

# **IMPORT – EXPORT**

## **International sale of goods and arbitration in Europe**



### **Part A : Cross border litigation – CISG - Softlaw**

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## **Structure of the presentation**

- **Introduction to cross border business + litigation (I.)**
- **UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 – CISG (II.)**
- **Soft law in international practice (III.)**

# **I. Introduction to cross border business**

- **European regulation on Jurisdiction (Brussels I bis regulation)**
- **European regulation on applicable law (Rome I & II regulations)**

# I. Introduction to cross border business

- **European regulation on Jurisdiction (Brussels I bis regulation)**
  - Regulation (EC) No 1215/2012 of the European Parliament and the Council of December 12, 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters
- **Ratione temporis:**
  - Shall apply to legal proceedings initiated after January 10, 2015
- **Ratione materiae:**
  - Updates the previous EU regulation “Brussels I” on the jurisdiction, the recognition and enforcement of judgements in civil and commercial matters in order to ease and improve the circulation of judgements regarding civil and commercial cases.

# I. Introduction to cross border business

- **European regulation on Jurisdiction (Brussels I bis regulation)**
  - Key elements
    - Regulation does not apply to family law, bankruptcy, inheritance questions and other specific matters
    - Amendments to the previous Regulation Brussels I:
      - Extension of the scope: residence of the parties becomes inoperative
      - Consecration of the principle of the autonomy of the clause conferring jurisdiction (vs. arbitration clause)
      - The exequatur procedure is abolished

# I. Introduction to cross border business

- **European regulation on Jurisdiction (Brussels I bis regulation)**

- Structure

- CHAPTER I - SCOPE AND DEFINITIONS (arts. 1-3)

- Article 1
- Article 2
- Article 3

- CHAPTER II - JURISDICTION (arts. 4 to 35)

- Section 1 - General provisions (arts. 4 to 6)
- Section 2 - Special Jurisdiction (Clauses 7 to 9)
- Section 3 - Jurisdiction in insurance matters (arts. 10 to 16)
- Section 4 - Jurisdiction over consumer contracts (arts. 17-19)
- Section 5 - Jurisdiction over individual employment contracts (arts. 20 to 23)

# I. Introduction to cross border business

- **European regulation on Jurisdiction (Brussels I bis regulation)**

- Structure

- Section 6 - Exclusive jurisdiction (art. 24)
- Section 7 - Extension of jurisdiction (arts. 25 to 26)
- Section 8 - Examination as to jurisdiction and admissibility (arts. 27-28)
- Section 9 - Lis pendens and related actions (arts. 29 to 34)
- Section 10 - Provisional and protective measures (art. 35)
- CHAPTER III - RECOGNITION AND PERFORMANCE (arts. 36-57)
  - Section 1 - Recognition (arts. 36 to 38)
  - Section 2 - Enforcement (arts. 39 to 44)
  - Section 3 - Refusal of recognition and enforcement (arts. 45 to 51)
  - Section 4 - Common provisions (arts. 52 to 57)

# I. Introduction to cross border business

- **European regulation on Jurisdiction (Brussels I bis regulation)**
  - Structure
    - CHAPTER IV - AUTHENTIC ACTS AND JUDICIAL TRANSACTIONS (arts. 58-60)
    - CHAPTER V - GENERAL PROVISIONS (arts. 61 to 65)
    - CHAPTER VI - TRANSITIONAL PROVISIONS (art. 66)
    - CHAPTER VII - RELATIONS WITH OTHER INSTRUMENTS (arts. 67-73)



# I. Introduction to cross border business

- **European regulation on Jurisdiction (Brussels I bis regulation)**
- General provisions : Residence of the parties

## **Art. 4 § 1 Brussels I bis Regulation**

*“1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”*

# I. Introduction to cross border business

- **European regulation on Jurisdiction (Brussels I bis regulation)**
  - Specific jurisdiction : contractual matters

## **Art. 7 § 1 Brussels I bis Regulation**

*“A person domiciled in a Member State may be sued in another Member State:*

- (1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;*
- (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:*
- *in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,*
  - *in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;*
- (c) if point (b) does not apply then point (a) applies;”*

# I. Introduction to cross border business

- **European regulation on Jurisdiction (Brussels I bis regulation)**
- Specific jurisdiction : matters relating to tort, delict or quasi-delict

## **Art. 7 § 2 Brussels I bis Regulation**

*“(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;”*

# I. Introduction to cross border business

- **European regulation on Jurisdiction (Brussels I bis regulation)**
  - Specific jurisdiction : agreement conferring jurisdiction

## **Art. 25 Brussels I bis Regulation**

- “1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:*
- (a) in writing or evidenced in writing;*
  - (b) in a form which accords with practices which the parties have established between themselves; or*
  - (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned. ...*

# I. Introduction to cross border business

- **European regulation on Jurisdiction (Brussels I bis regulation)**
  - Specific jurisdiction : agreement conferring jurisdiction

## **Art. 25 Brussels I bis Regulation**

- “...2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to ‘writing’.*
- 3. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved.*
- 4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.*
- 5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.*
- The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.”*

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
    - **Ratione temporis:**
      - shall apply to contracts concluded after 17 December 2009 (Article 28)
    - **Ratione materiae:**
      - shall apply to contractual obligations in civil and commercial matters arising within the context of international situations

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
    - Scope of the Regulation excludes obligations relating to
      - the status and legal capacity of natural persons
      - family relationships
      - matrimonial property regimes
      - negotiable instruments such as bills of exchange, cheques and promissory notes
      - arbitration and choice of court

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
    - Scope of the Regulation excludes obligations relating to
      - the law applicable to companies and other associations or legal entities
      - the commitment of a person or company towards a third party
      - the formation of trusts
      - negotiations prior to the conclusion of a contract
      - insurance contracts, with the exception of those referred to in Article 2 of Directive 2002/83/EC with respect to direct life assurance



# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
  - **Structure**
    - **CHAPTER I - SCOPE OF APPLICATION**
      - Article 1 Material scope of application
      - Article 2 Universal nature
    - **CHAPTER II - UNIFORM RULES**
      - Article 3 Freedom of choice
      - Article 4 Applicable law in the absence of choice
      - Article 5 Contracts of carriage
      - Article 6 Consumer contracts
      - Article 7 Insurance contracts
      - Article 8 Individual employment contracts

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
    - **Structure**
      - Article 9 Police laws
      - Article 10 Consent and substantive validity
      - Article 11 Formal validity
      - Article 12 Scope of the law of the contract
      - Article 13 Incapacity
      - Article 14 Assignment of receivables and contractual subrogation
      - Article 15 Legal subrogation
      - Article 16 Multiple debtors
      - Article 17 Legal compensation
      - Article 18 Burden of proof

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
  - **Structure**
    - **CHAPTER III - OTHER PROVISIONS**
      - Article 19 Habitual residence
      - Article 20 Exclusion of referral
      - Article 21 Public policy of the jurisdiction
      - Article 22 Non-unified systems
      - Article 23 Relationship with other provisions of European law
      - Article 24 Relationship with the Rome Convention
      - Article 25 Relationship with existing international conventions
      - Article 26 List of conventions
      - Article 27 Review clause
      - Article 28 Application over time

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
  - Material and spatial scope of application

## **Art. 1 Rome I Regulation**

- “1. This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.  
It shall not apply, in particular, to revenue, customs or administrative matters.*
- 2. The following shall be excluded from the scope of this Regulation:*
- (a) questions involving the status or legal capacity of natural persons, without prejudice to Article 13;*
  - (b) obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations; ...*

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
    - **Material and spatial scope of application**

## Art. 1 Rome I Regulation

- “(c) obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;*
- (d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;*
- (e) arbitration agreements and agreements on the choice of court;*
- (f) questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body; ...*

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
  - Material and spatial scope of application

## Art. 1 Rome I Regulation

- “... (g) the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party;*
- (h) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;*
- (i) obligations arising out of dealings prior to the conclusion of a contract;*
- (j) insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (1) the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work....*

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
  - Material and spatial scope of application

## Art. 1 Rome I Regulation

- “...3. This Regulation shall not apply to evidence and procedure, without prejudice to Article 18.*
- 4. In this Regulation, the term ‘Member State’ shall mean Member States to which this Regulation applies. However, in Article 3(4) and Article 7 the term shall mean all the Member States.”*

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
  - Universal application

## **Art. 2 Rome I Regulation**

*“Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.”*



# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
  - Freedom of choice

## Art. 3 Rome I Regulation

- “1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.*
- 2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties. ...*

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
  - Freedom of choice

## Art. 3 Rome I Regulation

- “3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.*
- 4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.*
- 5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.”*

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
  - Applicable law in the absence of a choice

## **Art. 4 Rome I Regulation**

- “1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:*
- (a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;*
  - (b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;*
  - (c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated; ...*

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
  - Applicable law in the absence of a choice

## Art. 4 Rome I Regulation

- “...(d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;*
- (e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;*
  - (f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;*
  - (g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined; ...*

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
- Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
  - Applicable law in the absence of a choice

## Art. 4 Rome I Regulation

- “... (h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretion-ary rules and governed by a single law, shall be governed by that law.*
- 2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. ...*

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
- Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
  - Applicable law in the absence of a choice

## Art. 4 Rome I Regulation

- “... 3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.*
- 4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.”*

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
- Police laws

## Art. 9 Rome I Regulation

- “1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.*
- 2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.*
- 3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful...*

## I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
  - Police laws

### **Art. 9 Rome I Regulation**

*“...In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.”*



# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
- Examples of "police laws"
  - French Law
    - Sudden termination of business relations (art. 442-6-I, 5° C.com)
    - Direct action in the field of subcontracting (L. 31 Dec. 1975 - art. 9)
  - Foreign legislation
    - Belgian law: Exclusive concession law of 1963
    - German law: no police laws in the field of civil and commercial law

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
    - Protective provisions of the weaker party
      - Consumer (art. 6)
      - Insured party (art. 7)
      - Employee (art. 8)

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 593/2008 of the European Parliament and the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)
    - Protective provisions of the weaker party
      - Consumer (art. 6)
      - Insured party (art. 7)
      - Employee (art. 8)

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 864/2007 of the European Parliament and the Council of July 11, 2007 on the law applicable to non-contractual obligations (Rome II)
    - **Ratione temporis:**
      - shall apply to non-contractual obligations arisen after January 11, 2009 (except for Article 29 which became applicable as of July 11, 2008)
    - **Ratione materiae:**
      - shall apply to non-contractual obligations arising within the context of international situations

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 864/2007 of the European Parliament and the Council of July 11, 2007 on the law applicable to non-contractual obligations (Rome II)
    - Key elements
      - Designation of the law applicable with respect to non-contractual obligations, in particular in cases of tort (a wrong under civil law) and delict (civil liability);
      - Balance between the interests of the person claimed to be liable and those of the person who has suffered damage;
      - The regulation does not replace national substantive laws (i.e. laws determining the rights and obligations) on non-contractual obligations but only determines which substantive law applies.

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 864/2007 of the European Parliament and the Council of July 11, 2007 on the law applicable to non-contractual obligations (Rome II)
    - Law applicable to a non-contractual obligation arising out of a tort/delict
      - the law of the country where the damage occurs; or
      - The law of the country where both the parties were primarily living or had their main place of business when the damage occurred; or
      - If the case is more closely connected with the law of another country, the law of that country.
      - In some cases, the regulation allows the parties to choose, by mutual agreement, which law applies.

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 864/2007 of the European Parliament and the Council of July 11, 2007 on the law applicable to non-contractual obligations (Rome II)
    - Scope of the applicable law
      - The applicable law to non-contractual obligations governs in particular:
        - Basis and extent of liability, including determining who may be held liable;
        - Grounds for exemption from liability and the limitation or division of liability;
        - Existence, nature and assessment of damage and the remedy claimed;
        - Measures the court may take to prevent or terminate injury or damage and ensure compensation;

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 864/2007 of the European Parliament and the Council of July 11, 2007 on the law applicable to non-contractual obligations (Rome II)
    - Scope of the applicable law
      - The applicable law to non-contractual obligations governs in particular:
        - Manner in which an obligation may be extinguished and the rules relating to prescription or limitation;
        - Transfer of the right to compensation;
        - Persons entitled to compensation for damage they have sustained;
        - Liability for the acts of another person.



# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 864/2007 of the European Parliament and the Council of July 11, 2007 on the law applicable to non-contractual obligations (Rome II)
    - Scope of the applicable law
      - Specific rules are applicable to certain non-contractual obligations (in example : product liability, intellectual property, etc.)
      - Certain non-contractual obligations are excluded from the scope of the regulation, in particular:
        - Revenue, customs and administrative matters;
        - State liability;
        - Specific non-contractual obligations such as: matrimonial property regimes and family relationships, nuclear damage or violations of privacy and rights relating to personality.

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**

- Regulation (EC) No 864/2007 of the European Parliament and the Council of July 11, 2007 on the law applicable to non-contractual obligations (Rome II)

➤ Structure

- CHAPTER I - SCOPE OF APPLICATION
  - Article 1 - Scope of application
  - Article 2 - Non-contractual obligations
  - Article 3 - Universal nature
- CHAPTER II - DAMAGE (arts. 4 to 9)
  - Article 4 - General rule
  - Article 5 - Product liability
  - Article 6 - Unfair competition and acts restricting free competition
  - Article 7 - Environmental damage

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**

- Regulation (EC) No 864/2007 of the European Parliament and the Council of July 11, 2007 on the law applicable to non-contractual obligations (Rome II)

➤ **Structure**

- **CHAPTER II - DAMAGE (arts. 4 to 9)**
  - Article 8 - Infringement of intellectual property rights
  - Article 9 - Liability for strike or lockout
- **CHAPTER III - UNJUSTIFIED ENRICHMENT, BUSINESS MANAGEMENT AND "CULPA IN CONTRAHENDO" (arts. 10 to 13)**
  - Article 10 - Unjust enrichment
  - Article 11 - Business management
  - Article 12 - "Culpa in contrahendo"
  - Article 13 - Applicability of Article 8

# I. Introduction to cross border business

- **European regulation on applicable law (Rome I and II regulations)**
  - Regulation (EC) No 864/2007 of the European Parliament and the Council of July 11, 2007 on the law applicable to non-contractual obligations (Rome II)
    - **Structure**
      - CHAPTER IV - FREEDOM OF CHOICE (art. 14)
        - Article 14 - Freedom of choice
      - CHAPTER V - COMMON RULES (arts. 15 to 22)
      - CHAPTER VI - OTHER PROVISIONS (arts. 23 to 28)
      - CHAPTER VII - FINAL PROVISIONS (arts. 29 to 32)

## **II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)**

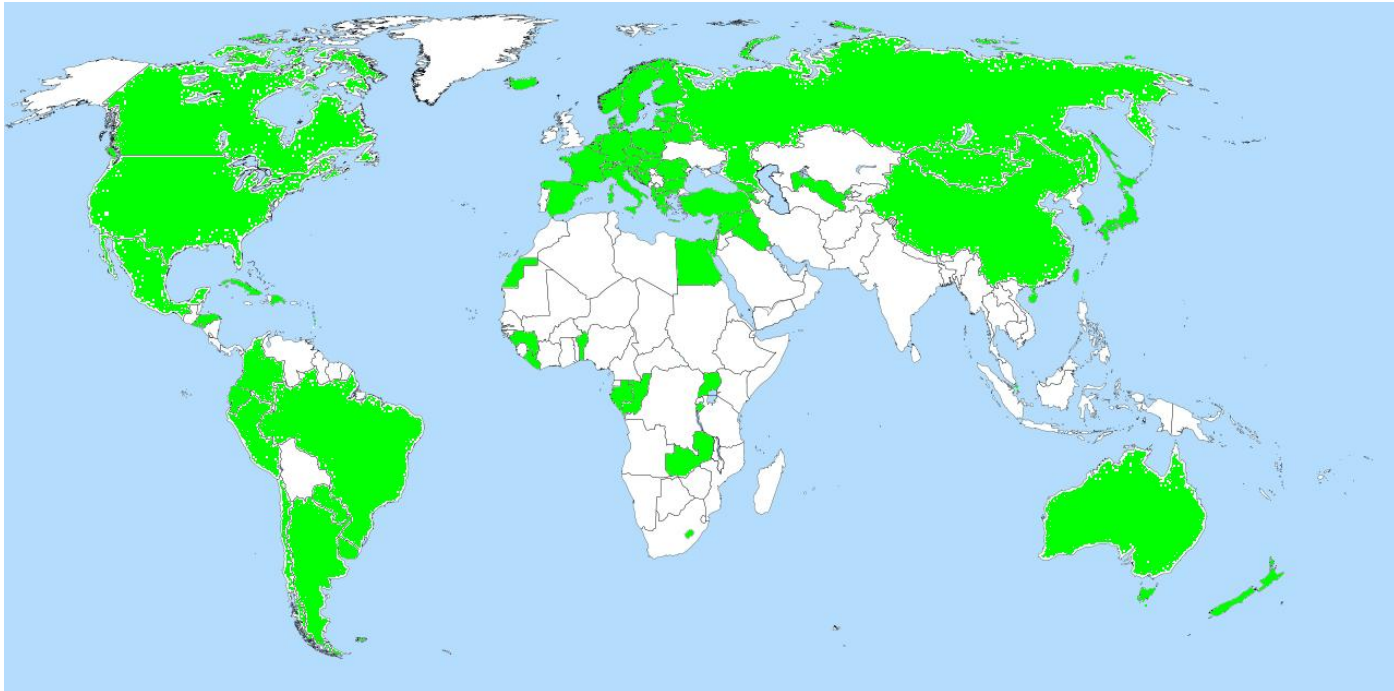
- CISG's role in cross boarder sales contracts
- Scope of application and general provisions
- Interpretation of CISG
- Negotiation and conclusion of the International contract
- Practical aspects of CISG

