

Council on General Affairs and Policy – March 2020

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Annexes	Consolidated draft of the Legal Guide to Uniform Legal Instruments in the area of international commercial contracts (with a focus on sales)	
Related documents	“Joint Proposal on Co-operation in the Area of International Commercial Contract Law (with a focus on sales)”, Prel. Doc. No 6 of February 2016 for the attention of the 2016 CGAP “The development of a Guide to uniform legal instruments in the area of international commercial contracts (with a focus on sales)”, Prel. Doc. No 6 of December 2017 for the attention of the 2018 CGAP	

I. Introduction

1. At its March 2019 meeting, the Council on General Affairs and Policy (hereinafter, “CGAP”) mandated the Permanent Bureau (hereinafter, “PB”) of the Hague Conference on Private International Law (hereinafter, “HCCH”) to submit to CGAP a consolidated draft Legal Guide to Uniform Legal Instruments in the area of international commercial contracts (hereinafter, “Guide”), which is a joint project of UNCITRAL, UNIDROIT and the HCCH (hereinafter, “Project”), for consideration at its meeting in 2020, having taken into account the complexities inherent in the nature of multi-partite approval processes for joint projects.

2. In line with this mandate, the PB worked together with the Secretariats of UNCITRAL and UNIDROIT and the designated experts to further advance the Project. The purpose of this document is to inform CGAP of progress made so far, and to invite CGAP to consider the parts in the draft Guide related to private international law and HCCH instruments (*i.e.*, the first three chapters). The Guide will then be considered by UNIDROIT and UNCITRAL.

II. Background of the Project and progress made

3. In 2015, the Secretariat of UNCITRAL discussed with the Secretariats of both UNIDROIT and the HCCH the possibility of co-operating in preparing a guide in the area of international commercial contracts law (with a focus on sales), with a view to promoting the adoption, application and uniform interpretation of the instruments developed by each organisation in the area of international commercial contracts law. The Guide is intended to map out the instruments developed by each organisation, to further provide a comparative understanding of the coverage and basic themes of each instrument, and to clarify the relationship among them. As such, it would benefit various stakeholders engaged in cross-border commercial transactions. The Project is a continuation of the long-lasting cooperation between the three Secretariats in fields of common interest.

4. The Guide deals with both instruments on substantive law of sales and those on private international law. In this respect, the HCCH 2015 *Principles on Choice of Law in International Commercial Contracts* are addressed. Substantive law of sales includes the *United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)* (CISG), the *United Nations Convention on the Limitation Period in the International Sale of Goods (New York, 1974, amended 1980)* and the *UNIDROIT Principles of International Commercial Contracts*. The Guide makes reference to uniform texts prepared by other international governmental and non-governmental organisations with a global or regional scope to the extent that those texts assist in clarifying the operation of the HCCH, UNIDROIT and UNCITRAL instruments. The Guide is designed to be a living document and will be kept under review by the three Secretariats with a view to its periodic revision.

5. The Guide has been compiled by the three Secretariats, with input from a group of five experts, representing different legal traditions – Professor Neil Cohen (USA), Professor Lauro da Gama e Souza Jr (Brazil), Professor Hiroo Sono (Japan), Professor Pilar Perales Viscasillas (Spain) and Professor Stefan Vogenauer (Germany). The Secretariats have also engaged with other international organisations specialised in international business transactions for input. For example, the Project was presented at the IBA Annual Conference in October 2018 for views and comments from IBA members.

6. Following CGAP's mandate to allocate minimal resources to the Project,¹ the Project has been carried out on an offline and remote basis. The Max Planck Institute for European Legal History, directed by Professor Stefan Vogenauer, has generously supported two face-to-face meetings, in October 2017 and September 2019, which enabled the experts and representatives from the three Secretariats to kick off and to further advance the Project, respectively.

7. As mandated by CGAP at its meeting in 2019, the PB circulated the Guide to Members on 22 October 2019 inviting them to comment on the private international law-related sections. The comments received are available on the HCCH Secure Portal, and have been subsequently addressed and incorporated in a further revised Guide (see Annex).

III. Next steps

8. Pursuant to the 2019 mandate of CGAP and with a view to streamlining the approval process, the PB invites CGAP to consider the Guide, particularly the first three chapters. Following such consideration, the Guide will be further considered by UNIDROIT and UNCITRAL for their respective consultation and approval procedures.

9. As part of the tripartite approval process, the Guide will be considered by the Governing Council of UNIDROIT in May 2020 and at the 53rd Session of UNCITRAL in July 2020, during which individual external experts, stakeholders and respective Members will have the opportunity to further comment on the Guide until its finalisation.

¹ See "Conclusions and Recommendations of the Council on General Affairs and Policy (14-16 March 2017)", C&R No 17, and "Conclusions and Recommendations of the Council on General Affairs and Policy (15-17 March 2016)", C&R No 23, available on the HCCH website at < www.hcch.net >, under "Governance" then "Council on General Affairs and Policy".

ANNEX

**Legal Guide to Uniform Legal Instruments in the Area of International
Commercial Contracts (with a focus on sales)
Consolidated draft**

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1. Introduction

a. Origin and purpose of the Guide

1. For several decades, the Hague Conference on Private International Law (“HCCH”), the International Institute for the Unification of Private Law (“UNIDROIT”) and the United Nations Commission on International Trade Law (“UNCITRAL”) have been preparing uniform law texts that promote the progressive harmonisation and modernisation of commercial contract law. Other international governmental and non-governmental organisations have also made significant contributions at the global and regional levels.
2. Over time, the HCCH, UNIDROIT and UNCITRAL have produced a series of texts that are complementary: the United Nations Convention on Contracts for the International Sale of Goods (“CISG”),¹ the UNIDROIT Principles of International Commercial Contracts (“UPICC”)² and the HCCH Principles on Choice of Law in International Commercial Contracts (“HCCH Principles”).³ Additionally, UNCITRAL has prepared treaties that are closely related to the CISG, and complement its regulation as to specific matters, such as the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (“Electronic Communications Convention”)⁴ and the Convention on the Limitation Period in the International Sale of Goods, 1974, amended in 1980 (“Limitation Convention”).⁵ Similarly, the HCCH has historically adopted a number of treaties that deal with choice of law rules in international sales: the HCCH Convention of 15 June 1955 on the law applicable to international sales of goods (1955 HCCH Sales of Goods Convention),⁶ the HCCH Convention of 14 March 1978 on the Law Applicable to Agency (“1978 HCCH Agency Convention”),⁷ and the HCCH Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods (“1986 HCCH Sales Convention”).⁸ In relation to sales, UNIDROIT has also historically adopted the Convention on agency on the international sale of goods (“1983 Geneva Agency Convention”) regulating substantive aspects of agency.⁹
3. These drafting efforts have often been carried out in coordination with the other organisations. 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

¹ United Nations, *Treaty Series*, Vol. 1489, No 25567, p. 3.

² In their most recent version: the UNIDROIT Principles of International Commercial Contracts 2016, available from www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016.

³ The Convention is available from: www.hcch.net/en/instruments/conventions/full-text/?cid=135.

⁴ United Nations, *Treaty Series*, Vol. 2898, No 50525, p. 3.

⁵ Convention on the Limitation Period in the International Sale of Goods (New York, 1974), United Nations, *Treaty Series*, Vol. 1511, No 26119, p. 3; as amended by the Protocol of 11 April 1980 (Vienna), United Nations, *Treaty Series*, Vol. 1511, No 26121, p. 99.

⁶ The Convention is available from: www.hcch.net/en/instruments/conventions/full-text/?cid=31.

⁷ The Convention is available from: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=89>.

⁸ The Convention is available from: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=61> (not in force).

⁹ The Convention is available from: <https://www.unidroit.org/instruments/agency>. It has five State parties but it is not in force. The UPICC now contain a detailed section on Agency in Chapter 2: Section 2 “Formation and Authority of Agents”, on which see *infra*, para. 368 and Chapter 5.d.

UNIDROIT.¹⁰ In turn, the CISG has 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 organisations have developed a range of tools to that end, such as the Case Law on UNCITRAL Texts (CLOUT) information system, the database UNILEX which collects, among others, international case law on the UPICC (www.unilex.info), and the Model Clauses for the use of the UNIDROIT Principles of International Commercial Contracts.¹¹
5. Uniform international trade law aims at achieving a harmonised and global set of rules which are international in their origin, formulation and in their 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 light of the manifold advantages of uniform law in this sector, the above-mentioned uniform texts were developed to introduce balanced rules suitable to 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 those 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.
6. This Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts (with a focus on sales) (the “Guide”) aims to clarify the relationship among these 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, this Guide provides orientation to the reader on a range of legal issues relating to international commercial contract law, from choice of law to a description of 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.

¹⁰ See, *inter alia*, as to UNIDROIT instruments: Convention Relating to a Uniform Law on the International Sale of Goods (The Hague, 1964), available from www.unidroit.org/instruments/international-sales/international-sales-ulis-1964; Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (The Hague, 1964), available from www.unidroit.org/instruments/international-sales/international-sales-ulfc-1964-en; or the 1955 HCCH Sales of Goods Convention.

¹¹ <https://www.unidroit.org/english/principles/modelclauses2013/modelclauses-2013.pdf>. For the French version see <https://www.unidroit.org/french/principles/modelclauses2013/clausestypes2013.pdf>; for the Spanish version see <https://www.unidroit.org/other-languages-e/spanish>.

8. The Guide has been prepared on the basis of a joint proposal,¹² which resulted from a series of events organised by the UNCITRAL Secretariat to celebrate the 35th anniversary of the CISG,¹³ and was approved by the governing bodies of the HCCH, UNIDROIT and UNCITRAL.¹⁴ It has been compiled by the respective Secretariats with input from a group of five experts, representing different legal traditions and geographical backgrounds – Neil Cohen (USA), Lauro da Gama e Souza Jr (Brazil), Hiroo Sono (Japan), Pilar Perales Viscasillas (Spain) 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, UNIDROIT and UNCITRAL. It refers to legislative texts such as treaties and model 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 organisations with a global or regional scope to the extent that those texts assist in clarifying the operation of the HCCH, UNIDROIT and UNCITRAL texts. Reference is also made to guidance documents that may offer useful additional information to the reader. The Guide does not aim to provide 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.¹⁵

¹² A/CN.9/892 – *Joint proposal on cooperation in the area of international commercial contract law (with a focus on sales)*.

¹³ A/CN.9/849 – *Note by the Secretariat. Current trends in the field of international sale of goods law*, paras. 46-47.

¹⁴ See A/71/17, *Report of the United Nations Commission on International Trade Law – Forty-ninth session*, para. 281; Conclusions and recommendations adopted by the HCCH Council on General Affairs and Policy of March 2016, para. 23, available from www.hcch.net/en/governance/council-on-general-affairs; Unidroit Governing Council, Summary of the Conclusions, 95th Session, Rome, 18-20 May 2016, C.D. (95) Misc. 2, para. 18, available from www.unidroit.org/english/governments/councildocuments/2016session/cd-95-misc02-e.pdf.

¹⁵ A recent example is the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming, a guidance instrument on agricultural production under contract adopted in 2015. The text of the Legal Guide is available at: <https://www.unidroit.org/english/guides/2015contractfarming/cf-guide-2015-e.pdf>.

13. The Guide first discusses private international law (PIL)¹⁶ 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 law applicable and the consequences of not making such a choice. The Guide then provides an overview of the content of the CISG and the Limitation Convention, before turning to the nature, use and content of the UPICC, highlighting similarities and differences between the CISG and other uniform texts with which the UPICC may interact. Finally, the Guide refers to a number of recurrent legal issues related to sales contracts.

2. Why read this 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 legal uniform regime for international¹⁷ 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 or harmonisation of the laws of different States and because they can simplify, clarify, and modernise 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 this 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, UNIDROIT and UNCITRAL. Emphasis is placed on the complementary nature of these instruments when more than one instrument applies to a transaction.
17. This Guide can assist both parties and their lawyers as well as mediators, arbitrators and judges in navigating through the uniform instruments that may be applicable. The intended result is to enable parties to efficiently and effectively structure their commercial transactions in light of the benefits presented by these 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 their interpretation by judges, arbitrators and scholars. Rather, it provides introductory guidance in navigating through them so as to understand their scope, their basic provisions, and their interactions. There are several useful sources, some freely available online, containing case law, bibliographies and other

¹⁶ It is generally understood that PIL consists of three elements: jurisdiction, applicable law and recognition and enforcement of foreign judgments. In this Guide, the term “private international law (PIL)” is used mainly with reference to applicable law / choice of law issues, in line with the use of that term in certain uniform instruments (e.g., Art. 7(2) CISG). The term “choice of law” will also be used when it is necessary to reflect the terminology of the relevant instrument.

¹⁷ 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.

information relating to these instruments. A list of available sources of further information is provided in Annex X to this Guide.

19. The instruments that are the primary focus of this Guide are:
 - The **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.
 - The **UPICC**: the UPICC are a non-binding codification of contract law rules and principles designed for application 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 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.
 - The **HCCH Principles**: the HCCH Principles are a similarly 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 most suitable for their transaction), and, at the same time, set balanced boundaries to the principle. Thus, they aim at providing a refinement of the concept of party autonomy where it is already accepted.
20. Two other instruments emanating from UNCITRAL are also addressed:
 - The **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.
 - The **Electronic Communications Convention**: the Electronic Communications Convention aims 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 originating from international, supranational or regional bodies:
 - The **1955 HCCH Sales of Goods Convention**: the Convention regulates the choice of law issues for the international sale of tangible goods.
 - The **1978 HCCH Agency Convention**: the Convention provides choice of law rules for agency relationships.
 - The **1986 HCCH Sales Convention**: the Convention sets out choice of law rules relating to contracts for the international sale of goods. The Convention is not yet in force.

- Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (the **Rome I Regulation**):¹⁸ the Regulation sets out EU-wide rules for determining which national law should apply to contractual obligations in civil and commercial matters involving more than one country.
- The Inter-American Convention on the Law Applicable to International Contracts (the **Mexico Convention**):¹⁹ the 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 this Guide are not mutually exclusive. Rather, more than one instrument can apply to the same transaction. A simple illustration of this point appears in the table below, which indicates (by way of a ✓ in the appropriate boxes) the international instruments that may apply to four paradigm transactions:

	CISG	UPICC	HCCH Principles	Limitation Convention	Electronic Communications Convention
International Sale of Goods (not concluded by electronic communications)	✓	✓	✓	✓	
International Sale of Goods (concluded by electronic communications)	✓	✓	✓	✓	✓
Other Commercial Contracts (not concluded by electronic communications)		✓	✓		
Other Commercial Contracts (concluded by electronic communications)		✓	✓		✓

23. The Guide explains 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 find application. 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

¹⁸ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L 177/6, 4/7/2008, pp. 6-16.

¹⁹ At the time of writing, five countries have signed the Mexico Convention (Bolivia, Brazil, Mexico, Uruguay and Venezuela) and two have ratified it (Mexico and Venezuela). See *infra*, paras 57-58.

information about the nature and sources of rules that govern the determination of applicable law.

24. Because of the critical role played by the determination of applicable law, the Guide not only examines choice of law rules under the HCCH Principles but also examines other PIL rules that may be applicable in a forum. Hence, the Guide presents an analysis of choice of law rules under the Rome I Regulation, the Mexico Convention, the several HCCH instruments mentioned in paragraph 21, *supra*, as well as presenting a brief survey of PIL rules used in various States. A key portion of that 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. A second 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 placed by the applicable law. Reference is also made to such terms that parties may incorporate in their sales contracts by way of a shorthand clause, the content and interpretation of which is provided by an international body. An example is constituted by the ICC INCOTERMS®, shorthand clauses collected and developed by the International Chamber of Commerce (ICC) and reflecting international practice. In addition, the Guide highlights the role played by commercial practices established between the parties and usages when the sales contract is regulated by an international instrument.

3. Determination of the law applicable to international commercial contracts

a. By direct application of a uniform law treaty

How do the uniform law treaties of this Guide 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, *i.e.*, 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 of recourse to PIL rules.

CISG

27. In relation to its territorial scope of application, Article 1(1) of the CISG provides for two ways in which the CISG directly applies to international sales contracts, namely: (a) when the parties’ respective places of business,²⁰ as determined under the CISG, are in different Contracting States (see *infra*, paras 106-109); or (b) when a PIL rule leads 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.

²⁰ For the determination of the relevant “place of business” under the CISG see *infra*, paras 147-149.

28. International sales contracts may fall outside the scope of the CISG when the type of sales contracts is excluded by 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 on the applicability of the CISG has been explored by a number of court decisions, arbitral awards and doctrinal authorities.²¹ The law applicable to sales contracts outside the scope of the CISG is determined by the application of PIL rules.²²
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 Art. 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 CISG’s applicability to a contract may also be affected by the declarations lodged by States (see *infra*, Chapter 4.a).²³

Limitation Convention

31. As to its territorial scope of application, Article 3 of the Limitation Convention provides for two ways in which the treaty directly applies to international sales contracts, namely: (a) when the parties’ respective places of business are in different Contracting States; or (b) when the rules of PIL 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 rules of PIL (see *infra*, Chapter 3.b). Article 3(2) allow the parties to agree on the exclusion of the application of the Convention (“opting out”).²⁴
32. The Limitation Convention’s applicability to a contract may also be affected by the declarations lodged by States.²⁵

Electronic Communications Convention

²¹ *E.g.*, for the treatment of distribution contracts, see *infra*, Chapter 5.b, and for the treatment of barter, see *infra*, Chapter 5.e.

²² For the choice of law rules, including the choice of the UPICC as non-State law, see *infra*, Chapter 3.b.

²³ For the status and text of the declarations made by CISG Contracting States, see: https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status.

²⁴ This paragraph explains the scope of application of the Limitation Convention as amended by the 1980 Protocol to Amend the 1974 Limitation Convention. For more details, including information on the scope of application of the original 1974 Convention, see *infra*, Chapter 4.b.

²⁵ For the status and text of the declarations made by the Contracting States of the Limitation Convention, see: https://uncitral.un.org/en/texts/salegoods/conventions/limitation_period_international_sale_of_goods/status.

33. The Electronic Communications Convention defines its territorial and substantive scope in Articles 1 and 2 and applies to a broader variety of international commercial contracts than does the CISG. Article 1(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, the Contracting State may lodge a declaration requiring that the Convention will apply 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 validly chosen its provisions as the law applicable to the contract. However, Article 3 allows the parties to opt out of the Convention or derogate from or vary the effect of any of its provisions.

b. By the application of rules of PIL

34. As seen above, international transactions can be governed by uniform law instruments, which 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 manners to identify the applicable law: (1) when the parties have chosen the law governing their contract, PIL rules will determine whether the parties' choice is valid and effective, or (2) 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, other than by direct application, a uniform law instrument may become applicable to an international transaction, including sales contracts, 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 law to govern their transaction the law of a State that has adopted a uniform law instrument which applies to the transaction; (b) when the parties have chosen a uniform law instrument as "rules of law" to govern their transaction; and (c) when, absent 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. Below, this Guide will examine PIL rules found in treaties, which will be helpful to determine which law(s) will be applicable to an international transaction. When examining these rules, two aspects will be looked into: when parties made a choice and in the absence of a parties' choice. This Guide will also provide a brief summary of non-treaty PIL rules (soft law), in particular the HCCH Principles.

i. The application of rules of PIL when parties made 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, limitations imposed by public policy, etc. One aspect which is the subject matter of the Guide – *i.e.*, 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 sections.
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 1955 HCCH Sales of Goods Convention, the 1978 HCCH 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. Readers should be aware also of the potential application of the Mexico Convention. The Guide on the Law Applicable to International Commercial Contracts in the Americas (OAS Guide),²⁶ adopted by the Organization of American States (OAS) in 2019, provides, *inter alia*, guidance on both the Mexico Convention and the HCCH Principles.

1. 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 recognised as early as in Article 28(1) of the 1985 UNCITRAL Model Law on International Commercial Arbitration; this Model Law as well as the UNCITRAL Arbitration Rules have served as a model for many jurisdictions.²⁷ 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” / 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,

²⁶ The Guide is available: http://www.oas.org/en/sla/iajc/docs/Guide_Law_Applicable_to_International_Commercial_Contracts_in_the_Americas.pdf.

²⁷ For the current status and additional information on the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, see the UNCITRAL website at https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration.

supranational or regional level as a neutral and balanced set of rules” (Art. 3 HCCH Principles). 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 below (see *infra*, para. 71), the HCCH Principles give effect to the choice of “rules of law” not only in the arbitral setting but also in the judicial setting, provided that such choice is allowed under the otherwise applicable law.

46. In the 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 rules of PIL do not lead to the application of the CISG. In this context, the CISG applies as transnational (non-State) law.

Judicial setting

47. In a judicial setting, parties are generally free to choose State law applicable to their contracts. Most national laws do not however allow parties to choose non-State rules of law to govern the contract (at the time of writing, the law of Paraguay²⁸ expressly allows parties to choose non-State law to govern their contracts). 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, *i.e.*, as actual terms of the contract.²⁹

1955 HCCH Sales of Goods Convention

48. The Convention was one of the first steps towards unification of international sales law. It regulates the choice of law issues for the international sales 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 Art. 4). The choice of law can either be made expressly or “unambiguously result from the provisions of the contract” (Art. 2(2)). The Convention only identifies the law of a State as the applicable law, but not non-State law.
49. The Convention is currently in force in five EU Member States (Denmark, Finland, France, Italy and Sweden), Niger, Norway and Switzerland.³⁰ Thus, for contracts that fall within its scope, the Convention takes precedence over the Rome Convention and the Rome I Regulation (see Art. 21 and Art. 25(1), respectively).

1986 HCCH Sales Convention

50. The Convention aims at unifying the 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

²⁸ With the inspiration of the HCCH Principles, this rule was introduced when Paraguay promulgated Law No 5393 on the Law Applicable to International Contracts on 15 January 2015.

²⁹ See also *infra*, particularly para. 56 for incorporation as contractual terms under the Rome I Regulation; para. 337 for incorporation as contractual terms of the UPICC.

³⁰ For examples of its application, see M. Sumampouw (ed), *Les Nouvelles Conventions de La Haye*, Tome III (Martinus Nijhoff 1984), 15–20 (reporting decisions from Finland, the Netherlands, and Belgium); see also <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=34&cid=31>.

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(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, either regarding the whole or part of the contract (Art. 7(2)).

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

1978 HCCH Agency Convention

52. The Convention aims 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 both to the internal relationship between principal and agent, and to 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.³¹ The term “internal law” indicates that only substantive law of the applicable State would be referred to.
54. The Convention is in force in three EU Member States (France, the Netherlands and Portugal) and Argentina. Thus, for contracts that fall into its scope, the Convention takes precedence over the Rome I Regulation (see Art. 21 and Art. 25(1), respectively).

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 recognise 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 a choice of an international convention, such as the CISG. However, the CISG may be otherwise applicable under its own terms and therefore prevails over the Regulation.

Mexico Convention

57. The Mexico Convention also recognises the parties’ freedom to choose the law applicable to their international contract. The law chosen may be related to the whole or to only part of the

³¹ The internal law of the State in which the agent had his business establishment at the time of his relevant acts shall govern the two external relationships (Arts 11 and 15).

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 shall, in accordance with Article 10, take into account certain categories of non-State law, including guidelines, customs and principles of international commercial law as well as commercial usages and practises generally accepted.³²

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(1)) not only of State law as the law governing their international contract but also (under certain conditions, as further discussed below, see *infra*, para. 71) non-State law (Art. 3). The law chosen may be related 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(2)). No connection is required between the law chosen and the parties to the transaction (Art. 2(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 *infra*, para. 71).
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. 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 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.

³² See also the OAS Guide, in particular § 194.

64. It is worth noting that an agreement between the parties to confer jurisdiction on a court³³ or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a tacit choice of law, *e.g.*, Article 4 of the HCCH Principles; 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, *e.g.*, Recital 12 of the Rome I Regulation; Article 4 of the HCCH Principles (commentary).

Model Clauses for the application of the UNIDROIT Principles

65. The *Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts*, adopted in 2013,³⁴ 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 in what way they would like the UPICC to be used, either during the performance of the contract, or when a dispute arises.
66. The Model Clauses 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 (Model Clauses No 1); (b) to incorporate the UPICC as terms of the contract (Model Clauses No 2); (c) to refer to the UPICC to interpret and supplement the CISG when the latter is chosen by the parties (Model Clauses No 3); or (d) to refer to the UPICC to interpret and supplement the applicable domestic law (Model Clauses No 4). The commentaries under each Model Clause detail their advantages and disadvantages, and point to possible modifications 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”).³⁵

2. HCCH Principles

³³ In this regard, see HCCH Convention of 30 June 2005 on Choice of Court Agreements which aims at ensuring the effectiveness of choice of court agreements between parties to international commercial transactions. For more information on this Convention, see <https://www.hcch.net/en/instruments/specialised-sections/choice-of-court>.

³⁴ <https://www.unidroit.org/english/principles/modelclauses2013/modelclauses-2013.pdf>. For the French version see <https://www.unidroit.org/french/principles/modelclauses2013/clausestypes2013.pdf>; for the Spanish version see <https://www.unidroit.org/other-languages-e/spanish>.

³⁵ It is important to note that the purpose of the Model Clauses 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 these Model Clauses, judges and arbitrators may still apply the UPICC according to the circumstances of the case as indicated in the Preamble. For more information on the UPICC and their intended use see *infra*, Chapter 4.c.

67. The HCCH Principles are a non-binding soft law instrument that contain general principles and rules concerning choice of law in international contracts. They recognise that giving effect to party autonomy at a 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, para. 1).
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.
70. The HCCH Principles are formed by a Preamble and 12 Articles. While some provisions of the HCCH Principles reflect an approach that enjoys wide international consensus (*e.g.*, Art. 2(1) and Art. 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.*, Art. 2(2), (3), (4), Arts 4, 7, 9). The HCCH Principles also contain innovative provisions (*e.g.*, Arts 3, 5, 6, 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 at 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 (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 recognised by the HCCH Principles, is not absolute. As in all jurisdictions that recognise party autonomy, the HCCH Principles also 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 *infra*, para. 100).
73. The HCCH Principles may serve a harmonising purpose, since they can be adopted as a legislative model in those jurisdictions willing to modernise their PIL rules in regard to contracts. Paraguay, which has already passed a law inspired by the HCCH Principles, is an example.³⁶
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. Finally, they may be

³⁶ See footnote 28.

