

# UNCITRAL, HCCH and UNIDROIT

Legal Guide to Uniform Instruments in  
the Area of International Commercial  
Contracts, with a Focus on Sales



UNITED NATIONS



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UNCITRAL, HCCH and UNIDROIT  
Legal Guide to Uniform Instruments  
in the Area of International  
Commercial Contracts,  
with a Focus on Sales



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## **Executive summary**

The present Guide offers an overview of the uniform law instruments in the area of international commercial contracts. Chapters I and II provide information on the origin and purpose, scope and approach, and intended readership of the Guide. Chapter III deals with issues of private international law, namely the determination of the law applicable to international commercial contracts, whether chosen or not by the parties. Reference is made to the texts prepared by the Hague Conference on Private International Law (HCCH), specifically, the HCCH Principles on Choice of Law in International Commercial Contracts. Chapter IV deals with the uniform law of international sales, discussing in particular the provisions of the United Nations Convention on Contracts for the International Sale of Goods, the Convention on the Limitation Period in the International Sale of Goods and the UNIDROIT Principles of International Commercial Contracts, and their interaction. Chapter IV also contains a reference to regional uniform texts and to model contracts based on uniform texts. Chapter V contains a summary of recurring legal issues that arise frequently in connection with sales contracts and how they are addressed in uniform law instruments.



# I. Introduction

## A. Origin and purpose of the Guide

1. For several decades, the Hague Conference on Private International Law (HCCH), the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT) have been preparing uniform law texts that promote the progressive harmonization and modernization of commercial contract law. Other international governmental and non-governmental organizations have also made significant contributions at the global and regional levels.

2. Over time, the HCCH, UNCITRAL and UNIDROIT have produced a series of texts that are complementary: the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG);<sup>1</sup> the UNIDROIT Principles of International Commercial Contracts (UPICC);<sup>2</sup> and the HCCH Principles on Choice of Law in International Commercial Contracts (HCCH Principles).<sup>3</sup> In addition, UNCITRAL has prepared treaties, such as the United Nations Convention on the Use of Electronic Communications in International Contracts (2005) (Electronic Communications Convention)<sup>4</sup> and the Convention on the Limitation Period in the International Sale of Goods (1974, amended in 1980) (Limitation Convention),<sup>5</sup> that are closely related to the CISG and complement it with regard to specific matters.<sup>6</sup> Similarly, the HCCH has historically adopted a number of treaties that deal with choice of law rules in international sales: the Convention on the Law Applicable to International Sales of Goods (1955) (HCCH 1955 Sales of Goods Convention);<sup>7</sup> the Convention on the Law Applicable to Agency (1978) (HCCH 1978 Agency Convention);<sup>8</sup> and the Convention on the Law Applicable to Contracts for the International Sale of Goods (1986) (HCCH 1986 Sales Convention).<sup>9</sup>

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<sup>1</sup> United Nations, *Treaty Series*, vol. 1489, No. 25567.

<sup>2</sup> The most recent version, the UPICC 2016, is available on the UNIDROIT [website](#).

<sup>3</sup> The HCCH Principles are available on the HCCH [website](#).

<sup>4</sup> United Nations, *Treaty Series*, vol. 2898, No. 50525.

<sup>5</sup> *Ibid.*, vol. 1511, No. 26119.

<sup>6</sup> *Ibid.*, vol. 1511, No. 26121.

<sup>7</sup> *Ibid.*, vol. 510, No. 7411.

<sup>8</sup> Netherlands, *Treaty Series*, 1987, No. 138.

<sup>9</sup> The Convention is not yet in force.

In relation to sales, UNIDROIT adopted the Convention on Agency on the International Sale of Goods (1983), regulating substantive aspects of agency.<sup>10</sup>

3. The drafting of the above-mentioned texts was often carried out in coordination with the other organizations. A good illustration of this is the legislative history of the CISG, for the preparation of which UNCITRAL took advantage of earlier uniform texts developed by UNIDROIT.<sup>11</sup> In turn, the CISG influenced the development of later uniform texts such as the UPICC. Moreover, texts like the HCCH Principles build upon – and help implement – the CISG and the UPICC.

4. To achieve their intended purpose, uniform texts need to be accompanied by adequate support for their implementation. The three organizations have developed a range of tools to that end, such as the Case Law on UNCITRAL Texts (CLOUT) information system,<sup>12</sup> the UNILEX database, which contains a collection of, among others, international case law on the UPICC,<sup>13</sup> and the Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts.<sup>14</sup>

5. Uniform international trade law is aimed at achieving a harmonized and global set of rules which are international in their origin, formulation and framework of application and interpretation; consequently, uniform law diminishes the legal obstacles to the flow of international trade, levels the playing field among buyers and sellers, strengthens commercial relations among States and generates investment opportunities. In the light of the manifold advantages of uniform law in this sector, the above-mentioned uniform texts were developed to introduce balanced rules suitable for international transactions, and to assist parties in drafting their contracts and adjudicators in resolving disputes. Each of the texts provides the parties with some autonomy to decide, by agreement, the extent to which the text will govern their transaction. However, information on how the texts relate to each other is not always readily available. As a result, commercial parties, lawyers, judges, arbitrators, academic researchers and legislators interested in adopting, applying or interpreting that vast legislative corpus may face challenges in identifying the relevant texts and placing them in context.

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<sup>10</sup>The Convention did not enter into force and has now been superseded by the UPICC, which contain a detailed section on agency in chapter 2, “Formation and authority of agents” (see also para. 369 and chap. V, sect. C, below).

<sup>11</sup>See the Convention Relating to a Uniform Law on the International Sale of Goods (1964) (United Nations, *Treaty Series*, vol. 834, No. 11929); and the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (1964) (United Nations, *Treaty Series*, vol. 834, No. 11930) (for more on these two conventions, see para. 286 below); see also the HCCH 1955 Sales of Goods Convention.

<sup>12</sup>Available on the [UNCITRAL website](#).

<sup>13</sup>Available on the [UNILEX website](#).

<sup>14</sup>Available on the [UNIDROIT website](#).

6. The present *Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales* (the Guide) is aimed at clarifying the relationship among the texts with a view to promoting their adoption, use and uniform interpretation and, ultimately, the establishment of a predictable and flexible legal environment for cross-border commercial transactions based on the principle of freedom of contract.

7. Accordingly, the Guide provides orientation to the reader on a range of legal issues relating to international commercial contract law, from choice of law to the legislative, contractual and guidance texts that may assist in a commercial transaction. The Guide is not intended to favour any particular interpretation, or to offer any new interpretation of uniform texts.

8. The Guide was prepared on the basis of a joint proposal,<sup>15</sup> which had resulted from a series of events organized by the UNCITRAL secretariat to celebrate the thirty-fifth anniversary of the CISG.<sup>16</sup> It was approved by the governing bodies of the HCCH, UNCITRAL and UNIDROIT.<sup>17</sup> It was compiled by the respective secretariats with input from a group of five experts, representing different legal traditions and geographical backgrounds: Neil Cohen (United States of America); Lauro da Gama e Souza Jr (Brazil); Pilar Perales Viscasillas (Spain); Hiroo Sono (Japan); and Stefan Vogenauer (Germany). It is designed to be a living document and will be kept under review by the three secretariats, with a view to its periodic revision.

## B. Scope and approach

9. The Guide deals with international commercial contracts, with a particular focus on sales. Consumer contracts are not covered. The Guide also provides guidance on the interaction between sales contracts and certain closely related transactions such as barter, agency and distribution. It further provides guidance on cross-cutting issues such as the use of electronic communications.

10. The Guide deals specifically with the uniform texts prepared by the HCCH, UNCITRAL and UNIDROIT. It refers to legislative texts such as treaties and model

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<sup>15</sup>Note by the Secretariat entitled “Joint proposal on cooperation in the area of international commercial contract law (with a focus on sales)” (A/CN.9/892).

<sup>16</sup>Note by the Secretariat entitled “Current trends in the field of international sale of goods law” (A/CN.9/849), paras. 46–47.

<sup>17</sup>Report of the United Nations Commission on International Trade Law on its forty-ninth session (A/71/17), para. 281; “Conclusions and recommendations adopted by the Council on General Affairs and Policy of March 2016”, para. 23, available on the HCCH [website](#); and “Summary of the conclusions of the UNIDROIT Governing Council at its ninety-fifth session”, document C.D. (95) misc. 2, para. 18, available on the UNIDROIT [website](#).

laws, as well as principles and model clauses that are designed to be implemented by the parties in their contractual arrangements.

11. The Guide is thus an effort to clarify the relationship among those uniform international legal texts and is a document prepared jointly by the three secretariats to promote uniformity, certainty and clarity in this area of the law.

12. The Guide makes reference to uniform texts prepared by other international governmental and non-governmental organizations with a global or regional scope to the extent that those texts assist in clarifying the operation of HCCH, UNCITRAL and UNIDROIT texts. Reference is also made to guidance documents that may offer useful additional information to the reader. The Guide is not aimed at providing an exhaustive list of global and regional texts relevant to international commercial contracts. In particular, the Guide does not cover those international instruments which, although not primarily addressing international sales contracts, refer to the CISG and the UPICC as an expression of general principles and provisions suitable for modern contract laws.<sup>18</sup>

13. The Guide contains a discussion of private international law (PIL)<sup>19</sup> issues, focusing on the HCCH Principles and their relation to the CISG and the UPICC, with a view to explaining the extent to which the contractual parties may choose the applicable law and the consequences of not making such a choice. The Guide also provides an overview of the content of the CISG and the Limitation Convention. The nature, use and content of the UPICC are covered, and similarities and differences between the CISG and other uniform texts with which the UPICC may interact are highlighted. Finally, the Guide contains references to a number of recurrent legal issues related to sales contracts.

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<sup>18</sup> A recent example is the *Legal Guide on Contract Farming* by UNIDROIT, the Food and Agriculture Organization of the United Nations and the International Fund for Agricultural Development, which is a guidance instrument on agricultural production under contract adopted in 2015. It is available on the UNIDROIT [website](#).

<sup>19</sup> It is generally understood that PIL consists of three elements: (a) jurisdiction; (b) applicable law; and (c) recognition and enforcement of foreign judgments. Administrative and judicial cooperation relating to these issues are also covered by PIL. In the Guide, the term PIL is used mainly with reference to applicable law and choice of law issues, in line with the use of that term in certain uniform instruments (e.g., CISG, art. 7, para. 2). The term “choice of law” is also used when it is necessary to reflect the terminology of the relevant instrument.

## II. Why read the Guide?

14. The existence of different legal, political and economic systems around the world leads to legal fragmentation that is an obstacle to the flow of trade. Uniform law provides rules that are coherent and consistent on a global scale. In particular, uniform law provides a uniform legal regime for international<sup>20</sup> sale of goods contracts. By doing so, it facilitates the development of international trade.

15. Parties entering into international contracts, particularly those for the sale of goods, are faced with a plethora of uniform law instruments. These instruments are very useful both because they lead to uniformity in or harmonization of the laws of different States and because they can simplify, clarify and modernize the law for this important aspect of commerce.

16. However, it is not always obvious how these uniform law instruments interact with and complement each other. The purpose of the Guide is to provide an introduction to, and a brief summary of, several important legal instruments concerning such contracts that have been prepared by the HCCH, UNCITRAL and UNIDROIT. Emphasis is placed on the complementary nature of these instruments when more than one instrument applies to a transaction.

17. The Guide can assist both parties and their lawyers, as well as mediators, arbitrators and judges, in navigating the uniform instruments that may be applicable. The intended result is to enable parties to efficiently and effectively structure their commercial transactions in the light of the benefits presented by the instruments.

18. In view of its purpose and nature, the Guide does not purport to offer an exhaustive treatment of the content of each instrument and of the interpretation thereof by judges, arbitrators and scholars. Rather, it provides introductory guidance to navigating them so as to assist in understanding their scope, basic provisions and interaction. There are several useful sources, some available online at no cost, containing case law, bibliographies and other information relating to these instruments. A list of available sources of further information is provided in the annex.

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<sup>20</sup>The concept of “internationality”, which is more specific or broader depending on the instrument, will be explained in the relevant section for each individual instrument below.

19. The instruments that are the primary focus of the Guide are:

(a) **CISG.** As its name suggests, the CISG provides rules for the formation of contracts and the rights and obligations of the parties for the international sale of goods. When it is applicable, it provides neutral legal rules governing such contracts and largely avoids the necessity of determining which State's law governs key issues. Thus, the CISG may contribute significantly to introducing certainty in commercial exchanges and decreasing transaction costs;

(b) **UPICC.** The UPICC are a non-binding codification of contract law rules and principles designed to be applied to commercial contracts on a global scale. Their objective is to provide parties, as well as adjudicators and other users, with a set of balanced rules that are particularly well suited to cross-border transactions. Being a "soft-law" instrument, they offer parties and adjudicators a range of different options as to their use, and an ample degree of flexibility;

(c) **HCCH Principles.** The HCCH Principles are also a non-binding set of principles, providing guidance for the development and refinement of legal rules governing the extent, and application, of the principle that parties to a commercial contract have the autonomy to select, by agreement, the law governing their contract. The HCCH Principles acknowledge and promote the principle of party autonomy (parties to a contract may be best positioned to determine which set of legal norms is best suited to their transaction) and, at the same time, set balanced boundaries for the principle. Thus, they are aimed at providing a refinement of the concept of party autonomy where it is already accepted.

20. Two instruments emanating from UNCITRAL are also addressed:

(a) **Limitation Convention.** The Limitation Convention establishes uniform rules governing the period of time within which a party to a contract for the international sale of goods must commence legal proceedings to assert a claim arising from the contract. By doing so, it brings clarity and predictability to an aspect of great importance for the adjudication of the claim;

(b) **Electronic Communications Convention.** The Electronic Communications Convention is aimed at legally enabling the use of electronic communications in international trade by assuring that communications exchanged electronically, including contracts, are as valid and enforceable as their paper-based equivalents.

21. In addition, reference is made to other instruments emanating from international, supranational or regional bodies:

(a) **HCCH 1955 Sales of Goods Convention.** The HCCH 1955 Sales of Goods Convention regulates the choice of law issues for the international sale of tangible goods;



(b) **HCCH 1978 Agency Convention.** The HCCH 1978 Agency Convention provides choice of law rules for agency relationships;

(c) **HCCH 1986 Sales Convention.** The HCCH 1986 Sales Convention sets out choice of law rules relating to contracts for the international sale of goods. It is not yet in force;

(d) **Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation).** The Rome I Regulation sets out European Union-wide rules for determining which national law should apply to contractual obligations in civil and commercial matters involving more than one country;

(e) **Inter-American Convention on the Law Applicable to International Contracts (1994) (Mexico Convention).**<sup>21</sup> The Mexico Convention sets out rules for determining the law applicable to international contracts within States parties to the Convention.

22. As noted above, the instruments addressed in the Guide are not mutually exclusive. Rather, more than one instrument can apply to the same transaction. A simple illustration of this point appears in table 1 below, which indicates (by way of an asterisk (\*)) in the appropriate boxes) the international instruments that may apply to four transactions in four instances.

Table 1  
**Application of international instruments to different transactions**

<i>Transaction</i>	<i>CISG</i>	<i>UPICC</i>	<i>HCCH Principles</i>	<i>Limitation Convention</i>	<i>Electronic Communications Convention</i>
International sale of goods (not concluded by electronic communications)	*	*	*	*	
International sale of goods (concluded by electronic communications)	*	*	*	*	*
Commercial contracts other than international sale of goods (not concluded by electronic communications)		*	*		
Commercial contracts other than international sale of goods (concluded by electronic communications)		*	*		*

<sup>21</sup> Organization of American States, *Treaty Series*, No. 78; see also paras. 57–58 below.

23. The Guide contains an explanation of the difference between the circumstances in which the conventions and regulations, as “hard-law” instruments, are applicable and have the force of law and the circumstances where “soft-law” instruments, such as the UPICC and the HCCH Principles, may be applied. Moreover, inasmuch as the applicability of hard-law instruments such as the CISG may depend on the determination of which State’s law is applicable, the Guide provides information about the nature and sources of rules that govern the determination of the applicable law.

24. Because of the critical role played by the determination of applicable law, the Guide contains an examination not only of the choice of law rules under the HCCH Principles but also of the other PIL rules that may be applicable in a forum. Hence, an analysis is presented in the Guide of choice of law rules under the Rome I Regulation, the Mexico Convention and the HCCH instruments mentioned in paragraph 21 (a)–(c) above. A brief survey of PIL rules used in various States is also presented in the Guide. A key portion of the analysis relates to “party autonomy” – the ability of the parties, under most choice of law regimes, to select the law that governs their contract – and its limits.

25. Another aspect of what is usually referred to as party autonomy is considered as well: the parties’ “freedom of contract” to choose the rights and responsibilities with respect to each other, subject to the limits put in place by the applicable law. Reference is also made to terms that parties may incorporate in their sales contracts by way of a shorthand clause, the content and interpretation of which are provided by an international body. An example is the International Chamber of Commerce (ICC) Incoterms, which are shorthand clauses collected and developed by the ICC and which reflect international practice. In addition, the role played by commercial practices established between the parties and usages when the sales contract is regulated by an international instrument is highlighted in the Guide.

### **III. Determination of the law applicable to international commercial contracts**

#### **A. Direct application of a uniform law treaty**

##### **How do uniform law treaties apply to an international contract?**

26. Modern uniform law treaties apply to international contracts when the requirements for their territorial and substantive application are met. The CISG, the Limitation Convention and the Electronic Communications Convention each define their scope of application, namely, the cross-border contracts and communications to which their provisions apply, by stating the requirements that must be satisfied. If those requirements are satisfied, the conventions apply without the need for recourse to PIL rules.

##### *CISG*

27. In relation to its territorial scope of application, article 1, paragraph 1, of the CISG provides for two ways in which the CISG applies directly to international sales contracts: (a) when the parties' respective places of business,<sup>22</sup> as determined under the CISG, are in different contracting States (see paras. 106–109 below); and (b) when PIL rules lead to the application of the law of a contracting State. The latter case includes situations in which the law of a contracting State applies because the parties have selected it in the contract.

28. International sales contracts may fall outside the scope of the CISG when the type of sales contract is not covered under the Convention (art. 2) or in the case of “mixed contracts”, in which the provision of labour or services is predominant (art. 3). The precise nature of these and other limits to the applicability of

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<sup>22</sup>For the determination of the relevant “place of business” under the CISG, see paras.148-150 below.

the CISG has been explored by a number of court decisions, arbitral awards and doctrinal authorities.<sup>23</sup> The law applicable to sales contracts outside the scope of the CISG is determined by the application of PIL rules.<sup>24</sup>

29. Article 6 of the CISG allows the parties to opt out of the Convention or derogate from or vary the effect of any of its provisions (with the exception of article 12), thus embodying the autonomy principles referred to in paragraphs 24 and 25 above. According to almost unanimous case law and scholarly opinion, a contractual provision indicating which State law governs a contract does not constitute such an opt-out. Rather, if the choice is of a contracting State and it is given effect by PIL rules, the result is that the CISG applies.

30. The applicability of the CISG to a contract may also be affected by the declarations lodged by States (see paras. 106–110 and 283–286 below).<sup>25</sup>

### *Limitation Convention*

31. With regard to the territorial scope of application of the Limitation Convention, article 3 of that Convention provides that the treaty applies directly to international sales contracts when the parties' respective places of business are in different contracting States or when the PIL rules lead to the application of the law of a contracting State. Moreover, parties may contractually agree on the application of the Limitation Convention, including by choosing the law of a contracting State, when allowed under PIL rules (see chap. III, sect. B, below). Article 3, paragraph 2, of the Convention allows the parties to agree on the exclusion of the application of the Convention ("opting out").<sup>26</sup>

32. The applicability of the Limitation Convention to a contract may also be affected by the declarations lodged by States.<sup>27</sup>

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<sup>23</sup> For example, for the treatment of distribution contracts, see chapter V, section B, below, and for the treatment of barter, see chapter V, section E, below.

<sup>24</sup> For the choice of law rules, including the choice of the UPICC as non-State law, see chapter III, section B, below.

<sup>25</sup> For the status and text of the declarations made by the contracting States to the CISG, see the United Nations Treaty Collection [website](#).

<sup>26</sup> The present paragraph explains the scope of application of the Limitation Convention as amended by the 1980 Protocol amending the Limitation Convention. For more details, including information on the scope of application of the original 1974 Convention, see chapter IV, section B, below.

<sup>27</sup> For the status and text of the declarations made by the contracting States to the Limitation Convention, see the United Nations Treaty Collection [website](#).

### *Electronic Communications Convention*

33. The territorial and substantive scope of the Electronic Communications Convention is defined in articles 1 and 2 of the Convention. The Convention applies to a broader variety of international commercial contracts than the CISG. Article 1, paragraph 1, of the Convention provides for its direct application when a PIL rule leads to the application of the law of a contracting State. According to article 19, a contracting State may lodge a declaration that it will apply the Convention when the parties' respective places of business are in different contracting States. The Electronic Communications Convention is also applicable if the parties to the contract have chosen its provisions as the law applicable to the contract. However, article 3 allows the parties to opt out of the application of the Convention or derogate from or vary the effect of any of its provisions.

## **B. Application of PIL rules**

34. As seen above, international transactions can be governed by uniform law instruments that apply directly to the contract or by virtue of PIL rules.

35. Most jurisdictions, if not all, have PIL rules to which a court can refer in order to identify the law applicable to a particular legal relationship. In the context of cross-border sales or transactions, there are two main ways of identifying the applicable law: (a) when the parties have chosen the law governing their contract, PIL rules will determine whether the parties' choice is valid and effective; and (b) when the parties have not chosen the law governing their contract or their choice is invalid or ineffective, PIL rules will determine which law applies to the transaction.

36. In this context, a uniform law instrument may become applicable to an international transaction, including sales contracts, other than by direct application, by virtue of PIL rules.

37. There are three PIL routes by way of which a uniform law instrument may apply to an international transaction: (a) when the parties have chosen as the law governing their transaction the law of a State that has adopted a uniform law treaty which applies to the transaction; (b) when the parties have chosen a uniform law instrument as the "rules of law" to govern their transaction; and (c) when, in the absence of a choice of law by the parties, the relevant PIL rules lead to the application of a uniform law treaty.

38. Each of these routes is dependent on applicable PIL rules. Sometimes, the rules are the domestic PIL rules of a forum State while, other times, the PIL rules are those contained in a treaty to which the forum State is a contracting State. Domestic PIL rules may be influenced by soft-law principles such as the HCCH Principles.

39. The subsections below contain an examination of PIL rules found in treaties, which will be helpful in determining which law(s) are applicable to an international transaction. When examining these rules, two scenarios will be considered: (a) when the parties have made a choice of law; and (b) when the parties have not made such a choice. A brief summary of non-treaty PIL rules (soft law), in particular the HCCH Principles, is also provided.

## **1. Application of PIL rules when parties make a choice of law**

40. Party autonomy as to the choice of the law applicable to international contracts is generally accepted in most jurisdictions across the world. It refers to the freedom of parties to select, through an agreement, the law(s) or legal system(s) to govern their contractual dealings. It is, however, important to note that that autonomy is not without limitations, and the extent of such autonomy differs from jurisdiction to jurisdiction.

41. Such differences concern various aspects of parties' choices, such as the aspects of the contract that can be governed by the chosen law, formality requirements for making such choices and limitations imposed by public policy. Whether and to what extent parties can choose the law of a State or a non-State law to govern their contracts will be addressed in the following subsections.

42. There are several international instruments, some of which are used more often than others, that cover the issue of the law applicable to international contracts and its application by State courts: the HCCH 1955 Sales of Goods Convention, the HCCH 1978 Agency Convention, the Rome I Regulation and the HCCH Principles. The two HCCH conventions and the Rome I Regulation, which is a supranational instrument of mandatory application in the European Union member States (except Denmark), are hard-law instruments. In contrast, the HCCH Principles are a soft-law and non-binding instrument of universal scope.

43. The potential application of the Mexico Convention should also be noted. The *Guide on the Law Applicable to International Commercial Contracts in the Americas*,<sup>28</sup> adopted by Inter-American Juridical Committee of the Organization of

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<sup>28</sup> The Guide is available on the OAS [website](#).

American States in 2019, provides, inter alia, guidance on both the Mexico Convention and the HCCH Principles.

### *Choice of State law or transnational (non-State) law*

#### *Arbitral setting*

44. In arbitration, parties enjoy substantial freedom to choose non-State “rules of law” applicable to the merits of their dispute. Such freedom was recognized as early as 1985, in article 28, paragraph 1, of the UNCITRAL Model Law on International Commercial Arbitration;<sup>29</sup> this Model Law, as well as the UNCITRAL Arbitration Rules,<sup>30</sup> have served as a model for many jurisdictions. Today, in accordance with most arbitration laws and rules, arbitrators must uphold the parties’ choice concerning the “rules of law” governing their dispute.

#### *“Rules of law” and non-State law*

45. The notion of rules of law is specified in the HCCH Principles as including rules that do not emanate from State sources but that are “generally accepted on an international, supranational or regional level as a neutral and balanced set of rules” (HCCH Principles, art. 3). Thus, “rules of law” may refer to legal rules, such as the UPICC, created by non-legislative bodies. The requirement that the rules be generally accepted as a neutral and balanced set of rules leads to the conclusion that those trade codes and similar instruments that have not achieved this degree of credibility as neutral and balanced would not qualify as “rules of law” for the purposes of the HCCH Principles. As discussed in paragraph 71 below, the HCCH Principles give effect to the choice of “rules of law” not only in an arbitral setting but also in a judicial setting, provided that such choice is allowed under the otherwise applicable law.

46. In an arbitral setting, the CISG may be chosen as the law applicable even when the parties do not have their places of business in contracting States or the PIL rules do not lead to the application of the CISG. In this context, the CISG may apply as transnational (non-State) law.

#### *Judicial setting*

47. In a judicial setting, parties are generally free to choose the State law applicable to their contracts. Most national laws do not allow parties to choose non-State

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<sup>29</sup> UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006 (United Nations publication, Sales No. E.08.V.4). For the status of enactments and additional information on the Model Law, see the UNCITRAL [website](#).

