Brief Contents

1 Global Challenge of International Sales Law ......................... page 3
2 History of the CISG and Its Present Status .......................... 8
3 The CISG: Divergences between Success–Scarcity and Theory–Practice ...... 23
4 CISG Sources and Researching the CISG .............................. 37
5 Reducing Legal Babelism: CISG Translation Issues .................. 51
6 The CISG in National Courts ............................................. 63
7 Interpretive Methodologies in the Interpretation of the CISG ............ 79
8 Divergent Interpretations: Reasons and Solutions .................... 102
9 Good Faith Principle: Vexata Quaestio .................................. 120
10 The CISG and International Arbitration ............................... 135
12 Contract Formation under the CISG: The Need for a Reform ........... 179
13 The CISG and the Battle of the Forms .................................. 203
14 Conformity of Goods: Inspection and Notice .......................... 215
15 Interpreting Fundamental Breach ........................................ 237
16 Remedies: Damages, Price Reduction, Avoidance, Mitigation, and Preservation ....................................................... 257
17 Litigation Costs as Reimbursable Damages ............................. 286
18 Excuse of Impediment and Its Usefulness ............................. 295
19 The CISG in Austria ......................................................... 309
20 Baltic States, Belarus, and Ukraine ..................................... 331
21 French Perspective of the CISG .......................................... 338
<table>
<thead>
<tr>
<th>Brief Contents</th>
</tr>
</thead>
<tbody>
<tr>
<td>22</td>
</tr>
<tr>
<td>23</td>
</tr>
<tr>
<td>24</td>
</tr>
<tr>
<td>25</td>
</tr>
<tr>
<td>26</td>
</tr>
<tr>
<td>27</td>
</tr>
<tr>
<td>28</td>
</tr>
<tr>
<td>29</td>
</tr>
<tr>
<td>30</td>
</tr>
<tr>
<td>31</td>
</tr>
<tr>
<td>32</td>
</tr>
<tr>
<td>33</td>
</tr>
<tr>
<td>34</td>
</tr>
<tr>
<td>35</td>
</tr>
<tr>
<td>36</td>
</tr>
<tr>
<td>37</td>
</tr>
<tr>
<td>38</td>
</tr>
<tr>
<td>39</td>
</tr>
<tr>
<td>40</td>
</tr>
<tr>
<td>41</td>
</tr>
<tr>
<td>42</td>
</tr>
<tr>
<td>43</td>
</tr>
<tr>
<td>44</td>
</tr>
<tr>
<td>45</td>
</tr>
</tbody>
</table>
## Contents

<table>
<thead>
<tr>
<th>List of Contributors</th>
<th>xxix</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preface</td>
<td>xliii</td>
</tr>
<tr>
<td>Tributes</td>
<td>xlv</td>
</tr>
</tbody>
</table>

In Memory of John Honnold, Peter Schlectriem, and Albert H. Kritzer

### PART I: HISTORY OF AND RESEARCHING THE CISG

1. **Global Challenge of International Sales Law** ........................................ 3  
   *Larry A. DiMatteo*
   
   I. Introduction 3  
   II. Blueprint for a Conference and a Book 6  
   III. Conclusion 7

2. **History of the CISG and Its Present Status** ........................................ 8  
   *Vikki Rogers and Kaon Lai*
   
   I. Introduction 8  
   II. Movement toward Uniform International Sales Law 8  
   III. Development of the CISG 12  
   IV. Structure of the CISG 15  
   V. Contracting States 15  
   VI. Impact of the CISG on National Law Reform 18  
   VII. Global Efforts to Promote the Adoption and Use of the CISG 20  
   VIII. Conclusion 22

3. **The CISG: Divergences between Success–Scarcity and Theory–Practice** ........ 23  
   *Olaf Meyer*
   
   I. The CISG: A Success Story 23  
   II. Measuring Success by the Numbers 24  
   III. “Quiet” Areas of the CISG 25  
   A. Theoretical Issues and Practical Significance 25  
      1. Indirect Application of the CISG by Noncontracting States: Article 1(1)(b) 25  
      2. Domestic Product Liability Law under CISG Article 5 26  
   B. Derogation by the Parties 27
## Table of Contents

### 4 CISG Sources and Researching the CISG

*Marie Stefanini Newman*

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>Introduction</td>
</tr>
<tr>
<td>II.</td>
<td>Brief History of the CISG</td>
</tr>
<tr>
<td>III.</td>
<td>Challenges in Researching the CISG and Its Uniform Application</td>
</tr>
<tr>
<td></td>
<td>A. Moving from “Homeward Trend” to Uniform Application</td>
</tr>
<tr>
<td></td>
<td>B. Internet to the Rescue</td>
</tr>
<tr>
<td>IV.</td>
<td>Methodology for CISG Research</td>
</tr>
<tr>
<td>V.</td>
<td>Leading Online Resources for CISG Research</td>
</tr>
<tr>
<td></td>
<td>A. UNCITRAL</td>
</tr>
<tr>
<td></td>
<td>B. CISG Database, Pace University School of Law</td>
</tr>
<tr>
<td></td>
<td>C. UNIDROIT and UNILEX</td>
</tr>
<tr>
<td></td>
<td>D. TransLex</td>
</tr>
<tr>
<td></td>
<td>E. Commercial Databases</td>
</tr>
<tr>
<td></td>
<td>1. Lexis and Westlaw</td>
</tr>
<tr>
<td></td>
<td>2. Kluwer Arbitration</td>
</tr>
<tr>
<td>VI.</td>
<td>Conclusion</td>
</tr>
</tbody>
</table>

