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Current trends in the field of international sale of goods law

Note by the Secretariat

Introduction

1. At its forty-sixth session, the Commission requested the Secretariat to commence planning for a colloquium to celebrate the thirty-fifth anniversary of the United Nations Convention on Contracts for the International Sale of Goods (the “United Nations Sales Convention” or “CISG”),¹ to take place on a date after the forty-seventh Commission session. The Commission agreed that the scope of that colloquium could be expanded by including some of the issues raised by a proposal submitted at its forty-fifth session (A/CN.9/758).² That request was reiterated at the Commission’s forty-seventh session.³ Accordingly, a panel discussion will be organized by the Secretariat at the forty-eighth Commission session with participation of experts in the field of international sale of goods law.

2. Since the forty-seventh Commission session, the Secretariat has coordinated or contributed to a series of regional and national events on the United Nations Sales Convention with a view to compiling information for the Commission and, in particular, providing background information for the panel discussion on international sale of goods.

3. Past events include the following: “International Commercial Law from a Nordic and Baltic Perspective: Status and Current Challenges”, held at the University of Aarhus (Denmark), 18 September 2014; “35 Years CISG and Beyond”, held at the University of Basel (Switzerland), 29-30 January 2015; “Global Sales Law Conference: The CISG at 35: Challenges Today”, held at Georgetown University (United States of America), 30 January 2015; “International

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

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

³ *Ibid.*, *Sixty-ninth Session, Supplement No. 17 (A/69/17)*, para. 255.



Sales Contracts in the 21st Century: Conference on the 35th Anniversary of the Adoption of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)", held at Széchenyi István University, Deák Ferenc Faculty of Law and Political Sciences, 19 February 2015 (Hungary); "Brazil and the CISG", held at FIEP — Campus da Indústria Curitiba (Brazil), 4 March 2015; "Celebrating the 35th Anniversary of the CISG: United Nations Convention on Contracts for the International Sale of Goods and Contract Law in Asia", held at the University of Tokyo (Japan), 11 March 2015; "7th Annual MAA Peter Schlechtriem CISG Conference: The Electronic CISG — The Future of the CISG in light of Technological Progress", held in Vienna (Austria), 26 March 2015; and "Congreso Internacional: Celebrando el Éxito de la CNUDMI: 35º Aniversario de la CISG y 30º Aniversario de la Ley Modelo de Arbitraje", held at Universidad Carlos III de Madrid (Spain), 20 April 2015.

4. Planned events include the following: "UNCITRAL-Singapore Seminar on 35 Years of the CISG: Achievements and Perspectives", to be held at Singapore Management University (Singapore), 23-24 April 2015; "2015 UNCITRAL Asia Pacific Incheon Spring Conferences" to be held in Incheon (Republic of Korea), 4-5 June 2015; "360° of International Sales of Goods", to be held at Universidad Externado de Colombia (Colombia), 19-20 October; and "35 Years of CISG — Present Experiences and Future Challenges", to be held at the University of Zagreb (Croatia), 1-2 December 2015.

5. Based also on the discussions held at the above-mentioned events, this note aims at describing current trends in the adoption and use of the United Nations Sales Convention, and complementary texts, i.e. the Convention on the Limitation Period in the International Sale of Goods (New York, 1974),⁴ as amended by the Protocol of 1980 (Vienna) (the "Limitation Convention");⁵ and the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (the "Electronic Communications Convention");⁶ as well as related non-UNCITRAL texts.

Promotion of the adoption of the CISG by States

6. In the past decade, as part of an increased attention to technical assistance and cooperation, the Secretariat has intensified its activities promoting the adoption, effective use and uniform interpretation of the United Nations Sales Convention. In that framework, the CISG has been identified as one of those treaties whose universal adoption is desirable.⁷ As a result, the Secretariat has been involved, to different degrees, in several domestic procedures of consideration and adoption of the CISG. This increased engagement has contributed or been related to a number of new treaty adoptions. However, due to limited resources, only in a few instances the contribution of the Secretariat could be offered on a regular or continuing basis.

7. Among those instances, it might be useful to point at the case of Brazil, where the adoption of the United Nations Sales Convention has been accompanied by the remarkable engagement of academics, the private sector, including arbitral centres,

⁴ United Nations, *Treaty Series*, vol. 1511, No. 26119.

