Introduction

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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.

[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.

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[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.