CHAPTER I
The Convention

(a) Origins of the Convention

1.01 The United Nations Convention on Contracts for the International Sale of Goods (hereafter cited as the United Nations Sales Convention), which was adopted by a diplomatic Conference in 1980,[1] was elaborated under the auspices of the United Nations Commission on International Trade Law (UNCITRAL). The United Nations Sales Convention is the outcome of a long process of unification whose origins go back to the early days of the movement in respect of the unification of international trade law[2]. In April 1930 the International Institute for the Unification of Private Law (UNIDROIT) decided to undertake the preparation of a uniform law on the international sale of goods. Drafts were prepared and submitted for comments to Governments through the League of Nations prior to the cessation of work on this project in 1939 on account of the Second World War.

1.02 In 1951 the Government of the Netherlands organized a diplomatic conference on the international sale of goods in order to consider the draft prepared by UNIDROIT and to determine the means by which the work could be brought to a successful conclusion. The conference decided that the work should be continued and appointed a special committee to prepare a new draft on the basis of the suggestions made at the conference. The special committee prepared a revised draft in 1956, which was circulated by the Government of the Netherlands to interested Governments. On the basis of replies a modified draft was prepared by the special committee in 1963. In 1964 the Government of the Netherlands convened a diplomatic conference at The Hague to which the 1963 draft of the Uniform Law on the International Sale of Goods (ULIS) was submitted for consideration.

1.03 In the meantime UNIDROIT had prepared a draft of the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). The Government of the Netherlands also circulated that draft to interested Governments for their

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1 Final Act of the United Nations Conference on Contracts for the International Sale of Goods. (A/CONF.97/18) [United Nations Commission on International Trade Law Yearbook 1980, part three, chapter I, section C] (reproduced in Official Records of the United Nations Conference on Contracts for the International Sale of Goods, United Nations publication, Sales No. E.81.IV.3, part one).

2 See historical introduction to the draft Convention on Contracts for the International Sales of Goods, prepared by the Secretariat (reproduced in Official Records of the United Nations Conference on Contracts for the International Sale of Goods, part one, sec. B) (originally published as the introduction to document A/CONF.97/5).

comments. The draft and the comments thereon were also submitted to the 1964 Hague Conference. The 1964 Hague Conference adopted the two Uniform Laws as well as two Conventions to which the Uniform Laws were annexed, i.e. the Convention Relating to a Uniform Law on the International Sale of Goods (1964 Hague Sales Convention) and the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (1964 Hague Formation of Contracts Convention) and opened them for signature on 1 July 1964[3].

1.04 The 1964 Hague Sales Convention entered into force on 18 August 1972. It has been ratified, or acceded to by two Commonwealth States Gambia and the United Kingdom of Great Britain and Northern Ireland, and by Belgium, the Federal Republic of Germany, Luxemburg, Israel, Italy, the Netherlands and San Marino. The 1964 Hague Formation of Contracts Convention entered into force on 23 August 1972. It has been ratified, or acceded to, by the States listed above, with the exception of Israel. Both conventions have been denounced by Italy as of 1 January 1988 and the Federal Republic of Germany as of 1 January 1991 as a result of their adherence to the United Nations Sales Convention. Since the substantive provisions on the formation of contracts and on the law of sales were embodied in the uniform law annexed to the conventions, and States that ratified or acceded to either of the conventions were obligated to enact the uniform law into their domestic legal system, further reference will be made either to ULIS or ULF or to the conventions depending on the context.

1.05 In 1966 the United Nations General Assembly created UNCITRAL and entrusted it with the objective of furthering the progressive harmonization and unification of the law of international trade[4]. The Commission was charged with carrying out that objective by, among other means, preparing new or promoting the adoption of existing international conventions, model laws and uniform laws[5]. At the first session of UNCITRAL held in 1968, it was decided that, in respect of the two 1964 Hague Conventions, which were then not yet in force, the Commission should determine whether States intended to become party to them. Accordingly, the Commission requested the Secretary-General to send a questionnaire to States Members of the United Nations and Member States of any of its specialized

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3 The text of the ULIS may be found in the Convention Relating to a Uniform Law on the International Sale of Goods, 834 U.N.T.S., p.107, reprinted in 3 I.L.M., p.855 (1964) and of the ULF may be found in the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 834 U.N.T.S. p.169, reprinted in 3 I.L.M., p.864 (1964).

4 General Assembly resolution 2204 (XXI) (Yearbook 1968-1970, part one, chap. II, sec. E).

5 Ibid.

agencies[6]. The replies and an analysis of the replies were submitted to the second session of the Commission in 1969[7].

