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CONTRACT LAW IN THE CISG: CIVIL LAW, COMMON LAW OR A THIRD WAY?

ABSTRACT: The CISG is unquestionably one of the most successful contemporary instruments of International Trade Law: less than half a century after its adoption, it has secured the accession or ratification of nearly one hundred countries, among them several of the main trading nations of the world. The Convention's approach to the unification of the law on contracts for the international sale of goods is based on a compromise between the Common Law and Civil Law traditions, albeit with a predominance of the former, combined with the applicability of the domestic laws of the Convention's contracting states to matters in respect of which such a compromise could not be reached. This approach is one of the Convention's strengths, since it has succeeded in mitigating the existing legal barriers to cross-border trade. But it also constitutes a clear limitation to the uniformity of international sales law that the Convention was intended to provide. Extending the scope of the Convention's provisions to issues on which no consensus was reached during its negotiations is perhaps one of the main challenges faced by UNCITRAL as the centenary approaches of the launch of the work that led, on Ernst Rabel's initiative, to the conclusion of the Convention.

KEYWORDS: CISG, Civil Law, Common Law, Conflict of Laws, Contract Law, Unification of Private Law

I. Framing the issue

As is well known, the preparatory work on the United Nations Convention on Contracts for the International Sale of Goods (hereafter CISG) started in 1968, and the Convention was adopted at a diplomatic conference held in Vienna in 1980 under the aegis of the United Nations Commission on International Trade Law (hereafter UNCITRAL). It entered into force in 1988, with eleven ratifications. The roots of the

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movement for the international unification of the legal rules on the sale of goods contracts can, however, be traced back much further.[1] Prominent among them, in the 1930s, was the draft of a uniform law on sales whose primary driving force was Ernst Rabel.[2] This draft did not, however, come to fruition, due to the subsequent chain of events across Europe, which hampered international efforts to unify private law. Several initiatives were launched after the Second World War with the same fundamental aim. By far, the most successful one was the CISG, which now has 97 contracting parties.[3]

Portuguese-speaking countries and territories only belatedly started joining the Convention, although it had long been the object of considerable attention in Brazilian and Portuguese literature.[4] In Brazil, the Convention was promulgated in 2014.[5] Portugal became its 94th contracting state in 2020.[6] Macau has not yet achieved this status but is expected to do so in the near future, considering that Mainland China

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[1] On the origins and evolution of the CISG, see Peter Huber, 'Some Introductory Remarks on the CISG' (2006) Internationales Handelsrecht 228ff; Ulrich Schroeter, 'Gegenwart und Zukunft des Einheitskaufrechts' (2017) 81(1) RabelsZ 32–76; Steffan Kröll and others, 'Introduction to the CISG' in Stefan Kröll and others (eds), *UN Convention on Contracts for the International Sale of Goods—A Commentary* (Munich, 2nd edn, Bloomsburry Publishing 2018) 3ff; G C Cerqueira, '*Les 40 ans de la Convention de Vienne sur la vente internationale de marchandises*' (2020) *Actualité Juridique Contrat* 507ff; John O Honnold and Harry M Fletcher, *Honnold's Uniform Law for International Sales under the 1980 United Nations Convention* (5th edn, Alphen aan den Rijn, Wolters Kluwer Law & Business 2021) 5ff; and Ulrich G Schroeter, *Internationales UN-Kaufrecht* (7th edn, Tübingen, Mohr Siebeck 2022) 1ff.

[2] See Ernst Rabel, 'Der Entwurf eines einheitlichen Kaufgesetzes'(1935) 9 RabelsZ 1–79; and Rabel, 'L'unification du droit de la vente internationale. Ses rapports avec les formulaires ou contrats-types des divers commerces' in *Introduction à l'étude du Droit Comparé. Recueil d'Études en l'honneur d'Édouard Lambert* (vol. II, Paris, 1938) 688ff.

[3] See the state of ratifications at <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg>, last accessed on September 9, 2025.

