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Thirty-five Years of Uniform Sales Law: Trends and Perspectives

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-five Years of Uniform Sales Law: Trends and Perspectives

Proceedings of the High Level Panel held during the Forty-eighth Session of the United Nations Commission on International Trade Law

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Foreword

At its forty-sixth session, the United Nations Commission on International Trade Law ("UNCITRAL" or the "Commission") requested the Secretariat to commence planning for a colloquium to celebrate the thirty-fifth anniversary of the United Nations Convention on Contracts for the International Sale of Goods (the "United Nations Sales Convention" or "CISG"),[1] to take place after the forty-seventh Commission session.[2] The Commission agreed that the scope of that colloquium could be expanded by including some of the issues raised by a proposal submitted at its forty-fifth session.[3] That request was reiterated at the Commission's forty-seventh session.[4]

Accordingly, a high-level panel was organized by the Secretariat during the forty-eighth Commission session on Monday, 6 July 2015, with participation of experts in the field of international sale of goods law. Moreover, a note on "Current trends in the field of international sale of goods law"[5] was prepared by the Secretariat for the Commission's forty-eighth session. That note provides information on several aspects of the promotion, interpretation and application of CISG and of its complementary texts as well as suggestions for the consideration of the Commission on possible future UNCITRAL initiatives in the field of international sale of goods.

In line with the request formulated by the Commission at its forty-eighth session,[6] this publication reproduces the papers presented at that high-level panel as well as the keynote speech delivered at the "2015 UNCITRAL Asia Pacific Incheon Spring Conferences" organized by the UNCITRAL Regional Centre for Asia and the Pacific on 4 and 5 June 2015 in Incheon, Republic of Korea.

A summary of the discussions held during the high-level panel is available in the "Report of the United Nations Commission on International Trade Law, forty-eighth session".[7] In particular, at that session, "[n]oting that the matter of sales of goods law had not been dealt with in a working group for about three decades, and that therefore a regular forum for the exchange of information relating to the promotion and implementation of the United Nations Sales Convention was not readily available in UNCITRAL, the Commission asked the Secretariat to report periodically on promotional and capacity-building activities aimed at supporting the Convention implementation, with a view to seeking strategic guidance on those activities".[8]

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[1] United Nations, *Treaty Series,* vol. 1489, No. 25567.

[2] Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17), para. 315.

[3] United Nations doc. A/CN.9/758

[4] Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17), para. 255.

[5] United Nations doc. A/CN.9/849

[6] Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), para. 333.

[7] Ibid., paras. 325-334.

[8] Ibid., para. 334.

Introduction

János Martonyi

It is, indeed, a great pleasure and honour to chair this panel celebrating the thirty-fifth anniversary of CISG in the presence of the most outstanding experts and of persons driven by the same interest and aspiration whether they are from countries having been parties to the Convention right from its inception, or from countries that have just recently acceded to it, or countries that are just considering joining the CISG family and thereby further promote the adoption and the more universal application of the Convention.

It was 10 years ago that a similar colloquium celebrated the twenty-fifth anniversary of CISG. It is time to take a look at the development in the last decade regarding the adoption and application of the Convention. The impressive map on the UNCITRAL website clearly shows the growing number of the contracting States of the Convention (currently 83) and the growing attraction of it towards countries, inter alia, from Africa and South America. The UNCITRAL Secretariat prepared for us a preliminary document "current trends in the international sale of goods law" that makes a couple of references to my country, Hungary, as well. I am grateful for these references because CISG, and more generally UNCITRAL, did play a very special role not only in the legal history, but also in the political history of my country.

Hungary was striving to play an active role in the unification of law right from the early sixties. Hungarian legal scholars and academics, based upon a century-old sophisticated legal culture, were never willing to accept the idea and reality of a divided world and their country's isolation behind what was called the Iron Curtain. They all shared the dream of more unified legal rules for international transactions not only because there was a universal need and aspiration for this, but also because the unification of civil law, at least relating to cross-border contracts, opened a window of opportunity to break out of the political, economic and legal isolation of Hungary. Among these leading scholars the most outstanding role was played by Professor Ferenc Mádl, a specialist of conflict of laws, civil law as well as international trade law and European law who later, in the early 1990s was minister for education and culture in the first democratically elected government of Hungary and was also the President of the Republic from 2000 to 2005.

Beyond these academic endeavours, international trade was becoming more and more important for the country as the old theory of economic autarchy turned out to be completely obsolete and unworkable.

These were the reasons, coupled with the regime's efforts to alleviate political isolation, that caused the government to propose the establishment of an international organization for the unification of international trade law in the United Nations General Assembly and, based upon this proposal, the United Nations Commission on International Trade Law was set up in 1966.

It was in this context that another outstanding Hungarian civil law professor of international reputation, Gyula Eörsi, headed the diplomatic conference in Vienna adopting the

Convention in 1980. Hungary was one of the first countries that signed the Convention at the conference and was among the first States to ratify it.

The Note of the Secretariat rightly underlines the importance of the Convention as a source of inspiration for regional and national law reforms. The influence of CISG is not limited to the contract of sale of goods, but extends to general contract law. Among several national legislations recently adopted (Argentina, Japan and Spain), the Hungarian Civil Code (Act V of 2013) is also referred to.

The most significant examples of this influence are the rules on liability for breach of contract both as regards the basis of liability and the measure of the damages to be paid in case such liability is established. The relevant provisions are now modelled upon article 79, respectively article 74 of the Convention replacing the former fault-based liability system by strict liability for breach of contract and limiting the extent of damages to be paid by the party in breach by introducing the foreseeability criterion.

According to article 6:142 of the new Civil Code, the party in breach is exempted from liability if he proves that the breach was due to an impediment beyond his control, which could not have been foreseen at the time of the conclusion of the contract and he could not have been expected to avoid the impediment or prevent the damage.

As for the measure of the damages, article 6:143 of the Code limits the liability for consequential damages to the extent it is proved that the damages, as potential consequence of the breach, were foreseeable at the time of the conclusion of the contract. (It is interesting to note that a version of the foreseeability test regarding the measure of damages also applied in the former system only for international economic contracts i.e. contracts between Hungarian economic entities and foreigners.)

This short introduction gives me the opportunity to bring up another concrete and highly relevant issue, also discussed in the Secretariat's Note. As highlighted in the Note, seven declarations to CISG have been withdrawn in the past four years and as a result, no state party is currently excluding the application of Part II or III according to article 92.

As you are aware, Hungary made a declaration on the basis of article 96 of the Convention. This declaration goes back to the old rule of a Ministerial Decree from 1974 that required so called "foreign trade contracts" to be concluded in writing. The relevance, the meaning, as well as the legal effect of the declaration has been highly controversial for a long time, in particular after legislation abolished the concept of "foreign trade contract" at the time of Hungary's accession to the European Union on 1 May, 2004. Even before that date, the courts tried to loosen this formal requirement interpreting it only as a means of evidence for the contract and not as a condition of its validity. The declaration created substantial uncertainty as well as academic debate as to whether the requirement applies automatically by (Hungarian) courts as part of the *lex fori* or—as it was followed by both Hungarian courts—the requirement was to be applied pursuant to the applicable law as defined by the conflict of law rules.[1] In any case the declaration did not only create uncertainties and difficulties but it has become entirely redundant.[2]

[1]Tamás Sándor and Lajos Vékás, 'Nemzetközi adásvétel—A Bécsi Egyezmény kommentárja' [International Sale of Goods—Commentary on CISG] HVG Orac, Budapest 2005.

[2]Sarolta Szabó, "„Fenn/tarthatatlan": a Bécsi Vételi Egyezmény és az írásbeliségre vonatkoztatott magyar fenntartás' [„Unsustainable": CISG and the Hungarian "Written Form" Reservation], in Bonas Iuris Margaritas Quaerens—Emlékkötet a 85 éve született Bánrévy Gábor tiszteletére [—Essays in honour of the late Professor Gábor Bánrévy on the occasion of his 85th birthday], Pázmány Press, Budapest, 2015.

I am most happy to announce that the Hungarian Parliament adopted a resolution to withdraw the declaration about a month ago. We timed the deposit of the declaration on the withdrawal for today. The Hungarian representative in New York is now informing the Secretary-General of the United Nations about the withdrawal of the Hungarian declaration.

At the outset of my introduction I referred to a dream that many of us shared, in fact, have been sharing for a long time, irrespective of the continent, the region, the culture, the language or, indeed, the economic, political and legal system we belong to. The dream is an ideal as expressed by Ernst Rabel when he said: "Il ne faut pas oublier le but suprème de nos efforts, il est idéaliste. Nous cherchons à ouvrir une voie au droit mondial...".[3]

Droit mondial, global law, global, universal legal order? Some decades ago this looked like a fairly realistic project, an inevitable development due to expanding international trade, economic growth and the economic, political and institutional internationalization of the world. Trade played a key role in this process and we all advocated the liberalization as well as the better regulation of trade. "Trade is good"—was the slogan—"free trade is even better". At the same time, the need for a more secure, more predictable, hence a more homogenous legal environment, a more uniform legal framework was also generally recognized.

Huge progress was achieved in developing this legal framework both in the public law and the private law area well before the unfolding of the globalization process. A multilateral, indeed, more and more universal trading system was established with the fundamental objectives of progressive liberalization and fair and balanced regulation of international trade based upon the principle of equal treatment implemented primarily by the ingenious legal device, the most favoured nation clause.

The unification of private law was only seemingly lagging behind. Commercial practice rapidly developed due to the explosion in the growth of international trade as it was reflected and also stimulated by standard contracts and terms, uniform customs, model rules, standardized practices of all sorts. The unification of international treaties got a decisive impetus with the setting up of UNCITRAL in 1966 and spectacular progress was made in the following decades. No doubt it is CISG that was the cornerstone of all the achievements in the field of the unification of international commercial law.

When we want to discuss the future unification of international trade law and, more specifically, the future of CISG, we have to consider a couple of relevant points.

First, we have to analyse the strengths and weaknesses of the Convention based upon the experiences of the time passed since its entry into force. This exercise is busily going on; views and conclusions vary, some of these views went to the extreme by summarily suggesting that CISG was "largely rejected by commercial practice".[4] But on balance the outcome is positive.

Second, we have to take into account the tremendous changes that have taken place in the last 35 years, primarily due to technological progress, in particular the information revolution, the socio-economic and institutional changes entailed by it, a process and syndrome briefly called globalization.

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[3]Ernst Rabel, "Observations sur l'utilité d'une unification du droit de vente au point de vue des besoins du commerce international", 22 RabelsZ (1957) 122, 123.

[4]Jan H. H. Dalhuisen, "Globalization and the Transnationalization of Commercial and Financial Law", 67 *Rutgers University Law Review* 1 (2014) 24.

A new slogan appeared, "The world is flat"[5]—reflecting these developments but not fully taking into account the complexities, uncertainties and the unpredictable and incidental nature of our present world. The world may be flat from a distance. But if you get closer you will see the peaks and valleys, even cliffs. Game theory teaches that because of the interplay of multiple actors, outcomes are highly uncertain. Black (and grey) swans swim in (sometimes in the form of unforeseen political explosions) and the course of developments takes an entirely different turn. Complexity, unpredictability and uncertainty are aggravated by the acceleration of processes of causality to the effect that what used to be called the "butterfly effect" is now called the "butterfly defect".[6] Globalization is more complex and diverse than it looks, as if it is intertwined with elements of fragmentation, regionalization and localization, especially—but not exclusively—in the field of culture, governance and rule-making.

This is not the most beneficial environment for the rule-maker. All the more so that the law, legal rules and regulations also undergo deep and wide-ranging changes in substance, methods, procedure and geometric structure. We now have a multilevel (global, regional, national, subnational) system with increasingly blurred dividing lines and conflicts between the different levels. More importantly, non-State rules also appear on all these levels and compete with, and sometimes outcompete rules adopted by legislation either on national or international level.[7]

What used to be a fairly clear cut hierarchic relationship between different levels of legal rules, in particular between international and national laws described as a geometric structure or pyramid, is now becoming more and more a diffuse cloud where legal norms of a different nature, function and level compete, swirl and interact, mutually refer to, feed and exclude one another. Old categories like treaty, legislation, regulation, case law, principles, customs, commercial practice, public law, private law are no longer carved in stone and carry an increasingly relative meaning.

The trends of fragmentation and regionalization are more visible in the field of the public law of international trade. The progress of the multilateral trading system as established by a "provisional" agreement less than 70 years ago and developed spectacularly by what has become the WTO system, a network of a wide range of regulations has now at best slowed down significantly, at worst came to a standstill. At the same time, and also because of this, the original sacrosanct (but in reality never fully respected) principle of equal treatment and its legal instrument, the MFN treatment continued to decline, regional and bilateral free trade agreements proliferated and cover an increasing part of world trade.[8] This tendency of the decline of MFN and the spreading of specific bilateral or regional trade regimes will no doubt also continue in the future, especially in the light of the important negotiations going on between the most important players in world trade.

What is then the place, the role and the future of the Convention in this turbulent and changing environment?

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[5]Thomas L. Friedman, *The World is Flat,* Farrar, Straus & Giroux, New York, 2005.

[6]Ian Goldin and Mike Mariathasan, *The Butterfly Defect: How Globalization Creates Systemic Risks, and What to Do about It,* Princeton University Press, 2014.

[7]János Martonyi, "Univerzális értékek, globális szabályok, lokális felelősség" [Universal Values, Global Rules, Local Responsibilities] in Magyarország ma és holnap [Hungary today and tomorrow], Magyar Szemle Könyvek, Budapest, 2007. 137-175.

[8]János Martonyi, "Decline of the Principle of Equal Treatment in the Global Economy", Legal Supplement, *Studies in International Economics,* August 2015, Vol. 1. No. 1.

It is often and rightly pointed out and also referred to above that the Convention is a model, a source of inspiration for regional and national legislation. It was also an ingenious compromise, a bridge between treaty law and commercial practice. Article 6 and particularly article 9.2 no doubt represented a real breakthrough 35 years ago, not only by permitting the parties to exclude the application of the Convention, but also by recognizing the applicability of usages of which the parties knew or ought to have known, which are widely known and regularly observed in the particular trade.

This is the reason why CISG has been a bridge in several senses. It is a bridge between the top-down and bottom-up approach to the unification of the law of transnational contracts combining treaty made law with party autonomy and commercial practice. It is a bridge between common law and civil law. It is also a bridge between disparate legal notions, terms and meanings aiming to create a common language, a lingua franca, a language nobody can identify as its own, but everybody can understand, use and benefit from.[9] This is probably the most ambitious and risky venture a uniform law can ever embark on. Legal notions, concepts and terms are rooted in history, culture and are inseparable from language. Most of them have been developed by national legal systems and it is exclusively or at least in the context and framework of these legal systems that their meaning can be interpreted, defined and applied. If they are taken out of their safe and familiar environment like ships when they leave their safe ports and embark on uncharted waters, they might loosen their firm meaning or direction. Despite these concerns, the ambition is right and the risk is limited. Legal notions and terms were not always strictly national (albeit they have always been diverse) and many of them originated from a common heritage. They have always been communicating with one another and, in the last 150 years of growing internationalization, this communication has become much more intensive and efficient. The phenomenon of cross-fertilization applies not only for the relationship between treaty made law and commercial practice, but also to the interaction between national legislations, judicial practice, legal concepts, notions, terms as well as their meanings. As referred to above, the legal world is also getting more complex and tendencies are diverse, competing and conflicting. But the Convention's effort to tread an uncharted path represents a decisive step towards a more secure, safer and less expensive world—at least of international transactions.

