## 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

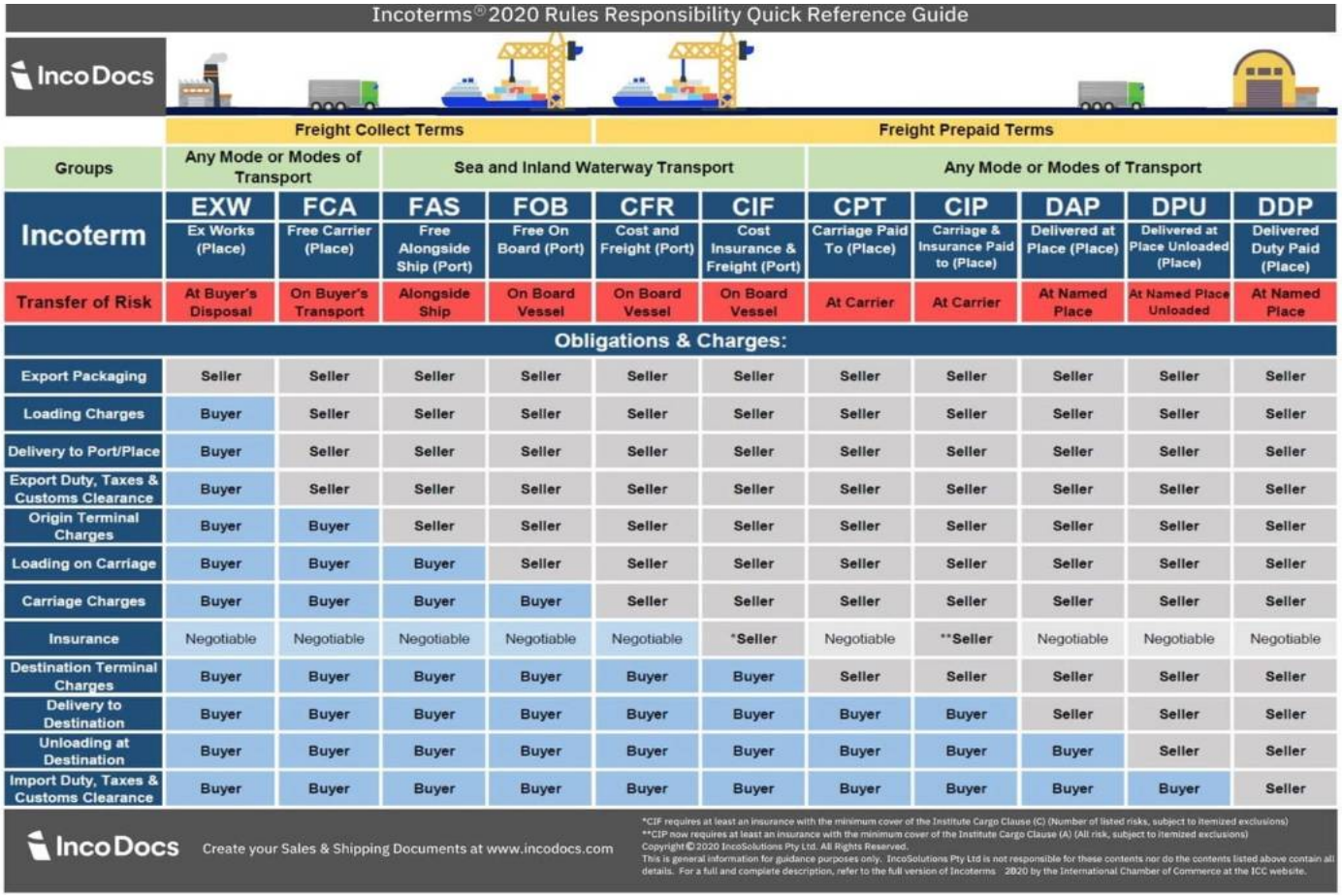
## A. Incoterms

- **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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Avocats | Rechtsanwälte

# A. Incoterms

- **Structure of Incoterms 2020**



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| | 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 | FCA | FAS | FOB | CFR | CIF | CPT | CIP | DAP | DPU | DDP |
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| 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 |
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| Import Duty, Taxes & Customs Clearance | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Seller |

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| | Freight Collect Terms | | | | | | Freight Prepaid Terms | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **Groups** | Any Mode or Modes of Transport | | Sea and Inland Waterway Transport | | | | Any Mode or Modes of Transport | | | | |
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| Export Packaging | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller |
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| Origin Terminal Charges | Buyer | Buyer | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller |
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| Carriage Charges | Buyer | Buyer | Buyer | Buyer | Seller | Seller | Seller | Seller | Seller | Seller | Seller |
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## 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)