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **CISG's role in cross boarder sales contracts**
  - Economic role
    - more than 80 contracting States worldwide
    - direct application provided that legal conditions are met
    - applicable to all export contracts of European (besides: UK and P) companies
    - also applicable to most import contracts:
      - If the contracting partner is a resident of a Contracting State of the CISG
      - If the law of a Contact State is applicable to the contract under the DIP rules
    - exception: exclusion (express or implied) by the parties (art. 6)

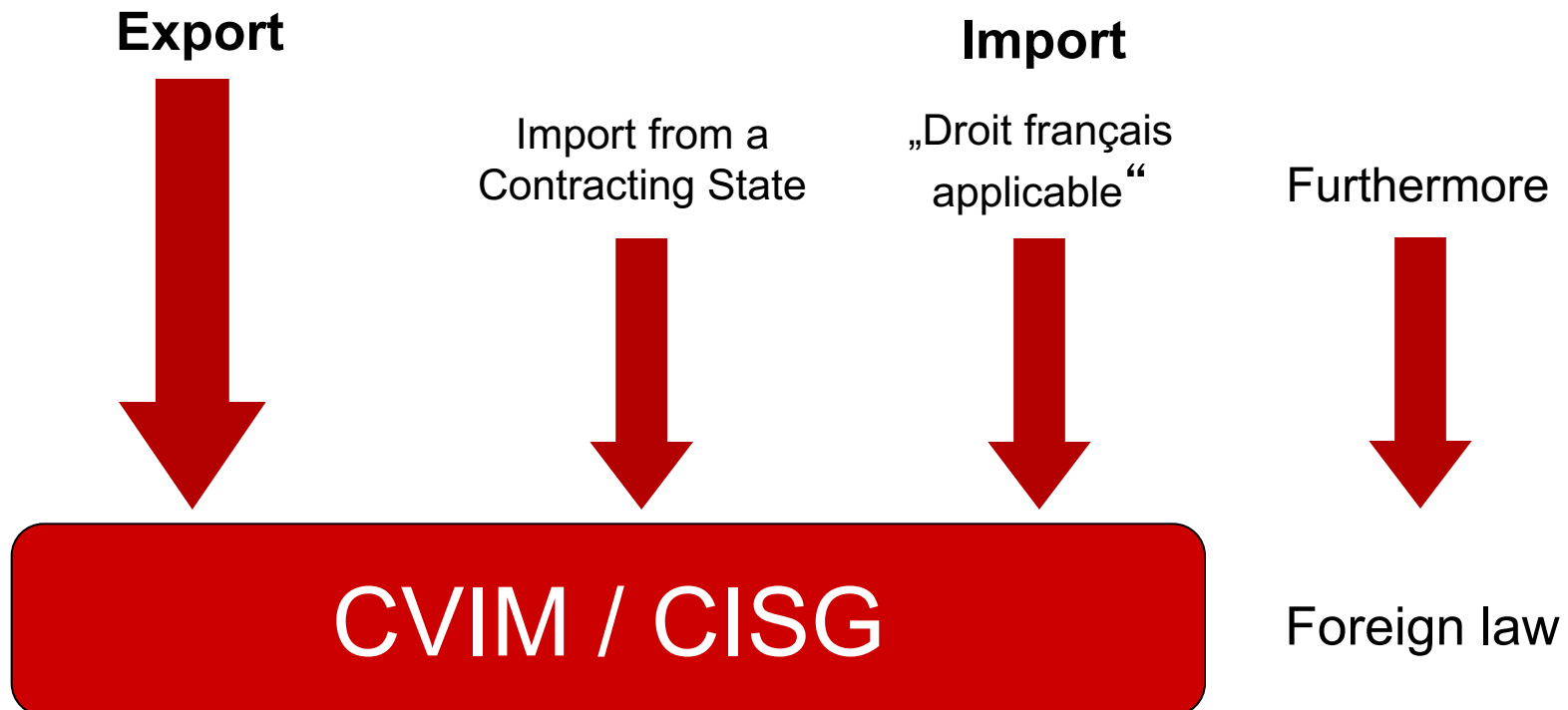
## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **CISG's role in cross border sales contracts**
  - Economic role in international trade



## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **CISG's role in cross boarder sales contracts**
  - Economic role in international trade





## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **CISG's role in cross border sales contracts**
  - Economic role in international trade

### Principaux partenaires de la France à l'exportation en 2011

#### Principaux partenaires de la France à l'exportation en 2011



## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **CISG's role in cross boarder sales contracts**
  - Benefits and drawbacks of the CISG
    - **Benefits/advantages**
      - Largely recognized as a uniform legal regime
      - Simple and practical design
      - Flexibility of the legal regime (practices established between the parties - international trade practices - Lex Mercatoria principles)
      - Drafted in several languages
      - Large contractual freedom
      - Protection against national specificities (subject to national police laws)

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **CISG's role in cross boarder sales contracts**
  - Benefits and drawbacks of the CISG
    - Drawbacks/disadvantages
      - Differing national case-law in the absence of a Supreme Court
      - Tendency of professionals to systematically exclude the CISG
      - Non-exhaustive nature of the regulated subjects (use of the national law is inevitable!)

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**
  - Scope of application (*ratione materiae* and *ratione personae*)

### *Ratione materiae*

1. Applicable to international contracts for the sale of goods
2. Not excluded in articles 2 and 3 CISG

### *Ratione personae*

1. Parties with residence in different States
- +
2. Connection with at least one Contracting State

Residence of both parties in Contracting States

PIL of the competent court leads to a Contracting State

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**
  - Scope of application (*ratione materiae*)
    - Applicable to:
      - Contracts for the sale of movable objects (including software)
      - Exchange contracts in the form of counter-purchase agreements
      - Master distribution agreements, insofar as they contain obligations related to the sale law
      - Supply contracts, where the buyer does not provide an essential part of the required material elements
      - Mixed contracts (e. g. development contracts) if the predominant party relates to sales.