CISG may therefore be not only a bridge between treaty made uniform law and international commercial practice, not only between common law and civil law, not only—in a more general sense—between different legal cultures, concepts and languages, but also between the past and the future. In other words, it is not only a bridge, but an anticipation and anchor for the future.

Referring back to the dream so many of us shared and still share, the Convention may be considered as an important milestone along the road to realizing the dream. It is not flawless, it does have some lacunae, and it may have some concepts that are difficult to be absorbed in everyday juridical, arbitration or commercial practice. Its success is still disputed; commercial and contractual practice should still be more receptive and benevolent to its application. But it is the most important achievement of private law unification up till now.

[9]See, e.g. Peter Schlechtriem, "25 Years of the CISG: An International Lingua Franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts", in *Drafting Contracts under the CISG* (Harry M. Flechtner et al. eds.), Oxford University Press, New York, 2007. Sarolta Szabó, 'A Bécsi Vételi Egyezmény, mint nemzetközi lingua franca—az egységes értelmezés és alkalmazás újabb irányai és lehetőségei' [The Vienna Sales Convention as an International Lingua Franca—Recent Trends and Results of the Uniform Interpretation and Application] Pázmány Press, Budapest, 2014.

Dreams are also needed for the future. But they have to be reconciled with the realities, complexities and diversities of the world. Words like "uniform" and "global" carry within them a dangerous simplification and generate reticence or outright rejection. Any future attempt should therefore be realistic, flexible and pragmatic—as CISG tried to be in its time 35 years ago. The world has changed a lot; fundamental values and aspirations hopefully, have not.

Thirty-five years of the United Nations Convention on Contracts for the International Sale of Goods: expectations and deliveries*

Eric E. Bergsten

This conference, like a number of others around the world, celebrates the thirty-fifth anniversary of the adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG) at a diplomatic conference. It was on 11 April 1980 that the conference held in the impressive setting of the Hofburg in Vienna came to an end with the adoption of the Final Act and the opening of the signature of the Convention.

I have been asked to speak on the expectations for the then new Convention and on the deliveries on those expectations. One might also add, what are the possibilities for the future? This topic is, therefore, first of all a matter of historical exposition. In particular, to attempt to determine the expectations it is useful to explore how we arrived at that signing ceremony.

What was it that had been signed? As a matter of positive law it was a draft. Ten States would have to ratify those signatures or otherwise adhere to CISG before it became law in those 10 countries. It was not a foregone conclusion that the necessary ratifications would ever take place. A look at the UNCITRAL website will show that there are, unfortunately, a number of conventions prepared by UNCITRAL that were adopted at diplomatic conferences or by the General Assembly that have never received the requisite number of adherences to put them into force. That is the fate of many efforts in multilateral treaty making and not only those for the unification of law.

I remember the relief, and puzzlement, felt in the office of the secretariat of UNCITRAL when in June 1981 we were notified that the first adherence had been deposited. It was from Lesotho, a poor country surrounded by South Africa. How did they even know about CISG? I later asked the Attorney General and he said he had heard about it at a conference, not unlike the one we are holding today. Following the action by Lesotho there was a slow trickle of further ratifications. Finally, in December 1986, five and a half years after the event we celebrate here today, China, Italy and the United States together deposited their ratifications, making eleven altogether, and the Convention came into force for those 11 States on 1 January 1988. Perhaps that is the date we should be celebrating.

To understand the symbolic importance of the four ratifications I have mentioned, it is necessary to remember that in 1988 we were still in the Cold War and not that far from the period when the developing countries were actively promoting the New International Economic Order. East-West and North-South tensions were high. However, in those four ratifications there was a developing country, a large and significant communist country, the major Western capitalist country and a European party to the 1964 Uniform Law on the

*The paper reproduces the keynote speech delivered at the 2015 UNCITRAL Asia Pacific Incheon Spring Conferences, organized by the UNCITRAL Regional Centre for Asia and the Pacific on 4 and 5 June 2015 in Incheon, Republic of Korea.

International Sale of Goods or ULIS. There was both civil law and common law. On that basis alone one could say that CISG was acceptable to all levels of economic development, different forms of economic organization and the two major legal systems. A bright future seemed to be certain.

Of course, there are other important dates in the history of CISG. As is well known, CISG is a revision of ULIS and the separate Uniform Law on the Formation of Contracts for the International Sale of Goods, or the ULF. Those two texts, annexed to conventions, were adopted at a diplomatic conference in The Hague in 1964. Work on them had begun in the International Institute for the Unification of Private Law, known generally as Unidroit, in 1929. In a certain sense, therefore, the genesis of CISG goes back 86 years.

The first thing to be noticed is that the international unification of private law is a slow process. There are many steps along the way. That can be true of domestic legislation as well, but it is particularly true when it is a question of unifying the law amongst nation States.

To consider the expectations, or should I say the hopes, of those who began the work on the international law of sales in 1929, it is useful to see what had gone before. The international unification of private law had begun in the late nineteenth century. It began in Europe, though there was some activity in Latin America. What is now the Hague Conference on International Private Law held its first conference in 1894. The belief at the time was that the problems for foreign trade inherent in the differences in the national legal regimes could best be reduced by unification of the law of conflicts of law. In less than 20 years the desire for unification of the substantive provisions of at least some areas of law led to the adoption of the Convention Relating to Bills of Exchange and Promissory Notes with an attached Uniform Law in 1912. It failed to come into force, at least in part because of the First World War.

The text served as the basis for the conventions on negotiable instruments adopted in the League of Nations in 1930 and 1931. There were also adopted in the League of Nations the two Geneva texts of arbitration law of 1923 and 1927. The Hague Rules on bills of lading were adopted in 1924. Finally there was the Warsaw Convention on the carriage of goods by air, proposed by France in 1923 and adopted in 1929.

As early as 1865, the first international agreement governing a form of communication, the International Telegraph Convention, was adopted. The International Convention concerning the Carriage of Goods by Rail was first adopted in 1890 and, along with the technical matters with which it is largely concerned, it includes some provisions governing private rights. By the very nature of rail transport it was conceived of as a regional convention,

What lessons might we learn from this aspect of the historical record? First of all, there was clearly recognition that the international unification of law, both governing technical matters and private rights, would be desirable. Secondly, unification was easiest to do when the activity in question was in a narrow and clearly defined field with specialized practitioners. Thirdly, there was no single organization with the function of working for the international unification of private law on a broad basis. At the instigation of Italy, Unidroit was created in Rome in 1929 to undertake that function. We will return to Unidroit in a moment.

Finally, areas of law that in their essence involved international commercial activity were by far the easiest to unify. This applied primarily to the international carriage of

goods by sea or air. It also applied to negotiable instruments, which had historically been used largely for financing international trade. Even so, neither the United Kingdom nor the United States—or any other common law country—became party to the Geneva Conventions on negotiable instruments. During the prior century, the law had diverged too much from that in the civil law countries to make the prospect of unification attractive to them.

Both the United Kingdom and the United States had further difficulties that precluded any interest generally in the international unification of private law—difficulties that lasted until the 1960s and continue to have their effect. For the United Kingdom, there was the fact that its trade was largely within the empire, which had in essence a system of unified commercial law. Even now when its trade is largely with the other countries of the European Union, its role as the premier common law country is an important political and economic factor in its hesitancy to international unification efforts.

The problem for the United States was, and is today, caused by its version of federalism. Private law, whether commercial or not, is the responsibility of the 50 individual states. Prior to about 1960, it was generally believed that it would be unconstitutional for the federal government to engage in the unification of such matters as negotiable instruments or sales of goods, even in the narrow context of international trade. Even if it were not legally unconstitutional, it would violate constitutional practice. That attitude persists today and is affecting several matters of unification of law that are not the subject of this conference.

When Unidroit was created in 1929 it began the work on the unification of the law of sales as its first project at the urging of Ernst Rabel, a prominent German scholar. By 1935, there was a first draft, but work was discontinued until after the Second World War came to an end. Work began again on the uniform law in 1953 and led to the diplomatic conference in The Hague in 1964 at which two conventions were adopted to which were attached ULIS and ULF. States that adhered to either convention became obligated to adopt the attached uniform law by ordinary parliamentary means.

A different approach to the harmonization of the law of sales took place in the United Nations Economic Commission for Europe during the 1950s, when the ECE formulated and disseminated General Conditions of Sale and Standard Forms of Contract. While they were primarily intended to reduce the plethora of such standard forms, they also were expected to facilitate East-West trade in Europe.

During the entire period of Unidroit's preparation of ULIS, the United Kingdom was the only common law member of the organization. It did not show a great deal of interest in the work, but there was hope that it would adopt the text nevertheless. It is not surprising that ULIS took a distinctly civil law approach.

The United States overcame its constitutional concerns and joined Unidroit in 1963, joining the Hague Conference on Private International Law at the same time. The participation of the United States was of crucial importance to the later developments in this field. The American delegates to the conference had long and intense experience in regard to the unification of the law of sale of goods. The genesis of what became the Uniform Commercial Code was dissatisfaction with the Uniform Sales Law of 1906, which had been adopted by 36 states, and the divergent judicial interpretation of the text in those states. Soon after the revision work had begun, the project was broadened to include a wider range of commercial law subjects. Nevertheless, article 2 of the finished text, the portion on the sale of goods, remained crucial. There had been a complete text available

for adoption in 1952, but the definitive text dated from 1958. The process of adoption of the UCC by the 50 individual states was not unlike the process of securing ratifications of an international convention for the unification of an area of private law. It was in 1962 that the big wave of adoptions took place.

Professor John Honnold was one of the legal scholars who had worked hard to bring about the adoption of the UCC, and in particular his work had been important in the state of New York. He knew the subject well. It is not, therefore, surprising that he was a member of the American delegation to the diplomatic conference in 1964 at which ULIS and ULF were to be considered. It is also not surprising that he and the entire American delegation made many proposals for amending the text, almost none of which were adopted. It was simply too late for substantial revisions of the text.

The United Kingdom ratified the Convention as had been hoped, but it made a declaration that it would apply only when it was chosen by the parties to the contract. It is hardly surprising that there is no record of it ever having been chosen by a party from the United Kingdom as the governing law of the particular contract. ULIS was criticized severely in the United States and there was no feasible likelihood that it would receive any further attention.

Two years later the General Assembly of the United Nations created UNCITRAL with the mandate to promote the "progressive harmonization and unification of international trade law". The first order of business at its first session in 1968 was to determine in what fields the new commission would undertake work. In regard to the law of sales a long list of topics was suggested, including "elaboration of a commercial code." More prosaically, four topics were selected as the areas in which it would concentrate its efforts: *(a)* the Hague Conventions of 1964; *(b)* the Hague Convention on Applicable Law of 1955; *(c)* time limits and limitations (prescription) in the field of international sale of goods; and *(d)* general conditions of sale, standard contracts, Incoterms and other trade terms. It was a broad agenda of many individual parts.

As it turned out, the Commission prepared a convention on time limits that was adopted in diplomatic conference in 1974. The Convention has been ratified to date by 35 States in either its original form or as modified by a 1980 protocol. The Commission began work on general conditions, but soon gave it up. It never did anything with the Hague Convention on the Applicable Law, but the Hague Conference on Private International Law adopted an amended convention in 1986.

As far as the Hague Conventions of 1964 were concerned, the Secretary-General was requested to send a questionnaire to all States inquiring whether they intended to adhere to the Conventions and the reasons therefore. A significant number of States replied and those replies were submitted to the Commission at its second session. While there were a few States that indicated they were planning to adhere to the conventions, most indicated that they were not. The reasons given varied, but the most prevalent was that the conventions were not appropriate in their then form for universal adoption.

There were three groups of States that stood out as having no intention of ratifying those conventions. The first was the common law States. The second comprised the developing countries. Many of them had just gained political independence in 1964 and they had consequently not participated in the preparatory work. A somewhat similar situation existed in regard to the State-trading countries which had been represented at the conference in The Hague by only Hungary.

As a consequence of these various objections, the Commission decided to create a Working Group to "ascertain which modifications of the existing texts might render them capable of wider acceptance by countries of different legal, social and economic systems, or whether it will be necessary to establish a new text for the same purpose". This was a somewhat problematic decision, given that the uniform laws had been prepared by Unidroit.

It was at this time that John Honnold, the American delegate to the conference in The Hague, became the secretary of UNCITRAL. As might be expected, he was particularly interested in the work on the law of sales and his influence on developments was substantial.

The Working Group promptly began its work and in the next several years made a number of modifications to ULIS and later to ULF. By 1975, it had made such a large number of changes that it recommended that UNCITRAL should adopt them as its own conventions. Furthermore, it recommended that rather than use the traditional method of a convention with the uniform law attached, the new convention itself should contain the substantive rules on the sale of goods.

At the last session of UNCITRAL prior to the diplomatic conference, it was decided to merge the revised ULIS and ULF into a single text, with the option for a State to declare that it was not to be bound by one or the other of the two sections of the convention. The option was for the benefit of the Nordic countries, which had indicated that they were in favour of the substantive portions of the new text, but would not adopt the provisions on the formation of the contract. As it turned out, they did make the declaration when they ratified CISG, but recently they have withdrawn those declarations.

Merging the substantive provisions that had originally been in ULIS with the formation provisions that had originally been in ULF has been a great success. We can now only wish that the convention on the limitation period had not been adopted when it was. It would be such an advantage if those provisions were also part of CISG, with the possibility of opting out of them, if desired.

It would be difficult to say what the expectations of the drafters really were. They had successfully merged important common law concepts with the basic civil law provisions coming from ULIS. The developing countries and the State-trading countries had all been present and active during the deliberations. They could look forward to broad acceptance of their work.

As it is expressed in the Preamble to the Convention, "BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems [will] contribute to the removal of legal barriers in international trade and promote the development of international trade". As has been noted by some, it is a matter of faith as to whether uniform law really has that effect, and I for one am a true believer, though cause and effect in such matters is impossible to document.

What has been the measurable success of CISG in these past 35 years? One measure of success is the extent to which it has been adopted by States. There are currently 83 countries that are party to it. They comprise about 80 per cent of the world's international trade. It is interesting to note that all of the top five destinations for Korean exports are parties to the Convention as are the top three States from which Republic of Korea imports.

That does not mean that 80 per cent of the world's trade is in fact governed by CISG. The Convention is excluded as the governing law in a significant number of contracts to which it would otherwise apply. The evidence suggests that the reason is largely that the lawyers negotiating the contract or preparing the standard conditions prefer to deal with the domestic law that they learned in law school and which they use regularly in domestic sales contracts. Of course, that can't work for both parties to the contract. In any case, the growing familiarity of the legal profession with CISG seems to be reducing the extent to which it is excluded.