1.06 An analysis of the answers revealed that the existing texts of ULIS and ULF were unlikely to command a wide acceptance by many countries of different legal, social and economic systems. Among the objections raised were the following:

(a) the 1964 Hague Conference, at which ULIS and ULF had been adopted, had been attended by only twenty-eight States, mainly market-economy industrialized countries, and the developing countries and socialist countries had not been adequately represented[8]. That encouraged a belief that the ULIS and ULF favoured the sellers of manufactured goods in the industrialized nations. In any case, without the adequate participation of the developing countries and socialist countries, the hope that the two Uniform Laws would become generally accepted on a worldwide basis could not be fulfilled;

(b) ULIS used abstract and complex concepts taken from the civil Law which could easily result in ambiguity and error and could not be easily understood either by businessmen or by common law lawyers;

(c) ULIS pointed more to external trade between common boundary nations geographically near to each other; insufficient attention had been given to international trade problems involving overseas shipments and

(d) the scope of application of the two uniform laws was considered by many as too broad as they were to apply regardless of conflict of laws rules[9].

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6 Report of the United Nations Commission on International Trade Law on the work of its first session (1968), Official Records of the General Assembly, Twenty-third session, Supplement 16 (A/7216), paragraphs 16 and 17.

7 "Replies and studies by States concerning the Hague Conventions of 1964: note by the Secretary-General" (A.CN.9/11 and corr. 1 and add. 4). See also the analyses of those replies and studies prepared by the Secretariat: "International Sale of Goods: The Hague Conventions of 1964: Analysis of the replies and studies received from governments: report of the Secretary-General" (A/CN.9/17); "Analysis of the Studies and Comments by Governments on the Hague Conventions of 1964: report of the Secretary-General" (A/CN.9/31) [Yearbook 1968-1970, part three Chap. I, sect. A.1].

8 Only Egypt and Yugoslavia participated from the developing countries.

9 See ULIS article 2.

1.07 After consideration of the replies, the Commission decided to create a Working Group on the International Sale of Goods consisting of 14 States Members of the Commission, later increased to 15 States, which was instructed 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 elaborate a new text for the same purpose ... ."[10]. The Working Group in both cases eventually recommended the adoption of new texts.

1.08 UNCITRAL at its tenth session in 1977 adopted the draft Convention on International Sale of Goods[11] based on the text submitted by the Working Group. In 1978 at its eleventh session it adopted the provisions on the Formation of Contracts for the International Sale of Goods and merged the two together into the draft Convention on Contracts for the International Sale of Goods[12]. The draft Convention was submitted by the General Assembly to a diplomatic conference convened in Vienna from 10 March to 11 April 1980. The Conference was attended by representatives of 62 States and of 8 international organisations. The main work was done by two Committees, one charged with the preparation of the substantive provisions of the Convention (articles 1-88), the other with the preparation of the final clauses (articles 89-101). At the end of the Conference the texts prepared by the two Committees were voted on in Plenary session article by article; the Convention as a whole was then submitted to a roll-call vote and was approved without dissent[13].

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10 Report of the United Nations Commission on International Trade Law on the work of its second session (1969), Official Records of the General Assembly, Twenty-fourth session, Supplement No.18 (A/7618), paragraph 38.

11 Report of the United Nations Commission on International Trade Law on the work of its tenth session (1977), Official Records of the General Assembly, Thirty-second session, Supplement No.17 (A/32/17).

12 Report of the United Nations Commission on International Trade Law on the work of its eleventh session (1978), Official Records of the Genreal Assembly, Thirty-third session, Supplement No.17 (A/33/17).

13 Final Act of the United Nations Conference on Contracts for the International Sale of Goods (A/CONF. 97/18) [Yearbook 1980, part three, chap. 1, sect. A]. The Convention is set forth in Annex I of the Final Act. The Conference also adopted a protocol amending the Convention of the Limitation Period in the International Sale of Goods (New York, 1974) in order to harmonise the provisions of that Convention in respect of the sphere of application, with those of the Convention on Contracts for the International Sale of Goods. protocol amending the Convention on the Limitation Period in the International Sale of Goods, Final Act of the United Nations Conference on Contracts for the International Sale of Goods (A/CONF.97/18), Annex II) [Yearbook 1980, part three, chap. I, sect. C].