### 5 Reducing Legal Babelism: CISG Translation Issues

*Claire M. Germain*

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>Introduction</td>
</tr>
<tr>
<td>II.</td>
<td>Drafting Issues: Six Official Languages</td>
</tr>
<tr>
<td>III.</td>
<td>Drafting Issues: Choice of Words and Neutral Language</td>
</tr>
<tr>
<td>IV.</td>
<td>Interpretation and Homeward Trend</td>
</tr>
<tr>
<td>V.</td>
<td>Solutions to Deal with Language and Translation Issues</td>
</tr>
<tr>
<td></td>
<td>A. International Sales Law Thesauri and Case Translations</td>
</tr>
<tr>
<td></td>
<td>B. Reading Foreign Decisions: French Cour de cassation</td>
</tr>
<tr>
<td></td>
<td>C. Role of Foreign Decisions and Scholarly Writings</td>
</tr>
<tr>
<td>VI.</td>
<td>Language Risk</td>
</tr>
<tr>
<td>VII.</td>
<td>Conclusion</td>
</tr>
</tbody>
</table>

### 6 The CISG in National Courts

*Camilla Baasch Andersen*

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>Breadth of CISG Applications</td>
</tr>
<tr>
<td></td>
<td>A. Nonapplication of the CISG</td>
</tr>
<tr>
<td></td>
<td>B. National Application outside the Scope of the CISG</td>
</tr>
<tr>
<td>II.</td>
<td>CISG Case Law: Uniform Law in National Courts</td>
</tr>
</tbody>
</table>

---

C. Divergence between Scholarship and Practice

1. The Price Paradox
2. Battle of the Forms

D. Compromise and Dispute

1. Revocability of an Offer
2. Specific Performance
3. Compromises and the Developing Countries

E. Part II Formation and Scarcity of Case Law

IV. Conclusion

5 Reducing Legal Babelism: CISG Translation Issues

Claire M. Germain

I. Introduction

II. Drafting Issues: Six Official Languages

III. Drafting Issues: Choice of Words and Neutral Language

IV. Interpretation and Homeward Trend

V. Solutions to Deal with Language and Translation Issues

VI. Language Risk

VII. Conclusion

6 The CISG in National Courts

Camilla Baasch Andersen

I. Breadth of CISG Applications

A. Nonapplication of the CISG

B. National Application outside the Scope of the CISG

II. CISG Case Law: Uniform Law in National Courts
Contents

A. Understanding Uniformity 66
B. Textual Uniformity versus Applied Uniformity 66
C. The CISG and Uniformity 67

III. The CISG and Nonuniformity 67
A. Inadvertent “Homeward Trend” 68
B. Blatant Disregard 69

IV. Global Jurisconsultorium of the CISG 69
A. The “Legal” Arguments 70
B. The “Policy” Arguments 71
C. Global Jurisconsultorium: The CISG in National Courts 72

V. Criteria for Judging CISG Case Law 74

VI. Future of the Jurisconsultorium 75

PART II: INTERPRETATION AND USE OF THE CISG

7 Interpretive Methodologies in the Interpretation of the CISG ............... 79
Larry A. DiMatteo and André Janssen

I. Introduction 79

II. Traditional National Methods for Interpreting the CISG 80
A. Need for a “Blend” of Different National Methodologies 80
B. National Methodologies: A Summary 81

III. Textual Interpretation 84

IV. Systemic Interpretation: Intraconventional and Interconventional 85

V. Historic Interpretation 86

VI. Teleological Interpretation 87

VII. Relative Weight of the Different Interpretative Methods 88

VIII. CISG Interpretive Methodology 88
A. Creative Interpretation: Self-Generation of Underlying Principles 89
B. Analogical Reasoning within the CISG 90
C. Analogical Reasoning Using CISG Case Law 92
D. Secondary Legal Sources in Interpreting the CISG 94
E. Good-Faith Interpretation 95

IX. Supplementary Methodologies 95
A. Use of Soft Law in the Interpretation of the CISG 95
B. Contextualism: Internal–External Exchange 96
C. Use of Comparative Law in the Interpretation of the CISG 97
D. Economic Interpretation of the CISG 98

X. Party-Generated Rules of Interpretation 100

XI. Conclusion 101

8 Divergent Interpretations: Reasons and Solutions ...................... 102
Ingeborg Schwenzer

I. Introduction 102

II. Main Areas of the Homeward Trend 103
A. General 103
### Table of Contents

**B. Not Applying the CISG Where it Should be Applied**  
- 104

**C. Interpreting CISG Provisions in Light of Domestic Law**  
1. Examination and Notice Requirements: CISG Articles 38 and 39  
- 108
2. Other Areas of Divergent Interpretation  
- 111

**D. Narrowing the Scope of the CISG**  
1. Concurring Domestic Law Remedies  
- 112
2. Issues of Validity  
- 113
3. The Substantive–Procedural Divide  
- 113

**III. Reasons for the Homeward Trend**  
1. Lack of Knowledge  
- 114
2. Language Barriers  
- 115
3. Relevant Cases Are Arbitrated  
- 116

