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**Adjustments to the draft Legal Guide to Uniform Legal
Instruments in the Area of International Commercial
Contracts (with a focus on sales), as contained in document
A/CN.9/1029**

Note by the Secretariat

Contents

	<i>Page</i>
I. Introduction	2
II. Adjustments to the draft Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts (with a focus on sales), as contained in document A/CN.9/1029	2
III. Communications	7



I. Introduction

1. At its fifty-second session (Vienna, 8–19 July 2019), the Commission took note with satisfaction of the continuing coordination with the Hague Conference on Private International Law and the International Institute for the Unification of Private Law (Unidroit), and the progress on the preparation of the joint guidance document on commercial contract law (with a focus on sales) to be submitted to the Commission at its fifty-third session, in 2020.¹ That joint guidance document has been submitted to the Commission as the draft Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts (with a focus on sales) (the “draft Legal Guide”) (A/CN.9/1029) for approval of its publication.
2. Section II of this note sets out adjustments to the draft Legal Guide prepared in coordination with the Hague Conference on Private International Law and Unidroit as a result of the consultations that took place in connection with the consideration of the draft Legal Guide by the governing bodies of those organizations.
3. Section III of this note reproduces a letter from the Secretary General of the Hague Conference on Private International Law to the Secretary of UNCITRAL and a letter from the Secretary General of Unidroit to the Secretary of UNCITRAL on the process of consideration of the draft Legal Guide in those international organizations.

II. Adjustments to the draft Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts (with a focus on sales), as contained in document A/CN.9/1029

4. Replace the text in footnote 37 with the following:

“In this regard, the HCCH Convention of 30 June 2005 on Choice of Court Agreements aims at ensuring the effectiveness of exclusive choice of court agreements between parties to international commercial transactions. For more information on this Convention, see www.hcch.net/en/instruments/specialised-sections/choice-of-court. Recognition and enforcement of judgments deriving from a non-exclusive choice of court agreement will be governed by the HCCH Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. For more information on the Judgments Convention, see www.hcch.net/en/instruments/conventions/full-text/?cid=137.”
5. In paragraph 123, insert the following at the end:

“However, sums paid by the buyer as compensation for death or personal injury of a third person caused by goods or services supplied by the seller may be regarded as claims for pecuniary loss of the buyer.”
6. In paragraph 124, insert the following at the end:

“If the CISG would not apply on its own terms (i.e. if the conditions of article 1(1) are not met), its choice as applicable law would be subject to the limits to the choice of non-State rules of law to govern the contract (see paras. 45–47 above).”
7. In paragraph 132, replace the second sentence with the following:

“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 can serve to corroborate the existence of a given general principle, and, thus, they can be a tool to interpret the CISG

¹ United Nations, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17* (A/74/17), para. 224.

(art. 7(1) CISG) or to fill its gaps (art. 7(2) CISG), whenever there is no collision between the two instruments (see paras. 352 and 393 below).”

8. In paragraph 139, replace the third sentence with the following:

“Practices and agreed usages have a bilateral effect and are thus binding only to the extent that they are reflected in the habitual conduct of the parties in their business relationship or in the agreement of the parties concerned. Well-established and widely recognized international usages of trade enjoy a presumption of general knowledge and tacit acceptance as their existence is disconnected from a concrete commercial operation.”

9. After paragraph 144, insert the following text (see [A/CN.9/1028](#)):

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

“Ex Works” (EXW) means that the seller delivers when it places the goods at the disposal of the buyer at the seller’s premises or at another named place (i.e., works, factory, warehouse, etc.). The seller does not need to load the goods on any collecting vehicle, nor does it need to clear the goods for export, where such clearance is applicable.

