United Nations Convention on Contracts for the International Sale of Goods

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Background

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

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

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

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

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

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

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

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

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

Current situation

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

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

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

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

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

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

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

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

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

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

Sphere of application

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Structure

The Convention is divided into four parts:

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

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

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

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

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

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

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

Outlook in the Americas

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Final considerations

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

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

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

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

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

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

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

Abbreviations

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

Bibliography

Galán Barrera, Diego Ricardo: *La Convención de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías*, lawyer and specialist in Commercial Law at Colegio Mayor de Nuestra Señora in Rosario, Colombia, published by Estudios Gerenciales.

Cajo Escudero, Herbert: *La Convención de Viena sobre Contratos de Compraventa Internacional de Mercaderías*, Peruvian lawyer, university lecturer and arbitrator-at-law.

Sierralta, Aníbal: *Contratos de Comercio Internacional*, Editorial Puc, Lima, Peru, 1990.

Jenkis, Alma del Carmen: *Panamá y la CISG: ¿Facilitador del Comercio Internacional?* Published by Legalinfo-Panamá.

Garro, Alejandro y Zuppi, Alberto: *La Convención de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías*, Argentine lawyers, the former, Professor of Latin American Law at Columbia Law School and the latter, Professor at the University of Buenos Aires, published by Pace Law School Institute of International Commercial Law.

Van Alstine, Michael P.: *Análisis de la Convención de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías y su trascendencia para América Latina*, Professor of Law at the University of Cincinnati.

Sánchez Alcantar, Alfonso: *La Convención de las Naciones Unidas sobre Contratos de Compraventa Internacional y su relación con el Tratado de Libre Comercio para América del Norte*, Professor at the Law Faculty of the University of De La Salle Bajío, Mexico, published in the online journal Ex-lege.

Quezada, Kim: *Convención sobre la Compraventa Internacional de Mercaderías*, Instituto Mexicano de Contadores Públicos, Baja California, Mexico.

Ramacciotti, Novak and Negro: *Derecho Internacional Económico*, Editorial Puc, Lima, Peru, 1993.

Web page of the United Nations Commission on International Trade Law.

Web page of the Organization of American States, Secretariat for Legal Affairs, Department of International Law, Private International Law.

Case law of the Judicial Authority of El Salvador.

IAJC: Report of IAJC rapporteurs on the law applicable to international contracts.

United Nations: Text of the United Nations Convention on Contracts for the International Sale of Goods, New York, 2011.