**IV. Homeward Trend: How Can it be Changed?**  
1. Comparative Research  
- 117
2. Language  
- 118
3. CISG as Genuine Contract Law  
- 118
4. CISG in Education and Legal Practice  
- 119

**V. Conclusion**  
- 119

**9 Good Faith Principle: Vexata Quaestio**  
Francesco G. Mazzotta  
- 120

**I. Introduction**  
- 120

**II. Domestic Meanings of Good Faith**  
1. United States  
- 120
2. United Kingdom  
- 124
3. Italy  
- 125
4. Germany  
- 126

**III. Good Faith in the CISG**  
1. CISG Article 7(1)  
- 127
2. CISG Case Law  
- 128
   1. United States  
   - 128
   2. Italy  
   - 129
   3. Germany  
   - 130
3. Analysis  
- 131

**IV. Conclusion**  
- 134

**10 The CISG and International Arbitration**  
André Janssen and Matthias Spilker  
- 135

**I. Introduction**  
- 135

**II. A Short Look at International Arbitration**  
1. International Arbitration and Its Popularity  
- 136
2. International Arbitration Rules  
- 137

**III. The CISG and Arbitration**  
1. Statistical Evidence  
- 137
2. Application of the CISG by Arbitral Tribunals: Choice of Law  
- 138
   1. Direct Choice  
   - 138
   2. Indirect Choice and Opting Out  
   - 139
Contents

C. Application of the CISG in the Absence of a Choice of Law: Direct Method 140
D. Some Observations 142
1. Party Autonomy and Transnational Spirit 142
2. Practical Reasons 142
3. The CISG as a “Neutral Law” 143
E. Indirect Method of Application: Absence of a Choice of Law 143
1. Initial Situation Provided by Arbitration Rules 143
2. Significance of Article 95 CISG 144
3. Article 1(1)(a) CISG as a Conflict-of-Laws Rule 145

IV. Formalities: The CISG versus International Arbitration 146
A. Conflict 146
B. Solution 148

V. Divergent Interpretations: National Courts and Arbitral Tribunals 149

VI. Specific Performance in International Arbitration 151

VII. Concluding Remarks 153

Lisa Spagnolo

I. Introduction 154

II. Characteristics of Hard and Soft Law 154
A. When Soft Is Not So Soft 159
B. When Hard Is Not So Hard 161

III. CISG in Adjudication as Hard and Soft Law 162
A. When the CISG Is Hard Law 162
B. When the CISG Is More Soft Than Hard 163
C. When the CISG Is More Hard Than Soft 164

IV. How CISG Article 6 Transforms Hard Law to Soft Law 165
A. Legal Effect of Exclusion 165
B. Operational and Practical Effect of Exclusion 166

V. When and Why the Quasi-Softness of the CISG Is Relevant 167

VI. Examples 169
A. Commodities and Majoritarianism 169
B. Good Faith and Precontractual Liability 172
C. Formation and Nonconformity 173

VII. Limitations of the Concept of the CISG as Soft Law 174

VIII. Conclusion 174

PART III: INTERPRETING THE CISG’S SUBSTANTIVE PROVISIONS

12 Contract Formation under the CISG: The Need for a Reform ................... 179
Morton M. Fogt

I. Introduction 179

II. Case Study: Hanwha Corporation v. Cedar Petrochemicals, Inc. 179
A. The CISG as a Dynamic Instrument of Unification 182
B. The CISG’s Principles of Contract Law 184
The CISG’s Traditional Contract Formation Regime 184
A. Contract Formation: The Offer 186
1. Common Intention to Be Bound by a Contract (animus contrahendi) 187
2. Criteria for Distinguishing the Elements of a Contract 187
3. CISG essentialia negotii 187
4. Nonformalistic Definition of Offer and Counteroffer 189
B. Realistic Concept of Acceptance 195
C. Validity: External Lagunae 196
IV. General Principles of Part II 197
A. Brief Legislative History of Part II 197
B. General Principles 199
V. Conclusion: Reforming CISG Part II 201

The CISG and the Battle of the Forms ............................. 203
Bruno Zeller
I. Introduction 203
II. Formation of Contracts 204
A. CISG Article 14 205
B. CISG Article 19 207
C. CISG Article 18 208
III. Battle of the Forms 210
A. Last-Shot Approach 210
B. Knock-Out Approach 211
IV. Conclusion 213

Conformity of Goods: Inspection and Notice .......................... 215
Harry M. Flechtner
I. Introduction 215
II. Conformity of Goods: CISG Article 35 215
III. Notice of Lack of Conformity: CISG Article 39 222
IV. Inspection of Goods: CISG Article 38 227
A. Relationship between Article 38 Inspection and Article 39 Notice 228
B. Purpose of Article 38 228
C. “Short a Period as Is Practicable” 229
V. Burden of Proof Governing Conformity of Goods and Notice of Lack of Conformity: A Systemic View 231
VI. Conclusion 236

Interpreting Fundamental Breach ................................. 237
Aneta Spaic
I. The CISG in Context 237
II. Establishment of Precedents in International Law 238
III. Fundamental Breach and Remedies under the CISG 241
A. Concept of the Fundamental Breach 241
PART IV: REMEDIES AND DAMAGES

