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Transnational Business Law

Part B : Legal sources

University of Strasbourg
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Powerpoint

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PRESENTATION OUTLINE

I. INTERNATIONAL LAW

II. EUROPEAN LAW

III. NATIONAL LAW

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I. INTERNATIONAL LAW

A. HARD LAW

B. SOFT LAW

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I. INTERNATIONAL LAW

A. HARD LAW

A.1 MATERIAL / SUBSTANTIVE RULES

A.2 CONFLICT OF LAWS RULES

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I. INTERNATIONAL LAW

A. HARD LAW

A.1 MATERIAL / SUBSTANTIVE RULES

① United Nations Convention on Contracts for the International Sale of Goods (CISG) dated 11 April 1980

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A. HARD LAW

A.1 MATERIAL / SUBSTANTIVE RULES

① CISG

1. Scope of Application

- Multilateral treaty (Vienna, 11 April 1980 ; in force since 1 January 1988)
- Uniform rules for international sale of goods
- Aims to reduce legal barriers & transaction costs in global trade

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① CISG

1. Scope of Application

- International treaty drafted by UNCITRAL (United Nations Commission on International Trade Law) and adopted in Vienna in 1980

- Today in force in 97 countries (e.g., France, Germany, USA, China)

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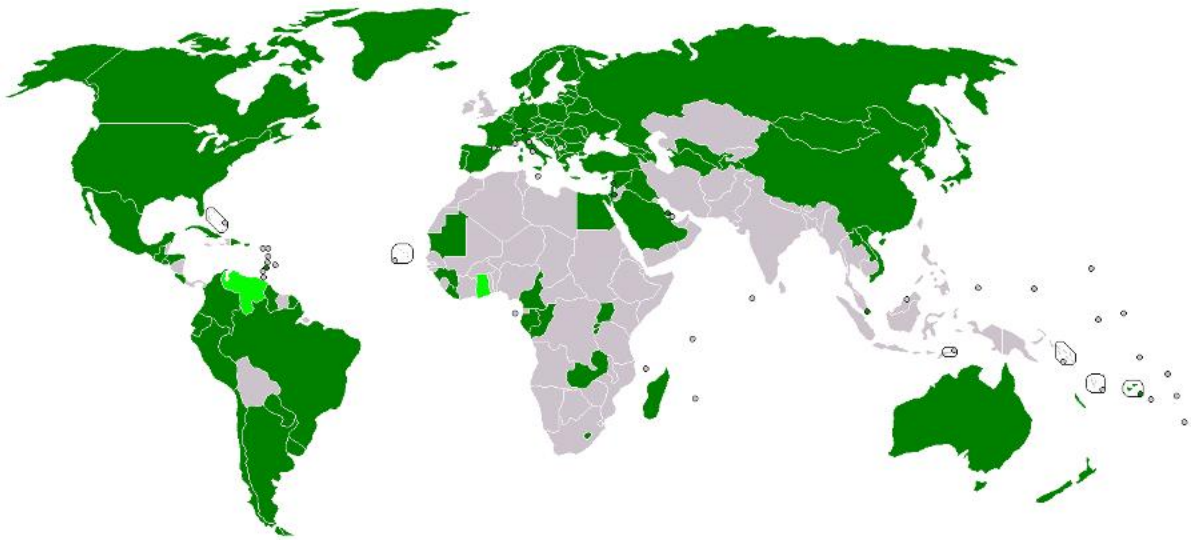
① CISG

1. Scope of Application

Green = ratified

Light green = signed but not ratified



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① CISG

1. Scope of Application

- Directly governs material issues :
  - Contract formation
  - Parties' rights and obligations
  - Remedies

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① CISG

1. Scope of Application

- Directly applicable (no transposition)
- Substantive / material rules (vs. conflict-of-law rules)
- Can be excluded or modified by parties (Art. 6)
- May be completed by national law or soft law (e.g., UNIDROIT principles)

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① CISG

1. Scope of Application

- Automatically applies when :

  - EITHER : parties have their place of business in different Contracting States (Art. 1(1)(a))

  - OR : rules of Private International Law (PIL) lead to a Contracting State's law (Art. 1(1)(b))

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① CISG

1. Scope of Application

Examples :

- French seller + German buyer → both parties are established in a Contracting State → CISG applies

- French seller + UK buyer :

