# Transnational Business Law

## *Part C.1 : IMPORT / EXPORT*

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## PRESENTATION OUTLINE

## I. Introduction to Import / Export

A. Definition & Context

B. Legal frameworks

C. Risks & Challenges

D. Role of legislative harmonization

E. Key legal instruments

## A. Definition & Context

- International sales of goods: commercial transactions where buyer and seller are established in different countries

- Involves physical transfer of goods + interaction of different legal systems

- Various forms: B2B contracts, long-term supply agreements, framework agreements, purchase orders

## B. Legal frameworks

- Multiple legal frameworks (complex network) :

  - Domestic context : contracts are solely governed by national contract law
  - Cross border context : international treaties/conventions harmonize principles and substantive / material rules between contracting states (e.g., CISG)
  - Private international law (conflict-of-laws rules): EU regulations and international conventions determine competent jurisdiction (Brussels 1bis) and applicable law (Rome I + II vs. La Haye 1955, 1973, 1978)
  - Soft law: non-binding but influential instruments (Incoterms, UNIDROIT Principles, model contracts)

## C. Risks & Challenges

- Determination of the competent jurisdiction and applicable law by PIL rules
- Differences between legal traditions (civil law and common law)
- Costs of legal uncertainty and litigation before foreign State Courts
- Language and cultural barriers
- Enforceability of State Court judgments or arbitral awards

## D. Role of legislative harmonization

- PIL-rules permit legal predictability and reduce transaction costs
  - Conflict-of-jurisdiction rules : Brussels I bis Regulation
  - Conflict-of-laws rules : Rome I / II Regulations – Hague Conventions

- Legislative harmonization: domestic vs. international context
  - Domestic context: harmonization / uniformization by EU directives
  - International context: CISG + soft law (Incoterm + Unidroit Principles)

- Positive effects and benefits of legislative harmonization:
  - Less need to negotiate applicable law each time
  - Limits forum shopping
  - Provides neutral, fair legal frameworks

- No need of conflict-of-laws rules if legislative harmonization was achieved to 100%

## E. Key legal instruments

- **CISG**
  - Uniform legal regime (substantive / material rules) for international sales of goods contracts between companies established in contracting States or with connection to the law of a Contracting State
  - Widely ratified / entered into force and applied by State courts and in particular arbitral tribunals

- **Incoterms**
  - Clarify the parties' obligations, risk transfer, transport, customs responsibilities
  - Standardize General Termes and Conditions in an international context

## E. Key legal instruments

- **Rome I**
  - Distinction between:
    - Rome I (vs. Rome II) EU Regulation and
    - La Haye International Conventions 1955, 1973, 1978
  - Rome I EU Regulation determines the law applicable to contractual obligations in civil and commercial matters
  - Emphasizes party autonomy, but contains also objective connection rules and includes mandatory (overriding) rules for protection of the “weak” party
  - Do not confuse:
    - Mandatory national provisions (*ius cogens*): provisions of a national applicable law that cannot be derogated contractually
    - Mandatory overriding provisions (*loi de police*) : provisions of a national (not applicable) law that shall have immediate application (art. 9 Rome I)

## E. Key legal instruments

- **International commercial arbitration**
  - Resolves disputes outside the authority of State courts
  - Ensures neutrality, flexibility, celerity, confidentiality, enforceability (e.g., New York Convention)
  - Private (contractual) justice vs. State Courts justice
  - Alternative method (ADR) with jurisdictional authority (arbitrators = judges!)
  - Parties may choose between
    - Institutional arbitration (e.g. International Arbitration Court of CCI / Paris)
    - *Ad hoc* arbitration
  - Legal framework of international commercial arbitration
    - Statutory Provisions of national (French) law : art. 1454 and ss. CPC
    - Soft Law of the competent arbitral institution: e.g. CCI Arbitration Rules

## II. CISG (Convention on International Sales of Goods)

A. CISG’s role in cross border sales contracts

B. Scope of application

C. Advantages & Limits

D. Legal structure of the CISG

E. Key provisions

F. The principle of party autonomy

## A. CISG's role in cross border sales contracts

- **Economical role in international trade**

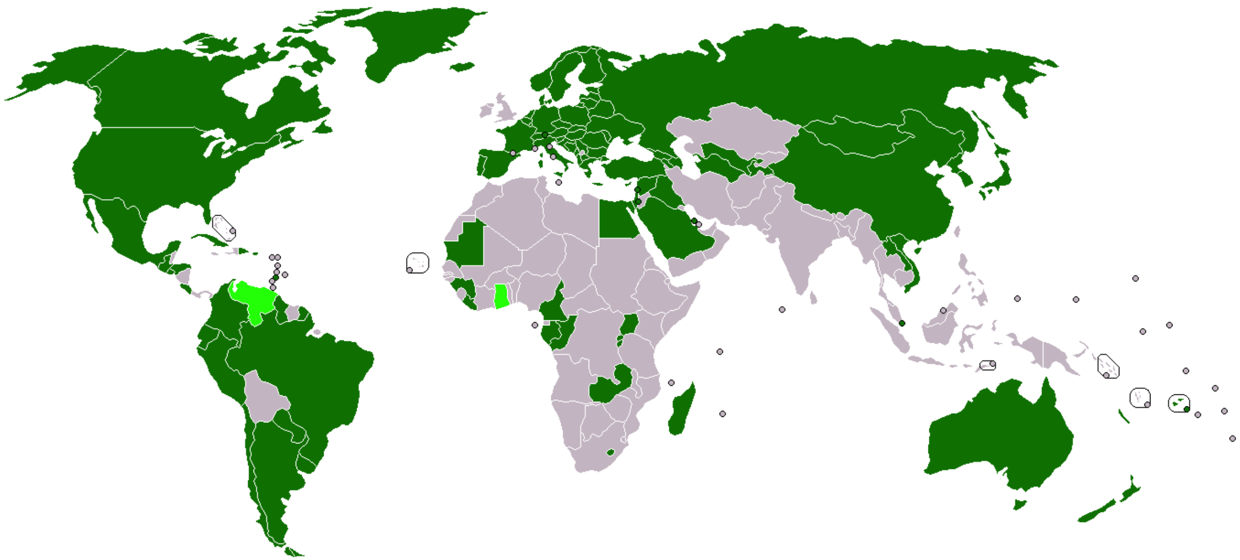
  - More than 97 contracting States worldwide
  - Direct application provided that legal conditions are met
    - Applicable to all export contracts of European (besides: UK) companies
    - Also applicable to most import contracts:
      - If the contracting party is established in a CISG Contracting State
      - If the national law of a Contracting State is applicable to the contract under the PIL rules (Rome I Regulation – 1955 Hague Convention)
  - Exception: exclusion (express or implied) by the parties (art. 6)