16 Remedies: Damages, Price Reduction, Avoidance, Mitigation, and Preservation  ................................................................. 257
Ulrich Magnus

I. Introduction 257
II. Elements Common to All CISG Remedies 258
III. Damages 259
A. The Concept 260
B. Requirements 260
1. Breach of Obligation 260
2. Damages 260
3. Duties of the Creditor 261
C. Exemption from Liability 261
1. Impediment 261
2. Excuse Due to Third-Party Conduct 262
3. Hardship 262
4. Exemption from Damages 262
5. Period of Exemption and Notice 263
6. Limit of Damages under CISG Article 44 263
D. Calculation of Damages 263
1. Full Compensation 263
2. Causation and Foreseeability 264
3. Proof and Certainty 264
E. Problems 265
1. Unforeseeable Losses 265
2. Consequential Damages 265
3. Loss of Business 265
4. Wasted Expenditures 266
5. Currency Loss 266
## Table of Contents

| A. Case Law | 287 |
| B. Literature Review | 288 |
| III. Interpreting the CISG on Recovering Legal Costs | 290 |
| IV. Remarks | 294 |

### 18 Excuse of Impediment and Its Usefulness

**Martin Davies**

| I. Introduction | 295 |
| II. Impediment | 297 |
| III. Change of Circumstances and Tacit Assumptions | 299 |
| IV. Foreseeability versus “Taken into Account” | 302 |
| V. Conclusion | 305 |

### PART V: COUNTRY ANALYSES: EUROPE

#### 19 The CISG in Austria

**Wolfgang Faber**

| I. Introduction | 309 |
| II. Principle of Good Faith | 311 |
| III. Contract Formation | 311 |
| A. Sufficient Determination or Determinability | 312 |
| B. Incorporation of Standard Terms | 313 |
| C. Battle of the Forms | 315 |
| IV. Conformity of Goods: Inspection and Notice | 316 |
| A. CISG Articles 38 and 39 | 316 |
| B. Two-Year Time Limit under Article 39(2) | 320 |
| V. *Nachfrist* Notice | 321 |
| VI. Fundamental Breach | 321 |
| VII. Remedies, Damages, Mitigation, and Preservation | 322 |
| A. Price Reduction | 323 |
| B. Avoidance of the Contract | 324 |
| C. Damages | 325 |
| D. Mitigation of Loss | 328 |
| E. Preservation of Goods | 329 |
| VIII. Excuse in Case of Impediment | 329 |
| IX. Concluding Remarks | 330 |

#### 20 Baltic States, Belarus, and Ukraine

**Tadas Klimas**

| I. History of the CISG in the Baltic States | 331 |
| II. CISG Jurisprudence in the Baltic States | 333 |
| A. Contract Formation and Incorporating Standard Terms | 333 |
| B. Right to Cover versus Duty to Cover | 334 |
| C. No Latvian Cases | 334 |
| III. History of the CISG in Belarus and the Ukraine | 334 |
| IV. CISG Jurisprudence in Belarus and the Ukraine | 335 |
| V. Summary | 337 |
## 21 French Perspective of the CISG

**Sylvaine Poillot-Peruzzetto**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Introduction</td>
<td>338</td>
</tr>
<tr>
<td>II. Contract Formation</td>
<td>339</td>
</tr>
<tr>
<td>A. Intention of the Parties</td>
<td>339</td>
</tr>
<tr>
<td>1. Scope of the Intention Doctrine</td>
<td>339</td>
</tr>
<tr>
<td>2. Acceptance by Silence</td>
<td>341</td>
</tr>
<tr>
<td>B. Essential Terms of Contract</td>
<td>341</td>
</tr>
<tr>
<td>1. Price and Quantity</td>
<td>342</td>
</tr>
<tr>
<td>2. Battle of Forms: Strict Application of Article 19(1)</td>
<td>344</td>
</tr>
<tr>
<td>III. Performance and Breach of Contract</td>
<td>345</td>
</tr>
<tr>
<td>A. Fundamental Breach and Seller’s Duty to Deliver Conforming Goods</td>
<td>345</td>
</tr>
<tr>
<td>1. Definition of Fundamental Breach</td>
<td>345</td>
</tr>
<tr>
<td>2. CISG Nonconformity of Goods and French Law</td>
<td>346</td>
</tr>
<tr>
<td>3. CISG Article 40</td>
<td>347</td>
</tr>
<tr>
<td>4. Nachfrist Notice</td>
<td>348</td>
</tr>
<tr>
<td>5. Buyer’s Duties of Inspection and Notice</td>
<td>350</td>
</tr>
<tr>
<td>IV. Remedies</td>
<td>353</td>
</tr>
<tr>
<td>A. Damages</td>
<td>353</td>
</tr>
<tr>
<td>1. Foreseeability</td>
<td>353</td>
</tr>
<tr>
<td>2. Prevention of Loss: Price Reduction, Mitigation, and Preservation</td>
<td>355</td>
</tr>
<tr>
<td>B. Avoidance of Contract</td>
<td>356</td>
</tr>
<tr>
<td>1. Incomplete Understanding</td>
<td>356</td>
</tr>
<tr>
<td>2. Misapplication of CISG Article 79</td>
<td>359</td>
</tr>
<tr>
<td>V. Conclusion</td>
<td>360</td>
</tr>
</tbody>
</table>