What goes far beyond the expectations of the drafters of CISG is the influence it has had on the law of sales in a number of countries, or even of the law of contracts in general. One might ask why this is so. Certainly it is testimony to the quality of the work done on its preparation. It is probably also due to the extensive materials available on CISG. The UNCITRAL Clout programme contains abstracts of decisions of courts interpreting the Convention. It is available online in the six United Nations languages. An UNCITRAL Digest of the case law is now in its second edition. The full text in English of 3,000 cases, of which 1,500 are translations, is available on the Pace Law School website. Perhaps as a result of the availability of so much material, there is an abundant literature in both journal and book form. There is no area of international law, whether public or private, that is so thoroughly documented.

As a result of the growing interest in CISG, Switzerland has proposed that UNCITRAL undertake an assessment of its operation and related UNCITRAL instruments in light of the practical needs of international business parties today and tomorrow, and discuss whether further work both in these areas and in the broader context of general contract law is desirable and feasible on a global level to meet those needs. A report has been submitted to the session of the Commission that will be held next month discussing the influence of CISG and setting out some of the remaining matters not covered by it. The reaction to this report should be interesting. That there is more to be done is clear. What is not clear is whether any work that might be undertaken should be restricted to issues arising out the law of sales or whether the Commission might venture more broadly into the field of contracts in general.

The story of the unification of the law of sales, and therefore of the law of contracts, has not come to an end. We can only wonder what the keynote speaker will have to say about the impact of CISG at a conference on the occasion of its seventieth birthday.

Epilogue

At the UNCITRAL session there was an extensive discussion of developments in regard to the law of international sale of goods and contracts in general. It was widely recognized that CISG had been the model for a number of legislative texts at the regional and national level. The greatest concern expressed was for the uniform interpretation and application of CISG. However, the general sentiment was that further legislative work by UNCITRAL in this area would be untimely given that it remained to be demonstrated whether such work was useful or desirable.

An opinion that further work would be untimely in 2015 leaves open the possibility that it may be considered to be timely at some point prior to the conference on the occasion of the seventieth birthday of CISG. Personally, I expect that to be the case.

Perspectives on Harmonizing Transnational Commercial Law

Quentin Loh

Introduction

Mr Chairman, distinguished speakers and delegates, good afternoon. I am indeed honoured to be invited to join this distinguished panel of speakers. Today, as we gather to commemorate the thirty-fifth anniversary of the United Nations Convention on Contracts for the International Sale of Goods (CISG), and hearing the speeches from this learned panel, I cannot be but struck by how far the grand project of harmonizing transnational commercial law has come. Yet, it cannot be gainsaid that the destination remains some distance away.

The case for harmonization

It is indeed self-evident that the existence of diverse legal systems increases the transaction costs of cross-border businesses.[1] Today the sheer volume and scale of cross-border trade and investment flows[2] has rendered the paradigm of operating in jurisdictional legal silos obsolete. As Singapore's Chief Justice said in his speech at the thirty-fifth anniversary of CISG in Singapore on 23 April 2015: "… the world has experienced an unprecedented period of technological innovation, trade liberalisation and economic integration. This led to a phenomenal increase in the volume and frequency with which capital, goods, people and ideas flowed across national boundaries."[3]

While the harmonization debate nevertheless remains ongoing,[4] the case for the harmonization of transnational commercial law is stronger than ever.

The Asia-Pacific region

This is particularly the case for the Asia-Pacific region, which can be fairly described as a "morass of civil, common, and socialist legal traditions laid over with highly specific

[1]Helmut Wagner, "Costs of legal uncertainty: is harmonization of law a good solution" in *Modern Law for Global Commerce: Proceedings of the Congress of the United Nations Commission on International Trade Law Held on the Occasion of the Fortieth Session of the Commission* (Vienna: United Nations, 2011) 53 at 57, online: UNCITRAL http://www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf

[2]See J. H. Dalhuisen, "Globalization and the Transnationalization of Commercial and Financial Law" [2014] 67 *Rutgers Uni. L. R.* 1 at 2.

[3]Sundaresh Menon, "Roadmaps for the Transnational Convergence of Commercial law: Lessons Learnt from the CISG" delivered at the thirty-fifth anniversary of the Convention on Contracts for the International Sale of Goods (Singapore)—unpublished ("Roadmaps").

[4]For an overview, see Silvia Faizo, *The Harmonization of International Commercial Law* (The Netherlands: Kluwer Law International, 2007) at 16. C.f. Martin Boodman, "The Myth of Harmonization of Laws" (1991) 39 Am. J. Comp. L. 699; Paul B. Stephan, "The Futility of Unification and Harmonization in International Commercial Law" (1999), online: http://papers.ssrn.com/paper.taf?abstract_id=169209.

national and customary distinctions implemented across multiple strata, from federal governments and city-states to municipalities and urban communities."[5] Unlike the European Union ("EU"), the Asia-Pacific region does not have the option of effecting harmonization of commercial laws from a top-down approach. The considerable heterogeneity among Asian legal systems, while certainly insufficient to keep investors away, will make it more costly and difficult for businesses to operate in this region.

One would have thought that CISG, which was drawn up with the participation of no fewer than 62 States and to which 83 States are parties today, would have fulfilled the crying need for a uniform contract law for cross-border sale of goods, which undoubtedly forms a significant proportion of trade. But surprisingly the experience in Singapore is that its use is sparse and its visibility is not high.

The Singapore courts have only had five reported cases that refer to CISG since we ratified CISG and enacted the Sale of Goods (United Nations Convention) Act (Cap 238A, 2013 Rev Ed) to bring it into force. Furthermore, none of these five cases involve the direct application of CISG. Two of the cases involve applications to set aside arbitral awards on the ground that, inter alia, the tribunal failed to apply CISG as the governing law.[6] The remaining three cases referred to CISG as a reflection of the prevalent position adopted in transnational commercial law.[7]

The reasons for the relatively low prominence of CISG in Singapore are not clear. One reason could be that CISG features more often in the arena of arbitration rather than litigation. Or perhaps legal advisers and their clients tend to prefer legal systems or instruments with which they are familiar. My personal view, drawn from my time in private practice and as a commercial judge, is that perhaps the most important stakeholders—men of commerce and their legal advisers—who are already overburdened with the multiplicity of legal systems in their cross-border transactions do not want yet another legal regime plastered on their deal. They may perceive a lack of precedent on CISG which adds to the uncertainty. This of course ignores the CISG database maintained by Pace University,[8] which is certainly remarkable, but as pointed out in the home page of the database, the cases that end up in arbitration are often not reported. The impedance of a build-up of a body of case law or jurisprudence is thus significantly impacted.

If these are indeed the reasons, then the answer is obvious. More must be done to secure the "buy-in" of legal practitioners and their clients. The programme of conferences, meetings and workshops held by UNCITRAL and the Centre for Transnational Law to raise awareness of CISG go a long way. Legal practitioners must be convinced that the infrastructure supporting the use of CISG is suitably developed before they would have the confidence to recommend it to their clients. There should also be greater collaboration with law schools around the world to ensure that young, aspiring law students are exposed to CISG. Our efforts should be focused on training and familiarizing the future generation of lawyers on CISG. For example, the two law schools in Singapore each have specialist centres dedicated to the field of transnational commercial law.[9] The gradual transition

[5]Roadmaps, *supra,* note 3 at para 25.

[6]*Quarella SpA v Scelta Marble Australia Pty Ltd* [2012] 4 SLR 1057 and *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114.

[7]*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029; *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594; *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 195.

[8]Online: http://www.cisg.law.pace.edu/.

[9]The National University of Singapore, School of Law, operates the Centre for Law & Business, while the Singapore Management University, School of Law, operates the Centre for Cross-Border Commercial Law in Asia.

towards a more harmonized commercial law would, by no small measure, require our law students to be conversant with international instruments like CISG.

In Singapore, in looking to the future, the Ministry of Law, the Judiciary and the legal fraternity see a tremendous potential which spells a bright new chapter for the development of the *lex mercatoria* and along with it, conventions like CISG, in Asia.

It has been estimated that Asia already accounted for 30 per cent of world trade in 2010 and this figure will reach 35 per cent by 2020.[10] The Asian Development Bank suggests that by 2050, Asia could account for half of global GDP, trade and investment.[11] These are not fanciful projections. China has publicly announced and is committed to reviving the ancient maritime Silk Road[12] which linked it to Europe through the South China Sea and the Indian Ocean. Inter-government engagement has already begun to develop joint infrastructure projects and free trade agreements which will reconnect the ties between Asia, the Middle-East and Africa along this historic trade route. The very recently constituted Asian Infrastructure Investment Bank had a tremendous start with some 50 countries signing on as founder members, and another seven waiting for approval from their domestic legislatures.[13] President Joko Widodo of Indonesia, another significant burgeoning economy, has also unveiled plans to position his country as the centrepiece of a global maritime axis.[14] These are but just some examples of Asia's economic aspirations and the tremendous opportunities still to be realized in this part of the world.[15]

In light of this tremendous economic growth in Asia, significantly more must be done to reduce the considerable heterogeneity among Asian legal systems. I am told ASEAN—the Association of South-East Asian Nations—is on track to form a common market by the end of 2015, and greater legal harmonization in the area of commercial law would be a natural corollary. Since 2007, ASEAN member States have been examining various modalities for harmonizing trade laws, one of which is the more widespread use of CISG.

One of Singapore's key initiatives to promote the transnational convergence of commercial laws in Asia is the establishment of the Asian Business Law Institute ("ABLI"). ABLI is a permanent research facility that focuses on the comparative study of business laws in the region. It will serve two major functions. The first is to undertake original academic research into the commercial laws and policies of Asia; this will no doubt include studies on how the usage of transnational conventions like CISG can be increased in the region. The second is to operate as the nerve-centre for collaboration between judges, academics, practitioners and policymakers in Asia. If meaningful strides towards convergence are to be made, then stakeholders from the full spectrum of Asia's legal systems will have to be engaged. ABLI will not only serve as a centralized forum for these various stakeholders to exchange ideas, information and proposals, it will be the driving force to strive for convergence among certain business laws in Asia, especially in relation to issues

[10]See online at https://www.bcgperspectives.com/content/articles/financial_institutions_globalization_profiting_from_asias_rise_new_global_trade_flows/.

[11]Asia 2050: Realizing the Asian Century (Asian Development Bank, 2011), available online: http://www.adb.org/publications/asia-2050-realizing-asian-century.

[12]Paul Carsten and Ben Blanchard, "China to establish $40 billion Silk Road infrastructure fund", Reuters (8 November 2014).

[13]See online at online at http://www.ibtimes.com/fifty-countries-sign-china-led-asian-infrastructure-investment-bank-diplomatic-1987459.

[14] Vibhanshu Shekhar and Joseph Chinyong Liow, "Indonesia as a Maritime Power: Jokowi's Vision, Strategies, and Obstacles Ahead" (November 2014) available online at http://www.brookings.edu/research/articles/2014/11/indonesia-maritime-liow-shekhar.

[15] Working Group on Examining the Modalities for the Harmonisation of the Trade Laws of ASEAN Member States, formed under the auspices of the ASEAN Law Ministers Meeting and the ASEAN Senior Law Officials Meeting.

such as corporate governance, intellectual property, tax and data protection, just to name a few. It will also operate as a common point of contact for other research agencies and international organizations like UNCITRAL. Ultimately, the aim is for ABLI to provide the thought-leadership necessary to complement Asia's economic success.

The path to harmonization

Conceptually, harmonization can occur on three different levels.[16] The first involves harmonization at the recognition and enforcement level. To a large extent, harmonization at this level has been achieved in the context of international arbitration pursuant to the 1958 New York Convention and the UNCITRAL Model Law. The Hague Convention on Choice of Court Agreements aims to do the same for court-based disputes in both civil and commercial matters, and has the potential to be as game-changing as the 1958 New York Convention. Singapore became a signatory this year, along with the European Union, Mexico and the United States. To the end-users of litigation, being able to reap the benefits of a favourable judgment is typically the final goal. The costs of uncertainty which arise out of the current private international law regime that governs the enforceability of foreign judgments simply do not add up for complex business that operate on a global or regional scale. Harmonization should logically begin on this front.

The second level pertains to harmonization of the dispute resolution process. By this I am referring to the creation of specialist courts that are custom-built to deal with international commercial disputes and which operate in tandem with national courts. These courts would not only possess the attendant coercive powers of national courts, they would be particularly attuned to the needs and realities of international business. Despite the success of international commercial arbitration, such international commercial courts are necessary in order to create legitimacy in the context of transnational commercial dispute resolution. They also provide an avenue for the advancement of the rule of law as a normative ideal in global commerce.

In this context, Singapore launched the Singapore International Commercial Court ("SICC") at the beginning of this year. SICC operates as a branch of the Singapore High Court and deals with international and commercial cases where parties have consented to SICC having jurisdiction, be it before or after their dispute, and cases which are transferred from the Singapore High Court to SICC. Some of the key features of SICC are as follows: (i) the availability of foreign counsel representation; (ii) simplified rules of discovery; (iii) the option to dis-apply the Singapore Evidence Act, which contains rules such as the rules against hearsay evidence, the rule in *Browne v Dunn*[17] and the rule of direct evidence; (iv) the option of confidentiality; (v) the court can adopt procedure best suited to the case at hand; and (vi) less cumbersome methods of proving foreign law. SICC currently comprises 14 judges from the Singapore Bench and 12 eminent international judges and jurists from both common law and civil traditions,[18] of which I name two: the first is the Honourable Dr Irmgard Griss, formerly of the Austrian Supreme Court, and the second is the Honourable Dominique Hascher from the French Supreme Judicial Court. This diversity

[16]Sundaresh Menon, "The Somewhat Uncommon Law of Commerce" [2014] 26 *Sing. Ac. L. J.* 23 at [60]–[64].

[17](1893) 6 R 67 (HL).

[18]As at 29 June 2015, the international judges are Justice Carolyn Berger (United States), Justice Patricia Bergin (Australia), Justice Roger Giles (Australia), Justice Irmgard Griss (Austria), Justice Dominique Hascher (France), Justice Dyson Heydon (Australia), Justice Sir Vivian Ramsey (United Kingdom), Justice Anselmo Reyes (Hong Kong), Justice Sir Bernard Rix (United Kingdom), Justice Yasuhei Taniguchi (Japan), Justice Simon Thorley (United Kingdom), and Justice Sir Henry Bernard Edder (United Kingdom).

is specifically intended to enhance the international character of SICC and strengthen its ability to handle matters that originate from civil law systems. It also provides the platform for the cross-pollination of ideas, procedures and jurisprudence from both common and civil law jurisdictions. As SICC will develop jurisprudence that is consanguine with Singapore's domestic jurisprudence, it is well positioned to contribute to the development and harmonization of substantive commercial laws and practices. Eventually, the goal is the creation of a community of commercial courts, including the English Commercial Court, the Dubai International Financial Centre Courts and the New South Wales Supreme Court Commercial Division, which consistently engages and learns from one another, resulting in the adoption of best practices and the development of a consistent jurisprudence of international commercial law.