[4] See, for example, Maria Ângela Bento Soares and Rui Moura Ramos, *Contratos Internacionais: Compra e Venda, Cláusulas Penais, Arbitragem* (Coimbra, Livraria Almedina 1986); Dário Moura Vicente, 'A Convenção de Viena Sobre a Compra e Venda Internacional de Mercadorias: Características Gerais e Âmbito de Aplicação' in Dário Moura Vicente, *Direito Internacional Privado. Ensaios* (vol. II, Coimbra, 2005) 39ff; *Dário Moura Vicente, Direito* Comparado (vol II, Coimbra, 2017) 591ff; Luís de Lima Pinheiro, Direito Comercial Internacional (Coimbra, 2005) 259ff; Rui Moura Ramos, 'A Convenção de Viena de 1980 Sobre o Contrato de Compra e Venda Internacional de Mercadorias Trinta e Cinco Anos Depois' XCII (1) Boletim da Faculdade de Direito da Universidade de Coimbra (2016) 1ff; Paulo Nalin and Renata Steiner, *Compra e Venda Internacional de Mercadorias, A Convenção das Nações Unidas Sobre Compra e Venda Internacional de Mercadorias (CISG)* (Belo Horizonte, 2016); Ingeborg Schwenzer and other (eds), *A CISG e o Brasil. Convenção das Nações Unidas para os Contratos de Compra e Venda Internacional de Mercadorias* (Madrid, MARCIAL PONS BRASIL 2015); Alexandre de Soveral Martins, *Compra e Venda Internacional de Mercadorias: a CISG. Primeiros Comentários* (Coimbra, Almedina 2021) 9ff; and Ingeborg Schwenzer and others (eds.), *CISG, Brasil e Portugal. Convenção das Nações Unidas para os Contratos de Compra e Venda Internacional de Mercadorias* (São Paulo, Almedina Brasil 2022).

[5] See the President Dilma Rousseff, 'Presidential Decree no. 8.327', 16 October 2014.

[6] The Convention was approved for accession by the Decree of the Portuguese Government no. 5/2020, of 7 August, and took effect for the Portuguese Republic on 1 October 2021.

acceded to the CISG in 1986 and that it was extended to Hong Kong in 2022.[7]

As stated in its Preamble, the premise of the Convention is that, 'the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States', and that 'adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade'.

According to Article 1, the CISG applies to 'contracts of sale of goods between parties whose places of business are in different States'. It therefore concerns primarily international contracts; it is not an instrument for unifying domestic laws, but instead sets out to institute specific rules for those contracts. These rules, moreover, are limited to the formation of the contract, and the rights and obligations that arise from it between the parties (Article 4), the interpretation of the contract (Article 8) and its form (Article 11).

The Convention has nevertheless exerted undeniable influence both on other international instruments in the field of contracts (most significantly the *UNIDROIT Principles on International Commercial Contracts*, the latest version of which was published in 2017),[8] and on the legal acts of the European Union (notably Directives 1999/44 and 2019/771 on the sale of consumer goods)[9] and the Organisation for Harmonisation of Business Law in Africa (such as its Uniform Act relating to General Commercial Law).[10] These instruments effectively echo concepts and rules enshrined in the CISG, which have thus found their way into national legal systems, including in states not party to the Convention.[11] In addition, the Convention has inspired major legislative reforms undertaken in a number of countries in the field of sale of goods

[7] See Zeyu Huang and Wenhui Chi, 'The CISG Applies to Hong Kong and Mainland China: Shall Macau Follow Suit?', available at <https://conflictoflaws.net/2022/the-cisg-applies-to-hong-kong-and-mainland-china-now-shall-macau-follow-suit/>, last accessed on September 8, 2025.

[8] See International Institute for the Unification of Private Law, 'UNIDROIT Principles of International Commercial Contracts 2016', (Rome, UNIDROIT, 2016) <https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf>, last accessed on September 8, 2025.

[9] Published, respectively, in the *Official Journal of the European Communities*, no. L 171 of 7 July 1999 12ff, and in the *Official Journal of the European Union* no. L 136 of 22 May 2019 28ff.

[10] Reproduced in Dário Moura Vicente (ed.), *OHADA – Tratado, Regulamentos e Actos Uniformes* (2nd edn, Coimbra, Almedina 2019) 31ff.

[11] This was the case of Portugal before 2020, which through the transposition of Directive 1999/44/EC received into its legal system the concept, originating in the Vienna Convention, of an obligation of conformity of the goods sold with the contract: see below, section II.G.

and of contracts in general: this was the case in the Netherlands in 1992, in Russia in 1994, in China in 1999 and 2020 and in Germany in 2001.[12]

The growing international acceptance of the CISG stands in stark contrast, however, to the limited degree to which it has been adopted in the contractual practice of several countries.[13] This is notably the case in Germany, where a recent survey showed that 52.9% of lawyers regularly exclude its application to the contracts they draft, relying on the opting out provision contained in Article 6 of the Convention.[14]

For its part, the United Kingdom has so far not engaged in this process of rapprochement between national legal systems. Although it took part in the CISG negotiations, it has neither ratified nor replicated it within its domestic law, opting instead for a policy of competition with other legal systems. This policy has proven largely successful, especially in the field of international arbitration, as is shown by the frequent choice of English law to govern international contracts.[15] India has followed the United Kingdom's stance on this issue and has so far refrained from ratifying the Convention.

To understand the abovementioned phenomena, an enquiry is necessary into the Convention's underlying concept of contract and, in particular, into whether it reflects those of the prevailing legal traditions in contemporary international trade, or whether, instead, it should be seen as a tertium genus, independent of any of these traditions. Such is the essential purpose of this paper, which also seeks to determine, in the light of the outcome of that enquiry, the extent to which the Convention has lived up to its aims as it reaches 45 years of age.