## 22 German Country Analysis: Good Faith, Formation, and Conformity of Goods

**Stefan Kröll**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Introduction: History of the CISG in Germany</td>
<td>361</td>
</tr>
<tr>
<td>II. Principle of Good Faith</td>
<td>363</td>
</tr>
<tr>
<td>III. Contract Formation</td>
<td>365</td>
</tr>
<tr>
<td>A. Requirements for a Valid Offer</td>
<td>366</td>
</tr>
<tr>
<td>B. Acceptance</td>
<td>367</td>
</tr>
<tr>
<td>C. Standard Terms</td>
<td>368</td>
</tr>
<tr>
<td>IV. Battle of Forms</td>
<td>370</td>
</tr>
<tr>
<td>V. Conformity of Goods: Inspection and Notice</td>
<td>371</td>
</tr>
<tr>
<td>A. Conformity of the Goods</td>
<td>371</td>
</tr>
<tr>
<td>B. Examination and Notification Requirements</td>
<td>372</td>
</tr>
<tr>
<td>1. Specificity Requirement</td>
<td>373</td>
</tr>
<tr>
<td>2. “Within a Reasonable Time” Requirement</td>
<td>374</td>
</tr>
<tr>
<td>3. Waiver of the Right to Rely on the Belatedness of Notice</td>
<td>375</td>
</tr>
<tr>
<td>4. Exclusions in Articles 40 and 44</td>
<td>376</td>
</tr>
<tr>
<td>VI. Conclusion</td>
<td>376</td>
</tr>
</tbody>
</table>
Contents

23  German Country Analysis: Part II ........................... 377
    Sören Kiene
    I. History of the CISG in Germany 377
    II. Price Reduction Remedy 378
        A. Declaration of Price Reduction 379
        B. Calculation of Reduction Amount 379
        C. Exclusion 380
        D. Relationship to Other Remedies 380
    III. Avoidance 381
        A. Right of Avoidance in Cases of Fundamental Breach
           (Non-delivery and Non-payment) 381
        B. Fixing an Additional Period of Time 383
           1. Determination of Additional Period and Request for
              Performance 383
           2. Reasonable Length of Time Extension 384
        C. Right of Avoidance: Delivery of Nonconforming Goods 385
        D. Right of Avoidance for Other Types of Breaches 387
        E. Declaration of Avoidance 388
           1. Time Period 388
           2. Exclusion of Avoidance 390
           3. Legal Consequences 390
    IV. Damages 391
    V. Interest 393
    VI. Mitigation and Preservation 394
    VII. Excuse (Impediment) 395
    VIII. Concluding Remarks 396

24  Italy .......................................................... 399
    Edoardo Ferrante
    I. Introduction: Issues of Methodology 399
    II. Sources of International Sales Law 401
    III. Problem of Scarcity 404
    IV. Toward Supranational Stare Decisis? 405
    V. Interpreting the CISG 407
        A. Good Faith and the Prohibition of Venire Contra
           Factum 407
        B. Formation of Contract and Battle of the Forms 408
        C. Notice of Lack of Conformity 410
    VI. Concluding Remarks 412

25  The Nordic Countries ....................................... 414
    Jan Ramberg
    I. Introduction: Article 92 and the Nordic Countries 414
    II. Nonconformity and Notice of Nonconformity 415
        A. Duty to Inspect and Notice of Nonconformity 415
        B. Timely Notice of Nonconformity 416
C. Prescription Period: Notice of Nonconformity 417

III. Avoidance and Fundamental Breach 417

26 The CISG in Southeastern Europe .................................................. 419
   Milena Djordjević and Vladimir Pavić
   I. Introduction 419
   II. Interpretation of the CISG and Contracts 420
      A. Autonomous Interpretation 420
      B. Uniformity of Application 422
      C. Good Faith 424
      D. Gap Filling 425
      E. Interpretation of the Parties’ Statements and Conduct 428
      F. Role of Usages and Business Practices 429
   III. Formation and Modification of Contracts 430
   IV. Nonconformity of Goods 432
      A. Concept of Nonconformity 432
      B. Notice of Nonconformity 433
         1. Form of Notice 433
         2. Content of Notice 434
         3. Timeliness of Notice 435
         4. Seller’s Knowledge of Nonconformity 437
   V. Remedies 438
      A. Avoidance 438
         1. Basis of Avoidance 438
         2. Declaration of Avoidance 441
         3. Effects of Avoidance 442
      B. Damages 443
         1. Types of Recoverable Loss 444
         2. Proof of Loss 445
         3. Foreseeability Requirement 446
         4. Damages on the Basis of Substitute Transaction 447
         5. Mitigation 448
         6. Exemption from Liability to Pay Damages 448
         7. Liquidated Damages 449
   VI. Preservation of Goods 451
   VII. Conclusion 451

27 Spain ................................................................. 453
   Pilar Perales Viscasillas and Javier Solana Álvarez
   I. Introduction 453
   II. Principle of Good Faith 454
   III. Contract Formation 455
   IV. Conformity of Goods: Inspection and Notice 455
   V. Avoidance 460
   VI. Remedies: Price Reduction and Damages 462
      A. Awarding Damages 462
      B. Enforceability of Penalty Clauses 463
## Contents