# Incoterms® 2020 Rules Responsibility Quick Reference Guide

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| Groups | Freight Collect Terms: Any Mode or Modes of Transport | | Sea and Inland Waterway Transport | | | | Freight Prepaid Terms: Any Mode or Modes of Transport | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **Incoterm** | **EXW** Ex Works (Place) | **FCA** Free Carri (Place) | **FAS** Free Alongside Ship (Port) | **FOB** Free On Board (Port) | **CFR** Cost and Freight (Port) | **CIF** Cost Insurance & Freight (Port) | **CPT** rriage 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) |
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| **Loading Charges** | Buyer | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller |
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| **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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## 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)

# Incoterms® 2020 Rules Responsibility Quick Reference Guide

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| Groups | Any Mode or Modes of Transport | | Sea and Inland Waterway Transport | | | | Any Mode or Modes of Transport | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
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| **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 |
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| 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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## 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

# Incoterms® 2020 Rules Responsibility Quick Reference Guide

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| | Freight Collect Terms | | | | | | Freight Prepaid Terms | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
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| 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 |
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| 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 |
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## 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!)

# Incoterms® 2020 Rules Responsibility Quick Reference Guide

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| 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 |
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| Origin Terminal Charges | Buyer | Buyer | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Seller |
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| 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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## 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

# Incoterms® 2020 Rules Responsibility Quick Reference Guide

IncoDocs



| | Freight Collect Terms | | | | Freight Prepaid Terms | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **Groups** | Any Mo T | | | | ay Transport | | Any Mode or Modes of Transport | | | | |
| **Incoterm** | EXW Ex Work (Place) | FCA Free Carrier (Place) | FAS Free Alongside Ship (Port) | FOB Free On Board (Port) | FR st and ht (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) |
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| | Ob | | | | ons & Charges: | | | | | | |
| Export Packaging | Seller | Seller | Seller | Seller | eller | Seller | Seller | Seller | Seller | Seller | Seller |
| Loading Charges | Buyer | Seller | Seller | Seller | eller | Seller | Seller | Seller | Seller | Seller | Seller |
| Delivery to Port/Place | Buyer | Seller | Seller | Seller | eller | Seller | Seller | Seller | Seller | Seller | Seller |
| Export Duty, Taxes & Customs Clearance | Buyer | Seller | Seller | Seller | eller | Seller | Seller | Seller | Seller | Seller | Seller |
| Origin Terminal Charges | Buyer | Buyer | Seller | Seller | eller | Seller | Seller | Seller | Seller | Seller | Seller |
| Loading on Carriage | Buyer | Buyer | Buyer | Seller | eller | Seller | Seller | Seller | Seller | Seller | Seller |
| Carriage Charges | Buyer | Buyer | Buyer | Buyer | eller | Seller | Seller | Seller | Seller | Seller | Seller |
| Insurance | Negotiab | Negotiable | Negotiable | Negotiable | otiable | *Seller | Negotiable | **Seller | Negotiable | Negotiable | Negotiable |
| Destination Terminal Charges | Buyer | Buyer | Buyer | Buyer | uyer | Buyer | Seller | Seller | Seller | Seller | Seller |
| Delivery to Destination | Buyer | Buyer | Buyer | Buyer | uyer | Buyer | Buyer | Buyer | Seller | Seller | Seller |
| Unloading at Destination | Buyer | Buyer | Buyer | Buyer | uyer | Buyer | Buyer | Buyer | Buyer | Seller | Seller |
| Import Duty, Taxes & Customs Clearance | Buyer | Buyer | Buyer | Buyer | uyer | 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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This is general information for guidance purposes only. IncoSolutions Pty Ltd is not responsible for these contents nor do the contents listed above contain all details. For a full and complete description, refer to the full version of Incoterms 2020 by the International Chamber of Commerce at the ICC website.