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 (i) in the arbitral context, (ii) in the case where they supplement the rules of PIL of a given State, or (iii) where a State has adopted them as its PIL rules for international contracts.

ii. The application of rules of PIL in the absence of a parties' choice

76. Although most international contracts state the parties' choice of the law to be applied to their contract, in some instances such a choice may not have been made³⁷ or may not be enforceable. The adjudicator must then determine the law applicable to the contract by the 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 invalidity of such agreement, arbitrators enjoy a substantial discretion to determine the law applicable to the merits of the dispute, including both State law and non-State "rules of law".
79. According to 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 the rules of PIL (*e.g.*, Art. 21 ICC Rules, Art. 1511 French Arbitration Act). This is called the *voie directe* method.
80. On the other hand, rules such as Article 28(2) of the 1985 UNCITRAL Model Law on International Commercial Arbitration and Section 46(3) of the English Arbitration Act state that the tribunal shall apply the law determined by the conflict of laws rules which 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: either the domestic rules or those enacted at the international or supranational level. One should note that the majority of domestic PIL systems do not authorise the adjudicator to apply transnational non-State law to govern the contract in the absence of a choice. However, this has not prevented State courts from referring to non-State law for other purposes, *e.g.*, interpretation of the applicable State law, or filling gaps in that law.³⁸

³⁷ Note that the choice can be made expressly or tacitly. The determination of such choice depends on the applicable law, see *e.g.*, Art. 4 HCCH Principles.

³⁸ See *infra*, Chapter 4.c.ii.3; for case law, see UNILEX.

1. Uniform PIL instruments

83. In the absence of the parties' choice, the 1955 HCCH Sales of Goods Convention applies the main rule that the law of the country where the seller has its business establishment or habitual residence 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 1986 HCCH Sales Convention, in which Article 8 provides for additional connecting factors. As for the 1978 HCCH Agency Convention, three main connecting factors have a claim to apply to the agency relationship between the principal and the agent in the situation where each party has its own business establishment: the law of the State where the agent acts, the law of the State where the principal has its business establishment, and the law of the State where the agent has its business establishment (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 recognised by international organisations, 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(1)(a) of the Regulation states that the sale of goods shall be governed by the law of the country where the seller has its habitual residence.³⁹ In that case, under Article 1(1)(b) CISG, the CISG applies when the seller's habitual residence is in a State that is a party to the CISG, unless that State has lodged a declaration that Article 1(1)(b) shall not apply.
86. Articles 4(2), (3) and (4) of the Rome I Regulation lay 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 where the parties have not chosen the law applicable to the contract. In light of the diversity of rules regarding this subject, there is currently no international consensus (with the exception of the 1955 HCCH Sales of Goods Convention) with respect to the rules that determine the applicable law in the absence of a choice.

1. National laws

³⁹ The place of habitual residence is defined in Art. 19 of the Rome I Regulation.

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*). Still 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 overriding mandatory rules and public policy.
92. Overriding mandatory rules are legal provisions enacted by a State, contained in an international treaty or emanating from a supranational body (for example, Art. 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, 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.
93. 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.
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 absent 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 shall necessarily 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 to exclude the application of the law designated by the Convention "when it is manifestly contrary to the public order of the forum."
98. Article 9(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 organisation. The provisions are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract. Article 9(3) 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 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 where the parties' choice of the governing law can be limited. Articles 11(1) and (2) address 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. Paragraphs 3 and 4 address 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 the fundamental notions of public policy of another State. Finally, 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 1955 HCCH Sales of Goods Convention; Articles 16 and 17 of the 1978 HCCH Agency Convention; and Articles 17 and 18 of the 1986 HCCH 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 rules of PIL (see *infra*, para. 340).
103. The UPICC, in their Article 1.5, use the term “mandatory rules” also in a different meaning, *i.e.*, referring to certain UPICC internal provisions that cannot be derogated or excluded from by the parties (see *infra*, para. 388). 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.

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 ⁴⁰ Article 28

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.

⁴⁰ See *infra*, Chapter 4.a.

4. Substantive Law of International Sales

a. CISG

- i. Scope of application (including declarations under Arts 92 and 95) – Bases for applying the CISG

When is a sale international?

What contact / connection between the sales transaction and a Contracting State will trigger the application of the Convention?

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 its Article 1(1), are met. A sale of goods is defined as “international” where 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 is required to determine the internationality of the sales contract, such as the nationality of the parties, the civil or commercial character of the parties or of the contract.
107. The provisions in Article 1(a) and (b) describe the contacts between the sales transaction and Contracting State that trigger the application of the Convention. The Convention will apply if either the States where both parties have their places of business are Contracting States or when rules of PIL lead to 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.⁴¹
109. In accordance with Article 1(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 its principal’s place of business is in a different State than 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 and if some Contracting States have declared that they share the same or closely related legal rules on matters governed by the Convention. Currently, the latter declaration applies to contracts concluded by parties having their place of business in Denmark, Finland, Iceland, Norway and Sweden.

⁴¹ Please refer to the UNCITRAL website for the list of current Contracting States that made a declaration under Art. 95 CISG.

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 within 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, *i.e.*, 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(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 something (*facere*). Under Article 3(1) 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 him or by the buyer if the latter does not provide a substantial part of the materials necessary for such manufacture or production (Art. 3(1) CISG).
114. Article 3(2) addresses the application of the CISG to mixed contracts, *i.e.*, 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 who furnishes the goods. However, services or work needed to manufacture or produce the goods under Article 3(1) do not count for the purpose of Article 3(2).
115. For the possible application of the CISG to barter or countertrade transactions, see *infra*, Chapter 5.e); to distribution contracts (see *infra*, Chapter 5.b).
116. New technologies have 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 both issues as to whether they are contracts for sale or whether the subject-matters of the sale are goods (see *infra*, Chapter 5.d).
117. Six specific categories of international sales are excluded from the Convention. Those mentioned in Article 2(a) concerns sales of goods to buyers who acquire them for personal, family, or household purposes; in most countries, such sales are characterised as consumer transactions and governed by specific rules, often of a mandatory nature. Article 2 (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 (Art. 2(a), (b), (c)) are based on the specific nature of the transaction. On the other hand, the remaining exclusions (Art. 2(d), (e), (f)) are based on the nature of the goods. Sales of shares and other securities, as well as money, are excluded from the Convention's scope. Sales of ships, vessels, hovercraft or aircraft are also excluded. Contracts for the sale of electricity are

excluded. On the other hand, the supply of gas and oil and other energy sources are not excluded from 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 expressly deal with this issue. Matters that are governed by the CISG are exclusively addressed 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 *infra*, Art. 7 CISG).
119. Article 4 provides that the CISG governs two of the most important matters that arise in contracts of sales 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 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 *infra*, Art. 9 CISG) (Art. 4(a)). 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.⁴²
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(b)). The question of how and when the property passes from the seller to the buyer is to be decided by the domestic law.
122. However, there is an important exception to Article 4(a) and (b) 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 due to mistake of quality of the goods. However, since the CISG has express 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 (see Art. 5). Since death or personal injury deals with extra contractual interests, this is an issue that is 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(2) of the CISG.

⁴² The UPICC filled in 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 *infra*, paras 369-371.

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) (for a more thorough discussion of this point see *supra*, Chapter 3.b.i). In such cases, the CISG will be regarded as a body of rules of law (Art. 3 HCCH Principles).
125. Under Article 2(2) 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 one of the UNIDROIT Model Clauses. 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.⁴³

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

126. One of the CISG's underlying principles 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 any of its provisions, at the time of or after the conclusion of the contract⁴⁴ (see *supra*, para. 29).

How is the CISG to be interpreted?

How are the gaps of the contract filled?

What are the general principles within the CISG?

127. Article 7 provides a framework for the uniform and international interpretation of the CISG. It aims to avoid a distortive interpretation and application of the CISG due to the interferences with domestic laws, case law and doctrinal traditions.
128. The autonomous interpretative criterion is based upon the principles of internationality, uniformity and good faith (Art. 7(1) CISG). The autonomous gap-filling method is to be applied according to the same general principles inherent to the CISG (Art. 7(2) CISG).
129. CISG, similarly to UPICC (see *infra*, para. 386) and other uniform texts, pursues the goal of a uniform interpretation. Terms and concepts used must be interpreted autonomously.⁴⁵ Therefore, the meaning of the vast majority of the 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 as well as arbitral tribunals applying the CISG in different jurisdiction tend to consider cases issued by other Courts when interpreting the CISG.
130. Article 7 minimises the need to apply rules of PIL and of domestic substantive law. When a question concerning a matter governed by the Convention is not expressly settled in it, the

⁴³ See, in particular, Model Clauses 3(a) and 3(b) of the Model Clauses for the use of the UNIDROIT Principles of International Commercial Contracts (p. 20 *et seq.*).

⁴⁴ See *infra*, Art. 12.

⁴⁵ These principles apply to several uniform texts. The language used here comes from the UPICC, Commentary 2 to Article 1.6.

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 *ultima ratio*.

131. In practice, an important number of general principles to be found within the CISG has been developed by case law.
132. Whether and to what extent, external principles may play a role in filling gaps in the CISG, absent 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 that they might be a tool to interpret the CISG or to fill its gaps, particularly where there is no collision between the two instruments, or even applied as an expression of the good faith principle (Art. 7(1) CISG) (see *infra*, paras 352 and 393).

What are the rules for the interpretation of the contract?

133. Article 8 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(1) 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 and the other party could not have been aware of that intent, then, under Article 8(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 in the same circumstances.
136. Article 8(3) 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, which is opened by 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,⁴⁶ and endorses the contextual approach followed by CISG.⁴⁷ 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 *infra*, paras 372 and 393).

⁴⁶ Art. 4.1 UPICC.

⁴⁷ Arts 4.3 and 4.4 UPICC.

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. CISG considers in this regard the importance of practices and usages. Article 9 of the CISG (like Art. 1.9 UPICC)⁴⁸ refers to three situations that are different in name, content and effect: practices established between the parties, agreed usages, and international usages of trade or customs. While practices and agreed usages have a bilateral effect and are thus recognised 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, the international usages of trade have an *erga omnes* or general application as their existence is disconnected from a concrete 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.
141. Usages and practices also have another important role within the CISG, *i.e.*, as an interpretative criterion for the contract according to Article 8(3).
142. Article 4(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. 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 as between buyer and the seller, including with respect to import/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 the buyers.
144. First published in 1936 by the International Chamber of Commerce, Incoterms® have been regularly updated to reflect current trade practices. The latest version is Incoterms® 2020.
145. Under the CISG, 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 Incoterms® in regard to delivery, passing of risk and payment. The use of 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). Also, ICC Incoterms® do not deal with, among others,

⁴⁸ On Art. 9 CISG and Art. 1.9 UPICC see also *infra*, para. 393.

the formation of the contract, buyer's payment obligations, and most notably, remedies for breach of contract.

146. Trade terms may also be defined differently from the ICC Incoterms® with respect to business sectors or at the level of domestic law.⁴⁹ It is therefore advisable to correctly identify the intended trade term.

How can we determine the place of business under the CISG?

147. As the CISG refers to a party's place of business in several provisions,⁵⁰ defining which of the party's multiple "places of business" is relevant to promote legal certainty and predictability in applying the Convention.
148. According to Article 10(a), in case 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.⁵¹ When the party does not have a place of business, reference is to be made to his/her habitual residence rather than to his/her domicile.
149. 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.⁵²

Does the CISG have any form requirements?

150. CISG does not require any particular form, writing for example, or any special requirements, such a signature, for the conclusion of the contract.
151. 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 formal requirements are irrelevant.
152. 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).
153. 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.

⁴⁹ For example, the US Uniform Commercial Code § 2-320 defines the trade term C.I.F.

⁵⁰ *E.g.*, Arts 1, 12, 20(2), 24, 31(c), 42(1)(b), 57(1)(a), 69(2) and 96.

⁵¹ CLOUT case No 746, Oberlandesgericht Graz, Austria, 29 July 2004.

⁵² CLOUT case No 261, Bezirksgericht der Saane, Switzerland, 20 February 1997.

154. Parties might well expressly or impliedly agree on the exclusion or derogation of the principle of informality under Article 11 by virtue of Article 6 CISG, by agreement on a merger clause, or by a "No Oral Modification Clause" (NOM Clause) whereby the former excludes all prior oral negotiations in order to interpret or supplement the contract, while the latter excludes oral agreements for the modification of the contract (Art. 29 CISG). Merger and NOM clauses are expressly referred to by the UPICC, which provide specific provisions on them (see *infra*, para. 393).
155. States may lodge a declaration under Article 96 whose effect 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 but also to their evidence".

When and how is a contract concluded under the CISG?

When is a proposal to conclude a contract an offer?

Is an open-price contract valid under the CISG?

Can an offer be withdrawn or revoked?

Can an offer be accepted by silence or inaction?

What is a counteroffer?

Does the CISG govern the battle of the forms?

How is the contract modified?

156. CISG Part II regulates the formation of an international sales contract considering rules for the offer (Arts 14-17) and acceptance (Arts 18-22).⁵³ A contract is concluded when an acceptance of an offer becomes effective by reaching 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.
157. 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) that follow the offer-acceptance process.
158. 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 (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(2) CISG)), 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(1) CISG).