<sup>30</sup> UNCITRAL Arbitration Rules as revised in 2010 (Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17), annex I).

rules of law to govern the contract, although in many cases this is the result of interpretation as the law is silent on this point.<sup>31</sup> Nevertheless, even in States that do not give effect to the choice of non-State law by the parties, non-State law may still be applied indirectly by way of incorporation by reference, namely, as actual terms of the contract.<sup>32</sup>

### *HCCH 1955 Sales of Goods Convention*

48. The HCCH 1955 Sales of Goods Convention was one of the first steps towards unification of international sales law. It regulates choice of law issues for the international sale of tangible goods. The Convention allows the parties to freely choose the applicable law (art. 2). In general, only one law can be identified as the applicable law (with the exception of article 4). The choice of law can either be made expressly or “unambiguously result from the provisions of the contract” (art. 2). The Convention identifies only the law of a State as the applicable law, but not non-State law.

49. The Convention is currently in force in five European Union member States (Denmark, Finland, France, Italy and Sweden) and in the Niger, Norway and Switzerland.<sup>33</sup> Thus, for contracts that fall within its scope, the Convention takes precedence over the Convention on the Law Applicable to Contractual Obligations<sup>34</sup> and the Rome I Regulation (see articles 21 and 25, paragraph 1, of those instruments, respectively).

### *HCCH 1986 Sales Convention*

50. The HCCH 1986 Sales Convention is aimed at unifying choice of law rules relating to contracts for the international sale of goods. It determines the law applicable to contracts for the sale of goods between parties having their places of business in different States and in all other cases involving a choice between the laws of different States. It is a basic principle of the Convention that international sales are regulated by the law chosen by the parties to the contract (art. 7, para. 1). Such choice must be made expressly or clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety, regarding either

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<sup>31</sup> Inspired by the HCCH Principles, in Paraguay and Uruguay, national law expressly allows parties to choose non-State law to govern their contracts (Paraguay, Law No. 5393 on the Law Applicable to International Contracts of 15 January 2015; and Uruguay, Law No. 19.920 on the General Law of Private International Law of 27 November 2020).

<sup>32</sup> See also below, particularly paragraph 56, for incorporation as contractual terms under the Rome I Regulation, and paragraph 338, for incorporation as contractual terms of the UPICC.

<sup>33</sup> For examples of its application, see Mathilde Sumampouw, ed., *Les Nouvelles Conventions de La Haye: Leur Application par les Juges Nationaux*, vol. III (Dordrecht, the Netherlands, Martinus Nijhoff, 1984), pp. 15–20 (reporting decisions from Finland, the Netherlands and Belgium); see also the publications listed on the HCCH [website](#).

<sup>34</sup> United Nations, *Treaty Series*, vol. 1605, No. 28023.



the whole or part of the contract (art. 7, para. 2). In addition, the law determined under the Convention applies irrespective of whether or not it is the law of a contracting State.

51. The Convention was designed to replace the HCCH 1955 Sales of Goods Convention. Like the latter, it identifies only the law of a State as the applicable law, but not non-State law.

#### *HCCH 1978 Agency Convention*

52. The HCCH 1978 Agency Convention is aimed at establishing common provisions concerning the law applicable to agency. It encompasses both commercial and non-commercial agency and regular and casual agency. The Convention provides choice of law rules for both the internal relationship between principal and agent and the external relationships between principal and third parties, and agent and third parties.

53. The law chosen by the parties is the primary rule for the internal relationship between principal and agent (art. 5). The internal law chosen by the parties may be express or implied.<sup>35</sup> The term “internal law” indicates that only substantive law of the applicable State would be referred to. In addition, the law specified in the Convention is to apply irrespective of whether or not it is the law of a contracting State.

54. The Convention is in force in three European Union member States (France, the Netherlands and Portugal) and in Argentina. Thus, for contracts that fall within its scope, the Convention takes precedence over the Rome I Regulation (see art. 25, para. 1).

#### *Rome I Regulation*

55. Article 3 of the Rome I Regulation allows the parties to choose the law of a State to govern their contract. Such choice may be made either expressly or tacitly, in regard to the whole or to only part of the contract.

56. While the Rome I Regulation does not allow State courts to recognize the choice of a non-State body of law, such as the UPICC, as governing law, it does not preclude parties from incorporating such rules into their contracts, subject to general limits on freedom of contract under the applicable contract law. The same applies to the choice of an international convention, such as the CISG. However, the CISG may be otherwise applicable under its own terms and therefore prevail over the Regulation.

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<sup>35</sup>The internal law of the State in which the business establishment of the agent was located at the time of the relevant acts is to govern the two external relationships (arts. 11 and 15).

### *Mexico Convention*

57. The Mexico Convention also recognizes the parties' freedom to choose the law applicable to their international contract. The law chosen may relate to the whole or to only part of the contract. Such choice may be express or result from the parties' behaviour and the overall terms of the contract.

58. The Convention has adopted a more flexible approach towards the application of non-State law. In applying the State law governing the contract, the court, in accordance with article 10, is to take into account certain categories of non-State law, including guidelines, customs and principles of international commercial law, as well as commercial usages and generally accepted practices.<sup>36</sup>

### *HCCH Principles*

59. In line with today's generally accepted principle of party autonomy, the HCCH Principles give effect to a choice by the parties (art. 2, para. 1) not only of State law as the law governing their international contract but also (under certain conditions, as further discussed in paragraph 71 below) of non-State law (art. 3). The law chosen may relate to the whole or to only part of the contract, and different laws may be chosen for governing different parts of the contract (art. 2, para. 2). No connection is required between the law chosen and the parties or the transaction (art. 2, para. 4). Such choice may be express or appear clearly from the provisions of the contract or the circumstances (art. 4).

60. The "rules of law" (i.e., non-State law) chosen by the parties must meet certain criteria, a measure that is intended to afford greater legal certainty (for details, see paragraph 71 below).

61. Since the HCCH Principles can serve as a model for national legislators, they may be adopted as a domestic body of choice of law rules. The effect of such an adoption would be that, for matters litigated in a forum in that State, the forum would give effect to a choice of transnational non-State law.

### *Interplay of choice of law and dispute resolution method (including choice of forum)*

62. The PIL rules determine the legal rules that govern the parties' rights and obligations. Since those rules may differ from State to State, it is essential to determine the applicable law when a dispute arises since the application of the law of one State rather than another may in some cases change the outcome of a dispute.

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<sup>36</sup> See also the *Guide on the Law Applicable to International Commercial Contracts in the Americas*, in particular, paragraph 194.

Yet, it is equally important for parties to assess the effectiveness of their choice of law before concluding the contract, so that they can determine their rights and obligations under the proposed contract before entering into it and thereby lower the probability of a dispute arising later. Assessing the effectiveness of the choice of law before the conclusion of the contract may also avoid surprises later if the parties had different assumptions as to which law would govern. The effectiveness of a choice of law is closely related to the method of dispute resolution chosen by the parties.

63. In arbitration, the parties' choice, which can include transnational non-State law, is generally upheld by arbitral tribunals all over the world. In contrast, when parties decide to submit their future disputes to State courts, they should choose a forum which gives full effect to their choice of law agreement.

64. It is worth noting that an agreement between the parties to confer jurisdiction on a court<sup>37</sup> or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a tacit choice of law (see, for example, article 4 of the HCCH Principles and article 7 of the Mexico Convention). Nevertheless, when a choice of law has not been expressly made or clearly demonstrated, a choice of court agreement may be a factor to be taken into account in determining whether the circumstances lead to the conclusion that the parties made a tacit choice of the law applicable to the contract (see, for example, recital 12 of the Rome I Regulation and the commentary on article 4 of the HCCH Principles).

### *Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts*

65. The Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts, adopted in 2013, are a guidance document on how parties to a contract may refer to the UPICC. Unlike binding instruments, which are applicable whenever the contract at hand falls within their scope and the parties have not excluded their application, the UPICC, being a "soft-law" instrument, offer a greater range of possibilities to parties, of which they may not always be fully aware. This is the reason behind the preparation of model clauses that parties may wish to adopt in order to indicate more precisely how they would like the UPICC to be used, either during the performance of the contract or when a dispute arises.

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<sup>37</sup> In this regard, the HCCH Convention of 30 June 2005 on Choice of Court Agreements is aimed at ensuring the effectiveness of exclusive choice of court agreements between parties to international commercial transactions. For more information on that Convention, see the HCCH [website](#). Recognition and enforcement of judgments deriving from a non-exclusive choice of court agreement will be governed by the HCCH Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. For more information on that Convention, see the HCCH [website](#).

66. The Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts reflect the different ways in which the UPICC have been referred to by parties or applied by judges and arbitrators. They are divided into four categories, according to whether their purpose is: (a) to choose the UPICC as the rules of law governing the contract; (b) to incorporate the UPICC as terms of the contract; (c) to refer to the UPICC to interpret and supplement the CISG when the latter is chosen by the parties; or (d) to refer to the UPICC to interpret and supplement the applicable domestic law. The commentaries under each model clause detail their advantages and disadvantages, and point to possible modifications that parties may wish to introduce, depending on their intent. Where appropriate, for each model clause, two versions are proposed, one for inclusion in the contract (“pre-dispute use”) and one for use after a dispute has arisen (“post-dispute use”).<sup>38</sup>

### *HCCH Principles*

67. The HCCH Principles are a non-binding soft-law instrument containing general principles and rules concerning choice of law in international contracts. They recognize that giving effect to party autonomy at the global level is key to promoting cross-border commercial transactions, as it enhances certainty and predictability in respect of the parties’ contractual arrangements.

68. The main purpose of the HCCH Principles is to reinforce the parties’ freedom to choose the law applicable to international commercial contracts and to ensure that the law chosen has the widest scope of application, subject to limited exceptions (preamble, first paragraph).

69. The HCCH Principles provide rules only for situations in which the parties have made a choice of law (express or tacit) by agreement. As opposed to the Rome I Regulation and the Mexico Convention, which contain provisions dealing with the law applicable in the absence of a choice, the HCCH Principles do not contain a comprehensive body of rules for determining the law applicable to international commercial contracts.

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<sup>38</sup> It is important to note that the purpose of the Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts is merely to allow parties to indicate more precisely the way they wish the UPICC to be used. Thus, even if parties decide not to use the Model Clauses, judges and arbitrators may still apply the UPICC according to the circumstances of the case, as indicated in the UPICC preamble. For more information on the UPICC and their intended use, see chapter IV, section C, below.

70. The HCCH Principles are composed of a preamble and 12 articles. While some provisions of the HCCH Principles reflect an approach that enjoys wide international consensus (e.g., arts. 2, para. 1, and 11), other provisions reflect the view of the HCCH as to best practice and provide helpful clarifications for those legal systems that accept party autonomy (e.g., arts. 2, paras. 2–4, 4, 7 and 9). The HCCH Principles also contain innovative provisions (e.g., arts. 3, 5, 6 and 8).

71. One of the most prominent features of the HCCH Principles is the provision in article 3 that expressly allows the parties to choose “rules of law” (i.e., transnational or non-State law) to govern their contract. However, such rules of law must be qualified as generally accepted on an international, supranational or regional level as a neutral and balanced set of rules. They will include international treaties and conventions, as well as non-binding instruments formulated by established international bodies. Instruments such as the UPICC and the CISG (that is, the CISG when applied as the law designated by the parties, as opposed to its application as a treaty) meet the conditions set forth in article 3. The HCCH Principles are, however, silent regarding the application of trade usages.

72. Party autonomy, as recognized by the HCCH Principles, is not absolute. As in the law of all jurisdictions that recognize party autonomy, the HCCH Principles impose limitations on it. Under article 11, a court or arbitral tribunal may decline to give effect to the law chosen by the parties in the exceptional circumstances where such law contravenes overriding mandatory rules or public policy (*ordre public*) of the forum or of a third State (for more details, see para. 100 below).

73. The HCCH Principles may serve a harmonizing purpose, since they can be adopted as a legislative model in those jurisdictions willing to modernize their PIL rules with regard to contracts. Paraguay and Uruguay, which have already passed laws inspired by the HCCH Principles, are examples (see para. 47 above).

74. The HCCH Principles may also provide guidance to courts and arbitral tribunals as to how to approach issues concerning the choice of law in international contracts. Lastly, they may be useful for parties and their counsel in assessing the law or rules of law that may be effectively chosen.

75. Thus, as a non-binding instrument, the HCCH Principles may be used: (a) in the arbitral context; (b) in the case where they supplement the PIL rules of a given State; or (c) where a State has adopted them as its PIL rules for international contracts.

## 2. Application of PIL rules in the absence of a parties' choice

76. Although most international contracts state the parties' choice of the law to be applied to the contract, in some instances, such a choice may not have been made<sup>39</sup> or may not be enforceable. The adjudicator must then determine the law applicable to the contract by means of PIL rules.

77. The rules governing the determination of the law applicable in the absence of a choice by the parties may vary in accordance with the method of dispute resolution chosen by the parties.

### *Arbitral setting*

78. In the absence of a choice of law agreement, or in the case of the invalidity of such an agreement, arbitrators enjoy a substantial degree of discretion in determining the law applicable to the merits of the dispute, including both State law and non-State "rules of law".

79. Under a number of arbitration rules and laws, the arbitral tribunal may directly determine the law applicable to the merits of the case, without resort to PIL rules (e.g., ICC Arbitration Rules, art. 21, and French Code of Civil Procedure, art. 1511). This is called the *voie directe* method.

80. On the other hand, rules such as article 28, paragraph 2, of the UNCITRAL Model Law on International Commercial Arbitration and section 46, paragraph 3, of the English Arbitration Act state that the tribunal shall apply the law determined by the conflict of laws rules that it considers applicable.

81. In practice, as arbitrators must provide reasons for their decisions, they often resort to PIL rules to determine the law applicable in the absence of a choice.

### *Judicial setting*

82. In determining the law applicable in the absence of a choice, State courts apply the PIL rules of the forum, which may be international, supranational or domestic rules. It should be noted that the majority of domestic PIL systems do not authorize the adjudicator to apply transnational non-State law to govern the

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<sup>39</sup>It is important to note that the choice can be made expressly or tacitly. The determination of such choice depends on the applicable law (see, for example, HCCH Principles, art. 4).

contract in the absence of a choice. However, this has not prevented State courts from referring to non-State law for other purposes, for example, interpretation of the applicable State law, or filling gaps in that law.<sup>40</sup>

### *Uniform PIL instruments*

83. In the absence of the parties' choice, the HCCH 1955 Sales of Goods Convention applies the main rule that the law of the country in which the seller's business establishment or habitual residence is located at the time of receipt of the buyer's order will govern the contract of sale (art. 3). Should the seller have more than one business establishment in different countries, the business establishment receiving the order is the relevant one. A similar approach has been adopted in the HCCH 1986 Sales Convention, article 8 of which provides for additional connecting factors. In terms of the HCCH 1978 Agency Convention, three main connecting factors have a claim to apply to the agency relationship between the principal and the agent in a situation in which both parties have their own business establishment: (a) the law of the State in which the agent acts; (b) the law of the State in which the business establishment of the principal is located; and (c) the law of the State in which the business establishment of the agent is located (art. 6).

84. The Mexico Convention adopts a general criterion to be followed by the judge in determining the governing law. According to article 9, the contract shall be governed by the law of the State with which it has the closest ties. In determining the law applicable under this provision, the court must take into account not only the objective and subjective elements of the contract, but also general principles of international commercial law recognized by international organizations, such as the UPICC.

85. The Rome I Regulation presents a complex regime for determining the law applicable in the absence of a choice. Pursuing the goal of legal certainty, the Regulation sets out, in articles 4 to 8, a variety of rules relating to specific contracts, such as sale of goods, provision of services, franchise and distribution agreements, contracts of carriage, consumer and insurance contracts, and individual employment contracts. For example, article 4, paragraph 1 (a), of the Regulation states that the sale of goods shall be governed by the law of the country in which the habitual residence of the seller is located.<sup>41</sup> In that case, under article 1, paragraph 1 (b), of the CISG, the CISG applies when the habitual residence of the seller is in a State that is a party to the CISG, unless that State has lodged a declaration that article 1, paragraph 1 (b), does not apply.

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<sup>40</sup> See paras. 351–353 below; and for case law, see the [UNILEX](#) database.

<sup>41</sup> The place of habitual residence is defined in article 19 of the Rome I Regulation.

86. Article 4, paragraphs 2–4, of the Rome I Regulation lays down general rules based on characteristic performance of the contract or closest connections to determine the law applicable in the absence of a choice.

87. The HCCH Principles do not cover situations in which the parties have not chosen the law applicable to the contract. In the light of the diversity of rules regarding this subject, there is currently no international consensus (with the exception of the HCCH 1955 Sales of Goods Convention) with respect to the rules that determine the applicable law in the absence of a choice.

### *National laws*

88. Determination of the law applicable in the absence of a choice may result in different solutions according to the choice of law rules employed by the adjudicator. In this context, some jurisdictions have more flexibility than others.

89. For example, certain jurisdictions apply the law of the place of performance as the governing law (*lex loci executionis*), whereas others apply the law of the country where the contract has been concluded (*lex loci celebrationis*). Others apply subsidiary connecting factors in cases where these factors cannot be determined.

90. Most modern legal systems have a more flexible rule to the effect that the law of the jurisdiction of “closest connection” should govern the contract. However, they differ on what is meant by the “closest connection”. Some national laws establish a number of factors to be taken into account, while others presume the “closest connection” to be the law of the habitual residence of the party having to perform the characteristic obligation. Other legal systems presume the “closest connection” to be the place of the conclusion of the contract or the place of performance of the contract.



## C. Mandatory rules and public policy

### Are there limits on the application of the law chosen by the parties?

91. As indicated above, parties to contracts of sale are generally free to choose the law governing the contract and to agree on their terms. However, the application of the parties' chosen law may be limited by mandatory rules and public policy.

92. In PIL, overriding mandatory rules should be distinguished from ordinary mandatory rules of contract law (i.e., those that cannot be derogated from by agreement) in that they represent rules of fundamental importance in the legal system in which they operate. While ordinary mandatory rules apply only to the extent that they are part of the applicable law, overriding mandatory rules apply irrespective of the law otherwise applicable to the contract.

93. Overriding mandatory rules are legal provisions enacted by a State, contained in an international treaty or emanating from a supranational body (for example, article 101 of the Treaty on the Functioning of the European Union), and applicable irrespective of the law otherwise applicable to the contract. These rules vary from one system to another, as they relate to sensitive issues deserving special protection or regulation (e.g., consumer protection, competition law, currency and corruption). Therefore, overriding mandatory rules establish important limitations to the principle of party autonomy and may prevent forum shopping in sensitive areas. However, mandatory rules are seldom explicitly identified as such. Often, case law identifies which rules are mandatory. In some jurisdictions, the notion of mandatory rules is unknown or unused; however, judges achieve the same result by using doctrine that allows the court to decline the application of laws that violate public policy. These limitations may in practice hinder legal predictability if judicial precedents interpreting a certain legal provision do not exist or are not easily accessible.

94. The notion of public policy (*ordre public*) expresses a mechanism protecting the basic values of the forum's legal system against the application of a foreign law. By preventing the application of a foreign law – chosen by the parties or determined in accordance with PIL rules – the public policy exception produces effects similar to those of overriding mandatory rules. Under the public policy exception, the application of a foreign law is barred by the adjudicator on the grounds that its application in the particular case would be inconsistent or repugnant to the fundamental policies of the forum or another legal system whose law would apply to the contract in the absence of the parties' choice. It is an exceptional yet necessary device to avoid results which may offend a country's fundamental concepts of social, economic or political justice.

95. Many international or regional PIL instruments deal with both overriding mandatory rules and public policy.

96. Article 11 of the Mexico Convention contains a general rule stating that the provisions of the law of the forum must be applied when they are mandatory requirements. It also establishes the adjudicator's discretion to decide on the application of mandatory provisions of the law of another State with which the contract has close ties.

97. Article 18 of the Mexico Convention allows for the exclusion of the application of the law designated by the Convention "when it is manifestly contrary to the public order of the forum".

98. Article 9, paragraph 1, of the Rome I Regulation has further elaborated on the notion of mandatory rules, namely "overriding mandatory provisions". Respect for the provisions is regarded as crucial by a country in order to safeguard its public interests, such as its political, social or economic organization. The provisions are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract. Article 9, paragraph 3, of the Regulation allows for the exceptional application of the overriding mandatory provisions of a third country, provided that the obligations arising out of the contract have to be or have been performed in that country and that those overriding mandatory provisions render the performance of the contract unlawful.

99. Article 21 of the Rome I Regulation states that "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".

100. Article 11 of the HCCH Principles establishes the exceptional circumstances in which the parties' choice of the governing law can be limited. Article 11, paragraphs 1 and 2, addresses overriding mandatory provisions of law, with paragraph 1 establishing the forum's discretion to apply its overriding mandatory provisions, and paragraph 2 indicating the circumstances in which the forum may apply mandatory provisions of another State. Article 11, paragraphs 3 and 4, addresses fundamental notions of public policy (*ordre public*), with paragraph 3 establishing the forum's discretion to exclude the application of the chosen law if it contravenes the forum's fundamental notions of public policy and paragraph 4 indicating the circumstances in which the forum may take into account fundamental notions of public policy of another State. Finally, article 11, paragraph 5, addresses the application of overriding mandatory provisions and public policy (*ordre public*) by arbitral tribunals.

101. Similar rules can be seen in other HCCH choice of law instruments: article 6 of the HCCH 1955 Sales of Goods Convention; articles 16 and 17 of the HCCH 1978 Agency Convention; and articles 17 and 18 of the HCCH 1986 Sales Convention.

102. The UPICC contain, in article 1.4, a broad rule addressing the prevalence of mandatory rules over the UPICC. It states that nothing in the UPICC shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant PIL rules (see para. 341 below).

103. The UPICC, in their article 1.5, use the term “mandatory rules” also in a different meaning, referring to certain UPICC internal provisions that cannot be derogated from or excluded by the parties (see para. 389 below). It is true that, given the non-binding character of the UPICC, the non-observance of the mandatory provisions may have no consequences. It is, however, considered an important guidance for contracting parties and adjudicators, especially when the UPICC are chosen as the governing law. Table 2 below sets out selected mandatory rules within the UPICC and the CISG.

Table 2

**UPICC and CISG: selected mandatory rules**

Selected mandatory rules within the UPICC	Article 1.7 (good faith and fair dealing) Article 3.1.4 (general provisions on validity) Article 5.1.7(2) (price determination) Article 7.4.13(2) (agreed payment for non-performance) Article 10.3(2) (limitation periods)
Mandatory rules within the CISG	Article 12 <sup>a</sup> Article 28

<sup>a</sup>See chap. IV, sect. A, below.

104. Article 9 of the Electronic Communications Convention establishes minimum standards for the functional equivalence between electronic communications and form requirements that may exist under the applicable law. These form requirements may be considered of mandatory application in certain jurisdictions.

105. The principle of party autonomy contained in article 3 of the Electronic Communications Convention does not empower the parties to set aside statutory requirements on the form or authentication of contracts and transactions. Thus, article 9 of the Convention should not be understood as allowing the parties to go as far as relaxing statutory requirements on signature in favour of methods of authentication that provide a lesser degree of reliability than electronic signatures.



## IV. Substantive law of international sales

### A. United Nations Convention on Contracts for the International Sale of Goods

#### 1. Scope of application – bases for applying the CISG

*When is a sale international?*

*What contact or connection between the sales transaction and a contracting State will trigger the application of the CISG?*

106. The CISG is a hard-law instrument applicable to the international sale of goods. It is binding on parties, judges and arbitrators when the conditions set out in the instrument itself, and particularly in its article 1, paragraph 1, are met. A sale of goods is defined as “international” when the contracting parties have their places of business in different States. If parties have more than one place of business, the place of business is that which has the closest relationship to the contract and its performance. No other test, for example, with regard to the nationality of the parties or to the civil or commercial character of the parties or of the contract is required to determine the internationality of the sales contract.

107. The provisions in article 1, paragraphs 1 (a) and (b), describe the relationship between the sales transaction and contracting State that triggers the application of the CISG. The Convention will apply if the States in which both parties have their places of business are contracting States or if PIL rules lead to the application of the law of a contracting State.

108. The application of the CISG may be excluded by agreement of the parties (art. 6). Moreover, a contracting State may lodge a declaration under article 95 that excludes the application of the CISG through the application of PIL rules.<sup>42</sup>

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<sup>42</sup>For the status and text of the declarations made by contracting States to the CISG, see the United Nations Treaty Collection [website](#).

109. In accordance with article 1, paragraph 2, when facts that would reveal that the sale is international are not apparent to the parties at the time of the conclusion of the contract, the internationality is to be ignored in determining whether the Convention applies. Thus, for example, when a sales contract is concluded by an agent for one party without disclosure that the principal's place of business is in a different State from the other party, the contract is not governed by the Convention.

*Does the CISG always apply in a contracting State?*

110. Exceptions to the application of the CISG may occur if the CISG is in force only in some territorial units of a contracting State (art. 93) and if some contracting States have declared that they share the same or closely related legal rules on matters governed by the Convention (art. 94). Currently, the latter declaration applies to contracts concluded between parties having their place of business in Denmark, Finland, Iceland, Norway or Sweden.

*What is a contract for sale under the CISG and what are goods under the CISG?*

111. Most of the time, what constitutes a contract for sale under the Convention is obvious; however, there are circumstances in which more explanation or analysis is required. The same applies to what constitutes goods under the CISG.

112. Articles 1 and 3 of the CISG identify transactions to which the Convention applies. A definition of a sales contract under the CISG is achieved by resorting to the provisions that typically characterize the obligations of the parties under the contract, namely, articles 30 and 53 of the CISG: the seller has to deliver the goods and the buyer has to receive them and pay the agreed price.