⁵ United Nations, *Treaty Series*, vol. 1511, No. 25121.

⁶ United Nations, *Treaty Series*, No. 50525.

⁷ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 255.

and the judiciary.⁸ The adoption of the CISG in Brazil is seen not only as an improvement of the legal framework for cross-border transactions, including for South-South trade, but also as a manner of introducing in that country's legal system new notions that might influence national contract law.

8. In other cases, the Secretariat has been able to deliver a regular contribution thanks to the closer engagement of local partners and of third party donors. This has happened, for example, with regard to Madagascar and San Marino. In both cases, the technical assistance involved other areas of international trade law, namely electronic commerce, and is ongoing.⁹

9. In spite of those efforts, the yearly rate of adoption of the CISG by States has not increased. In fact, while the overall rate of adoption of the CISG is about 2,4 States per year, the rate of adoption in the last ten years is 1,9 States per year. The Convention's 83 State parties represent approximately 40 per cent of existing States but account for more than 80 per cent of global trade. This suggests that a significant majority of the States with sufficient capacity to consider adoption of the CISG have already done so, while States without that capacity are not in a position to do so autonomously. Hence, future adoptions are likely to require additional efforts in order to adequately support the treaty consideration process.

Review of existing declarations

10. Based on existing trends both in public international law¹⁰ and in international trade law,¹¹ the Secretariat has monitored and, where appropriate, contributed to the review of existing declarations to the United Nations Sales Convention. That process is based on the consideration that, while declarations permitted under the treaty's own terms are fully legitimate, they should be periodically reviewed to ensure their continuing relevance in light of economic and legal changes intervened since the deposit of those declarations.

11. In the past four years, seven declarations to the United Nations Sales Convention have been withdrawn, while only two had been withdrawn previously.¹²

⁸ A/CN.9/775, Technical cooperation and assistance — Note by the Secretariat, para. 19.

⁹ United Nations Information Service, Madagascar accedes to the UN Convention on Contracts for the International Sale of Goods (CISG), UNIS/L/206, 25 September 2014, available from www.unis.unvienna.org/unis/en/pressrels/2014/unisl206.html; UN Information Service, San Marino Accedes to United Nations Convention on Contracts for the International Sale of Goods (CISG), UNIS/L/160, 24 February 2012, available from www.unis.unvienna.org/unis/pressrels/2012/unisl160.html.

¹⁰ International Law Commission, Guide to Practice on Reservations to Treaties, Yearbook of the International Law Commission, 2011, vol. II, Part Two, sub. 2.5.3.

¹¹ Ulrich G. Schroeter, The withdrawal of reservations under uniform private law conventions, *Uniform Law Review* (2015), available from doi:10.1093/ulr/unv007.

¹² Most of the withdrawals of declarations originate from Nordic and Baltic States. The matter was discussed at the conference "International Commercial Law from a Nordic and Baltic Perspective: Status and Current Challenges", held at the University of Aarhus, 18 September 2014. A video-book of that conference is available at www.cisgnordic.net/conferencebook.shtml. See also the conference report in Thomas Neumann, *International Commercial Law from a Nordic and Baltic Perspective: Status and Current Challenges*, *Nordic Journal of Commercial Law*, Issue 2, 2014. Papers on the topic were also presented at the conference "35 Years CISG and Beyond", held at the University of Basel, 29-30 January 2015, whose proceedings will be published.

As a result, no State party is currently excluding the application of Part II or III according to article 92 CISG. Moreover, formal requirements have decreased, in line with a trend noted in domestic law. Overall, the review process has rapidly increased the uniformity in the scope of application of the United Nations Sales Convention. Its outcome might also have an effect on States considering adoption of the CISG and the deposit of related declarations.

Promotion of use and uniform interpretation of the CISG

12. The promotion of the principles of party autonomy and contractual freedom has been highlighted as a fundamental contribution of the CISG to the development of contract law worldwide. This remains true even in cases when the United Nations Sales Convention is excluded. In fact, when parties to a contract for international sale of goods decide to opt out of the CISG, their decision is based on the recognition and promotion of party autonomy and contractual freedom by the CISG, specifically in its article 6. This is a significant result in those jurisdictions where the regulatory function of the law, rather than the enabling one, is emphasized. For instance, in certain Asian as well as Central and Latin American States provisions of national contract law may not easily be derogated by parties to a contract and the choice of a foreign law as law applicable to a contract may be limited.¹³ The matter may be particularly relevant to economies in transition.