The third level of harmonization is of course the harmonization of substantive commercial law itself. CISG is a prime example of harmonization on this front. Standard form contracts such as the International Federation of Consulting Engineers ("FIDIC") forms typically used in the construction industry also promote transnational harmonization on a substantive level. However, achieving uniformity solely on a textual level would only generate the veneer of harmonization. The perennial obstacle to uniformity has always been the interpretation of these uniform texts.

This is where national courts have a pivotal role to play. As a starting point, national courts should attempt to achieve the harmonization of commercial laws and avoid divergence where this detracts from the international business environment. They will have to be less insular in their outlook and more open to discussions and debates with courts in other jurisdictions. The Singapore judiciary regularly examines jurisprudence from other jurisdictions for normative examples of best practices, especially in relation to interpreting international conventions such as the New York Convention or internationally used standard form contracts such as the FIDIC forms. For example, the Singapore Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*[19] consciously adopted a narrow construction of the public policy ground under the UNCITRAL Model Law after reviewing the general consensus of judicial and expert opinion internationally, limiting it to those violations of fundamental notions and principles of justice that would shock the conscience. In the event that a harmonized approach cannot be taken, there is great benefit to be had for all stakeholders if courts were to elucidate the reasons for the divergence.

I qualify the endeavour of achieving harmonization of international commercial law with one caveat. While harmonization may represent an economic boon, nation States are more than mere trading entities and may justifiably prioritize other areas of public policy over economic benefits. Differences are acceptable when they are the result of domestic imperatives, considered government policy or structural differences across jurisdictions. For example, the Singapore Court of Appeal had the opportunity to revisit the contextual approach towards contractual interpretation in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*.[20] The court noted that adopting a contextual approach would result in a convergence with civil law doctrine and the approach adopted by transnational conventions such as CISG. While such harmonization of commercial laws is to be welcomed on a conceptual level, it must be assessed at the practical level of implementation, specifically, how it sits with Singapore's laws on the admissibility of evidence and the litigation process in general.[21] There was concern that the unqualified combination of liberal civil law doctrines on admissibility of extrinsic evidence with the common law pretrial discovery process might result

[19][2007] 1 SLR(R) 597.

[20][2013] 4 SLR 195.

[21]Ibid. at [38].

in an overwhelming amount of material being brought before the court. The court eventually concluded that the migration towards the civil law approach of contractual interpretation had to be a controlled one and imposed certain requirements on parties seeking to rely on the contextual approach.[22] In other words, harmonization must be steered in a precise and measured manner, with due regard given to its compatibility with local circumstances.

Conclusion

It remains to be seen whether international commercial law will eventually coalesce into a free-standing body of law applicable in and of itself, or in the famous words of the arbitral tribunal reported in the then English House of Lords case of *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan*,[23] "those transnational general principles and usages which reflect the fundamental requirements of justice in international trade and the concept of good faith in business." I would venture to say that some of the key elements for a successful *lex mercatoria* include consistency, predictability, and developed and clear substantive notions of fairness, justice and equity.

What is certain is that the creation of such law can no longer be considered the monopoly of nation States. Harmonization can ultimately only be achieved through the collective effort of various vital actors, such as academics, judges, practitioners and politicians, and the tireless work of organizations like UNCITRAL. This makes dialogues such as the one today indispensable and I look forward to the rest of the colloquium. Thank you.

[22]Ibid. at [73].

[23][2010] UKSC 46.

The United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980: thirty-five years on

Rui Manuel Moura Ramos

Mr. Chair, dear colleagues and distinguished delegates,

I would like to begin by thanking the UNCITRAL secretariat for its invitation to attend this commemorative session and to express my sincere appreciation for its organization of this conference. I would also like to take this opportunity to extend my warmest greetings to the Chair, János Martonyi, and other members of the panel (Ms. Elisabeth Villalta, Professor Liming Wang and Justice Quentin Loh), and to express my appreciation to those whose enlightening statements I have already had the opportunity to hear.

A little more than thirty-five years ago, a diplomatic conference[1] held here in Vienna from 10 March to 11 April 1980 approved, at the end of its work, a convention on contracts for the international sale of goods.[2] Signed the same day by Austria, Chile, Ghana, Hungary and Singapore, the Convention, in accordance with its article 99, paragraph 1, entered into force less than eight years later, on 1 January 1988, following the expression by 10 States of their consent to be bound by it.

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[1]Convened in accordance with United Nations General Assembly resolution 33/93 of 16 December 1978 following the preparation of a draft text by a working group whose work was carried out over the course of nine sessions from 1970 to 1977.

At its first session (in 1968), the United Nations Commission on International Trade Law included the international sale of goods in its programme of work by according priority to that subject. A questionnaire was subsequently prepared on the position of the United Nations Member States with respect to the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods and the Convention relating to a Uniform Law on the International Sale of Goods, promoted by the International Institute for the Unification of Private Law (Unidroit) and signed at The Hague in 1964, neither of which had yet entered into force. Following receipt of the responses to that questionnaire, it was concluded that broad acceptance of those texts was unlikely, and it was decided to establish the aforementioned working group with a view to deciding whether the texts should be revised in order to achieve such acceptance or whether a new text should be prepared. That second alternative was chosen and the work led to the elaboration of two texts (one on the formation of contracts and the other on the regime applicable to such contracts) which were then merged, resulting in the aforementioned draft (of 1978), which was submitted to the diplomatic conference of 1980. For the origins of the Commission and an overview of its work, see Manuel Olivencia Ruiz, "La codificación del derecho mercantil internacional y la experiencia de la CNUDMI/UNCITRAL", in *Cómo se codifica hoy el derecho comercial internacional?* (Coordinators: Jürgen Basedow, Diego P. Fernández Arroyo and José A. Moreno Rodríguez), Asunción, 2010, *La Ley*, pp. 365-383.

[2]See document A/CONF/97/18 and, for the English and French versions of the Convention, *Uniform Law Review/ Revue de droit uniforme*, 1980, Issue 1, pp. 60-137. For a translation into Portuguese, see Maria Ângela Bento Soares and Rui Manuel Moura Ramos, *Contratos internacionais: compra e venda, cláusulas penais, arbitragem*, Coimbra, 1986, Almedina, pp. 443-485.

See also C. M. Bianca and M. J. Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention*, Giuffré, Milan, 1986, and Kazuaki Sono, "The Vienna Convention: History and Perspective" in *International Sale of Goods: Dubrovnik Lectures* (edited by Petar Šarčević and Paul Volken), New York, 1986, Oceana Publications Inc., pp. 1-17, and, in the Portuguese literature on the subject, Maria Ângela Bento Soares and Rui Manuel Moura Ramos, "Do contrato de compra e venda internacional: análise da Convenção de Viena de 1980 e das disposições pertinentes do direito português", in *Contratos internacionais: compra e venda, cláusulas penais, arbitragem* (see previous reference in this footnote), pp. 1-273, and Luís Lima Pinheiro, *Direito do Comércio Internacional: Contratos comerciais internacionais; Convenção de Viena sobre a Venda Internacional de Mercadorias; Arbitragem Transnacional*, Coimbra, 2005, Almedina, pp. 259-324.

Since then, the number of States that have acceded to the Convention has steadily increased, currently standing at 83, including the major world economies (with the exception of the United Kingdom).[3] The success of the Convention clearly invites reflection. It is therefore an appropriate time to measure the extent of its influence on international trade and relevant legal practice and to consider opportunities for extending that impact. I am delighted that the Commission wished to mark this date by bringing together some of those who, in various ways, have helped to ensure the outcome that we see today.

Contracts of sale are, as is well known, a fundamental element of international trade, hence the key importance of the uniform regulation of such contracts in the development of international trade. Indeed, the uncertainties created by situations in which the body of rules applicable to the settlement of a dispute is not determined in advance can pose a serious obstacle to trade, and clearly justify the efforts undertaken in this area since the beginning of last century with a view to achieving unification.[4] Going well beyond the results achieved to date, the unification achieved by the UNCITRAL text (the Sales Convention of 1980) has made it possible to strengthen the security of international trade in the same way as it has influenced the evolution of relevant national legislation.[5]

Beyond national law, the Convention has also left its mark on other international texts on unification with respect to contracts: the Unidroit Principles of International Commercial Contracts,[6] the Principles of European Contract Law,[7] the Draft Common Frame of

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[3]See Barry Nicholas, "The United Kingdom and the Vienna Sales Convention: another case of splendid isolation?", Rome, 1993, Centro di Studi e Ricerche di Diritto Comparato e Straniero, and Sally Moss, "Why the United Kingdom has not ratified the CISG", *Journal of Law and Commerce*, vol. 25 (Fall 2005/Spring 2006), pp. 483-485.

On the discussions leading to accession in some countries, such as Brazil, see Eduardo Grebler, "The Convention on International Sale of Goods and Brazilian Law: are differences irreconcilable?", *Journal of Law and Commerce*, vol. 25 (Fall 2005/Spring 2006), pp. 467-476; Iacyr de Aguilar Vieira, "Plaidoyer por uma aplicação da Convenção de Viena de 1980 relativa à compra e venda internacional de mercadorias no Brasil" in *Estudos de Direito Comparado e de Direito Internacional Privado* (Iacyr de Aguilar Vieira, Organizer), vols. I and II, Curitiba, 2011, Juruá Editora, pp. 437-462; and "A Convenção de Viena sobre a compra e venda internacional de mercadorias e o direito interno brasileiro: interacções possíveis entre sistemas distintos" in *Internationaler Rechtsverkehr und Rechtsvereinheitlichung aus deutsch-lusitanischer Perspektive*, Baden-Baden, 2014, Nomos Verlagsgesellschaft, pp. 255-269.

[4]We refer to the Unidroit draft convention on the international sale of goods that was circulated through the League of Nations in 1930. After the Second World War, the Government of the Netherlands took the initiative of reviving that instrument and convened an international conference to discuss the text. On the basis of the discussions that took place, a working group was tasked with drafting a new text, which was presented in 1956. That text was subsequently circulated to Governments and, together with the comments submitted by those Governments, formed the basis for a final draft (of 1963) submitted to the diplomatic conference held in The Hague, which approved the uniform law conventions referred to in footnote 1. At the same conference, a draft uniform law on the formation of contracts for the international sale of goods, drawn up by Unidroit in 1958, was also presented.

[5]That influence on national legislation is characteristic of the texts developed by UNCITRAL. For example, the UNCITRAL Model Law on International Commercial Arbitration, adopted by the Commission in 1985 (and subsequently amended in 2006), had a major impact on the evolution of relevant national legislation.

[6]See *Principles of International Commercial Contracts*, Rome, 1994, International Institute for the Unification of Private Law. For an introductory analysis, see Michael Joachim Bonell, *An International Restatement of Contract Law: The Unidroit Principles of International Commercial Contracts*, New York, 1994, Transnational Juris Publications; Paolo Michele Patocchi and Xavier Favre-Bulle, "Les Principes Unidroit relatifs aux contrats du commerce international: Une introduction", in *Semaine judiciaire*, 1998, No. 34, pp. 569-616; and José Ângelo Estrella de Faria, "Die Bedeutung der Unidroit Grundregeln über internationale Handelsverträge für die internationale Vertragspraxis: Bemerkungen aus lateinamerikanischer Sicht", in *Internationaler Rechtsverkehr und Rechtsvereinheitlichung aus deutsch-lusitanischer Perspektive* (see footnote 3), pp. 227-254. For a Portuguese-language translation of the Principles, see *Princípios UNIDROIT 2004 relativos aos contratos comerciais internacionais* (João Baptista Villela, author and editor), São Paulo, 2009, Quartier Latin.

On the interaction between the two instruments, see Herbert Kronke, "The United Nations Sales Convention, the Unidroit Contract Principles and the way beyond", *Journal of Law and Commerce*, vol. 25 (Fall 2005/Spring 2006), pp. 451-465.

[7]See *Principles of European Contract Law* (Ole Lando and Hugh Beale (eds.)), Parts I and II, The Hague, 1999; Part III (Ole Lando, Eric Clive, André Prum and Reinhard Zimmermann (eds.)), The Hague, 2003. The Principles were prepared by the Commission of European Contract Law (the so-called "Lando Commission").

For an overview of the general principles of contract law in general, and in particular with respect to the international sale of goods, see Ulrich Drobnig, "General principles of European contract law", in *International Sale of Goods: Dubrovnik Lectures* (see footnote 2), pp. 305-333.

Reference[8] and the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law.[9]

Given the diversity and plurality of such documents, one might ask whether there is still room for reflection on the Sales Convention[10] or whether such an exercise would be devoid of interest in view of the many (in some cases more recent and more detailed) texts that I have enumerated.

I believe, however, that such reflection is desirable. Firstly, because the Sales Convention remains the only binding document on the subject and its clear role in actual practice in international trade cannot be compared with that of other instruments, although the impact achieved by those other instruments should not be forgotten. Secondly, because its impact (as reflected in the number of States engaged in its implementation) is universal, unlike that of some of the other texts we have cited.[11] Lastly, it should not be forgotten that the unification achieved 35 years ago has its limitations, which continue to persist, and provides solutions that might warrant further development or modification[12] simply in view of changed and changing circumstances.

The time has therefore come, in our view, to reflect on whether those limitations are no longer relevant and, if they still apply, whether and to what extent some of the solutions provided by the instruments that have followed can be incorporated in the Convention. If that is possible, it will facilitate a process of "cross-fertilization" whereby the Sales Convention can draw on the solutions developed through the instruments that it in turn has influenced so much.

While the time that has been so generously allocated to us does not allow us to expand on the core issues that we have highlighted, I should like to present some examples by way of expressing our thoughts on the subject.

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[8]See *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) and edited by Christian von Bar, Eric Clive and Hans Schulte-Nölke), Interim Outline Edition, Munich, 2008, Sellier European Law Publishers.

[9]See Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011) 635 final) of 11 October 2011.

On the Proposal and the problems presented by the policy decision that underlies it, see Sixto Alfonso Sánchez Lorenzo, "De Bruselas a La Haya, pasando por Roma y Viena: la normativa común de compraventa europea", in *Entre Bruselas y La Haya. Estudios sobre la unificación internacional y regional del Derecho internacional privado. Liber Amicorum Alegría Borrás*, Madrid, 2013, Marcial Pons, pp. 821-832; Christian Kohler, "La proposition de la Commission Européenne pour un 'droit commun européen de la vente' vue sous l'angle des conflits de lois", in *A Commitment to Private International Law: Essays in honour of Hans van Loon*, Cambridge, 2013, Intersentia, pp. 259-270; Paul Lagarde, "Instrument optionnel international et droit international privé — subordination ou indépendance?", ibid., pp. 287-298; Stefan Grundmann, "Encantos e desafios do direito europeu comum de compra e venda", in *Internationaler Rechtsverkehr und Rechtsvereinheitlichung aus deutsch-lusitanischer Perspektive* (see footnote 3), pp. 85-106; and the various studies presented in *Gemeinsames Europäisches Kaufrecht—Anwendungsbereich und kollisionsrechtliche Einbettung* (ed. Martin Gebauer), Munich, 2013, Sellier European Law Publishers, and *Grundlagen eines europäischen Vertragsrechts* (ed. Stefan Arnold), Munich, 2014, Sellier European Law Publishers.