# A. CISG's role in cross border sales contracts

- **Economical role in international trade**

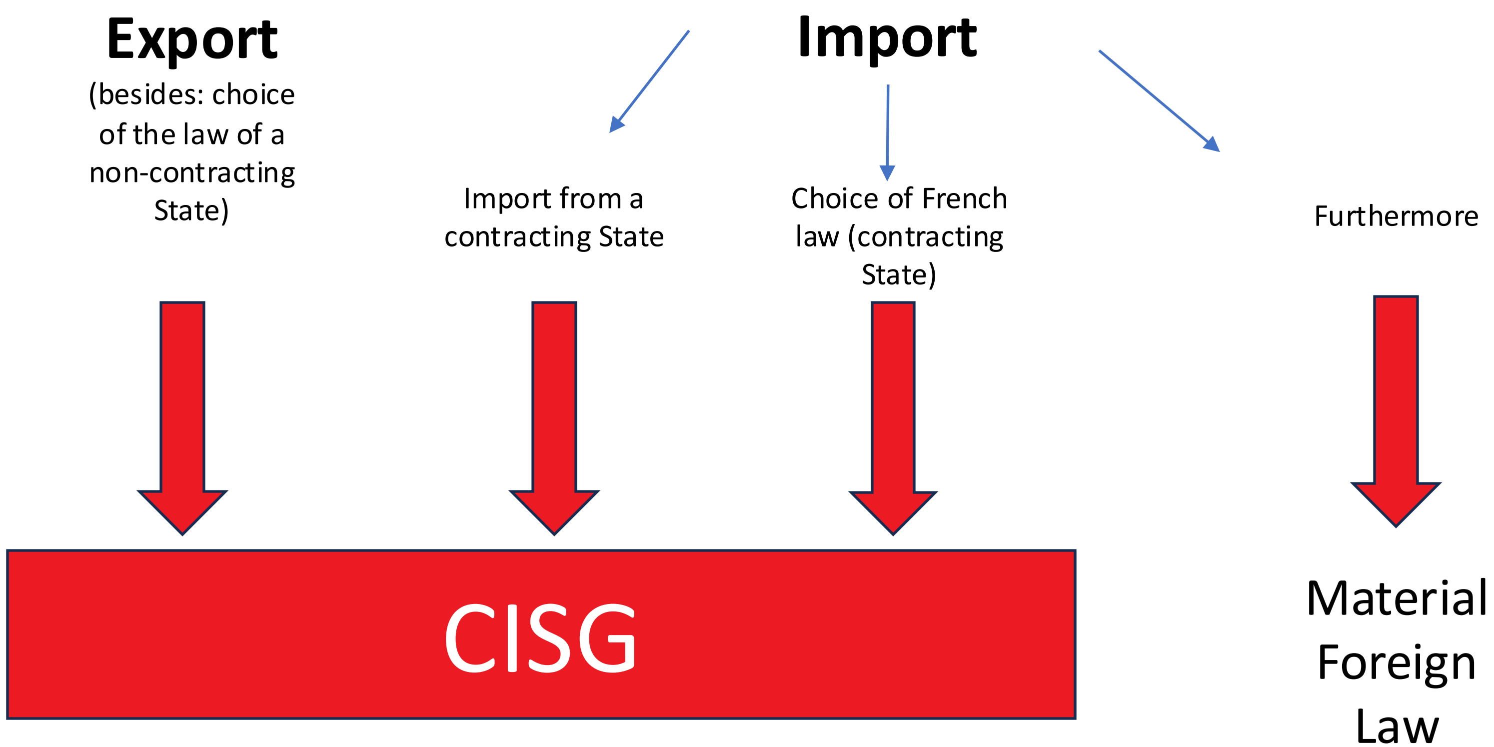
Green = ratified

Light green = signed but not ratified



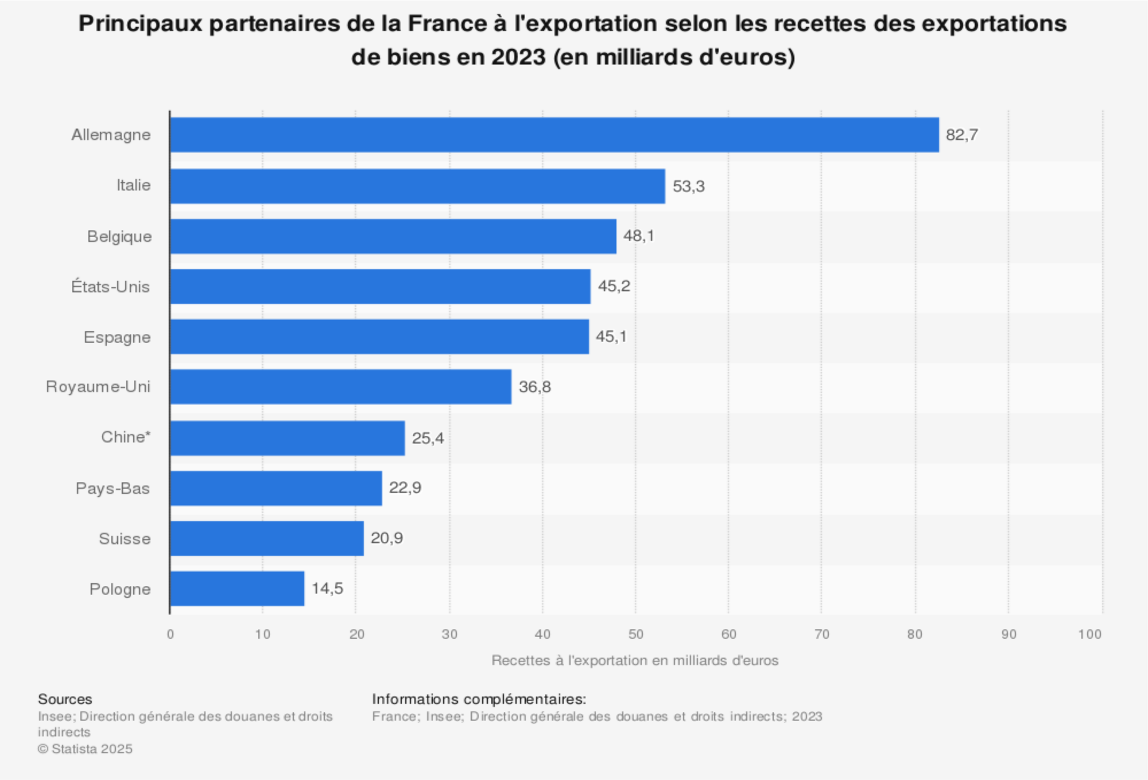
## A. CISG's role in cross border sales contracts

- **Economical role in international trade**



## A. CISG's role in cross border sales contracts

- **Economical role in international trade**



## B. Scope of application

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

### *Ratione personae*

1.Parties with residence in different Countries

2. Connection with at least one Contracting State

Residence of both parties in Contracting States

Rules of PIL lead to the law of a Contracting State

### *Ratione materiae*

1. Applicable to international contracts for the sale of goods

2. Not excluded in articles 2 and 3 of the CISG (e.g. consumer goods, auctions, ships)

## B. Scope of application

- **Scope of application (*ratione personae*)**

Examples :

- French seller + German buyer → both countries are Contracting States → CISG applies
- French seller + UK buyer :
  - UK is not a Contracting State → art. 1(1)(a) CISG does not apply
  - Art. 1(1)(b) : rules of PIL lead to French law (seller's law) → CISG applies

## B. Scope of application

- **Scope of application (*ratione materiae*)**

  - CISG is 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 (and not distribution)
    - 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 part relates to sales.

## B. Scope of application

- **Scope of application (*ratione materiae*) :**

  - Matters regulated by the CISG
    - Conclusion of the contract
    - Rights and obligations of the buyer
    - Rights and obligations of the seller

## B. Scope of application

- **Scope of application (*ratione materiae*) :**

  - Matters not regulated by the CISG (art. 4 and 5)

    - 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, limitation period)

## B. Scope of application

- **Scope of application (*ratione materiae*)** :

  - Excluded contracts under art. 2 and 3 CISG

    - Sales to consumers (unless seller was not aware of this usage)
    - Sales of shares, commercial bills and currencies
    - Electricity sales (excluding oil or natural gas sales)
    - Sales by way of seizure or any other means by judicial authority (auction)
    - Sales of ships, boats, hovercrafts and aircrafts
    - Sales of industrial plants with a predominant part of service contracts.

## B. Scope of application

- **Scope of application of the CISG: principle of "opting out"**

  - Exclusion (full or partial) through agreement between the parties (art. 6).