C. Interest Damages 464  
VII. Substitute Transactions 464  
VIII. Mitigation and Preservation 465  

28 Switzerland .......................... 466  
Corinne Widmer Lüchinger  
I. History of the CISG in Switzerland 466  
II. Principle of Good Faith 468  
III. Contract Formation 470  
   A. Commercial Letters of Confirmation 471  
   B. Battle of the Forms 472  
IV. Conformity of Goods: Inspection and Notice 473  
   A. Lack of Conformity 473  
   B. “Reasonable” Period of Time 474  
   C. Requirements as to Specificity 475  
   D. CISG Article 39(2) and the Statute of Limitations 476  
V. Fundamental Breach and Nachfrist Notice 477  
   A. Delivery of Nonconforming Goods 477  
   B. Failure to Deliver Goods in a Timely Manner 478  
VI. Remedies: Price Reduction, Damages, and Avoidance 478  
   A. Price Reduction 478  
   B. Damages 479  
   C. Avoidance 481  
      1. Timely Declaration of Avoidance 481  
      2. Requirements of Declaration of Avoidance 481  
VII. Mitigation and Preservation 482  
   A. Mitigation 482  
   B. Preservation 483  
VIII. Excuse (Impediment) 483  
IX. Summary 484  

29 The Netherlands .......................... 486  
Sonja A. Kruisinga  
I. Introduction 486  
II. History of the CISG in The Netherlands 487  
III. Application of the CISG in The Netherlands 487  
   A. Uniform Application of the CISG 488  
   B. Scope of Application of the CISG 488  
   C. Excluding the CISG 488  
IV. Contract Formation and Standard Terms 489  
   A. Duty to Transmit Conditions 491  
   B. Standard Terms in Long-Term Relationships 493  
   C. Standard Terms and Choice of Law Clause 494  
V. Conformity of the Goods 494  
   A. Concurrent Claims 495  
   B. Notification and Time Limits 496  
VI. Place of Delivery and Brussels I 497
## Contents

<table>
<thead>
<tr>
<th>Part</th>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>VII.</td>
<td>Avoidance</td>
<td>498</td>
</tr>
<tr>
<td>VIII.</td>
<td>Interest and the Right to Suspend Performance</td>
<td>498</td>
</tr>
<tr>
<td>IX.</td>
<td>Exemptions</td>
<td>499</td>
</tr>
<tr>
<td>X.</td>
<td>Future of the CISG in The Netherlands</td>
<td>499</td>
</tr>
<tr>
<td>XI.</td>
<td>Conclusion</td>
<td>500</td>
</tr>
</tbody>
</table>