## A. Incoterms

- **Incoterms classification**
  - **Class C : CFR (Cost and freight), CIF (*Cost insurance and freight*), CPT (*Carriage paid to*), CIP (*Carriage insurance paid*) or**
    - 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



Incoterms® 2020 Rules Responsibility Quick Reference Guide

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| Groups | Freight Collect Terms: Any Mode or Modes of Transport | | Sea and Inl | | | | | | s of Transport | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **Incoterm** | **EXW** Ex Works (Place) | **FCA** Free Carrier (Place) | **FAS** Free Alongside Ship (Port) | **FC** Free Board | **CFR** Cost and eight (Port) | **CIF** Cost Insurance & Freight (Port) | **CPT** Carriage Paid To (Place) | **CIP** Carriage & Insurance Paid to (Place) | **P** d at ace) | **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 B Ves | On Board Vessel | On Board Vessel | At Carrier | At Carrier | ed | At Named Place Unloaded | At Named Place |
| **ations & Charges:** | | | | | | | | | | | |
| Export Packaging | Seller | Seller | Seller | Sel | Seller | Seller | Seller | Seller | r | Seller | Seller |
| Loading Charges | Buyer | Seller | Seller | Sel | Seller | Seller | Seller | Seller | r | Seller | Seller |
| Delivery to Port/Place | Buyer | Seller | Seller | Sel | Seller | Seller | Seller | Seller | r | Seller | Seller |
| Export Duty, Taxes & Customs Clearance | Buyer | Seller | Seller | Sel | Seller | Seller | Seller | Seller | r | Seller | Seller |
| Origin Terminal Charges | Buyer | Buyer | Seller | Sel | Seller | Seller | Seller | Seller | r | Seller | Seller |
| Loading on Carriage | Buyer | Buyer | Buyer | Sel | Seller | Seller | Seller | Seller | r | Seller | Seller |
| Carriage Charges | Buyer | Buyer | Buyer | Buy | Seller | Seller | Seller | Seller | r | Seller | Seller |
| Insurance | Negotiable | Negotiable | Negotiable | Nego | Negotiable | *Seller | Negotiable | **Seller | ble | Negotiable | Negotiable |
| Destination Terminal Charges | Buyer | Buyer | Buyer | Buy | Buyer | Buyer | Seller | Seller | r | Seller | Seller |
| Delivery to Destination | Buyer | Buyer | Buyer | Buy | Buyer | Buyer | Buyer | Buyer | r | Seller | Seller |
| Unloading at Destination | Buyer | Buyer | Buyer | Buy | Buyer | Buyer | Buyer | Buyer | r | Seller | Seller |
| Import Duty, Taxes & Customs Clearance | Buyer | Buyer | Buyer | Buy | Buyer | Buyer | Buyer | Buyer | r | Buyer | Seller |

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of listed risks, subject to itemized exclusions)
risk, subject to itemized exclusions)
ese contents nor do the contents listed above contain all
ational Chamber of Commerce at the ICC website.

## A. Incoterms

- **Incoterms classification**
  - **Class D: DAP (*Delivered at place*), DPU (Delivered at place unloaded), 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

# Incoterms® 2020 Rules Responsibility Quick Reference Guide

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| | Freight Collect Terms | | | | Freight Prepaid Terms | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **Groups** | Any Mode or Modes of Transport | | Sea and Inland Waterway Transport | | | | Any | | | | |
| **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) | **CI** Carria Insuranc to (Pl | **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 Ca | At Named Place | At Named Place Unloaded | At Named Place |
| **Obligations & Charges:** | | | | | | | | | | | |
| Export Packaging | Seller | Seller | Seller | Seller | Seller | Seller | Seller | Sell | Seller | Seller | Seller |
| Loading Charges | Buyer | Seller | Seller | Seller | Seller | Seller | Seller | Sell | Seller | Seller | Seller |
| Delivery to Port/Place | Buyer | Seller | Seller | Seller | Seller | Seller | Seller | Sell | Seller | Seller | Seller |
| Export Duty, Taxes & Customs Clearance | Buyer | Seller | Seller | Seller | Seller | Seller | Seller | Sell | Seller | Seller | Seller |
| Origin Terminal Charges | Buyer | Buyer | Seller | Seller | Seller | Seller | Seller | Sell | Seller | Seller | Seller |
| Loading on Carriage | Buyer | Buyer | Buyer | Seller | Seller | Seller | Seller | Sell | Seller | Seller | Seller |
| Carriage Charges | Buyer | Buyer | Buyer | Buyer | Seller | Seller | Seller | Sell | Seller | Seller | Seller |
| Insurance | Negotiable | Negotiable | Negotiable | Negotiable | Negotiable | *Seller | Negotiable | **Sel | Negotiable | Negotiable | Negotiable |
| Destination Terminal Charges | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Seller | Sell | Seller | Seller | Seller |
| Delivery to Destination | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Buy | Seller | Seller | Seller |
| Unloading at Destination | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Buy | Buyer | Seller | Seller |
| Import Duty, Taxes & Customs Clearance | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Buyer | Buy | Buyer | Buyer | Seller |