  - UK is not a Contracting States → Art. 1(1)(a) CISG does not apply

  - Art. 1(1)(b) : rules of PIL lead to French law (seller's law) → CISG applies

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① CISG

2. Legal structure

- Part I. Sphere of application and general provisions
  - Chapter I. Sphere of application (Art. 1-6)
  - Chapter II. General provisions (Art. 7-13)

- Part II. Formation of the contract (Art. 14-24)

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① CISG

2. Legal structure

- Part III. Sale of goods
  - Chapter I. General provisions (Art. 25-29)
  - Chapter II. Obligations of the seller (Art. 30-52)
  - Chapter III. Obligations of the buyer (Art. 53-65)
  - Chapter IV. Passing of risk (Art. 66-70)
  - Chapter V. Provisions common to the obligations of the seller and of the buyer (Art. 71-88)

- Part IV. Final provisions (Art. 89-101)

① CISG

3. Key provisions

- **Art. 1 (geographical scope)** : different Contracting States + PIL rules
- **Art. 2 – 3 (material scope)** : exclusions of goods / contractual contents
- **Art. 4 (thematic scope)** : only formation of the contract and rights and obligation of the parties (not validity of contract / clauses)
- **Art. 6 (party autonomy)** : exclusion totally or partially
- **Art. 7 (interpretation)** : uniform application + good faith

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① CISG

3. Key provisions

- **Art. 8 (interpretation)** : according to the common intention of the parties or according to the understanding that a reasonable person would have

- **Art. 9 (usages and practices)** : trade usages + established practices

- **Arts. 14-24 (formation)** : offer and acceptance (no specific form required) + no acceptance if offer is substantially altered (by GTC)

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① CISG

3. Key provisions

- **Art. 25 (fundamental breach)** : serious deprivation of expected benefit
- **Art. 38 (Conformity of the goods and duty of examination)** : buyer must examine the goods
- **Art. 39 (Loss of the right to rely on a lack on conformity)** : notice of the lack of conformity within a reasonable time / within a period of two years from delivery
- **Art. 74 (damages)** : loss of profit + foreseeable damages
- **Art. 79 (exemption)** : force majeure + uncontrollable events

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I. INTERNATIONAL LAW

A. HARD LAW

A.2 Conflicts of law

② Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods

③ Hague Convention of 2 October 1973 on the Law Applicable to Products Liability

④ Hague Convention of 14 March 1978 on the Law Applicable to Agency Contracts

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② Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods

1. Scope of application

- Covered : international sales of goods
- Not covered :
  - Personal / home use (unless seller didn't know)
  - Sales by court or public authority
  - Shares, stocks, negotiable instruments
  - Ships, planes, electricity
- No rules about : party capacity, contract form, ownership transfer, third-party effects, court/arbitration rules, consumer protection

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② Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods

1. Scope of application

- In force since 1964
- Contracting Parties (Art. 2) : Italy, Belgium, France, Denmark, Finland, Norway, Niger, and Sweden

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② Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods

1. Scope of application

- The Hague Convention may play a role when:
  - Parties are not established in Contracting States to the CISG, or
  - CISG has been excluded by the contract (Art. 6), or
  - CISG does not cover certain aspects (e.g., contract validity, third party effects)

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② Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods

1. Scope of application

- **Legal articulation between the 1955 Hague Convention and the European PIL :**

→ Rome I Regulation on the law applicable to contractual obligations of 2008

- **Hague Convention 1955** applies in its Contracting States (that are also Member States of EU) as the specific conflict-of-laws rule for the contract of sale of goods

- **Rome I Regulation 2008** applies in the Hague Convention's Contracting States (that are also Member States of EU) as the general conflict-of-laws rule for all other types of contracts (besides the sale of goods)

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② Hague Convention 15 June 1955 on the Law Applicable to International Sales of Goods

2. Legal structure

- Art. 1 : scope of application
- Arts. 2 – 4 : applicable law
- Art. 2 : choice of law by the parties
- Art. 3 : applicable law in the absence of choice
- Art. 4 : law applicable to inspection of goods
- Arts. 5 – 6 : limitations and general provisions
- Art. 5 : matters excluded from the Convention
- Art. 6 : public policy (*ordre public*)
- Art. 7 : implementation into national law
- Arts. 8 – 11 : final provisions (signature, ratification, entry into force, territorial application, accession)
- Art. 12 : duration and denunciation

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② Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods

3. Key provisions

- **Art. 2 : party choice of law** = valid if clear or express; change allowed anytime

- **Art. 3** : **default of choice of law**
  - Principle: Vendor's / seller's law (place of business)
  - Exceptions :
    - Vendor's establishment's law if order has been received in this country
    - Purchaser's law if order has been received (by vendor or vendor's agent) in purchaser's country

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② Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods

3. Key provisions

- **Art. 5 : exclusions - Convention does not apply to :**

  - capacity of the parties,
  - form of the contract,
  - transfer of ownership,
  - effects of the sale in relation to persons other than the parties.