13. With respect to the practice of opting out of the CISG, it should be noted that studies point to an increase of its application in disputes over the years.¹⁴

14. Moreover, a recent survey focusing on international trade law practitioners¹⁵ indicates that they most value legal predictability, including accessibility of the law, and flexibility. They also attribute importance to the neutral and international character of the applicable law. Those preferences should lead to strong support for the use of the CISG. In practice, however, practitioners do not always act on those stated preferences when advising clients on choice of law. That contradictory behaviour is not apparently related to the preferences of clients, who typically focus on the commercial rather than the legal aspects of transaction. Rather, that behaviour seems related to insufficient familiarity with the United Nations Sales Convention, the desire to follow established practices, and similar factors.

15. Nevertheless, an awareness that unjustified opting out may expose practitioners to professional liability is increasing.¹⁶ Hence, when professional advice is given in favour of opting out of the CISG, an accurate analysis of advantages and disadvantages arising from the application of the CISG seems to be

¹³ See, e.g., María Mercedes Albornoz, Choice of Law in International Contracts in Latin American Legal Systems, 6(1) *Journal of Private International Law* (2010), 23-58.

¹⁴ Lisa Spagnolo, CISG Exclusion and Legal Efficiency (Kluwer Law International, 2014), at 212-218.

¹⁵ Luiz Gustavo Meira Moser, Parties' preferences in international sales contracts: an empirical analysis of the choice of law, *Uniform Law Review* (2015), available from doi: 10.1093/ulr/unv008.

¹⁶ Ulrich G. Schroeter, To Exclude, to Ignore, or to Use? Empirical Evidence on Courts', Parties' and Counsels' Approach to the CISG (With Some Remarks on Professional Liability), in L. DiMatteo (Ed.), *The Global Challenge of International Sales Law* (Cambridge University Press, 2014), at 665-667; Lisa Spagnolo, CISG Exclusion and Legal Efficiency (Kluwer Law International, 2014), at 128.

the professional standard required. That analysis would need to be tailored to the specific needs of the parties and features of the transaction. For instance, relevant considerations may be whether the party is the seller or buyer or whether the object of the contract consists of manufactured goods or commodities. Nonetheless, a survey of current practice indicates that, in the majority of the cases, legal practitioners do not disclose the reasons for opting out of the CISG or avoiding a particular national law to their clients.¹⁷

16. In the same line, it was reported that the CISG finds a higher level of acceptance by small and medium-sized enterprises, which do not have well-established contractual forms and related practice, and therefore are more open to becoming acquainted with the provisions of the CISG.¹⁸

17. The CISG is also more likely to be used in transactions involving countries whose domestic law is not easy to access. In particular, operators in developing countries report that the suggestion to use their national law as applicable to the contract is routinely rejected because of difficulties in accessing its content due to linguistic and other barriers. For those traders, this may mean having to concede to a choice of the law of the other party's place of business or of a third country. Because of the difficulty in gaining an understanding of that chosen law, the party from the developing country may be particularly affected by increased transaction costs. In the worst-case scenarios, those transaction costs may effectively prevent commercial operators in developing countries from having equal access to the law applicable to their contracts. In this respect, the United Nations Sales Convention and related materials, being available in several languages often at no cost, may be easier to access than national law.

18. The application of the CISG in contracts involving parties in developing countries and small and medium-sized enterprises may be under-reported. This is due to the fact that small and medium-sized enterprises are more often inclined to settle disputes than to bear litigation costs, which could be significant when compared to the value of the litigated amount. Moreover, developing countries do not always have efficient or accessible case-reporting systems in place.

19. Where parties do not agree on the applicable law, the United Nations Sales Convention, when it applies, fulfils its function as the default regime, providing a neutral and balanced "safety net" that gives full recognition to party autonomy.¹⁹

20. In jurisdictions with a robust domestic legal system, legal actors, being familiar with their domestic law, may underestimate the benefits arising from use of the United Nations Sales Convention and exclude it unjustifiably or not apply it

¹⁷ Luiz Gustavo Meira Moser, *Parties' preferences in international sales contracts: an empirical analysis of the choice of law*, *Uniform Law Review* (2015), available from doi: 10.1093/ulr/unv008.

