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Transnational Business Law

Part C.1 : IMPORT / EXPORT

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Powerpoint

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PRESENTATION OUTLINE

I. Introduction to Import/Export

II. CISG (Convention on International Sales of Goods)

III. Soft Law in international practice

IV. Negotiation and legal design of international contracts

V. Practical aspects of international distribution

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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 a 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 Terms and Conditions** in an international context

E. Key legal instruments

- **Rome I**
  - **Distinction between:**
    - Rome I (vs. Rome II) EU Regulation and
    - Hague Conventions from 1955, 1973, 1978.

    - 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 ff. 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. Key provisions

E. The principle of party autonomy

A. CISG's role in cross border sales contracts

- **Economical role in international trade**

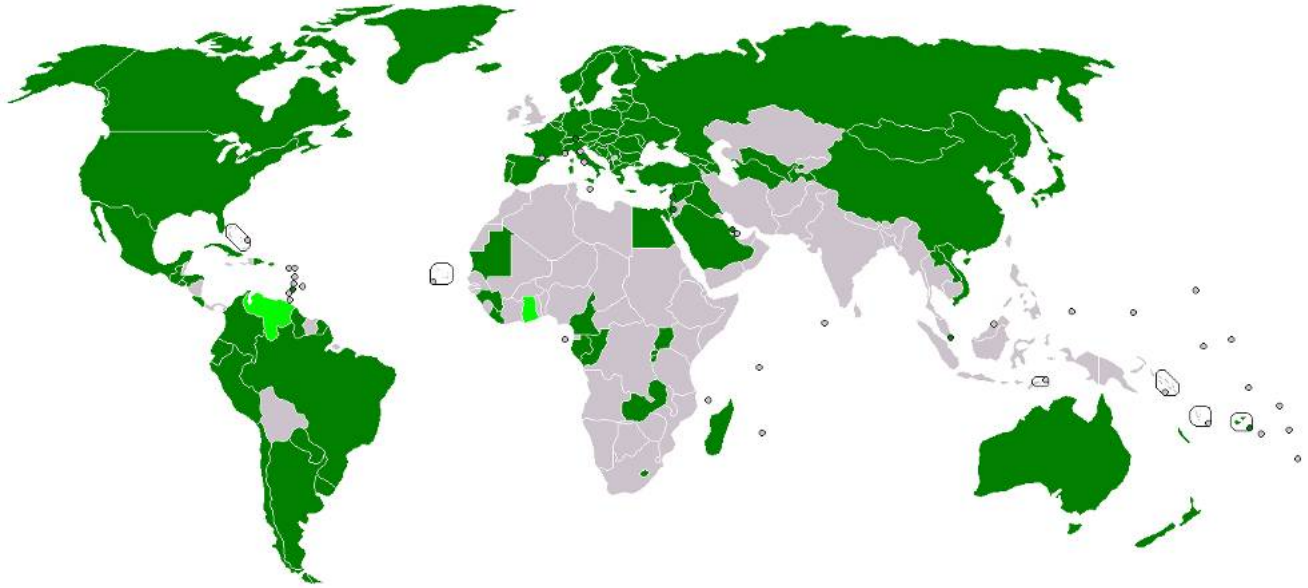
  - More than 97 contracting States worldwide
  - Direct application provided that legal conditions are met
    - Applicable to all export contracts of European (besides: UK) companies
    - Also applicable to most import contracts:
      - If the contracting party is established in a CISG Contracting 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**

