

## Table of Contents

<b>SOURCES OF INTERNATIONAL BUSINESS LAW.....</b>	<b>1</b>
ROLE OF LAW IN INTERNATIONAL COMMERCE.....	1
INTERNATIONAL LAW AND INSTITUTIONS.....	1
<b>INTERNATIONAL SALE OF GOODS .....</b>	<b>6</b>
VIENNA SALES CONVENTION (CISG).....	6
INCO TRADE TERMS 2010.....	22
FORCE MAJEURE CLAUSES.....	24
CHOICE OF LAW CLAUSES AND MANDATORY RULES.....	24
OTHER MANDATORY RULES: .....	25
<b>INTERNATIONAL CARRIAGE OF GOODS.....</b>	<b>27</b>
TOG .....	27
HAGUE, HAGUE-VISBY, HAMBURG, HYBRID RULES.....	36
SEAWAY BILLS .....	37
VOYAGE CHARTERPARTIES .....	37
MARINE INSURANCE.....	37
AIR TRANSPORT.....	41
INTERNATIONAL CONVENTIONS FOR CARRIAGE OF GOODS BY AIR.....	41
OTHER MODES OF INTERNATIONAL CARRIAGE (INCLUDING MULTIMODAL) .....	42
<b>INTERNATIONAL PAYMENTS.....</b>	<b>43</b>
<b>CORRUPTION IN GLOBAL BUSINESS.....</b>	<b>49</b>
<b>DISTRIBUTION, AGENCY AND FRANCHISING .....</b>	<b>57</b>
AGENTS .....	58
DISTRIBUTORS .....	58
FRANCHISING.....	61
<b>INTELLECTUAL PROPERTY AND LICENSING.....</b>	<b>66</b>
LICENSING .....	66
PIRACY, PARALLEL IMPORTING AND COMPULSORY LICENSING .....	70
<b>FOREIGN DIRECT INVESTMENT .....</b>	<b>73</b>
NATURE.....	73
FORMS .....	73
REGULATION.....	74
TREATIES .....	76
BIT ARBITRATION .....	77
AUSTRALIAN ↔ INDONESIA BIT .....	79
<b>DISPUTE RESOLUTION .....</b>	<b>83</b>
INITIATION OF PROCESS .....	84
CROSS-BORDER LITIGATION.....	84
ARBITRATION: .....	84
UNCITRAL MODEL LAW.....	87
ICSID CONVENTION .....	88
<b>CISG: CONTRACTING STATES.....</b>	<b>89</b>



## Sources of International Business Law

### Role of Law in International Commerce

Private International Law → notions relate broadly to commercial arrangements of:

- Finance
- Transports
- Licensing
- Sale/Carriage of Goods

#### Aspects

1. Micro → Parties (Buyer/Seller)
    - a. Individual relationship
      - i. Transaction: shipping, finance, sale
    - b. Governing rules
    - c. DR methods
  2. Macro → government to government
    - a. Free trade arrangements
    - b. Bilateral agreements
    - c. Treaties
    - d. ^^ the above necessarily impact upon the individual trade relationship
- For trade and investment to be effective → needs to be supported by legal rules and institutions
    - Provides businesses certainty
  - Main difficulty is identifying the range of legal systems which may be applicable, determine how to understand these foreign legal systems and resolve any conflicts between potentially applicable systems.

#### Different families of law

1. **Roman Law-German family;**
  - a. Historical origin → *Roman Law* → *civil codes*. *Strong emphasis on legislation and theory*
  - b. Now → France, Germany
2. **Common law system;**
  - a. Historical origin → *England*. *Strongly centralised court system. Strong emphasis on experience and development of theory as precedents to case determination.*
  - b. Now → United States, Australia, UK, Canada, India, Singapore etc.
3. **Nordic or Scandinavian systems;**
  - a. → *separate/sub-group*
  - b. Not part of common law or German-roman
  - c. Roman law played smaller role in development of the law. → *no civil code*
4. **Socialist system;**
  - a. Marxism-Leninism view of society
  - b. Socialist laws are inexorably intertwined with political dogma
  - c. On the decline in Eastern Europe
5. **Religious systems (Jewish, Islamic, Hindu)**
  - a. Has divine origins.
  - b. Significance has increased since the economic development of Arab countries and the broader implementation of Islamic Law in countries such as Iran, Pakistan and Malaysia
6. Other (Indigenous)
  - a. AUSTRALIA → *Mabo* → native title rights and privileges of the Meriman people to the use and occupation of the land.

#### International Law and Institutions

##### **Shortcomings of private international law**

- If parties have not chosen a governing law, *may be difficult to determine objectively which country's law should govern the contract*
- Even if parties have made a choice, some states will have mandatory laws that apply (which cannot be excluded)
- Unfairness

## INTERNATIONAL COMMERCIAL LAW & DISPUTES – LAWS50094

- Each person is familiar with their own legal system BUT in the context where dispute resolution is occurring in another country → one party may not be familiar with the rules/processes of the other legal system
  - Other party has no knowledge or experience with that legal system → disadvantage
- Once applicable law is determined, national laws are developed with national interests and national policy behind them
  - Therefore, national laws may not be as suitable for *international* transactions

### Practical Guidance

#### Drafting?

→ at the drafting stage attempt to foresee possible issues. Have clear choice of law and forum clauses. This will mitigate the risk of having an (undesirable) foreign law being applied or foreign proceeding.