**Article 6**

*« 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****. »*

  - Exclusion may be expressed 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 provisions of a national law

  - **Warning**: the choice of a national law (« *This contract is governed by French law* ») does not exclude the CISG

## B. Scope of application

- **Scope of application of the CISG**
  - CISG application "ratione personae" (geographical approach)

**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****.*
*(…)»*

## B. Scope of application

- **Scope of application of the CISG**
  - Exclusions “ratione materiae”

**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****. »*

## B. Scope of application

- **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.** »*

## B. Scope of application

- **Scope of application of the CISG**
  - Sale of goods aspects that are covered vs. excluded

**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.»*

## B. Scope of application

- **Scope of application of the CISG**
  - Principle of “opting out” : partial or total exclusion of CISG par parties

**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****. »*

## C. Advantages & Limits

- **Advantages of CISG** :

  - Uniformity : CISG replaces divergent national laws with a single set of international (substantive / material) rules of sale of goods

  - Neutrality : avoids the need to choose between the seller's or buyer's domestic law

## C. Advantages & Limits

- **Advantages of CISG** :

  - Legal security : CISG uses the same rules in all Contracting States (Art. 7), which reinforces legal clarity and certainty (BUT: default of an International CISG Supreme Court)

  - Flexibility : parties can totally or partially exclude or derogate from CISG's provisions (very high decree of contractual freedom)

  - Balance : CISG draws from both civil and common law traditions

## C. Advantages & Limits

- **Advantages of CISG :**

  - Largely recognized as a uniform legal regime
  - Simple and practical legal design
  - Flexibility of the legal regime : practices established between the parties – international trade usages – Unidroit principles - Lex Mercatoria)
  - Drafted in several languages
  - Large contractual freedom → large responsibility of each party
  - Protection against national specificities (subject to national mandatory provision)

## C. Advantages & Limits

- **Limits of CISG** :

  - CISG does not cover several important aspects of the sales of goods practice :
    - For contractual gaps: Rome I / 1955 Hague Convention
    - For non-contractual gaps: Rome II / 1973 Hague Convention
    - For property ownership transfer: *lex rei sitae*

  - Reservation possibilities : states can declare exceptions (e.g.: art. 96 declarations limiting freedom from writing requirements)

## C. Advantages & Limits

- **Limits of CISG** :

  - Lack of uniform interpretation by national State courts (despite of art. 7): national courts may diverge in their rulings in the absence of an international Supreme Court.

  - Therefore: General tendency of professionals to systematically exclude CISG

## D. Legal structure of the CISG

- **Part I – Scope and general provisions (Arts. 1–13) :**

  - Personal and material scope of application (art. 1– 3
  - External gaps of CISG (art. 4 – 5)
  - Opting out system : total or partial exclusion by the parties (Art. 6)
  - Rules on interpretation (uniformity, good faith : Art. 7 - 8)
  - Trade usages and party practices (Art. 9)

## D. Legal structure of the CISG

- **Part II – Formation of the contract (Arts. 14–24) :**

  - Rules on offers, acceptances, and counter-offers
  - No requirement of written form
  - Defines when and how a contract is formed
  - Offer is not accepted when the “acceptation” (with reference to other GTC) alters materially the offer’s terms : mirror rule + last shot rule

## D. Legal structure of the CISG

- **Part III – Sale of goods (Arts. 25–88):**
  - Chapter I – General rules on breach, remedies
  - Chapter II – Obligations of the seller (delivery, conformity, documents)
  - Chapter III – Obligations of the buyer (payment, taking delivery)
  - Chapter IV – Risk of loss (passing of risk from seller to buyer)
  - Chapter V – Common rules (damages, exemptions, contract termination, preservation of goods)

## D. Legal structure of the CISG

- **Part IV – Final provisions :**

  - Rules on ratification, reservations, and territorial application

  - Entry into force, amendments, and official language

## E. Key provisions

- **Scope of application (art. 1 - 6 CISG)**

- **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. »*

## E. Key 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**.»*

## E. Key provisions

- **General provisions of the CISG**
  - Formation of the contract

**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. »*

## E. Key provisions

- **General provisions of the CISG**

  - Acceptance vs. rejection of an offer (counter-offer)

**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**. »*

## E. Key provisions

- **General provisions of the CISG**

  - 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. »*

# E. Key provisions

- **General provisions of the CISG**
  - 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;*
(...) »

# E. Key provisions

- General provisions of the CISG
  - 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.*

## E. Key provisions

- **General provisions of the CISG**
  - 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 redispatched 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 redispatch, examination may be deferred until after the goods have arrived at the new destination. »*

# E. Key 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. »*

## E. Key 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. »*

## E. Key provisions

- **Common provisions to the buyer and the seller**
  - Exemptions : “Force majeure”

**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.*
*(…) »*

## E. Key provisions

- **Common provisions to the buyer and the seller**
  - Exemptions

**Article 79 CISG**

*« (…)*
*(3) The exemption provided by this article has effect for the period during which the impediment exists.*

*(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. »*

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# F. The principle of party autonomy in practice

- **The principle of party autonomy**

- **Some practical aspects of party autonomy**

  - (1) The battle of the forms (CISG's legal design : "last shot rule")

  - (2) Opting in of CISG by parties (of non-Contracting States)

## F. The principle of party autonomy in practice

- **The principle of party autonomy**

Party autonomy: important principle in both CISG and arbitration

CISG : Art. 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 : Art. 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 ir considers appropriate. In either case, the arbitral tribunal shall take trade usages into account.“

# F. The principle of party autonomy in practice

- **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**)

## F. The principle of party autonomy in practice

- **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 contact would have on the property in the goods sold.

- In this case **subsidiary national law applies**, which must be **<u>interpretated by the light of the CISG</u>**
- If the parties have **not chosen a subsidiary national law**, the question arises of **how the State Court or the arbitral tribunal will determine the applicable law.**

## F. The principle of party autonomy in practice

- **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

**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 „<u>appropriate</u>“**
- 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 <u>explicit, implicit or presumed will of the parties</u>** (e.g. trade usages)

# F. The principle of party autonomy in practice

- **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 (e.g., amount of the interest for default interests)

## F. The principle of party autonomy in practice

- **Practical aspects of party autonomy**
  - (1) The battle of the forms : Last shot rule
  - (2) Opting in of CISG by parties established in non-Contracting States

# F. The principle of party autonomy in practice

- **(1) The battle of the forms: definition**

**The definition of the battles 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 relations to the essential terms of general conditions (e.g.jurisdiction or arbitration clause) are considered to alter the terms of the offer materially (**art. 19 (3) CISG**)

## F. The principle of party autonomy in practice

- **(1) The battle of the forms : legal conception**

  - **The last-shot rule as a complex legal conception**:

    - It can be a complex challenge for the courts to determine what the exact terms of the contract are (**art. 8 (2) CISG**)
    - Both scholars and case law consider **that article 19 (2) CISG incorporates the so-called « <u>last-shot rule</u> »**
    - 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**

# F. The principle of party autonomy in practice

- **(1) The battle of the forms : out-dated solution**
  - **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 criticized, but both parties and arbitrators should try to avoid it

## F. The principle of party autonomy in practice

**(1) The battle of the forms : remedies to the "last shot rule"**

**<u>Implicit and explicit exclusion by parties:</u>**

- The parties can **<u>expressly</u>** 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.
- The parties can **<u>implicitly</u>** waive the application of the last-shot rule. However, they must have an exclusive conduct.

**<u>Presumption of the exclusion of the last shot rules as a business standard:</u>**

- We can consider that according to a **widely spread <u>business standard and/or trade usages</u> the parties would have preferred the last-shot rule not to be applied to the contract** (art. 6, 7, 8 CISG);
**State judges** are hesitant to presume the parties' common 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 State judges, the **arbitrator have much more flexibility and margin of appreciation** (idea of art. 1511 CPC).