113. Article 3, paragraph 1, of the CISG expands upon the traditional definition of the sales contract found in certain legal traditions, which characterizes the seller's obligation as an obligation to give (*dare*), as opposed to other contracts, such as work, services or construction contracts, in which the obligation is an obligation to do (*facere*). Under article 3, paragraph 1, of the CISG, the obligation of the seller is not solely characterized as an obligation to give, but also includes an obligation to do. The CISG thus considers as a "sales contract" a contract for the supply of goods to be manufactured or produced by the seller with materials provided by the seller or by the buyer if the latter does not provide a substantial part of the materials necessary for such manufacture or production.

114. Article 3, paragraph 2, addresses the application of the CISG to mixed contracts, namely, contracts for sales in which the seller's obligations include a duty to provide labour or other services as well as goods. It provides that the Convention

applies to such contracts unless the supply of labour or services constitutes the “preponderant part” of the obligations of the party that furnishes the goods. However, services or work needed to manufacture or produce the goods under article 3, paragraph 1, do not count for the purpose of article 3, paragraph 2.

115. For the possible application of the CISG to distribution contracts, see chapter V, section B, below; to barter or countertrade transactions, see chapter V, section E, below.

116. The use of new technologies has raised a number of issues regarding the substantive scope of the CISG, in particular in the realm of computer software and data. Contracts with respect to software and data may raise issues as to whether they are contracts for sale or whether the subject matter of the sale is goods (see chap. V, sect. D, below).

117. Six specific categories of international sales are excluded from the scope of the Convention. Those mentioned in article 2, paragraph (a), concern sale of goods to buyers who acquire them for personal, family, or household use; in most countries, such sales are characterized as consumer transactions and are governed by specific rules, often of a mandatory nature. Article 2, paragraphs (b) and (c), relate to sales by auction or on execution or otherwise by authority of law, which may raise issues regarding the formation of the contract and the seller’s consent. All these exclusions are based on the specific nature of the transaction; the remaining exclusions (art. 2, paras. (d)–(f)) are based on the nature of the goods. Under those paragraphs, sales of shares and other securities, as well as money, sales of ships, vessels, hovercraft or aircraft, and contracts for the sale of electricity, are excluded from the scope of the Convention. However, the supply of gas and oil and other energy sources are not excluded from the scope of the CISG by article 2.

### *What matters are governed by the CISG?*

118. Once the applicability of the CISG is decided, the next issue to consider is what matters are governed by the CISG. Articles 4 and 5 deal expressly with this issue. Matters that are governed by the CISG are addressed exclusively by the express provisions or general principles underlying the CISG. Only when no provision or general principles can be found will the domestic law apply, in accordance with article 7 (see paras. 127–132 below).

119. Article 4 provides that the CISG governs two of the most important matters that arise in contracts of sale of goods. The first is whether and when a contract has been concluded. The second is the rights and obligations of the seller and buyer arising from the contract. Domestic law notions such as consideration and *causa* are not relevant for the CISG. Rights and obligations of third parties are not governed by the CISG.

120. Article 4, paragraph (a), provides that the CISG is not concerned with two matters. The first is the validity of the contract, any of its provisions, or any usage (for the application of usages, see para. 139 below). Under the CISG, validity is to be distinguished from formation of the contracts. The question of whether a contract is to be invalidated arises only after a contract is concluded. Examples in domestic law of such invalidation rules include rules on public policy, mistake, fraud, threat or incapacity.<sup>43</sup>

121. The second matter with which the CISG is not concerned is the effect of the contract on the property in the goods sold (art. 4, para. (b)). The question of how and when the property passes from the seller to the buyer is to be decided by the applicable domestic law.

122. However, there is an important exception to article 4, paragraphs (a) and (b), of the CISG. Article 4 provides that the CISG is not concerned with validity and property “except as otherwise expressly provided in this Convention”. For example, some domestic legal systems may allow a contract to be invalidated owing to a mistake as to the quality of the goods. However, since the CISG has explicit rules on delivery of non-conforming goods, the CISG governs this matter to the exclusion of domestic laws.

123. The liability of the seller for death or personal injury caused by the goods to any person is not governed by the CISG (art. 5). Since death and personal injury deal with extracontractual interests, they are issues that are better dealt with in accordance with the public policy decisions of each contracting State. Thus, domestic rules on product liability between sellers and buyers apply even if the contract of sale is governed by the CISG as far as they concern death or personal injury. This includes death or personal injury caused by labour or other services provided by the seller, if that contract is a sales contract under article 3, paragraph 2, of the CISG. However, sums paid by the buyer as compensation for the death or personal injury of a third person caused by goods or services supplied by the seller may be regarded as claims for pecuniary loss of the buyer.

*Can the CISG be chosen as governing sales law and  
what role can the UPICC play in this context?*

124. Under the principle of party autonomy, parties may make the CISG applicable when it would not otherwise apply (opting in as non-State law).<sup>44</sup> In such

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<sup>43</sup>The UPICC filled this gap and contain a detailed set of provisions on the validity of contract, including avoidance for mistake, fraud and threat, a provision on gross disparity, a provision on illegality and express rules on restitution in the case of avoidance (see paras. 370–372 below).

<sup>44</sup>For a more thorough discussion of this point, see paragraphs 40–61 above.



cases, the CISG will be regarded as a body of rules of law (HCCH Principles, art. 3). If the CISG would not apply on its own terms (i.e., if the conditions of article 1, paragraph 1, are not met), its choice as applicable law would be limited by restrictions that PIL rules may impose on the choice of non-State rules of law to govern the contract (see paras. 45–47 above).

125. Under article 2, paragraph 2, of the HCCH Principles, the parties may choose more than one law to govern their contract. Accordingly, the parties may choose both the CISG and the UPICC as the governing laws. In doing so, the parties may refer to the Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts. Depending on the choice made by the parties, the UPICC may play the limited role of background law, as opposed to the primary role played by the CISG.<sup>45</sup>

*Can the parties derogate from the CISG or vary its rules?*

126. One of the underlying principles of the CISG is party autonomy. As established in article 6, the parties are free not only to exclude the Convention but also to derogate from or vary the effect of its provisions, at the time of or after the conclusion of the contract (see, however, para. 29 and table 2 above).

*How is the CISG to be interpreted?*

*How are the gaps in the contract filled?*

*What are general principles within the CISG?*

127. Article 7 provides a framework for the uniform and international interpretation of the CISG. It is aimed at avoiding a distortive interpretation and application of the CISG resulting from interference with domestic laws, case law and doctrinal traditions.

128. The autonomous interpretative criterion is based upon the principles of internationality, uniformity and good faith (CISG, art. 7, para. 1). The autonomous gap-filling method is to be applied according to the same general principles inherent to the CISG (CISG, art. 7, para. 2).

129. Similarly to the UPICC (see para. 387 below) and other uniform texts, the CISG pursues the goal of uniform interpretation. Terms and concepts used must be interpreted autonomously.<sup>46</sup> Therefore, the meaning of the vast majority of the

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<sup>45</sup> See, in particular, model clauses 3 (a) and (b), and paragraphs 65–66 above.

<sup>46</sup> These principles apply to several uniform texts: see, for example, comment 2 to article 1.6 of the UPICC.

CISG terms is to be found within the CISG and not in domestic laws. In order to achieve the goal of uniform interpretation, domestic courts and arbitral tribunals applying the CISG in different jurisdictions tend to consider cases issued by other courts when interpreting the CISG.

130. Article 7 minimizes the need to apply PIL rules and rules of domestic substantive law. When a question concerning a matter governed by the Convention is not expressly settled in it, the question is to be settled in conformity with the general principles on which the Convention is based. Only in the absence of such principles is the interpreter referred to the domestic law determined by the choice of law rules; hence, recourse to domestic law is the last resort.

131. In practice, a significant number of general principles to be found within the CISG have been developed by case law.

132. Whether and to what extent external principles may play a role in filling gaps in the CISG, in the absence of an agreement of the parties, is an open issue. In the case of the relationship between the CISG and the UPICC, the common understanding is that the UPICC are not, as such, considered to be the general principles of the CISG, but rather as being able to serve to corroborate the existence of a given general principle and, thus, they can be a tool to interpret the CISG (CISG, art. 7, para. 1) or to fill its gaps (CISG, art. 7, para. 2), whenever there is no conflict between the two instruments (see paras. 353 and 394 below).

### *What are the rules for the interpretation of the contract?*

133. Article 8 of the CISG addresses interpretation of statements and other conduct of a party to a contract. This article, which displaces the application of domestic laws on interpretation of such statements and conduct, can play an important role in determining the meaning of a contract.

134. Article 8, paragraph 1, of the CISG states a preference for the interpretation of unilateral statements and conduct in accordance with the intention of the party speaking or acting so long as the other party knew or could not have been unaware of the intent of the party speaking or acting.

135. If the intention of the party speaking or acting is not known to the other party or the other party could not have been aware of that intent, then, under article 8, paragraph 2, of the CISG, the statements or conduct are to be interpreted in accordance with the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

136. Article 8, paragraph 3, of the CISG mandates a contextual approach to ascertaining the intent of a party or the understanding that a reasonable person would have. It does so by requiring that due consideration 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”.

137. Chapter 4 of the UPICC contains a more detailed set of rules on contractual interpretation. Article 4.1 contains a general provision on the interpretation of the contract according to the common intention of the parties or, if a common intention cannot be established, according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances. Articles 4.3 and 4.4 endorse the contextual approach followed by the CISG. The UPICC also expressly address additional issues such as the interpretation of terms supplied by one party (through the *contra proferentem* rule), linguistic discrepancies and supplying omitted terms (see paras. 373 and 394 below).

### *What is the role of practices and usages?*

138. The determination of the content of an international sale of goods contract is left to party autonomy that can shape its content in accordance with the needs of each specific transaction within the limits derived by mandatory rules. In practice, parties may draft a very long and detailed contract or exchange offer and acceptance indicating only the fundamental elements of the contract. In any case, the question is how gaps in the contract are to be filled.

139. The CISG considers in this regard the importance of practices and usages. Article 9 of the CISG (in the same way as article 1.9 of the UPICC)<sup>47</sup> refers to three situations that are different in name, content and effect: (a) practices established between the parties; (b) agreed usages; and (c) usages and customs of international trade. Practices and agreed usages have a bilateral effect and are thus binding only to the extent that they are reflected in the habitual conduct of the parties in their business relationship or in the agreement of the parties concerned. Well-established and widely recognized international usages of trade enjoy a presumption of general knowledge and tacit acceptance as their existence is disconnected from a specific commercial operation.

140. All three become an integral part of the contract and bind the parties, usually during the formation of the contract, either by express or implied agreement. The rest of the terms of the contract would be filled by the CISG itself through its default provisions.

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<sup>47</sup> On article 9 of the CISG and article 1.9 of the UPICC, see also paragraph 394 below.

141. Usages and practices have another important role within the CISG as an interpretative criterion for the contract (art. 8, para. 3).

142. Article 4, paragraph (a), of the CISG excludes from the scope of the Convention issues in regard to the validity of any usage.

### *What is the interplay between the CISG and the ICC Incoterms?*

143. The ICC Incoterms are a set of widely accepted definitions for the most commonly used terms of trade for the sale and purchase of goods. They describe the allocation of certain obligations, risks and costs between the buyer and the seller, including with respect to import and export formalities and transport. In contract practice, the Incoterms rules are incorporated into contracts for the sale of goods and help provide clarity and reduce uncertainties and risks for sellers and buyers.

144. First published in 1936 by the ICC, the Incoterms have been updated regularly to reflect current trade practices. The latest version is the Incoterms 2020.

145. The Incoterms 2020 feature 11 rules. Seven of them (EXW, FCA, CPT, CIP, DAP, DPU and DDP) are rules for any mode or modes of transport, while the remaining four (FAS, FOB, CFR and CIF) are rules for sea and inland waterway transport:

(a) “Ex Works” (EXW) means that the seller delivers when it places the goods at the disposal of the buyer at the seller’s premises or at another named place (works, factory, warehouse, etc.). The seller does not need to load the goods onto any collecting vehicle or clear the goods for export, where such clearance is applicable;

(b) “Free Carrier” (FCA) means that the seller delivers the goods to the carrier or another person nominated by the buyer at the seller’s premises or another named place. The parties are well advised to specify as clearly as possible the point within the named place of delivery, as the risk passes to the buyer at that point;

(c) “Carriage Paid To” (CPT) means that the seller delivers the goods to the carrier or another person nominated by the seller at an agreed place (if any such place is agreed between parties) and that the seller must arrange or contract for and pay the costs of carriage necessary to bring the goods to the named place of destination;

(d) “Carriage and Insurance Paid to” (CIP) means that the seller delivers the goods to the carrier or another person nominated by the seller at an agreed place (if any such place is agreed between parties) and that the seller must arrange or contract for and pay the costs of carriage necessary to bring the goods to the named place of destination. The seller also contracts for insurance cover against the buyer’s risk of

loss of or damage to the goods during the carriage. The buyer should note that, under CIP, the seller is now required to obtain insurance of a higher level than in the past, in line with the Institute Cargo Clauses (A) or similar clauses. Buyers wishing to have more insurance protection have to either expressly agree as much with the sellers or make their own extra insurance arrangements;

(e) “Delivered at Place” (DAP) means that the seller delivers when the goods are placed at the disposal of the buyer on the arriving means of transport ready for unloading at the named place of destination. The seller bears all risks involved in bringing the goods to the named place;

(f) “Delivered at Place Unloaded” (DPU) means that the seller delivers when the goods, once unloaded from the arriving means of transport, are placed at the disposal of the buyer at a named place of destination. The seller bears all risks involved in bringing the goods to and unloading them at the place of destination;

(g) “Delivered Duty Paid” (DDP) means that the seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import on the arriving means of transport ready for unloading at the named place of destination. The seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities;

(h) “Free Alongside Ship” (FAS) means that the seller delivers when the goods are placed alongside the vessel (e.g., on a quay or a barge) nominated by the buyer at the named port of shipment. The risk of loss of or damage to the goods passes when the goods are alongside the ship, and the buyer bears all costs from that moment onwards;

(i) “Free on Board” (FOB) means that the seller delivers the goods on board the vessel nominated by the buyer at the named port of shipment or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards;

(j) “Cost and Freight” (CFR) means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. The seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination;

(k) “Cost, Insurance and Freight” (CIF) means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. The seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination. The seller also contracts for insurance cover against the buyer’s

risk of loss of or damage to the goods during the carriage. The buyer should note that, under CIF, the seller is required to obtain insurance only on minimum cover. Buyers wishing to have more insurance protection have to either expressly agree as much with the sellers or to make their own extra insurance arrangements.

146. Under the CISG, the ICC Incoterms have been considered both as agreed usages and practices established between the parties, and as trade usages. There is an important interplay between the CISG and the Incoterms with regard to delivery, passing of risk and payment. The use of the Incoterms does not entirely displace the CISG rules on the passing of the risk, as it is only a partial derogation of the CISG (art. 6). In addition, the Incoterms do not deal with, among others, the formation of the contract, the buyer's payment obligations or, most notably, remedies for breach of contract.

147. Trade terms may also be defined differently from the ICC Incoterms with respect to business sectors or in domestic law.<sup>48</sup> It is therefore advisable to correctly identify the intended trade term.

### *How can the place of business be determined under the CISG?*

148. As the CISG refers to a party's place of business in several provisions,<sup>49</sup> defining which of the party's multiple "places of business" is relevant to promote legal certainty and predictability in applying the Convention.

149. According to article 10, paragraph (a), if a party has more than one place of business, the relevant place of business for the purposes of the Convention is that which has the closest relationship to the contract and its performance. Thus, if the party has multiple places of business, it is not always the principal one that is relevant in determining whether a contract is governed by the CISG.<sup>50</sup> When the party does not have a place of business, reference is to be made to habitual residence rather than to domicile.

150. By way of example, article 10 of the CISG has been interpreted to consider the seller's relevant place of business to be the construction site where the contract had been concluded and where the equipment was to be picked up by the buyer.<sup>51</sup>

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<sup>48</sup> For example, the United States Uniform Commercial Code, article 2, paragraph 320, defines the trade term CIF.

<sup>49</sup> Arts. 1, 12, 20, para. 2, 24, 31, para. (c), 42, para. (1) (b), 57, para. (1) (a), 69, para. 2, and 96.

<sup>50</sup> CLOUT system, case No. 261, Bezirksgericht der Saane, Switzerland, 20 February 1997.

<sup>51</sup> CLOUT system, case No. 746, Oberlandesgericht Graz, Austria, 29 July 2004.

### *Does the CISG have any form requirements?*

151. The CISG does not require any particular form, such as in writing, or any special requirements, such as a signature, for the conclusion of the contract.

152. Form, as considered in the CISG, has its own autonomous and uniform meaning; thus, even if the issue of form is a matter of validity under domestic law, article 11 prevails and the domestic requirements such as the statute of frauds or any other form requirement are irrelevant.

153. The principle of freedom of evidence also applies and the contract can be evidenced by any means including witnesses, thus displacing domestic evidentiary rules such as those that exclude oral testimony (“parole evidence rule”).

154. The weight to be given to the evidence is a matter to be left to the judge or arbitrator and thus the probative value of the evidence is to be assessed in accordance with the procedural laws or rules of law and on a case-by-case basis.

155. Parties might well expressly or impliedly agree on the exclusion or derogation of the principle of informality under article 11 of the CISG by virtue of article 6 of the CISG or by a no-oral-modification (NOM) clause that excludes oral agreements for the modification of the contract (art. 29). NOM clauses are expressly referred to in the UPICC, which contain specific provisions on them (see para. 395 below).

156. States may lodge a declaration under article 96 of the CISG, the effect of which is to trigger the application of article 12 and therefore the written form requirement. The article 96 declaration applies to article 11, to the communications in part II relating to the formation of the contract (arts. 14–24) and to the modification and termination of the contract by agreement (art. 29) with respect to the form of the contract and of other communications, and also with regard to their evidence.

### *When and how is a contract concluded under the CISG?*

157. Part II of the CISG regulates the formation of an international sales contract considering rules for the offer (arts. 14–17) and acceptance (arts. 18–22).<sup>52</sup> A contract is concluded when an acceptance of an offer becomes effective by reaching

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<sup>52</sup>The CISG provisions on the formation of the contract, and particularly those relating to the offer and the acceptance, are among those provisions which were followed in the UPICC with no or limited adaptations. However, specific rules for matters not expressly dealt with in the CISG, such as writings in confirmation, contracts with terms deliberately left open and incorporation of standard terms, were introduced in the UPICC. There are also rules covering bad faith and breaches of confidentiality during the negotiations leading up to the conclusion of the contract. See paras. 368 and 394–397 below.

the offeror (arts. 23 and 24). There are no rules for determining the place of conclusion of the contract and, thus, this issue is left to the otherwise applicable law.

158. Part II applies when offer and acceptance may not be easily identified. It applies also to the modification of the contract and its avoidance (termination) following the offer and acceptance process.

*When is a proposal to conclude a contract an offer?*

159. Under the CISG, in order for a proposal for concluding a contract to constitute an offer, it must be addressed to one or more specific persons and it must be sufficiently definite. For an offer to be considered sufficiently definite, it must indicate the goods and expressly or implicitly fix or make provisions for determining the quantity and the price (art. 14, para. 1). Offers to the general public are considered an invitation to make an offer, unless the contrary is clearly indicated by the person making the proposal (art. 14, para. 2).

160. Under the CISG, the parties may agree that the contract is concluded only when certain specific matters are agreed besides those considered under article 14, paragraph 1, of the CISG.

*Is an open-price contract valid under the CISG?*

161. Article 14 of the CISG indicates that the price must be determined in the offer, while article 55 of the CISG establishes a method to determine this element by applying the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned. In the case of open-price contracts, the apparent contradiction between articles 14 and 55 of the CISG is usually solved by the performance of the contract. Instances in which the contract has not been performed may be problematic.

*Can an offer be withdrawn or revoked?*

162. The CISG distinguishes between withdrawal (art. 15), revocation (art. 16) and termination (art. 17) of the offer. The offer also expires when it is not accepted within the time fixed or, if no time is fixed, within a reasonable time (art. 18, para. 2).

163. An acceptance is the positive response to an offer. It must be made clearly and unconditionally by the acceptor. Acceptance can take place by means of a statement, conduct or, in qualified circumstances, silence or inaction (art. 18, para. 1).



164. Unless the offeror sets out a specific form of acceptance, the offeree is free to accept the offer either orally (in person, over the phone, etc.) or in writing, including by electronic means (a letter, telegram, telex, fax, email, etc.). In both circumstances, for the acceptance to be effective and, in turn, the contract be concluded, it must reach the offeror within the time period established in the offer or, in the absence of such provision, within a reasonable time (art. 18, para. 2).

165. In the case of oral offers, the CISG requires that the acceptance be immediate, unless the circumstances indicate otherwise (art. 18, para. 2).

166. Acceptance can also take place by means of conduct or by acts of performance. When acceptance occurs by conduct (such as raising a hand and nodding one's head), the contract is concluded when notice of such conduct reaches the offeror, i.e., when the offeror learns of it. If the acceptance takes place through acts of performance (for example, by delivering the goods and paying the price), it is not necessary to make a notification of acceptance, since the very act of delivery or payment concludes the contract as long as it is made within the time set by the offeror for acceptance, or within a reasonable time if no such period is set. Nevertheless, to be able to accept through acts of performance without the need for sending a communication to the offeror, it is necessary that the offer allows for such (i.e., "begin manufacturing", "send immediately", "buy in my name without delay", or "make payment to my account number") or that it is permitted by virtue of established practices of the contracting parties or by usage (art. 18, para. 3).

167. An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective (art. 22).

### *Can an offer be accepted by silence or inaction?*

168. Silence or inactivity do not in themselves amount to acceptance (art. 18, para. 2). However, silence or inactivity, along with other factors, could amount to an acceptance of the offer. This may happen by application of a legal provision (arts. 19, para. 2, and 21); by application of a usage of trade or of a practice established between the parties (art. 9); or where in some circumstances the silence of the addressee of a letter of confirmation that purports to modify an oral contract might amount to an acceptance.

### *What is a counter-offer?*

169. A frequent problem in contract formation arises out of a reply to an offer that purports to be an acceptance but contains additional or different terms. Article 19 of the CISG makes a distinction between those terms that materially alter the terms of the offer (counter-offer) and those that do not (acceptance).

170. In order to determine when an element that is introduced in an acceptance materially alters the offer, thereby preventing the conclusion of the contract, or not, the following list of elements is provided in the CISG: price, quality and quantity of merchandise, place and time of delivery, the extent of one party's liability to the other and the settlement of disputes.

171. Although the CISG does not have special rules dealing with the use of standard terms, namely, provisions prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party as defined in article 2.1.19, paragraph 2, of the UPICC, case law has generally considered the use of standard terms under the CISG, mainly its articles 8 and 14–24, in relation to the question of whether the standard terms are incorporated into the contract.

### *Does the CISG govern the “battle of the forms”?*

172. Although the CISG does not contain an express provision on the issue known as “battle of the forms”, it is generally accepted that it is a matter governed by it. The “battle of the forms” refers to a situation in which the parties exchange general conditions (pre-printed forms) that add one or more terms that materially modify the offer. The general conditions in the two forms generally contain contradictions and, in the case of dispute, the question arises of whether a contract has been concluded and, if so, what the terms of that contract are. If a contract has been validly concluded, the rules most commonly applied to address the battle of the forms are the “last-shot rule”, namely, the last form used by the parties prevails; and the “knock-out rule”, according to which contradictory clauses contained in the standard forms are out of the content of the contract, which is the solution expressly adopted in article 2.1.22 of the UPICC. It has not been settled in case law applying the CISG which one of these two solutions should prevail.<sup>53</sup>

### *How is the contract modified?*

173. Under the CISG, a contract may be modified or terminated by the mere agreement of the parties (art. 29, para. 1). Modification and termination generally follow the same pattern of contract conclusion, namely, offer and acceptance, and domestic law concepts such as consideration are not relevant in this area. If a NOM clause (see para. 155 above) is included within the contract, it may not be orally modified or terminated by agreement. However, the conduct of one party may preclude that party from asserting such a provision to the extent that the other party has relied on that conduct (art. 29, para. 2).

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<sup>53</sup> See *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, article 19.

## 2. Obligations of the parties (including passing of risk and preservation of goods)

174. Part III, chapters II and III, of the CISG adopt a simple structure of defining the obligations of the parties, and then providing remedies available for the other party in the case of breach of any of those obligations. The obligations of the seller are listed in article 30 and elaborated upon in articles 31 to 44, which also include provisions on the buyer's duty to examine the goods and to give notice of lack of conformity of the goods to the seller (arts. 38–44). The obligations of the buyer are listed in article 53 and further elaborated upon in articles 54 to 60.

175. The question of when the risk of loss passes from the seller to the buyer is closely related to the seller's obligation because it defines whether a loss of or damage to the goods amounts to a breach of the seller's obligation. Part III, chapter IV, of the CISG deals with the question of passing of risk. In addition, the seller or buyer may be required to preserve the goods when risk of loss is on the other party. Rules on the duty to preserve the goods are provided in part III, chapter V, section VI.

176. In practice, parties often use shorthand trade terms, such as FCA, FOB, CPT and CIF, to indicate the allocation of certain obligations, risks and costs as between the seller and buyer under the contract in accordance with the ICC Incoterms, which provide definitions for EXW (E terms); FCA, FAS and FOB (F terms); CPT, CIP, CFR and CIF (C terms); and DAP, DPU and DDP (D terms). For the interplay between the CISG and the ICC Incoterms in general, see paragraph 146 above.

### *What are the obligations of the seller under the CISG?*

177. The general obligations of the seller are to deliver the goods, hand over any documents relating to the goods and transfer the property in the goods, as required by the contract and the CISG (art. 30). The obligation to deliver the goods includes obligations to deliver goods that are in conformity with the contract and to deliver goods that are free from any right or claim of third parties.

### *Where should the goods be delivered and how?*

#### *Are there special rules for a contract involving carriage of goods?*

178. In international sale of goods, the parties often agree to engage independent carriers for the delivery of goods. These arrangements are known as sales that "involve carriage of goods". In such cases, the seller is obligated to hand the goods over to a carrier at a certain place and the buyer is obligated to take delivery of the goods from the carrier at the destination of the carriage, which is not necessarily the same location as the buyer's place of business. If the seller agrees in the contract

to deliver at the buyer's place of business, that is not a contract involving carriage of goods for the purpose of the CISG, even if the seller engages an independent carrier. This is because, in this case, the seller's obligation to deliver is not fulfilled by handing the goods over to an independent carrier, but by placing the goods at the buyer's disposal at the buyer's place of business.

