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

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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

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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.