¹⁸ See Haruo Hirano, *Why do Japanese general trading companies opt out CISG? Their skeptical perspective and the reasons behind*, presentation at the conference, "Celebrating the 35th Anniversary of the CISG: United Nations Convention on Contracts for the International Sale of Goods and Contract Law in Asia", held at the University of Tokyo, 11 March 2015.

¹⁹ E.g., János Bóka, presentation at the conference "International Sales Contracts in the 21st Century: Conference on the 35th Anniversary of the Adoption of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)", held at Széchenyi István University, Deák Ferenc Faculty of Law and Political Sciences, 19 February 2015.

when adjudicating disputes. To counteract this tendency, it was suggested that additional promotional work should be undertaken in those jurisdictions, focusing on the use and application of the CISG, especially among practitioners and the judiciary.²⁰

Influence on regional and national legislation

21. The discussion relating to the proposal on “Possible future work in the area of international contract law” submitted at the Commission’s forty-fifth session (A/CN.9/758) has highlighted the importance of the United Nations Sales Convention not only as the law for contracts for international sale of goods but also as a source of inspiration for regional and national law reform. In that respect, the influence of the CISG is not limited to the law of sale of goods, but often extends to general contract law and the law of obligations.

22. Recent examples of texts influenced by the provisions of the CISG include the Civil and Commercial Code of Argentina (Law 26994 of 1 October 2014), the draft Commercial Code of Spain of 2014, the draft Civil Code of Japan, and the Civil Code of Hungary (Act V of 2013).

23. A well-documented case of influence of the CISG on domestic law is provided by the People’s Republic of China. As a result, the Chinese legal community has become acquainted with the content and operation of the United Nations Sales Convention, which seems to receive in that jurisdiction a particularly high rate of application.²¹

24. The impact of the United Nations Sales Convention at the regional level may take different forms. There are instances where it may serve as a *de facto* regional uniform sales law because of its wide adoption, for example in Europe or the Americas. For regions with disparate legal traditions, such as Asia, achieving regional trade law harmonization through wider adoption of CISG has been discussed as a potentially successful strategy.²² In other cases, the CISG may influence regional uniform legislation, as was the case, for example, with the OHADA Uniform Act on General Commercial Law,²³ and could have been the case

²⁰ That conclusion was put forward at the “Global Sales Law Conference: The CISG at 35: Challenges Today”, held at Georgetown University, 30 January 2015.

²¹ A number of papers on the application of the CISG in the People’s Republic of China and its influence on Chinese national law have been presented at the conference “Unification of International Trade Rules in the Age of Globalization: China and the World”, held at Tsinghua University School of Law, 19-20 October 2013. See also Sophia Juan Yang, Application of CISG in PRC Court Practice: Tips and Pitfalls, paper presented at the NYSBA International Section Seasonal Meeting, held in Vienna, 15-17 October 2014.

²² Argument discussed at the conference “Celebrating the 35th Anniversary of the CISG: United Nations Convention on Contracts for the International Sale of Goods and Contract Law in Asia”, held at the University of Tokyo, 11 March 2015; see also Subianta Mandala, Examining Modalities for Harmonisation of Contract Law in ASEAN, 6 Indonesian Law Journal (November 2013), 39-54.

²³ Gaston Kenfack Douajni, La vente commerciale OHADA, 8 Uniform Law Review (2003), 191-200. During the revision of the Uniform Act on General Commercial Law that was finalized in 2010, additional elements of the CISG were brought into that Uniform Act.

with the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011) 635 final) (CESL).²⁴

25. The United Nations Sales Convention has also influenced regional legislation that, in turn, has provided the basis for national legislation, thus introducing uniform notions into national law. In those cases, however, there may be limited awareness of the relation between the CISG and national law.²⁵ As a result, jurisdictions may have adopted notions originating from the CISG domestically but not yet be a party to the CISG. This is the case, for instance, in certain States having adopted legislation based on the Model Civil Code of the Commonwealth of Independent States of 1994, and of those States members of the Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA).