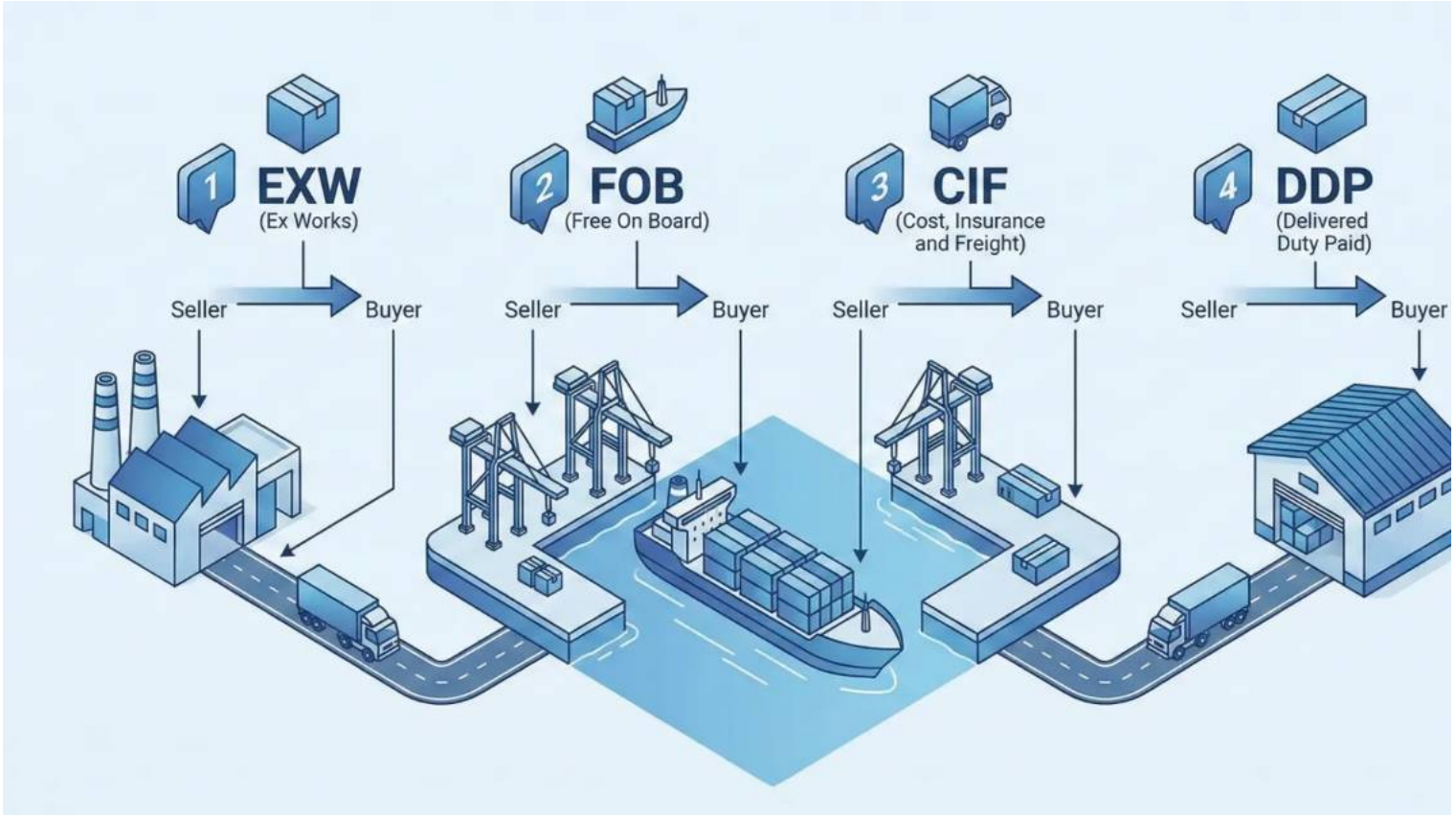
IncoDocs Create your Sales & Shipping Documents at www.incodocs.com

*CIF requires at least an insurance with the minimum cover of the Institute
**CIP now requires at least an insurance with the minimum cover of the Ins

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details. For a full and complete description, refer to the full version of Incoterms 2020 by the International Chamber of Commerce at the ICC website.

