etc.

According to Article 7 Paragraph 2, “Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private International law.”

The purpose of this Article is to fulfill gaps of rules. It set up the principle for the parties not to use Domestic law for a sale contract under International trade and to prevent the court to use domestic law for International trade. When the dispute arises, the parties can use law which is close and compatible to in force, general principle. However, there is not much for interpretation for general principles. The commentaries contain lists of principles that are regarded to be contained or to be the basis of certain rules or articles of the Convention\(^{64}\). Such widely recognized principles are for of certain rules or articles of the

\(^{61}\) Ibid.


Convention. For instance: party autonomy (derived mainly from Article 6 of the CISG); pact a sunt servanda (derived from a number of articles, Article. 30, Article 53 of the CISG among others); good faith (derived from Article 7 Paragraph 1 of the CISG in particular); standard of reasonableness (found in different provisions of the CISG, e.g. Article. 39, Article 75 of the CISG); general duty to cooperate (derived from duties existing beside the main obligations, such as the duty to preserve goods which have to be returned, Article. 85, Article 86 of the CISG, the duty to accept cure, Article. 34, Article 37, Article 48 of the CISG, and many more)\(^{65}\). For the CISG to be applicable, it should be settled in conformity under the national law which is rules of private International law.

C. The middle of the CISG

1. Transfer of ownership

Under the CISG, it does not prescribe about transfer of ownership; therefore, the parties can use their own law for the principle of transfer of ownership. Otherwise, the parties have to set up the point for transfer of ownership. In case of one of the party is Thai, transfer of ownership of ascertained goods shall transfer immediately from the seller to the buyer when the contract is formed, (Section 458). For the ownership of unascertained goods, transfer of ownership shall not transfer from the seller to the buyer unless the property is identified as specific goods, the goods has been numbered, counted, weighed, measured, selected, or identified as certain, (Section 460). This being the case, it is likely that transfer of ownership under the CISG has no effect to Thailand.

D. The additional points for against adoption the CISG

To support that Thai law is more applicable, there are such matters to be concerned with. To settle the dispute for a sale contract under the CISG, the parties can choose to bring the cases to the court or arbitration. Attorney’s fee is also one area of problem according to provision of law Article 74; who shall bear for Attorney’s fee or litigation cost. It is because the different point of views between Civil law and Common law countries. For Common law countries, Attorney’s fee may be split

\(^{65}\) Ibid.
between the parties if the claimant is only partly successful, they do agree that judicial costs are generally recoverable and the looser of the claim will therefore generally be ordered to reimburse the winning part’s expense, especially its Attorney’s fees. In contrast, Civil law counties, the looser shall pay for the Attorney’s fees. There is no prescription for Attorney’s fee under the CISG unlike the Thai legal system that the looser shall pay for Attorney’s fees.

The provisions of law under the CISG do not interpret in details, it would make the contractors get confused and misunderstand its principle. It would also cause some damages for such new contractors, who have less experience, who decide to apply the CISG for International sale of Goods. This is such reason why domestic law, Thai law, is the first choice for the contractors to apply for the dispute. To avoid domestic law, the uniformity of the CISG shall be more universal.

According to the uniformity, the interpretation should following the uniformity. In additional, the interpretation should get along with the uniformity, and also be respected to reach qualify of the nations. As there are both Common Law and Civil Law countries, the problems or the disputes would arise because different legal systems shall apply the same convention. The question is how the CISG can make both different legal systems trust itself and believe that the CISG is following the way of fairness, realistic and application.

Without International Sale of Goods, Civil and Commercial code of Thailand is in use for International trade, there are more rules that also can apply, for example the usage of INCOTERMS. INCOTERMS is such the usage, which is well known, and is accepted by nations. INCOTERMS are terms which are used around the world. They are used to divide transaction costs and responsibilities between the buyer and seller and reflect state-of-the-art transportation practices.

In case of there is no law to enforce in any issue, there is General principle under the Civil and Commercial Code to apply with. According to Section 4:

"The law must be applied in all cases which come within the letter or the spirit of any of its provision is applicable, the case shall be decided according to the local custom. If

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66 Ibid.

there is no such custom, the case shall decided by analogy to the provision most nearly applicable, and, in default of such provision, by the general principles of law.”