26. When the relation between the CISG, any intermediate text and the final outcome of the legislative effort is not apparent, this may create unintended discontinuity between global, regional and national sales law, introducing elements of uncertainty and affecting legal predictability.

27. Departures from the approach adopted in the United Nations Sales Convention may be justified if the nature and goals of the new text are different from those of the CISG. For instance, article 78 CISG, on interest, is compatible with the prohibition against interest contained in Islamic law (*ribā*) and other laws, but that article has been perceived as not providing sufficient guidance. However, more detailed solutions, such as the one contained in article 7.4.9 of the Unidroit Principles of International Commercial Contracts, might be more appropriate for a text of a contractual nature than for a text aiming at universal statutory adoption. A detailed analysis of those differences in nature and goals, and of advantages and disadvantages of the various options, would seem particularly useful also to avoid the introduction in the CISG of principles and provisions that have been discarded by its drafters.²⁶

28. In that respect, the Commission might wish to consider whether additional guidance on the content of the general principles of the CISG, referred to in its article 7(2), would be desirable and, if so, in what form.

29. Finally, instances have been reported where there has been limited coordination between the CISG and subsequent related legislative texts, leading to potential issues when interpreting those texts.²⁷

²⁴ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 255.

²⁵ The matter was discussed at the workshop “Current Issues of the Contract Law of the Republic of Azerbaijan”, organized by the Kiel Center for Eurasian Economic Law and the Academy of Justice under the Ministry of Justice of Azerbaijan in Baku, 3-4 March 2015. Azerbaijan is currently considering the adoption of the United Nations Sales Convention.

²⁶ On the challenges to the use of the Unidroit Principles of International Commercial Contracts when interpreting the CISG, see *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, para. 211; see also Michael Bridge, *The CISG and the Unidroit Principles of International Commercial Contracts*, 19 *Uniform Law Review* (2014), 623-642, available from doi:10.1093/ulr/unu031.

²⁷ With respect to Directive 2011/7, of the European Parliament and of the Council of 16 February 2011 on Combating Late Payment in Commercial Transactions, see Claude Witz, *Harmonization in the European Union*, paper presented at the conference “35 Years CISG and Beyond”, held at

Complementary texts

30. The Secretariat continues to be involved in promoting those texts more directly related to the United Nations Sales Convention, namely the Limitation Convention and the Electronic Communications Convention.

31. While the rate of adoption of the Limitation Convention has not significantly increased, it should be noted that a number of cases relating to the application of that treaty have now been collected in the Case Law on UNCITRAL Texts (CLOUT) database. This may provide a useful contribution to better understanding the scope and operation of the Limitation Convention as case law on that Convention was not previously easily accessible. An analysis of that case law indicates not only that judges and arbitrators, especially in Eastern Europe, are acquainted with the Limitation Convention and apply it regularly, but also that certain provisions of the Limitation Convention have been transposed in national law.

32. The relation between the United Nations Sales Convention and the Electronic Communications Convention has been illustrated, in particular, in academic articles. That relation is not limited to establishing the functional equivalence of paper-based notions such as “writing”, “original” and “signature”. In fact, the Electronic Communications Convention contains substantive rules that adapt the provisions of the CISG to the electronic environment. This is relevant, in particular, for Part II of the United Nations Sales Convention, on formation of contracts, but is relevant also for its Part III, on rights and obligations of the parties, and, in particular, to the use of electronic communications in the management of contracts for the international sale of goods.²⁸

33. Promotional work has led to increasing awareness of the complementarity of the two texts. In that respect, it should be noted that all State parties to the Electronic Communications Convention are also parties to the United Nations Sales Convention.

Considerations on possible future work

34. In the various events celebrating the 35th anniversary of the CISG, and in those immediately preceding that anniversary, a significant amount of time has been devoted to discussing possible future developments, including in the form of future

the University of Basel, 29-30 January 2015; Cara Bilotta, Ending the Commercial Siesta: The Shortcomings of European Union Directive 2011/7 on Combating Late Payments in Commercial Transactions, 38 *Brooklyn Journal of International Law* (2013), 699-727; for comments on the previous directive, see Pilar Perales Viscasillas, Late Payment Directive 2000/35 and the CISG, 19 *Pace International Law Review* (2007), 125-142.