### PART VI: A WORLD VIEW OF THE CISG

#### 30 The CISG in Islamic Countries: The Case of Egypt

**Hossam A. El-Saghir**

I. Introduction 505

II. Overview of Islamic Law 506

A. Sources of Islamic Law 506
   1. Primary Sources 506
   2. Secondary Sources 506

B. Contracts under Islamic Law 507

C. Prohibition of Riba or Usury in Islamic Law 507

D. Influence of Islamic Law (Shari’a) in the Egyptian Legal System 508

III. Achieving Uniformity: Autonomous Interpretation of the CISG 509

IV. Obstacles to the Uniform Application of the CISG in the Arab World 510

A. Official Texts of the CISG: Errors in the Arabic Version 511

V. Implementation of CISG Article 78 in Egypt 512

VI. Influence of National Laws in Arab Countries on the Interpretation of the CISG 513

VII. Scholarly Writings 515

A. Good Faith 515

B. Barter Contracts 516

VIII. Influence of the CISG on Egyptian Law 516

IX. Conclusion 517

#### 31 Israel

**Yehuda Adar**

I. Introduction 518

II. Scope of Application: Expansion of CISG Jurisdiction 519

III. Concurrent Grounds of Liability 519

IV. Principle of Good Faith 523

A. Good Faith in Israeli Law 524

B. Good Faith in International Trade: Eximin Case and the Birth of Comparative Negligence in Israeli Contract Law 525

C. Interrelationship of International Sales Law and Domestic Law: *Eximin* as a Test Case 528

V. Contract Formation 530

VI. Conformity of Goods: Inspection and Notice 532

A. Inspection and Notice Requirements: Scope and Content 533

B. Seller’s Power to Bar Buyer’s Claim: Nature and Limits 535

VII. Conclusion 538
## Contents

<table>
<thead>
<tr>
<th>32</th>
<th>New Zealand ......................................................... 539</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>Petra Butler</em></td>
</tr>
<tr>
<td></td>
<td>I. Introduction 539</td>
</tr>
<tr>
<td></td>
<td>II. The CISG’s Impact on Practicing Lawyers, Legal Scholars,</td>
</tr>
<tr>
<td></td>
<td>and Legislators 540</td>
</tr>
<tr>
<td></td>
<td>III. Review of New Zealand Case Law Relating to the CISG</td>
</tr>
<tr>
<td></td>
<td>A. Analogical Use of the CISG 541</td>
</tr>
<tr>
<td></td>
<td>B. <em>RJ &amp; AM Smallmon v. Transport Sales Limited</em> 544</td>
</tr>
<tr>
<td></td>
<td>IV. Conclusion 546</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>33</th>
<th>People’s Republic of China ....................................... 548</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>Li Wei</em></td>
</tr>
<tr>
<td></td>
<td>I. Introduction 548</td>
</tr>
<tr>
<td></td>
<td>II. History of China’s Economic Transition and the CISG</td>
</tr>
<tr>
<td></td>
<td>III. China’s Contract Law and the CISG 550</td>
</tr>
<tr>
<td></td>
<td>IV. Applying the CISG in China 553</td>
</tr>
<tr>
<td></td>
<td>V. Case Study: <em>Indian Iron Sand Case</em> 557</td>
</tr>
<tr>
<td></td>
<td>A. Application of Law 557</td>
</tr>
<tr>
<td></td>
<td>B. Damages 558</td>
</tr>
<tr>
<td></td>
<td>C. Discussion 558</td>
</tr>
<tr>
<td></td>
<td>VI. Conclusion 560</td>
</tr>
<tr>
<td></td>
<td>Appendix. Comparative Analysis: The CISG and CCL 561</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>34</th>
<th>The United States and Canada ...................................... 562</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>Robert W. Emerson and Ann M. Olazábal</em></td>
</tr>
<tr>
<td></td>
<td>I. Analysis of the CISG: American and Canadian Case Law 563</td>
</tr>
<tr>
<td></td>
<td>A. Contract Formation 563</td>
</tr>
<tr>
<td></td>
<td>B. Battle of the Forms 564</td>
</tr>
<tr>
<td></td>
<td>C. Notice of Nonconformity Requirements 566</td>
</tr>
<tr>
<td></td>
<td>D. Conformity of Goods 567</td>
</tr>
<tr>
<td></td>
<td>1. Canada 568</td>
</tr>
<tr>
<td></td>
<td>2. United States 569</td>
</tr>
<tr>
<td></td>
<td>E. Nachfrist Notice 571</td>
</tr>
<tr>
<td></td>
<td>F. Fundamental Breach 572</td>
</tr>
<tr>
<td></td>
<td>1. Canada 572</td>
</tr>
<tr>
<td></td>
<td>2. United States 573</td>
</tr>
<tr>
<td></td>
<td>G. Price Reduction Remedy 574</td>
</tr>
<tr>
<td></td>
<td>H. Remedies: Avoidance and Damages 574</td>
</tr>
<tr>
<td></td>
<td>I. Mitigation 577</td>
</tr>
<tr>
<td></td>
<td>J. Excuse (Impediment) 578</td>
</tr>
<tr>
<td></td>
<td>II. Summary 578</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>35</th>
<th>Central and South America ......................................... 580</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>Virginia G. Maurer</em></td>
</tr>
<tr>
<td></td>
<td>I. Introduction 580</td>
</tr>
<tr>
<td></td>
<td>II. Argentina 580</td>
</tr>
<tr>
<td></td>
<td>A. Contract Formation 581</td>
</tr>
<tr>
<td></td>
<td>B. Conformity of Goods: Inspection and Notice 582</td>
</tr>
</tbody>
</table>
C. Cases Involving Other CISG Articles 582

III. Brazil, Chile, and Colombia 583

IV. Mexico 584
   A. Principle of Good Faith 585
   B. Contract Formation 585
   C. Conformity of Goods: Inspection and Notice 586
   D. Cases Involving Other CISG Articles 587

36 The CISG across National Legal Systems 588
   Larry A. DiMatteo
   I. Introduction 588
   II. Problem of Scarcity 588
   III. Problem of National Law Bias 589
      A. Persistence of Homeward Trend Bias 589
      B. Parallel Citation Approach 590
   IV. Unevenness and Convergence of Jurisprudence 591
      A. Principle of Good Faith versus Duty of Good Faith 591
      B. Contract Formation and Contract Modification 593
      C. Incorporation of Standard Terms 594
      D. Conformity, Inspection, and Notice of Nonconformity 595
      E. Fundamental Breach 596
      F. Nachfrist Notice 597
      G. Price Reduction Remedy 597
      H. Payment of Interest 598
      I. Surprises 598
   V. Influence of German Courts 599
      A. Quantity and Quality 599
      B. The CISG as a European Code? 600
   VI. Influence of the CISG 601
      A. Generational Lag 601
      B. Vehicle for Harmonization of National Laws 601

PART VII: THEORETICAL INSIGHTS

37 Problems of Uniform Laws 605
   Jan M. Smits
   I. Introduction 605
   II. Problematic Relationship between Cross-Border Trade and Uniform Laws 606
   III. Problems with the CISG 607
      A. Uniform Application of the CISG by Courts 607
      B. Exclusion by Contracting Parties 609
      C. Incompleteness of the CISG 609
      D. Background Problem: The CISG Is Not a “Jurisdiction” 610
   IV. Conclusion 611

38 The CISG as Bridge between Common and Civil Law 612
   Sieg Eiselen
   I. Introduction 612
## Contents

II. Common Law–Civil Law Divide 613  
A. Characteristics of the Common Law 614  
B. Characteristics of the Civil Law 616  
1. Romanistic Legal Family 616  
2. Germanic Legal Family 617  
C. Characteristics of the Common and Civil Laws of Contract 619  
1. Codification 619  
2. Freedom of Contract 620  
3. Principle of Good Faith 620  
4. Interpretation of Contracts and Parol Evidence 621  
5. Consideration and the Binding Force of Offers 622  
6. Specific Performance and Damages 623  