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**
  - Scope of application (*ratione materiae*)
    - Excluded contracts under Articles 2 and 3
      - Sales to consumers
      - Sales of shares, commercial bills and currencies
      - Electricity sales (excluding oil or natural gas sales)
      - Distribution contracts (except for obligations relating to the sale)
      - Auctions
      - Sales by way of seizure or any other means by judicial authority
      - Sales of ships, boats, hovercraft and aircraft
      - Sales of industrial plants with a predominant share of service contracts.

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**
  - Scope of application of the CISG
    - Matters regulated by the CISG
      - Conclusion of the contract
      - Rights and obligations of the buyer
      - Rights and obligations of the seller
    - Matters not regulated by the CISG
      - Validity of the contractual clauses
      - Transfer of ownership
      - Seller's liability for death or physical injury caused to any person by the goods.
      - Mechanisms of general law of obligations (assignment, subrogation, compensation)

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**
  - Scope of application of the CISG
    - Exclusion (full or partial) through agreement between the parties (art. 6)

*"The parties may exclude the application of this Agreement or, subject to the provisions of Article 12, derogate from any of its provisions or modify its effects."*
    - Exclusion may be express or implied
      - an agreement of the parties during the negotiations and/or at the time of conclusion of the contract (*electio juris* clause)
      - a pending procedural agreement by reference to the provisions of a national law
    - Warning: the choice of a national law (*"This contract is governed by French law"*) does not exclude the CISG



## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**
  - Scope of application of the CISG
    - Basic rules of applicability

### Article 1 CISG

- “(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:*
- (a) when the States are Contracting States; or*
  - (b) when the rules of private international law lead to the application of the law of a Contracting State.*
- (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.*
- (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.”*

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**
  - Scope of application of the CISG
    - Exclusions from the convention

### Article 2 CISG

*“This Convention does not apply to sales:*

- (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;*
- (b) by auction;*
- (c) on execution or otherwise by authority of law;*
- (d) of stocks, shares, investment securities, negotiable instruments or money;*
- (e) of ships, vessels, hovercraft or aircraft;*
- (f) of electricity.”*

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**
  - Scope of application of the CISG
    - Manufactured goods

### Article 3 CISG

- “(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.*
- (2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.”*

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**
  - Scope of application of the CISG
    - Issues covered and excluded; validity and the effect on property interest in the goods sold

### **Article 4 CISG**

*“This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:*

- (a) the validity of the contract or of any of its provisions or of any usage;*
- (b) the effect which the contract may have on the property in the goods sold.”*

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**
  - Scope of application of the CISG
    - Primacy of the contract

### **Article 6 CISG**

*“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.”*

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**
  - General provisions of the CISG
    - Interpretation of the convention

### **Article 7 CISG**

- “(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.*
- (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.”*

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**

- General provisions of the CISG

- Interpretation of statements or other conduct from a party

### **Article 8 CISG**

- “(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.*
- (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.*
- (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.”*

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**
  - Formation of the contract
    - Acceptance: time and manner to indicate assent

### Article 18 CISG

- “(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.*
- “(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.*
- “(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.”*



## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**
  - Formation of the contract
    - Acceptance with modification

### Article 19 CISG

- “(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.*
- (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.*
- (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.”*

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**
  - Sale of goods
    - Definition of fundamental breach

### Article 25 CISG

*“A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.”*

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**
  - Conformity of the goods and third party claims
    - Conformity of the goods

### Article 35 CISG

- “(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.*
- (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:*
- (a) are fit for the purposes for which goods of the same description would ordinarily be used;*
  - (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;...*

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**
  - Conformity of the goods and third party claims
    - Conformity of the goods

### Article 35 CISG

- “...(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;*
- (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.*
- (3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.”*

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**
  - Conformity of the goods and third party claims
    - Examination of the goods

### Article 38 CISG

- “(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.*
- (2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.*
- (3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.”*

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**
  - Conformity of the goods and third party claims
    - Notice for lack of conformity

### Article 39 CISG

- “(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.*
- (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.”*

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**
  - Breach of contract by the buyer
    - Remedies available to the seller

### Article 61 CISG

- “(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:*
- (a) exercise the rights provided in articles 62 to 65;*
  - (b) claim damages as provided in articles 74 to 77.*
- (2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.*
- (3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.”*

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**
  - Common provisions to the buyer and the seller
    - Exemptions

### Article 79 CISG

- “(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.*
- (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:*
- (a) he is exempt under the preceding paragraph; and*
  - (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.*
- (3) The exemption provided by this article has effect for the period during which the impediment exists. ...*



## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Scope of application and general provisions**
  - Common provisions to the buyer and the seller
    - Exemptions

### Article 79 CISG

- “... (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.*
- (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.”*

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Interpretation of CISG**
  - Legal design of CISG
    - Formation of the contract: art. 14 et seq.
    - Conformity of goods: art. 35-44
    - Obligations of the seller: art. 30-52
    - Reporting of non-compliance ss. 38-39
    - Obligations of the buyer: art. 53-65
    - Transfer of risks: art. 67-70
    - Damages: Art. 74 et seq.
    - Default interest: art. 78 (+ national law)

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Interpretation of CISG**
  - Legal design of CISG
    - Legal optimization of contracts involving international sales of goods
    - Drafting of the contract to suit the client's individual needs (overriding the legal conception of the CISG)
    - Designation of the CISG as the applicable legal regime
    - Choice of Swiss law as a subsidiary applicable law (in particular with regard to the validity of contractual clauses derogating from the legal conception of the CISG)

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Negotiation and conclusion of the international contract**
  - What is an "international contract"?
    - General legal approach: " extraneous element "
      - ➡ *National and European PIL (Brussels I and Rome I Regulations)*
    - Specific legal approach: cross-border establishment
      - ➡ *United Nations Convention on the International Sale of Goods of 11 April 1980 (CISG)*
    - Economic approach: "movement of goods, services or payment across borders"
      - ➡ *International commercial arbitration*