## F. The principle of party autonomy in practice

- **(2) Opting in of CISG**

  - The possibility of *opting in* the CISG by parties established in non-Contracting States

  - No dot confuse:

    - PRINCIPLE of *Opting out*: according to article 6 CISG, the parties have the freedom to exclude the application of the CISG

    - EXCEPTION of *Opting in*: the parties (established in not-Contracting States) have the possibility to apply the CISG, even if the legal conditions of Art. 1 are not fulfilled

## F. The principle of party autonomy in practice

- **(2) Opting in of CISG**

  - The different scope of the contractual clause

    - <u>Before a State court</u>

      - The clause will only have <u>limited effectiveness</u>
      - The CISG will not 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 that would be considered as applicable (under the PIL rules / Rome I) will govern the contract as the « <u>*lex contractus*</u> »

## F. The principle of party autonomy in practice

- **(2) Opting in of CISG**

  - The different scope of the contractual clause

    - <u>Before a State court</u>

      - Only in the case the « *lex contractus* » allows derogations from the general provisions of the national applicable law, the State court will take the provisions of the CISG into account
      - Consequently, the CISG can only be applicable if the national applicable law (« *lex contractus* ») leaves certain matters to the discretion of the parties
      - In this case, CISG can be compared <u>to soft law</u>

## F. The principle of party autonomy in practice

- **Opting in of CISG**

  - The different scope of the contractual clause

    - <u>Before an arbitral tribunal</u>

      - The arbitrator (Art. 1511 French CPC) will give a great importance to <u>the choice of law (« rules of law ») made by the parties</u>

      - The arbitrator will consider CISG (opted in) as the *lex contractus*, i.e. the substantive law of the contractual relationship

## F. The principle of party autonomy in practice

- **Opting in of CISG**

  - The different scope of the contractual clause

    - <u>Before an arbitral tribunal</u>

      - The arbitrator will take national law only into account, if the parties have stipulated that it must be applied as <u>subsidiarily applicable law</u> or to <u>fill in gaps not covered</u> by the provisions of the contract

      - The arbitrator will also take intro consideration the “rules of law” (law includes soft law!) which it considers <u>appropriate</u> (better-law approach) as well as <u>trade usages</u> (Art. 1511 French CPC)

## III. Soft law in international practice

**A. Incoterms**

**B. The notion of Lex Mercatoria**

**C. UNIDROIT Principles of international Commercial Contracts**

## A. Incoterms

- General aspects
- Incoterms classification
- Structure of Incoterms 2020
- Examples of Incoterms
- Relationship with CISG and contracts

## A. Incoterms

- **General aspects**

  - Non-binding terms by ICC – only apply if included in contract by parties
  - Clarify roles of seller/buyer : obligations, costs, risk
  - Additional aspects: packaging, customs formalities, invoicing, documentary credits, VAT, cost allocation

# A. Incoterms

- **General aspects**

  - Must specify the exact location (e.g., "*FCA Warehouse Paris*" or "*DAP Hamburg Port*")

  - Should be aligned with contract documents and transport arrangements

  - Do not govern:

    - Transfer of title/ownership
    - Contract formation or dispute resolution
    - Payment terms (unless otherwise stated)

## A. Incoterms

- **General aspects**
  - Regulated aspects :
    - Export packaging
    - Loading charges
    - Delivery to Port/Place
    - Export Duties, Taxes and Customs Clearance

# A. Incoterms

- **General aspects**
  - Regulated aspects :
    - Origin Terminal Charges
    - Loading on Carriage
    - Carriage Charges
    - Transfer ot risk (vs. transfer of title / ownership / property)

## A. Incoterms

- **General aspects**
  - Regulated aspects :
    - Insurance
    - Destination Terminal Charges
    - Delivery to destination
    - Unloading on destination
    - Import Duties, Taxes and Customs Clearance

## A. Incoterms

- **General aspects**

  - Groups of Terms

    - Maritime transport only : FAS, FOB, CFR, CIF
    - Multimodal transport : EXW, FCA, CPT, CIP, DAP, DPU, DDP

## A. Incoterms

- **General aspects**
  - Most frequently used Incoterm-clauses
    - EXW (Ex Works): buyer assumes all responsibilities from seller's premises
    - FOB (Free On Board): seller delivers to ship; risk passes at loading
    - CIF (Cost, Insurance, Freight): seller covers transport + basic insurance
    - DAP/DDP: seller delivers in buyer’s country (incl. customs clearance)

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# A. Incoterms

- **Structure of Incoterms 2020**

Incoterms® 2020 Rules Responsibility Quick Reference Guide

IncoDocs

| | EXW | FCA | FAS | FOB | CFR | CIF | CPT | CIP | DAP | DPU | DDP |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | Freight Collect Terms | | | | Freight Prepaid Terms | | | | | | |
| Groups | Any Mode or Modes of Transport | | Sea and Inland Waterway Transport | | | | Any Mode or Modes of Transport | | | | |
| Incoterm | EXW Ex Works (Place) | FCA Free Carrier (Place) | FAS Free Alongside Ship (Port) | FOB Free On Board (Port) | CFR Cost and Freight (Port) | CIF Cost Insurance & Freight (Port) | CPT Carriage Paid To (Place) | CIP Carriage & Insurance Paid to (Place) | DAP Delivered at Place (Place) | DPU Delivered at Place Unloaded (Place) | DDP Delivered Duty Paid (Place) |
| Transfer of Risk | At Buyer's Disposal | On Buyer's Transport | Alongside Ship | On Board Vessel | On Board Vessel | On Board Vessel | At Carrier | At Carrier | At Named Place | At Named Place Unloaded | At Named Place |
| **Obligations & Charges:** | | | | | | | | | | | |
| Export Packaging | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller |
| Loading Charges | Buyer | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller |
| Delivery to Port/Place | Buyer | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller |
| Export Duty, Taxes & Customs Clearance | Buyer | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller |
| Origin Terminal Charges | Buyer | Buyer | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller |
| Loading on Carriage | Buyer | Buyer | Buyer | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller |
| Carriage Charges | Buyer | Buyer | Buyer | Buyer | Seller | Seller | Seller | Seller | Seller | Seller | Seller |
| Insurance | Negotiable | Negotiable | Negotiable | Negotiable | Negotiable | *Seller | Negotiable | **Seller | Negotiable | Negotiable | Negotiable |
| Destination Terminal Charges | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Seller | Seller | Seller | Seller | Seller |
| Delivery to Destination | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Seller | Seller | Seller |
| Unloading at Destination | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Seller | Seller |
| Import Duty, Taxes & Customs Clearance | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Seller |

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*CIF requires at least an insurance with the minimum cover of the Institute Cargo Clause (C) (Number of listed risks, subject to itemized exclusions)
**CIP now requires at least an insurance with the minimum cover of the Institute Cargo Clause (A) (All risk, subject to itemized exclusions)

## A. Incoterms

- **Structure of Incoterms 2020**

  - Maritime-only terms (for sea and inland waterway transport) :

    - FAS (Free Alongside Ship)
    - FOB (Free On Board)
    - CFR (Cost and Freight)
    - CIF (Cost, Insurance, and Freight)

# A. Incoterms

- **Structure of Incoterms 2020**

  - Multimodal terms (suitable for all modes of transport, including air, road, rail, and combined transport) :

    - EXW (Ex Works)
    - FCA (Free Carrier)
    - CPT (Carriage Paid To)
    - CIP (Carriage and Insurance Paid To)
    - DAP (Delivered At Place)
    - DPU (Delivered at Place Unloaded) – *new in 2020, replaces DAT*
    - DDP (Delivered Duty Paid)

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## A. Incoterms

- **Structure of Incoterms 2020**

  - Key elements defined by each Incoterm :

    - The point at which risk transfers from seller to buyer
    - The allocation of transportation and insurance costs
    - Responsibilities for customs export/import formalities

## A. Incoterms

- **Incoterms classification**

  - **E-Class - EXW *(Ex Works)***:

    - The most suitable Incoterm clause for the exporter (seller)
    - The seller has duly delivered the goods as soon as they have been made available to the buyer at seller's own premises (*ex works*)
    - 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 *(ex works*) and the buyer has been informed
    - Transport is at the expense and risk of the buyer
    - Recommended clause for intra-EU trade (no customs export formalities!)