Interaction between the Convention and the law of the European Union is not limited to this instrument. With respect to the relationship between the Convention and Directive No. 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, see (in the Portuguese literature on the subject) Dário Moura Vicente, "Desconformidade e garantias na venda de bens de consumo: a Directiva 1999/44/EC e a Convençáo de Viena 1980", in *Thémis: Revista de direito*, vol. 2 (2001), No. 4, pp. 121-144.

[10]Let us recall that Switzerland submitted a proposal in that regard to the Commission "to undertake an assessment of the operation of the [...] Convention [...] and related UNCITRAL instruments in light of practical needs of international business parties today and tomorrow, and [...] to discuss whether further work both in these areas and in the broader context of general contract law is desirable and feasible on a global level to meet those needs" (document A/CN.9/758 of 8 May 2012).

[11]Those texts having a more regional focus. However, on the importance of unification at the regional level, see Franco Ferrari, "El papel de la unificación regional en la unificación del derecho de compraventa", in *Cómo se codifica hoy el derecho comercial internacional?* (see footnote 1), pp. 227-244.

[12]As was the case with regard to the evolution of the UNCITRAL Model Law on International Commercial Arbitration of 1985 and of the instruments referred to in footnote 4.

Firstly, with regard to the practical scope of unification as envisaged by the Sales Convention, it is well known that, beyond the formation of contracts, the Convention is essentially limited, as regards the regulation of sale,[13] to the obligations of the seller[14] and the buyer[15] and the passing of risk.[16] Among the issues that the Convention does not cover, that of the validity of contracts invites a fresh look at whether its exclusion is justified given that it is closely related to the matters covered by the Convention. Among other instruments, the Unidroit Principles address that issue,[17] and the solutions offered by that instrument may be a useful starting point in revisiting the issue.

The same can be said of specific performance, which the Convention addresses in such a way as to accommodate legal systems that do not provide for that remedy. In this case also the provisions of the Unidroit Principles[18] and the Draft Common Frame of Reference[19] could be useful sources of inspiration.

However, I would probably be more reluctant to propose that the transfer of property be addressed. While transfer of property remains one of the effects of a contract of sale in a number of national legal systems, I would personally hesitate to argue in favour of its being addressed by the Convention. However, it would certainly be a subject worth considering as part of the discussion of the possibility and scope of revision of the Convention.

Other than that aspect, which essentially relates to the scope of the text, there are other aspects that relate more to the actual content of the solutions that the Convention offers, and that could be included in the discussion. They include, first and foremost, the formation of contracts[20] and the contractual model underlying the existing provisions on that subject.

In that regard, it is well known that the provisions that were ultimately decided on reflect a view of formation of sales contracts that in a way precedes the emergence of general conditions (standard forms of contract), which, in sales as elsewhere, to an extent first appeared in the field of contracts. While the Convention is quite naturally open to these manifestations of contractual autonomy by providing, in its article 6,[21] for the primacy of the will of the parties[22] (which [*Translator's note*: "subject to article 12"] may derogate from or vary the effects of any of the Convention's provisions), it is true that the fulfilment

[13]Other than the issues specifically provided for in the text, the Convention, in addition to its general provisions on the sale of goods (articles 25 to 29), addresses the rules applicable both to the obligations of the seller and to those of the buyer (articles 71 to 88, which include provisions for anticipatory breach and instalment contracts (articles 71 to 73), damages (articles 74 to 77), interest (article 78), exemptions (articles 79 and 80), effects of avoidance (articles 81 to 84) and preservation of the goods (articles 85 to 88)); on those rules, see Jelena Vilnus, "Provisions common to the obligations of the seller and the buyer", in *International Sale of Goods: Dubrovnik Lectures* (see footnote 2), pp. 239-264.

[14]Articles 30 to 52. See Fritz Enderlein, "Rights and obligations of the seller under the United Nations Convention on Contracts for the International Sale of Goods", in *International Sale of Goods: Dubrovnik Lectures* (see footnote 2), pp. 133-201.

[15]Articles 53 to 65. On this subject, see Leif Sevón, "Obligations of the buyer under the United Nations Convention on Contracts for the International Sale of Goods", in *International Sale of Goods: Dubrovnik Lectures* (see footnote 2), pp. 203-238, and Henry Deeb Gabriel, "The buyer's performance under the CISG: Articles 53-60, Trends in the Decisions", *Journal of Law and Commerce*, vol. 25 (Fall 2005/Spring 2006), pp. 273-283.

[16]Articles 66 to 70. On that subject, see Bernd von Hoffmann, "Passing of risk in international sales of goods", in *International Sale of Goods: Dubrovnik Lectures* (see foonote 2), pp. 265-303, and Johan Erauw, "CISG articles 66-70: the risk of loss and passing it", *Journal of Law and Commerce*, vol. 25 (Fall 2005/Spring 2006), pp. 203-217.

[17]See articles 3.1 to 3.20 [*Translator's note*: article reference is to 2004 edition of the Principles]. See also chapter 7 ("Grounds of invalidity") in Book II ("Contracts and other juridical acts") of the Draft Common Frame of Reference.

[18]Articles 7.2.1 to 7.2.5.

[19]See rules 3:301 to 3:303 of chapter 3 of Book III ("Obligations and corresponding rights").

[20]Part II of the Convention.

[21]According to this provision, "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." See Franco Ferrari, "Remarks on the UNCITRAL Digest's comments on article 6 CISG", *Journal of Law and Commerce*, vol. 25 (Fall 2005/ Spring 2006), pp. 13-37.

[22]See Bernard Audit, *La vente internationale de marchandises: Convention des Nations-Unies du 11 avril 1980*, Paris, 1990, Librairie générale de droit et de jurisprudence (LGDJ), pp. 37-41.

of differing (and sometimes contradictory) general conditions as may be established by Contracting States often proves difficult. As was argued shortly after the conclusion of the Convention[23], the differing positions taken by the parties with respect to general conditions do not always prevent the commencement of performance of the contract; it is therefore necessary, once performance has begun, to decide on the content of the contract and select from among the various modifications made by the parties to the terms initially proposed. This problem of the well-known "battle of forms"[24] is not expressly resolved in the text of the Convention, of which only article 19 might be applicable to that problem. However, the texts that have followed the Convention and that we have referred to previously contain some potential solutions,[25] which could be considered in the context of a review of the provisions of the Convention.

Another area that should not be excluded from the proposed discussion relates to one of the most important aspects of any instrument of uniform law and one that is covered by all other relevant instruments, namely the interpretation of the text and the emphasis that should be placed on such interpretation given that the conflicts of laws that the Convention was intended to prevent might well re-emerge in the form of conflicts of interpretation.[26]

In order to offset any problems that might arise from its application, the Convention was careful to specify, in its article 7, that in its interpretation[27] "regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade". While that first requirement (that the international character of the text be taken into consideration) is especially relevant with regard to Part IV of the Convention, the provisions of which[28] refer more to the rights and obligations of the States parties to the Convention,[29] Part II (which highlights the need to promote uniformity of solutions in the application of the Convention)[30] is a key element of the interpretation of those provisions relating specifically to the formation of contracts of sale[31] or to the sale of goods per se.[32]

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[23]See Jan Hellner, "The Vienna Convention and standard form contracts", in *International Sale of Goods: Dubrovnik Lectures* (see footnote 2), pp. 335-363.

[24]On two interesting cases of application of the provisions of the Convention (specifically, articles 18 and 19) in which the question of the effectiveness of jurisdiction clauses in documents exchanged between the parties was raised, see André Huet, "Convention de Vienne du 11 avril 1980 sur les contrats de vente internationale de marchandises et compétence des tribunaux en droit judiciaire européen", in *Le droit international privé: esprit et méthodes. Mélanges en l'honneur de Paul Lagarde*, Paris, 2005, Dalloz, pp. 417-430 (418-423).

[25]See articles 2.1.9 to 2.2.2 of the Unidroit Principles, rules 4:209 to 4:211 of chapter 4 of Book III of the Draft Common Frame of Reference and article 39 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law.

[26]On this subject, see Paul Lagarde, "Les interprétations divergentes d'une loi uniforme donnent-elles lieu à un conflit de lois?", in *Revue critique du droit international privé*, vol. 59 (1960), pp. 235-251.

[27]On that provision, see Alexander S. Komarov, "Internationality, uniformity and observance of good faith as criteria in interpretation of CISG: some remarks on article 7 (1)", *Journal of Law and Commerce*, vol. 25 (Fall 2005/Spring 2006), pp. 75-85.

[28]Articles 89 to 101.

[29]And must therefore be interpreted in accordance with the principles of public international law (see articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties).

[30]In the sense that, in addition to uniformity, other instruments of uniform law should also be taken into account in the interpretation of such texts; see Franco Ferrari, "As relações entre as convenções de direito material uniforme em matéria contratual e a necessidade de uma interpretação interconvencional", in *Estudos de Direito Comparado e de Direito Internacional Privado* (see footnote 3), pp. 463-481.

[31]See Part II, articles 14 to 24, and, for a commentary, Kazuaki Sono, "Formation of international contracts under the Vienna Convention: a shift above the comparative law", in *International Sale of Goods: Dubrovnik Lectures* (see footnote 2), pp. 111-131.

On this subject in general, see, in the Portuguese literature, Dário Vicente Moura, "A formação dos contratos internacionais", in *Estudos de Direito Comercial Internacional*, vol. 1, Coimbra, 2004, Almedina, pp. 195-217.

[32]See Part III, articles 25 to 88.

Part I of the Convention, for its part, deals with scope of application and general provisions (articles 1 to 13). On those provisions, see, in the Portuguese literature, Dário Moura Vicente, "A Convenção de Viena sobre a compra e venda internacional de mercadorias: características gerais e âmbito de aplicação", in *Estudos de Direito Comercial Internacional* (see footnote 28 above), pp. 271-288.

The importance of this part of the article should be underscored, although the provision was the subject of criticism at the time of its adoption.[33] Indeed, it should not be forgotten that the need for uniform interpretation is emphasized through instruments such as the Convention, in which the role of concepts that are open to interpretation or not defined is particularly important.[34] Moreover, under a regime such as that established by the Convention, in which uniformity of interpretation is not assured through the intervention of an international court whose decisions would prevail over those of national courts,[35] the achievement of uniform results is entirely down to the judge hearing the case, which requires not only that the judges be aware of their duty to seek the uniform application of uniform provisions but also that they have the means of doing so, which requires knowledge of the decisions awarded by counterparts in other States parties to the Convention.[36]

The Convention is on the right track by requiring courts and tribunals to promote uniformity in the application of its provisions. To that end, they must have the necessary tools at their disposal, and the initiative of the UNCITRAL secretariat to increase knowledge of the decisions issued by the various national judicial systems through the establishment of a digest of national decisions[37] should certainly be commended. In that regard, it might also be useful to know the extent to which case law relating to the application of the Convention has become truly international, i.e. whether and to what extent judges refer, in their judgements, to decisions relating to the Convention that have been issued under different legal systems. The role that the Convention has come to play in arbitral decisions should also be borne in mind.

Another forward-looking feature of the Convention, other than the fact that it recognizes the role of party autonomy, is for the importance it places on usage, establishing, in article 9, paragraph 1, that "The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves." However, while that provision may still be deemed to fall within the realm of party autonomy, that is not the case with regard to paragraph 2 of the same article, which states that "The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in

[33]See Michael Joachim Bonell, "Some critical reflections on the new UNCITRAL draft convention on international sale", *Uniform law review/Revue de droit uniforme*, II (1978), pp. 2-12, who considered the article to be a step backwards with regard to the system established through the Convention relating to a Uniform Law on the International Sale of Goods, believing that it could entail risks of "nationalization" of the interpretation of the Convention (pp. 5 and 9).

[34]See, for example, the key concept set out in article 25, in which, by way of introduction to Part III, it is stated that "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."

[35]Such a possibility would raise concerns, according to Pierre-Yves Gautier, "Inquiétudes sur l'interprétation du droit uniforme international et européen", in *Le droit international privé: esprit et méthodes. Mélanges en l'honneur de Paul Lagarde* (see footnote 22 above), pp. 327-342 (334). For an equally negative, or at least reserved, attitude with regard to the establishment of an international court that would be entrusted with issuing binding decisions on the interpretation and application of uniform law, see C. H. Lebedev, "Unification des normes juridiques dans les rapports économiques internationaux (quelques observations générales)", *Uniform law review/Revue de droit uniforme*, 1981, Issue 2, pp. 2-36, expressing the position of the (then) socialist countries (p. 31).

[36]On efforts undertaken in that regard, see Michael R. Will, *International Sales Law under CISG. The UN Convention on Contracts for the International Sale of Goods (1980): the first 284 or so decisions*, fourth edition, Geneva, 1996, and *Twenty Years of International Sales Law Under the CISG (The United Nations Convention on Contracts for the International Sale of Goods): International Bibliography and Case Law Digest (1980-2000)*, The Hague, 2000, Kluwer Law International.

Also, for a review of case law relating to the Convention twenty-five years after its signature, see Claude Witz, "Os vinte e cinco anos da Convenção das Nações Unidas sobre os contratos de compra e venda internacional de mercadorias: balanço e perspectivas", in *Estudos de Direito Comparado e de Direito Internacional Privado* (see footnote 3 above), pp. 413-435.

[37]See *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, the 2012 edition of which was published in the *Journal of Law and Commerce*, vol. 30, Special Issue, pp. 1-694. For the process that led to that initiative, see Jernej Sekolec, "25 Years United Nations Convention on Contracts for the International Sale of Goods: Welcome address", in *Journal of Law and Commerce*, vol. 25 (Fall 2005/ Spring 2006), pp. XV-XIX.

international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."[38]

In accordance with this provision, a contract must incorporate not only the usages known by the parties but also those that the parties ought to know, provided that those usages are widely known and regularly observed by parties to contracts of the type involved in the particular trade concerned. The Convention therefore follows closely in the wake of *lex mercatoria*,[39] which it acknowledges, while at the same time seeking to complement and develop it.

There is a further key feature by means of which the Convention has encouraged the adoption of the solutions it provides in international practice. In defining its spatial scope of application, the Convention is not limited to seeking application to contracts for the international sale of goods between parties whose places of business are in different Contracting States, but also provides for situations in which "the rules of private international law lead to the application of the law of a Contracting State".[40]

This solution underscores that the new rules set out in the Convention are not limited to seeking to minimize problems arising from the diversity of national legal systems with respect to sale but, rather, make clear that the Convention is regarded as a regime for the regulation of contracts for the international sale of goods that is much more appropriate than the regimes established in domestic legal orders.[41] It is, of course, on the basis of such an understanding that the regime established by the Convention should prevail over domestic law whenever a legal regime incorporating the solutions provided for by the Convention has been declared applicable to the contract, even under the rules of private international law of a non-Contracting State.[42] Consequently, the application of the body of rules set out in the Convention might well take place outside the judicial system of the Contracting States, which naturally extends the impact of the Convention on international trade.