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# Most important INCOTERMS :




**UNDERSTANDING INCOTERMS 2026: EXW, FOB, CIF, DDP**
**20/01/2026 HTTPS://XILINKGLOBALTRADE.COM/UNDERSTANDING-INCOTERMS-2026-EXW-FOB-CIF-DDP/**

## 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

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## Practical case n°6

### I. FACTS

A Nigerian seller agrees to sell machinery to a Canadian buyer. The contract provides that the goods will be delivered under the CIF rule. During the sea voyage, the goods are damaged.

### II. QUESTIONS

1) When does the risk pass from the seller to the buyer?

2) Who is responsible for the costs of carriage and insurance?

| Groups | Any Mode or Modes of Transport | | Sea and Inland Waterway Transport | | | | Any Mode or Modes of Transport | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **Incoterm** | **EXW** | **FCA** | **FAS** | **FOB** | **CFR** | **CIF** | **CPT** | **CIP** | **DAP** | **DPU** | **DDP** |
| | Ex Works (Place) | Free Carrier (Place) | Free Alongside Ship (Port) | Free On Board (Port) | Cost and Freight (Port) | Cost Insurance & Freight (Port) | Carriage Paid To (Place) | Carriage & Insurance Paid to (Place) | Delivered at Place (Place) | Delivered at Place Unloaded (Place) | 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 |

## II. QUESTIONS

1) When does the risk pass from the seller to the buyer?

2) Who is responsible for the costs of carriage and insurance?



## Practical case n°7

## I. FACTS

A company established in Ecuador sells goods to a company established in Chile under an EXW Incoterm.

The contract provides for the goods to be collected at the seller's premises in Ecuador and transported to Chile.

## II. QUESTIONS

1) When does the risk pass from the seller to the buyer?

2) Who is responsible for the export duty, taxes & customs clearance under the EXW Incoterm?

| Groups | Any Mode or Modes of Transport | | Sea and Inland Waterway Transport | | | | Any Mode or Modes of Transport | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **Incoterm** | **EXW** | **FCA** | **FAS** | **FOB** | **CFR** | **CIF** | **CPT** | **CIP** | **DAP** | **DPU** | **DDP** |
| | Ex Works (Place) | Free Carrier (Place) | Free Alongside Ship (Port) | Free On Board (Port) | Cost and Freight (Port) | Cost Insurance & Freight (Port) | Carriage Paid To (Place) | Carriage & Insurance Paid to (Place) | Delivered at Place (Place) | Delivered at Place Unloaded (Place) | 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 |

## II. QUESTIONS

1) When does the risk pass from the seller to the buyer?

2) Who is responsible for the export duty, taxes & customs clearance under the EXW Incoterm?

## III. Soft law in international practice

**A. Lex Mercatoria**

**B. UNIDROIT Principles**

## A. 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




Lex Mercatoria: or, The Merchant's Companion. Jacob, Giles, 1729

## A. 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

## B. 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

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International Institute for the Unification of Private Law
Institut International pour l'Unification du Droit Privé

## B. UNIDROIT Principles

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

## B. UNIDROIT Principles

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

  - Choose the Unidroit Principles as the law governing the contract **(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 clauses of the contract **(2)**

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

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



## Practical case n°8

## I. FACTS

A Chinese company and a Japanese company conclude an international commercial contract. The contract provides: *"This contract shall be governed by the UNIDROIT Principles of International Commercial Contracts, with the exclusion of any conflict-of-law rules ».* A dispute is subsequently submitted to an arbitral tribunal.

## II.QUESTION

Do the UNIDROIT Principles apply as binding law to the contract?

## Guiding questions n°8

- **UNIDROIT Principles**
  - Is soft law binding ?
  - How important is party autonomy ?

## 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) :*

    « *An arbitration is international when international trade interests are at stake*. »

## 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)

## 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 **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)

## Arbitration clause :

***Institutional*** :

- "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/arbitration-clause/

- « All disputes resulting in connection with the contract .... (designation of the contract) or concerning its validity, shall be finally decided according to the rules of arbitration of Frankfurt am Main Chamber of Commerce and Industry, excluding ordinary courts of law. However, judicial payment order proceedings shall remain admissible. » https://www.frankfurt-main.ihk.de/servicenavigation/chamber-of-commerce-and-industry/legal-matters-taxes/alternative-dispute-regulation/arbitration-clause-5277388

## Arbitration clause :

***Ad hoc*** :

« Any dispute arising out of or in connection with this Contract, including its validity, interpretation, performance, breach or termination, shall be finally settled by ad hoc arbitration in accordance with the UNCITRAL Arbitration Rules. The tribunal shall consist of [one/three] arbitrator(s). The seat of arbitration shall be [City, Country], and the language of the arbitration shall be [English]. The award shall be final and binding.»