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③ Hague Convention of 2 October 1973 on the Law Applicable to Products Liability

1. Scope of Application

- In force since **1977**
- **Contracting parties** : Belgium, Croatia, Finland, France, Italy, Luxembourg, Montenegro, Netherlands, North Macedonia, Norway, Portugal, Serbia, Slovenia, Spain

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③ Hague Convention of 2 October 1973 on the Law Applicable to Products Liability

1. Scope of Application

- **Legal articulation between the Hague Convention 1973 and the European PIL :**

  → Rome II Regulation of 11 July 2007 on the law applicable to non-contractual obligations (Art. 5 : product liability)

  - **Hague Convention 1973** is in its Contracting States (that are also MS of EU) the specific conflict-of-laws rule for product liability (→ Art. 5 Rome II Regulation does not apply)
  - **Rome II Regulation 2007** is in the Hague Convention's Contracting States (that are also MS of EU) the general conflict-of-laws rule for all the other non-contractual obligations (besides product liability)

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③ Hague Convention of 2 October 1973 on the Law Applicable to Products Liability

1. Scope of Application

- **Covers** : liability of manufacturers and other business parties for product damage
- **Damage** : personal injury, property damage, economic loss
- **Liability** : defects, wrong description, missing warnings

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③ Hague Convention of 2 October 1973 on the Law Applicable to Products Liability

2. Legal Structure

- **22 articles, no formal chapters, but:**
  - Art. 1-3 : scope
  - Art. 4-7 : choice of law rules
  - Art. 9-16 : general provisions (public policy, territorial scope, reservations)
  - Art. 17-22 : final clauses (ratification, territorial extension, entry into force, denunciation, renewal)

- **Possible reservations** (e.g., exclusion of raw agricultural products)

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③ Hague Convention of 2 October 1973 on the Law Applicable to Products Liability

3. Key provisions

- **Art. 4 : General principle = *lex loci damni*;**
  → applicable law = internal law of **place of damage**, if also
  (a) victim's residence,
  (b) Person claimed to be liable's main place of business, or
  (c) place where victim bought the product

- **Art. 5 : <u>if not</u>**, law of victim's **residence** if also person claimed to be liable's business or place of purchase

- **Art. 6** : **<u>otherwise</u>**, law of person claimed to be liable's main **business**

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③ Hague Convention of 2 October 1973 on the Law Applicable to Products Liability

3. Key provisions

- **Art. 7 : foreseeability exception** = if defendant could not reasonably foresee sale in damage/residence State → Art. 4 – 6 does not apply

- **Art. 8 : covers all liability aspects** = basis / extent of liability, grounds for exemption from liability, kinds of damage, form of compensation, claim transfer, ability to claim, principal's liability for agent's acts, burden of proof, rules of prescription and limitation

- **Art. 11 : no reciprocity needed** = applies even if the applicable law is from non-contracting State (= "universal" approach of Hague Conventions)

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④ Hague Convention of 14 March 1978 on the Law Applicable to Agency Contracts

1. Scope of application

- Applies to **international contracts** where an **agent** acts its own name OR on behalf of **the principal**
- Includes agents who **negotiate, receive, or transmit** offers for others
- **Excludes** legal representation **in family law, court procedures, public functions,** and **employment**

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④ Hague Convention of 14 March 1978 on the Law Applicable to Agency Contracts

1. Scope of application

- **Contracting States : France, Netherlands, Portugal and Argentina**
- **Legal articulation between the Hague Convention 1978 and the European PIL :** → Rome I Regulation (concerning the contracts between principal and agent)
  - **Hague Convention 1978** is in its Contracting States (that are also MS of EU) the specific conflict-of-laws rule for the contractual relationship between the principal and agent
  - **Rome I** Regulation is in the Hague Convention's Contracting States the general conflict-of-laws rule for contractual obligations including the contract between principal and third party