⁵³ The CISG provisions on the formation of the contract, and particularly those relating to the offer and the acceptance, are among those provisions which the UPICC followed with no or limited adaptations. The UPICC however introduce specific rules for matters not expressly dealt with in the CISG, such as writings in confirmation, inclusion of standard terms and battle of the form, contracts with terms deliberately left open. There are also rules covering bad faith and breaches of confidentiality during the negotiations leading up to the conclusion of the contract. battle of the form, contracts with terms deliberately left open. See *infra*, specifically, paras 367, 415 and 442.

159. Indeed, 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(1) CISG.
160. Article 14 CISG indicates that the price must exist in the offer, while Article 55 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 CISG is usually solved by the performance of the contract. Instances when the contract has not been performed are problematic.
161. The CISG distinguishes between withdrawal of the offer (Art. 15), revocation (Art. 16) and termination (Art. 17). The offer also expires when the offer is not accepted within the time fixed or, if no time is fixed, within a reasonable time (Art. 18(2)).
162. An acceptance is the positive response to an offer. It must be made clearly and unconditionally by the acceptor. Acceptance can take place in three ways: by means of a declaration, an action, or, in qualified circumstances silence or inaction (Art. 18(1)).
163. 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 electronic means (a letter, telegram, telex, fax, e-mail, 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(2)).
164. An 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) (Art. 18(3)), it is not necessary to notify 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.
165. In the case of oral offers, the CISG requires that the acceptance be immediate, unless circumstances indicate otherwise (Art. 18(2)).
166. Silence or inactivity does not in itself amount to acceptance (Art. 18(2)). However, silence or inactivity, along with other factors, could amount to an acceptance of the offer, such as indicated by a legal provision (Arts 19(2) and 21), by application of a usage of trade or a practice established between the parties (Art. 9) 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; or finally by application of a duty to answer as derived by the good faith principle (Art. 7(1)).

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).
168. 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. Under the CISG, Article 19 makes a distinction between terms that materially alter the terms of the offer (counteroffer) and those that do not (acceptance).
169. 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, a list of items is provided by the CISG and includes the following elements: 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.
170. Although the CISG does not have special rules dealing with the use of standard terms, *i.e.*, provisions which are 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(2) of the UPICC, case law has generally considered the use of standard terms under CISG provisions, mainly Articles 8 and 14-24, in relation to the question of whether the standard terms are incorporated into the contract.
171. The CISG also governs the issue known as "battle of the forms" which 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. Such conditions generally reveal contradictions between the two set of forms and in case of dispute the following two questions arise: Has a contract been concluded? If so, what are the terms of the contract? If a contract has been validly concluded, the rules most commonly applied to address the battle of the forms are the "last-shot rule", *i.e.*, 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; a solution expressly adopted by Article 2.1.22 of the UPICC. It is not settled in case law applying the CISG which one of these two solutions should prevail.⁵⁴
172. A contract may be modified or terminated by the mere agreement of the parties (Art. 29.1 CISG). Modification and termination follow generally the same pattern of contract conclusion, *i.e.*, offer and acceptance, and domestic law concepts such as consideration are not relevant in this area. If a NOM clause (see *supra*, para. 154) is included within the contract, it may not be orally modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct (Art. 29.2 CISG).

⁵⁴ See the case law compiled in UNCITRAL, Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, sub Art. 19.

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

173. Chapters II and III of Part 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 case of breach of any of such obligations. The obligations of the seller are listed in Article 30 and elaborated in Articles 31 to 44 (although they 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 in Articles 54 to 60.
174. 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 or damage to the goods amounts to a breach of the seller's obligation. Chapter IV of Part III 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 Section VI, Chapter V of Part III.
175. In practice, parties often use shorthand trade terms, such as FCA, FOB, CPT, 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®. It provides definition for EXW (E term); 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 ICC Incoterms in general, see *supra*, paras 143-146.

What are the obligations of the Seller under the CISG?

176. The general obligations of the seller are to deliver the goods, hand over any documents relating to the goods, and to 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 to 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 in case of a contract involving carriage of goods?

177. It is often the case in international sale of goods that the parties agree to engage independent carriers for delivery of the goods. These arrangements are known as sale that "involve carriage of goods". In such case, the seller is obligated to hand the goods over to a carrier at a certain point of place and the buyer is obligated to take delivery of the goods from the carrier at the destination of the carriage which is different from 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.

178. 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 (*cf.* 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 Ladings (the 1924 Brussels Convention) and various Protocols amending it, or the "Hamburg Rules" regime established by the 1978 United Nations Convention on the Carriage of Goods by Sea.⁵⁵ For international carriage by air, the most relevant instrument is the 1999 Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention). Uniform law instruments relating to land and inland waterway transport include the 1956 Convention on the Contract for the International Carriage of Goods by Road (CMR), 2002 Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI), and the Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM) which is under the framework of the 1980 Convention concerning International Carriage by Rail (COTIF).

179. 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(a)). Once this is done, the seller has fulfilled his obligation to deliver the goods, 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(1)). The duty to give notice of consignment under Article 32(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).
180. 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 FCA, FOB, CFR, or CIF according to ICC Incoterms®, or otherwise. In such case, that agreement prevails (Art. 6).
181. 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 carriage of the goods. The CISG does not directly answer these questions.
182. 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(2)).
183. 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, Incoterms rules provides that that contract of carriage must be made on usual terms at the seller's cost and provide for carriage by the usual route customary manner of the type normally used for carriage of the type of goods sold. It also provides that if the

⁵⁵ The most recent uniform law instrument on international carriage of goods by sea, the 2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules"), is not yet in force.

seller is not bound to arrange for the contract of carriage, it must provide the buyer with information in its possession that the buyer needs for arranging the carriage.

184. 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(3)). This applies irrespective of whether it is the seller or buyer who arranges for the carriage.
185. According to 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, CFR), the seller has no obligation to make a contract of insurance but must provide the buyer with information within its possession that the buyer needs to obtain insurance.
186. 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 his obligation to "place the goods at the buyer's disposal" by doing everything on his part to enable the buyer to take over (*i.e.*, to take possession of) the goods.
187. The place for placing the goods at the buyer's disposal depends on the following distinction. In principle, that place is the place where the seller had his/her place of business at the time of the conclusion of the contract (Art. 31(c)). However, (i) if the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured, and (ii) if the parties knew at the time of the contract where the goods were at, or where the goods were to be manufactured or produced at, the place of placing the goods at the buyer's disposal is that place (Art. 31(b)). If the parties agree on a different place of delivery, that agreement prevails (Art. 6).
188. 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.
189. **Cost of delivery.** 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(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. 6.1.1 UPICC)⁵⁶. The seller bears the costs necessary for delivery (*e.g.*, packaging, measuring, weighing the goods). The seller bears the transportation costs 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(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(b) and (c)), the seller does not bear the cost of transportation beyond that place.
190. ICC Incoterms[®] contain more specific rules on the allocation of various costs relating to delivery or transport documents, export or import clearance, checking, packaging, marking of the goods.

⁵⁶ Art. 6.1.1: each party bears the cost of the respective performance, unless otherwise agreed.

When should the goods be delivered?

Time of Delivery

191. 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(a)). If there is a “period” of time for delivery 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(b)). In any other cases, the seller must deliver within a reasonable time after the conclusion of the contract (Art. 33(c)).
192. **Late Delivery.** 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.
193. **Early Delivery.** 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 (cf. Art. 52(1)).

Seller’s obligation to deliver conforming goods

194. The goods that the seller delivers must be of the quantity, quality and description required by the contract (Art. 35(1)). The goods must also be contained or packaged in the manner required by the contract (Art. 35(1)). Packaging is particularly important in international sale of goods in order to protect the goods from loss or damage during shipment. Thus, Incoterms rules also generally consider packaging in the manner appropriate for transport to be the obligation of the seller.
195. **Quantity.** With respect to quantity, not only delivery of quantity smaller than that provided for by the contract, but also delivery of quantity of goods 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(2), second sentence), but the buyer is also entitled to remedies, such as damages for loss caused by the excess delivery.
196. **Quality.** If the parties have not agreed on the quality of the goods, conformity is determined according to the following criteria. First, 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(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(2)(b)). However, the rule in Article 35(2)(b) does not apply where the circumstances show that the buyer did not rely on the seller’s skill or judgement (e.g., the buyer made the choice himself), or that it was unreasonable for him to rely on the seller’s skill and judgement (e.g., the seller does not hold out as an expert); or (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model (Art. 35(2)(c)). However, the seller is not liable under Article 35(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(3)).

197. **Packaging.** 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(2)(d)). However, the seller is not liable under Article 35(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(3)).
198. In practice, depending on the flexibility of contract interpretation (Art. 8), the determination based on Article 35(1) and 35(2) can be blurred. It is more advantageous for the buyer to rely on Article 35(1) because the seller is not liable under Article 35(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(3)).
199. **The Relevant Time for Determination of Conformity.** The relevant time for determination of conformity is the time when the risk passes to the buyer (Art. 36(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 Incoterms). It is not necessary that the lack of conformity was apparent at the time of passing of risk. Its existence may be discovered later.
200. 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(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 will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.
201. **Seller's Right to Cure.** The seller has a right to cure lack of conformity. If the seller has delivered goods before the date for delivery, he 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).
202. However, even if the seller cures the lack of remedy, 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(1)).
203. 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, lists the conditions and limits under which cure is admitted and clarifies the relationship with the exercise of other remedies (see *infra*, para. 378).

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

204. 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(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(2)). In addition, if the goods are redirected in transit or re-dispatched by the buyer without a reasonable opportunity for examination by him, and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of redirection or re-dispatch, examination may be deferred until after the goods have arrived at the new destination (Art. 38(3)).
205. 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 which deprives the buyer of any right to remedy for lack of conformity if the buyer does not give notice to the seller (explained below). Namely, the time the buyer should have examined the goods under Article 38 is the time under Article 39(1) when 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 buyer to examine the goods, the nature of the goods (for example, perishable or durable; seasonal or not), frequency of the transaction, practices established between the parties and usages, etc.
206. The buyer has a duty to give notice to the seller of any lack of conformity of the goods. He loses all of his rights to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it (Art. 39(1)). The determination of what is “a reasonable period of time” depends on various factors such as the nature of the goods (for example, perishable or durable; seasonal or not), frequency of the transaction, practices established between the parties and usages, etc. There is also an absolute cut-off period of two years from the date on which the goods were actually handed over to the buyer (Art. 39(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 this two-year time-limit by agreeing on a different contractual period of guarantee (Art. 39(2)). These time-limits are not to be confused with the “limitation period” which concerns the period within which legal proceedings needs to be commenced (see *infra*, under the Limitation Convention).
207. The 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 he 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).
208. The rigidity of the duty of examination and notification is somewhat eased by an exception provided in Article 44. If the buyer has a reasonable excuse for his failure to give the required notice, he may still resort to his right to price reduction in accordance with Article 50 or claim

damages except for loss of profit. However, note that this exception does not apply to the two-year time-limit under Article 39(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?*

209. 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, sentence 1). 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 (but not intellectual property which is dealt with under Art. 42) that hinder the use or disposal of the goods by the buyer. 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 who are usually in a foreign State.
210. 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.
211. **Intellectual Property.** 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.
212. Although intellectual property rules are increasingly being harmonised under WIPO treaties, due 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 international sales of goods to ascertain which law is to be used to determine whether the seller has fulfilled his obligation to deliver goods free from third party's right or claim based on intellectual property. Article 42(1) provides that it is the law of the State where 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(1)(a)). If such was not contemplated by the parties, it is the law of the State where the buyer has his place of business (Art. 42(1)(b)).
213. Secondly, 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 seller's liability is limited only for intellectual property right it knew or could not have been unaware at the time of the contract (Art. 42(1)). This is a requirement unique to intellectual property that does not exist under Article 41.
214. 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 where (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(2)).

215. As is the case in lack of conformity regarding quantity, quality and description of the goods, the buyer loses the right to rely on the provisions of Article 41 or 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim (Art. 43(1)).
216. The seller is not entitled to rely on the buyer's failure to give timely notice if he knew of the right or claim of the third party and the nature of it (Art. 43(2)). There is also the same exception that the buyer may still resort to his right to price reduction in accordance with Article 50 or claim damages except for loss of profit if the buyer has a reasonable excuse for his failure to give the required notice (Art. 44). However, unlike the case in lack of conformity regarding quantity, quality and description of the goods, the buyer has no duty of examination (*cf.* Art. 38) and is not subject to the two-year time-limit to give notice (*cf.* Art. 39(2)).

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

217. The seller must hand over any documents relating to the goods (Arts 30 and 34). Such documents not only include 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 include, for example, invoice, insurance policies, certificate of origin, certificate of quality, and any other documents that the contract requires to be handed over. Parties often specify in the contracts what these documents are, for example, by incorporating trade terms under Incoterms.
218. In 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(1)). However, in principle, the buyer is not bound to pay until he has had an opportunity to examine the goods (Art. 58(3)). The examination under Article 58(3) is limited to a brief and superficial examination of the goods, unlike the examination under Article 38. (On Art. 58, see more fully, *infra*, paras 245-246.)
219. 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, he 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(1)(b), 74-77).
220. The seller must transfer the property (ownership) in the goods to the buyer (Art. 30). If the seller is unable to transfer the property in the goods because it belongs to a third party, the seller is in breach (Art. 41).