## 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**

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# NDA

« This Nondisclosure Agreement (the “Agreement”) is entered into by and between _____ with its principal offices at _____, (“Disclosing Party“) and _____, located at _____ (“Receiving Party“) for the purpose of preventing the unauthorized disclosure of Confidential Information as defined below. The parties agree to enter into a confidential relationship with respect to the disclosure of certain proprietary and confidential information (“Confidential Information”).

1. Definition of Confidential Information. For purposes of this Agreement, “Confidential Information” shall include all information or material that has or could have commercial value or other utility in the business in which Disclosing Party is engaged. If Confidential Information is in written form, the Disclosing Party shall label or stamp the materials with the word “Confidential” or some similar warning. If Confidential Information is transmitted orally, the Disclosing Party shall promptly provide a writing indicating that such oral communication constituted Confidential Information. »

https://nondisclosureagreement.com/#NDA_Standard_Template

## 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

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## Currency clause

« It is mutually agreed that the monthly hire due under Clause ..... is based upon the mean of the present Bank of England's selling and buying rate for the U.S. dollar, viz: $ ..... to the Pound Sterling. Should this mean rate fluctuate it is understood and agreed that the Sterling hire payments shall be adjusted upwards or downwards and the amount actually payable in Sterling shall be the hire calculated at the agreed rate in Sterling of ..... multiplied by $ ..... and divided by the new mean rate in force on the due date of payment. »

https://www.bimco.org/contractual-affairs/bimco-clauses/current-clauses/currency_clause/

## 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

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## Force majeure

« In the case of failure to perform this Agreement due to any force majeure, neither party shall be liable for such failure, and this Agreement shall be terminated automatically. In the case of failure to perform any part of this Agreement due to any force majeure, the party suffering from such force majeure may be exempted from corresponding liability to the extent of the impact of such force majeure. However, such party shall continue to perform other obligations under this Agreement which have not been affected by such force majeure. If such force majeure occurs after such party delays to perform this Agreement, it shall not be exempted from its corresponding liabilities. »

04/26/2018 (CHINA SOUTHERN AIRLINES CO LTD), https://www.sec.gov/Archives/edgar/data/1041668/000119312518134851/d478859dex448.htm

## 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

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## General Terms and Conditions Acceptance Clause

Seller, by signing this Agreement, or delivering the supplies or performing the services identified herein, agrees to comply with all the terms and conditions and all specifications and other documents that this Agreement incorporates by reference or attachment. Company hereby objects to any terms and conditions contained in any acknowledgment of this Agreement that are different from or in addition to those mentioned in this document. Failure of Company to enforce any of the provisions of this Agreement shall not be construed as evidence to interpret the requirements of this Agreement, nor a waiver of any requirement, nor of the right of Company to enforce each and every provision. All rights and obligations shall survive final performance of this Agreement.

https://www.lawinsider.com/clause/acceptance-of-terms-and-conditions

## 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)

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## Governing law clause

« These terms are governed by and shall be construed in accordance with the laws of the Hong Kong Special Administrative Region. »
https://www.termsfeed.com/blog/governing-law-terms-conditions/

« The contract as well as any questions raised by the contract shall be governed by CISG and for any question that is not ruled by CISG subsidiary by swiss law as the applicable material law. »

## 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*)

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## Hardship clause
(art. 1195 French Civil code) :

« If a change in circumstances that was unforeseeable at the time the contract was concluded renders performance excessively onerous for a party who had not agreed to bear that risk, that party may request that the other party renegotiate the contract. It shall continue to perform its obligations during the renegotiation.

In the event of a refusal or failure to renegotiate, the parties may agree to terminate the contract on the date and on the terms they determine, or may jointly apply to the court to have the contract amended. In the absence of agreement within a reasonable period, the court may, at the request of either party, amend the contract or terminate it on the date and on the terms it determines. »

## 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

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## Hold harmless clause

« Each Party shall indemnify, defend and hold harmless the other Party, its affiliates, and their respective directors, officers, employees and agents from and against any third-party claims, losses, damages, liabilities, costs and expenses (including reasonable legal fees) arising out of or resulting from the indemnifying Party's breach of this Agreement, negligence, wilful misconduct, or violation of applicable law. »

## 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 **hybrid clause**: combination of arbitration + mediation and/or jurisdiction + arbitration clause depending on the value of the dispute
  - Problem: legal validity of the so-called **asymmetric jurisdiction clause** conferring an option to one party between the chosen jurisdiction and "all other competent jurisdictions"