179. The rights and obligations of the carrier and consignor or the holder of transport documents (e.g., bills of lading) are not governed by the CISG (see art. 4). They are governed by the law applicable to the contract of carriage or the bills of lading. In most cases regarding international carriage of goods, uniform laws are applicable. For carriage by sea, they are either the Hague-Visby Rules regime, established by the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (1924) (the 1924 Brussels Convention)<sup>54</sup> and various protocols amending it,<sup>55</sup> or the Hamburg Rules regime, established by the United Nations Convention on the Carriage of Goods by Sea (1978).<sup>56</sup> For international carriage by air, the most relevant instrument is the Convention for the Unification of Certain Rules for International Carriage by Air (1999) (Montreal Convention).<sup>57</sup> Uniform law instruments relating to land and inland waterway transport include the Convention on the Contract for the International Carriage of Goods by Road (1956) (CMR),<sup>58</sup> the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (2001) (CMNI)<sup>59</sup> and the Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM), which are under the framework of the Convention concerning International Carriage by Rail (1980) (COTIF).<sup>60</sup>

180. Under the CISG, if the contract of sale involves carriage of goods, the seller's obligation is to hand over the goods to the first carrier for transmission to the buyer (art. 31, para. (a)). Once this is done, the obligation of the seller to deliver the goods has been fulfilled, except that the seller must further give the buyer notice of the consignment specifying the goods if the goods are not clearly identified to the contract by markings on the goods, shipping documents or otherwise (art. 32, para. 1). The duty to give notice of consignment under article 32, paragraph 1, also applies when it is the buyer that arranges for the carriage, if the seller's delivery obligation consists of handing over the goods to the carrier (e.g., FOB and FCA contracts).

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<sup>54</sup> League of Nations, *Treaty Series*, vol. 120, No. 2764.

<sup>55</sup> United Nations, *Treaty Series*, vol. 1412, No. 23643.

<sup>56</sup> *Ibid.*, vol. 1695, No. 29215. The most recent uniform law instrument on international carriage of goods by sea, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules"), is not yet in force.

<sup>57</sup> *Ibid.*, vol. 2242, No. 39917.

<sup>58</sup> *Ibid.*, vol. 399, No. 5742.

<sup>59</sup> United Nations publication, Sales No. 03.IIE.1.

<sup>60</sup> United Nations, *Treaty Series*, vol. 1397, No. 23353.

181. In practice, parties often agree on a different place (e.g., port of shipment) where the goods are to be handed over to a carrier, whether it is the first carrier or not. This is done either by use of trade terms, such as the ICC Incoterms FCA, FOB, CFR or CIF, or otherwise. In such cases, that agreement prevails (art. 6).

182. When the contract of sale involves carriage of goods, there is also the question of who arranges for the contract of carriage and insurance in respect of the carriage of the goods. The CISG does not directly answer these questions.

183. However, the CISG provides that, if the seller is bound by the contract to arrange for the carriage of the goods, the seller must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation (art. 32, para. 2).

184. The ICC Incoterms clarify when the seller has the obligation to arrange for the contract of carriage (i.e., C terms), and when it does not (i.e., F terms). When the seller is bound to arrange for the contract of carriage, the Incoterms rules provide that the contract of carriage must be made on usual terms at the seller's cost and provide for carriage by the usual route in the customary manner normally used for carriage of the type of goods sold. When the seller is not bound to arrange for the contract of carriage, the seller must provide the buyer with the information that the buyer needs for arranging the carriage.

185. With respect to insurance, if the seller is not bound to effect insurance in respect of the carriage of the goods, the seller must, at the buyer's request, provide the buyer with all available information necessary to enable the buyer to effect such insurance (art. 32, para. 3). This applies irrespective of whether it is the seller or the buyer who arranges for the carriage.

186. According to the ICC Incoterms, the seller must obtain cargo insurance under CIP and CIF terms, but not under other trade terms. Under other terms relating to sale involving carriage (F terms and CPT and CFR), the seller has no obligation to make a contract of insurance but must provide the buyer with the information that the buyer needs to obtain insurance.

187. If the contract of sale does not involve carriage of goods, the seller is obligated to deliver the goods by placing them at the buyer's disposal. The seller fulfils the obligation to "place the goods at the buyer's disposal" by doing everything possible to enable the buyer to take over (i.e., to take possession of) the goods.

188. The place at which the goods are to be placed at the buyer's disposal depends on the following distinction: in principle, that place is the place of business

of the seller at the time of the conclusion of the contract (art. 31, para. (c)); however, if (a) the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured, and (b) the parties knew at the time of the conclusion of the contract that the goods were at a particular place, or that the goods were to be manufactured or produced at a particular place, the place of placing the goods at the buyer's disposal is that place (art. 31, para. (b)). If the parties agree on a different place of delivery, that agreement prevails (art. 6).

189. If the parties use E or D terms according to the Incoterms rule, they have agreed on a different place of delivery for contract not involving carriage.

### *Cost of delivery*

190. Although the CISG does not have an express provision on bearing of cost of performance, the relevant trade usage (art. 9), or the general principle underlying the CISG (art. 7, para. 2), is that the cost of delivery must be borne by the seller, unless otherwise agreed by the parties. This rule corresponds to the provision contained in the UPICC on cost of performance (art. 6.1.11).<sup>61</sup> The seller bears the costs necessary for delivery (e.g., packaging, measuring, weighing the goods). The seller bears the costs of transportation only to the place of delivery. If the seller's obligation to deliver is to hand the goods over to the first carrier (art. 31, para. (a)), the seller does not bear the transportation cost beyond that point. Likewise, if the buyer is to collect the goods at a particular place (art. 31, paras. (b) and (c)), the seller does not bear the cost of transportation beyond that place.

191. The ICC Incoterms contain more specific rules on the allocation of various costs relating to delivery or transport documents, export and import clearance, and checking, packaging and marking of goods.

### *When should the goods be delivered?*

192. Under the CISG, if there is a date of delivery fixed by the contract or determinable from the contract, the seller is obligated to deliver on that date (art. 33, para. (a)). If there is a period of time for delivery that is fixed by the contract or determinable from the contract, the seller is obligated to deliver within that period but may deliver at any time within that period unless circumstances indicate that the buyer is to choose a date (art. 33, para. (b)). In any other case, the seller must deliver within a reasonable time after the conclusion of the contract (art. 33, para. (c)).

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<sup>61</sup> Article 6.1.11 of the UPICC indicates that parties shall bear the costs of the performance of the respective obligations, unless otherwise agreed.

### *Late delivery*

193. If the seller does not deliver by or on those dates, the seller is in breach of the contract. It is not necessary for the buyer to demand delivery to put the seller in breach.

### *Early delivery*

194. Delivery earlier than the fixed date or period for delivery is also a breach of the seller's obligation, even if the buyer takes delivery of the goods (art. 52, para. 1).

### *Seller's obligation to deliver conforming goods*

195. The goods that the seller delivers must be of the quantity, quality and description required by the contract; the goods must also be contained or packaged in the manner required by the contract (art. 35, para. 1). Packaging is particularly important in international sale of goods in order to protect the goods from loss or damage during shipment. Thus, the Incoterms rules also generally consider packaging in the manner appropriate for transport to be the obligation of the seller.

### *Quantity*

196. With respect to quantity, the delivery of not only a quantity smaller than that provided for by the contract but also a quantity greater than that provided for by the contract constitutes lack of conformity. The seller is still in breach, even if the buyer takes delivery of the excess quantity. In that case, the buyer must pay for the excess quantity it took at the contract rate (art. 52, para. 2), but the buyer is also entitled to remedies, such as damages for loss caused by the excess delivery.

### *Quality*

197. If the parties have not agreed on the quality of the goods, conformity is determined according to certain criteria. The goods do not conform to the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used (fitness for ordinary purpose, art. 35, para. 2 (a)); (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract (fitness for particular purpose, art. 35, para. 2 (b)); or (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model (art. 35, para. 2 (c)). The rule in article 35, paragraph 2 (b) does not apply when the circumstances show that the buyer did not rely on the seller's skill or judgment (e.g., if the buyer made the choice), or that it was unreasonable for the buyer to rely on the seller's skill and judgment (e.g., the

seller did not claim to be an expert). However, the seller is not liable under article 35, paragraph 2 (a)–(c), for any lack of conformity if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity (art. 35, para. 3).

### *Packaging*

198. Likewise, it is possible that the parties have not agreed on the manner of how the goods are to be contained or packaged. In that case, the goods do not conform with the contract unless they 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 (art. 35, para. 2 (d)). However, the seller is not liable under article 35, para. 2 (d), for any lack of conformity of the packaging if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity (art. 35, para. 3).

199. In practice, depending on the flexibility of contract interpretation (art. 8), the determination based on article 35, paragraphs 1 and 2, can be blurred. It is more advantageous for the buyer to rely on article 35, paragraph 1, because the seller is not liable under article 35, paragraph 2, 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 (art. 35, para. 3).

### *Relevant time for determination of conformity*

200. The relevant time for determination of conformity is the time when the risk passes to the buyer (art. 36, para. 1). The time of passing of risk is determined according to articles 67 to 69, or according to the parties' agreement (e.g., inclusion of trade terms according to the Incoterms). It is not necessary for the lack of conformity to be apparent at the time of passing of risk; its existence may be discovered later.

201. Lack of conformity which occurs after the passing of risk can also give rise to the seller's liability. This is when the lack of conformity was due to a breach of any of the seller's obligations (art. 36, para. 2). Typically, this is the case if the lack of conformity occurred notwithstanding a guarantee by the seller that for a period of time the goods would remain fit for their ordinary purpose or for some particular purpose or would retain specified qualities or characteristics.

### *Seller's right to cure*

202. The seller has a right to cure lack of conformity. If the seller has delivered goods before the date for delivery, the seller may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or



deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense (art. 37). The seller has a similar right to cure after the delivery date (art. 48).

203. However, even if the seller cures the lack of conformity, it does not change the fact that the delivered goods lacked conformity and, therefore, the buyer retains any right to claim damages as provided for in the CISG (arts. 37 and 48, para. 1).

204. The UPICC contain a provision on the right to cure by the non-performing party in article 7.1.4 that is couched in more general terms so as to apply to all contracts. It lists the conditions and limits under which cure is admitted and clarifies the relationship with the exercise of other remedies (see para. 379 below).

*What should the buyer do to preserve rights deriving from non-conformity of the goods?*

205. The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances (art. 38, para. 1). Generally, the period commences when the seller delivers the goods. However, if the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination (art. 38, para. 2). In addition, if the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination, and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of redirection or redispach, examination may be deferred until after the goods have arrived at the new destination (art. 38, para. 3).

206. There is no independent sanction for not conducting this examination. However, failure to examine the goods may lead to grave results for the buyer. Article 38 is to be read in conjunction with article 39 (explained in paragraphs 207–209 below) that deprives the buyer of any right to remedy for lack of conformity if the buyer does not give notice to the seller. Namely, the time that the buyer should have examined the goods under article 38 is the time under article 39, paragraph 1, that the buyer “ought to have discovered” the lack of conformity. The length of “as short a period as practicable in the circumstances” depends on various factors, such as giving reasonable opportunity to the buyer to examine the goods, the nature of the goods (for example, perishable or durable, seasonal or not), the frequency of the transaction and practices established between the parties and usages.

207. The buyer has a duty to give notice to the seller of any lack of conformity of the goods. Buyers lose all the rights to rely on a lack of conformity of the goods if they do not give notice to the seller specifying the nature of the lack of

conformity within a reasonable time after they have discovered the lack of conformity or ought to have discovered it (art. 39, para. 1). The determination of what is a reasonable period of time depends on various factors (see para. 206 above). There is also an absolute cut-off period of two years from the date when the goods were actually handed over to the buyer (art. 39, para. 2). This cut-off period applies even if the buyer could not have discovered a hidden lack of conformity within that period. However, the parties may extend or shorten the two-year time limit by agreeing on a different contractual period of guarantee (art. 39, para. 2). These time limits are not to be confused with the “limitation period”, which concerns the period within which legal proceedings need to be commenced (see chapter IV, section B, below, on the Limitation Convention).

208. The main purpose of giving notice to the seller is to enable the seller to cure the lack of conformity. Thus, if the lack of conformity relates to facts of which the seller knew or could not have been unaware, and which the seller did not disclose to the buyer, the seller cannot rely on the buyer’s failure to give notice in accordance with article 39 (art. 40).

209. The rigidity of the duty of examination and notification is somewhat eased by an exception provided in article 44. If buyers have a reasonable excuse for their failure to give the required notice, they may still resort to price reduction in accordance with article 50 or claim damages, except for loss of profit. However, it should be noted that this exception does not apply to the two-year time limit under article 39, paragraph 2. Therefore, the two-year time limit is absolute.

*Is the seller obliged to deliver goods which are free from  
any right or claim of a third party?*

*What are the buyer’s duties in this respect?*

210. The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim (art. 41). The right or claim of a third party under article 41 includes property rights such as ownership (i.e., sale of third party’s property) or security rights that hinder the use or disposal of the goods by the buyer, but not intellectual property, which is dealt with under article 42. The right or claim of a third party need not be substantiated. Thus, even if the buyer acquires full ownership of the goods according to domestic property law protecting good faith purchasers, the seller is still liable under the CISG if the owner makes any claim against the buyer. This is because, particularly in international sales, the buyer should not be expected to deal with third parties, which are usually in a foreign State.

211. The seller is obligated to deliver goods that are free from rights of a third party that existed at the time of delivery. Third-party claims include those raised only after the time of delivery as long as they are based on rights that existed at the time of delivery.

### *Intellectual property*

212. If the right or claim of the third party is based on industrial property or other intellectual property, the seller's obligation is governed by article 42. As is the case with other rights or claims under article 41, the seller must deliver goods which are free from any right or claim of a third party based on intellectual property. However, the nature of intellectual property requires special treatment.

213. Although intellectual property rules are increasingly being harmonized under World Intellectual Property Organization treaties, owing to the principle of territoriality in intellectual property law, infringement of intellectual property could still be determined differently according to the laws of each State. Thus, it is particularly significant in the international sale of goods to ascertain which law is to be used to determine whether the seller has fulfilled the obligation to deliver goods free from a third party's right or claim based on intellectual property. The CISG provides that it is the law of the State in which the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State (art. 42, para. 1 (a)). If such use was not contemplated by the parties, it is the law of the State in which the place of business of the buyer is located (art. 42, para. 1 (b)).

214. The seller is obligated to deliver goods that are free from any right or claim based on intellectual property of a third party that existed at the time of delivery. However, the liability is limited only for intellectual property rights of which the seller knew or could not have been unaware at the time of the conclusion of the contract (art. 42, para. 1). This is a requirement unique to intellectual property that does not exist under article 41.

215. Furthermore, the obligation of the seller to deliver goods free from any right or claim based on intellectual property of a third party does not extend to cases in which: (a) the buyer knew or could not have been unaware of the right or claim at the time of the conclusion of the contract; or (b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer (art. 42, para. 2).

216. As is the case in lack of conformity regarding quantity, quality or description of goods, buyers lose the right to rely on the provisions of article 41 or 42 if they do not give notice to the seller specifying the nature of the right or claim of the

third party within a reasonable time after they have become aware or ought to have become aware of the right or claim (art. 43, para. 1).

217. The seller is not entitled to rely on the buyer's failure to give timely notice if the seller knew of the right or claim of the third party and the nature of it (art. 43, para. 2). There is also the same exception that the buyer may still resort to price reduction in accordance with article 50 or claim damages, except for loss of profit, if the buyer has a reasonable excuse for failure to give the required notice (art. 44). However, unlike the case of lack of conformity regarding quantity, quality or description of the goods, the buyer has no duty of examination (art. 38) and is not subject to the two-year time limit to give notice (art. 39, para. 2).

*Does the seller have other obligations  
(handing over of documents, transfer of ownership)?*

218. The seller must hand over any documents relating to the goods (arts. 30 and 34). Such documents include not only documents that represent the proprietary right to the goods needed to claim or dispose of the goods (e.g., bills of lading, warehouse receipts), but also, for example, invoices, insurance policies, certificates of origin, certificates of quality and any other documents that the contract requires to be handed over. In the case of a letter of credit, the seller's duty in respect of shipping documents is to present them to the bank nominated to receive them. Parties often specify in the contracts what these documents are, for example, by incorporating trade terms under the Incoterms.

219. In the case of documentary sales, where the seller's obligation is to deliver documents that represent the proprietary right to the goods needed to claim or dispose of the goods (e.g., bills of lading, warehouse receipts), article 58 provides that the buyer must pay the price when the seller places the documents controlling the disposition of the goods at the buyer's disposal (art. 58, para. 1). However, in principle, only after having had an opportunity to examine the goods is the buyer bound to pay (art. 58, para. 3). The examination under article 58, paragraph 3, is limited to a brief and superficial examination of the goods, unlike the examination under article 38. (On article 58, see paras. 246–247 below.)

220. The documents must conform to the contract. They must be handed over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, the seller may, up to that time, cure any lack of conformity in the documents, as far as the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in the CISG (arts. 34, 45, para. 1 (b), and 74–77).

221. The seller must transfer the property (ownership) in the goods to the buyer (art. 30). If the seller is unable to transfer property in the goods because title in the goods is vested in another person, the seller is in breach (art. 41).

222. The CISG is not concerned with how such transfer can and should be effectuated (art. 4, para. 2 (b)). That is to be determined according to the law governing transfer of property applicable by virtue of PIL rules (see para. 121 above).

### *How is the passing of risk regulated under the CISG?*

223. The goods identified to the contract may get lost or damaged. When that happens, whether the non-delivery (in case of loss) or delivery of damaged goods (in case of damage) amounts to a breach of the seller's obligation to deliver goods depends on whether the loss or damage occurred before or after the passing of the risk of loss or damage.

224. When loss of or damage to the goods occurs after the risk of loss or damage has passed from the seller to the buyer, the seller is not obligated to remedy the loss or damage, and the buyer must pay the full price (art. 66). However, there are two exceptions. First, if the loss or damage is due to an act or omission of the seller, not delivering or delivering the damaged goods is a breach of the seller's obligation to deliver the goods (art. 66). It is irrelevant whether that act or omission itself amounts to a breach of the seller's obligation. Second, even if loss or damage occurs after the passing of the risk, if there was a fundamental breach of contract by the seller (whether or not it is the cause of the loss or damage), the buyer may resort to the remedies available to the buyer on account of such breach (art. 70). This includes requesting delivery of substitute goods (art. 46, para. 2) and declaring avoidance (termination) (art. 49, para. 1 (b)), notwithstanding the fact that the loss or damage occurred after the passing of risk.

225. On the other hand, if loss of or damage to the goods occurs before the risk passes to the buyer, the seller will have to deliver substitute goods. Otherwise, the seller will be in breach of the obligation to deliver the goods.

226. It follows from the above that determination of the time when the risk passes is critical. The parties are free to agree on the time the risk passes. In practice, parties often agree on the time of passing of the risk by agreeing on a trade term in accordance with the Incoterms (however, the Incoterms rules do not define the consequences of passing of the risk). The Incoterms rules generally consider that the risk of loss remains with the seller until the seller has delivered the goods in accordance with each term. For example, under FCA, CPT and CIP, the risk passes when the goods have been handed over to or placed at the disposal of the carrier; under FOB and CIF, when the seller places the goods on board the vessel; and,

under EXW, DAP and DDP, when the seller places the goods at the buyer's disposal at the agreed point. If the parties have not made such an agreement, the risk passes under the CISG according to articles 67 and 68. From a practical viewpoint, parties should purchase insurance to cover their loss.

227. The passing of risk is detached from the question of transfer of property. In general, the risk passes when the seller has done everything to deliver the goods and when the buyer is in a better position to control the goods. It should be noted that the risk does not pass to the buyer unless the goods are identified to the contract (arts. 67, para. 2, and 69, para. 3).

228. The UPICC do not have express default provisions on the passing of risk of loss and its consequence, in view of their broader scope of application to all contracts.

### *Passing of risk in contracts for the sale of goods involving carriage*

229. Article 67 specifies the time of passing of the risk in cases where the contract of sale involves carriage of the goods. If the seller is not bound to hand them over to the carrier at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. This coincides with the manner of delivery required of the seller under article 33, paragraph (a). If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place (e.g., if an inland seller agrees to hand over the goods to a carrier at a seaport, the risk does not pass by handing over the goods to the first inland carrier at the seller's place of business). The fact that the seller is authorized to retain documents controlling the disposition of the goods (e.g., bills of lading) after handing over the goods to the carrier does not affect the passing of the risk. In these cases, the seller has already delivered the goods, and the risk of loss during the entire transport is on the buyer, who is in a better position to establish loss or damage after the goods arrive at the destination.

230. However, the risk does not pass to the buyer until the goods are clearly identified to the contract (art. 67, para. 2). Identification may be done by markings on the goods, by shipping documents, by notice given to the buyer or otherwise. Identification after shipment is particularly relevant to the sale of undivided bulk goods.

### *Passing of risk in contracts for the sale of goods in transit*

231. Article 68 deals with the situation where the goods already in transit are sold. In principle, the risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate (e.g., the buyer has insurance coverage for the period of entire transport), the risk is assumed retroactively by the buyer from the time the goods are handed over to a carrier that issues the documents embodying the contract of carriage. The document can be any document that demonstrates the existence of the contract. It need not be a document controlling the disposition of the goods.

232. Nevertheless, if, at the time of the conclusion of the contract of sale of goods in transit, the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller (art. 68).

### *Passing of risk in all other cases*

233. Article 69 provides the time of passing of risk for cases not covered by articles 67 and 68. If the buyer is to take over the goods at the seller's place of business, the risk passes to the buyer upon taking over the goods (art. 69, para. 1). This is because the buyer is then in a position to control the disposition of the goods. However, if the buyer does not take over the goods in due time, the risk still passes from the time when the goods are placed at the disposal of the buyer, and the buyer commits a breach of contract by failing to take delivery (see arts. 53 and 60). The time of placing the goods at the buyer's disposal and the time the buyer fails to take delivery may not coincide because the seller may place the goods at the buyer's disposal before the due date, or the seller was required to notify the buyer that the goods were placed at the buyer's disposal. Placing the goods at the buyer's disposal alone is not sufficient to pass the risk because the seller is in control of the goods at the place of business of the seller.

234. If the buyer is to take over the goods at a place other than the place of business of the seller (e.g., the buyer's place of business or a third party's warehouse), the risk passes when delivery is due, the goods are placed at the buyer's disposal at that place and the buyer is aware of that fact (art. 69, para. 2). It should be noted that this is different from the Incoterms rules, which generally do not make buyer's awareness a requirement for passing of risk. The passing of risk under article 69, paragraph 2, takes place earlier than under article 69, paragraph 1, because the seller is not in control of the goods.

235. It should be noted, however, that the goods are not considered to be placed at the disposal of the buyer until they are clearly identified to the contract (art. 69, para. 3).

### *What are the obligations of the buyer?*

236. The general obligations of the buyer are to pay the price for the goods and to take delivery of them as required by the contract and the CISG (art. 53).

### *Obligation to pay the price*

237. The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made (art. 54). For example, if the contract requires payment by a letter of credit, the buyer must arrange with the bank to open a letter of credit. The buyer must also comply with currency exchange regulations. In view of the general principle of strict liability under the CISG, a buyer who is unable to pay the price because the relevant authority denies permission to transfer funds would still be liable for non-payment, subject to the possibility of exemption under article 79. Parties concerned about the risk of adverse currency and monetary control measures may consider the UPICC, which contain a set of specific default rules (arts. 6.1.14–6.1.17) on the application for public permission, defined in broad terms, addressing the issues of which party should apply for the permission and which obligations derive for that party, as well as the consequences in terms of liability of a refusal of permission or of a situation where permission is neither granted nor refused.

238. The parties may not have expressly or implicitly fixed or made a provision for determining the price, even when the contract is validly concluded (see para. 161 above). In such cases, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned (art. 55). This interpretative solution corresponds to the default rule on price determination contained in the UPICC and dealing with a situation where a contract does not fix or make provisions for determining the price (art. 5.1.7). The UPICC additionally regulate a situation where the contract expressly provides that the price is to be determined by one party, by a third person or by reference to external factors. A further express provision of the UPICC deals with the situation where parties have deliberately left contractual terms open at the time of conclusion of the contract in order for them to be determined in the future. This provision applies to price terms and is particularly important for long-term contracts (see art. 2.1.14, comment 4).



239. If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight, and not by the gross weight, including the weight of packaging (art. 56).

### *Currency of payment*

240. The currency of payment must be the currency of payment agreed in the contract. The question of whether the buyer may choose to pay in a currency of the place of payment, if it is different from the contractual currency, is not settled under the CISG. The UPICC allow the choice in certain circumstances (art. 6.1.9). If the parties have not agreed on the currency of payment, it is not settled under the CISG which currency is to be used, but the determination must be made according to article 7, paragraph 2. On the other hand, the UPICC expressly provide that, in such cases, payment should be made in the currency of the place of payment (art. 6.1.10).

### *Method of payment*

241. Unlike the UPICC, which have provisions on the method of payment (arts. 6.1.7 and 6.1.8), the CISG does not provide rules on the methods of payment. However, the provisions of the CISG on the place of payment (art. 57) and the time of payment (art. 58) assume that payment may be made by cash or by funds transfer. Unless the parties have agreed on the method of payment, or unless there is a practice established between the parties or binding usage related to the method of payment (see art. 9), the buyer may pay in either form. Any other form of payment, including payment by bills of exchange, promissory notes, cheques or documentary letters of credit, require the agreement of the seller, either before or after the conclusion of the contract.