221. The CISG does not provide how such transfer can and should be effectuated (*cf.* Art. 4, sentence 2(b)). That is to be determined according to the law governing transfer of property applicable by virtue of the rules of private international law.

How is the passing of risk regulated under the CISG?

222. 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.
223. When loss or damage to the goods occurs after the risk of loss or damage have 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. Secondly, even if loss or damage occurred 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(2)) and declaring avoidance (termination) of Article 49(1)(b), notwithstanding the fact that the loss or damage occurred after the passing of risk.
224. On the other hand, if loss or damage to the goods occurs before the risk passes to the buyer, it will be a breach of the seller's obligation not to deliver (in case of loss) or to deliver the goods damaged (in case of damage). The seller will have to deliver substitute goods. Otherwise, the seller will be in breach of his obligation to deliver the goods.
225. 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 Incoterms (however, the Incoterms rules do not define the consequences of passing of the risk). 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, 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; 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 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.
226. The passing of risk is detached from the question of transfer of property. In general, the risk passes when the seller has done everything on his part to deliver the goods, and when the buyer is in a better position to control the goods. Note that the risk does not pass to the buyer unless the goods are identified to the contract (Arts 67(2) and 69(3)).

227. 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.
228. **Passing of risk in contracts for the sale of goods involving carriage.** Article 67 provides 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(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 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.
229. However, the risk does not pass to the buyer until the goods are clearly identified to the contract (Art. 66(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 relevant particularly with the sale of undivided bulk goods.
230. **Passing of risk in contracts for the sale of goods in transit.** Article 68 deals with the situation when 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 (Art. 68(1)). 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 were handed over to a carrier who issued 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.
231. 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(2)).
232. **Passing of risk in all other cases.** 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 when he takes over the goods (Art. 69(1)). This is because the buyer then is 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 his disposal and he commits a breach of contract by failing to take delivery (*cf.* 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 are placed at his 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 his place of business.

233. If the buyer is to take over the goods at a place other than a place of business of the seller (*e.g.*, buyer's place of business or a third-party's warehouse), the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place (Art. 69(2)). Note that this is different from Incoterms rules which generally do not make the buyer's awareness a requirement for passing of risk. The passing of risk under Article 69(2) is earlier than under Article 69(1) because the seller is not in control of the goods.
234. Note, however, that the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract (Art. 69(3)).

What are the obligations of the Buyer?

235. 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

236. 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 his bank to open a letter of credit. The buyer must also comply with currency exchange regulations. In case the relevant authority denies permission to transfer funds despite the proper steps taken by the buyer, it is not settled whether the buyer is still liable for non-payment, subject to the possibility of exemption under Article 79, or whether the buyer is not liable as the buyer is only required to carry out steps to obtain relevant authorization. In this context, it is useful to consider the UPICC which contain a set of specific default rules 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 the situation where permission is neither granted nor refused.⁵⁷
237. 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 *supra*, paras 158-160). In such case, 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 the situation where a contract does not fix or make provisions for determining the price (Art. 5.1.7). The UPICC additionally regulate the 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 deals with the different situation where parties have deliberately left contractual terms open at the time of conclusion of the contract in order to be determined in the future (a provision that applies for the price

⁵⁷ Arts 6.1.14-6.1.17.

terms and which is particularly important for long-term contracts, see Art. 2.1.14 UPICC, comment 4).

238. 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, not the gross weight including the weight of packaging (Art. 56).
239. **Currency of Payment.** 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 UPICC). If the parties have not agreed on the currency of payment, it is not settled under the CISG what currency is to be used, but the determination must be made according to Article 7(2). On the other hand, the UPICC expressly provide that in such case, payment should be made in the currency of the place of payment (Art. 6.1.10 UPICC).
240. **Method of Payment.** Unlike the UPICC that 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 CISG's provisions on the time of payment (Art. 58) and place of payment (Art. 59) 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 (*cf.* Art. 9), the buyer may pay in either of the forms. Any other form of payment, including payment by bills of exchange, promissory notes, cheques or documentary letters of credit require agreement of the seller, either before or after the conclusion of the contract.
241. Various uniform law instruments provide rules on payment methods. Regarding funds transfer, the UNCITRAL Model Law on Credit Transfer (1992) provides a global uniform model. Regional texts, such as the Payment Services (PSD 2) (Directive (EU) 2015/2366), may also be relevant.
242. 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 Uniform Law for Cheques in accordance with the 1932 and 1933 Geneva Conventions. The 1988 United Nations Convention on International Bills of Exchange and International Promissory Notes is not yet in force. For commercial letters of credit, ICC's Uniform Customs and Practice for Documentary Credits (UCP) provides a *de facto* standard. In order to accommodate electronic commerce, the ICC has also developed a supplement to UCP for electronic presentation of letters of credit (eUCP) and Uniform Rules for Bank Payment Obligations.
243. **Place of Payment.** 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 pay it to the seller at the seller's place of business (Art. 57(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(1)(b)). For the place of handing over the goods, see *supra*, paras 177-188.

244. **Cost of Payment.** For the same reason that the seller bears the cost of delivery (see *supra*, para. 189), 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, the seller must bear any increases in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract (Art. 57(2)).
245. **Time of Payment.** 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(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, will not be handed over to the buyer except against payment of the price (Art. 58(2)). Thus, the general rule is that the goods or documents and payment are to be exchanged simultaneously.
246. It should be noted that the CISG provides that the buyer is not bound to pay the price until he has had an opportunity to examine the goods (Art. 58(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 wrong goods (*aliud*), apparent defects, or delivery of wrong quantity. It is to be distinguished from the examination of the goods in order to discover any lack of conformity under Article 38.
247. 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

248. The buyer must take delivery of the goods. This involves not only physically taking over (taking possession of) the goods (Art. 60(b)), but also doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery (Art. 60(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?

249. In the course of events, there may be situations when one party is in possession of the goods because the other party has failed to take possession of the goods. For example, the buyer may be in delay 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(2)) [see "other remedies"], avoidance of the contract (Arts 49, 51, 73) (see "avoidance"), refusal of early delivery (Art. 52(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(1)). This is done for the benefit of the other party since the risk of loss rests on that party (*cf. e.g.*, Arts 69 and 70).

250. What steps are reasonable in the circumstances depends on such factors including the nature of the goods, the probability of loss or damage, 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 about two examples of steps for preservation of goods in Articles 87 and 88, which will be explained below.
251. Failure to take reasonable steps to preserve the goods will result in liability for damages under Article 46(1)(b) or 61(1)(b), if the goods are lost or damaged.
252. Also, Article 86(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. In addition, the duty to take possession does not arise if the seller or a person authorised to take charge of the goods on his behalf is present at the destination.
253. **Deposit in a warehouse.** The CISG specifically provides two 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 himself. However, this is not allowed when the expense is not reasonable.
254. **Self-help sale and emergency sale.** The second concrete example of reasonable steps to be taken to preserve the goods is the so-called self-help sale and emergency sale under Article 88.
255. A party who is bound to preserve the goods in accordance with Article 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(1)).
256. 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, that will result in liability in damages.
257. 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 Article 85 or 86 must take reasonable measures to sell them (Art. 88(2)). Unlike self-help sale under Article 88(1), emergency sale is a duty of party bound to preserve the goods.

258. As is the case with self-help sale under Article 88(1), emergency sale can take place privately in 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 that tolerated under Article 88(1) can be considered reasonable under Article 88(2).

What are the remedies of the Seller and Buyer under the CISG?

When is a party exempt from liability?

259. Articles 30 and 53 respectively summarize the seller's and buyer's obligations 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.

260. The CISG contains additional obligations addressed to the seller (e.g., Art. 35 – 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.

261. Given the CISG unitary approach 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.

262. The CISG's rules on remedies strongly influenced the UPICC's provisions on remedies (Chapter 7). The UPICC however contain a number of additional provisions covering issues not expressly settled by the CISG. (For more details, see *infra*, paras 378 *et seq.*)

Avoidance of the contract

263. The severe remedy of contract avoidance – equivalent to termination under the UPICC terminology (see *infra*, para. 380) – 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 minimise transaction costs. A breach is fundamental when it substantially deprives the non-breaching party of what he or she is entitled to expect under the contract (Art. 25).⁵⁸ The definition of a fundamental breach can only be made in 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.

⁵⁸ The corresponding provision in the UPICC contains a non-exhaustive list of additional elements to be considered when determining whether there is a fundamental non-performance (see Art. 7.3.1).

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

Other remedies available to the buyer

265. Also, in case of breach, the buyer has the right to require specific performance of the seller's obligations (Art. 46(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(2)) but this only when the breach is deemed fundamental. The buyer may also require that the seller repair the non-conforming goods (Art. 46(3)).

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

267. The remedies provided for in Articles 46 to 50 are subject to special rules (Art. 51) in situations of partial delivery.

268. The buyer has further rights not explicitly mentioned in Articles 46 to 52, in case the contract is breached by the seller. Such rights include remedies in case of anticipatory breach and instalment contracts (Arts 71-73) and the right to withhold performance of buyers' own obligations, in particular, payment of the agreed price.

Other remedies available to the seller

269. When the contract is breached by the buyer, the seller may require the buyer to pay the price, take delivery or perform his 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.

270. The contract may be avoided by the seller if the failure by the buyer to perform any of his or her obligations under the contract or the CISG amounts to a fundamental breach (Art. 64(1)(a)). It may also be avoided if the buyer does not perform his or her 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(1).

271. 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 himself in accordance with the requirements of the buyer that may be known to him (Art. 65).

How are damages regulated under the CISG?

272. In 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(1)(b)) and the seller (Art. 61(1)(b)). The calculation of damages and the exemptions that may apply are governed by Articles 74 to 77 and Articles 79 to 80. The principle of full compensation applies (Art. 74, first sentence), 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, second sentence). 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.
273. While Article 74 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(1)) and correspond to the price prevailing at the place where delivery of the goods should have been made (Art. 76(2)).
274. Article 77 CISG provides that a party who relies on a breach of contract must take measures to mitigate its own losses. Non-compliance with such obligation results in the non-performing party not being liable for any losses which the aggrieved party could have avoided.
275. Under the principle of freedom of contract (Art. 6), the parties may derogate from Articles 74 to 77 and provide for the payment of agreed sums for failure to perform the contract. Given the gaps within the CISG in respect of agreed sums, this issue may be regulated by Article 7.4.13 of the UPICC and the relevant provisions contained in the Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (1983).

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

276. 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(1))⁵⁹. While it is unsettled whether situations of hardship are covered by the CISG, several case law and doctrinal authorities refer to Article 79 as a gateway to regulating hardship under the CISG. In addition, Articles 6.2.1 to 6.2.3 UPICC have been invoked as gap-fillers to supplement the regulation of hardship in CISG contracts.⁶⁰

⁵⁹ The UPICC contain an analogous provision in Art. 7.1.7, which specifies the duties of information of the non-performing parties and the consequences of a breach of such duties, as well as 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.

⁶⁰ On the hardship provisions of the UPICC see *infra*, para. 377.

277. 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 *infra*, para. 378).

Are parties entitled to interest on sums which are not payed?

278. A claim for interest (Art. 78) is also available for any breach of contract by the buyer or the seller, whether it is fundamental or not. While this provision sets forth an unambiguous entitlement to interest for the aggrieved party, it fails to determine the interest rate applicable. This was done in acknowledgement that interests may violate mandatory provisions of domestic law in some jurisdictions. Such gap with the CISG may be filled with recourse to the otherwise domestic law applicable or Article 7.4.9 of the UPICC, where permissible.⁶¹

Anticipatory breach

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

280. 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).

281. Finally, a contract for delivery of goods by instalments may be avoided if the failure of one party to perform any of his/her obligations in respect of any instalment constitutes a fundamental breach with respect to that instalment (Art. 73(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

282. As usual in treaties, the CISG contains in its part IV final clauses, *i.e.*, 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 line with a general obligation on States to periodically review treaty declarations, several CISG declarations have been withdrawn. At the same time, it is not unusual that new contracting States lodge declarations.

⁶¹ See *infra*, paras 351 *et seq.* and 393.

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

283. 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 agreement. According to one view, the term “international agreement” does not include regional uniform law that needs transposition at the national law, such as European Union directives.
284. In general, the CISG and international agreements on PIL aspects of international sales contracts are mutually compatible. (For further details, see *supra*, paras 27-30.)
285. Article 99 requires the denunciation of the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 1964 (“ULF”) and the Convention relating to a Uniform Law on the International Sale of Goods, 1964 (“ULIS”) before adoption of the CISG.⁶² The relevance of the ULF and the ULIS is currently mostly historical.

b. Limitation Convention

i. The purpose of the Limitation Convention

What is the purpose of the Limitation Convention?