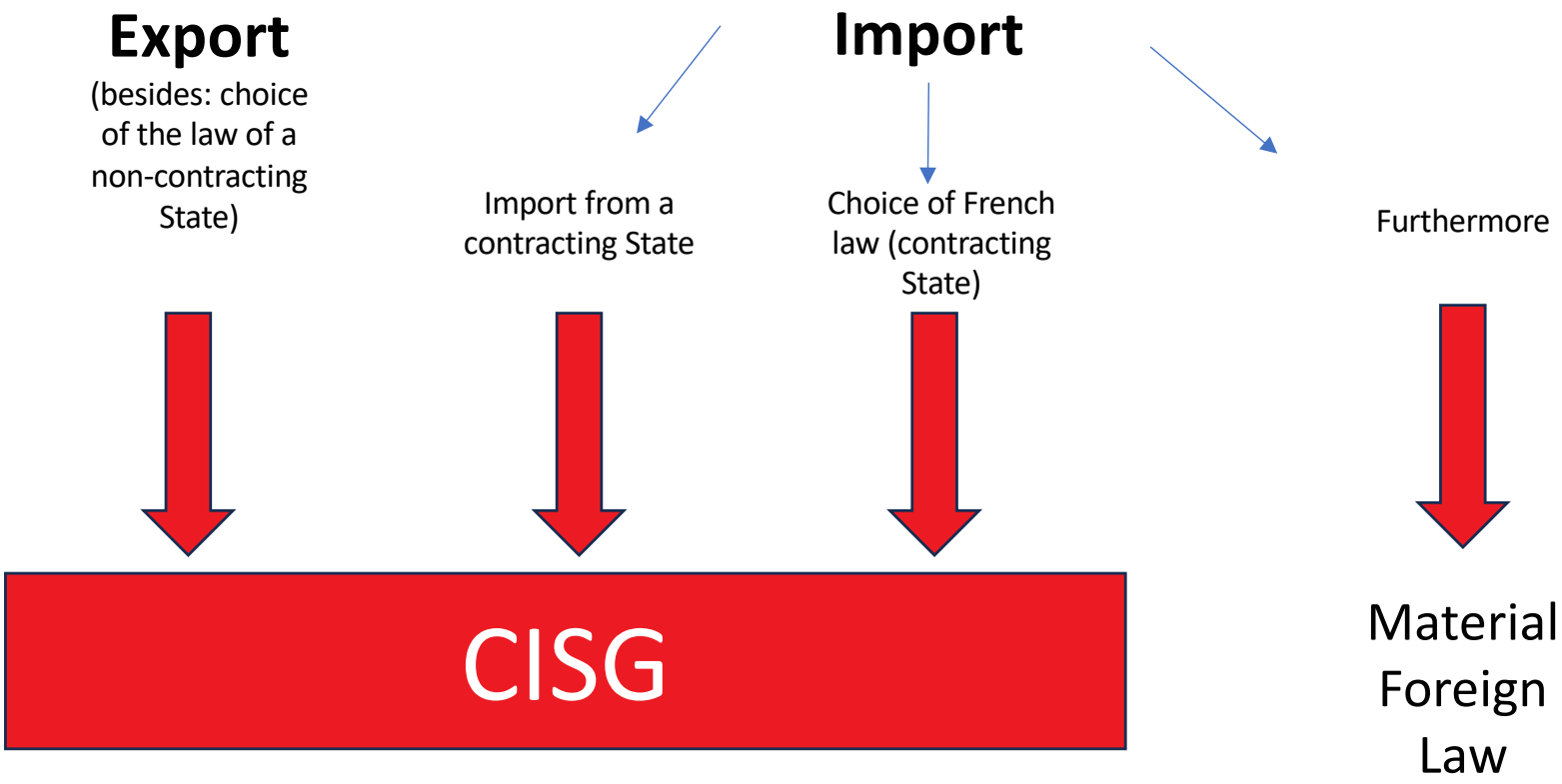
Green = ratified

Light green = signed but not ratified



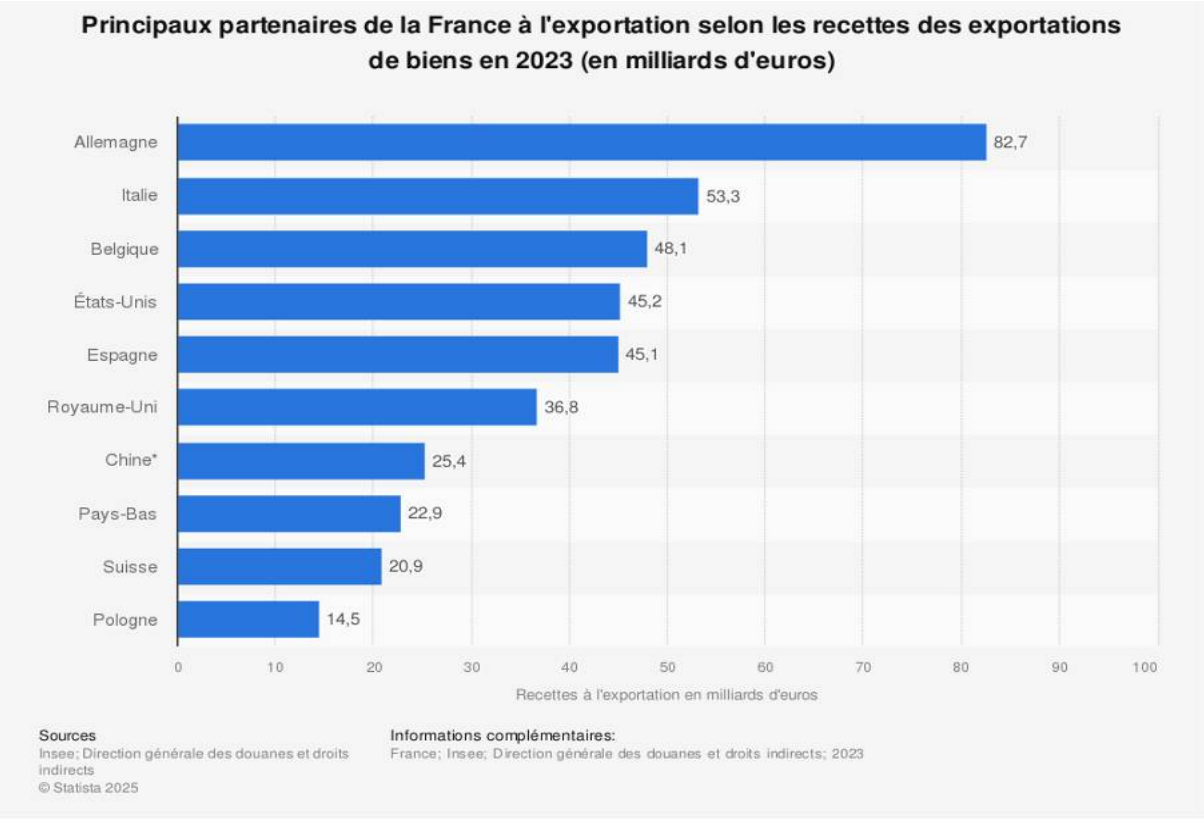
A. CISG's role in cross border sales contracts

- **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 :**

  - **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**
  - **Neutrality** : avoids the need to choose between the seller's or buyer's domestic law
  - **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 specific national legal requirements** (subject to national mandatory provision)

C. Advantages & Limits

- **Limits of CISG** :

  - **<u>does not cover several important aspects of the sales of goods</u>** 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. 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. »*

D. 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**.»*

D. 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. »*

D. 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****. »*

D. 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. »*

D. 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;*

(...) »

D. 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.*

D. 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. »

D. 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. »*

D. 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. »

D. 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.
(…) »

D. 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. »