242. Various uniform law instruments provide rules on payment methods. Regarding funds transfer, the UNCITRAL Model Law on International Credit Transfers (1992)<sup>62</sup> provides a global uniform model. Regional texts, such as the European Union directive on payment services,<sup>63</sup> may also be relevant.

243. For payment by bills of exchange, promissory notes and cheques, some countries have enacted the Uniform Law for Bills of Exchange and Promissory Notes and the Uniform Law for Cheques in accordance with the Geneva Conventions.<sup>64</sup>

<sup>62</sup> Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17 (A/47/17), annex I.

<sup>63</sup> Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No. 1093/2010, and repealing directive 2007/64/EC.

<sup>64</sup> Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930), League of Nations, *Treaty Series*, vol. 143; and Convention Providing a Uniform Law for Cheques (Geneva, 1931), League of Nations, *Treaty Series*, vol. 143.

The 1988 United Nations Convention on International Bills of Exchange and International Promissory Notes<sup>65</sup> is not yet in force. For commercial letters of credit, the Uniform Customs and Practice for Documentary Credits (UCP), prepared by the International Chamber of Commerce, provide a de facto standard. In order to accommodate electronic commerce, the International Chamber of Commerce has also developed a supplement to UCP for electronic presentation of letters of credit (eUCP) and Uniform Rules for Bank Payment Obligations (URBPO).

### *Place of payment*

244. If the parties have agreed on the place of payment, payment must be made at that place. If the parties have not agreed on the place of payment, in principle, the buyer must make a payment to the seller at the seller's place of business (art. 57, para. 1 (a)). However, if the payment is to be made against the handing over of the goods or of documents, payment is to be made at the place where the handing over takes place (art. 57, para. 1 (b)). For the place of handing over the goods, see paras. 178–189 above.

### *Cost of payment*

245. For the same reason that the seller bears the cost of delivery (see para. 190 above), the cost of payment is to be borne by the buyer, unless otherwise agreed. This corresponds to article 6.1.11 of the UPICC. However, under the CISG, the seller must bear any increase in the expenses incidental to payment that is caused by a change in its place of business subsequent to the conclusion of the contract (art. 57, para. 2).

### *Time of payment*

246. Unless otherwise agreed, the buyer must pay the price when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and the CISG (art. 58, para. 1). The seller may make such payment a condition for handing over the goods or documents. If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, are not to be handed over to the buyer except against payment of the price (art. 58, para. 2). Thus, the general rule is that the goods or documents and payment are to be exchanged simultaneously.

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<sup>65</sup> General Assembly resolution 43/165, annex.

247. It should be noted that the CISG provides that buyers are not bound to pay the price until they have had an opportunity to examine the goods (art. 58, para. 3). However, this right to examine the goods prior to payment does not apply if the procedures for delivery or payment agreed upon by the parties are inconsistent with having such an opportunity (e.g., cash against documents). This examination is a short and superficial examination mostly for the purpose of detecting delivery of the wrong goods (*aliud*), apparent defects or delivery of the wrong quantity. It is to be distinguished from the examination of the goods in order to discover any lack of conformity under article 38.

248. Unlike the law in some jurisdictions, the buyer must pay the price on the date fixed by or determinable from the contract and the CISG without the need for any request or compliance with any formality on the part of the seller (art. 59). This rule is most relevant when performance of payment and delivery of goods or documents are not simultaneous.

### *Obligation to take delivery*

249. The buyer must take delivery of the goods. This involves not only physically taking over (taking possession of) the goods (art. 60, para. (b)), but also doing all the acts which could reasonably be expected of the buyer in order to enable the seller to make delivery (art. 60, para. (a)). For example, if the buyer is to arrange the shipment of the goods, the buyer must conclude a contract of carriage and provide the seller with all information necessary, such as the name of the vessel, to enable the seller to hand over the goods to the carrier.

### *Does the CISG contain rules on the preservation of goods?*

250. In the course of events, there may be situations where one party is in possession of the goods because the other party has failed to take possession of them. For example, the buyer may be delayed in taking over the goods, or the seller may have not taken them over from the buyer following rejection (e.g., request for delivery of substitute goods (art. 46, para. 2; see also para. 266 below), avoidance of the contract (arts. 49, 51 and 73; see also paras. 264–265 below) or refusal of early delivery (art. 52, para. 1). The CISG imposes a duty on the party in possession of the goods to preserve the goods by taking steps reasonable in the circumstances to preserve them (arts. 85 and 86, para. 1). This is done for the benefit of the other party as the risk of loss rests on that party (see, e.g., arts. 69 and 70).

251. The steps that are reasonable in the circumstances depend on factors such as the nature of the goods, the probability of loss or damage and the prospective seriousness of the loss or damage. For example, storing perishable foods in a refrigerator would likely be a reasonable step to be taken. If the cost of preservation is

disproportionately high in comparison to the value of the goods, such steps would be unreasonable in the circumstances. The CISG provides detailed rules in connection with two examples of steps for the preservation of goods in its articles 87 and 88.

252. Failure to take reasonable steps to preserve the goods will result in liability for damages under articles 45, paragraph 1 (b), or 61, paragraph 1 (b), if the goods are lost or damaged.

253. Moreover, article 86, paragraph 2, provides that if goods dispatched to the buyer have been placed at the buyer's disposal at their destination but the buyer exercises the right to reject them, the buyer has a duty to take physical possession of the goods on behalf of the seller, and then to preserve them, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. However, the duty to take possession does not arise if the seller, or a person authorized to take charge of the goods on the seller's behalf, is present at the destination.

### *Deposit in a warehouse*

254. The CISG provides two specific examples of reasonable steps to be taken to preserve the goods. The first is to deposit the goods in a warehouse of a third person at the expense of the other party (art. 87). This relieves the party owing the duty of preservation to store and preserve the goods. However, this is not allowed when the expense is not reasonable.

### *Self-help sale and emergency sale*

255. The second specific example of reasonable steps to be taken to preserve the goods is the so-called "self-help sale" and "emergency sale" under article 88.

256. A party who is bound to preserve the goods in accordance with articles 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods (e.g., buyer's delay in taking over the goods) or in taking them back (e.g., seller's delay in taking back the goods when the contract was avoided) or in paying the price or the cost of preservation (art. 88, para. 1).

257. Self-help sale does not have to be a judicial sale: the sale can take place privately on the market. The only restriction is that the sale is by appropriate means. If the goods are sold by inappropriate means, liability in damages will result.

258. If the goods are subject to rapid deterioration (e.g., perishables) or their preservation would involve unreasonable expense (e.g., feeding of animals), a party

who is bound to preserve the goods in accordance with articles 85 or 86 must take reasonable measures to sell them (art. 88, para. 2). Unlike self-help sale under article 88, paragraph 1, emergency sale is a duty of the party bound to preserve the goods.

259. As is the case with self-help sale under article 88, paragraph 1, emergency sale can take place privately on the market, as long as the measure of selling the goods is reasonable. If the measure is not reasonable, that will result in liability for damages. Given the urgency of the matter in emergency sales, terms less favourable than those tolerated under article 88, paragraph 1, can be considered reasonable under article 88, paragraph 2.

*What are the remedies available to the seller and the buyer  
under the CISG?*

*When is a party exempt from liability?*

260. Articles 30 and 53 summarize the obligations of the seller and the buyer, respectively, under the CISG. While the seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, the buyer must pay the price for the goods and take delivery of them, as required by the contract and the Convention.

261. The CISG contains additional obligations addressed to the seller (e.g., art. 35 on the seller's obligation to deliver conforming goods) and the buyer. A breach of contract under the CISG exists when any obligation deriving from the CISG or the parties' agreement has been infringed.

262. Given the unitary approach of the CISG to contract breach, in principle, every breach triggers the same remedies. However, the remedies provisions in the CISG occasionally refer to particular categories of breaches. The CISG contains separate provisions governing the buyer's remedies for breach of contract by the seller (arts. 45–52) and the seller's remedies for breach of contract by the buyer (arts. 61–65). In both cases, the aggrieved party may claim damages as provided in articles 74 to 77.

263. The CISG rules on remedies strongly influenced the provisions of the UPICC on remedies (chap. 7). The UPICC, however, contain a number of additional provisions covering issues not expressly settled by the CISG (see paras. 379–381 below).

### *Avoidance of the contract*

264. The severe remedy of contract avoidance – equivalent to termination under the UPICC terminology (see para. 381 below) – requires, in general, that a fundamental breach has occurred. The CISG – as well as the UPICC – privileges the preservation of the agreement (*favor contractus*) and the need to minimize transaction costs. A breach is fundamental when it substantially deprives the non-breaching party of what it is entitled to expect under the contract (art. 25).<sup>66</sup> The definition of a fundamental breach can be made only in the light of the parties' contract and the circumstances of each particular case. In general, the case law establishes a high threshold for the avoidance of the contract on the grounds of fundamental breach. Parties may define what constitutes a fundamental breach in the contract.

265. In addition, the sales contract can be avoided when an additional period of time for performance has lapsed: (a) without delivery of the goods by the seller (art. 49, para. 1 (b)), in which case the buyer may declare the contract avoided; or (b) in a situation of non-payment or failure to take delivery by the buyer (art. 64, para. 1 (b)), in which case the seller may declare the contract avoided.

### *Other remedies available to the buyer*

266. In addition, in the case of breach, the buyer has the right to require specific performance of the seller's obligations (art. 46, para. 1). Under article 28, the remedy of specific performance is subject to its availability under the law applicable to the court or arbitral proceedings where the remedy is sought. Article 7.2.2 of the UPICC contains detailed provisions on specific performance that may be helpful in situations envisaged by article 28 of the CISG. Delivery of non-conforming goods by the seller triggers the buyer's right to claim delivery of substitute goods (art. 46, para. 2) but only when the breach is deemed fundamental. The buyer may also require that the seller repair the non-conforming goods (art. 46, para. 3).

267. Reduction of the contract price (art. 50) is also available to the buyer in the case of non-delivery of conforming goods.

268. The remedies provided for in articles 46 to 50 are subject to special rules (art. 51) in situations of partial delivery.

269. The buyer has further rights not explicitly mentioned in articles 46 to 52, if the contract is breached by the seller. Such rights include remedies in the case of

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<sup>66</sup> The corresponding provision in the UPICC (art. 7.3.1) contains a non-exhaustive list of additional elements to be considered when determining whether there is a fundamental non-performance.

anticipatory breach and instalment contracts (arts. 71–73) and the right to withhold performance of the buyers own obligations, in particular, payment of the agreed price.

### *Other remedies available to the seller*

270. When the contract is breached by the buyer, the seller may require the buyer to pay the price, take delivery or perform the other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement (art. 62). These remedies fall under the general category of specific performance.

271. The contract may be avoided by the seller if the failure of the buyer to perform any of the obligations under the contract or the CISG amounts to a fundamental breach (art. 64, para. 1 (a)). It may also be avoided if the buyer does not perform the obligation to pay the price or take delivery of the goods within the additional period of time fixed by the seller in accordance with article 63, paragraph 1.

272. Finally, when the buyer fails to specify the form, measurement or other features of the goods, as provided in the contract, the seller may make the specification in accordance with the requirements of the buyer that may be known to the seller (art. 65).

### *How are damages regulated under the CISG?*

273. In the case of breach of contract, the most important CISG remedy in practice is the claim for damages, which is common to the buyer (art. 45, para. 1 (b)) and the seller (art. 61, para. 1 (b)). The calculation of damages and the exemptions that may apply are governed by articles 74–77 and 79–80. The principle of full compensation applies, but it is limited to the losses that were foreseeable for the breaching party at the time of the conclusion of the contract (art. 74). In determining the damages, there is no need to prove the fault of the breaching party. Evidence of causality linking the breaching party's conduct to the damages caused, which must also be proved, will suffice.

274. While article 74 of the CISG states the general rule for the measurement of damages, articles 75 and 76 establish alternative methods to that end. Article 75 regulates the operation of a substitute transaction. As a result of a breach of contract, the aggrieved seller may resell the goods or the aggrieved buyer may repurchase the goods in a reasonable manner and within a reasonable time after avoidance and may recover the difference between the contract price and the price of the substitute transaction. Under article 76, damages are established in line with the current (or market) price for the goods in question. The current price must be established at the time of avoidance (art. 76, para. 1) and correspond to the price prevailing at the place where delivery of the goods should have been made (art. 76, para. 2).

275. Article 77 of the CISG provides that a party who relies on a breach of contract must take measures to mitigate losses. Non-compliance with such obligation results in the non-performing party not being liable for any losses that the aggrieved party could have avoided.

276. Under the principle of freedom of contract (art. 6), the parties may derogate from articles 74–77 and provide for the payment of agreed sums for failure to perform the contract. The CISG itself contains no specific rules on agreed sums, but in the light of the general principles on which it is based (art. 7, para. 2), any rules on the protection of the obligor of the otherwise applicable law or rules of law relying on notions such as reasonableness, excessiveness or proportionality must be applied in accordance with an international standard. In this respect, article 7.4.13 of the UPICC and the Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (1983)<sup>67</sup> are based on such notions. Parties wishing to make specific provisions on this matter may wish to refer to them.

*Are there situations in which the party in breach is  
exempted from damages?*

277. The breaching party may be exempted from paying damages if the breach of contract was caused by an impediment beyond that party's control (art. 79, para. 1).<sup>68</sup> However, the CISG makes no provision for renegotiation or adaptation of a contract to restore its original equilibrium if it was fundamentally altered by an unanticipated supervening event that increases the cost of a party's performance or diminishes the value of the performance a party receives ("hardship"). Some judicial decisions and doctrinal authorities refer to article 79 as a gateway to addressing such situations under the CISG. Articles 6.2.1 to 6.2.3 of the UPICC have detailed provisions that may be used to regulate the consequences of hardship in international contracts.<sup>69</sup>

278. According to the principle of freedom of contract (art. 6), the parties may derogate from the provisions of the Convention by directly excluding or limiting the breaching party's liability in the event of non-performance or defective performance (limitation and exclusion clauses). An express provision on exclusion or limitation of liability and its limits is contained in the UPICC (art. 7.1.6; see also para. 378 below).

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<sup>67</sup> *Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 17 (A/38/17)*, annex I; see also below, paras. 400–405. Additional information on the Uniform Rules is available on the UNCITRAL [website](#).

<sup>68</sup> The UPICC contain an analogous provision in article 7.1.7, which specifies the duties of information of the non-performing parties and the consequences of a breach of such duties. That article also expressly states that a party is not prevented from exercising a right to terminate the contract or to withhold performance or to request interest on money due.

<sup>69</sup> On the hardship provisions of the UPICC, see paragraph 378 below.



### *Are parties entitled to interest on sums which are not paid?*

279. A claim for interest (art. 78) is available for any breach of contract by the buyer or the seller, whether it is fundamental or not. This provision sets forth an unambiguous entitlement to interest for the aggrieved party but does not determine the applicable interest rate. This was done in acknowledgement of the fact that interest may violate mandatory provisions of domestic law in some jurisdictions. Most State courts applying article 78 determine the interest rate according to the domestic law applicable by reference to the conflict of laws rules of the forum State, though there are arbitral and judicial decisions that have referred to a uniform standard. For the drafting of contractual provisions on the applicable interest rate, parties may wish to consider the uniform rule provided in article 7.4.9 of the UPICC.<sup>70</sup>

### *Anticipatory breach and instalment contracts*

280. A number of remedies are available to either the buyer or the seller in the case of anticipatory breach by the other party. Article 71 of the CISG authorizes the aggrieved party to suspend the performance of obligations contained in single or instalment contracts if, after the conclusion of the contract, it has become apparent that a substantial part of the obligations of the other party will not be performed by that party. Anticipated non-performance by the other party must result either from a serious deficiency in the ability to perform or in creditworthiness or from the conduct in preparing to perform or in performing the contract.

281. In addition, the contract may be avoided if, prior to the date of performance, it becomes clear that the buyer or the seller will commit a fundamental breach (art. 72).

282. Finally, a contract for delivery of goods by instalments may be avoided if the failure of one party to perform any obligations in respect of any instalment constitutes a fundamental breach with respect to that instalment (art. 73, para. 1). The whole contract may be avoided if the breaching party gives the other party good grounds to conclude that a fundamental breach will occur with respect to future instalments.

### *Final clauses*

283. As usual in treaties, part IV of the CISG contains its final clauses, namely, provisions that set forth how States may become a party to the treaty, or that allow a State to modify the scope of application of the treaty by lodging declarations. In

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<sup>70</sup> See paras. 351–353 and 393 below. For an overview of the case law on the point, see *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, article 78.

line with a general obligation on States to periodically review treaty declarations, several declarations to the CISG have been withdrawn. At the same time, it is not unusual for new contracting States to lodge declarations.

*What is the relationship between the CISG and other international agreements dealing with matters governed by the CISG?*

284. According to article 90, the CISG does not prevail over other international agreements dealing with matters governed by the CISG if the parties to the contract have their places of business in States parties to such agreements. According to one view, “international agreements” do not include regional uniform law that needs to be transposed into national law, such as European Union directives.

285. In general, the CISG and international agreements on PIL aspects of international sales contracts are mutually compatible (see paras. 27–30 above).

286. Article 99 requires the denunciation of the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods and of the Convention relating to a Uniform Law on the International Sale of Goods before adoption of the CISG. The relevance of those two conventions is mostly historical.<sup>71</sup>

## **B. Limitation Convention**

### **1. The purpose of the Limitation Convention**

287. The Limitation Convention provides uniform international legal rules governing the limitation period in a contract for the international sale of goods. The limitation period is defined as a period of time within which a party under a contract for the international sale of goods needs to commence legal proceedings, including judicial, arbitral and administrative proceedings, against the other party to assert a claim arising from the contract or relating to its breach, termination or invalidity (art. 1, para. 1). After the expiration of the limitation period, no such claim may be recognized or enforced in any legal proceedings.

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<sup>71</sup>All States parties to the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods and the Convention relating to a Uniform Law on the International Sale of Goods, except the Gambia and the United Kingdom of Great Britain and Northern Ireland, have denounced those conventions and adopted the CISG.

288. Similar rules exist in most legal systems. However, a disparity exists not only regarding the length of the period and the rules governing the limitation of claims after the lapse of the period, but also regarding the conceptual basis of limitation periods. Some jurisdictions consider that claims are extinguished, as a matter of substantive law, as the result of expiration of the period (e.g., civil law rules on extinctive prescription periods). Other jurisdictions consider that the limitation period is a procedural rule barring the bringing of claims to the courts (e.g., common law rules of statute of limitations). The Limitation Convention does not attempt to solve this debate. Instead, it adopts a functional approach by listing the consequences of the expiration of the limitation periods.

289. For international commercial contracts other than sale of goods, or if the parties have opted out of the Limitation Convention in a contract for the international sale of goods, pertinent rules on limitation periods can be found in chapter 10 of the UPICC. The following paragraphs include a brief comparison of the Limitation Convention and chapter 10 of the UPICC.

## 2. Scope of application of the Limitation Convention

290. The Limitation Convention applies to the same contract for the international sale of goods to which the CISG applies (compare articles 1, paragraph 1, 3, 4 and 6, of the Limitation Convention with articles 1, 2 and 3 of the CISG).<sup>72</sup>

291. While the CISG does not deal with validity of the contract (art. 4, para. (a)), the Limitation Convention governs the limitation periods of claims resulting from the invalidity of contracts (art. 1, para. 1). They include claims for the restitution of goods delivered or payment made under a contract which subsequently turns out to be invalid because of, but not limited to, fraud (art. 10, para. 3).

292. Even when the Limitation Convention is applicable to a contract, it does not govern the limitation period of certain claims arising from that contract (art. 5).<sup>73</sup> The limitation period of those claims will be governed by the law applicable according to PIL rules.

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<sup>72</sup>The Limitation Convention, adopted in 1974, predates the CISG, which was adopted in 1980. In order to harmonize the scope of application of the Limitation Convention with that of the CISG, the Protocol amending the Convention on the Limitation Period in the International Sale of Goods was adopted at the same diplomatic conference that adopted the CISG. Although there are minor differences in the language of the provisions, the rules are basically identical. The present Guide makes reference to the Limitation Convention as amended in 1980.

<sup>73</sup>Those claims are: (a) claims based upon death of, or personal injury to, any person; (b) claims based upon nuclear damage caused by the goods sold; (c) claims based upon security interest in property; (d) claims based upon judgments or documents upon which enforcements can be obtained; and (e) claims based upon bills of exchange, cheque or promissory note (art. 5).

293. As is the case under the CISG, the parties may opt out of the Limitation Convention as a whole by agreement (art. 3, para. 2). If the parties have opted out of the Limitation Convention, the law applicable according to PIL rules governs the question of limitation period. It should be noted that the provisions of the Limitation Convention are mandatory except for modification of the length of the limitation period under article 22, paragraphs 2 and 3. Therefore, unlike article 6 of the CISG, there is no provision in the Limitation Convention allowing the parties to derogate from or vary the effects of its provisions.

### **3. Provisions on limitation periods**

#### *What is the length of the limitation period under the Limitation Convention?*

294. The Limitation Convention adopts a dual limitation period. There is a general limitation period of 4 years (art. 8), which can be extended or recommenced, and a maximum limitation period of 10 years (art. 23), which is a fixed period.

295. With respect to the time when the limitation period commences to run, the basic rule is that it commences on the date on which the claim accrues (art. 9, para. 1), namely, the date the claim matures.<sup>74</sup> This applies to both the general limitation period and the maximum limitation period.

296. The adoption of an objective time of commencement for both periods in the Limitation Convention is an approach different from the one adopted in recent domestic legislation and the UPICC. The latter texts also adopt a dual limitation period approach, but tend to choose a subjective time of commencement (e.g., the day the obligee knows or ought to know certain facts) for the shorter general period, and an objective time of commencement (e.g., the date the right can be exercised) for the longer maximum period (e.g., art. 10.2 of the UPICC). The approach of the Limitation Convention is due to the peculiarities of long-distance trade, and also to the fact that there is little need to protect a non-consumer seller or buyer by delaying commencement of the limitation period by adopting a subjective time of commencement for the shorter period.

297. The UPICC adopt a shorter general limitation period of three years, beginning on the day after the day the obligee knows or ought to know the facts as a result of which the obligee's right can be exercised (art. 10.2, para. 1). The length of the maximum limitation period under the UPICC is 10 years, which is the same as

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<sup>74</sup>The Convention also provides special rules on the commencement of the period depending on the type of claim (arts. 10–12).

under the Limitation Convention. However, the day of commencement is slightly different: it is the day after the day the right can be exercised (art. 10.2, para. 2).

298. The Limitation Convention has a detailed rule on how the limitation period is to be calculated (art. 28).

*Can the length be modified by agreement of the parties?*

299. The general limitation period cannot be modified by agreement of the parties prior to its running, but it can be extended by a written declaration of the debtor during the running of the period (art. 22, paras. 1 and 2). In addition, the contract of sale may stipulate a shorter period for the commencement of arbitral proceedings, if the stipulation is valid under the law applicable to the contract (art. 22, para. 3). The maximum limitation period cannot be modified by agreement of the parties.

300. The UPICC are more lenient in terms of modification of the limitation period. The general limitation period can be shortened by the agreement of the parties, but not to less than one year. The UPICC also allow the maximum period to be modified by agreement of the parties, except that it cannot be shortened to less than 4 years or extended to more than 15 years (art. 10.3).

*What happens if the limitation period expires?*

301. The principal consequence of the expiration of the limitation period is that no claim will be recognized or enforced in legal proceedings commenced thereafter (art. 25, para. 1). The Limitation Convention is only concerned with the recognition or enforcement of claims in any legal proceedings and is not concerned with whether the right is extinguished or not. The UPICC, on the other hand, expressly provide that the expiration of the limitation period does not extinguish the right (art. 10.9, para. 1).

302. However, according to the Limitation Convention, even after the limitation period has expired, a party can, in certain situations, raise a claim as a defence to or set off against a claim asserted by the other party (art. 25, para. 2; see also art. 10.9, para. 3, of the UPICC).

*Will the court consider the limitation period on its own initiative?*

303. Article 24 of the Limitation Convention provides that the expiration of the limitation period will not be taken into consideration in legal proceedings unless it is invoked by a party to the proceedings (see also art. 10.9, para. 2, of the UPICC).

### *How can the creditor stop the running of the limitation period?*

304. Limitation periods cease to run when the claimant commences judicial or arbitral proceedings against the debtor, or when a claim is asserted by the claimant in existing court proceedings (arts. 13 and 14 of the Limitation Convention; see also arts. 10.5 and 10.7 of the UPICC).<sup>75</sup> Procedures for commencement of judicial proceedings depend on national laws and, therefore, the Limitation Convention indicates that “any act which, under the law of the court where the proceedings are instituted, is recognized as commencing judicial proceedings” constitutes the commencement of judicial proceedings. Arbitral proceedings are commenced according to the manner provided for in the arbitration agreement or by the applicable arbitration law, for example, with the receipt of the request for arbitration and of any other required information by the secretariat of an arbitral institution. In the absence of such a provision, arbitration proceedings are deemed to commence on the date that the request for arbitration is delivered to the respondent (see also art. 3, para. 2, of the UNCITRAL Arbitration Rules).

305. By cessation, limitation periods are not suspended (see, however, para. 308 below), nor do they recommence anew (see, however, paras. 310 and 311 below). They simply cease to run; in other words, they do not run anymore.

306. The UPICC adopt a different approach by providing that the running of the limitation period is suspended when the obligee asserts rights in judicial proceedings or arbitration proceedings, such as by commencing the proceedings, or in insolvency proceedings or dissolution proceedings (arts. 10.5, para. 1, and 10.6, para. 1). The suspension lasts until a final decision has been issued or until the proceedings have been otherwise terminated (arts. 10.5, para. 2, and 10.6, para. 2). The UPICC also extend these rules to proceedings of alternative dispute resolution, such as mediation, whereby the parties request a third person to assist them in their attempt to reach an amicable settlement of their dispute (art. 10.7).