(b) Entry into force

1.09 In accordance with article 99(1) the Convention entered into force on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession. The numerical requirement was satisfied on 11 December 1986 with the simultaneous deposit of the requisite instruments of ratification of the Convention by the Peoples Republic of China, Italy and the United States of America. In consequence the Convention came into force on 1 January 1988.

1.10 As of 1 November 1990 the Convention had been ratified, or acceded to, by the following States (Commonwealth States being underlined): Argentina, Australia (1988), Austria, Bulgaria, Byelorussian S.S.R., Chile, China, Czechoslovakia, Denmark, Egypt, Finland, France, Germany (the Convention was signed by the former German Democratic Republic on 13 August 1981, ratified on 23 February 1989 and entered into force on 1 March 1990), Hungary, Iraq, Italy, Lesotho/(1981), Mexico, Norway, Spain, Sweden, Switzerland, Syrian Arab Republic, Ukrainian S.S.R., United States of America, U.S.S.R., Yugoslavia, Zambia (1986).

1.11 Although the United Nations Sales Convention does not formally represent a revision of the two 1964 Hague Conventions and the Uniform Laws annexed to them, it is clearly intended to replace them by becoming in the near future the only instrument governing international sales contracts at a world-wide level. For that reason it expressly provided that States which were parties to the 1964 Hague Conventions were required to denounce them when adhering to the new Convention (article 99(3), (4) and (6)).

1.12 On the other hand, article 94(1) allows two or more contracting States which have the same or closely related legal rules on matters governed by the Convention to declare at any time that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations. Also by article 94(2) a Contracting State which has the same or closely related legal rules on matters governed by the Convention as one or more non-contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Upon ratifying the Convention the Governments of Denmark, Finland, Norway and Sweden declared, pursuant to articles 94(1) and 94(2), that the Convention would not apply to contracts of sale where the parties have their place of business in Denmark, Finland, Iceland, Norway, Sweden. If a State which is the object of a declaration under the preceeding articles subsequently becomes a contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State have the effect of a declaration made under article 94(1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration (article 94(3)).

1.13 In terms of States covered, this multilateral Convention has proved to be an outstanding success. Already the diversity of the list of States that are now parties to the Convention indicates worldwide acceptance. The States represent every region, and every socio-economic, legal and major linguistic system of the world. Indications are that it will become the world sales law.

(c) Aims of the Convention

1.14 The Convention's main purpose is to bring about uniformity at a worldwide level in the law of international sales contracts. The Convention deals only with contracts of an international character for the sale of goods. Sales contracts of a purely domestic nature will still be governed by national laws. The principal reason for which the Convention has been limited solely to international transactions rests in the impossibility, at the present time, of agreeing, with respect to sales contracts no less than to other commercial contracts, on uniform rules intended to replace entirely the different national laws. It is significant that the only examples of such a total unification of law have so far been achieved only at a regional level, i.e. among countries with legal traditions and economic and political structures which are sufficiently homogenous. At a universal level, the only realistic approach is that of limiting the attempts at unification to international transactions, leaving States free to continue regulating purely domestic relations according to their own special needs.

1.15 Contracts across frontiers inevitably raise problems of conflict of laws, in the sense that in each case it is necessary to establish which of the various legal systems having contacts with the contract will ultimately regulate it. The uncertainties and the inconveniences that derive from this are too well known: suffice it to recall that because of the different national rules of private international law parties risk remaining uncertain of the law applicable to the contract until the competent forum is established. Until then, the same contract may be held to be subject to the law of State X or to the law of State Y depending on the forum in which a dispute arises and the conflicts rules of that forum are applied. The choice facing policy makers in a given country is not, therefore, whether their traders should be faced with the Convention rather than the domestic law of their country but, very often, whether they should be faced with the Convention rather than the law of a foreign country, difficult to understand and costly to translate.

1.16 In addition, the adoption of the United Nations Sales Convention aims at offering rules that will be more responsive than the traditional national laws to the effective needs of international trade. The Convention in this regard has a particular advantage in that a number of articles of the Convention have been tailored according to the special needs of international trade. It encourages the parties to preserve the contract by offering them less drastic means than litigation to resolve disputes (articles 46(2), 47(1), 48(1), 50, 63(1) and 65(1). The Convention requires parties to give prompt notice of nonconformity in goods or of a third party claim to the goods (articles 39(1), (2) and 43(1), (2)). It requires parties to

preserve goods in their possession belonging to the other party (articles 85 and 86). A party can under the Convention suspend his performance of a contract if it becomes apparent that the other party will not perform a substantial part of his obligations (article 71(1)(a)and (b), but must continue with performance if the other party gives adequate assurance of his performance (article 71(3)). The Convention uses nonconceptual language which is comprehensible to both traders and lawyers. Also the legal rules that the Convention elaborates provide a standard which helps indicate the type of trading conduct that is internationally acceptable.