²⁸ See Petra Butler, The CISG and the United Nations Convention on the Use of Electronic Communications in International Contracts, in I. Schwenzer and L. Spagnolo (eds.), *State of Play* (Eleven International Publishing, 2013); Sieg Eiselen, The Interaction between the Electronic Communications Convention and the United Nations Convention on the International Sale of Goods, in A. Boss and W. Kilian (eds.), *The United Nations Convention on the Use of Electronic Communications in International Contracts: An In-depth Guide and Sourcebook* (Kluwer Law International, 2008).

work by UNCITRAL.²⁹ A variety of possible options have been put forward, ranging from the desirability of not engaging in any further work in the field to preparing a new treaty. Intermediate positions suggest the preparation of a text specifically aimed at providing guidance to legislators or at implementing, and possibly complementing, the CISG domestically.

35. The position that UNCITRAL should not engage in any new work in the area of international contract law is based on an argument that there is no demonstrated need because there is no demand from any potential end-users, that existing texts suffice, that any new work would be particularly time- and resource-consuming, and that such work would have little chance of success given differences in national legal regimes.³⁰

36. Other commentators, however, have identified several contract law topics as deserving additional work by UNCITRAL. Those topics include: matters falling under the CISG on which there are diverging interpretations; matters governed but not settled in the CISG; and matters related to the international sale of goods but excluded from the scope of the CISG.

37. It has been observed that there have been diverging approaches to the issue of awarding attorney's fees and costs under CISG article 74. It may be that there is a trend toward awarding these fees and costs, and, in that case, UNCITRAL may wish to promote further harmonization on the topic, which could deter certain litigation abuses and accomplish a goal of awarding the entire cost of a breach to the damaged party.³¹

38. Set-off is considered a question that is governed by but not settled in the CISG. A number of rules that could be applied to set-off under the CISG have been identified and have found application in case law.³² For instance, set-off should operate *ex nunc* by way of declaration, provided that both claims are due. However, certain aspects of set-off remain open to interpretation, such as how to calculate claims, including when they are expressed in different currencies.³³ Moreover, it should be noted that set-off of time-barred claims is dealt with in article 25(2) of the Limitation Convention, but that the use of the Limitation Convention as a general principle underlying the CISG remains in discussion.

39. With respect to international distribution contracts, it was noted that the CISG already applies to the sale contracts occurring under a framework distribution agreement, and may also apply to that framework agreement, if it contains the specific elements that qualify it as a contract for sale of goods. Moreover, certain obligations under a framework agreement, such as exclusivity clauses, might be

²⁹ See, for instance, the proceedings of the Norman J. Shachoy Symposium "Assessing the CISG and Other International Endeavors to Unify International Contract Law: Has the Time Come for a New Global Initiative to Harmonize and Unify International Trade?", held at Villanova Law School, 18 January 2013, and published in 58(4) Villanova Law Review (2013).

³⁰ See Keith Loken, A New Global Initiative on Contract Law in UNCITRAL: Right Project, Right Forum? 58(4) Villanova Law Review (2013), 509-520.

³¹ John Y. Gotanda, To Fee or Not To Fee: Should a New International Sales Convention Include a Provision on Attorney's Fees and Costs, presentation at the conference "35 Years CISG and Beyond", held at the University of Basel, 29-30 January 2015.

³² Bundesgerichtshof (Supreme Court of Germany), case VIII ZR 394/12, 24 September 2014.

³³ Christiana Fountoulakis, Possibilities of Deduction and Set-off Under the CISG, paper presented at the conference "35 Years CISG and Beyond", held at the University of Basel, 29-30 January 2015.

interpreted in light of the CISG and failure to fulfil those obligations might be qualified as a fundamental breach, thus leading to termination of the contract. Given the close connection between international distribution contracts and contracts for the international sale of goods, additional guidance by UNCITRAL in that field could be desirable.³⁴

40. With regard to matters excluded from the scope of the CISG, it was said that validity questions arise frequently in business practice and that therefore lack of their uniform treatment may seriously endanger uniformity.³⁵ The work of UNCITRAL in the field has been limited to fixed sums, i.e., penalty and liquidated damages clauses, and the resulting text has limited acceptance and use.³⁶ Such validity questions include issues relating to validity of consent, such as mistake, undue influence, or fraud, and issues relating to validity of individual clauses and standard terms, such as gross disparity, burdensome obligations, exclusion and limitation of liability clauses.