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Negotiation and conclusion of the international contract**
  - What are the specific clauses?
    - **Clauses relating to the jurisdictional framework**
      - Alternative Dispute Resolution (ADR)
      - Arbitration agreement (arbitration clause)
      - Jurisdiction clause (international)
    - **Clauses relating to the legislative framework**
      - **Clauses for designating the applicable law**
        - National law (French or foreign)
        - Uniform international law
        - Lex Mercatoria: Unidroit Principles - Principles of European contract law
      - **Material clauses in international contracts**

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Negotiation and conclusion of the international contract**
  - How to negotiate an "international contract"?
    - Pre-contractual negotiation phase
      - Non-disclosure agreement
      - Letter of intent (LOI) - Memorandum of Understanding (MOU)
      - Pre-contract
    - Specificities relating to international contracts
      - Jurisdictional framework
      - Legislative framework
      - Linguistic framework

## **II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)**

- **Practical aspects of CISG**
  - **The principle of party autonomy**
  - **Some practical aspects of party autonomy**

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Practical aspects of CISG**
  - The principle of party autonomy
    - party autonomy as an important pillar in the CISG and arbitration
    - party autonomy as an interpretive standard in the CISG and arbitration



## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Practical aspects of CISG**
  - The principle of party autonomy

### Party autonomy: important pillar in the CISG and arbitration

**CISG:** article 6 guarantees the parties' autonomy by establishing that the parties can exclude the application of the CISG or modify any of its provisions. This gives the parties a great deal of freedom as to how they would like the CISG rules to govern their contractual relationship

**Arbitration:** Article 1511 CPC: "*The arbitral tribunal shall decide the dispute in accordance with the **rules of law** chosen by the parties or, where no such choice has been made, in accordance with the rules of law it considers **appropriate**. In either case, the arbitral tribunal shall take **trade usages** into account.*"

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Practical aspects of CISG**
  - The principle of party autonomy
    - Party autonomy used by arbitrators as an interpretive standard for filling contractual gaps
    - Filling of contractual gaps for matters not governed by the CISG (external gaps in the sense of article 4) in the absence of a choice of law
    - Filling of contractual gaps for matters governed by the CISG, but not expressly settled (internal gaps in the sense of art. 7)

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Practical aspects of CISG**

- The principle of party autonomy

**Filling of contractual gaps for matters not governed by the CISG (external gaps in the sense of article 4) in the absence of a choice of law**

According to **article 4 CISG**, the Convention is not concerned with the validity of the contract, its provision or usage and the effect, which the contract would have on the property in the goods sold.

- In this case **subsidiary national law applies**, which must be **interpreted in the light of the CISG**

- If the parties have **not chosen a subsidiary national law**, the question arises **how the arbitral tribunal will determine the applicable law**

**Article 1511 CPC** focuses on **party autonomy in a triple way**:

- The article entitles the arbitrator in the case the parties have not chosen the applicable law to their contractual relationship **to apply the rules of law he considers “appropriate”**

- This provision gives the arbitrator a great deal of **flexibility** (rules of law → *lex mercatoria* and UNIDROIT principles)

- the tribunal will always **try to act in accordance with the explicit, implicit or presumed will of the parties** (e.g. trade usages)

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Practical aspects of CISG**
  - The principle of party autonomy
    - **Filling of contractual gaps for matters governed by the CISG, but not expressly settled** (internal gaps in the sense of art. 7)
      - Article 7 CISG deals with the issue of (internal) **gaps in the contract** regarding **matters governed by the Convention, but not expressly settled** by the latter
      - In this case, the gaps in the contract must be filled by referring to **general principles of the Convention**
      - **In absence** of these principles, national law must be applied
      - These principles are not expressly set forth in the CISG, but have to be **deduced from the legal conception** that has to be interpreted **in the spirit of the CISG**
      - Therefore, since **arbitrators** dispose of a **larger margin of appreciation** than national judges, we consider that arbitrators are probably in a better position to **go**, what the freedom of interpretation concerns, **the whole way**

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Practical aspects of CISG**
  - The principle of party autonomy
    - Some practical aspects of party autonomy
      - The battle of the forms
      - Opting in the CISG

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Practical aspects of CISG**
  - The principle of party autonomy

➤ The battle of the forms

### The definition of the battle of the forms

- In international transactions, the situation can arise in which the **parties use standard form contracts containing conflicting general conditions**

- Each party will **try to impose their general conditions** in order to ensure their applicability

-The legal framework of the CISG regarding the battle of the forms can be found under **article 19**

The first paragraph of article 19 CISG is based on the **mirror-image rule**.

- In order to conclude a contract, an offer and an acceptance must correspond in all aspects. When the latter contains additions or alterations it must be considered as a counter-offer and not an acceptance.

- **Article 19 (2) CISG** tries to soften the severity of the mirror-image rule by allowing additional or different terms when the offeree's communication was intended to be an acceptance, the terms of the acceptance do not materially alter the terms of the offer and the offeror does not orally object to the altered terms

- However additional or different terms relating to the settlement of disputes (ex. Arbitration clause) are considered to alter the terms of the offer materially (**Article 19 (3) CISG**).

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Practical aspects of CISG**
  - The principle of party autonomy
    - The battle of the forms
      - The **last-shot rule** as an out-dated solution
        - It can be a complex challenge for the courts to determine what the exact terms of the contract are (cf. **Article 8 (2) CISG**)
        - Both scholars and case law consider that **article 19 (2) CISG incorporates the so-called “last-shot rule”**
        - According to this rule, the **terms contained in the last submitted form must be applied to the contract**
        - The last-shot rule is based on the idea that if **no valid objection** has been made within a reasonable period of time, the **party has tacitly accepted the terms**
        - Consequently, **the last person who sends its form** is in control of the terms of the contract and **wins the battle of the forms**

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Practical aspects of CISG**
  - The principle of party autonomy
    - The battle of the forms
      - The last-shot rule as an out-dated solution
        - This legal solution is **not appropriate for modern and international business**, since it can give rise to **legal insecurity**
        - Therefore, in practice this solution not only **shall be criticised**, but both parties and arbitrators should **try to avoid it**



## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

### The means to avoid the application of the last-shot rule

#### Implicit and explicit exclusion:

- The parties can **expressly** exclude the application of the last-shot rule under article 6 CISG