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## Jurisdiction clause

**Classical** « Any action or proceeding in respect to any matters arising out of or relating to this contract shall be brought only in the County of Los Angeles. »

**Hybrid** : « Any dispute arising out of or relating to this contract shall be submitted to mediation, followed by arbitration if unresolved within 30 days. For disputes exceeding 100,000 Dollars, the dispute shall instead be submitted exclusively to the competent courts of Los Angeles. »

**Asymetric** : « Any action or proceeding arising out of or relating to this Contract shall be brought exclusively in the courts of Los Angeles County, California, except that such action or proceeding may be brought in the courts having jurisdiction over the defendant where necessary to obtain protective measures, or to enforce any judgment or award.»

## 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)

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## Liability clause

« Neither party shall be liable for indirect damages or loss of profit arising from a breach of this contract, except in cases of wilful misconduct or gross negligence. »

## 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)

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## Non compete clause :

"The Employee agrees that for twelve (12) months following the termination of employment, they shall not engage in, or be employed by, any business that competes with the Company within a 50-mile radius of the Company's primary office in Tampa, Florida."

https://lawcantrell.com/non-compete-agreement-examples-what-they-look-like-and-why-they-matter/

## 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)

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**Termination clause :**

« Effective as of the Termination Date, this Agreement and all rights and obligations of the Parties hereunder shall terminate, except for Sections [Definitions], [Confidentiality], [Liability, Indemnification and Insurance], [Dispute Resolution], and [Miscellaneous], which shall survive termination. Notwithstanding the foregoing, any provisions expressly intended to survive termination shall remain in full force and effect. The terms of this Termination Agreement shall constitute the Confidential Information of both Parties.»

## Practical case

**What clause is the following ?**

- Arbitration clause (1)
- Confidentiality clause (2)
- Currency clause (3)
- Force majeure clause (4)
- General Terms and Conditions Acceptance Clause (5)
- Governing law clause (6)
- Hardship clause (7)
- Hold harmless clause (8)
- Jurisdiction clause (9)
- Liability clause (10)
- Non-compete clause (11)
- Termination clause (12)

« The Seller shall protect, defend, indemnify and hold the Purchaser and the Issuer and their respective assigns and their attorneys, accountants, employees, officers and directors harmless from and against all losses, costs, liabilities, claims, damages and expenses of every kind and character, as incurred, resulting from or relating to or arising out of (i) the inaccuracy, nonfulfillment or breach of any representation, warranty, covenant or agreement made by the Seller in this Receivables Purchase Agreement […] »




https://www.investopedia.com/

## Practical case

**What clause is the following ?**

- Arbitration clause (1)
- Confidentiality clause (2)
- Currency clause (3)
- Force majeure clause (4)
- General Terms and Conditions Acceptance Clause (5)
- Governing law clause (6)
- Hardship clause (7)
- Hold harmless clause (8)
- Jurisdiction clause (9)
- Liability clause (10)
- Non-compete clause (11)
- Termination clause (12)

« If a Party is unable, in whole or in part, to perform its obligations due to circumstances beyond its reasonable control and without its fault, it shall promptly notify the other Party, providing reasonable details of the circumstances. The affected obligations shall be suspended for the duration of the inability, provided that the affected Party uses reasonable efforts to overcome the circumstances and resume performance. Any obligations relating to Sales accepted before the occurrence shall remain governed by the applicable Sale Supplemental Agreement. »




https://www.investopedia.com/

## Practical case

**What clause is the following ?**

- Arbitration clause (1)
- Confidentiality clause (2)
- Currency clause (3)
- Force majeure clause (4)
- General Terms and Conditions Acceptance Clause (5)
- Governing law clause (6)
- Hardship clause (7)
- Hold harmless clause (8)
- Jurisdiction clause (9)
- Liability clause (10)
- Non-compete clause (11)
- Termination clause (12)

« Employee shall not, during Employee's employment with Employer and for a period of [twelve (12) months] following the termination of Employee's employment, whether such termination is voluntary or involuntary and regardless of the reason for the termination, [in any geographic region for which Employee had direct or indirect responsibility on behalf of Employer,] perform duties or services for a Direct Competitor, whether as an employee, consultant, principal, advisor, board member, or any other capacity, that are substantially similar to the duties or services Employee performed for Employer at any time during the last [twelve (12) months] of Employee's employment with Employer, »

https://pro.bloomberglaw.com/insights/contracts




https://www.investopedia.com/

## 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

## 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)

  - Explicite choice of CISG as the appliable legal regime for international sale of goods contracts

  - Designing (e.g.) the material / substantive rules to Swiss law as a subsidiary applicable law (in particular with regard to the validity check 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 actors : **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

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# 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

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# 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



## Practical case n°9

### I. FACTS

A Spanish company sells goods to a Dutch company. The contract does not contain a choice of court agreement. The goods were delivered in Belgium, but the Dutch buyer fails to pay the purchase price. The Spanish seller wishes to bring proceedings against the buyer.