286. The Limitation Convention provides uniform international legal rules governing “limitation periods” in contracts for the international sale of goods. 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(1)). After the expiration of the limitation period, no such claim shall be recognized or enforced in any legal proceedings.
287. Similar rules exist in most legal systems. However, disparity exists not only regarding length of the period and 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 limitation period is a procedural rule barring bringing 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.
288. For international commercial contracts other than sale of goods, or in case the parties have opted out of the Limitation Convention in a contract for international sale of goods, pertinent

⁶² All State parties to the ULF and the ULIS have denounced those Conventions and adopted the CISG except the Gambia and the United Kingdom.

rules on limitation periods can be found in Chapter 10 of the UPICC. The following paragraphs include a brief comparison between the Limitation Convention and Chapter 10 of the UPICC.

ii. Scope of application of the Limitation Convention

289. The Limitation Convention applies to the same contract for the international sale of goods to which the CISG apply (compare Arts 1(1), 3, 4, and 6 Limitation Convention with Arts 1, 2, and 3 CISG).⁶³
290. While the CISG does not deal with validity of the contract (Art. 4(a) CISG), the Limitation Convention governs limitation periods of claims resulting from invalidity of contracts (Art. 1(1) LC). They include claims for restitution of goods delivered or payment made under a contract which subsequently turns out to be invalid because of, but not limited to, fraud (cf. Art. 10(3) LC).
291. Even when the Limitation Convention is applicable to a contract, it does not govern limitation period of a certain “claim” arising from that contract (Art. 5).⁶⁴ The limitation period of those claims will be governed by the law applicable according to the rules of private international law.
292. As is the case under the CISG, the parties may opt out of the Limitation Convention as a whole by agreement (Art. 3(2)). If the parties have opted out of the Limitation Convention, the law applicable according to the rules of private international law governs the question of limitation period. Note that the provisions of the Limitation Convention are mandatory except for modification of the length of the limitation period according to Article 22(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.

iii. Provisions on limitation periods

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

293. The Limitation Convention adopts a dual limitation period. There is a general limitation period of four years (Art. 8), which can be extended or recommence, and a maximum limitation period of ten years (Art. 23), which is a fixed period.
294. 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(1)): *i.e.*, the date the claim

⁶³ 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 the CISG, a Protocol to Amend the 1974 Limitation Convention 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. This Guide explains the Limitation Convention as amended in 1980.

⁶⁴ They are: claims based upon death of, or personal injury to, any person (Art. 5(a)); claims based upon nuclear damage caused by the goods sold (Art. 5(b)); claims based upon security interest in property (Art. 5(c)); claims based upon judgements or documents upon which enforcements can be obtained (Art. 5(d) and (e)); and claims based upon bills of exchange, cheque or promissory note (Art. 5(f)).

matures.⁶⁵ This applies to both the general limitation period and the maximum limitation period.

295. The adoption of an objective time of commencement for both periods is an approach different from the approach adopted in recent domestic legislation and the UPICC. They 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 (see *e.g.*, Art. 10.2 UPICC). The Limitation Convention's approach is due to the peculiarities of long-distance trade, and also due to the 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.
296. The UPICC adopts 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(1) UPICC). The length of maximum limitation period under the UPICC is the same as under the Limitation Convention: ten years. However, the day of commencement is slightly different: it is the day after the day the right can be exercised (Art. 10.2(2) UPICC).
297. The Limitation Convention has a detailed rule on how the period is to be calculated (Art. 28).

Can the length be modified by agreement of the parties?

298. 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(1) and (2)). Also, 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(3)). The maximum limitation period cannot be modified by agreement of the parties.
299. The UPICC is more lenient to 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 (Art. 10.3(1), (2)(a) UPICC). The UPICC also allows the maximum period to be modified by agreement of the parties, except that it cannot be shortened to less than four years, or extended to more than fifteen years (Art. 10.3(1), (2)(b)(c) UPICC).

What happens if the limitation period expires?

300. 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(1)). The Limitation Convention is only concerned with the recognition or enforcement of claims in any legal proceedings, and is not concerned if the right is extinguished or not. The UPICC, on the

⁶⁵ The Convention also provides special rules on the commencement of the period depending on the type of claim (Arts 10-12).

other hand, expressly provides that the expiration of the limitation period does not extinguish the right (Art. 10.9(1) UPICC).

301. However, even after the limitation period has expired, a party can in certain situations raise his claim as a defense to or set off against a claim asserted by the other party (Art. 25(2); cf. Art 10.9(3) UPICC).

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

302. 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 (Art. 24; cf. Art. 10.9(2) UPICC).

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

303. Limitation periods cease to run when the claimant commences judicial or arbitral proceedings against the debtor, or when he asserts his claim in existing court proceedings (Arts 13 and 14; cf. Arts 10.5 - 10.7 UPICC).⁶⁶ Procedures for commencement of judicial proceedings depend on national laws, and therefore, the Limitation Convention requires “any act which, under the law of the court where the proceedings are instituted, is recognized as commencing judicial proceedings” to constitute commencement of judicial proceedings. Arbitral proceedings are commenced according to the manner provided for in the arbitration agreement or by the applicable arbitration law. In the absence of such provision, arbitration proceedings are deemed to commence on the date the request for arbitration is delivered to the respondent.
304. By cessation, limitation periods are not suspended (but see para. 307 on Arts 17(2) and 18(3)), nor do they recommence anew (but see paras 309 and 310 on two occasions where the limitation period recommences). They simply cease to run, *i.e.*, they do not run anymore.
305. The UPICC adopts a different approach by providing that the running of the limitation period is “suspended” when the obligee has asserted its rights in judicial proceedings or arbitration proceedings, such as by commencing the proceedings, or in insolvency proceedings or dissolution proceedings (Arts 10.5(1) and 10.6(1) UPICC). The suspension lasts until a final decision has been issued or until the proceedings have been otherwise terminated (Arts 10.5(2) and 10.6(2) UPICC). The UPICC also extends 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 UPICC).

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

306. 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

⁶⁶ 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 in case a proceeding have been commenced against the buyer by a party who purchased the goods from him (Art. 18).

court or arbitral tribunal lacks jurisdiction or because of a procedural defect. For such case, the 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(1)).

307. In that situation, most legal systems allow the creditor to pursue his 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 him an additional period of one year to commence new proceedings (Art. 17(2)). However, this is subject to the maximum limitation period of ten years (Art. 23).
308. The UPICC adopts a different approach by providing that suspension of the limitation period lasts until the proceedings have been terminated without reaching a final decision (Arts 10.5(2) and 10.6(2) UPICC). Therefore, there is no provision under the UPICC that corresponds to Article 17(2) of the Limitation Convention.

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

309. Under the Convention, the limitation period recommences, i.e., the four years period runs anew, within the total limit of ten years from the date the claim accrued, in two situations. Firstly, if the creditor performs in the debtor's State an act that, under the law of that State, has the effect of recommencing a limitation period including those that can be made outside legal proceedings (Art. 19).
310. Secondly, limitation period recommences if the debtor acknowledges in writing his obligation to the creditor (Art. 20(1)) or pays interest or partially performs the obligation from which his acknowledgement can be inferred (Art. 20(2)). The rule is similar but different under the UPICC. Under the UPICC, there is not writing requirement for acknowledgement (Art 10.4(1) UPICC). 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(2) UPICC).

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

311. The 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 his control and which he could neither avoid 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 ten years (Art. 23). The UPICC adopt the same rule (Art. 10.8(1) UPICC) but extend it to the situation where the impediment consists of the incapacity or death of the obligor or the obligee and when a representative those parties estate has not been appointed or a successor has not inherited the respective parties position (Art. 10.8(2) UPICC).

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

312. As noted above, limitation period ceases to run by instituting legal proceedings (Arts 13-18). The Limitation Convention provides that such 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 extension of limitation periods under Article 17 and the recommencement of the limitation period under Article 19.
313. 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.

iv. Interaction with other uniform law instruments

1. *Relationship with the CISG*

a. *General Relationship*

314. The Limitation Convention and the CISG can be considered to be 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 supplements that lacuna. Although they can be applied independently from each other, value will be derived the most if both apply to a contract. Thus, it is recommended that States become parties to both Conventions.
315. The scope of application of the Limitation Convention as amended in 1980 is aligned to the CISG. Thus, except for a few situations, the CISG and the Limitation Convention apply to the same contract and claims arising therefrom.

b. *Time Limits under the CISG to be Distinguished*

316. The CISG contains several provisions that relate to time-limits. For example, Article 39(2) CISG provides that the buyer loses its right to rely on a lack of conformity of the goods, unless it gives notice to the seller of the non-conformity within two years from the date the goods are handed over to the buyer. 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 particular time-limit within which one party is required, as a condition for the acquisition or exercise of his claim, to give notice to the other party or perform any act other than the institution of legal proceedings (Art. 1(2); cf. Art. 10.1(2) UPICC).

2. *Relationship with UPICC*

317. The parties need to opt out of the Limitation Convention (see *supra*, para. 292) in order to choose the UPICC as the law applicable to limitation periods, provided the rules of private international law allow such choice.

3. Relationship with Electronic Communications Convention

318. The Limitation Convention provides writing requirements for acknowledgement 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 writing requirements can be met by electronic communications in connection with a contract to which the Limitation Convention applies (Arts 9(2), 20(1) Electronic Communications Convention).

4. Relationship with PIL

319. The Limitation Convention does not exclude the application of PIL. There will always be a law made applicable by the rules of PIL, but for the matter of limitation periods, the Limitation Convention prevails. This is the case even if the law of the forum considers limitation period as a procedural matter.
320. If the parties opt out of the Limitation Convention in accordance with Article 3(2), the otherwise applicable law will apply. This includes application of domestic laws as well as the UPICC as far as the rule of PIL of allows such choice by the parties.

c. UNIDROIT Principles of International Commercial Contracts (UPICC)

What are the purposes of the UPICC?

321. 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.
322. First, the UPICC provide a “neutral” law for international transactions, *i.e.*, 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.
323. Secondly, 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.
324. Thirdly, the UPICC are multilingual. They are available in a variety of world languages, so that there is a high probability that both parties to an international contract can access them in a language that they are familiar with.

How were the UPICC developed?

325. The UPICC were elaborated by international Working Groups that consisted of eminent contract lawyers sitting in their personal capacity, under the auspices of UNIDROIT. Their publication was first authorised by the Governing Council of UNIDROIT in 1994.

326. The drafting of the UPICC was preceded by elaborate 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.
327. With regard to the former, they consulted a range of national contract laws from the civil law and the common law traditions, especially the major European civil codes, the English common law and American contract law as set out in the Restatement (Second) of Contracts and the Uniform Commercial Code.
328. With regard to the latter, a number of international conventions were particularly influential. Apart from the CISG and the Limitation Convention, these included the 1983 Geneva Convention on Agency in the International Sale of Goods, the 1988 Ottawa Convention on International Factoring and the 2001 United Nations Convention on Assignment of Receivables in International Trade. The drafters also took into account soft-law instruments issued by other international institutions, such as the Incoterms® and the Uniform Customs and Practice for Documentary Credits, both of which were prepared by the ICC. Moreover, they drew inspiration from model contracts of institutions like the ICC or the International Federation of Consulting Engineers (FIDIC).
329. As a result of this comparative exercise, the UPICC contain two types of provision. 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 is shared across domestic and international contract laws, and they restated this rule in one of the articles of the instrument. However, frequently this was not possible because no global “common core” of solutions could be established. In this event, the drafters either made choices between existing approaches or designed new rules in order to ultimately adopt what they perceived to be the “best” solutions, particularly with a view to the special requirements of international trade. In these cases, they aimed to strike a balance between the common law and the civil law traditions. For this reason, the UPICC are widely regarded as providing jurisdictionally “neutral” solutions.

Editions and language versions

330. The UPICC are currently in their fourth edition (2016), with the second and third editions dating from 2004 and 2010, respectively. Each edition added new provisions on further issues of contract law and thus broadened the coverage of the UPICC. The instrument is available in all five of the Institute’s official languages (English, French, German, Italian and Spanish). Apart from these official versions, there are numerous translations into other languages. All editions and language versions are easily accessible on the website of UNIDROIT.⁶⁷

What is the meaning of “principles” of contract law?

331. 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

⁶⁷ <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>.

majority of the 211 articles are straightforward, hard and fast “rules” which can be applied like any other national or transnational rule of contract law. They more or less pre-determine 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.

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

332. However, the UPICC differ from the CISG in three major regards. 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, *supra* paras 40-62 and 67, and *infra*, paras 337 *et seq.*). Secondly, 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 contract, including service contracts (see *infra*, paras 355 *et seq.*). For this reason, thirdly, 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 *infra*, particularly para. 396).
333. Like the CISG and the Limitation Convention, the UPICC were designed and drafted under the auspices of an international organisation. However, unlike these and other Conventions in the area of transnational commercial law, they are a so-called “soft law” instrument, *i.e.*, they do not impose an obligation on the respective Contracting States to bring the rules of the instrument into force by way of national legislation, constitutional arrangements or other mechanisms of transposition.
334. 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 expressly listed in their Preamble is to “serve as a model for national and international legislators”. There are many examples of national legislators which have chosen to do so.⁶⁸
335. 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 *infra*, Chapter 4.c.iii), 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. First, the parties, or someone adjudicating a dispute between them, must have chosen to make the UPICC applicable in their contractual relationship (see *infra*, paras 337 *et seq.*). Secondly, 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 *infra*, paras 342 *et seq.*). However, even if these requirements have not been met the UPICC

⁶⁸ Among others, the 1999 Chinese Contract Law, many post-Socialist civil codes in Eastern and Central Eastern Europe, the 2015 Argentinian Código civil y comercial and the revised French Code civil of 2016 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 alliance of 17 Francophone States.

may indirectly apply to the contractual relationship between the parties if the adjudicator uses them to interpret or supplement the applicable contract law (see *infra*, 350 *et seq.*).