II. Fundamental traits of the rules on contracts in the CISG

A. Contracts' constitutive elements

In Article 14.1, the CISG requires the intention to be bound as a constitutive

[12] See, on the CISG's role as a model for law reform, Angelo Chianale, 'The CISG as a Model Law: A Comparative Law Approach' (2016) Singapore Journal of Legal Studies 29ff; Ulrich G Schroeter, 'Does the 1980 Vienna Sales Convention Reflect Universal Values? The Use of the CISG as a Model for the Law Reform and Regional Specificities' (2018) 41 Loyola of Los Angeles Intl. and Comp. L. Rev. 1ff.

[13] See, Ingeborg Schwenzer and Pascal Hachem, 'The CISG – Successes and Pitfalls' (2009) 57(2) American Journal of Comparative Law 457ff (acknowledging, at p. 463, that 'there still seems to be a tendency to recommend the exclusion of the Convention, especially in the commodities trade').

[14] Justus Meyer, 'Die praktische Bedeutung des UN-Kaufrechts in Deutschland' (2021) 85(2) *RabelsZ* 357.

[15] Clayton P Gillette and Robert E Scott, 'The Political Economy of International Sales Law' (2005) 25(3) International Review of Law and Economics 446 ff; Gilles Cuniberti, *'The International Market for Contracts: The Most Attractive Contract Laws'* (2014) 34(3) Northwestern Journal of International Law & Business 455ff.

element of the contract. In contrast to Common Law systems, it does not demand consideration as an essential element for the effectiveness of the contract. This follows in particular from: (a) the irrevocability of the proposal during the period indicated for this purpose by the proponent, even if there is no corresponding quid pro quo (Article 16.2); and (b) the possibility of modifying the contract by simple agreement of the parties, without the need — as is required, for example, in English law — for the beneficiary thereof to provide any consideration for such modification (Article 29.1). Neither is there a requirement of cause, as demanded by, among others, the French system (until the 2016 reform of the Civil Code), and those of Italy, Spain, Quebec, and Argentina.[16]

The omission from the Convention of any express reference to these contractual elements is understandable. It results from the fact that, as mentioned above, the CISG aspires to institute uniform rules for the international sale of goods, in the context of which neither cause nor consideration would serve any useful purpose, in view of the manifest divergence on these concepts between the Civil and Common Law systems.

It should however be recalled in this respect that, since the validity of the contract is excluded from the sphere of application of the Convention (Article 4*a*)), it is governed by its contracting states' domestic laws. The abovementioned concepts may therefore still prove relevant through the law applicable to this matter (for instance, in the event of a contract being invalid due to having an unlawful cause). This point will be returned to below.[17]

B. Formation of contracts

The CISG contains detailed rules on the formation of contracts between absent parties, which have to an extent served as a model for the subsequently adopted international instruments referred to above.[18] These rules presuppose the formation of the contract by means of an offer and an acceptance. In this regard, it may be extracted from Article 14.1 that a declaration in the context of a negotiation, with a view to the conclusion of the contract, will be deemed to be an offer, provided: (a) it is addressed to one or more specific persons; (b) it is sufficiently definite; and (c) it indicates the offerer's intention to be bound in case of acceptance. The

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[16] See, on the notions of consideration and cause, Dário Moura Vicente, *Comparative Law of Obligations* (Cheltenham, Edward Elgar 2023) respectively 38ff and 26ff, as well as the literature cited there.

[17] See section V below.

[18] See Reiner Schulze, 'Formation of Contract' in Larry A DiMatteo and others (eds), *International Sales Law — Contract, Principles & Practice* (Baden-Baden, 2016), 203-41.

offer is sufficiently definite when 'it designates the goods and, expressly or implicitly, fixes or makes provision for determining the quantity and the price'.

Pursuant to Article 14.2, an offer addressed to indeterminate persons is deemed by the Convention to be a mere 'invitation to make offers', unless the person making the proposal has unequivocally indicated otherwise.

As for whether the proponent is bound by the offer, the CISG enshrines a compromise solution between the legal systems of its contracting states.[19] It establishes, in effect, that until the moment of conclusion of a contract, a contractual offer may be revoked, provided the revocation reaches the offeree before it has dispatched its acceptance (Article 16.1); but the Convention immediately adds that the contractual offer will be irrevocable if it so indicates in any way or if, in the disputed situation, it would be reasonable for the offeree to rely on the offer being irrevocable and acted accordingly (Article 16.2).

The contract is concluded at the moment when the statement of acceptance of the contractual offer takes effect in conformity with the Convention's provisions (Article 23). In this regard, the CISG adopts the 'theory of reception', as also enshrined in German and Portuguese law, whereby that declaration takes effect on reaching the offerer (Article 18.1).