### *What happens if proceedings do not result in a decision on the merits of the claim?*

307. Judicial or arbitral proceedings commenced by a claimant within the limitation period might terminate without a binding decision on the merits of the claim, for example, because the court or arbitral tribunal lacks jurisdiction or because of

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<sup>75</sup>The Limitation Convention provides a special rule that prevents limitation periods for counterclaims from expiring (art. 16). It also contains a special rule to resolve questions concerning the running of limitation periods when there are jointly and severally liable debtors and when the buyer brings a recourse claim against the seller if a proceeding has been commenced against the buyer by a party that purchased the goods from the buyer (art. 18).

a procedural defect. For such case, the Limitation Convention provides that if the original proceedings end without a binding decision on the merits, the limitation period will be deemed to have continued to run (art. 17, para. 1).

308. In that situation, most legal systems allow the creditor to pursue the claim by commencing new proceedings. However, by the time the original proceedings have ended, the limitation period might have expired, or there might remain insufficient time for the claimant to commence new proceedings. To protect the claimant in those cases, the Convention grants an additional period of one year to commence new proceedings (art. 17, para. 2). However, this is subject to the maximum limitation period of 10 years (art. 23).

309. The UPICC adopt a different approach by providing that suspension of the limitation period lasts not only until a binding decision has been issued, but also until the proceedings have been terminated without reaching a final decision (arts. 10.5, para. 2, and 10.6, para. 2). Therefore, there is no provision under the UPICC that corresponds to article 17, paragraph 2, of the Limitation Convention.

*Does the obligor's performance or acknowledgement have any effect on the running of the limitation period?*

310. Under the Limitation Convention, the limitation period recommences (i.e., the four-year period runs anew) within the total limit of 10 years from the date the claim accrued, in two situations. In the first situation, the limitation period recommences if the creditor performs in the debtor's State an act, including an act that can be made outside legal proceedings, that, under the law of that State, has the effect of recommencing a limitation period (art. 19).

311. In the second situation, the limitation period recommences if the debtor acknowledges the obligation to the creditor in writing (art. 20, para. 1) or pays interest or partially performs the obligation from which such acknowledgement can be inferred (art. 20, para. 2). The rule is similar but different under the UPICC. Under the UPICC, there is no requirement for written acknowledgement (see art. 10.4, para. 1). Another difference is that, unlike under the Limitation Convention, the maximum period does not recommence, but may be exceeded by the beginning of a new general limitation period (art. 10.4, para. 2).

*What happens if the creditor is prevented from instituting legal proceedings?*

312. The Limitation Convention protects a creditor who was prevented from taking the necessary acts to stop the running of the limitation period in extreme cases such as commercial dispute resolution in countries that have been affected

by military conflict. It provides that, when the creditor could not take those acts as a result of a circumstance beyond the control of the creditor and which could be neither avoided nor overcome, the limitation period will be extended so as to expire one year after the date when the circumstance ceased to exist (art. 21). However, this extension is subject to the maximum limitation period of 10 years (art. 23). The UPICC adopt the same rule (art. 10.8, para. 1), but extend it to a situation where the impediment consists of the incapacity or death of the obligor or the obligee and where a representative of the party's estate has not been appointed or a successor has not inherited the respective party's position (art. 10.8, para. 2).

*How can the creditor make sure that cessation in one State has international effect?*

313. As noted above, the limitation period ceases to run when legal proceedings are instituted (arts. 13–18 of the Limitation Convention). The Limitation Convention provides that such an act in one contracting State also has effect in other contracting States, provided that the creditor has taken reasonable steps to inform the debtor (art. 30). Thus, the creditor does not have to worry about instituting court proceedings in all relevant States to cease the running of the limitation period. This rule also applies to the extension of limitation periods under article 17 and the recommencement of the limitation period under article 19.

314. Under the Convention, cessation by performance or acknowledgement by the debtor (arts. 19 and 20) and extension by prevention (art. 21) are acts or circumstances not connected to a particular State, and have international effect by their nature.

#### **4. Interaction with other uniform law instruments**

*Relationship with the CISG*

*General relationship*

315. The Limitation Convention and the CISG may be considered sister conventions. Although the CISG governs the rights and obligations of the seller and buyer arising from contracts for the international sale of goods, it does not contain rules on limitation periods. The Limitation Convention fills that lacuna. Although they can be applied independently from each other, the most value will be derived if both are applied to a contract. Thus, it is recommended that States become parties to both Conventions.



316. In 1980, the scope of application of the Limitation Convention was amended to align it with that of the CISG (see para. 290 above). Thus, except for a few situations, the CISG and the Limitation Convention apply to the same contract and claims arising therefrom.

#### *Relationship with time limits under the CISG*

317. The CISG contains several provisions that relate to time limits. For example, article 39, paragraph 2, provides that the buyer loses the right to rely on a lack of conformity of the goods unless notice is given to the seller of the non-conformity within two years from the date the goods are handed over to the buyer (see para. 207 above). Such time limits are not to be confused with the limitation period under the Limitation Convention. The Limitation Convention expressly provides that it does not affect a particular time limit within which one party is required, as a condition for the acquisition or exercise of the claim, to give notice to the other party or perform any act other than the institution of legal proceedings (art. 1, para. 2; see also art. 10.1, para. 2, of the UPICC).

#### *Relationship with the UPICC*

318. The parties need to opt out of the Limitation Convention (see para. 293 above) in order to choose the UPICC as the law applicable to limitation periods, provided that PIL rules allow such choice.

#### *Relationship with the Electronic Communications Convention*

319. The Limitation Convention contains the requirements for acknowledgment in writing by the debtor without expressly providing that the written declaration can be made electronically. In this regard, the Electronic Communications Convention provides conditions under which such requirements can be met by electronic communications in connection with a contract to which the Limitation Convention applies (arts. 9, para. 2, and 20, para. 1).

#### *Relationship with PIL*

320. The Limitation Convention does not exclude the application of PIL. There will always be a law made applicable by the PIL rules, but for the matter of limitation periods, the Limitation Convention prevails. This is the case even if the law of the forum considers limitation periods as a procedural matter.

321. If the parties opt out of the Limitation Convention in accordance with its article 3, paragraph 2, the otherwise applicable law will apply. This includes domestic laws as well as the UPICC, as far as the PIL rules allow such choice by the parties.

## **C. UNIDROIT Principles of International Commercial Contracts**

### **1. What are the purposes of the UPICC?**

322. The UPICC are a non-binding codification of contract law rules and principles designed for international trade on a global scale. Their objective is to make available a set of rules that is better suited to cross-border transactions than national contract laws. Three features of the UPICC serve this purpose.

323. First, the UPICC provide a “neutral” law for international transactions; in other words, a set of rules that is not the national contract law of either of the parties. They achieve this by setting forth rules that do not specifically resemble any particular national contract law and that reflect a compromise between the common law and the civil law traditions.

324. Second, the UPICC stipulate rules that are better suited to the special requirements of international trade than national contract law regimes, which are primarily designed to deal with national transactions.

325. Third, the UPICC are multilingual. They are available in a variety of world languages, so that it is very likely that both parties to an international contract can access them in a language that they are familiar with.

### **2. How were the UPICC developed?**

326. The UPICC were developed by international working groups that consisted of eminent contract lawyers, acting in their personal capacity, under the auspices of UNIDROIT. The publication of the UPICC was first authorized by the Governing Council of UNIDROIT in 1994.

327. The drafting of the UPICC was preceded by detailed comparative examinations of existing contract law. The working groups drew upon a variety of national contract laws and international contract law instruments as sources of inspiration.

328. The working groups consulted a range of national contract laws from the civil-law and common-law traditions, in particular, the main European civil codes, English common law and American contract law as set out in the Restatement (Second) of Contracts and the United States Uniform Commercial Code.

329. A number of international conventions were particularly influential in the work of the working groups. These included, in addition to the CISG and the Limitation Convention, the Convention on Agency in the International Sale of Goods,<sup>76</sup> the Convention on International Factoring (1988)<sup>77</sup> and the United Nations Convention on the Assignment of Receivables in International Trade (2001).<sup>78</sup> The drafters also took into account soft-law instruments issued by other international institutions, such as the Incoterms (see paras. 143–147 above) and the UCP (see para. 243 above). Moreover, they drew inspiration from model contracts of organizations such as the ICC and the International Federation of Consulting Engineers (FIDIC).

330. As a result of this comparative exercise, the UPICC contain two types of provisions. Some of the articles represent what is often referred to as an “international restatement of general principles of contract law”. In these instances, the drafters were able to identify a solution to a particular problem that was shared across domestic and international contract laws, and they restated the rule in one of the articles of the instrument. However, that was frequently not possible because no global “common core” of solutions could be established. In that case, the drafters either chose from existing approaches or designed new rules in order to adopt what they perceived to be the best solutions, particularly with a view to the special requirements of international trade. They aimed to strike a balance between the common-law and the civil-law traditions. For those reasons, the UPICC are widely regarded as providing jurisdictionally “neutral” solutions.

### 3. Editions and language versions

331. The UPICC are currently in their fourth edition (2016), with the second and third editions dating from 2004 and 2010, respectively. New provisions on further issues of contract law were added to each edition and thus the coverage of the UPICC was broadened. The instrument is available in all five of the official languages of UNIDROIT (English, French, German, Italian and Spanish). In addition to those official versions, there are numerous translations into other languages. All editions and language versions are easily accessible online.<sup>79</sup>

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<sup>76</sup> More information on this convention is available on the UNIDROIT [website](#).

<sup>77</sup> United Nations, *Treaty Series*, vol. 2323, No. 41631.

<sup>78</sup> General Assembly resolution 56/81, annex.

<sup>79</sup> See the UNIDROIT [website](#).

#### 4. What is the meaning of “principles” of contract law?

332. Despite the reference to “principles” in their title, the UPICC are not confined to spelling out broad and general standards, or *principes directeurs*, such as “good faith and fair dealing”. The majority of the 211 articles are straightforward, hard-and-fast “rules” which can be applied in the same way as any other national or transnational rule of contract law. They more or less predetermine the solution in a given case in a predictable fashion. In this regard, the UPICC very much resemble a codification of general contract law as can be found in national civil codes or contract law acts or in transnational commercial law instruments, such as the CISG.

#### 5. What are the basic differences as compared to the CISG and what is their nature?

333. The UPICC differ from the CISG in three major ways. First, their status is not that of a treaty. They are a non-binding set of rules that will only apply to a given contract if the parties or an adjudicator so chooses and if such a choice is recognized or acknowledged by the relevant legal framework (see paras. 40–66 above and paras. 337–350 below). Second, the scope of application of the UPICC is not confined to contracts of sale. The UPICC spell out general rules of contract law that may be used for all types of contracts, including service contracts (see paras. 354–357 below). Third, they contain a vast array of rules pertaining to the general law of contract and obligations, and thus on issues not covered by the CISG (see below, in particular, para. 396).

334. Similarly to the CISG and the Limitation Convention, the UPICC were designed and drafted under the auspices of an international organization. However, unlike those and other conventions in the area of transnational commercial law, they are a so-called “soft-law” instrument; therefore, they do not impose an obligation on States to bring the rules of the instrument into force by way of national legislation, constitutional arrangements or other mechanisms of transposition.

335. National legislators may enact the UPICC either in their entirety or selectively as domestic rules of contract law, as they may do with other uniform law instruments. In fact, one of the purposes of the UPICC, as expressly listed in the preamble thereto, is to “serve as a model for national and international legislators”. There are many examples of national legislators which have chosen to do so.<sup>80</sup>

<sup>80</sup> Among others, the 1999 Contract Law of China, many post-Socialist civil codes in Eastern and Central-Eastern Europe, the 2015 Civil and Commercial Code of Argentina and the 2016 revised Civil Code of France contain many provisions modelled on the UPICC. The Scottish Law Commission routinely refers to the UPICC as a source of inspiration for its legislative proposals in the area of contract law. An even more comprehensive introduction has been discussed in Australia and Spain, and also by the Organization for the Harmonization of Business Law in Africa (OHADA), an intergovernmental organization with 17 States members.

336. As long as they have not been implemented in this way, the UPICC, as such, do not impose direct obligations on contracting parties. They do not automatically apply once a contract is within their scope of application (see paras. 354–357 below), as would be the case with a binding instrument, such as the CISG or the Limitation Convention. The UPICC can only bind the parties if two additional requirements have been met: (a) first, the parties, or someone adjudicating a dispute between them, must have chosen to make the UPICC applicable in their contractual relationship (see paras. 337–342 below); and, second, such a choice must be respected by the law governing the proceedings between the parties, be it the *lex fori* or the *lex arbitri* (see paras. 343–350 below). However, even if these requirements have not been met, the UPICC may indirectly apply to the contractual relationship between the parties if the adjudicator uses them to interpret or supplement the applicable contract law (see paras. 351–353 below).

## 6. How can the UPICC be used in practice?

337. There are various ways in which the UPICC can be made to apply in a given contractual relationship.

338. First, the parties themselves may designate the UPICC as the law governing their contract. Such a choice can be made by express agreement of the parties, either at the time of making the contract or at a later stage (see chap. III, sect. B, above). Since the coverage of the UPICC is limited to general issues of contract law, the parties may wish to supplement the choice with their choice of a domestic law. The rules of that law will then serve as a default law for issues outside the scope of application of the UPICC. In the absence of such choice, PIL rules will determine the domestic law applicable to those issues.

339. In order to assist parties in drafting pertinent choice of law clauses, UNIDROIT published the Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts in 2013 (see paras. 65–66 above). Further model clauses of a similar nature are contained in model contracts of other international organizations, such as the 2000 ICC Model International Franchising Contract, the 2002 ICC Model Commercial Agency Contract and the Model Contracts for Small Firms prepared by the International Trade Centre.<sup>81</sup>

340. Second, even if the parties choose to have their contract governed by a law other than the UPICC or do not designate any governing law at all, they may still incorporate the UPICC as terms of the contract, as they may do with any other set of rules (see para. 25 above). They may incorporate the UPICC in their entirety,

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<sup>81</sup>The Model Contracts for Small Firms are available on the International Trade Centre [website](#).

or they may incorporate individual provisions or selected parts only, for example, chapter 4, setting forth the rules on contractual interpretation, or chapter 6, section 2, containing provisions on hardship.

341. Insofar as a given rule of the UPICC has been incorporated as a term of the contract, the contractual relationship between the parties will be governed by that rule. However, as a term of the contract, the rule can bind the parties only to the extent that it does not violate the mandatory provisions of the law governing the contract; in other words, those rules from which the parties to a contract may not derogate by way of agreement. Comparative studies have shown that such conflicts arise rarely and, even if they do, article 1.4 of the UPICC expressly acknowledges the prevalence of mandatory rules (see para. 102 above).

342. Third, a court or an arbitral tribunal may designate the UPICC as the law governing a particular contract. There are two scenarios in which adjudicators may find this attractive: (a) the parties have not chosen any law at all to govern their contract; and (b) the parties have agreed that their contract should be governed by some unwritten transnational body of rules, such as the “general principles of law”, “the *lex mercatoria*” or “usages and customs of international trade”. In the former scenario, the UPICC will normally offer a more neutral solution than the domestic contract law of a given State; they also tend to be better adapted to the needs of international trade than national contract law rules that are not particularly concerned with the specific problems arising in cross-border contracting. In the latter scenario, the UPICC are generally considered the best available and most accessible manifestation of the unwritten rules of international commerce.

## **7. How would judges and arbitrators apply a clause designating the UPICC as the applicable law of the contract?**

343. A choice by the parties to designate the UPICC as the law governing their contract will not always be acknowledged by the relevant legal framework. Nor will it always be possible for adjudicators to make such choices. The reason for this is that party autonomy with regard to the choice of non-State law has traditionally been limited and continues to be so in important aspects (see paras. 44–47. above).

### *Judicial setting*

344. The possibility of choosing non-State law is particularly limited in litigation before State courts. Some courts may not acknowledge a choice of the UPICC as the law governing the contract made by the parties, and they are not themselves free to designate the UPICC as the applicable law. This is because they are subject

to the PIL rules of their forum. Most of these rules limit party autonomy to the choice of a particular State law and thus exclude choices of transnational non-State law instruments such as the UPICC. A major regional instrument following this traditional approach is the Rome I Regulation (art. 3, para. 1; see also paras. 55–56 above).

345. The domestic PIL rules of Paraguay and Uruguay are a notable exception to the traditional approach (see para. 47 above). If legislators in other States were to follow this example, the courts of those States would also have to acknowledge the choice of the UPICC by the parties.

346. It has also been argued that, under article 9, paragraph 2, of the Mexico Convention, State courts should take the UPICC into account as “general principles of international commercial law” if the parties have not chosen a law applicable to the contract.<sup>82</sup> However, the Mexico Convention has not yet secured a large number of accessions and ratifications.

347. Even when a traditional choice of law regime applies, a State court does not have to entirely ignore the fact that the parties intended to choose the UPICC. In order to give effect, as much as possible, to the intention of the parties, such a court should interpret the intention to choose the law governing the contract as an agreement to incorporate the UPICC as terms of the contract (see paras. 340–342 above). In the European Union, for example, this possibility is specifically mentioned in recital 13 of the Rome I Regulation.

### *Arbitral setting*

348. As opposed to State courts, arbitral tribunals normally acknowledge the parties’ choice of non-State law, such as the UPICC. The reason for this is that the rules of arbitration of most arbitral institutions provide that the parties are free to agree upon the “rules of law” to be applied by the tribunal (e.g., ICC Rules, art. 21, para. 1). This notion includes non-State law, such as the UPICC. In ad hoc arbitrations subject to the UNCITRAL Arbitration Rules, the tribunal is also bound to accept a choice of rules of law (art. 35, para. 1). Moreover, most domestic laws on arbitration respect the freedom of the parties to choose non-State law in arbitral proceedings. This is particularly so in those States that have adopted article 28, paragraph 1, of the UNCITRAL Model Law on International Commercial Arbitration.

349. Parties wishing to have their contract governed by the UPICC are therefore well advised to combine a choice of law clause in favour of the UPICC (see paras. 65–66 above) with an arbitration agreement. At least one arbitral institution

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<sup>82</sup> See, for example, the *Guide on the Law Applicable to International Commercial Contracts in the Americas*, paras. 185–187 and 352–354.

explicitly suggests the choice of the UPICC to parties that agree to have their dispute arbitrated by the institution.<sup>83</sup>

350. Finally, under the arbitration regimes mentioned in paragraph 348 above, arbitral tribunals are often free to apply the UPICC if the parties have expressly authorized the tribunal to decide *ex aequo et bono* or as *amiable compositeur* (e.g., UNCITRAL Model Law on International Commercial Arbitration, art. 28, para. 3; and ICC Rules, art. 21, para. 3), or have not made any stipulation with regard to the law governing the merits of the dispute (e.g., ICC Rules, art. 21, para. 1). In those cases, many of the relevant arbitration rules and laws tend to afford the tribunal broad discretion to apply the rules of law which it determines to be appropriate (e.g., French Code of Civil Procedure, art. 1511, para. 1). Under article 56 of the 2013 Panama Arbitration Law, tribunals in international arbitration are even under a duty to take the UPICC, among other sources of law, into account.

## **8. Indirect application as a means of interpretation and supplementation**

351. Even in scenarios in which neither the parties nor the adjudicator have designated the UPICC as the law governing the contract or in which such a designation took place but is not acknowledged by the relevant legal framework, the UPICC may affect the contractual relationship of the parties. This happens when State courts or arbitral tribunals use the UPICC as a means of interpreting and supplementing the otherwise applicable contract law.

352. Adjudicators may use the UPICC to determine the meaning of rules and concepts of national contract laws and international uniform law instruments, including the CISG. Whether an adjudicator may take the UPICC into account for the purposes of interpretation of another contract law regime depends on the rules and principles of interpretation of that particular regime. Recourse to the UPICC in interpreting the CISG, for example, is generally accepted because article 7, paragraph 1, of the CISG stipulates that, in its interpretation, “regard is to be had to its international character”.

353. Adjudicators may also have recourse to the UPICC to fill gaps in national and international contract law regimes. In both the national and the international contexts, the permissibility of gap-filling with reference to the UPICC depends on the relevant rules and principles on the methodology and the limits of gap-filling. In the CISG, for example, the relevant rule is article 7, paragraph 2 (see paras. 127–132 above).

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<sup>83</sup> Article 35, paragraph 1 (c), of the Arbitration Rules of the Chinese-European Arbitration Centre.



It stipulates that questions concerning matters governed by the Convention which are not expressly settled in it “are to be settled in conformity with the general principles on which it is based”. The general principles to which article 7, paragraph 2, refers are overarching rules that permeate the entire Convention, or at least a significant number of its provisions. They are arguably not numerous, and the more detailed UPICC do represent a compilation of such general principles. Nevertheless, both the CISG and the UPICC draw largely on the same sources, and at least some of the rules contained in the UPICC are restatements of general principles of international commercial law on which, among others, the CISG is based. UNCITRAL has formally commended the use of the UPICC for their intended purposes<sup>84</sup> and these purposes, as set out in the preamble to the UPICC, include the use of the UPICC to “supplement international uniform law instruments”.

## 9. What is the scope of application of the UPICC?

354. According to the first paragraph of their preamble, the UPICC “set forth general rules for international commercial contracts”.

355. The scope of the instrument is not narrowly confined. The notions of both international and commercial contracts are to be understood broadly. They potentially include all cross-border transactions in which neither of the parties acts as a consumer. In this regard, their scope of application resembles that of the CISG and the Limitation Convention (see paras. 106–109 and 290–293 above).

356. As opposed to those conventions, however, the scope of application of the UPICC is not confined to contracts for the sale of goods. The UPICC set forth “general rules” of contract law. As such, they are not specifically concerned with the rules pertaining to any particular type of contract. Rather, they contain provisions on general matters of contract law that occur in all types of contract, such as formation, interpretation, validity and the remedies for non-performance. As a result, the UPICC apply to all types of international commercial contracts, including but not limited to the sale of goods. Most importantly, service contracts are also within their scope of application.

357. Issues may arise with regard to the intertemporal scope of application of the various editions of the UPICC. There are four different editions of the instrument, dating from 1994, 2004, 2010 and 2016, with each of them increasing the coverage of the instrument (see para. 331 above). Unless the parties have agreed otherwise, adjudicators will normally apply the most recent version.

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<sup>84</sup> Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17), paras. 137–140.

## 10. Substantive provisions: general overview

358. The coverage of the UPICC extends to all important issues of general contract law that may arise in international commercial contracts. The relevant rules and principles are set forth in 211 separate articles, the so-called “black-letter rules”.

359. Each black-letter rule is followed by an additional comment, often including one or more hypothetical case applications (“illustrations”). According to UNIDROIT, these comments are an integral part of the UPICC, to the extent that the black-letter rules and the comments, taken together, constitute the “integral version” of the instrument.<sup>85</sup> This is particularly important because some of the comments go beyond mere explanation of the articles. In effect, they propose additional rules or advocate a narrower reading of certain rules than the text of the relevant articles would seem to indicate.

360. The first edition of the UPICC, published in 1994, set forth 120 articles. Each of the topics covered was the subject of a separate chapter of the instrument. These ranged from formation (chap. 2) to validity, especially problems arising from defects of consent (chap. 3), interpretation (chap. 4), content of contracts (chap. 5), performance of contracts (chap. 6) and remedies for non-performance (chap. 7). Chapter 1 sets forth definitions and general principles that apply across all the issues covered. It is on those topics, particularly with regard to formation and remedies for non-performance, that there is a substantial thematic overlap with the CISG (see para. 394 below).

361. In the 2004 edition, 65 new articles were added, dealing with six further thematic areas: agency (chap. 2, sect. 2), contracts for the benefit of third parties (chap. 5, sect. 2), set-off (chap. 8), assignment of rights, transfer of obligations and assignment of contracts (chap. 9) and limitation periods (chap. 10). The latter broadly covers the same ground as the Limitation Convention (see para. 395 below and chap. IV, sect. B, above).

362. The 2010 edition contained 26 new provisions, on illegality (chap. 3, sect. 3), conditions (chap. 5, sect. 3), the plurality of obligors and obligees (chap. 11) and restitution with respect to contracts to be performed over a period of time (art. 7.3.7), as well as a few other changes that were necessitated by those additions.

363. With each new edition, the portions of the text carried over from the more recent edition remained largely unchanged, with revisions confined mainly to some minor amendments and additions, and most of these being restricted to the comments.

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<sup>85</sup> The integral versions in English and French are available on the UNIDROIT [website](#).

364. A different approach was taken with the 2016 edition. The main objective was to better address the special requirements of long-term contracts. In order to do so, no new provisions were added; instead, six existing articles and many of the existing comments were substantially amended.

365. At present, therefore, the UPICC set forth 211 articles that are divided thematically into 11 chapters, with some of these being divided into sections.

366. The articles are preceded by a preamble listing the purposes of the instrument. These include the application of the UPICC as the law governing the contract because of a corresponding choice or decision by an adjudicator and their use as a means of interpreting and supplementing national law and international uniform law instruments as such. As has been seen, the extent to which these purposes will materialize will depend on the relevant *lex fori* or *lex arbitri* and on the applicable rules and principles on interpretation and gap-filling.

367. Chapter 1 contains a number of general provisions that are meant to inform the interpretation and application of the entire instrument. Apart from a general rule on the approach to be followed in the interpretation and supplementation of the UPICC (art. 1.6), these include a handful of overarching general principles of contract law, namely, freedom of contract (art. 1.1), freedom of form (art. 1.2), binding nature of the contract (art. 1.3) and good faith and fair dealing (art. 1.7). The chapter also includes statutory definitions of key terms (arts. 1.10 and 1.11) and a specific article on the priority of applicable mandatory rules (art. 1.4) (see paras. 102–103 above and para. 389 below).

368. Chapter 2, section 1, deals with the formation of contracts, with detailed rules on offer and acceptance that cover, among others, the withdrawal, revocation and rejection of offers (arts. 2.1.3–5), cases of modified acceptance (art. 2.1.11) and contracts with open terms (art. 2.1.14). Four provisions are devoted to the incorporation of standard terms (arts. 2.1.19–22). There are also rules covering bad faith and breaches of confidentiality during the negotiations that lead up to the conclusion of the contract (arts. 2.1.15–16). While the rules on offer and acceptance were modelled on, and are broadly in line with, the CISG, the others contain significant further details and cover additional topics (see chap. IV, sect. A, above).