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

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

“Carriage and Insurance Paid to” (CIP) means that the seller delivers the goods to the carrier or another person nominated by the seller at an agreed place (if any such place is agreed between parties) and that the seller must arrange or contract for and pay the costs of carriage necessary to bring the goods to the named place of destination. The seller also contracts for insurance cover against the buyer’s risk of loss of or damage to the goods during the carriage. The buyer should note that under CIP the seller is now required to obtain insurance of a higher level than in the past, in line with the Institute Cargo Clauses (A) or similar clauses. Should the buyer wish to have more insurance protection, it will need either to agree as much expressly with the seller or to make its own extra insurance arrangements.

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

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

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

for import, to pay any duty for both export and import and to carry out all customs formalities.

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

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

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

“Cost, Insurance and Freight” (CIF) means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. The seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination. The seller also contracts for insurance cover against the buyer’s risk of loss of or damage to the goods during the carriage. The buyer should note that under CIF the seller is required to obtain insurance only on minimum cover. Should the buyer wish to have more insurance protection, it will need either to agree as much expressly with the seller or to make its own extra insurance arrangements.”

10. Replace paragraph 154 with the following:

“Parties might well expressly or impliedly agree on the exclusion or derogation of the principle of informality under article 11 CISG by virtue of article 6 CISG or by a no oral modification (“NOM”) clause that excludes oral agreements for the modification of the contract (art. 29 CISG). NOM clauses are expressly referred to by the UPICC, which provide specific provisions on them (see para. 393 below).”

11. In paragraph 167, delete the phrase:

“; or by application of a duty to answer as derived by the good faith principle (art. 7(1)).”

12. In paragraph 177, third sentence, replace the words “which is a location different from the buyer’s place of business” with the words “which is not necessarily the same location as the buyer’s place of business”.

13. In paragraph 207, first sentence, insert the word “main” before the word “purpose”.

14. In paragraph 217, insert after second sentence the phrase:

“In the case of a letter of credit, the seller’s duty in respect of shipping documents will be to present them to the bank nominated in the credit to receive them”.

15. In paragraph 236, replace the fourth sentence and the first part of the fifth sentence with the following:

“In view of the general principle of strict liability under the CISG, a buyer who is unable to pay the price because the relevant authority denies permission to transfer funds would still be liable for non-payment, subject to the possibility of

exemption under article 79. Parties concerned about the risk of adverse currency and monetary control measures may consider the UPICC, which [...]”.

16. In paragraph 275, replace the second sentence with the following:

“The CISG itself contains no specific rules on agreed sums, but in the light of the general principles on which it is based (art. 7(2)), any rules on the protection of the obligor of the otherwise applicable law or rules of law relying on notions such as reasonableness, excessiveness or proportionality must be applied in accordance with an international standard. In this respect, article 7.4.13 UPICC and the Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (1983)² are based on such notions. Parties wishing to make specific provisions on this matter may wish to refer to them.”

17. Replace paragraph 276 with the following:

“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)).³ However, the CISG makes no provision for renegotiation or adaptation of a contract to restore its original equilibrium in case it was fundamentally altered by an unanticipated supervening event that increases the cost of a party’s performance or diminishes the value of the performance a party receives (“hardship”). Some judicial decisions and doctrinal authorities refer to article 79 as a gateway to addressing such situations under the CISG. Articles 6.2.1 to 6.2.3 UPICC have detailed provisions that may be used to regulate the consequences of hardship in international contracts.⁴”

18. In paragraph 278, replace the second, third and fourth sentences with the following:

“This provision sets forth an unambiguous entitlement to interest for the aggrieved party but does not determine the applicable interest rate. This was done in acknowledgement that interests may violate mandatory provisions of domestic law in some jurisdictions. Most State courts applying article 78 determine the interest rate according to the domestic law applicable by reference of the conflict of law rules of the forum State, though there are arbitral and judicial decisions that have made recourse to a uniform standard. In regulating the applicable interest rate, parties may wish to consider the uniform rule provided in article 7.4.9 UPICC.⁵”

19. In paragraph 279, replace heading with “Anticipatory breach and instalment contracts”.

20. In paragraph 352, replace the fifth, sixth and seventh sentences with the following:

“The ‘general principles’ to which article 7(2) of the CISG refers are overarching rules that permeate the entire convention or at least a significant number of its provisions. They are arguably not numerous, and the more detailed UPICC do represent a compilation of such general principles. Nevertheless, both the CISG and the UPICC draw largely on the same sources, and at least some of the rules contained in the UPICC are restatements of general principles of international commercial law on which, among others, the CISG is based.