## A. 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 to the carrier (ship / board)
    - 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

## A. 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 its 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

## A. 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 favorable clause for the importing company

## A. Incoterms

- **Relationship with CISG and contracts**

    - Incoterms complement the CISG and are often integrated into international sale of goods contracts governed by CISG
    - They help to fill gaps regarding delivery, risk, and cost allocation not detailed in the CISG
    - If both are used, they must be harmonized to avoid inconsistencies

## III. Soft law in international practice

**B. Lex Mercatoria**

**C. UNIDROIT Principles**

# B. Lex Mercatoria

- **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)

  - Party Autonomy
  - Pacta Sunt Servanda
  - Good Faith
  - Reasonableness
  - Certainty
  - Impartiality
  - Flexibility
  - Efficiency
  - Uniform Interpretation
  - Freedom from Formalism
  - Freedom to Adopt Model Rules
  - Binding Effect of Trade Usages
  - Duty to Mitigate
  - Proportionality
  - Duty to Cooperate
  - Finality of Awards
  - Enforceability
  - Non–Retroactivity
  - Comity
  - Predictability

## B. Lex Mercatoria

- **The notion of Lex Mercatoria**

  - ICC statistics: out of a total of 1.228 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: Arbitrators apply the « rules of law » (art. 1511 CPC) which includes soft law and shall take trade usages into account

## C. UNIDROIT Principles

- 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

## C. UNIDROIT Principles

- Chapter 6 : Enforcement
- Chapter 7: Non-performance
- Chapter 8: Compensation
- Chapter 9: Assignment of receivables, payables and contracts
- Chapter 10: Limitation periods

## C. UNIDROIT Principles

- **Model clauses for the use of the Unidroit Principles**

  - Choose the Unidroit Principles as the <u>law governing the contract</u> **(1)**
    → only in the case of international commercial arbitration
    - Designate solely the Unidroit Principes **(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 <u>clauses of the contract</u> **(2)**

  - Refer to the Unidroit Principles to <u>interpret and supplement the CISG</u> when it is chosen by the parties **(3)**

  - Refer to the Unidroit Principles to <u>interpret and supplement the applicable national (domestic) law</u> **(4)**

## IV. Negotiation and legal design of international contracts

- What is an « international contract » ?
- Which are the specific international clauses ?
- How to negotiate an « international contract »?
- How to optimize the legal design of international contracts ?

# IV. Negotiation and legal design of international contracts

- **What is an « international contract » ?**

  - General legal approach: *« extraneaous element »*

    → *National and European PIL (Brussels I and Rome I Regulations)*

  - Specific legal approach: cross border establishment

    → *UN Convention on the International Sales of Goods of 11 April 1980 (CISG)*

  - Economic approach: *« movement of goods, services or payment across borders »*.

    → *International commercial arbitration (art. 1504 CPC) :*

    *" (…) international (…) qui met en cause les intérêts du commerce international"*

# IV. Negotiation and legal design of international contracts

- **Which are the specific international clauses ?**

  - Arbitration clause (1)
  - Confidentiality clause (2)
  - Currency clause (3)
  - Force majeure clause (4)
  - General Terms and Conditions Acceptance Clause (5)
  - Governing law clause (6)

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# IV. Negotiation and legal design of international contracts

- **Which are the specific international clauses ?**

  - Hardship clause (7)
  - Hold harmless clause (8)
  - Jurisdiction clause (9)
  - Liability clause (10)
  - Non-compete clause (11)
  - Termination clause (12)

# IV. Negotiation and legal design of international contracts

- **(1) Arbitration clause** :

  - Allows disputes to be resolved outside of State courts
  - Faster and more efficient proceedings
  - More flexible procedure organization
  - More discreet (confidential)
  - More expertise (due to the experience and specialization of the arbitrators)
  - Hybrid clauses
    - ✓ Arbitration + Mediation
    - ✓ Arbitration vs. State Court proceedings (depending on the dispute value)

# IV. Negotiation and legal design of international contracts

- **(2) Confidentiality clause**

  - Synonymous : non-disclosure clause / agreement (NDA)
  - Protects sensitive and confidential information
  - Prevents the other party from disclosing or using confidential information
  - Helps maintaining the company’s competitiveness

# IV. Negotiation and legal design of international contracts

- **(3) Currency clause :**

  - Reduces uncertainty related to exchange rates and secures payment between foreign partners

  - Helps to anticipate and manage financial risks related to currency fluctuations

# IV. Negotiation and legal design of international contracts

- **(4) Force majeure clause :**

  - Protects if an unforeseen external event (such as a natural disaster, strike, or health crisis) prevents the party from fulfilling its obligations

  - Allows to temporarily suspend or cancel the contract without penalty in exceptional circumstances

 

# IV. Negotiation and legal design of international contracts

- **(5) General Terms and Conditions Acceptance Clause :**

  - Confirms the application of the GTC of one of both parties (and the refusal of the GTC of the other party)

  - Makes sure that very specific GTC clauses related to (e.g.) the choice of applicable law, the determination of jurisdiction, the parties' liability will apply

  - Reduces any ambiguity, especially when the contracting parties come from countries with different legal systems

  - Prevents against the negative effects of the "last shot rule"

  - Enhances the legal certainty of the contract and limits the risk of disputes

# IV. Negotiation and legal design of international contracts

- **(6) Governing law clause:**

  - One of the most crucial clauses in international contracts

  - Choice of the applicable law shall be express and clear (e.g., as concerns exclusion or not of CISG)

  - Governing law clause can comprise several national laws that shall be attributed to different aspects of the contract ("*dépeçage du contrat*")

  - Governing law clause can also make reference to soft law (in particular when complemented by arbitration clause)

# IV. Negotiation and legal design of international contracts

- **(7) Hardship clause** :

  - Hardship clauses allow the terms of the contract to be adjusted if unforeseen circumstances make its performance too difficult or too costly

  - Hardship clauses may permit to find common ground with the contracting party without having to terminate the contract

  - Hardship clauses must be drafted in accordance with Force Majeure clauses as well as the statutory provision (of the applicable law) based on the principle “*regula rebus sic stantibus*” (= under French law: *théorie de l’imprévision*)

# IV. Negotiation and legal design of international contracts

- **(8) Hold harmless clause:**

  - Hold harmless clauses shall protect a contracting party in the event of a (justified) claim by a third party : under this clause, the other party will be responsible for handling the third-party-claim on its behalf and will “liberate” the contracting party from this issue

  - Hold harmless clauses do not act against the third party that made the (justified) claim but transfers the burden of liability and costs associated with certain risks to the co-contractor

  - Very common in subcontracting, distribution and transnational service contracts

# IV. Negotiation and legal design of international contracts

- **(9) Jurisdiction clause :**

  - Jurisdiction clauses determine which national State court will have (exclusive) jurisdiction to resolve disputes
  - Parties may designate the State court of the country of one of the parties or or a neutral court
  - It is possible to refer solely to the State courts of one country in general ("*German Courts shall have jurisdiction*") without precising the local Court
  - Parties also may designate the State court "of the defending party"
  - Possibility to sign a <u>hybrid clause</u>: combination of arbitration + mediation and/or jurisdiction + arbitration clause depending on the value of the dispute
  - Problem: legal validity of the so-called <u>asymmetric jurisdiction clause</u> conferring an option to one party between the chosen jurisdiction and "all other competent jurisdictions"

# IV. Negotiation and legal design of international contracts

- **(10) Liability clause :**

  - Liability clauses are used to rule out certain types of contractual breaches (decree of responsibility) and to exclude certain types of damages (e.g., indirect damages / gain losses)

  - Liability clauses allow to exclude or to limit the financial consequences if one of the parties fails to fulfill its commitments

  - The legal validity of liability clauses (even under CISG !) shall be appreciated regarding to the statutory provisions of the applicable law (subsidiarily applicable law in CISG governed contracts)

# IV. Negotiation and legal design of international contracts

- **(11) Non-compete clause:**

  - Non-compete clauses prevent the other party (e.g., the distributor or co-developer) from directly competing with the other party during or after the term of the contract

  - Non-compete clauses allow to prevent trade secrets, business strategies & business relationships from unfair competition

  - The drafting of non-compete clauses shall be done in accordance with the (mandatory) statutory provisions of the applicable law (there may be legal obligation to pay a compensation to the other party)

# IV. Negociation and legal design of international contracts

- **(12) Termination clause :**

  - Termination clauses define the conditions under which the contract can be terminated without incurring penalties etc.