369. Chapter 2, section 2, sets forth rules on agency in the context of contract formation (for further information on agency, see chap. V, sect. C, below). It deals with the circumstances in which an agent affects the contractual relations between the principal and the third party. The section also provides remedies for the third party against the agent if the latter purports to bind the principal and fails to do so. The section therefore governs the express, implied and apparent granting of authority to the agent (arts. 2.2.2 and 2.2.5) and a potential sub-agent (art. 2.2.8),

as well as the termination of authority (art. 2.2.10). An agent acting without authority may be liable for damages (art. 2.2.6), unless the principal ratifies the unauthorized act (art. 2.2.9). The principal may avoid the contract if the agent was involved in a conflict of interests (art. 2.2.7). The section is limited to the external aspects of agency, namely, the relations between the principal or the agent on the one hand, and the third party on the other; it does not cover questions arising from the internal relationship between the principal and the agent (art. 2.2.1).

370. Chapter 3 covers the validity of contracts, with a few introductory provisions in chapter 3, section 1. These clarify that the chapter does not cover questions of capacity (art. 3.1.1) and that its rules are mandatory (art. 3.1.4) (see para. 389 below).

371. Chapter 3, section 2, lists the relevant grounds for the avoidance of a contract. These are mistake (arts. 3.2.1–4), fraud (art. 3.2.5), threat (art. 3.2.6) and gross disparity (art. 3.2.7). In all these cases, the innocent party has the right to bring the contract to an end with retroactive effect and may claim damages and restitution where appropriate (arts. 3.2.10–17).

372. Chapter 3, section 3, deals with illegal contracts, namely, contracts infringing a mandatory rule, whether of national, international or supranational origin. The effects of the infringement are those expressly prescribed by the relevant mandatory rule or, in the absence of an express prescription, the remedies that are reasonable in the circumstances of the case (art. 3.3.1). If appropriate, restitution may be granted (art. 3.3.2).

373. Chapter 4 sets out a detailed set of rules for the interpretation of contracts and contractual statements. A contract has to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it, unless a different common intention of the parties can be established (art. 4.1). In doing so, the adjudicator must have regard to all relevant circumstances, including the negotiations preceding the contract and the subsequent conduct of the parties (art. 4.3). Contracts must be interpreted as a whole (art. 4.4), in a way that all terms are given effect (art. 4.5) and, in the event of an unclear term, against the party that supplied the term (art. 4.6). There are specific rules on linguistic discrepancies between different language versions of a contract (art. 4.7) and gap-filling (art. 4.8).

374. Chapter 5, section 1, contains a number of rules pertaining to the content of contracts, once concluded. The obligations of the parties may be implied (art. 5.1.2), and they include a general duty of cooperation (art. 5.1.3). Criteria for the distinction between duties to achieve a result and duties of best efforts are introduced (arts. 5.1.4–5). There are rules on the quality and the price of performance and the possibility of terminating contracts concluded for an indefinite period of time for cases where those issues have not been expressly agreed by the parties (arts. 5.1.6–8).

375. Chapter 5, section 2, lays out a comprehensive regime for contracts in favour of third parties, namely, the conferral of an enforceable contractual right on a “beneficiary” by way of agreement between the original parties (the “promisee” and the “promisor”) (art. 5.2.1). Rules fleshing out the intricate tripartite relationship arising from such contracts include those on potential defences of the promisor, the entitlement of the original parties to revoke the conferral of the right and the right of the beneficiary to renounce the right conferred (arts. 5.2.4–6).

376. Chapter 5, section 3, deals with contractual conditions. It distinguishes suspensive and resolutive conditions and their respective effects (arts. 5.3.1–2 and 5.3.5). Parties may not interfere with conditions in bad faith and are under a good faith duty to preserve the other party’s rights while a condition is pending (arts. 5.3.3–4).

377. Chapter 6, section 1, contains default rules on how performance is to be rendered with regard to the time and place of performance (arts. 6.1.1 and 6.1.6), the right to reject partial or earlier performance (arts. 6.1.3 and 6.1.5), payment modalities (arts. 6.1.7–12) and the effects of public permission requirements (arts. 6.1.14–17).

378. Chapter 6, section 2, deals with the effects of hardship, namely, supervening events that fundamentally alter the equilibrium of the contract (art. 6.2.2). It is clear from article 6.2.1 that, where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations, unless the exceptional circumstance of hardship may be invoked. As a result of a hardship situation, the aggrieved party has a right to renegotiate the contract conditions so as to restore its equilibrium. If the renegotiations are unsuccessful, the court or tribunal, should it decide to take action, may terminate the contract or adapt it with a view to restoring its equilibrium (art. 6.2.3).

379. Chapter 7 sets forth the remedies for non-performance, once again with substantial overlap with the rules in the CISG (see para. 394 below). To begin with, there are a number of general provisions on non-performance in chapter 7, section 1. These include the non-performing party’s right to cure (art. 7.1.4), the aggrieved party’s right to withhold performance (art. 7.1.3), the possibility for the aggrieved party to set an additional time for performance at the end of which, if the other party has not yet performed, the aggrieved party may exercise all available remedies (art. 7.1.5, the *Nachfrist* mechanism), the policing of exemption clauses (art. 7.1.6) and the exemption from liability for damages in cases of force majeure (art. 7.1.7).

380. Chapter 7, section 2, deals with specific performance that is generally available, albeit with a number of important restrictions in the case of non-monetary obligations (art. 7.2.2). Court orders for performance are strengthened by the possibility of imposing additional judicial penalties (art. 7.2.4).

381. Chapter 7, section 3, lays out the rules on termination of contracts. This is only available if non-performance can be qualified as “fundamental” (art. 7.3.1), when an additional period for performance of reasonable length was set and the other party has not performed within that period (art. 7.3.1, para. 3) or when fundamental non-performance is anticipated before the date set for performance (art. 7.3.3). Termination does not require the involvement of an adjudicator and can be effected by simple notice (art. 7.3.2). It releases both parties from their obligations (art. 7.3.5) and requires a party that has already received performance to return all or some of what it has received (arts. 7.3.6–7).

382. Chapter 8 allows the parties to set off their obligations against each other if the obligations are of the same kind and certain other requirements are met (art. 8.1). The right of set-off is exercised by notice to the other party (arts. 8.3–4) and set-off, once effected, discharges the obligations for the future (art. 8.5).

383. Chapter 9 contains a detailed regime on the assignment of rights (chap. 9, sect. 1), the transfer of obligations (chap. 9, sect. 2) and the assignment of contracts (chap. 9, sect. 3).

384. Chapter 10, on limitation periods, conceptualizes limitation as a defence that does not extinguish the right but bars its exercise if asserted (arts. 10.1 and 10.9). It establishes a general period of three years and a maximum period of 10 years (art. 10.2). The parties may modify the period within limits (art. 10.3). The limitation period may be suspended by judicial or other proceedings and in the case of force majeure or other unforeseen circumstances (arts. 10.5–8). There are many overlaps with, and some differences from, the Limitation Convention (see chap. IV, sect. B, above).

385. Chapter 11 deals with legal issues arising from a plurality of obligors (i.e., a scenario where the performance of a contractual obligation is owed by more than one obligor (chap. 11, sect. 1)), or a plurality of obligees (i.e., a scenario where the performance of a contractual obligation is owed to more than one obligee (chap. 11, sect. 2)).

## **11. Selected features**

386. Many of the rules of the UPICC are specifically designed for the particular requirements of international trade. These include provisions on the relevant time zone (art. 1.12), linguistic discrepancies between versions of the contract (art. 4.7), public permission requirements (arts. 6.1.14–17), currency of payment (arts. 6.1.9–10) and the currency in which damages are to be assessed (art. 7.4.12).

387. In the same way as those of the CISG (see para. 129 above), the rules of the UPICC must be interpreted autonomously or, in other words, without having regard to the established legal terminology of national contract laws (art. 1.6, para. 1). Gaps should be settled, as far as possible, not by recourse to domestic laws but in accordance with the general principles underlying the instrument (art. 1.6, para. 2) (see para. 394 below).

388. In a similar vein, the UPICC do not normally make it explicit if they deviate from established national doctrines of contract law. Articles 3.1.2 and 3.1.3 constitute a rare exception in that they clarify that domestic requirements as to indicia of seriousness, such as the doctrines of consideration or cause, or domestic views as to initial impossibility as an impediment to performance, are irrelevant as potential grounds of invalidity (art. 3.1.3).

389. Most of the rules contained in the UPICC are default rules. They do not apply if the parties have agreed to the contrary. Only some of its provisions are mandatory and cannot be contracted out (art. 1.5). These include the duty of the parties to act in accordance with good faith and fair dealing (art. 1.7), the provisions of chapter 3 on validity (art. 3.1.4) and the limits on the potential modification of limitation periods by the parties (art. 10.3, para. 2). However, given the non-binding status of the UPICC, it may be impossible to enforce the mandatory character in a given case (see para. 103 above).

390. The non-binding character of the UPICC may also affect the application of their rules that are designed to deal with three-party relationships, such as agency (chap. 2, sect. 2), contracts in favour of third parties (chap. 5, sect. 2), assignment of rights, transfer of obligations and assignment of contracts (chap. 9) and plurality of obligors and obligees (chap. 11). It may be the case that the relevant rule of the UPICC will apply merely to one of the two-party relationships that, together, constitute the tripartite relationship. For example, the rules on agency may apply between the principal and the other party, but not between the principal and the agent or between the agent and the other party.

391. The UPICC do not set forth a rule providing for the overt policing of unfair standard terms. Instead they contain a number of provisions that are designed to protect parties with less experience and inferior bargaining power. These include the prohibition on invoking grossly unfair exemption clauses (art. 7.1.6), the reduction of grossly excessive penalty clauses (art. 7.4.13), the avoidance of the contract in cases of gross disparity (art. 3.2.7), the *contra proferentem* rule in the interpretation of contracts (art. 4.6) and the ineffectiveness of surprising standard terms (art. 2.1.20). Rules of this kind are notably absent from the CISG.

## 12. How do the UPICC interact with other uniform law instruments?

### *Relationship with the CISG and the Limitation Convention*

392. The UPICC were drafted against the background of existing transnational commercial law, which included the CISG and the Limitation Convention (see para. 329 above). Since, however, the UPICC are intended to provide a system of rules especially tailored to the needs of international commercial transactions, they also embody what are perceived to be the best solutions, even if still not yet generally adopted.

393. When comparing the UPICC with the CISG and the Limitation Convention, three types of provisions may be distinguished: (a) provisions addressing the same issues; (b) provisions addressing the same subject matter, but to a different level of detail; and (c) provisions addressing issues excluded from the scope of application of the CISG and the Limitation Convention. It is specifically with regard to the second and the third of these that the function of the UPICC as a means of interpreting and supplementing international uniform law instruments may be relevant (see paras. 351–352 above).

394. First, some of the provisions address exactly the same issues as the conventions. They are usually taken either literally or at least in substance from the corresponding rules of the conventions. Notable examples include the rules on offer and acceptance (UPICC, arts. 2.1.2–11; and CISG, arts. 14–24 (see paras. 157–172. above)), on the foreseeability of harm (UPICC, art. 7.4.4; and CISG, art. 74 (see para. 273 above)) and on force majeure (UPICC, art. 7.1.7; and CISG, art. 79 (see para. 277 above)). In some instances, the rules are virtually identical, but there are slight, if important differences. Both the CISG and the UPICC, for example, contain rules on the interpretation and supplementation of the instrument (see paras. 133–137 above). However, in contrast to article 7, paragraph 2, of the CISG, article 1.6, paragraph 2, of the UPICC does not refer the adjudicator to domestic law as a last resort in cases where gaps cannot be filled by recourse to the general principles underlying the instrument. Both instruments consider the contractual parties to be bound to usages widely known to and regularly observed in international trade (see paras. 138–142 above). Yet, in contrast to article 9, paragraph 2, of the CISG, article 1.9, paragraph 2, of the UPICC does not require the parties' actual or constructive knowledge of a particular usage to make it binding.

395. Second, some of the provisions address subject matter that is also covered by the conventions. This concerns many of the rules on formation, damages and limitation periods. In these cases, there is a broad overlap between the UPICC and the conventions although, once again, the former sometimes go beyond the



solutions of, or are at least more explicit than, the latter. Article 2.1.1 of the UPICC, for example, expressly recognizes that contracts may be concluded not only by the acceptance of an offer, but also by other conduct of the parties that is sufficient to show agreement. The UPICC also contain specific rules on writings in confirmation, on cases where the parties made the conclusion of a contract dependent upon reaching an agreement on specific matters or in a specific form and on merger and no-oral-modification clauses (arts. 2.1.12–13 and 2.1.17–18), none of which is expressly covered by the CISG. Moreover, while the CISG only recognizes a role for good faith in international trade (art. 7, para. 1), the UPICC set forth a general and far-reaching duty of the parties to act in accordance with good faith and fair dealing throughout the life of the contract, including the negotiations (arts. 1.7, 1.8 and 2.1.15). The rules on contractual interpretation in chapter 4 of the UPICC are substantially more detailed and comprehensive than those on the same topic in article 8 of the CISG, with, among others, specific provisions on interpretation *contra proferentem*, the interpretation of multilingual texts and gap-filling (see paras. 133–137 above). The CISG does not contain specific rules on standard terms, whereas the UPICC contain a detailed set of provisions, most importantly on the incorporation of such terms and the “battle of the forms” (arts. 2.1.19–22) (see paras. 171–172 above). Further issues covered by the UPICC but not expressly covered by the CISG include exemption clauses (art. 7.1.6), interest rates (arts. 7.4.9–10) and agreed payment for non-performance (art. 7.4.13). In rare cases, the UPICC deliberately depart from the previous conventions. For example, their general limitation period of three years (art. 10.2) differs from the four-year period of article 8 of the Limitation Convention.<sup>86</sup>

396. Third, many of the provisions of the UPICC cover issues that are expressly excluded from the scope of application of the conventions, such as the substantive validity of contracts (chap. 3; see also art. 4 of the CISG and paras. 119–122 above), or issues that are obviously beyond their scope. The latter include the rules on the authority of agents (chap. 2, sect. 2), contracts in favour of third parties (chap. 5, sect. 2), set-off (chap. 8), assignment of rights, transfer of obligations and assignment of contracts (chap. 9) and the plurality of obligors and obligees (chap. 11).

397. Many, but not all, of these topics are dealt with because the UPICC are not restricted to sales contracts but apply to all types of international commercial contracts. Some of the provisions that have no equivalent in the conventions are specifically tailored to service contracts, not least long-term contracts and so-called “relational contracts”, whereas the CISG and the Limitation Convention tend to focus on individual, one-off transactions. These include the formation of contracts with terms deliberately left open (art. 2.1.14), the unwinding of failed contracts (arts. 3.2.15 and 7.3.7), the duty of cooperation (art. 5.1.3), the determination of the quality of

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<sup>86</sup> See chapter IV, section B, above for a comparison of provisions of the Limitation Convention and of the UPICC.

performance (art. 5.1.6), the unilateral cancellation of contracts for an indefinite period (art. 5.1.8) and hardship (arts. 6.2.1–3). In the 2016 edition of the UPICC, six existing articles and many of the existing comments were substantially amended to better address the special requirements of long-term contracts. Also in that edition, a specific definition was provided in article 1.11 of “long-term contract” as “a contract which is to be performed over a period of time and which normally involves, to a varying degree, complexity of the transaction and an ongoing relationship between the parties”.

### *Relationship with the HCCH Principles*

398. The HCCH Principles are particularly important for promoting the applicability, by agreement, of the UPICC. This is achieved by article 3 of the HCCH Principles, one of the most innovative rules in the Principles. As discussed in chapter III.B above, article 3 furthers party autonomy by expressly permitting the choice of non-State “rules of law” as the law governing the contract if such rules are “generally accepted on an international, supranational or regional level as a neutral and balanced set of rules”. In paragraph 3.6 of the commentary on the HCCH Principles, the UPICC are explicitly mentioned as a prime example of such a set of rules.

399. The HCCH Principles therefore offer a solution to the practice of many States that do not authorize their courts to give effect to the choice of the parties to make non-State law the law governing the contract (see paras. 59–61 above).

## **D. Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance**

400. International commercial contracts often include clauses providing that an agreed sum is to be paid upon failure to perform. The nature of such payment may be compensation (“liquidated damages clauses”) or may be a penalty (“penalty clauses”). Domestic laws vary on the treatment of such clauses, particularly as to their validity, the judge’s power to reduce the agreed sum and the possibility of claiming damages when the loss exceeds the agreed sum. The Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (1983), prepared by UNCITRAL, are a soft-law instrument that provides uniform rules on those issues. The instrument is contractual in nature and is applicable when the parties agree to incorporate it into their contract.

401. The Uniform Rules apply to international contracts containing contract clauses for an agreed sum due upon failure to perform (art. 1). For the purpose of the Uniform Rules, a contract is international if the parties have their places of

business in different States (art. 2, para. (a)). The definition of “international” is the same as in the CISG (arts. 2 and 3; see also arts. 1 and 10 of the CISG). The Uniform Rules do not apply to contracts concerning goods, other property or services which are to be supplied for the personal, family or household purposes of a party, unless the other party, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the contract was concluded for such purposes (art. 4).

402. The Uniform Rules do not make actual loss a requirement to claim the agreed sum, but provide that the obligee is entitled to the agreed sum irrespective of the actual loss. This rule is contained also in article 7.4.13, paragraph 1, of the UPICC, which indicates that “the aggrieved party is entitled to that sum irrespective of its actual harm”. On the other hand, under the Uniform Rules, the obligee is entitled to the agreed sum only if the obligor is liable for the failure of performance (art. 5). Thus, for example, if a party is exempt from liability according to articles 79 or 80 of the CISG, that party need not pay the agreed sum even if there was an agreement to pay an agreed sum in the case of failure to perform. The parties may derogate from or vary the effect of this rule (Uniform Rules, art. 9), subject to validity rules under the applicable domestic law.

### **1. Relationship with right to specific performance**

403. If the contract provides that the obligee is entitled to the agreed sum upon delay in performance, the obligee is also entitled to performance of the obligation in addition to the agreed sum (art. 6, para. 1). If the contract provides that the obligee is entitled to the agreed sum upon a failure of performance other than delay, the obligee is entitled either to performance (e.g., repair of non-conforming goods) or to the agreed sum. If, however, the agreed sum cannot reasonably be regarded as compensation for that failure of performance, the obligee is entitled to both performance of the obligation and the agreed sum (art. 6, para. 2). The parties may derogate from or vary the effect of this rule (art. 9).

### **2. Relationship with right to damages**

404. If the obligee is entitled to the agreed sum, no damages may be claimed to the extent of the loss covered by the agreed sum. Nevertheless, the obligee may claim damages to the extent of the loss not covered by the agreed sum if the loss substantially exceeds the agreed sum (art. 7). The parties may derogate from or vary the effect of this rule (art. 9).

### **3. Reduction of the agreed sum by the court or arbitral tribunal**

405. In principle, the court or arbitral tribunal does not have the power to reduce the agreed sum. However, the court or arbitral tribunal is granted the power to reduce the agreed sum if it is substantially disproportionate in relation to the loss that has been suffered by the obligee (art. 8). The UPICC adopt a similar rule (art. 7.4.13, para. 2). This is a mandatory rule and the parties may not derogate from it or vary its effect (Uniform Rules, art. 9).

## **E. Regional texts**

### **Organization for the Harmonization of Business Law in Africa Uniform Act on General Commercial Law**

406. Commercial sale within the framework of the Organization for the Harmonization of Business Law in Africa (OHADA) is provided for in articles 234–302 of the OHADA Uniform Act on General Commercial Law of 15 December 2010.

407. Based largely on the CISG, the Uniform Act's provisions on commercial sale state that they apply to contracts for the sale of goods and that, unless otherwise stipulated, a commercial sales contract is subject to the provisions of the Uniform Act when the contracting parties have their main place of business in one of the States parties to OHADA or when PIL rules result in the application of the law of a State party.

408. In addition to the substantive scope of application being the same for commercial sale under OHADA and the CISG (sale of goods), the two texts are also clearly and indisputably identical in respect of their rules on the formation of a contract, the obligations of the parties to a contract for the sale of goods, the effects of that contract and the rules governing non-performance of the contract and the determination of related liability.

409. When the parties to a contract have their main place of business in States parties to OHADA, the law applicable to the contract is the Uniform Act. When the States parties to OHADA are also parties to the CISG, the Uniform Act remains applicable in accordance with article 10 of the OHADA Treaty on the Harmonization of Business Law in Africa, pursuant to which uniform acts are directly applicable to and binding on the States parties. The Uniform Act on General Commercial Law would only not be applicable if the parties to the contract had agreed on different provisions.

## F. Model contracts based on uniform texts

### 1. ICC Model International Sales Contract and developing neutral legal standards for international contracts

410. The ICC produces a robust and wide-ranging series of international commercial model contracts and clauses that provide a sound legal basis upon which global traders can quickly establish an even-handed agreement acceptable to both sides in international transactions.

411. The foundational pillars of the ICC model contract series relate to global trade in goods, including models on agency, distributorship, franchising and confidentiality. All the ICC models are constructed to take balanced account of the interests of all the parties, combining a single framework of rules with flexible provisions allowing the parties to insert their own requirements.

412. The ICC model contracts usually contain provisions on the applicable law, and refer to international instruments as the default rule, leaving it to the parties to modify this choice if they so prefer. For example, the ICC Model International Sale Contract (Manufactured Goods), published for the first time in 1997 and reviewed and updated in 2020, contains a reference to the application of the CISG in its general conditions. Article 1.2, in particular, states that any questions which are not settled in the contract itself (including agreed general conditions) shall be governed by the CISG and, to the extent that such questions are not covered by the CISG and no applicable law has been agreed upon, by reference to the law of the seller's place of business. Parties wishing to choose a law other than that of the seller's place of business to govern questions not covered by the CISG are encouraged to do so in the first part of the Model Contract, where individual terms can be negotiated. It should also be highlighted that, in drafting the terms of the contract and general conditions themselves, the ICC used the CISG as the primary model for the default clauses.

413. Most of the other model contracts contain a reference to the application of general principles of commercial law and to the UPICC. For example, according to article 24.1 of the ICC Model Contract on Commercial Agency, any question not expressly or implicitly settled by contractual provisions shall be governed by the principles of law generally recognized in international trade as applicable to international agency contracts, by the relevant trade usages and by the UPICC, in that order.

414. The ICC has also developed stand-alone clauses to address specific issues, such as force majeure or hardship, which influenced the language used by the

UPICC provisions on regulating these issues (see art. 7.1.7, on force majeure, and arts. 6.2.1–6.2.3, on hardship). In turn, the UPICC have played a role in the most recent revision of such clauses, particularly the Hardship Clause.<sup>87</sup>

## 2. International Trade Centre guidance texts

415. The International Trade Centre has prepared a guide to preparing international commercial contracts,<sup>88</sup> as well as a compilation of model contracts.<sup>89</sup> Those texts provide practical guidance on the conclusion of international commercial contracts, focusing on the needs of small firms and making frequent reference to uniform texts such as the CISG and the UPICC.

## 3. International Bar Association drafting guide

416. Bearing in mind the various requirements of international contracts and cross-border transactions, and in particular the need to take into account several documents when drafting those contracts, the International Sales Committee of the International Bar Association produced *Cross-Border Transactions: A Drafting Guide for International Sales Contracts*. The goal of the Guide is to offer practitioners and entrepreneurs a user-friendly checklist of the main issues to be taken into account.

417. The Guide is divided into 10 chapters dealing with, among others, preparing for a visit to the foreign country, the substantive law on sales (particularly focused on the CISG), soft-law matters, currency and payment issues, export regulations, resale in the importing country, dispute resolution and tax treaties. It also provides a specimen form of distribution agreement. Each chapter contains short comments and a collection of websites to allow readers to further investigate the topics they are interested in. The Guide was last updated in 2015.

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<sup>87</sup> The 2020 ICC Force Majeure and Hardship Clauses are available on the ICC [website](#).

<sup>88</sup> International Trade Centre, “Cross-border contracting: how to draft and negotiate international commercial contracts” (Geneva, November 2018). Available on the dedicated [website](#).

<sup>89</sup> *Model Contracts for Small Firms: Legal Guidance for Doing International Business*, (United Nations publication, Sales No. E.10.III.T.1). Available on the International Trade Centre [website](#).

## V. Recurring legal issues arising in connection with sales contracts

### A. Use of electronic means

418. The use of electronic information in contractual transactions, including across borders, has become prevalent for a number of reasons, including speed of transmission, ability to access data remotely and anytime, and the possibility of reusing data. It has also raised several issues with respect to the legal status of electronic information.

419. UNCITRAL has prepared texts that address contractual matters related to the use of electronic information. Those texts include the UNCITRAL Model Law on Electronic Commerce (1996),<sup>90</sup> the UNCITRAL Model Law on Electronic Signatures (2001),<sup>91</sup> the Electronic Communications Convention (see paras. 425–430 below) and the UNCITRAL Model Law on Electronic Transferable Records (2017).<sup>92</sup> Guidance texts have also been prepared by UNCITRAL in the areas of cross-border recognition of electronic signatures<sup>93</sup> and contractual aspects of cloud computing contracts.<sup>94</sup>

420. UNCITRAL texts on electronic commerce are based on the three fundamental principles: (a) technology neutrality; (b) non-discrimination against the use of electronic information; and (c) functional equivalence.

421. The principle of technology neutrality requires that legislation not impose the use of or otherwise favour any specific technology, method or product. Under the principle of non-discrimination, a communication is not to be denied validity on the sole ground that it is in electronic form. Under the principle of functional equivalence, electronic communications may satisfy the purposes and functions of

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<sup>90</sup> United Nations publication, Sales No. E.99.V.4.

<sup>91</sup> *Ibid.*, Sales No. E.02.V.8.

<sup>92</sup> *Ibid.*, Sales No. E.17.V.5.

<sup>93</sup> *Promoting Confidence in Electronic Commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods* (United Nations publication, Sales No. E.09.V.4).