² United Nations, *Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 17 (A/38/17)*, annex I; see below, paras. 399 ff; additional information on the Uniform Rules is available at https://uncitral.un.org/en/texts/salegoods/contractualtexts/failure_of_performance.

³ 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.

⁴ On the hardship provisions of the UPICC see para. 377 below.

⁵ See paras. 351 ff and 393 below. For an overview of the case law on the point, see United Nations, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, New York, 2016, sub art. 78.

UNCITRAL has formally commended the use of the UPICC for their intended purposes⁶ and these purposes, as set out in the Preamble to the UPICC, include the use of the UPICC ‘to supplement international uniform law instruments’.”

21. In paragraph 391, insert at the end the following phrase:

“Since, however, the UPICC are intended to provide a system of rules especially tailored to the needs of international commercial transactions, they also embody what are perceived to be the best solutions, even if still not yet generally adopted.”

22. In paragraph 392, replace first sentence with the following:

“When comparing the UPICC with the CISG and the Limitation Convention, three types of provisions may be distinguished: provisions addressing the same issues; provisions addressing the same subject matter, but to different level of detail; and provisions addressing issues excluded from the scope of application of the CISG and the Limitation Convention.”

23. In Part IV, Section E, insert the following text provided by the OHADA Secretariat:

“1. OHADA Uniform Act on General Commercial Law

Commercial sale within the OHADA framework is provided for in articles 234 to 302 of the OHADA Uniform Act on General Commercial Law of 15 December 2010.

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

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

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

24. After paragraph 408, insert the following:

“The ICC has also developed stand-alone clauses to address specific issues, such as force majeure or hardship, which influenced the language used by the UPICC’s provisions in regulating these issues (see art. 7.1.7 on force majeure and arts. 6.2.1–6.2.3 on hardship). In turn, the UPICC have played a model role in the most recent revision of such clauses, particularly the hardship clause.⁷”

⁶ United Nations, *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, paras. 137–140.

⁷ The 2020 ICC Force Majeure and Hardship clauses are available at <https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf>.

III. Communications

A. Hague Conference on Private International Law

[Original: English]
[10 June 2020]

25. In 2015, the UNCITRAL Secretariat discussed with the secretariats of Unidroit and the HCCH the possibility of co-operating in preparing a Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts (with a focus on Sales) (Guide). This proposal was endorsed by the Council on General Affairs and Policy (CGAP) of the HCCH at its 2016 meeting, which directed the Permanent Bureau (PB) to cooperate with the two secretariats in developing the Guide (Project).⁸

26. After four years of close cooperation and effective co-ordination between the three secretariats, the Guide has been successfully considered by CGAP in March 2020 and by the Governing Council of Unidroit in May 2020; as a result, the Guide is now ready to be presented at the fifty-third session of the Commission for consideration.

27. Against this background, this submission briefly sketches the process of developing the Guide and the procedures that have been taken by the HCCH leading to the successful consideration of its members.

28. The Guide has been drafted with a view to promoting the adoption, application and uniform interpretation of the legal instruments developed by each organization in the area of international commercial contracts. It maps out the instruments developed by each organization, to further provide a comparative understanding of the coverage and basic themes of each instrument, and to clarify the relationship among them. As such, the Guide will benefit various stakeholders engaged in cross-border commercial transactions.

29. The Guide was prepared by five recognized experts, representing different legal traditions – Professor Neil Cohen (United States of America), Professor Lauro da Gama e Souza Jr (Brazil), Professor Hiroo Sono (Japan), Professor Pilar Perales Viscasillas (Spain) and Professor Stefan Vogenauer (Germany). The three secretariats coordinated the work. They also sought input from other international organizations specialized in international business transactions.