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④ Hague Convention of 14 March 1978 on the Law Applicable to Agency Contracts

2. Legal Structure

- 28 articles, grouped in 5 chapters :
  - **Scope** of the Convention (Art. 1-4)
  - **Internal relationship** (principal ↔ agent) (Art. 5-10)
  - **External relationship** (principal / agent ↔ third party) (Art. 11-15)
  - **General provisions** (Art. 16-22)
  - **Final clauses** (ratification, entry into force, declarations) (Art. 23-28)

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I. INTERNATIONAL LAW

A. HARD LAW

B. SOFT LAW

⑤ UNIDROIT Principles

⑥ INCOTERMS

⑦ Arbitration Rules – ICC

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⑤ UNIDROIT Principles

1. Scope of Application

- **Non-binding** rules for international commercial contracts
- Apply **only if parties expressly** choose them in contract
- Parties can also refer to **"*general principles of law*" or "*lex mercatoria*"**
- Used in **arbitration** to fill legal gaps (suppletive source)

UNIDROIT, available at: https://www.unidroit.org/

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⑤ UNIDROIT Principles

2. Legal structure

- Adopted by UNIDROIT (Rome-based intergovernmental body)
- First published 1994, updated in 2004, 2010, 2016
- 2016 edition : 11 chapters

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⑤ UNIDROIT Principles

2. Legal structure

- **Chapter 1** : general provisions (Art. 1.1 - 1.12)
- **Chapter 2 :** formation and authority of agents (Art. 2.1.1 - 2.2.10)
- **Chapter 3** : validity (Art. 3.1.1 – 3.3.2)
- **Chapter 4** : interpretation (Art. 4.1 – 4.8)
- **Chapter 5** : content and third party's rights (Art. 5.1.1 – 5.3.5)
- **Chapter 6** : performance (Art. 6.1.1 – 6.2.3)

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⑤ UNIDROIT Principles

2. Legal structure

- **Chapter 7** : non-performance (Art. 7.1.1 - 7.4.13)
- **Chapter 8** : set-off (Art. 8.1 – 8.5)
- **Chapter 9** : assignment of rights, transfer of obligations, assignment of contracts (Art. 9.1.1 – 9.3.7)
- **Chapter 10** : limitation periods (Art. 10.1 – 10.11)
- **Chapter 11** : plurality of obligors and of obligees (Art. 11.1.1 – 11.2.4)

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⑤ UNIDROIT Principles

2. Legal structure

- Model rules – **no legal effect without party agreement**
- **Soft law** : valid only within the limits of the subsidiarily applicable national laws (ius cogens)
- Frequently applied by **arbitral tribunals**
- Rarely used by national courts (only to fill gaps when express parties' agreement on it)

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⑥ INCOTERMS

1. Scope of Application

- Non-binding rules by International Chamber of Commerce (ICC)
- Standardized General Terms and Conditions (GTC) for cross-border sale of goods
- Apply only if chosen by parties in the contract : concrete choice of the applicable Incoterm necessary
- Define trade obligations (for seller and purchaser) and risk transfer

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⑥ INCOTERMS

2. Legal structure

- Updated every 10 years by ICC
- Current version : Incoterms 2020 (valid from Jan 2020 to Dec 2029)
- **11 Incoterms divided into 2 groups:**
  - **Maritime** only : FAS, FOB, CFR, CIF, DPU (ex-DAT)
  - **Multimodal** : EXW, FCA, CPT, CIP, DAP, DDP
- Based on commercial trade practices, not law

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2. Legal structure

Incoterms® 2020 Rules Responsibility Quick Reference Guide

IncoDocs

	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)
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⑥ INCOTERMS

3. Key provisions

- **Define** :
  - Transfer of risk (delivery point)
  - Which party is responsible for paying freight, insurance, customs, etc.

- **Examples** :
  - EXW : delivery at seller's premises – minimal seller obligation
  - FOB : seller bears costs/risks up to loading on ship
  - CIF : seller adds basic insurance + transport to destination
  - FCA : seller loads goods for export – risk passes at loading
  - CIP : seller pays carriage + insurance to destination
  - DAP/DDP : seller delivers to buyer's country – risk at delivery