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

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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.

[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.