1.17 One should not ignore the fact that the Convention has not resolved all issues that may arise in connection with the conclusion or the performance of an international sales contract, and that with respect to questions that fall within its scope it does not always provide for direct and clear-cut solutions. When levelling these criticisms it is important to remember that even in an area as technical as sales law, the attempt to reach unification at a universal level today encounters objective limits. In part, this stems from the difficulty of reconciling diverse legal traditions. Suffice it to consider the contrary solutions, that at least in principle, follow the civil law and common law systems in regard to the revocability of the offer, specific performance and the basis of contractual liability. In part, the reasons lie in the particular structure and/or in the differing degrees of economic development of individual States or groups of States. A typical example may be found in the different positions taken as far as the relevance of usage in the interpretation and implementation of the contractual agreement is concerned or the possibility of concluding a sales contract without explicitly or implicitly determining the price or the time-limit within which the buyer must give notice of the non-conformity of the goods. In the circumstances the Convention represents a major achievement and is as good as can be expected.

1.18 The Convention is not intended to constitute the only legal source in the field of international sales contracts. There exist a number of ancillary uniform laws, such as the Convention on the Limitation Period in the International Sale of Goods (New York 1974) as amended by the 1980 protocol, also prepared by UNCITRAL, and the Convention on Agency in International Sale of Goods (Geneva 1983), prepared by UNIDROIT. The Hague Conference of Private International Law has revised the Convention on the Law applicable to International Contracts for the Sale of Goods (Hague 1955) with a view to making it consistent with the United Nations Sales Convention. The new Hague Convention was adopted in 1985 by a Diplomatic Conference.

1.19 The Convention contains a number of features that are innovations in the law of sales in common law legal systems. Several go to the formation of contracts, such as that in contrast to the Statute of Frauds, which requires signed writing for the enforcement of sales contracts whenever the price exceeds a certain amount, no writing is required by the Convention (article 11); no consideration is required to support an offeror's promise not to revoke the offer (article 16(2)(a)) or an agreement to modify the contract by increasing or reducing the obligations of any one of the parties (article 29(a)). Another

innovation for common law systems is the elimination of the traditional distinction between conditions and warranties in respect of the seller's obligation to deliver conforming goods (article 35). These innovations in regard to the common law represent the acceptance of concepts that are well known in civil law countries. There are, of course, many concepts in the Convention taken from the common law that are innovations to the civil law. This balancing of ideas from different legal systems represents both an effort to effect compromises that would make the Convention acceptable to all States and an effort to choose from the competing legal rules those that seemed advantageous for international sales transactions.

1.20 There are also a number of solutions that represent an authentic innovation of the uniform law insofar as they are as such virtually unknown to most, if not all, traditional sales laws. These include the unified approach to the parties' obligations and, correspondingly, to the remedies for breach of contract (articles 30 and 53, 45 and 61); the sellers right to cure defects in his or her performance not only up to the date for delivery, but even thereafter, provided that he can do so without causing the buyer unreasonable inconvenience (articles 34, 37 and 48); the limitation of the right to avoid the contract to breaches that are fundamental (articles 25, 49(1)(a), 64(1)(a) and 73), except in the case of non-delivery, non-payment or failure to take delivery, where avoidance becomes possible also if the defaulting party does not perform within an additional period of time of reasonable length fixed by the aggrieved party (articles 49(1)(b) and 64(1)(b)); and separation of the passing of risk for loss of or damage to the goods from the passing of property and relating it to the physical acts of transfer of possession of the goods to a carrier or to the buyer (articles 85-88).

4. SPHERE OF APPLICATION OF THE CONVENTION

(a) Scope

1.21 As article 1 indicates, the Convention applies to contracts of sale of goods. There is no definition of a sale, but the statements of the obligations of seller (article 30) and buyers (article 53) imply a conventional definition. A contract of sale is first and foremost a contract, i.e. a concensual transaction based on an agreement to buy and an agreement to sell. A contract of sale of goods must be distinguished from several other transactions that are normally quite different from a sale of goods but that, in particular circumstances, may closely resemble such a contract, namely

(1) a contract of exchange,
(2) a gift,
(3) a contract of bailment,
(4) a contract of hire-purchase,
(5) a contract of loan on the security of goods,
(6) a contract of agency and
(7) a contract for the supply of services.