30. The Project was carried out on an offline and remote basis, following CGAP's mandate to allocate minimal resources to it.⁹ The Max Planck Institute for European Legal History, directed by Professor Stefan Vogenauer, generously supported two in-person meetings, in October 2017 and September 2019, respectively, which enabled the experts and representatives from the three secretariats to kick off the Project and further advance it.

31. During the yearly updates to CGAP on the progress of the Project, the PB has received support for the continuation of the work in close cooperation with the other secretariats. With a view to a smooth and efficient consideration process at CGAP, the PB, as mandated, circulated the draft Guide to the members of the HCCH on 22 October 2019, inviting them to comment on the private international law-related sections. After addressing and incorporating comments submitted by the members of the HCCH, the PB submitted a further revised Guide to CGAP at its March 2020 meeting for consideration, in particular the first three chapters. At this meeting, CGAP unanimously considered the first three chapters and invited the PB to cooperate with the secretariats of UNCITRAL and Unidroit to ensure its finalization.¹⁰ Moreover,

⁸ See “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”.

⁹ *Ibid.*, see also “Conclusions and Recommendations of the Council on General Affairs and Policy (14–16 March 2017)”, C&R No. 17, see path indicated in footnote 8.

¹⁰ See “Conclusions and Decisions of the Council on General Affairs and Policy (3–6 March

CGAP invited the PB to cooperate with the secretariats of UNCITRAL and Unidroit for the publication and subsequent promotion of the Legal Guide.¹¹

32. This joint Project is yet another example of excellent cooperation between the three secretariats. It demonstrates the importance of such cooperation and of the synergy between the three organizations contributing to the pursuit of greater legal certainty and uniformity in cross-border commercial dealings.

33. The HCCH looks forward to the successful consideration of the Guide at the fifty-third session of the Commission and to the publication of the Guide in the coming months.

B. Unidroit

[Original: English]

[1 June 2020]

34. Unidroit had already shared a preliminary draft of the Legal Guide with its Governing Council members in a remote consultation held in February 2020. As you know, the comments received during that consultation were discussed among the three secretariats and considered in finalizing the draft document which was submitted to the Governing Council for approval.

35. It is my pleasure to inform you that the Governing Council, at the end of its remote session held from 6 April to 8 May 2020, unanimously approved the Tripartite Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts by unanimity, subject to such minor adjustments as may be introduced during the 2020 UNCITRAL Commission session (originally scheduled to take place in July 2020).

36. In the remote session of the Governing Council, great satisfaction was expressed by members with the outcome of the cooperation between the three sister organizations. I am particularly pleased to convey that Governing Council members commended the accuracy and comprehensiveness of this tool as an informative guidance to existing complementary uniform law texts, as well as its user-friendliness and usefulness for various addressees, and extended warm congratulations to the drafters.

37. Specific comments focused on the issue of the clarification of the distinction between “ordinary mandatory rules” and “overriding mandatory rules”, as well as between “overriding mandatory rules” and “public policy”, which had already been raised during the preliminary consultations. On the other hand, other members noted the impracticability of providing too much detail in a general guidance document. In this regard, the Secretariat explained that an amendment had already been made to address the issue in paragraphs 92–94 of the draft Tripartite Guide.

38. Finally, in relation to the finalized draft that you will be presenting to the Commission, I would like to refer to the recent publication of the revised Force Majeure and Hardship clauses of the International Chamber of Commerce. In view of the role played by the Unidroit Principles as a model for such clauses and in order to preserve the accuracy and comprehensiveness of the Guide, we would like to suggest a minor amendment to the current text. The amendment is included as an annex to this letter.¹²

2020)”, C&R No. 42, see path indicated in note footnote 8.

¹¹ Ibid.

¹² The amendment contained in the annex to the letter is reproduced in para. 24 above.