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[38]On this provision, see Aleksandar Goldstajn, "Usages of trade and other autonomous rules of international trade according to the United Nations (1980) Sales Convention", in *International Sale of Goods: Dubrovnik Lectures* (see footnote 2 above), pp. 55-110, and Charalambos Pamboukis, "The concept and function of usages in the United Nations Convention on the International Sale of Goods", *Journal of Law and Commerce*, vol. 25 (Fall 2005/Spring 2006), pp. 107-131.

In particular, for some of those usages to which the International Rules for the Interpretation of Trade Terms (Incoterms) refer, see Jan Ramberg, "To what extent do Incoterms 2000 vary articles 67 (2), 68 and 69?", *Journal of Law and Commerce*, vol. 25 (Fall 2005/Spring 2006), pp. 219-222, and, in the Portuguese literature, Luis Lima Pinheiro, "Incoterms — introdução e traços fundamentais", *Revista da Ordem dos Advogados*, No. 65, vol. II (2005), pp. 387-406, and "Venda marítima internacional: alguns aspectos fundamentais da sua regulação jurídica", *Boletim da Faculdade de Direito de Bissau*, No. 5 (March 1998), pp. 173-225.

[39]For a summary, see Francesco Galgano, *Lex Mercatoria. Storia del Diritto Commerciale*, Bologna, 1976, Il Mulino. Also, for a recent discussion in the Portuguese literature, see Luís Lima Pinheiro, "O direito autónomo do comércio internacional em transição: A adolescência de uma nova lex mercatoria", in *Estudos de Direito Civil, Direito Comercial, e Direito Comercial Internacional*, Coimbra, 2006, Almedina, pp. 391-439.

[40]For a critique of the position taken by the Convention in that regard, arguing in favour of the desirability of a return to the system provided for in the Convention relating to a Uniform Law on the International Sale of Goods, see Michael Joachim Bonell, "Some critical reflections on the new UNCITRAL draft Convention on International Sale" (see footnote 33 above). See also Giorgio Conetti, "Uniform substantive and conflicts rules on the international sale of goods and their interaction", in *International Sale of Goods: Dubrovnik Lectures* (see footnote 2 above), pp. 385-399; Jacob Siegel, "The scope of the Convention: reaching out to article one and beyond", *Journal of Law and Commerce*, vol. 25 (Fall 2005/Spring 2006), pp. 59-73; and Maria Ângela Bento Soares and Rui Manuel Moura Ramos, "Do contrato de compra e venda internacional: análise da Convenção de Viena de 1980 e das disposições pertinentes do direito português" (see footnote 2 above), pp. 19-25.

[41]And, in a sense, a genuine *jus commune* of international sale. In that regard, see Maria Ângela Bento Soares and Rui Manuel Moura Ramos, "Do contrato de compra e venda internacional: análise da Convenção de Viena de 1980 e das disposições pertinentes do direito português" (see footnote 2 above), p. 25.

[42]In that regard, and on the position of the Convention with respect to Portuguese legal orders (Portugal continues to be a non-Contracting State), see Luís Lima Pinheiro, "A Convenção de Viena sobre a Venda Internacional de Mercadorias perante as ordens jurídicas portuguesa e dos países africanos lusófonos", in *Internationaler Rechtsverkehr und Rechtsvereinheitlichung aus deutsch-lusitanischer Perspektive* (see footnote 3 above), pp. 273-287 (283-286).

If one considers that, in addition to such application, the parties may, simply by virtue of their will, extend the application of the Convention to situations that, for geographical reasons or on account of the nature and purpose of the contract, do not fall within its scope,[43] it is clear that the regime established by the Convention is well equipped to develop and expand its influence over what is the main instrument for conducting international trade.

I would also like to make a final point that strikes me as an important one with regard to the Convention and that relates to the concerns raised with regard to the clarity of the regime that the Convention establishes. In most national legal systems, especially those that have been most influenced by Germanic doctrine, the legal regime governing sale is scattered over different areas of legislation, whether the general provisions of civil codes, the rules of the law of obligations or provisions governing the specific subject dealt with by the contract itself.[44] This situation far from facilitates understanding of the regime as a whole, and naturally makes the situation of the parties with regard to the predictability of the applicable law more difficult.

The Convention, however, has of course distanced itself from such a situation in that it offers a concentrated regime that is intended as a comprehensive body of regulations relating to sale. In setting out its various solutions, it goes even further by considering the perspective of each contracting party, setting out the obligations of both seller and buyer[45] and, in the event of a breach of those obligations by one party, the remedies available to the other party.[46] This descriptive approach, while consistent with what might be called the "external system"[47] of the Convention, has proven clearly to be more favourable to the transparency of the model on which the Convention as a whole is based, and facilitates understanding of these solutions.

With these brief considerations, we have tried to explain why we firmly support the view that the initiative to revise the Sales Convention is a welcome one.

In an attempt to sum up the key points of our position in that regard, we would say that, on the one hand, the Sales Convention, in force in almost half of all United Nations Member States but whose influence in international economic life is by far more representative of its impact than that number, is certainly an achievement in the process of

[43]In that regard, see Bernard Audit, *La vente internationale de marchandises: Convention des Nations-Unies du 11 avril 1980* (see footnote 22 above), pp. 40-41.

[44]This is the case with regard to the Civil Code of Portugal in particular. On the formation of contracts, see Book I (General provisions), articles 217, 218, 224, 226 and 228 to 235 (on those provisions, see Maria Ângela Bento Soares and Rui Manuel Moura Ramos, "Do contrato de compra e venda internacional: análise da Convenção de Viena de 1980 e das disposições pertinentes do direito português" (see footnote 2 above), p. 47, and Heinrich Ewald Horster, "Sobre a formação do contrato segundo os artigos 217.º e 218.º, 224.º a 226.º e 228.º a 235.º do Código Civil", *Revista de Direito e Economia*, No. 9 (1983), pp. 121-157). On the effects of the contract, see the provisions of Book II ("Law of obligations") relating to contracts in general [Section I ("Contracts") of Chapter II ("Sources of obligations"), articles 405 to 456, and Chapter VII ("Performance and non-performance of obligations"), articles 762 to 816, of Part I ("General obligations")] or the provisions of Chapter I ("Sale") of Part II ("Special contracts"), articles 874 to 938; on those provisions, see Maria Ângela Bento Soares and Rui Manuel Moura Ramos, "Do contrato de compra e venda internacional: análise da Convenção de Viena de 1980 e das disposições pertinentes do direito português" (see footnote 2 above), p. 65.

[45]Respectively, Section I (articles 31 to 34) of Chapter II and Sections I (articles 54 to 59) and II (article 60) of Chapter III of Part III of the Convention.

[46]On remedies for breach of contract by the seller, see Section III (articles 45 to 52) of Chapter II, and on remedies for breach of contract by the buyer, see Section III (articles 61 to 65) of Chapter III, both under Part III. In a previous study (Maria Ângela Bento Soares and Rui Manuel Moura Ramos, "Les moyens dont dispose l'acheteur en cas de contravention au contrat par le vendeur (autre que le défaut de conformité) dans la Convention de Vienne de 1980 sur les contrats de vente internationale de marchandises", *Uniform law review/Revue de droit uniforme*, 1986, Issue 1, pp. 67-89), it is highlighted that the Convention provides in that regard for a global system of sanctions, aimed at ensuring that contractual equilibrium is maintained, that makes a distinction between general means and specific means and within which that distinction can be made according to the time at which the breach with respect to which remedy is sought was committed.

[47]To use Heck's well-known expression.

international unification with respect to the sale of goods. It therefore cannot be disregarded in the consideration of any initiative aimed at expanding that process. In our view, that argument suffices to persuade that it would be unwise to commence a new process of unification in this area without taking the Sales Convention into account.

Having said that, while recognizing the progress achieved through the conclusion of the Convention and the increased security that it has brought to international trade, it should also be recognized that the solutions it provides for, dating back to more than 35 years ago and in some cases to much earlier circumstances, should be reviewed regularly.

That applies, above all, to issues that have remained outside the scope of the unification efforts undertaken but fall within the scope of the regime for the regulation of international sale. It must be determined whether the raison d'être for some of those excluded issues (fear of a lack of agreement) continues to exist or whether, on the contrary, we are now in a position to be much bolder in this matter.

On that basis, and taking into account the solutions reached through the text of the Convention, all of the issues that, very often in the light of the provisions of the Convention, have been the focus of developments in instruments relating to sale or contract law in general, should be taken into consideration. These new solutions reflect the development of contractual techniques and the needs of practitioners, as well as developments in relevant jurisprudence. They should therefore be the subject of careful consideration with the aim of addressing the question of whether and to what extent they can be incorporated in the existing body of law.

Furthermore, it should not be forgotten that the task of building law is to ensure the effectiveness of the regulations it establishes, and, therefore, that the application of unified rules in practice must always be borne in mind. In that regard, I believe that the basic structure of the international community has not changed much with the passing of time. This being the case, I am not inclined to believe that the time is right to establish a judicial system that, either through a remedial mechanism or through a case-law mechanism, ensures the uniformity of decisions (or at least reduces the possibility of conflicting judgements). On the contrary, given this situation, every effort should be made to increase knowledge of judgements issued in application of the solutions provided for by the Convention, with the aim of contributing to the development of a common culture among the judges who, within different legal and jurisdictional systems, contribute to the implementation of a common body of law whose implementation should be uniform.[48] If, for the time being, there is no possibility of considering the establishment of a single court with competence (possibly on a preliminary basis) to interpret standardized rules, consideration should be

[48]It might also be useful, in our view, to draw on the example of the interaction of constitutional and supreme courts, which, while applying differing rules (albeit with a common purpose and nature), have succeeded in establishing a fruitful dialogue that could serve as the basis for a common jurisdictional culture. On that dialogue and its importance, see Vincenzo Sciarabba, *Tra Fonti e Corti. Diritti e principi fondamentali in Europa: profili costituzionali e comparati degli sviluppi sovranazionali*, Padua, 2008, Cedam. However, for consideration of the issue with reference to two European courts (the European Court of Human Rights and the Court of Justice of the European Union), see the collection of articles in *Pouvoirs*, No. 96, 2001 (*Les Cours Européennes. Luxembourg et Strasbourg*), and, in the context of transatlantic relations, Elaine Mak, "The US Supreme Court and the Court of Justice of the European Union: emergence, nature and impact of transatlantic judicial communication", in *A transatlantic community of law: legal perspectives on the relationship between the EU and US legal orders* (edited by Elaine Fahey and Deirdre Curtin), 2014, Cambridge, Cambridge University Press, pp. 9-34. For a broader perspective, see the communications set out in *Le dialogue des juges. Actes du colloque organisé le 28 avril 2006 à l'Université Libre de Bruxelles*, Brussels, 2007, Bruylant; Catherine Kessedjian, "Le dialogue des juges dans le contentieux privé international", in *A Commitment to Private International Law: Essays in honour of Hans van Loon* (see footnote 9 above), pp. 253-258; and Christian Kohler, "Balancing the judicial dialogue in Europe: some remarks on the interpretation of the 2007 Lugano Convention on jurisdiction and judgements", in *Entre Bruselas y La Haya. Estudios sobre la unificación internacional y regional del Derecho internacional privado. Liber Amicorum Alegría Borràs* (see footnote 9 above), pp. 565-574.

given to facilitating the development of judicial interaction, which naturally can arise only from shared knowledge.

That said, it is also important not to lose sight of the main principles that guided the work carried out in Vienna and that remain anchored in the text in force. The first is the promotion of greater recognition of the will of the parties, which is increasingly recognized as a general principle of law (at least in the area under discussion) and seeks recognition of certain aspects of fundamentality. The drafters of uniform law should, in that regard, maintain the approach that prevailed during the preparation of the current text and from which they rarely deviated.[49] The second is recognition—alongside and beyond national law—of the importance of usages and practices that are established between the parties and, above all, that have been adopted in international trade practice. Independently of the fact that some such solutions have been consolidated in the rules developed by institutions whose regulatory role in international trade practice is essentially undisputed in the present day,[50] it should be noted that we are increasingly witnessing the creation of a true common law of international trade, which, in the light of past developments,[51] has been formed independently of State institutions. A body of law, or rather a set of rules, which, drawn up on the basis of the needs of international trade entities, has gained the favour of those entities by recognizing the legal orders of States.

Those principles should also guide the review to be undertaken with respect to the solutions presently offered by the Convention, the improvement of which remains desirable. That process could certainly draw on all that has been written about these solutions in recent years, and should also take into account the development of judicial and arbitral practice in this area. I am strongly convinced that if such a course is followed, the outcome will be a text that is more up-to-date and better adapted to the conditions in which international trade is developing today.

[49]The only exception to the broad possibility of exclusion of application of the Convention or derogation from or modification of the effects of its provisions (as provided for in article 6 of the Convention) is article 12, with respect to form. While article 11 provides for the principle of the sufficiency of agreement between the parties in order to establish a contract, establishing that a contract of sale is not subject to any other requirement as to form, article 96 allows States whose legislation requires contracts of sale to be concluded in or evidenced by writing to declare (at any time, not only at the time of accession to the Convention) that any provision of article 11, article 29 (relating to modification of the contract) or Part II of the Convention (relating to offer and acceptance) that allows any form other than writing does not apply to a contract of sale covered by the Convention where any party has his place of business in a State that has made such a declaration. Article 12 recalls that possibility and specifies that the parties may not derogate from or vary the effect of that article.

[50]For example, the International Chamber of Commerce and its Incoterms, the most recent version of which is that of 2010. In that regard, see Jan Ramberg, *ICC Guide to Incoterms 2010*, 2011, International Chamber of Commerce; "To what extent do Incoterms 2000 vary articles 67 (2), 68 and 69?" (see footnote 38 above); and, in the Portuguese literature, Luis Lima Pinheiro, "Incoterms — introdução e traços fundamentais" (see footnote 38 above), pp. 315-333.

[51]See Francesco Galgano, *Lex Mercatoria: Storia del Diritto Commerciale* (see footnote 39 above), pp. 31-69.

United Nations Convention on Contracts for the International Sale of Goods

Ana Elizabeth Villalta Vizcarra

Background

The United Nations Convention on Contracts for the International Sale of Goods, also known as the United Nations Sales Convention, was signed on 11 April 1980, therefore this year marks the thirty-fifth anniversary of its adoption; the Convention entered into force on 1 January 1988 and there are currently 83 States Parties to the Convention, including 18 of the 35 Member States of the Organization of American States (OAS).