However, the **problem** can arise that parties fail to realize that the CISG is applicable to their contract

Consequently, they often do not provide for the exclusion of the last-shot rule, because they are unaware to what rules the contract is subject to

- The parties can **implicitly** waive the application of the last-shot rule. However, they must have a conclusive conduct

#### Presumption of the exclusion of the last shot rules as a business standard:

- We can consider that according to a **widely spread business standard and/or trade usages** the parties would have preferred the last-shot rule not to be applied to the contract

The **problem** is that the last-shot rule comes with a **procedural conflict**, in particular for **national judges**: they are hesitant to presume the parties' will to exclude its application

Therefore, in case of doubt, **they prefer following the safe path** of what is **exactly stipulated** in the contract and applying the last-shot rule instead of the presumed will of the parties

→ In comparison with national judges, the **arbitrator has much more flexibility and margin of appreciation**, as we have already demonstrated above

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Practical aspects of CISG**
  - The possibility of *opting in* the CISG
    - Opting out: according to article 6 CISG, the parties have the freedom to exclude the application of the CISG
    - Opting in: the parties have the possibility to apply the CISG, even if the conditions of article 1 and following are not fulfilled

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Practical aspects of CISG**
  - The different scope of the contractual clause
    - **Before a national court**
      - The clause will only have **limited effectiveness**
      - The CISG won't be applicable as the general law of the international sales of goods, because the contract is not within the scope of the CISG
      - Therefore, the national law of the State where the court has been seized will govern the contract
      - Only if the national law allows derogations from the general provisions that are applicable, the national judge will take the provisions of the CISG into account
      - Consequently, the CISG will only be applicable if the national law leaves certain matters to the discretion of the parties
      - In this case, CISG can be compared to soft law

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Practical aspects of CISG**
  - The different scope of the contractual clause
    - **Before an arbitral tribunal**
      - The arbitrator will give a great importance to the choice of law made by the parties
      - The arbitrator will consider it being the ***lex contractus***, in other words the substantive law of the contractual relationship
      - He will take national law only into account, if the parties have stipulated that it must be applied as subsidiary law or to fill in gaps not covered by the provisions of the contract.

## II. UN-Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup> 1980 (CISG)

- **Practical aspects of CISG**
  - The different scope of the contractual clause
    - **Before an arbitral tribunal**
      - The arbitrator will give a great importance to the choice of law made by the parties
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### III. Soft law in international practice

- The notion of *Lex Mercatoria*
- Incoterms
- UNIDROIT Principles of International Commercial Contracts

### III. Soft law in international practice

- The notion of *Lex Mercatoria* ("soft law")
  - Refers to the principles, customs and practices of "merchants" in international trade, the "habits and customs" of markets;
  - *"a spontaneous right, consisting of codified professional practices, legal arrangements and contractual clauses, the repetition of which we can and must ask ourselves whether they are not gradually being elevated to the level of customary institutions, arbitral awards"*

Berthold Goldman, "La lex mercatoria dans les contrats et l'arbitrage internationaux", Journal du droit international, 1979.1 et seq.

### III. Soft law in international practice

- The notion of *Lex Mercatoria*

- Michael PRYLES, Application of the Lex Mercatoria in International Commercial Arbitration: list of the " 20 key *principles of the lex mercatoria*" (according to Lord Mustill)
- <http://www.unswlawjournal.unsw.edu.au/wp-content/uploads/2017/09/31-1-4.pdf>
  - Fundamental principle: "*Pacta sunt servanda*"
  - Two exceptions to be observed:
    - Theory of unpredictability ("*regula rebus sic stantibus*") concerning (long-term) contracts of indefinite duration (➡ hardship)
    - The theory of abuse of right ("*abus de droit*") according to which unfair and unconscionable contracts and clauses should not be enforced performed.



### III. Soft law in international practice

- The notion of *Lex Mercatoria*
  - *Lex mercatoria* in international commercial arbitration
    - ICC statistics: out of a total of 1228 awards less than 30 (2.5%) expressly mentioned the "*lex mercatoria*" as the rule of law applicable to the contract (E. Jolivet, La jurisprudence arbitrale de la CCI et la lex mercatoria, GP.2001 doctr.653)
    - ICC Award No. 10422 in 2001: possible to "*refer to the principles relating to Unidroit's international commercial contracts for questions relating to the general regulation of contracts*"
    - Decree of 13 January 2011: the arbitrator applies the "rules of law" or acts in an amicable manner

## III. Soft law in international practice

- **Incoterms**
  - **General information**
  - **Incoterms classification**
    - E-Class
    - F-Class
    - C-Class
    - D-Class
  - **Compare: Incoterms ® 2000 vs. Incoterms ® 2010**

## III. Soft law in international practice

- **Incoterms**

- General information

- ICC Standard Terms of Delivery (2020 version)
    - No legally binding standards, but standardised general conditions to which the parties may refer
    - Rules of international trade usage (ECJ, Electrosteel judgment, June 9, 2011, C-87)
    - Do not regulate the transfer of ownership (*lex rei sitae*), but (only) the transfer of risk

## III. Soft law in international practice

- **Incoterms**

- General information

- Regulated aspects

- Transport and its organisation: methods, modalities, choice of carrier
      - The transfer of risks
      - The insurance
      - Processing, packaging, control of goods
      - Customs formalities and accompanying documents
      - The export selling price, the selling price, the invoicing and the payment
      - Delivery and reception
      - The documentary credit
      - VAT and Intrastat
      - The allocation of costs

## III. Soft law in international practice

- **Incoterms**

- Incoterms classification

- E-Class - EXW clause (ex works)

- the most suitable Incoterms clause for the exporter (seller)
      - the seller has duly delivered the goods as soon as they have been made available to the buyer at his own premises
      - the seller only bears the risks related to the packaging of the goods
      - the transfer of risk occurs when the goods are made available to the buyer at the seller's premises
      - transport is at the expense and risk of the buyer
      - recommended clause for intra-Community trade (no customs export formalities)

## III. Soft law in international practice

- **Incoterms**

- Incoterms classification

- Class F: FCA (free carrier), FAS (free along the ship), FOB (free on board)
      - The seller must deliver the goods to the carrier or another person appointed by the buyer, at the seller's premises or at any other duly designated place
      - The seller bears the risk of loss or damage that the goods may suffer until they have been delivered as indicated above
      - Customs formalities are the responsibility of the seller, the buyer chooses the mode of transport and the carrier.
      - The FAS and FOB clauses are only used in maritime and inland waterway transport.