### II. QUESTION

Under the Brussels I bis Regulation, which court has jurisdiction to hear the dispute?



## Guiding questions n°9

- **Art. 4 and Art. 25 Brussels I bis:** In the absence of a choice of court agreement, which courts have jurisdiction based on the defendant's domicile?

- **Art. 7(1) Brussels I bis:** In a contractual dispute concerning the sale of goods, which courts may also have jurisdiction based on the place where the goods were delivered?

## 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

## 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 : <u>Hague Convention of 1978</u>**

**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 : Hague Convention of 1955**

| | 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 – general rule : seller's habitual residence | 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)** | Exception to the rule: seller's foreign establishment | If the order was received by the seller's **establishment located in another country**, the law of that establishment applies |
| **Art. 3(2)** | Exception to the rule: purchaser's habitual residence | 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."*

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# 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 : Rome I Regulation**

**Art. 4 Rome I Regulation:**

"*1. To the extent that the law applicable to the contract has **not been chosen** in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:*

*(a) a contract for the **sale of goods** shall be governed by the law of the country where the seller has his habitual residence;*

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

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

*(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. »*

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## Practical case n°10

## I. FACTS

A German company based in Berlin (A) makes an offer to sell a machine to a French company established in Paris (B). They are still in the negotiation phase: the German company offers to sell the machine at a certain price and refers to its General Terms and Conditions (GTC) of sale. These GTC stipulate that (i) German law shall apply, (ii) German courts shall have jurisdiction, (iii) CISG is excluded, and that (iv) delivery is to be made under the Incoterm EXW (Ex Works).

The French company accepts the offer including the GTC of sale.

The German company wishes to sue the French company for breach of contract.

## II. Questions

1) Which national State Courts have jurisdiction ?

2) Which national law is applicable ?



## Guiding questions n°10

- **Jurisdiction**
  - **Art. 25 Brussels I bis** : Did the buyer accept the seller's GTC, including the jurisdiction clause?
- **Applicable law**
  - **Art. 1-6 CISG** : Is the CISG applicable ?
  - **Art. 3 Rome I** : Did the parties agree on the applicable law?

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

### 1. Defect Products 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)

## 1. Defect Products Liability

- **Applicable Law**

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

  - France : **Hague Convention of 1973**

# 1. Defect Products Liability

- **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. Defect Products Liability

- **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** |

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# 1. Defect Products Liability

- **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. Defect Products Liability

- **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. Defect Products Liability

- **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. Defect Products Liability

- **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.***

# 1. Defect Products Liability

- **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. »*

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# 1. Defect Products Liability

- **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. |

## 1. Defect Products Liability

- **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. Defect Products Liability

- **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. Defect Products Liability

- **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. Defect Products Liability

- **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. Defect Products Liability

- **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. Defect Products Liability

- **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."*

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## Practical case n°11

### I. FACTS

A French company sells industrial machinery to a German company. The sales contract does not contain a choice of law clause. After delivery, a dispute arises concerning the seller's liability for lack of conformity, (b) for injury caused by the product to a third person.

### II. QUESTION

Which choice-of-law rule is relevant to determine the law applicable to this dispute under (a) and (b), if the dispute is brought before a :

- French court ?

- German court ?



## Guiding questions n°11

➢ **Applicable Convention**

1) Which conflict of law rule is applicable before a French state court :

a. for lack of conformity ?
b. for injury caused to a third party ?

2) Which conflict of law rule is applicable before a German state court :

a. for lack of conformity ?
b. for injury caused to a third party ?

## 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

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

- Several questions on PIL:

  - According to the French law case-law : **Monster Cable (2008, C.Cass.),** the qualification of art. **L 442-1 C. com** as an "overriding mandatory provision" (*loi de police*) in the sense of **art. 9 of Rome I** cannot cancel the validity of a jurisdiction clause in favour of foreign (not french) state courts.

  - The question regarding the correct qualification of art. L 442-1 as a contractual vs. delictual claim is currently pending before the CJUE.

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# Thank you for your attention !




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