41. In particular, control of the material validity of standard terms is an area where no uniform text is available and where national rules diverge. Hence, additional guidance on that topic may be beneficial not only to increase predictability in international trade but also to harmonize existing laws as well as to assist jurisdictions not having yet adopted any rule.³⁷

42. With respect to transfer of property, a global trend towards the convergence of the two major possible approaches has been noted. It was noted that intention-based systems are increasingly admitting exceptions based upon delivery, while delivery-based systems are increasingly admitting exceptions based upon intention.³⁸ In that scenario, a uniform rule might gather broad acceptance.

43. With regard to the form of any proposed future work, arguments against the preparation of a new treaty include the difficulty of amending an existing text with broad acceptance, as this would probably lead to the co-existence of a dual regime for a significant amount of time. The fact that several international trade law treaties enjoy limited State participation is also mentioned as a reason for caution before choosing that form of text.

44. On the other hand, arguments in favour of the preparation of a new treaty highlight that the maximum level of harmonization can only be reached through a text of mandatory application.

³⁴ Pilar Perales Viscasillas, *International Distribution Contracts and CISG*, paper presented at the conference “35 Years CISG and Beyond”, held at the University of Basel, 29-30 January 2015.

³⁵ Ingeborg Schwenzer, *Who Needs a Uniform Contract Law, and Why?*, 58(4) *Villanova Law Review* (2013), 723-732, at 729; similar considerations were expressed with regard to the desirability of having the CISG govern limitation clauses in international sales contracts by Lauro Gama, *Limitation and Exclusion of Liability in CISG Contracts: Validity Issues*, paper presented at the conference “35 Years CISG and Beyond”, held at the University of Basel, 29-30 January 2015.

³⁶ *Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance*, Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 17 (A/38/17), annex I.

³⁷ Sieg Eiselen, *Control of Unfair Standard Terms in International Sales*, paper presented at the conference “35 Years CISG and Beyond”, held at the University of Basel, 29-30 January 2015.

³⁸ Michael Bridge, *An Overview of the CISG and an Introduction to the Debate About the Future Convention*, 58(4) *Villanova Law Review* (2013), 487-490, at 490.

45. One outcome of the discussion on possible future work by UNCITRAL in the field of contract law has been increased attention to the regular need for modernizing civil codes and other legislation dealing with contract law, and the difficulties in building the local capacity necessary for that task, especially in developing countries. In that respect, it was noted that existing texts are not accompanied by implementing tools specifically designed for legislators. Moreover, it was suggested that texts for legislative consideration should originate from a body with universal participation such as UNCITRAL.

46. Another outcome of that discussion has been a focus on the desirability to further highlight complementarity among various texts prepared by international organizations and to promote their adoption and use in a joint manner.

47. In this regard, attention has been given, for example, to the potential for additional efforts to promote party choice of the CISG as a freestanding set of rules of law, including in arbitral proceedings, or when it would not otherwise apply. This is an area where the CISG's complementarity with the Principles on Choice of Law in International Commercial Contracts ("Hague Principles") could be highlighted. The Hague Principles, which have been submitted by the Hague Conference on Private International Law for consideration for the Commission's endorsement at this session (A/CN.9/847), allow parties to choose not only the law of a State but also, in article 3, "rules of law", provided certain conditions are met and unless the law of the forum provides otherwise.

48. In conclusion, the discussion on the United Nations Sales Convention has stressed its importance both as a treaty providing default rules for contracts for international sale of goods and promoting party autonomy in cross-border transactions and as a model for law reform.

49. With respect to the use of the CISG as a treaty, regular calls are made to reinforce the promotional work, especially in developing countries where benefits of its adoption seem evident and local capacity in international trade law reform scarce. The availability of more precise indicators of the economic impact of the CISG might assist in drawing the attention of stakeholders in the delivery of technical assistance to law reform.

50. Greater involvement of the private sector is also often recommended. In that respect, the success of the Willem C. Vis International Commercial Arbitration Moot may offer inspiration.

51. The use of the CISG as a model for regional and national law reform is well documented. The Commission may wish to consider whether and, if so, to what extent UNCITRAL should be involved in such use.

52. The Commission may also wish to consider whether the topics suggested for possible future work deserve further attention.