## III. Soft law in international practice

- **Incoterms**

- Incoterms classification

- Class C: CPT (Carriage paid to), CFR (Cost and freight), CIP (Carriage insurance paid) or CIF (Cost insurance and freight)
      - The seller must conclude a contract of transport at his own expense in order to ensure the transport of the goods to the agreed place
      - The seller fulfils his delivery obligation when he delivers the goods to the carrier
      - CPT and CIP: the transfer of risk takes place at the time when the goods have been handed over to the carrier designated in the contract (to the first carrier in the case of multiple carriers)
      - CFR and CIF: the transfer of risk occurs when the goods are delivered on board the ship to the port of shipment

## III. Soft law in international practice

- **Incoterms**

- Incoterms classification

- Class D: DAP (Delivered at place), DAT (Delivered at terminal) and DDP (Delivered duty paid)
      - The seller is responsible for and bears the risk of all operations related to transport until delivery to the buyer at the agreed place of delivery
      - Unloading at the agreed destination is at the seller's expense
      - DDP: the seller is also responsible for all import formalities and the resulting duties and taxes
      - DDP: most favourable clause for the importer



## III. Soft law in international practice

- **Incoterms**

- Incoterms ® 2000 vs. Incoterms ® 2010

- Incoterms ® 2000

- A total of 13 Incoterms divided into 4 groups:

- EXW (the export clause)
        - Type F clauses
        - Type C clauses
        - Type D clauses

- Incoterms ® 2010

- A total of 11 Incoterms divided into 4 groups and 2 transport categories

- Multimodal Incoterms (all types of transport)
        - Incoterms that can be used for maritime transport (or inland waterways)

### III. Soft law in international practice

- **Incoterms**

- Incoterms ® 2000 vs. Incoterms ® 2010 vs. Incoterms ® 2020

- Incoterms ® 2010: effective as of January 1, 2011

- The terminology DAF (Delivered At Frontier), DES (Delivered At Ship), DDU (Delivered Duty Unpaid) has been replaced by the term DAP (Delivered At Place)

- The term DEQ (Delivered Ex Quay) has been replaced by the term DAT (Delivered At Terminal).

- Incoterms ® 2020: effective as of January 1, 2020

- Minor and more formal differences related to a clearer presentation of the 11 different clauses

- Example: **Incoterms 2020 – Free Ebook - SHIPHUB**

## III. Soft law in international practice

- **Incoterms**

- Incoterms ® 2000 vs. Incoterms ® 2010

INCOTERMS 2000	INCOTERMS 2010	Commentaires
EXW	EXW	Identique
FCA	FCA	Identique
FAS	FAS	Fin de la notion de bastingage
FOB	FOB	Fin de la notion de bastingage
CFR	CFR	Fin de la notion de bastingage
CIF	CIF	Fin de la notion de bastingage
CPT	CPT	Identique
CIP	CIP	Identique
DEQ	DAT (delivered at terminal)	Incoterm 2000 supprimé et remplacé par le DAT
DAF	DAP (delivered at place)	INCOTERMS 2000 supprimés et remplacés par le DAP
DES		
DDU		
DDP	DDP	Identique

### III. Soft law in international practice

- **UNIDROIT Principles of International Commercial Contracts**
  - Consolidation *"of the entire body of international contract law"* which expressly claims to be part of the *lex mercatoria*
    - Preamble: *"may apply where the parties agree that their contract shall be governed by general principles of law, the lex mercatoria or other similar formula"*.
  - Substantive scope broader than the CISG
  - Broader scope than CEDPs
  - In force: 3rd version (May 2010) which includes 211 articles
  - Incorporation of 26 new articles concerning restitution, illegality, condition, plurality of creditors and debtors
  - Structure practically unchanged from previous versions

### III. Soft law in international practice

- **UNIDROIT Principles of International Commercial Contracts**
  - Preamble (purpose of the principles)
  - Chapter 1: General provisions
  - Chapter 2: Formation of the contract and power of representation
  - Chapter 3: Validity
  - Chapter 4: Interpretation
  - Chapter 5: Content of the contract and third party rights
  - Chapter 6: Enforcement
  - Chapter 7: Non-performance
  - Chapter 8: Compensation
  - Chapter 9: Assignment of receivables, payables and contracts
  - Chapter 10: Limitation periods

### III. Soft law in international practice

- **UNIDROIT Principles of International Commercial Contracts**
  - Model clauses for the use of the Unidroit Principles of International Commercial Contracts (04/2013)
    - Choose the Unidroit Principles as the law governing the contract (1) ➡ international commercial arbitration
      - Designate only the Unidroit Principles (1.1.)
      - Choose the Unidroit Principles supplemented by domestic law (1.2.)
      - Choose the Unidroit Principles supplemented by the acknowledged principles of international trade law (1.3.)
    - Incorporate the Unidroit Principles as clauses of the contract (2)
    - Refer to the Unidroit Principles to interpret and supplement the CISG when it is chosen by the parties (3)
    - Refer to the Unidroit Principles to interpret and supplement the applicable domestic law (4)

**Thank you for your kind attention !**

## Annexs

- Regulation Bruxelles I bis
- Regulation Rome I
- Regulation Rome II
- UN- Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup>, 1980 (CISG)
- Incoterms



## **Annex 1 – Regulation Bruxelles I bis**

## Annex 2 - Regulation Rome I

## **Annex 3 - Regulation Rome II**

## **Annex 4 - UN- Convention on Contracts for the International Sale of Goods from April 11<sup>th</sup>, 1980 (CISG)**

## **Annex 5 - Incoterms**