How can the UPICC be used in practice?

336. There are various ways in which the UPICC can be made to apply in a given contractual relationship.
337. 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 *supra*, Chapter 3.b). Since the coverage of the UPICC is limited to general issues of contract law, the parties may wish to supplement their choice with the 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.
338. In order to assist parties in drafting pertinent choice of law clauses UNIDROIT published a set of *Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts* in 2013 (see *supra*, paras 65-66). Further model clauses of a similar nature are contained in model contracts of international organisations, such as the 2000 *ICC Model International Franchising Contract* and the 2002 *ICC Model Commercial Agency Contract* and the *Model Contracts for Small Firms* prepared by the International Trade Center (ITC).
339. Secondly, 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, *supra* para. 43). They may incorporate the UPICC in their entirety, or they may incorporate individual provisions or selected parts only, for example, the Chapter setting forth the rules on contractual interpretation (Chapter 4) or the Section containing provisions on hardship (Section 6.2).
340. In so far 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 this rule. However, as a term of the contract, the rule can only bind the parties to the extent that it does not violate the mandatory provisions of the law governing the contract, *i.e.*, those rules from which the parties to a contract may not derogate by way of agreement. Comparative studies have shown that such conflicts will only rarely arise, and even if they do Article 1.4 of the UPICC expressly acknowledges the prevalence of mandatory rules (see *supra*, para. 102).
341. Thirdly, a court or an arbitral tribunal may designate the UPICC as the law governing a particular contract. There are two scenarios where adjudicators may find this attractive: either the parties have not chosen any law at all to govern their contract, or they 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.

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

342. A choice of 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 open to 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 regards (see *supra*, Chapter 3).

Judicial setting

343. This is particularly so 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 private international law 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 like the UPICC. The most important regional instrument following this traditional approach is the EU Rome I Regulation (Art. 3(1)) (see *supra*, para. 56).

344. A notable exception from the traditional approach is the domestic PIL rules of Paraguay, *supra*, Chapter 3.b.ii). If legislators in other States were to follow this example, the courts of those States would also have to acknowledge party choices of the UPICC.

345. It has also been argued that, under Article 9(2) of the Mexico Convention, State courts shall take the UPICC into account as “general principles of international commercial law” if the parties have not chosen a law applicable to the contract.⁶⁹ However, this Convention has not yet secured a sufficient number of ratifications.

346. Even a State court that is subject to a traditional choice of law regime does not have to ignore a purported choice by the parties of the UPICC entirely. In order to give effect, as much as possible, to the intention of the parties such a court should interpret the purported choice as the law governing the contract as an agreement to incorporate the UPICC as terms of the contract (see *supra*, paras 339 *et seq.*). In the EU, for example, this possibility is specifically mentioned in Recital 13 of the Rome I Regulation.

Arbitral Setting

347. 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.*, Art. 21(1)(1) ICC Rules). This notion includes non-State law, such as the UPICC. In ad-hoc arbitrations subject to the 2010 UNCITRAL Arbitration Rules, the tribunal is

⁶⁹ See, *e.g.*, the OAS Guide, paras 185-187 and 352-354.

also bound to accept a choice of rules of law (Art. 35(1) the Rules). 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(1) of the UNCITRAL Model Law on International Commercial Arbitration.

348. Parties who wish 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 *supra*, paras 65-66) with an arbitration agreement. At least one arbitral institution explicitly suggests the choice of the UPICC to parties that agree to have their dispute arbitrated by the institution.⁷⁰
349. Finally, under the arbitration regimes mentioned in paragraph 351, arbitral tribunals are often free to apply the UPICC if the parties have expressly authorised the tribunal to decide *ex aequo et bono* or as *amiable compositeur*, or have not made any stipulation with regard to the law governing the merits of the dispute. In these cases, many of the relevant arbitration rules and laws tend to vest a broad discretion in the tribunal to apply the rules of law which it determines to be appropriate (*e.g.*, Art. 21(3) ICC Rules, Art. 28(3) UNCITRAL Model Law; Art. 21(1)(2) ICC Rules, Art. 1511(1) French Code of Civil Procedure). Under Article 56 of the 2013 Panama Arbitration Law, tribunals in international arbitration are even under a duty to take the UPICC into account, among other sources of law.

Indirect application as a means of interpretation and supplementation

350. Even in scenarios where neither the parties nor the adjudicator has designated the UPICC as the law governing the contract or where 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.
351. 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(1) of the Convention stipulates that, in its interpretation, "regard is to be had to its international character".
352. 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 context, 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(2) (see *supra*, paras 130 *et seq.*). 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". It might be argued that the UPICC do not embody *per se* the general principles on which the CISG is based, not least because they were published only 14 years after the Convention was adopted. However, it might well be argued that at

⁷⁰ Art. 35(1)c) of the Arbitration Rules of the Chinese-European Arbitration Centre.

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, the international organisation behind the CISG, has formally commended the use of the UPICC for their intended purposes,⁷¹ and these purposes, as set out in the Preamble to the UPICC, include the use of the UPICC “to supplement international uniform law instruments”.

What is the scope of application of the UPICC?

353. According to the first paragraph of their preamble, the UPICC “set forth general rules for international commercial contracts”.
354. 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 none of the parties acts as a consumer. In this regard, their scope of application resembles that of the CISG and the Limitation Convention (see *supra*, to be added).
355. As opposed to these 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 at all. They rather 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.
356. 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 *supra*, para. 330). Unless the parties have agreed otherwise, adjudicators will normally apply the most recent version.

Substantive Provisions: general overview

357. 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”.
358. Each of these 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, so that the black letter rules and the comments, taken together, constitute

⁷¹ Report of the UN Commission on International Trade Law, Forty-sixth Session, 8-26 July 2013, UN Doc A/68/17, Official Records of the General Assembly, Sixty-eighth Session, Supplement No 17 (2013) 137-140.

the “integral version” of the instrument.⁷² 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.

359. 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 (Chapter 2) over validity, especially problems arising from defects of consent (Chapter 3) to interpretation (Chapter 4), content of contracts (Chapter 5), performance of contracts (Chapter 6) and remedies for non-performance (Chapter 7). Chapter 1 set forth definitions and general principles that apply across all the issues covered. It is on these topics, particularly with regard to formation and remedies for non-performance, that there is a substantial thematic overlap with the CISG (see *infra*, v.1).
360. The 2004 edition added 65 new articles dealing with six further thematic areas: agency (Chapter 2, Section 2), contracts for the benefit of third parties (Chapter 5, Section 2), set-off (Chapter 8), assignment and transfer of rights and obligations (Chapter 9), and limitation periods (Chapter 10). The latter broadly covers the same ground as the Limitation Convention (see *infra*, Chapter 4.c.v.1).
361. The 2010 edition contained 26 new provisions on illegality (Chapter 3, Section 3), conditions (Chapter 5, Section 3), the plurality of obligors and obligees (Chapter 11) and the unwinding of failed contracts (Art. 7.3.7) as well as a few other changes that were necessitated by these additions.
362. 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.
363. The 2016 edition took a different approach. Its main objective was to better address the special requirements of long-term contracts. In order to do so it did not add any new provisions but rather substantially amended six existing articles and many of the existing comments.
364. At present, therefore, the UPICC set forth 211 articles that are thematically divided into 11 chapters, with some of these being once again divided into sub-chapters (“sections”).
365. They are preceded by a Preamble that lists 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 means for interpreting and supplementing national law and international uniform law instruments as such. As has been seen, the extent to which these purposes will materialise will depend on the relevant *lex fori* or *lex arbitri* and on the applicable rules and principles on interpretation and gap-filling.

⁷² The English and the French integral versions are accessible on the UNIDROIT website, e.g., <https://www.unidroit.org/unidroit-principles-2016/unidroit-principles-2016-overview/english-integral>.

366. Chapter 1 then lays down a number of “general provisions” that are meant to inform the interpretation and the 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, *i.e.*, 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 (Art. 1.10 and 1.11) and a specific article on the priority of applicable mandatory rules (Art. 1.4) (see *supra*, paras 102-103 and *infra*, para. 388).
367. Section 2.1 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 to 2.1.5), 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 to 2.1.22). 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 and 2.1.16). While the rules on offer and acceptance were modelled on, and are broadly in line with the CISG, the others provide significant further detail and cover additional topics (see *infra*, Chapter 4.a).
368. Section 2.2 sets forth rules on agency in the context of contract formation (for further information on agency, see *infra*, Chapter 5.d). 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 in case 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 unauthorised 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, *i.e.*, 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 out of the internal relationship between the principal and the agent (Art. 2.2.1).
369. Chapter 3 covers the validity of contracts, with a few introductory provisions in Section 3.1. 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 *infra*, para. 388).
370. Section 3.2 lists the relevant grounds for the avoidance of a contract. These are mistake (Arts 3.2.1 to 3.2.4), 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 to 3.2.17).
371. Section 3.3 deals with illegal contracts, *i.e.*, 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).

372. 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 a series of 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 who 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).
373. Section 5.1 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 and 5.1.5). There are rules on the quality and the price of performance and the possibility to terminate contracts concluded for an indefinite period of time for cases where these issues have not been expressly agreed by the parties (Arts 5.1.6 to 5.1.8).
374. Section 5.2 lays out a comprehensive regime for contracts in favour of third parties, *i.e.*, 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 on him (Arts 5.2.4 to 5.2.6).
375. Section 5.3 deals with contractual conditions. It distinguishes suspensive and resolutive conditions and their respective effects (Arts 5.3.1, 5.3.2 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 and 5.3.4).
376. Section 6.1 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 to 6.1.12) and the effects of public permission requirements (Arts 6.1.14 to 6.1.17).
377. Section 6.2 deals with the effects of hardship, *i.e.*, 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 is 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).
378. Chapter 7 sets forth the remedies for non-performance, once again with substantial overlap with the rules in the CISG (see *infra*, v.1.). To begin with, there are a number of general provisions on non-performance in Section 7.1. These include the right to cure of the non-

performing party (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 - so-called *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).

379. Section 7.2 deals with specific performance which 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).
380. Section 7.3 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 (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 and 7.3.7).
381. 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 and 8.4), and set-off, once effected, discharges the obligations for the future (Art. 8.5).
382. Chapter 9 contains a detailed regime on the assignment of rights (Section 9.1), the transfer of obligations (Section 9.2) and the assignment of contracts (Section 9.3).
383. Chapter 10, on limitation periods, conceptualises 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 three-year period and a maximum period of ten years (Art. 10.2). The parties may modify the period within limits (Art. 10.3). It may be suspended by judicial or other proceedings and in case of *force majeure* or other unforeseen circumstances (Arts 10.5 to 10.8). There are many overlaps with, and some differences from the Limitation Convention (see *supra*, Chapter 4.c).
384. 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 (Section 11.1), or a plurality of obligees, *i.e.*, a scenario where the performance of a contractual obligation is owed to more than one obligee (Section 11.2).

Selected features

385. 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 to 6.1.17), currency of payment (Arts 6.1.19 and 6.1.10) and the currency in which damages are to be assessed (Art. 7.4.12).

386. Like those of the CISG (see *supra*, para. 129), the rules of the UPICC must be interpreted autonomously, *i.e.*, without having regard to the established legal terminology of national contract laws (Art. 1.6(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(2)) (see *infra*, para. 393).
387. 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).
388. 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. 10.3.2). However, given the non-binding status of the UPICC, it may be impossible to enforce the mandatory character in a given case (see *supra*, para. 103).
389. 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 (Section 2.2), contracts in favour of third parties (Section 5.2), assignment of rights and transfer of obligations (Chapter 9) and plurality of obligors and obligees (Chapter 11). It may be the case that the relevant rule of the UPICC will merely apply 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.
390. 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.

How do the UPICC interact with other uniform law instruments?

1. Relationship with the CISG and the Limitation Convention

391. The UPICC were drafted against the existing background of transnational commercial law which included the CISG and the Limitation Convention (see *supra*, para. 328).
392. As compared to these instruments, three types of provision may be distinguished. It is specifically with regard to the second and the third of these that the function of the UPICC as

a means for interpreting and supplementing international uniform law instruments may be relevant (see *supra*, Chapter 4.c.ii.3).

393. 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 (Arts 2.1.2-2.1.11; *cf.* Arts 14-23 CISG, see *supra*, paras 156 *et seq.*), on the foreseeability of harm (Art. 7.4.4; *cf.* Art. 74, second sentence CISG, see *supra*, para. 272) and on *force majeure* (Art. 7.1.7; *cf.* Art. 79 CISG, see *supra*, para. 263). 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 *supra*, paras 127 *et seq.*). However, in contrast to Article 7(2) of the CISG, Article 1.6.2 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 *supra*, paras 138 *et seq.*). Yet, in contrast to Article 9(2) of the CISG, Article 1.9.2 of the UPICC does not require the parties' actual or constructive knowledge of a particular usage to make it binding.
394. Secondly, some of the provisions address a 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, for example, expressly recognises that contracts cannot only be concluded by the acceptance of an offer, but also by other conduct of the parties that is sufficient to show agreement. There are also 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 as well as on merger and no-oral-modification clauses (Arts 2.1.12, 2.1.13, 2.1.17 and 2.1.18), neither of which is expressly covered by the CISG (see *supra*, para. 158). Moreover, while the CISG only recognises a role for good faith in international trade (Art. 7(1) CISG), 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, 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 *supra*, paras 132 *et seq.*). The CISG does not have 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 forms" (Arts 2.1.19 to 2.1.22) (see *supra*, paras 170 *et seq.*). 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 and 7.4.10) and agreed payment for non-performance (Art. 7.4.19). In rare cases, the UPICC deliberately depart from the previous conventions. For example, their general limitation period of four years (Art. 10.2) differs from the three-year period of Article 8 of the Limitation Convention. (See *supra*, Chapter 4.b for a comparison of provisions of the Limitation Convention and of the UPICC.)