  - In order to avoid the French "sudden termination rule" of contractual established relationship (art. 442 I 2 French Commercial Code) it is (theoretically) recommendable to foresee a notice period of "18 months"

  - Termination clauses shall also precise the contractual obligations of each party for the period
    - ✓ until effectiveness of the termination (e.g., restitution of property)
    - ✓ after effectiveness of termination (e.g., supply service, confidentiality)

# IV. Negotiation and legal design of international contracts

- **How to negotiate an « international contract »?**

- Pre-contractual negotiation phase
  - Non-disclosure agreement (NDA)
  - Letter of intent (LOI) – Memorandom of Understanding (MOU)
  - Signing & Closing of the final contracts

- Specificities relating to international contracts
  - Jurisdictional framework : choice of jurisdiction or arbitration
  - Legislative framework : CISG and choice of subsidiary applicable national law
  - Linguistic framework : language priority clause

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# IV. Negotiation and legal design of international contracts

- **How to optimize the legal design of international sales of goods contracts**

  - Drafting the contract with the intent to satisfy to the client's individual needs (it will be necessary to override the legal "neutral" conception of the CISG)

  - <u>Explicite choice of CISG </u>as the appliable legal regime for international sale of goods contracts

  - Designing (e.g.) the material / substantive rules to <u>Swiss law </u>as a <u>subsidiary applicable law</u> (in particular with regard to the <u>validity check </u>of the contractual clauses derogating from the legal conception of the CISG)

## V. International Distribution

### A. International Distribution as a Contractual Phenomenon

1. Definition and Schemes of Distribution

2. Private international Law Rules

### B. International Distribution as an Extra-Contractual Phenomenon

1. Defect Products Liability

2. Abrupt Termination of Commercial Relations

## A. International Distribution as a Contractual Phenomenon

### 1. Definition and Schemes of Distribution

- **Distribution by sales agent**
- **Distribution by contractual chain**

## 1. Definition and Schemes of Distribution

- **General aspects of distribution by sales agent**

  - Three persons : principal – sales agent – purchaser
  - Sales agent: self-employed intermediary natural or legal person
  - Sales agent can have (or not) contractual authority/powers to negotiate/conclude sales on behalf of the principal
  - Contractual relationship
    - no contractual relationship between sales agent and purchaser
    - sales agency contract between sales agent und principal
  - No ownership of the goods :
    - sales agent does not take title to goods
    - direct ownership transfer between principal and purchaser

# 1. Definition and Schemes of Distribution

- **General aspects of distribution by sales agent**

  - Agent duties towards principal: promote sales, report material facts, avoid conflicts
  - Directive 86/653/EEC: harmonization of commercial agency law
  - Agent’s rights following termination by the principal:
    - Indemnity or;
    - Compensation
  - Financial consequences due to different transposition in national law:
    - France: indemnity on the basis of (at least) 2 years of commissions
    - Germany: compensation on the basis of the concrete financial loss within the limit of 1 year of commissions

# 1. Definition and Schemes of Distribution

- **General aspects of distribution through supply chain**

  - Definition

    - Supply chain : export company -> import company -> reseller -> final purchaser

    - Each member of the supply chain purchases and resells products

    - Remuneration by margin of each sales transaction (no commissions!)

    - Distributors in the supply chain own goods and bear resale risk

## 1. Definition and Schemes of Distribution

- **General aspects of distribution by supply (contractual) chain**

  - Main forms

    - Exclusive Distribution : distributor has exclusive rights and/or obligations
      - simple exclusivity: territory is exclusively granted to distributer
      - mutual exclusivity:
        - ✓ exclusivity of distribution territory (pro: distributor)
        - ✓ exclusivity of supplier (pro: supplier)

    - Selective Distribution :
      - supplier sells to selected distributors
      - supplier sets quality or control conditions (e.g. luxury sector)

## 1. Definition and Schemes of Distribution

- **General aspects of distribution by supply (contractual) chain**

  - Franchising

    - Franchisor licenses brand and know-how

    - Franchisee :
      - ✓ buys products from franchisor
      - ✓ pays fees/royalties
      - ✓ operates as independent business

## 2. Private International Law Rules

- **Jurisdiction (Brussels I bis Regulation)**
    - Article 25 : prorogation of jurisdiction by agreement
    - Article 7(1) : Special jurisdiction for contracts
        - sales contracts: place where the goods are / should be delivered
        - distribution / franchise contrats : place where the services are / should be provided
    - Article 4 : Domicile of defendant

## 2. Private International Law Rules

- **Applicable Law**

  - Distribution by sales agent : Hague Convention of 1978

  - Distribution in the supply chain : Rome I Regulation / Hague Convention 1955

## 2. Private International Law Rules

- **Applicable Law : <u>Hague Convention of 1978</u>**
  - France is a contracting State (with Argentina, Netherlands and Portugal) ; entered into force on May 1, 1992)
  - Applies to international agency contracts : in particular the contractual relationship between principle and agent

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## 2. Private International Law Rules

- **Applicable Law : <u>Hague Convention of 1978</u>**

| | **Rule or applicable law** | **Key conditions / exceptions** |
|---|---|---|
| Art. 5 | Freedom of choice | Principal and agent may choose the applicable law **expressly or impliedly** |
| Art. 6(1) | In absence of choice | Law of the country where the **agent has his business establishment** |
| Art. 6(2) | Exception | If the agent **mainly acts in the principal's country**, the law of that country applies |
| Art. 6(3) | Escape clause | If circumstances show a **manifestly closer connection** with another country, apply that law |

## 2. Private International Law Rules

- **Applicable Law : <u>Hague Convention of 1978</u>**

**Art. 5 Hague 1978:**

*"The internal law chosen by the principal and the agent shall govern the agency relationship between them.*

*This choice must be express or must be such that it may be inferred with reasonable certainty from the terms of the agreement between the parties and the circumstances of the case. »*

## 2. Private International Law Rules

- **Applicable Law : Hague Convention of 1978**

**Art. 6 Hague 1978:**

“*In so far as it has not been chosen in accordance with Article 5, the applicable law shall be the internal law of the State where, at the time of formation of the agency relationship, the agent has his business establishment or, if he has none, his habitual residence.*

*However, the internal law of the State where the agent is primarily to act shall apply if the principal has his business establishment or, if he has none, his habitual residence in that State.*

*Where the principal or the agent has more than one business establishment, this Article refers to the establishment with which the agency relationship is most closely connected.* »

## 2. Private International Law Rules

- **Applicable Law : <u>Hague Convention of 1978</u>**

  - Covered Issues (**Art. 8**)

    - Authority of agent
    - Liability beyond authority
    - Sub-agents
    - Non-compete clauses
    - Termination rights
    - Clientele indemnity (e.g. French "*indemnité de clientèle*")
    - Recoverable damages

## 2. Private International Law Rules

- **Applicable Law : <u>Rome I Regulation</u>**

| | **Rule or applicable law** | **Key conditions / exception** |
|---|---|---|
| **Art. 3(1)** | Party autonomy | Parties may **choose the applicable law** (expressly or impliedly) for all or part of the contract |
| **Art. 3(2)** | Change of choice | Parties may change the chosen law at any time, without prejudice to third-party rights |
| **Art. 3(3)** | Mandatory domestic protection | Where all elements are located in one country, choice of a foreign law **does not prejudice mandatory rules** of that country |
| **Art. 3(4)** | EU safety clause | If the situation is closely connected to the EU, the choice of a non-EU law cannot exclude **EU mandatory provisions** |
| **Art. 4(1)** | Default rule – absence of choice | Definition of the applicable law for each specific contract type. |
| **Art. 4(2)** | Standard contracts | If contract type not listed, governed by law of the country where the party required to effect the **characteristic performance** has habitual residence |
| **Art. 4(3)** | Escape Clause | Where the contract is **manifestly more closely connected** with another country, that law applies (escape clause) |
| **Art. 4(4)** | Global clause | If applicable law cannot be determined under (1) or (2), apply the law of the country **most closely connected** with the contract. |