For Thai law, the judge has the power to interpret law. In case of the dispute arising between the parties, the Civil and Commercial code can also apply to International trade if one of the parties is Thai; this principle is to protect Thais. It is according to the provision of the Civil and Commercial Code. Therefore, the provision of section 4 is very important. In addition, the court has the duty to adjudicate the case though there is no the provision of law which is applicable to the case. According to Section 134 of the Code of Civil Procedure:

“In no case shall the court in which a case has been entered refuse to pronounce a judgment or order disposing of the case, on the ground that there are no provisions of law applicable to the case or that the provisions of law to be applied are obscure or incomplete.”

From this provision, it is obvious that the court has the power to apply and interpret law. In case of there is no provision of law applicable; local custom, similar provision and general principle of law shall be applied to the case respectively. This being the case, it can be said that Thai legal system and The Civil and Commercial code reaches the standard of law, and it can be used for the purposes of International trade, to settle the disputes between the parties under an International sale contract.

In case of law in the other country, the other’s party country, is conflict or not relates the principle of Thai law, Thailand has Conflict of Laws Act B.E. 2481 (1938). Conflict of law is concerned for the court’s decision. It is liked to be fair for the other party to follow the conflict of law.

As the UNCITRAL created the CISG for the purpose of International Sale of Goods, the committees who drafted this convention are from many countries in America and the West. They are mostly from developed countries which have power to control the world’s trade; it will be unfavorable for Thailand to bargain the trade with contracting states. The provision of law under the CISG also has the disadvantages more than the advantages according to comparison. Additionally, Thailand has the Civil and Commercial Code which can for the purpose to entry into the contract, and Thai merchants usually used INCOTERMS2000 for International trade. Conflict of law is usable when there is such the conflict of law between countries. This being the case, Thailand should not adopt the CISG for International Sale of Goods.
Chapter 5

Conclusion and Recommendations

A. Conclusion

The CISG is such a master piece of The United Nations Commission on International Trade Law, it aims to promote uniformity of International sales law under the point of view that International sales contracts are quite different from domestic ones in countries. This being the case, The CISG is drafted and contains Sphere of Application and General Provisions, Formation of the contract, Sale of Goods, and Final Provisions for the purposes of International sale of goods. In additional, the purpose of the CISG is to compromise between the parties under the fairness. The CISG also eliminates the problem of law in case of there is such the dispute between the parties. To adopt the CISG for International sale of goods as other countries, it will also support and give the credit that Thailand is satisfied and equal foreign countries in the matter of International Sale of Goods. However, most merchants around the world including the Western Europe likely preferred to use INCOTERMS for International sale.

The purpose of the CISG is to facilitate International sale of goods for private sectors and merchants. It also desires to reach the predictabilities, to use it as the uniform rules to apply for International trade in a similar way. The CISG has many advantages for Thailand, but it also has disadvantages. For Thailand to decide to adopt the CISG, there are such disadvantages more that advantages. The CISG does not cover some points for International sale of goods such as the complement of the contract, the interpretation of law, and the protection for the party to bargain the other party. Although formation of contract is similar to Thailand, the CISG does not concern the complement of the contract; there is also some conflict for the price. It also does not prescribe for the transfer of ownership of the goods sold, and also the different rescission of the contract when compared to Thai law. For comparison between Thai law and the CISG, Thai law is likely to cover all necessary details for the contract than the CISG.

Although there are many countries who practice the CISG, this convention is established for a while, the CISG is new for private sectors and merchants. The provisions of law under this convention are likely different from Domestic law. The CISG used the
word for the definition in general terms, not specific. Therefore, there have some problems for the understanding, and the interpretation in the court cases of the problems arise. Additionally, there are no court decisions for cases under the CISG. At sight of private sectors and merchants, the CISG does not qualify the standard for International sale of goods as INCOTERMS.