The Convention was preceded by the work carried out from 1930 by the International Institute for the Unification of Private Law (Unidroit), which led to the adoption in 1964 of two Hague Conventions, one on the formation of contracts for the international sale of goods and the other on the formation of contracts for the international sale of goods relative to the rights of the buyer and the seller, but, as those Conventions were not drafted by countries representing all the regions of the world, they failed to achieve worldwide acceptance, being widely criticized for reflecting primarily the legal traditions and economic realities of continental Western Europe.

In the light of this, the United Nations tasked the United Nations Commission on International Trade Law (UNCITRAL) with developing a convention that would achieve worldwide acceptance; a working group was then set up to review these precedents with the help of leading jurists in this field; in 1978 a unified Draft Convention was produced entitled the Draft Convention on Contracts for the International Sale of Goods, which achieved wider acceptance among countries with different legal, social and economic systems.

For that reason, the United Nations General Assembly convened a Diplomatic Conference in Vienna, Austria in April 1980 to review the Draft Convention, at which Conference the States present unanimously adopted on 11 April the text of the Convention, drafted in the six official languages of the United Nations, entering into force on 1 January 1988, entitled the United Nations Convention on Contracts for the International Sale of Goods.

The Convention aims to provide a modern, uniform and equitable regime for contracts for the international sale of goods, as well as provide legal certainty for trade, since a wide variety of countries from all regions of the world took part in drafting the Convention.

It is the result of a major legislative effort to carefully reconcile and balance the interests of the seller and the buyer; accordingly, States that adopt the Convention have at their disposal modern, uniform legislation governing the international sale of goods that applies to any sales transaction concluded between parties with a place of business in any

of the Contracting States, it being directly applicable without the need to resort to private international law to determine the law applicable to the contract.

For this reason, it has been seen as a key tool of international trade that all States should adopt irrespective of their legal tradition or level of economic development and that seeks to maintain a balance between the interests of sellers and those of buyers.

Its application has been highly successful during the thirty-five years of its existence, having been adopted by more than two thirds of the Member States of the United Nations, which have accepted its unifying rules for regulating most of their international trade.

Current situation

There are currently 83 States Parties to the Convention, and the Convention has been ratified by States whose combined economies make up more than two thirds of the global economy and which represent all geographical regions of the world, all stages of development and all legal traditions.

The Convention governs worldwide the formation and development of contracts for the international sale of goods, thus replacing domestic legislation, becoming the most successful agreement in unifying those legislations.

The aim of the Convention is to promote legal certainty in the international sale of goods, establishing a uniform text of laws for all countries in the world and separating itself, as has been said, from domestic legislation; it provides exporters and manufacturers with a number of powers or authorities relating to the sale of their products, being equally advantageous for industrialized nations and developing economies, therefore its provisions are favourable to the interests of Member States and their commercial relations as well as to those of import and export.

The Convention aims to provide a uniform body of rules that harmonize the principles of international trade, providing directly applicable rules that recognize the importance of business usages and practices, making it a model for the harmonization of international trade law.

Likewise, the Convention establishes a modern, uniform and equitable regime for contracts for the international sale of goods, thereby contributing to legal certainty in trade, reducing transaction costs and providing a basis for international trade in all countries.

The Convention is applicable only to international transactions, not to contracts covered by private international law or contracts for national sale only, which are covered by the relevant domestic law, or contracts in which the parties have agreed on the application of another law and will not therefore be affected by the Convention.

It should be noted that the Convention applies only to sales contracts linked to international transactions, not to those linked to domestic transactions, which is why the place of business of the parties (seller and buyer) must be located in different States.

International merchandise trade has, in the Convention, a suitable legal instrument for facilitating commercial transactions between countries of the world, constituting

furthermore a set of international sales regulations that govern the contract as a whole, independently of any domestic legislation. The Convention also provides regulation that is compatible with the most diverse legal systems in the world, be they in the civil law or the common law tradition.

Regarding interpretation of the Convention, account must be taken of its international character and the need to promote uniformity in its application and ensure observance of good faith in international trade; thus parties to a contract for the international sale of goods under the Convention must follow the rules for interpreting the Convention.

Sphere of application

The Convention applies to all sales transactions between parties that have a place of business in any of the Contracting States, and is directly applicable without resorting to the rules of private international law to determine the law applicable to the contract. However, the Convention may also apply to a contract for the international sale of goods when the rules of private international law point at the law of a Contracting State as the applicable one, or when the parties exercise their autonomy and choose an applicable law, regardless of whether their respective places of business are located in a Contracting State.

In this regard, the Convention makes the spatial sphere of application conditional on the places of business of the parties being located in different States and, if the parties are Contracting States, the Convention will be directly applicable. If one of the States is not a Contracting State or even if neither of the States are Contracting States, a situation might arise where, under the relevant rules of private international law, the parties submit to the law of a Contracting State, the Convention thus being applied indirectly. By "place of business" we mean the permanent or habitual place where the Contracting State carries out its business and if there are several such places, the place of business shall be that which has the closest relation to the contract and the performance thereof.

Similarly, the application of the Convention is based on the notion of internationality, namely that the parties have a place of business in different States, and if they have several places of business, the one that has the closest links shall be taken into account, regardless of the nationality of the parties or of whether the contract is of a civil or commercial nature.

The Convention does not apply to consumer sales (personal, family or household use); to sales by auction, or sales on execution or otherwise by authority of law; to sales by reason of the nature of the contract; to sales of stocks, shares, investment securities, money, ships or aircraft; to contracts for the supply of goods to be manufactured or produced where the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production; to contracts where the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services; to the liability of the seller for death or personal injury caused by the goods to any person; or to the validity of the contract or of any of its provisions or of any usage, or to the effect which the contract may have on the property in the goods sold, unless otherwise provided by the Convention.

The rules of the Convention are of an eminently dispositive nature, being based on the importance of the principle of party autonomy, and therefore may be applied in full or in part if the parties to a contract so require. The basic principle of contractual freedom

in the international sale of goods is recognized by the provision allowing the parties to exclude the application of the Convention or vary the effect of any of its provisions.

Equally, the principle of good faith in international trade is important, as it helps not only in interpreting the provisions of the Convention but also in disciplining the conduct of the parties.

The work of interpretation must be of an international character and must seek uniformity in the application of the Convention, namely that it be interpreted consistently across all legal systems. The usages and customs of international trade shall be followed with the implicit or explicit agreement of the parties and be applied if they are widely known and used at the level of international trade. Moreover, such usages and customs maintain a balance between the industrialized States and developing States that have not yet established domestic legislation.

Thus, article 6 of the Convention enshrines the defence of the principle of party autonomy to choose the applicable law, and any gaps in legislation may be filled by *lex mercatoria*.

This article allows the parties, therefore, to establish provisions outside of the Convention. This does not reflect a lack of confidence on the part of the Convention in its own rules, but, on the contrary, enshrines the defence of the principle of party autonomy to choose the applicable law.

Article 7 of the Convention establishes the criteria of interpretation, which are based on its international character and the need to promote uniformity in its application and the observance of good faith in international agreements. Therefore, any dispute arising from a sales contract will be settled in conformity with the general principles of the Convention or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

In other words, the article determines the criteria for interpretation of the Convention, which should be based on its international character, the need to promote uniformity and the observance of good faith in international agreements. Thus, matters not covered by the Convention shall be governed by the applicable law in conformity with the rules of private international law.

In the interpretation of the Convention, regard must be had to the international character of the Convention, to the key importance of party autonomy and to the promotion of uniformity in the application of the Convention, for which familiarity with the case law of international trade is a necessity.

The rules of interpretation are an essential part of the Convention: parties to a contract that will be governed by the Convention may not agree that the Convention will be interpreted by rules other than those that the Convention itself sets out in its relevant articles.

Article 9 of the Convention, for its part, notes the complementarity that must exist between the Convention and *lex mercatoria*, establishing the pre-eminence of commercial usage and placing international trade customs at the same level of importance as the principle of party autonomy. In this sense, it establishes trade usages and party autonomy as the principal source for the international sale of goods.

Structure

The Convention is divided into four parts:

Part I sets out the sphere of application and the general rules on sales contracts, defining what is meant by fundamental breach, establishing how communication is conducted between the parties, establishing that the contract is amended by mere agreement of the parties and where it is possible to claim specific performance of the contract, inter alia. Part II contains the rules governing the formation of contracts for the international sale of goods. Part III refers to the obligations of the seller, determining the content of the obligation to deliver the goods, that is, the place, the time and how the goods should be delivered, and defining the responsibility of the seller for the quality of the goods and for the rights and claims by third parties on them, especially those resulting from intellectual property, and establishes the remedies to which the buyer is entitled in the event of breach by the seller. Likewise, it refers to the obligations of the buyer, specifying the content of its obligations to pay the price and take delivery of the goods, as well as the remedies available to the seller in the event of breach by the buyer; it also establishes common rules for the obligations of the seller and buyer and identifies the remedies available to them, the criteria for assessing damage and charging interest on arrears, as well as cases of exemption from liability for breach as well as the effects of avoidance of the contract. Part IV contains the final provisions of the Convention, such as its entry into force, reservations and declarations.

Thus, the contract for the sale of goods is concluded first with the offer that is the seller's proposal for concluding a contract, which is addressed to one or more specific persons, must be sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

The offer must therefore include the following elements: *(a)* identification of the person or persons to whom it is addressed; *(b)* the definition of the offer; and *(c)* observance of the time limit for expressing acceptance. The contract is concluded when the offeror actually receives the acceptance of the offer.

In that regard, the contract is formed by means of an offer and an acceptance, insofar as the seller and the buyer both have obligations as parties to the contract. As stated earlier, the principal obligations of the seller are to deliver the goods in conformity with the quantity and quality stipulated in the contract, as well as to deliver related documents and to transfer ownership of the property. The general obligations of the buyer are to pay the price for the goods and take delivery of them as required by the contract and the Convention.

In addition, the Convention is provided with remedies that the parties (seller and buyer) may use in the event of breach of contract, such that the injured party may demand performance of the contract and claim damages, and even declare the contract avoided in the event of fundamental breach.

Finally, Part IV sets out the final provisions, which contain the usual clauses for this type of international convention relating to its deposit, the depositary of the Convention being the Secretary-General of the United Nations, stating that the Convention was open for signature until 30 September 1981 and that it is subject to ratification, acceptance or approval by the signatory States, is open to accession by all States that are not signatories, and that the corresponding instruments of ratification, acceptance, approval or accession are to be deposited with the Secretary-General of the United Nations.

The Convention allows States to make declarations, which must be made in accordance with the text of the Convention, be made in writing and be formally notified to the depositary. Furthermore, States may withdraw their statements at any time by a formal notification in writing addressed to the depositary, no reservations being permitted except those expressly authorized by the Convention.

Outlook in the Americas

The Convention has to date been adopted by 18 States of the American continent, those States being: Argentina, Brazil, Canada, Chile, Colombia, Cuba, Dominican Republic, Ecuador, El Salvador, Guyana, Honduras, Mexico, Paraguay, Peru, Saint Vincent and the Grenadines, United States of America, Uruguay and Venezuela (Bolivarian Republic of) (signatory only). Thus, it has been taken up by States of the Americas with different legal traditions (civil law and common law), owing to the fact that the Convention allows the harmonization of both systems.

In the Americas, the Convention has been widely applied and forms part of domestic law there applicable to international sales contracts; it will, without doubt, be used more frequently with the entry into force of free trade agreements and with partnership agreements that many regions of the American continent have with the European Union, as trade becomes active between countries of those continents.

Moreover, the Convention has enabled the development of uniform case law in the American continent, which has greatly benefitted implementation of the Convention. In that regard, it has been one of the most important achievements in the field of international trade and represents a further step forward towards harmonizing the legislations of the individual States of the American continent in respect of the international sale of goods.

The Convention is of great importance to States of the American continent as it is very popular among companies involved in international trade, and many States Parties to the Convention are strategic business partners of American countries, which will help attract greater foreign investment by creating an environment favourable to international trade.

Applying the Convention has involved adapting the legislations of American States to the demands of trade in a globalized world in order to keep pace with international developments and trends.

The international character of the Convention has also brought practical benefits for lawyers in the Member States of the Convention, as becoming experts on the Convention has enabled them to advise exporters as well as all categories of buyers and sellers in accordance with the guidelines and principles of the Convention.

The Convention balances the interests of the seller with those of the buyer, making it attractive to States of the American continent, as that balance does not exist when transactions are governed exclusively by the rules of private law of the countries, which may even cause injustices between industrialized and underdeveloped countries.

The Convention has also proved to be beneficial for American States, especially those of Latin America, because in addition to its other benefits, it provides American exporters and manufacturers with a number of powers or authorities to sell their products to industrialized nations, thus benefiting developing economies.

Of further interest to American countries has been the international character of the Convention, which prevents a domestic law from governing international transactions, the clarity and simplicity of the principle of party autonomy contained in the Convention, and the establishment of a neutral regime that makes available to the parties, in the event of a dispute, a pre-established, known solution, which also saves them time and money.

The fact that the Convention is also available in Spanish, as one of the six official United Nations languages, facilitates interpretation of the Convention for Latin American countries, in the majority of which the language is Spanish, and helps to create a uniform case law, which will not be enjoyed by those countries of the Americas that have not yet adopted the Convention.

For the countries of Latin America, the Convention is important in that it enables them to adapt to uniform substantive provisions for their foreign trade operations, ensuring furthermore that operators have advance knowledge of the legal regime that will govern the operation for the international sale of goods; this will facilitate foreign trade by affording greater legal certainty to international commercial transactions, as a suitable legal instrument will be available to facilitate such transactions by governing the contract in toto, independently of any domestic legislation, which will not be resorted to in any case, given that the Convention is sufficient in itself under its own rules.

Under article 7 of the Convention, national courts in the Americas must interpret the Convention taking into account its international character and the need to promote uniformity in its application. Thus, in interpreting and applying the Convention, national judges must put aside their domestic law and apply international rules independently, adhering both to their letter and their spirit, and relying on the general principles arising from the Convention itself, such as good faith, reasonableness and party autonomy.

In many of the States of the American continent that are parties to the Convention, the national courts have, in many of their judgements and resolutions, referred expressly to the Convention where contracts for the international sale of goods have been involved, settling their cases by applying the Convention.

This is confirmation that all the States of the Americas that are parties to the Convention have accepted the Convention as being in favour of the interests of Member States thereto and of their trade relations, imports and exports.

American countries that are parties to the Convention have had to adapt their legislation to the commercial requirements of a globalized world in order to keep abreast of international developments and trends.

In most constitutions of the States of Latin America that are parties to the Convention the following hierarchy of legislation is established: first, the national constitution; second, international agreements; and third, secondary legislation. Therefore, the Convention takes precedence over secondary legislation as regards the international sale of goods, and only matters not covered by the Convention will be governed by domestic legislation.

In the inter-American system, international private law is developed progressively and codified within the framework of the Inter-American Specialized Conferences on Private International Law (known by their Spanish acronym CIDIPs) of the Organization of American States (OAS), seven of which have now been held, beginning with the first Conference in Panama in January 1975 and the most recent being the Conference in

Washington, D.C., in October 2009 on Model Registry Regulations under the Model Inter-American Law on Secured Transactions.