## 2. Private International Law Rules

- **Applicable Law : <u>Rome I Regulation</u>**

| | **Rule or applicable law** | **Key conditions / exception** |
|---|---|---|
| **Art. 9** | Overriding mandatory provisions (*lois de police*) | The forum applies its own overriding mandatory rules; may also give effect to those of the place of performance |
| **Art. 21** | Public policy (*ordre public*) | The application of a provision of foreign law may be refused if **manifestly incompatible** with the public policy of the forum |
| **Art. 25** | Relationship with international conventions | Rome I does not prejudice existing conventions binding EU Member States (e.g., Hague Conventions 1955, 1973) |

## 2. Private International Law Rules

- **Applicable Law : <u>Rome I Regulation</u>**

**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.*"

## 2. Private International Law Rules

- **Applicable Law : <u>Rome I Regulation</u>**

**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."*

## 2. Private International Law Rules

- **Applicable Law : <u>Rome I Regulation</u>**

**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 <u>seller has his habitual residence</u>;*

*(b) a contract for the **provision of services** shall be governed by the law of the country where the <u>service provider has his habitual residence</u>;*

*(c) a contract relating to a **right in rem in immovable property** or to a tenancy of immovable property shall be governed by the <u>law of the country where the property is situated</u>;*

*(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;*

## 2. Private International Law Rules

- **Applicable Law : <u>Rome I Regulation</u>**

**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:*

*(e) a **franchise contract** shall be governed by the law of the country where the <u>franchisee has his habitual residence</u>;*

*(f) a **distribution contract** shall be governed by the law of the country where the <u>distributor has his habitual residence</u>;*

*(g) a contract for the **sale of goods by auction** shall be governed by the law of the country where the <u>auction takes place</u>, if such a place can be determined;*

*(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-discretionary rules and governed by a single law, shall be governed by that law."*

## 2. Private International Law Rules

- **Applicable Law : <u>Rome I Regulation</u>**

**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****. 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.*"

## 2. Private International Law Rules

- **Applicable Law : <u>Rome I Regulation</u>**

**Art. 21 Rome I Regulation:**

*"The application of a provision of the law of any country specified by this Regulation may be refused only if such application is **manifestly incompatible with the public policy** (ordre public) of the forum."*

**Art. 25 Rome I Regulation:**

*"1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.*

*2. However, this Regulation shall, as between Member States, take **precedence over conventions concluded exclusively between two or more of them** in so far as such conventions concern matters governed by this Regulation. »*

## 2. Private International Law Rules

- **Applicable Law : <u>Hague Convention of 1955</u>**

| | **Rule or applicable law** | **Key conditions / exceptions** |
|---|---|---|
| **Art. 2** | Party autonomy | The parties to an international sale contract may **expressly or impliedly** choose the law applicable to their contract |
| **Art. 3(1.1)** | Absence of choice – principle rule : <u>seller's habitual residence</u> | In the absence of an express or implied choice of law, the contract is governed by the **law of the country in which the seller had its habitual residence or principal place of business** at the time of receiving the order |
| **Art. 3(1.2)** | <u>Exception rule: seller's foreign establishment</u> | If the order was received by the seller's **establishment located in another country**, the law of that establishment applies |
| **Art. 3(2)** | Exception rule: <u>purchaser's habitual residence</u> | If the the order was received (by the seller or sellor's agent / representative) **if sellor or sellor's agent / representative** is established in ther **country where the purchaser had its habitual residence** at the time of receiving the order |

## 2. Private International Law Rules

- **Applicable Law : <u>Hague Convention of 1955</u>**

**Art. 2 Hague 1955:**

*"A sale shall be governed by the **domestic law of the country designated** by the Contracting Parties.*

*Such designation must be contained in an **express clause**, or **unambiguously result from the provisions of the contract**.*

*Conditions affecting the consent of the parties to the law declared applicable shall be determined by such law."*

## 2. Private International Law Rules

- **Applicable Law : <u>Hague Convention of 1955</u>**

**Art. 3 Hague 1955:**

*"In default of a law declared applicable by the parties under the conditions provided in the preceding article, a sale shall be governed by the* ***domestic law of the country in which the vendor has his habitual residence*** *at the time when he receives the order. If the order is* ***received by an establishment of the vendor****, the sale shall be governed by the domestic law of the country in which the establishment is situated.*

*Nevertheless, a sale shall be governed by the* ***domestic law of the country in which the purchaser has his habitual residence****, or in which he has the establishment that has given the order, if the order has been received in such country, whether by the vendor or by his representative, agent or commercial traveller.*

*In case of a sale at an exchange or at a public auction, the sale shall be governed by the domestic law of the country in which the exchange is situated or the auction takes place."*

## B. International Distribution as an Extra-Contractual Phenomenon

1. **Defective Products Liability**

2. **Sudden or Abrupt Termination of Commercial Relationships**

## 1. Defective product liability

- **Jurisdiction (EU Regulation Brussels 1 bis):**
  - **Art. 25** : problem of (contractual vs. non-contractual) qualification
  - **Art 7(2)** : place where the harmful event occurred or may occur
  - **Art. 4** : defendant's State Court (= victim's of abrupt termination domicile)
- **French Procedural law** : material competence is concentrated to specific Judicial Tribunals (TJ) and Appel Courts

## 1. Defective product

- **Applicable Law**

  - EU States (besides France *et al.*) have jurisdiction : **Rome II Regulation**

  - France : **Hague Convention of 1973**

## 1. Defective product

- **Rome II Regulation (art. 5)**

| | **Rule or Applicable Law** | **Key Conditions / Exceptions** |
|---|---|---|
| **Art. 4 (1)** | Law of the ***place of injury*** | Irrespective of where the event giving rise to damage occurred or where indirect consequences are felt. |
| **Art. 4 (2)** | Law of the ***common habitual residence*** | Both the person claimed to be liable and the person sustaining damage |
| **Art. 4 (3)** | **Escape clause** – law of another country | If the tort/delict is "manifestly more closely connected" with another country (e.g. a pre-existing relationship between the parties) |
| **Art. 5** | ***Product liability*** | Law of the country where **a), b) or c) if also maketed** there:<br>(a) the person sustaining damage had its **habitual residence**, OR<br>(b) (b) the product was **acquired**; OR<br>(c) (c) the damage **occurred**. |

## 1. Defective product

- **Rome II Regulation**

| | **Rule or Applicable Law** | **Key Conditions / Exceptions** |
|---|---|---|
| **Art. 12** | Culpa in contrahendo | This Article applies to non-contractual obligations arising out of dealings prior to the conclusion of a contract |
| **Art. 14** | Party autonomy | The parties may agree to submit non-contractual obligations to the **law of their choice** (must be agreed after the event or between professionals) |
| **Art. 16** | Overriding mandatory provisions (*lois de police)* | Application of the chosen/applicable law may be overridden by the mandatory rules of the forum or other legislation |
| **Art. 26** | Public policy (ordre public) | Application of a provision of foreign law may be refused if manifestly incompatible with the public policy of the forum. |
| **Art. 28** | Relationship with existing international conventions | Rome II does **not prejudice the application of international conventions** to which one or more MS of the EU were parties when Rome II was adopted : → **1973 Hague Convention** |

## 1. Defective product

- **Rome II Regulation**

**Art. 4 Rome II:**

*« 1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the **law of the country in which the damage occurs** irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.*