395. Thirdly, 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 (Chapter 3; *cf.* Art. 4 CISG; see *supra*, paras 118 *et seq.*), or issues that are obviously beyond their scope. The latter include the rules on the authority of agents (Section 2.2), contracts in favour of third parties (Section 5.2), set-off (Chapter 8), assignment of rights, transfer of obligations and assignment of contracts (Chapter 9) and the plurality of obligors and obligees (Chapter 11).
396. Many, but not all 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 an individual “one off-transaction”. 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 performance (Art. 5.1.6), the unilateral cancellation of contracts for an indefinite period (Art. 5.1.8) and hardship (Arts 6.2.1-6.2.3). The 2016 edition of the UPICC substantially amended six existing articles and many of the existing comments to better address the special requirements of long-term contracts. It also provided, in Article 1.11, a specific definition 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”.

2. Relationship with the HCCH Principles

397. 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 HCCH Principles. As discussed in Chapter 3.b.i and ii, 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”. Particularly, Commentary 3.6 of the HCCH Principles explicitly mentions the UPICC as a paradigm case of such a set of rules.
398. The HCCH Principles therefore offer a solution to the practice of many States that do not authorise their courts to give effect to the choice of the parties to make non-State law the law governing the contract (see *supra*, Chapter 3.b.ii).

c. [UNCITRAL Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance](#)

399. 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 UNCITRAL Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure to Perform (1983) is 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 to their contract.

400. 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(1)). The definition of “international” is the same as in the CISG (Arts 2 and 3; *cf.* Arts 1 and 10 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).
401. The Uniform Rules do not make it a requirement to claim the agreed sum that there was actual loss. The Uniform Rules provide that the obligee is entitled to the agreed sum irrespective of its actual loss. This rule is contained also in Article 7.4.13(1) of the UPICC, which indicates that “the aggrieved party is entitled to the specified sum”. On the other hand, 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 Article 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 case of failure to perform. The parties may derogate from or vary the effect of this rule (Art. 9), subject to validity rules under the applicable domestic law.
402. **Relationship with right to specific performance.** If the contract provides that the obligee is entitled to the agreed sum upon delay in performance, he is also entitled to performance of the obligation in addition to the agreed sum (Art. 6(1)). If the contract provides that the obligee is entitled to the agreed sum upon a failure of performance other than delay, he 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(2)). The parties may derogate from or vary the effect of this rule (Art. 9).
403. **Relationship with right to damages.** In principle, the obligee may not claim damages in addition to the agreed sum, to the extent of the loss covered by the agreed sum. Nevertheless, he 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).
404. **Reduction of the agreed sum by the court or arbitral tribunal.** 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(2) UPICC). This is a mandatory rule which the parties may not derogate from or vary its effect (*cf.* Art. 9).

[e. Regional texts](#)

[Reserved]

f. Model contracts based on uniform texts

i. ICC Model International Sale Contract and Developing Neutral Legal Standards for International Contracts

405. 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.
406. The foundational pillars of ICC's model contract series relate to global trade in goods, including models on agency, distributorship, franchising, and confidentiality. All ICC's 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.
407. 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 Sales Contract (Manufactured Goods), published for the first time in 1997 and reviewed and updated in 2012, refers to the application of the CISG in its General Conditions. Article I, 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 different law than the seller's 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 primary model for the default clauses.
408. 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 Commercial Agency Contract any question not expressly or implicitly settled by contractual provisions shall be governed, in the following order, by the principles of law generally recognised in international trade as applicable to international agency contracts; the relevant trade usages; and the UPICC.

ii. ITC guidance texts

409. The International Trade Centre has prepared a guide to preparing international commercial contracts⁷³ as well as a compilation of model contracts.⁷⁴ Those texts provide practical

⁷³ International Trade Centre, *Cross-border contracting: How to draft and negotiate international commercial contracts*, Geneva, November 2018, available at <https://precontractual.com>.

⁷⁴ International Trade Centre, *Model contracts for small firms: legal guidance for doing international business*, Geneva, 2010, available from <http://www.intracen.org/model-contracts-for-small-firms/>.

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.

iii. IBA Cross-Border Transactions: Drafting Guide for International Sales Contracts

410. 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 (IBA) has compiled the document “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 take into account.
411. The Guide is divided in nine chapters dealing with the preparation of the visit to the foreign country, the substantive law on sale particularly focused on the CISG, soft law matters, currency and payments issues, export regulations, resale in the importing country, disputes resolution and tax treaties. It provides also a specimen form of distribution agreement. In each chapter the guide offers short comments and a collection of websites to allow the readers a quick investigation of the topic they are interested in. The Guide has been last updated in 2015.

5. Recurring Legal Issues Arising in Connection with Sales Contracts

a. Use of electronic means

412. The use of electronic information in contractual transactions, including across borders, has become prevalent due to 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 legal issues with respect to the legal status of electronic information.
413. UNCITRAL prepared texts that address contractual matters related to the use of electronic information. Those texts include the UNCITRAL Model Law on Electronic Commerce, 1996, the UNCITRAL Model Law on Electronic Signatures, 2001, the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005, (see *infra*, para. 419 *et seq.*) and the UNCITRAL Model Law on Electronic Transferable Records, 2017. Guidance texts have also been prepared in the areas of cross-border recognition of electronic signatures and of contractual aspects of cloud computing contracts.
414. UNCITRAL texts on electronic commerce are based on the three fundamental principles of technology neutrality, non-discrimination against the use of electronic information and functional equivalence.
415. The principle of technology neutrality requires that legislation shall not impose the use of or otherwise favour any specific technology, method or product. The principle of non-discrimination establishes that a communication shall not be denied validity on the sole ground that it is in electronic form. The principle of functional equivalence indicates that electronic communications may satisfy the purposes and functions of paper-based documents

provided 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.

416. UNCITRAL texts provide also 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.
417. In particular, 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 has 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.
418. 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 apply under certain circumstances also to non-consumers) and payments law.

Electronic Communications Convention and its relation to CISG and Limitation Convention

419. 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.
420. To that end, Article 20 of the Electronic Communications Convention declares 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 listed treaties will 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. 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.
421. One effect of the interaction between the Electronic Communications Convention, on the one hand, and the CISG and the Limitation Convention, on 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.
422. 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.

423. 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.
424. The Electronic Communications Convention contains also provisions relevant for electronic contracting, namely on: time and place of dispatch and receipt (Art. 10, updating Art. 15 of the UNCITRAL Model Law on Electronic Commerce); invitation to make offers (Art. 11, complementing Art. 14(2) CISG); use of automated message systems (Art. 12) and input errors made by natural persons (Art. 14).

b. Distribution contracts

425. Distribution agreements might respond to different kinds of modalities in practice. Basically, under a distribution contract, the supplier agrees to supply the other party, the distributor, with goods on a continuing basis and the distributor agrees to purchase them, and to resell them to others at its own risk, *i.e.*, in the distributor's name and on the distributor's behalf. Both nationally and internationally, there is neither a uniform definition of a distribution contract, nor a uniform characterisation of it, and so domestically it can be considered as a modality or subtype of a sales of goods contract or an autonomous contract itself. Under a distribution contract the parties foresee a long-term relationship that is often cooperative.⁷⁵
426. 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, 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.
427. At an 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 (Comment 3 to Art. 1.11, and several illustrations along the UPICC refer to them), 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). The UPICC juxtapose long-term contracts with ordinary exchange contracts such as sales contracts to be performed at one time (see also *supra*, para. 396).

⁷⁵ See *infra*, para. 427 for the definition of "long-term contracts" under the UPICC.

428. The CISG may apply to sale of goods contracts concluded on the basis of the distribution contract (the so-called framework contract) if all the conditions for the applicability of the CISG are met: internationality, goods, etc.
429. Furthermore, although this interpretation is not settled, the CISG in certain circumstances has been applied to the framework contract (distribution contract) as well, in situations where 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, 14.1 and 55 CISG). If this is the case, the contractual obligations derived from the framework agreement could be analyzed under CISG rules, including the exclusivity obligations without prejudice that others, such as competition obligations will be observed under the otherwise domestic applicable law, since competition issues are not covered by the Convention.
430. Absent 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).

c. Agency

431. 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 1.1 on the sphere of application of the UNIDROIT Convention on Agency in the International Sale of Goods (Geneva, 17 February 1983),⁷⁶ and Art. 2.2.1(1) UPICC⁷⁷). To this regard, the agent can act in his own name or in that of the principal.
432. Generally, the agent acts in relation not only to the conclusion of the international sale of goods contract but also might act in relation to its performance. Hence the agent may step in certain provisions of the CISG.
433. During the formation of the contract, the agent might be the one dealing with the offer or, as the case may be, an invitation to make an offer (Art. 14.1 CISG). 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 case of acceptance and so the agent will send the invitation to treat with a wording indicating no such intention, for example, “without my consent” or “save acceptance by the principal”.
434. During the performance of the contract, among others, the agent might be the person that receives from the buyer the notice about the lack of conformity of the goods under Article 39.1 CISG. In those circumstances the problems related with the scope of authority of the

⁷⁶ The Convention, which has not yet entered into force, aims 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.

⁷⁷ 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, though of course non-binding.

agent should be resolved in accordance with the otherwise applicable domestic law or rules of law chosen by the parties.

435. Furthermore, in relation to the field of application of the CISG particular problems might arise to determine the CISG application (Arts 1 and 10 CISG) especially 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 of the place of business of the principal.
436. The UPICC contain a fully-fledged set of rules on agency in its Section 2.2, referring to the formation of the contract and covering the authority of a person (“the agent”) to affect the legal relations of another person (“the principal”) by or with respect to a contract with a third party, whether the agent acts in its own name or in that of the principal. The Section 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 to 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 2.2.3-2.2.4), the situation where the agent acts with no authority or exceeds his/her authority, including the possible ratification by the principal (Arts 2.2.5-2.2.6 and 2.2.9), conflict of interests as a ground for avoidance of the contract (Art. 2.2.7), the appointment of sub-agent 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, different to a number of legal systems, does not distinguish between “direct or indirect” representation; it does not refer to situations where the agent’s authority is conferred by law or is derived from judicial authorisation; and it does not prevail over special rules governing agents of companies under mandatory applicable laws in case of conflict between those rules and the UPICC rules (See also *supra*, para. 368.)

d. Software / Data / Intellectual Property issues

437. Transactions in digital information, particularly when the information is detached from the tangible medium on which the information is stored, is a rather new phenomenon particularly in the sense that its legal framework is still an unsettled matter. It began with the emergence of computer software as an independent subject matter of trade, and quickly grew to include digital contents such as music, e-books, apps. 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 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 license contracts and some are developing a *sui generis* contract law applicable to transactions of digital contents.
438. Against this background, the question of whether transactions in “digital information” (software, computer programs, apps, music, e-books, smart goods, etc.) are within the scope

of the CISG poses a challenge to the interpretation of the 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.*, must goods be tangible?) and the nature of the transaction (*e.g.*, sale, license 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 the changing modern information technology on the other.

439. 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 intellectual property of that information or a person granted a license to supply the digital information to a third person, or a person with control over access to data that is 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.
440. Intellectual property is to a large extent harmonised through international conventions, such as the Berne Convention for the Protection of Literary and Artistic Works, the Paris Convention for the Protection of Industrial Property, the Agreement on Trade-Related Aspects of Intellectual Property Rights. However, due to the principle of territoriality, it is the law of the territory where 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 light of this problem, Article 42 of the CISG provides a uniform rule regarding which law is relevant in determining whether the goods infringe an intellectual property of a third person, for the purpose of determining whether the seller has fulfilled his obligation to deliver goods free from any right or claim by a third party based on intellectual property.
441. It should be noted as well that, at the present time, 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, particularly transactions in electronic data. If that endeavour succeeds, and the resulting soft law document proves influential, the result may be greater harmonisation in the area and the possibility of future work by international organisations.

e. [Countertrade / Barter \(including the UNCITRAL Legal Guide on International Countertrade Transactions\)](#)

442. In contracts for sale of goods, including 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”.
443. In 1992, UNCITRAL adopted a Legal Guide on International Countertrade Transactions that 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.⁷⁸

444. Provided they are of an international character and between commercial parties (see *supra*, para. 354), barter and other countertrade transactions are clearly within the scope of application of the UPICC, which is broader than that of the CISG.
445. 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. Generally, 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.
446. As far as uniform instruments of PIL are concerned, there seems to be consensus that instruments governing the applicable law to international sales 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.

⁷⁸ On offsets, *i.e.* contracts between a private and a public entity concluded as a condition for the same of goods or services in the public procurement market, see also the ICC-ECCO Guide to International Offset Contracts (2019), which makes reference to the UNCITRAL Model Law on Public Procurement as well as to European law.