<sup>94</sup> *Notes on the Main Issues of Cloud Computing Contracts* (New York, United Nations, 2019). Available on the UNCITRAL [website](#).

paper-based documents, provided that certain criteria are met. UNCITRAL texts provide functional equivalence rules for the paper-based notions of writing, signature, original, retention and transferable document or instrument.

422. UNCITRAL texts also provide rules on various aspects of electronic contracting, as well as on the use of electronic signatures, which may perform functions additional to those fulfilled by paper-based signatures.

423. In particular, part one, chapter III, of the UNCITRAL Model Law on Electronic Commerce deals with aspects directly relevant for electronic contracting, such as: formation and validity of contracts (art. 11); recognition by parties (art. 12) and attribution of data messages (art. 13), including acknowledgment of their receipt (art. 14); and time and place of dispatch and receipt of data messages (art. 15). Since a very large number of jurisdictions have already adopted the UNCITRAL Model Law on Electronic Commerce, the uniform law of electronic contracting set forth in those provisions has already gained broad acceptance.

424. Additional areas relevant for the use of electronic information in contractual transactions include privacy and data protection law, consumer protection law (the rules of which may also apply under certain circumstances to non-consumers) and payments law.

### *Electronic Communications Convention and its relation to the CISG and the Limitation Convention*

425. The Electronic Communications Convention pursues several goals related to establishing legal certainty in the use of electronic communications across borders. One of those goals is legally enabling the use of electronic communications in treaties concluded before the widespread use of electronic means.

426. To that end, it is declared in article 20 of the Electronic Communications Convention that the provisions of that Convention will apply to electronic communications exchanged in connection with the formation or performance of a contract to which a number of treaties apply. Among the treaties listed in article 20 are the CISG and the Limitation Convention, as well as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).<sup>95</sup> As the list of treaties is not exhaustive, the Electronic Communications Convention may apply to any international agreement applicable to a contract concluded across borders.

427. One effect of the interaction between the Electronic Communications Convention on the one hand, and the CISG and the Limitation Convention on

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<sup>95</sup> United Nations, *Treaty Series*, vol. 330, No. 4739.



the other, is the extension to the latter treaties of the principles of technology neutrality, non-discrimination against the use of electronic information and functional equivalence that underlie UNCITRAL texts on electronic commerce.

428. For instance, article 9 of the Electronic Communications Convention establishes the requirements for the functional equivalence between written and electronic form. Electronic communications compliant with those requirements will also satisfy written form requirements under the CISG when both the Electronic Communications Convention and the CISG apply.

429. Article 6 of the Electronic Communications Convention provides guidance on the determination of the place of business when electronic means are used. The notion of place of business is relevant to determine the applicability of the CISG and of the Limitation Convention.

430. The Electronic Communications Convention also contains provisions relevant for electronic contracting, namely on: (a) time and place of dispatch and receipt (art. 10, updating art. 15 of the UNCITRAL Model Law on Electronic Commerce); invitations to make offers (art. 11, complementing art. 14, para. 2, of the CISG); use of automated message systems (art. 12); and input errors made by natural persons (art. 14).

## B. Distribution contracts

431. Distribution contracts might respond to different kinds of modalities in business practice. Basically, under a distribution contract, the supplier agrees to supply the distributor with goods on a continuing basis and the distributor agrees to purchase them and to resell them to others in the distributor's name and on the distributor's behalf. No uniform definition of a distribution contract and no uniform characterization exist, either nationally or internationally; domestically, therefore, such a contract can be considered as a modality or subtype of a sale of goods contract or an autonomous contract itself. Under a distribution contract, the parties foresee a long-term relationship that is often cooperative (see paragraphs 397 above and 433 below for the definition of "long-term contracts" under the UPICC).

432. In some distribution contracts, apart from the obligation to distribute the goods, certain other obligations are agreed between the parties, such as obligations of marketing, distribution and development of advertising or marketing of the goods, non-competition clauses, technical assistance, industrial or intellectual rights or the obligation to follow certain instructions from the supplier and, finally, exclusivity obligations (exclusivity to sell or to buy within a certain territory or to a certain group of distributors or customers). The obligation of exclusivity can take

the form of an obligation to buy the goods only from the supplier, an obligation to sell exclusively to certain distributors that meet certain requirements, or an obligation to supply to only one distributor in a territory or to supply to a certain group of customers.

433. At the international level, there is no dedicated uniform instrument dealing with distribution contracts. At a more general level, the UPICC cover them as long-term contracts, whose definition refers to “a contract which is to be performed over a period of time and which normally involves, to a varying degree, complexity of the transaction and an ongoing relationship between the parties” (art. 1.11).<sup>96</sup> The UPICC juxtapose long-term contracts with simpler transactions such as sales contracts to be performed once (see also para. 397 above).

434. Most courts have concluded that the CISG does not apply to distribution contracts (the so-called “framework agreement”), as these contracts are focused on the “organization of the distribution” rather than the trade in goods. However, the CISG may apply to sale of goods contracts concluded on the basis of the distribution contract if all the conditions for the applicability (internationality, sale of goods, etc.) of the CISG are met.

435. Furthermore, although this interpretation is not settled, the CISG has been applied to the framework agreement in situations in which the framework agreement takes the form of a supply of goods agreement and contains the goods, quantity and price, or the basis for the future determination of the quantity and price (arts. 8, 9, 14, para. 1, and 55). If this is the case, the contractual obligations derived from the framework agreement could be analysed under CISG rules, including the exclusivity obligations without prejudice to other rules, such as competition obligations, being observed under the otherwise domestic applicable law, since competition issues are not covered by the CISG.

436. In the absence of a uniform international treaty in this area, the parties might exclude the uncertainties derived from the application of the CISG to international distribution contracts by opting into the CISG alone or in conjunction with the UPICC as the law or rules of law applicable to the contract (“opting in”).

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<sup>96</sup> Comment 3 to art. 1.11 UPICC and several illustrations contained in the UPICC refer to distribution contracts.

## C. Agency

437. Agency contracts might be defined as those contracts between principal and agent whereby the agent has authority or purports to have authority on behalf of another person, the principal, to conclude a contract of sale of goods with a third party (see article 1, paragraph 1, on the sphere of application, of the Convention on Agency in the International Sale of Goods,<sup>97</sup> the HCCH 1978 Agency Convention (see paras. 52–54 above) and article 2.2.1, paragraph 1, of the UPICC).<sup>98</sup> In this regard, acting either in the name of the agent or in that of the principal is possible.

438. Generally, the agent may act in relation not only to the conclusion of the international sale of goods contract but also to the performance of that contract. Hence, certain provisions of the CISG may apply to the agent.

439. During the formation of the contract, the agent might be the one dealing with the offer or, alternatively, an invitation to make an offer (CISG, art. 14, para. 1). In the latter situation, this is the case if the agent does not have the authority to conclude the contract on behalf of the principal since the proposal cannot certainly contain an intention to be bound in the case of acceptance and so the agent will send the invitation to make an offer with a wording indicating no such intention, for example, “without my consent” or “save acceptance by the principal”.

440. During the performance of the contract, among other instances, the agent might be the person who receives from the buyer the notice about the lack of conformity of the goods under article 39, paragraph 1, of the CISG. In those circumstances, the problems related to the scope of authority of the agent should be resolved in accordance with the otherwise applicable domestic law or rules of law chosen by the parties.

441. Furthermore, in relation to the field of application of the CISG, particular challenges might arise in determining the application of the CISG (arts. 1 and 10), in particular, in the case of undisclosed agency. Generally, the place of business of the agent will not have the closest relationship to the contract and its performance, but that would be the case in terms of the place of business of the principal.

442. The UPICC contain a fully fledged set of rules on agency in its chapter 2, referring to the formation of the contract and covering the authority of the agent to affect the legal relations of the principal by or with respect to a contract with a

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<sup>97</sup>The Convention, which has not yet entered into force, is aimed at supplementing the aspects of the agency relationship in an international sale of goods transaction between principal and agent that are not covered by the CISG.

<sup>98</sup>In fact, the UPICC intervened in this area for general contract law and replaced those rules with a more coherent and complete set of rules, although of course non-binding.

third party, whether the agent acts in the name of the agent or in that of the principal. The chapter governs only the relations between the principal or the agent on the one hand, and the third party on the other, and it is not concerned with the internal relations between the principal and the agent, which are governed by the contract and the otherwise applicable law. It deals with the scope of the agency (art. 2.2.2, following the general rule that the granting of authority to the agent by the principal is not subject to any particular requirement of form and the rule that the scope of the authority is to perform all acts necessary to achieve the purposes for which the authority was granted), the difference between “disclosed” and “undisclosed” agency (arts. 2.2.3–4), the situation in which the agent acts with no authority or exceeds the authority, including the possible ratification by the principal (arts. 2.2.5–6 and 2.2.9), conflict of interests as a ground for avoidance of the contract (art. 2.2.7), appointment of a subagent, which is considered to be within the implied authority of the agent (art. 2.2.8), and termination of the authority (art. 2.2.10). The UPICC, in contrast to a number of legal systems, do not distinguish between “direct” and “indirect” representation; they do not refer to situations in which the agent’s authority is conferred by law or is derived from judicial authorization; and they do not prevail over special rules governing agents of companies under mandatory applicable laws in the case of conflict between those rules and the UPICC rules (see also paras. 341 and 390 above).

#### **D. Software, data and intellectual property issues**

443. Transactions in digital information, particularly when the information is detached from the tangible medium on which the information is stored, are a fairly new phenomenon, and the legal framework is still an unsettled matter. Such transactions began with the emergence of computer software as an independent subject matter of trade, and quickly grew to include digital content such as music, e-books and applications. There are different approaches among jurisdictions regarding the characterization of such transactions for the purposes of determining which legal regime is applicable. Some jurisdictions apply the law applicable to the sale of goods, either by direct application of governing statutes or by analogy. Others treat transactions in digital information as ordinary contracts not governed by special regimes for the sale of goods or as licence contracts, and some are developing a *sui generis* contract law applicable to transactions of digital content.<sup>99</sup>

444. Against this background, the question of whether transactions in digital information (software, computer programs, applications, music, e-books, smart goods, etc.) are within the scope of the CISG poses a challenge to the interpretation of the

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<sup>99</sup> See, for example, directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

CISG. This issue was not foreseen when the CISG was adopted in 1980. Different views are expressed. The issue involves both the definition of “goods” (e.g., the question of whether goods must be tangible) and the nature of the transaction (e.g., sale, licence of property or access to data not protected by a property regime). Due consideration must also be given to the desirability of achieving uniformity of law by a broad application of the CISG on the one hand, and the desirability of developing a suitable rule tailored to changing modern information technology on the other.

445. One issue that is generally agreed, however, is that transactions in digital information should be distinguished from transactions in the underlying intellectual property (e.g., copyrights and patents) if the information is protected by such a regime. The party supplying the digital information, whether it is the holder of the intellectual property of that information, a person granted a licence to supply the digital information to a third person, or a person with control over access to data that are not protected by intellectual property rules, is merely granting the other party a right to use the digital information within the confines of their contract and the applicable intellectual property law. The intellectual property may or may not be retained by the holder.

446. Intellectual property is, to a large extent, harmonized through international conventions such as the Berne Convention for the Protection of Literary and Artistic Works (1886),<sup>100</sup> the Paris Convention for the Protection of Industrial Property (1883)<sup>101</sup> and the Agreement on Trade-Related Aspects of Intellectual Property Rights (1994).<sup>102</sup> However, owing to the principle of territoriality, it is the law of the territory in which intellectual property is protected that determines the extent of protection of intellectual property. In international trade, this causes the problem that rights in intellectual property are determined independently from jurisdiction to jurisdiction. In the light of this problem, article 42 of the CISG provides a uniform rule regarding which law is relevant in determining whether the goods infringe the intellectual property of a third person, for the purpose of determining whether the seller has fulfilled the obligation to deliver goods free from any right or claim by a third party based on intellectual property.

447. It should be noted as well that the American Law Institute and the European Law Institute have embarked on a joint project aimed at establishing principles to govern the emerging data economy, in particular, transactions in electronic data. If that endeavour succeeds, and the resulting soft-law document proves influential, the result may be greater harmonization in the area and the possibility of future work by international organizations.

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<sup>100</sup> United Nations, *Treaty Series*, vol. 828, No. 11850.

<sup>101</sup> *Ibid.*, vol. 828, No. 11851.

<sup>102</sup> *Ibid.*, vol. 1869, No. 31874.

## E. Countertrade and barter

448. In contracts for the sale of goods, including those falling under the scope of the CISG, the property over goods is transferred against the payment of a price in a currency. However, it may be also transferred, in full or in part, against transfer of property over other goods. That contract is commonly referred to as “barter”.

449. In 1992, UNCITRAL adopted the *Legal Guide on International Countertrade Transactions*,<sup>103</sup> which provides guidance on contractual solutions to different types of countertrade transactions, defined as “transactions in which one party supplies goods, services, technology or other economic value to the second party, and, in return, the first party purchases from the second party an agreed amount of goods, services, technology or other economic value”. The link between transactions must be explicit. Under that Guide, countertrade transactions include barter, counter-purchase, buy-back and offset.<sup>104</sup>

450. Provided that they are of an international character and between commercial parties, barter and other countertrade transactions are clearly within the scope of application of the UPICC (see para. 354 above), which is broader than that of the CISG.

451. Different views exist on the applicability of the provisions of the CISG to barter contracts. Elements such as the definition of the notion of price in the CISG may influence those views. In general, the provisions of the CISG have often been applied to barter contracts to the extent that the relevant issue is common to both sale of goods and barter contracts, but have not been applied when the relevant issue has a different legal treatment in sale of goods and barter contracts.

452. As far as uniform instruments of PIL are concerned, there seems to be consensus that instruments governing the law applicable to international sale of goods do not apply to contracts that involve the transfer of goods in exchange for something other than money. Instruments governing contracts more generally – such as the Rome I Regulation – do apply to barter, etc., but only as far as their general rules are concerned; the specific rules for contracts of sale, on the other hand, do not apply.

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<sup>103</sup> United Nations publication, Sales No. E.93.V.7.

<sup>104</sup> With regard to offsets, namely, contracts between a private and a public entity concluded as a condition for the sale of goods or services in the public procurement market, see also the ICC- European Club for Countertrade and Offset “Guide to international offset contracts” (Paris, 2019), available on the ICC [website](#), which makes reference to the UNCITRAL Model Law on Public Procurement (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 192 and annex I), as well as to European law.

## Annex

# Sources of information on uniform legal instruments in the area of international commercial contracts

The present annex provides information on case law repositories, bibliographies and other sources relating to uniform legal instruments in the area of international commercial contracts. The online resources are available at no cost.

### A. Resources provided by the HCCH, UNCITRAL and UNIDROIT

#### 1. Hague Conference on Private International Law

The text of and commentary on the Hague Conference on Private International Law (HCCH) Principles on Choice of Law in International Commercial Contracts (HCCH Principles), as well as legislation implementing the HCCH Principles and the *travaux préparatoires*, are available on the dedicated [page](#) of the HCCH website. In addition to English and French, which are the two official languages of the HCCH, the information on the HCCH Principles is available in Korean, Portuguese and Spanish. The articles of the HCCH Principles have been translated into Arabic, Bangla, Chinese, Farsi, Greek, Indonesian, Mongolian, Polish, Portuguese (Brazil), Romanian, Russian, Serbian, Ukrainian and Vietnamese.

The text of and explanatory report on the Convention on the Law Applicable to International Sales of Goods are available on the dedicated [page](#) of the HCCH website. Together with the *travaux préparatoires*, they are also included in the [proceedings of the seventh session](#) of the HCCH. In addition to the English and French versions, the text of the Convention is available in Chinese, Dutch, Norwegian and Russian.

The text of and explanatory report on the Convention on the Law Applicable to Agency are available on the dedicated [page](#) of the HCCH website. They, together with the *travaux préparatoires*, are also included in the [proceedings of the thirteenth](#)

**session.** In addition to the English and French versions, the two official languages of the HCCH, the text is also available in Chinese, Dutch and Polish.

The text of and explanatory report on the Convention on the Law Applicable to Contracts for the International Sale of Goods are available on the dedicated [page](#) of the HCCH website. Together with the *travaux préparatoires*, they are also included in the [proceedings of the extraordinary session of October 1985](#). In addition to the English and French versions, the text is available in Arabic, Chinese and Dutch.

The text of, explanatory report on and *travaux préparatoires* of the Convention on Choice of Court Agreements of 30 June 2005 are available in the “[Choice of Court section](#)” of the HCCH website. They are also included in the [proceedings of the twentieth session](#). In addition to the English and French versions, the text and explanatory report are available in Bulgarian, Croatian, Czech, Danish, Dutch, Estonian, Finnish, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish and Swedish.

The text of, explanatory report on and *travaux préparatoires* of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters of 2 July 2019 are available on the dedicated [page](#) of the HCCH website. They will be included in the proceedings of the twenty-second session.

## 2. UNCITRAL and other United Nations entities

Texts, explanatory notes and other materials relating to UNCITRAL texts are available on the UNCITRAL website in the six official languages of the United Nations.

The *travaux préparatoires* are available as Commission and working group documents. The [official records of the United Nations Conference on Prescription \(Limitation\) in the International Sale of Goods](#), held in New York from 20 May to 14 June 1974 (document A/CONF.63/16), and the official records of the United Nations Conference on Contracts for the International Sale of Goods, held in Vienna from 10 March to 11 April 1980 (document A/CONF.97/19), are also available.

The [commentary on the Convention on the Limitation Period in the International Sale of Goods](#) (document A/CONF.63/17) is available on the UNCITRAL website. While no official commentary on the United Nations Convention on Contracts for the International Sale of Goods (CISG) exists, the [report of the Secretary-General containing a commentary on the draft Convention on the Formation of Contracts for the International Sale of Goods](#) (document A/CN.9/144) provides useful information.



The UNCITRAL secretariat has established a system for collecting and disseminating information on court decisions and arbitral awards relating to UNCITRAL texts that is named “Case Law on UNCITRAL Texts” (CLOUT). The purpose of the system is to promote awareness, uniform interpretation and application of those texts. The CLOUT system is available on the [UNCITRAL website](#) in the six official languages of the United Nations.

The CLOUT system includes a database of abstracts of court decisions and arbitral awards applying the CISG, the Limitation Convention, the United Nations Convention on the Use of Electronic Communications in International Contracts and other UNCITRAL texts.

The UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods presents, in a clear, concise and objective manner, the main trends in the interpretation and application of the CISG. The Digest is updated regularly and is available on the [UNCITRAL website](#).

The United Nations Audiovisual Library of International Law contains lectures on the CISG (“[The United Nations Convention on Contracts for the International Sale of Goods \(part I\): purposes, background, history, nature, scope and application](#)”; and “[Part II: issues covered and key substantive provisions](#)”, by Harry M. Flechtner) and on UNCITRAL texts on electronic commerce (“[Legal aspects of electronic commerce in international trade \(part I\): electronic contracting: economic context and private law](#)”, and “[Part II: electronic authentication and signature methods: legal issues and public policy](#)”, by José Angelo Estrella-Faria).

The [United Nations Treaty Collection](#) offers authoritative information on the status of the treaties deposited with the Secretary-General, including historical status information.

### 3. UNIDROIT

The text of the UNIDROIT Principles of International Commercial Contracts (UPICC) 2016, containing black-letter rules and comments, is available in [English](#) and [French](#) on the UNIDROIT website. Numerous other language versions of the black-letter rules are available on the dedicated [page](#) of the UNIDROIT website. Earlier editions of the UPICC (1994, 2004 and 2010) are also available on the [UNIDROIT website](#), under “Instruments” and “Commercial contracts”. The *travaux préparatoires* (dating back to 1970) are also available on the UNIDROIT website. The Model Clauses for the Use of the UPICC are available in English, French and Spanish on the dedicated [page](#) of the UNIDROIT website.

The [UNILEX](#) database contains case law and a bibliography on the UPICC. UNILEX collects arbitral awards and the decisions of national courts, providing abstracts and keywords in English, as well as the original text, when available. It permits searches not only by date, court or arbitral tribunal, and articles of the UPICC, but also by “issues” listed under each article in a systematic order; since 2019 it has allowed users to search cases by type of contract, nationality of the parties, and international or domestic law.

UNIDROIT publishes the *Uniform Law Review* (an Oxford University Press publication since 2013), which contains the proceedings of various conferences on the UPICC organized by UNIDROIT, including “20 Years of UNIDROIT Principles of International Commercial Contracts: experiences and prospects” (*Uniform Law Review*, vol. 19, No. 4 (December 2014)); and *Uniform Law Review*, vol. 22, No. 1 (March 2017), on the theme “United Nations Convention on Contracts for the International Sale of Goods (CISG), UNIDROIT Principles of International Commercial Contracts: contrast and convergence”. UNIDROIT also published *Eppur Si Muove: The Age of Uniform Law – Essays in Honour of Michael Joachim Bonell to Celebrate his 70th Birthday* (Rome, UNIDROIT, 2016), which contains a section on the UPICC (pp. 1197–1713).

The texts of the [1964 Convention relating to a Uniform Law on the International Sale of Goods](#) and the [1964 Convention relating to a Uniform Law on the Formation of International Contracts of Sale of Goods](#) are available on the UNIDROIT website in English and French, as is the [Commentary](#) by André Tunc.

All other UNIDROIT instruments are accessible on the UNIDROIT website in English and French as well as in other languages depending on the instrument. In particular, the [Legal Guide on Contract Farming](#) by UNIDROIT, the Food and Agriculture Organization of the United Nations and the International Fund for Agricultural Development is available in English, French, Spanish, Chinese and Portuguese. The [Guide to International Master Franchise Arrangements](#) is available in English and French.

## B. Other resources

Many materials are available on uniform international commercial contract law. The information provided here is aimed at offering orientation to those materials and is not intended to be exhaustive.

### 1. Determination of the law applicable to international commercial contracts

The HCCH secretariat (Permanent Bureau) maintains, on the HCCH website, a [bibliography](#) of materials on the HCCH instruments on the law applicable to international commercial contracts.

A helpful resource in understanding the history and the contents of the HCCH Principles is *Choice of Law in International Commercial Contracts: Global Perspectives on the Hague Principles*, Daniel Girsberger, Thomas Kadner Graziano and Jan L. Neels, eds. (Oxford, Oxford University Press, 2021).

### 2. Substantive law of international sales

The UNCITRAL secretariat maintains a bibliography of UNCITRAL texts on the international sale of goods and on electronic commerce both as a [yearly document](#) and in a [consolidated form](#). The materials listed in the bibliography are also available in the [online catalogue of the UNCITRAL Law Library](#).

Commentaries on the CISG and related texts may provide significant assistance in research. The *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Ingeborg Schwenzer, ed.) and the *Uniform Law for International Sales under the 1980 United Nations Convention* (Harry Flechtner, ed.) are regularly updated. Other commentaries, such as *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (C. M. Bianca and Michael Joachim (Milan, Giuffrè, 1987)) and *Commentary on International Sales Law* (Fritz Enderlein and Dietrich Maskow (Bristol, United Kingdom of Great Britain and Northern Ireland, Oceana Publications, 1992)), contain useful historical information.

The [CISG-Online Database](#) at the University of Basel and the [Pace Law Albert H. Kritzer CISG Database](#) contain a very large number of cases and other materials on the CISG and related texts. Some cases are available in full and in the original language as well as in the English translation.

The CISG Advisory Council is a private academic organization that aims to promote the uniform interpretation of the CISG in the light of its international character. It has prepared several opinions discussing topical CISG issues. The opinions are available at no cost on the [Council's website](#) in several languages.

### 3. UNIDROIT Principles on International Commercial Contracts

Among the wealth of publications on the UPICC (and in addition to the resources cited above), the *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd ed., Stefan Vogenauer, ed. (Oxford, Oxford University Press, 2015)) contains an article-by-article in-depth analysis. An overview of the origin and purposes of the Principles can be found in *An International Restatement of Contract Law* (3rd ed., Michael Joachim Bonell (New York, Transnational Publishers, 2005)). The same author published a recent review of the practical application of the UPICC (“The law governing international commercial contracts and the actual role of the UNIDROIT Principles”, *Uniform Law Review*, vol. 23, No. 1 (March 2018)). The International Bar Association published the [results](#) of its research on the role of the UPICC in 2019 (*Perspectives in Practice of the UNIDROIT Principles 2016: Views of the IBA Working Group on the practice of the UNIDROIT Principles 2016* (London, 2019)). The International Academy of Comparative Law has repeatedly chosen the UPICC as a topic. See, for example, the publication of the general and national reports presented at its twentieth congress, held in Fukuoka, Japan, from 22 to 28 July 2018 (Alejandro M. Garro and José Antonio Moreno Rodríguez, eds., *Use of the UNIDROIT Principles to Interpret and Supplement Domestic Contract Law* (Heidelberg, Springer, 2021)).

The text of the Principles of Reinsurance Contract Law, as well as further materials, can be found on the [website](#) of the Principles of Reinsurance Contract Law Working Group.

#### 4. Websites cited in the present Guide

The following websites are cited in the present Guide:

- CISG Advisory Council: [www.cisgac.com](http://www.cisgac.com)
- Hague Conference on Private International Law: [www.hcch.net](http://www.hcch.net)
- International Chamber of Commerce: [www.iccwbo.org](http://www.iccwbo.org)
- International Trade Centre: [www.intracen.org](http://www.intracen.org)
- International Trade Centre, “Cross-border contracting: How to draft and negotiate international commercial contracts”: [www.precontractual.com](http://www.precontractual.com)
- Organization of American States: [www.oas.org](http://www.oas.org)
- Principles of Reinsurance Contract Law Working Group: [www.ius.uzh.ch/de/research/projects/pricl.html](http://www.ius.uzh.ch/de/research/projects/pricl.html)
- United Nations Audiovisual Library of International Law: <https://legal.un.org/avl>
- United Nations Treaty Collection: <https://treaties.un.org>
- UNCITRAL: <https://uncitral.un.org>
- UNIDROIT: [www.unidroit.org](http://www.unidroit.org)
- UNILEX: [www.unilex.info](http://www.unilex.info)