*2. However, **where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country** at the time when the damage occurs, the law of that country shall apply.*

*3. Where it is **clear from all the circumstances of the case that the tort/delict 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. A manifestly closer connection with another country might be based in particular on a **pre-existing relationship between the parties, such as a contract**, that is closely connected with the tort/delict in question. »*

## 1. Defective product

- **Rome II Regulation**

### Art. 5 Rome II:

*« 1. Without prejudice to Article 4(2), the law applicable to a non-contractual obligation arising out of* ***damage caused by a product*** *shall be:*
*(a) the law of the country in which* ***the person sustaining the damage had his or her habitual residence*** *when the damage occurred, if the product was* ***marketed*** *in that country; or, failing that,*
*(b) the law of the country in which the* ***product was acquired****, if the product was* ***marketed*** *in that country; or, failing that,*
*(c) the law of the country in which the* ***damage occurred****, if the product was* ***marketed*** *in that country.*
*However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could* ***not reasonably foresee*** *the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c).*

*2. Where it is* ***clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1****, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.»*

## 1. Defective product

- **Rome II Regulation**

**Art. 12 Rome II:**

*« 1. The law applicable to a non-contractual obligation arising out of* ***dealings prior to the conclusion of a contract****, regardless of whether the contract was actually concluded or not, shall be the* ***law that applies to the contract or that would have been applicable to it had it been entered into****.*

*2.Where the law applicable cannot be determined on the basis of paragraph 1, it shall be:*

*(a) the law of the country in which the* ***damage occurs****, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred; or*

*(b) where the* ***parties have their habitual residence in the same country*** *at the time when the event giving rise to the damage occurs, the law of that country; or*

*(c) where it is* ***clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b)****, the law of that other country.»*

# 1. Defective product

- **Rome II Regulation**

**Art. 14 Rome II:**

*« 1. The parties may agree to submit non-contractual obligations to the law of their choice:*

*(a) by an **agreement entered into after the event** giving rise to the damage occurred; or*

*(b) where all the parties are pursuing a **commercial activity**, also by an **agreement freely negotiated before the event** giving rise to the damage occurred.*

*The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.*

*2. Where **all the elements relevant to the situation at the time when the event giving rise to the damage occurs 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.*

*3. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the **Member States**, the parties' choice of the law applicable 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.***

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# 1. Defective product

- **Rome II Regulation**

**Art. 16 Rome II:**

*« Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are **mandatory** irrespective of the law otherwise applicable to the non-contractual obligation. »*

**Art. 26 Rome II:**

*« The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly **incompatible with the public policy (ordre public)** of the forum. »*

**Art. 28 Rome II:**

*« 1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations.*
*2. However, this Regulation shall, as between Member States, take **precedence over conventions concluded exclusively between two or more of them** in so far as such conventions concern matters governed by this Regulation. »*

## 1. Defective product

- **Hague Convention of 1973 (defect products liability)**

| | Rule or Applicable Law | Key Conditions |
|---|---|---|
| **Art. 4** | Law of the ***place of injury*** | If that State is also:<br>(a) habitual residence of the victim, OR<br>(b) principal place of business of the defendant, OR<br>(c) place of acquisition of the product. |
| **Art. 5** | Law of the ***victim's habitual residence*** | If that State is also:<br>(a) principal place of business of the defendant, OR<br>(b) (b) place of acquisition of the product |
| **Art. 6** | Law of the ***defendant's principal place of business*** | If neither Art. 4 nor Art. 5 applies.<br>BUT the claimant may instead choose the law of the **place of injury**. |
| **Art. 7** | Exclusion of foreseeability | Even if Art. 4–6 determine the applicable law, it does not apply if the defendant could not reasonably foresee the product being marketed there. |
| **Art. 8** | Scope of the applicable law | |
| **Art. 9** | Safety and conduct rules | Even when another law applies, courts may still consider the **safety standards** of the State where the product entered the market. |

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## 1. Defective product

- **Hague Convention of 1973 (defect products liability)**

**Art. 4 Hague 1973:**

*“The applicable law shall be the internal law of the State of the **place of injury**, if that State is also -*

*a) the place of the **habitual residence of the person directly suffering damage**, or*

*b) the **principal place of business of the person claimed to be liable**, or*

*c) the place where the **product was acquired by the person directly suffering damage**.”*

## 1. Defective product

- **Hague Convention of 1973 (defect products liability)**

**Art. 5 Hague 1973:**

*"Notwithstanding the provisions of Article 4, the applicable law shall be the* ***internal law of the State of the habitual residence of the person directly suffering damage****, if that State is also -*

*a) the* ***principal place of business of the person claimed to be liable****, or*

*b) the* ***place where the product was acquired by the person directly suffering damage****."*

# 1. Defective product

- **Hague Convention of 1973 (defect products liability)**

**Art. 6 Hague 1973:**

*"Where neither of the laws designated in Articles 4 and 5 applies, the applicable law shall be the* ***internal law of the State of the principal place of business of the person claimed to be liable****, unless the claimant bases his claim upon the internal law of the State of the place of injury."*

## 1. Defective product

- **Hague Convention of 1973 (defect products liability)**

**Art. 7 Hague 1973:**

*"Neither the law of the State of the place of injury nor the law of the State of the habitual residence of the person directly suffering damage shall be applicable by virtue of Articles 4, 5 and 6 if* ***the person claimed to be liable establishes that he could not reasonably have foreseen*** *that the product or his own products of the same type would be made available in that State through commercial channels."*

# 1. Defective product

- **Hague Convention of 1973 (defect products liability)**

**Art. 8 Hague 1973:**

*“The law applicable under this Convention shall determine, in particular -*

*(1) the basis and extent of **liability**;*

*(2) the grounds for **exemption from liability**, any limitation of liability and any division of liability;*

*(3) the kinds of **damage** for which compensation may be due;*

*(4) the form of **compensation** and its extent;*

*(5) the question whether a right to damages may be **assigned or inherited**;*

*(6) the persons who **may claim damages** in their own right;*

*(7) the liability of a principal for the acts of his **agent** or of an employer for the acts of his **employee**;*

*(8) the **burden of proof** insofar as the rules of the applicable law in respect thereof pertain to the law of liability;*

*(9) rules of **prescription and limitation**, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.*

## 1. Defective product

- **Hague Convention of 1973 (defect products liability)**

**Art. 9 Hague 1973:**

*“The application of Articles 4, 5 and 6 shall not preclude consideration being given to the **rules of conduct and safety** prevailing in the State where the product was introduced into the market.”*

## 2. French « sudden termination » rule (art. L. 442-1 II C. com)

- Sudden termination of long-term commercial relationships without adequate notice is considered as unfair / abusive

*“II.-Holds the perpetrator liable and obliges them to* ***compensate for the damage*** *caused by any person engaged in production, distribution, or service activities who* ***abruptly terminates, even partially, an established commercial relationship****, without written notice that takes into account, in particular, the duration of the commercial relationship, with reference to commercial practices or interprofessional agreements, and, for the determination of the price applicable during its duration, the economic conditions of the market in which the parties operate.*

*In the event of a dispute between the parties over the length of the notice period, the party responsible for the termination cannot be held liable for an insufficient notice period if it has given* ***eighteen months****' notice.*

*The provisions of this II shall not preclude the right to terminate without notice in the event of non-performance by the other party of its obligations or in the event of force majeure."*

## 2. French « sudden termination » rule (art. L. 442-1 II C. com)

- Several questions on PIL:
  - contractual vs. non-contractual qualification:
    - **Article 7(1) vs. 7(2) Brussels I bis**
    - Rome I vs. Rome II
  - French sudden termination rule as an “overriding mandatory provision” (*loi de police*) according to **art. 9 of Rome I**
  - Validity of a jurisdiction clause in favor of a foreign jurisdiction that does not recognize French sudden termination rule as an overriding mandatory provision

# Thank you for your attention !


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