Within the CIDIP framework, 27 international instruments have been produced, including 21 conventions, two additional protocols, two uniform instruments, one model law and one set of model regulations, which have substantially contributed to the codification, consolidation and modernization of the rules of private international law in the Americas.

Many of those instruments are based and modelled on instruments that have been established within the ambit of the United Nations Commission on International Trade Law (UNCITRAL). For example, the Inter-American Convention on the law applicable to international contracts, also known as the 1994 Mexico Convention, signed in Mexico City (Federal District) on 17 March 1994 at the Fifth Inter-American Specialized Conference on Private International Law, took as precedents the United Nations Sales Convention, the work of the International Institute for the Unification of Private Law (Unidroit) as regards the principles governing international commercial contracts, the Convention on the Law Applicable to Contractual Obligations, also known as the 1980 Rome Convention, the Convention on the Law Applicable to Contracts for the International Sale of Goods, concluded at The Hague in 1986, the Montevideo Treaties of 1889-1890 and 1939-1940 and the 1928 Bustamante Code.

Taking those instruments into account, the 1994 Mexico Convention is based on the principle of party autonomy and on modern trends, as the contract is governed by the law chosen by the parties.

In the same way as the principle of party autonomy is of great importance in the United Nations Sales Convention, in the 1994 Mexico Convention the determination of the applicable law implies the widest application of the principle of party autonomy, when in article 7 of the same it establishes that "[t]he contract shall be governed by the law chosen by the parties", this principle operating therefore as the fundamental or principal axis of the 1994 Mexico Convention, such that it is the parties themselves who assess and determine which law shall apply to them, as neither the judge nor the legislator will do it for them.

Like the United Nations Sales Convention, the 1994 Mexico Convention is based on the application of *lex mercatoria*, establishing at article 10 that the guidelines, customs, and principles of international commercial law as well as generally accepted commercial usage and practices shall apply in order to discharge the requirements of justice and equity in the particular case, considering *lex mercatoria* to be somewhat the new law of international trade operators.

Further, both the United Nations Sales Convention and the 1994 Mexico Convention represent a significant step forward in harmonizing the various legal systems of their Member States, helping to facilitate and to affirm the coexistence of all of these systems.

Another important point regarding the United Nations Sales Convention and the 1994 Mexico Convention is that sufficient outreach and understanding of those Conventions are required in order for their Member States to recognize the benefits that the Conventions bring to international contracts and trade in today's world.

A further significant point with regard to both Conventions is that 2015 sees two important anniversaries for the codification and progressive development of international

law, namely the thirty-fifth anniversary of the United Nations Sales Convention within the framework of the United Nations universal system, a product of the United Nations Commission on International Trade Law—a forum for unifying international trade law in the United Nations—and the fortieth anniversary of the Inter-American Specialized Conferences on Private International Law in the Inter-American system of the OAS—a forum for the regional codification of the rules of private international law of the Member States of the Organization of American States.

Final considerations

The importance of the United Nations Sales Convention, which comprises a total of 101 articles, is in providing a uniform body of rules that harmonize the principles of international trade, putting an end to legal insecurity for traders involved in cross-border sales; that is why most global trade has been regulated by its provisions and why it has to date garnered the broad international support of States.

The Convention affords to States Parties greater legal certainty in international commercial transactions, benefiting exporters and importers directly and bringing States in line with uniform substantive provisions for foreign trade operations, ensuring furthermore that operators have advance knowledge of the legal regime that will govern their international sales operation.

The Convention represents practically the largest and most comprehensive effort in the history of international trade to unify the legislation of States with regard to the international sale of goods, succeeding furthermore in brilliantly reconciling the world's legal and economic systems, and therefore the success of the Convention is not related to the number of States Parties to it, but rather to their geographical representation and their importance to international trade.

The Convention has been accepted by countries of all legal traditions, from civil law to common law, and has been adopted by countries from all economic systems. For that reason, the Convention provides a legal framework for the international sale of goods, constituting a uniform legal document that is compatible with the various legal systems.

The Convention also facilitates contracts for the international sale of goods through the use of electronic data interchange and helps to reduce unfair competition in such transactions.

Notwithstanding all the advantages and benefits that the Convention has brought to international trade and contracts, in order to enjoy significant international applicability and be the most widely used contract in the world of commerce through providing certainty, security and flexibility, the Convention must be disseminated more widely so that all States are aware of the benefits it affords for international transactions; therefore an appropriate outreach effort would be desirable to encourage States that are not yet parties to the Convention to join and enjoy the benefits it provides.

We congratulate, therefore, the United Nations Commission on International Trade Law (UNCITRAL) for its significant role as a global forum for unifying international trade law, and celebrate the thirty-fifth anniversary of the adoption of the United Nations Convention on Contracts for the International Sale of Goods, at this colloquium, which is of particular relevance for international trade and at which we pay tribute to the Convention that has become the world's uniform legal instrument for the international sale of goods.

Abbreviations

ASADIP:	American Association of Private International Law
CIDIPs:	Inter-American Specialized Conferences on Private International Law
IAJC:	Inter-American Juridical Committee
IHLADI:	Hispano-Luso-American Institute of International Law
OAS:	Organization of American States
UNCITRAL:	United Nations Commission on International Trade Law
Unidroit:	International Institute for the Unification of Private Law

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The United Nations Convention on Contracts for the International Sale of Goods and China's Contract Law

WANG Liming

Dear Mr. Chairman, Ladies and Gentlemen,

At the thirty-fifth anniversary of the United Nations Convention on Contracts for the International Sale of Goods (CISG), I am excited to visit the city of its birth. I feel especially delighted to join this high-level panel discussion, and exchange thoughts with colleagues in this panel.

As you may know, China ratified CISG in 1986 and is one of the original contracting States of this international convention. In the past three decades, CISG has had great influence on Chinese contract law and civil law in general. I would like to give a brief talk in this regard.

The history of Chinese contract law

China's contemporary civil legal system is the fruit of China's Reform and Opening Up Project since 1978. It is composed of separate laws, including the General Principles of Civil Law, Contract Law, Property Law and Tort Liability Law.

The present Contract Law of China was enacted in 1999. Before that, China had enacted three separate contract laws between 1981 and 1987, namely the Economic Contract Law in 1981, the Foreign Economic Contract Law in 1985, and the Technology Contract Law in 1987. Later on, the three separate laws were unified by the present Contract Law.

CISG has had profound influences on Chinese contract law and the market economy of China since the beginning of 1980s. Both the Chinese government and Chinese lawyers were in support of this international convention as soon as its first draft was issued, because it embodies modern, uniform and fair institutions for contracts in both international and domestic contexts. We also recognized that the structure and content of CISG has reflected the wisdom of contract laws in both the civil law tradition and common law jurisdictions.

This explains why the Foreign Economic Contract Law of China, which regulated international trade, had widely borrowed from CISG. For example, the Foreign Economic Contract Law adopted strict liability for breach of contract. It also established the rule of fundamental breach though in a slightly different style.

In September 1993, the Standing Committee of National People's Congress made a decision to amend the Economic Contract Law. Later on in the same year, the Commission

of Legislative Affairs of the Standing Committee held an expert conference to discuss how to amend the Economic Contract Law. The participants of that conference reached two consensuses. First, the three separate contract laws ought to be unified. Second, it was necessary to form an expert team drafting a legislative proposal for the amendment of Chinese contract laws.

I was lucky to participate in the whole drafting process. I still remember that one of the major debates during the drafting process was about the model of the new Contract Law. Namely, should China follow the model of continental legal systems in which contract law is only part of the law of obligation, or should China borrow the model of CISG and the Principles of International Commercial Contracts (PICC) in which contract law is an independent legal document?

As many of you may know, the civil law systems in the Continent, especially the German Civil Code, are quite influential in China. Nonetheless, after much deliberation, it was agreed to make the Contract Law of China in the form of an independent legislation, and to learn from the experiences of the international convention and the model law.

Now, let me briefly introduce why we adopted the model of CISG.

Why CISG instead of civil law traditions?

There are three main reasons that China chose CISG as the main reference for the drafting of its Contract Law.

First, China has joined the international convention, which means China is obliged to perform its international obligations prescribed by the convention. If China reflects the rules of contract it follows in the international context in its domestic law, it helps to ensure the integrity of its legal system.

Second, CISG contains the merits of both continental legal systems and common law traditions, and reflects the most recent tendency to satisfy the institutional demands of international trade. It greatly helps to facilitate market transactions. Ever since the outset of China's Reform and Opening Up Project, China has been increasingly involved in international trade. This requires that China's contract law should be forward-looking and in line with international norms and practices.

Third, CISG is consistent with the tendency of economic globalization. The core spirits of CISG, such as contractual autonomy, good faith and *favour contractus*, meet the inherent demands of market economies. The essence of China's reform project is to shift from its highly planned economy to a market oriented economy. The legislation of China's Contract Law was accomplished in a transitional period when the market economy was not deeply rooted in China. However, it is a consensus among the draftsmen that China's Contract Law should conform to the essence of the market economy. It could not only serve to regulate economic activities during the transitional period, but also operate as a tool to accelerate the future development of a market economy in China.

These are the basic economic and social backgrounds to China's legislation of the present Contract Law. In a word, China widely borrowed from CISG because of China's understanding that CISG has established many modern and advanced rules of contract that help to facilitate the construction of a market economy.

CISG's impacts on China's contract law

In 1999, the passage of China's present Contract Law ended the messy situation of the Chinese contract legal system that was composed of three separate laws. In more than a decade, the new Contract Law has proved to be successful in maintaining an efficient and healthy market economy in China. Today, China's present Contract Law is commonly regarded as a significant facilitation to China's market economy and robust economic growth.

Here I would like to give a couple of detailed illustrations of CISG's strong bearing on China's Contract Law.

First, the wide borrowing from CISG has promoted the modernization of China's Contract Law. Here are three examples.

One example is about the concepts of *Non-Conformity* adopted by CISG. Many colleagues in China suggested that China's Contract Law transplant the German's dual-track rules that distinguish *Inappropriate Performance* with *Liability for Defects Warranty*. In my view, the divide between the concept of *Inappropriate Performance* and *Liability for Defects Warranty* is unnecessary. I argued that the CISG rules work better to enforce contracts and give sufficient remedies to the innocent party in cases of inappropriate performance. In the end, the legislature adopted the CISG rule of *Non-Conformity*. I also noted that, years later, the amendment of the German law of obligation abandoned the dual-track rules, and followed the CISG rule.

Another example concerns whether China's Contract Law needs a general rule of contract termination, which is provided by CISG but absent in the German Civil Code. It was hotly debated whether China should take the CISG approach or the German model. We recognized that it is scientific to adopt the rule of *Fundamental Breach* included in CISG, because such a general rule sets up a clear standard for the termination of contract in the case of breach of contract. Eventually, article 94 of China's Contract Law accepted the rule of Fundamental Breach.

The third example relates to the written form requirement. China's contract laws used to place excessive emphasis on the written form of contracts. Thus, China made a "written form" declaration when ratifying CISG in 1986. But many written form requirements have proved to be inefficient regulations in domestic businesses in the past three decades. In the past few years, China has gradually accepted the approach taken by article 11 of CISG and withdrew its "written form" declaration in 2013.

Second, as I mentioned earlier, the legislation of China's Contract Law was accomplished before China fully constructed its socialist market economy. But China's Contract Law took a step forward by teaching the spirit of the market economy and promoting improvements to China's market environments. In a broader sense, the wide dissemination and application of China's Contract Law with the modern spirit borrowed from CISG and other sources have accelerated China's overall economic reform in the past decade.

Third, Chinese Contract Law's conformity with international norms reduces the transactional costs of Chinese enterprises when they go abroad. It is because the similarity between domestic contract law and international transactional rules, first, saves the expense of learning and conforming to different legal systems, and second, gives them the confidence to step into international trade. These benefits are equally available to foreign investors in China's market, and in effect makes China market friendly to foreign investors.

Fourth, both China's Contract Law and CISG are well enforced by the Chinese courts and arbitrators. According to the Working Report of China's Supreme People's Court in 2015, Chinese courts have resolved around eight million disputes over civil and commercial matters, nearly half of which are contract cases. The number of cases resolved through arbitration is also not small. As far as I know, both China's Contract Law and CISG are highly honoured in China. The work reports issued by the United Nations Commission on International Trade Law (UNCITRAL) also support my observation.

In addition, I am aware of the fact that CISG has also had positive impacts on other East Asian jurisdictions, such as Japan, Republic of Korea, and so forth.

The future of China's contract law and CISG

When celebrating CISG's great contributions to international trade (domestic economies and the rule of law in general), it is necessary to note that the world is changing unprecedentedly fast. Especially in the age of big data, the form and volume of transactions have been experiencing profound transformations. Taking China as an example, electronic commerce has brought revolutionary changes to traditional transactions. The volume of online sales in 2014 in China was more than 100 billion dollars, while that of online finance was almost 1.6 trillion dollars.

These changes are challenging the conventional wisdom of contract law at both national and international levels. In order to respond to such issues as forms of e-contracts, e-consumer protection, the roles of third parties in e-commerce, both national laws and international conventions need to reform.

I noted that UNCITRAL has provided a model law of international e-commerce, the United Nations Convention on the Use of Electronic Communications in International Contracts. It contains many rules that aim to facilitate cross-border electronic transactions. This Convention, in my view, would greatly improve the rule of international trade law under CISG. China, already a signatory of the Convention, is also assessing and improving its domestic law on e-commerce.

Actually, China has gained much experience in the institutional design of e-commerce and e-banking. For example, according to China's Consumer Protection Law, the online buyer is entitled to return goods to the seller within seven days without reason. This seven-day-no-reason-to-return rule has proved to be very efficient in practice.

Moreover, China is codifying its civil law, aiming to unify and systemize the present, separate civil laws, which were introduced at the beginning of my talk. In 2014, the Fourth Plenum of the Eighteenth Chinese Communist Party Central Committee made a formal decision to further improve China's market legal systems by means of civil law codification. The codification project is scheduled to proceed in two steps. The first step is to enact the General Principles of Civil Code in 2017. The second step is to pass the whole Code in 2020.

In form, CISG is still a significant reference for China's civil law codification. For instance, Contract Law will become one independent part of the future Code, instead of part of an independent obligation law. Probably, China's civil code will include a small General Principles of Obligation, which sets the goal to cover non-contractual obligations.

In substance, however, we will do our best to address the challenges coming from new technology and modern conception.

I believe Chinese experiences will be helpful to improve the rules in CISG.

Of course, it is not easy to formally amend CISG, which is after all an international convention joined by a large number of States. But as I proposed elsewhere, it may help to draft a model sales law by the United Nations Commission on International Trade Law, which would complement CISG and assist its effective use and uniform interpretation by Member States. Of course, the reform of CISG, no matter in what manner, needs to take into account the experiences of various Member States and other existing texts, such as Unidroit principles. I also believe that an effective reform of CISG in due manner will provide valuable references for domestic legal reform, as CISG has already done in the past three decades.

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