III. The CISG as Bridge 623  
A. Freedom of Contract and Party Autonomy 624  
B. Principle of Good Faith 624  
C. Parol Evidence 625  
D. Consideration and Binding Force of Offers 626  
E. Specific Performance 627  
F. Reliance on Foreign Case Law and Scholarly Literature 628  

IV. Conclusion 628  

39 Precontractual Liability and Preliminary Agreements 630  
Marco Torsello  

I. Introduction 630  
II. Review of Domestic Laws on Precontractual Liability 631  
III. Cross-Border Negotiations, the Concurrence of Domestic Laws, and the CISG on Precontractual Liability 635  
IV. Assessing Precontractual Liability: Contents and Purposes of Preliminary Agreements 639  
V. Closing Remarks 646  

PART VIII: PRACTITIONER’S PERSPECTIVE  

40 Empirical Evidence of Courts’ and Counsels’ Approach to the CISG  
(with Some Remarks on Professional Liability) 649  
Ulrich G. Schroeter  

I. Introduction 649  
II. Empirical Evidence on the Use of the CISG 650  
A. The CISG in Practice: Existing Surveys 650  
B. Courts’ Approach to the CISG 651  
1. Empirical Evidence 651  
2. Anecdotal Evidence 652  
3. Evidence Explained 655  
C. Sellers, Buyers, and the CISG 659  
1. Empirical Evidence 659  
2. Evidence Explained 660  
D. Counsels’ Approach to the CISG 661  
1. Empirical Evidence 661  
2. Evidence Explained 663
## Contents

III. Professional Liability 663  
   A. Ignoring the CISG 664  
   B. The CISG as Domestic (Not Foreign) Law 664  
   C. Exclusion of the CISG as Professional Malpractice 665  
   D. Failure to Plead Foreign Persuasive Precedents as Professional Malpractice 666  

IV. Conclusion 667  

### 41 The CISG and English Sales Law: An Unfair Competition 669

Qi Zhou  
I. Introduction 669  
II. Histories of English Sales Law and the CISG 670  
III. Problem of Fragmentary Law 673  
IV. Ambiguities in the CISG 675  
V. Divergent Legal Interpretations 678  
VI. Suggestions for Future Reform 680  

### 42 The CISG in Context of Complementary Texts 683

Luca G. Castellani  
I. The CISG as a Work in Progress 683  
II. Reconsideration of CISG Declarations 684  
IV. Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance 688  
V. UN Convention on the Use of Electronic Communications in International Contracts 689  

### 43 Soft Laws as Models for the Improvement of the CISG 694

Ole Lando  
I. Good Faith 694  
II. Usages 695  
III. Price Term 696  
IV. Revocation of Offer 696  
V. Battle of the Forms 697  
VI. Written Confirmation 697  
VII. Specific Performance 698  
VIII. Specific Performance and Force Majeure 698  
IX. Hardship 699  
X. Assurance of Performance 701  
XI. Remoteness of Damages 702  
XII. Interest 702  
XIII. Proposal for a Common European Sales Law 702  

© in this web service Cambridge University Press
www.cambridge.org
## Contents

### 44 Using the CISG Proactively

*Helena Haapio*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Introduction</td>
<td>704</td>
</tr>
<tr>
<td>II. Proactive Law Approach</td>
<td>705</td>
</tr>
<tr>
<td>A. Proactive Law Movement</td>
<td>706</td>
</tr>
<tr>
<td>B. Opinion of the European Economic and Social Committee on Proactive Law</td>
<td>708</td>
</tr>
<tr>
<td>III. Proactive Approach: Application</td>
<td>710</td>
</tr>
<tr>
<td>A. The Contract Puzzle: It Takes a Team!</td>
<td>710</td>
</tr>
<tr>
<td>B. Invisible Terms and the CISG</td>
<td>712</td>
</tr>
<tr>
<td>C. Improving CISG Awareness</td>
<td>713</td>
</tr>
<tr>
<td>IV. Action Plan: Learning from Experience</td>
<td>714</td>
</tr>
<tr>
<td>A. Learning from Case Law</td>
<td>714</td>
</tr>
<tr>
<td>B. Learning from Top Negotiated Terms and Frequent Sources of Disputes</td>
<td>715</td>
</tr>
<tr>
<td>V. Visualization: Increasing Traders’ Awareness</td>
<td>718</td>
</tr>
<tr>
<td>VI. Making the CISG Work</td>
<td>724</td>
</tr>
</tbody>
</table>

### 45 Future Challenges of International Sales Law

*Larry A. DiMatteo*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. A Brief Look at the Past</td>
<td>725</td>
</tr>
<tr>
<td>II. The CISG in the Present</td>
<td>726</td>
</tr>
<tr>
<td>A. CISG Jurisprudence</td>
<td>726</td>
</tr>
<tr>
<td>B. Interpreting and the Interpretation of the CISG</td>
<td>727</td>
</tr>
<tr>
<td>C. Country Analyses</td>
<td>729</td>
</tr>
<tr>
<td>III. Future of the CISG</td>
<td>730</td>
</tr>
<tr>
<td>IV. Marketplace for Transborder Commercial Law</td>
<td>731</td>
</tr>
</tbody>
</table>

Index

733