#### How?

- Need to have a strong understanding of the strengths and weaknesses of each jurisdiction.
- Considerations of different DR methods → litigation cf arbitration
  - Arbitration can provide parties more control, neutrality, protection from prejudice and bias
    - More advantageous mechanism

#### Risks beyond application of laws?

- Performance (possible force majeure factors!)
  - Distance?
  - Currency?
  - Expropriation?
  - Political disturbance?
  - General instability?
  - Language and cultures
    - Can be challenging at negotiation stages
    - Need to think creatively

### **Solution?**

→ Much tidier and fairer if national legal systems were confined to domestic law and international transactions were governed by rules of international law.

- Rules of international law have transnational currency and validity and ARE NOT rooted in a local or parochial legal system.
- BUT rule of international law are dependent on the identification and acceptance of such rules.
- International Court of Justice, Arbitration Tribunals → established

<u>UNCITRAL</u> <i>UN Commission on International Trade Law</i>	<u>UNIDROIT</u> <i>UN International Institute for the Unification of Private Law</i>	<u>ICC</u> <i>International Chamber of Commerce</i>	<u>Hague Conference on Private International Law</u>
Responsible for several international conventions and model laws <ul style="list-style-type: none"><li>• International carriage of goods, international bills of exchange and promissory notes and international arbitration</li></ul> → <u>Vienna Convention on Goods for the International Sale of Goods 1980 (CISG)</u>	Active in fields of international financial leasing, sale of goods and succession on death → <u>Principles of International Commercial Contracts</u> <ul style="list-style-type: none"><li>• Valuable source of the <i>lex mercatoria</i></li><li>• Principles described as</li></ul>	International, non-governmental, organisation → particularly successful in harmonising international commercial practice (esp. incoterms, banking, letters of credit and international commercial arbitration) → <u>INCOTERMS</u> (CIF, FOB) <ul style="list-style-type: none"><li>• Guide and definition of trade terms used in the international sale of goods</li><li>• Focused on passing of risk</li></ul> → <u>UCP 600</u>	International organisation drafts conventions in the field of private international law

	<p>b) declaring that a specified country has made a declaration under Part IV of the Convention and specifying details of that declaration, including the date the declaration took or will take effect; or</p> <p>c) declaring that a specified country has denounced the Convention or Part II or III of the Convention and specifying the date the denunciation took or will take effect—</p> <p>is evidence of the matters contained in the document.</p>
Test	<p><b>1. Does the CISG apply?</b></p> <p>a. CISG applies to contracts of sale of goods between parties <i>whose place of business</i> are in <i>different</i> States when:</p> <ol style="list-style-type: none"> <li><b>Art 1(1)(a):</b> The States are Contracting States; OR</li> <li><b>Art 1(1)(b):</b> rules of private international law lead to the application of the law of a Contracting State <ol style="list-style-type: none"> <li><i>I.e. The PIL rules of the country adjudicating the finding of the proper law, lead to the law of the CS to apply → then CISG applies</i> <ol style="list-style-type: none"> <li><i>E.g. PNG → AUS. VIC court finds German law to apply. As GER is CISG CS, CISG applies per 1(1)(b). DOES NOT matter PNG is not CS.</i></li> </ol> </li> </ol> </li> <li><i>Place of business?</i> <ol style="list-style-type: none"> <li><b>Art 10(a)</b> if part has more than 1, place of business is that <u>which has the closest relationship to the contract AND its performance → regard to circumstances/party contemplation</u></li> <li><b>Art 10(b):</b> no place of business? Then habitual residence</li> <li><b>CLOUT 400</b> → consider communications, invoices sent to determine centre of gravity</li> </ol> </li> <li><i>Different</i> <ol style="list-style-type: none"> <li><i>Buyer and seller CANNOT be in the same CS</i></li> <li><i>Must be in different countries</i></li> <li><i>But if chose law of the CISG to apply can effectively contract in to the convention</i></li> </ol> </li> <li><b>Art 95:</b> art 1(1)(b) can be <u>excluded</u> <ol style="list-style-type: none"> <li>USA, China, Armenia, Czech Republic, Singapore, Slovakia, St Vincent &amp; Grenadines have done this</li> <li><i>I.e. dispute in Chinese Court → art 1(1)(a) is <u>only</u> way to apply CSG</i></li> <li><i>BUT if the action was brought in VIC court could use 1(1)(b)</i></li> </ol> </li> </ol> <p>b. Nationality, civil or commercial character of parties/contract is <u>not</u> to be taken into account <b>Art 1(3).</b></p> <p>c. <b>Art 5</b> Does NOT apply to seller liability for death OR personal injury to <i>any</i> person</p> <p>d. <b>Timing?</b></p> <ol style="list-style-type: none"> <li>SoG contract must be concluded <u>after</u> CISG in force in either CS (1(1)(a)) or the country (PIL (1)(1)(b))</li> </ol> <p><b>2. What are 'goods' → ONLY commercial contracts <i>Business → Business</i></b></p> <p>a. 'Goods' undefined.</p> <p>b. Test is negative i.e what sales the CISG does NOT apply to:</p> <p>c. Narrow definition:</p> <ol style="list-style-type: none"> <li><b>Art 2(a)</b> of goods bought for personal, family or household use <u>UNLESS</u> the seller did not know <i>before the contract concluded</i></li> <li><b>Art 2(b)</b> by auction; <u>HIRE &amp; LEASING ALSO excluded</u></li> <li><b>Art 2(c):</b> on execution or by authority of law;</li> <li><b>Art 2(d):</b> stocks, shares, investment securities, negotiable instruments or money;</li> <li><b>Art 2(e):</b> of ships, vessels, hovercrafts or aircraft;</li> <li><b>Art 2(f):</b> of electricity</li> </ol> <p>d. Australian consumer law?</p> <ol style="list-style-type: none"> <li><b>S 3 ACL</b> much wider definition of 'consumer' → anything under \$40k</li> </ol>