As Thailand has the Civil and Commercial Code as written law. Under the provision BOOK III Civil and Commercial Code which defined for sale in detail. In addition, the Civil and Commercial Code handles advantage under the issue of the declaration of intention, which the parties can make a declaration of intention to make a sale contract according to the agreement. In case of there is no law defined, Civil and Commercial Code defined for the allowance the usages in use for the parties. This being the case, INCOTERMS and Civil and Commercial Code are for International sale of goods

For INCOTERMS, there are rules which private sectors and merchants have been used for long time as worldwide. It can say that the purposes of INCOTERMS are to standardize the trade usage of terms. It also identifies and interprets commercial terms such as the transaction costs, and the responsibilities of the buyer and of the seller, the carriage of the goods, the responsibilities of the export and the import formalities, the costs, and the risk under the condition of the goods which locates in the transport process. INCOTERMS are such world customs to make trade for countries to be easier, because there is the certainty of interpretation of each trade terms are different. Therefore, the parties under the contract can choose trade term according to their purpose. Additionally, it also avoids the dispute because of its interpretation of each trade terms. In Thailand, private sectors and merchants also use INCOTERMS for International sale of goods.

In case of there are the problem arise between the parties, INCOTERMS and the Civil and Commercial Code can be adapted and used for International sale of goods. In addition, if there is such the dispute arises between the parties, in case of contracting states are not members of the CISG and law of both countries are not the same; the conflict of law occurs. Thailand also has Conflict of Laws Act B.E.2481 (1938) for the conflict of law between the parties under International sale of goods.

Under Thai courts, the judge has the power to interpret law. As there are such disputes which arise between the parties, the Civil and Commercial code can apply as law not for only domestic trade, but also International trade if the party is not Thai. It is according to the provision of the Civil and Commercials Code. Therefore, the provision of
section 4 is very important. In addition, the court has the duty to adjudicate the case though there is no the provision of law which is applicable to the case, the Code of Civil Procedure. Therefore, Domestic law can be used between the parties in case of International Sale of Goods.

It does not mean that the CISG is not good enough for International Trade, but it does not reach the standard at the point of view. There are some points under the convention which should be changed to qualify for International sale of goods.

For the trust of previous decisions which the judge or arbitrator used as consideration for case law, Thailand should wait until there are much more case law under the CISG to be standard, realistic, and convincing. The provisions of law under the CISG should change to be suited for nations to use as International without doubt. The interpretation of the provisions of law should be more explicit and express. To adopt the CISG, Thai merchants and private sectors must learn more about the CISG, especially, how it works, and also the applicable law which differs from domestic law. As less experience, it would cause some problems for the contractors. Domestic law would be useless and disability for International trade because of using the CISG instead. This being the case, the CISG is not suited for Thailand.

The CISG has some damages according to the provision of law. Additional, the CISG is not such rules to collect all practices for International trade; it does not enact and interpret the provision of law for a sale contract’s issues in detail.

B. Recommendations

After the comparison between The CISG and Thai law, there are such complicated through many countries round the world which adopt it as International trade. At the point of view under Thai law, Civil and Commercial Code is easier to understand for Thais. Additionally, private sectors, including Europe, have practiced INCOTERMS for a long time. It is certainly clarified that INCOTERMS are more acceptable than the CISG which has been practiced for a while. Therefore, most private sectors and merchants use INCOTERMS instead of the CISG for International Sale of Goods. As Thailand has practiced INCOTERMS so far, Civil and Commercial Code takes place in the important role in case of there are such the dispute. In addition, Thai private sectors and merchants are
accustomed to practice these rules for a long time. There are also many court decisions to be standard in cases. This being the case, it is too easy for the court to make the decisions following the former cases. It also reduces such problems and disputes between the parties under the contract, because the parties shall know their responsibilities and the liabilities under the contract and outcome of the result. For the CISG, there are less case for study and decisions of the courts; therefore, the court’s decision for the case under the CISG is uncertain. The cases are also not enough for the court to look through former cases to make the decision for the later cases as a standard.

It is clearly that disadvantages under the CISG are more than advantages. As Thailand is not currently a member of the CISG, the authority of the Council of State of the Thai Government, various movements such as the conduct of researches to improve International sale of goods. I would recommend that Thailand should not adopt the CISG for International trade.
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Book


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Internet