The Convention's preparatory works suggest that it deliberately excluded *culpa in contrahendo* from its scope, because a proposal from the (then existing) German Democratic Republic to include it was rejected. This proposal sought to establish that '[i]f one of the parties breaches the usual duties of care in preparation and formation of a contract of sale, the other party may demand compensation for the costs it has incurred'.[20] Also rejected was Article 5 of the preliminary draft prepared in 1977 by the UNCITRAL, which stated: 'In the formation of the contract, the parties must act loyally and in good faith'.[21]

The latter formulation was objected to as being too vague, so that differences could arise as to its interpretation. It was also contended that, insofar as it failed to specify the consequences of not complying with the said provision, legal uniformity in this area would be undermined,

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[19] See Steffan Kröll and others (n 1), art16 nos1.

[20] See United Nations Commission on International Trade, *Uncitral Yearbook* (vol. IX ,1978) 66.

[21] ibid 35.

because the matter would have to be governed by national laws.[22]

The choice made in this regard was also influenced by the fact that in Common Law countries the principle of good faith is not enshrined with regard to the formation of contracts, while in Civil Law countries the reach of this principle varies greatly.[23]

In any case, Article 7 of the Convention established that:

> *1. In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.*
>
> *2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.*

This provision — seen by some as the most significant one in the Convention, given that its success depends essentially upon the direction taken by courts and arbitral tribunals with respect to its interpretation[24] — again adopts a compromise solution, this time between the position of states that called for the enshrinement of a general duty of good faith to be observed by the parties in the contract's formation and performance and those that opposed any explicit reference to this principle in the text of the Convention,[25] a difference in positions that persists to this day.[26] Under that compromise, good faith was accorded express recognition in the Convention, but only as a criterion for the interpretation of its provisions, and not as a rule of conduct for the parties.[27]

Liability arising from the breach of duties of conduct binding on the parties in the negotiation and conclusion of contracts for the international sale of goods is accordingly determined, pursuant to Article 7.2 of the Convention, by the domestic law applicable under the conflict-of-laws

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[22] Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Milan, Giuffrè 1987) 68ff.

[23] ibid 85ff.

[24] See, to this effect, Steffan Kröll and others (n 1) art7 nos2.

[25] C Massimo Bianca and Michael Joachim Bonell (eds) (n 22), 83ff; John O Honnold and Harry M Fletcher (n 1) 161.

[26] For a recent rejection of good faith as a general principle of Contract Law, see the judgement of the English Court of Appeal in *MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt* [2016] EWCA Civ 789, in which Lord Moore-Brick stated: 'There is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement'.

[27] See, to this effect, Franz Jürgen Säcker and others (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (7th edn, Munich, C. H. Beck 2015) art7 CISG nos32ff; Ulrich G Schroeter (n 12), 25ff; Ulrich G Schroeter, *Internationales UN-Kaufrecht* (7th edn, Tübingen, Mohr Siebeck 2022) 61ff; John O Honnold and Harry M Fletcher (n 1) 163ff.

rules in force in the state of the forum.[28] This is undisputed with regard to the breach of duties of protection and care, which, because of their tortious nature, fall outside the scope of the Convention; but the same solution should apply in the case of pre-contractual duties of disclosure intended to ensure the proper formation of the will to contract, insofar as the Convention does not deal with the lack of, or flaws in, the parties' will, which is subject to contracting states' laws.[29]

C. Contractual form

On matters of form, the CISG enshrines the principle of freedom now adopted by a large number of national legal systems: Article 11 lays down that a contract of sale, 'need not be concluded in or evidenced by writing and is not subject to any other requirements as to form'; and Article 29.1 adds that a contract, 'may be modified or terminated by the mere agreement of the parties'.

However, here too, the Convention had to adopt a compromise solution because, at the time of its signing, a considerable number of countries, including the former Soviet Union, required international contracts of sale to be concluded in writing, in order to facilitate official control of foreign trade. This is why Article 12 of the Convention provides that Articles 11 and 29 will not apply when one of the parties to the contract has its place of business in a contracting state which has made an opt-out declaration under Article 96.[30]

D. Interpretation and supplementation of contracts

Regarding contractual interpretation, the CISG seeks to strike a compromise between the subjectivist and objectivist approaches, with the former slightly predominating. In fact, Article 8 provides that the statements and other conduct of a party will in principle be interpreted in accordance with his intent, where the other party knew or could not have been unaware what that intent was. When that intent cannot be determined, the statements and other conduct of a party are interpreted in accordance with the meaning that a reasonable person of the same kind as the other party would assign to them in view of the circumstances. This last rule corresponds to that which Article 236.1 of the Portuguese

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[28] This is also the view taken by Peter Huber, 'Some Introductory Remarks on the CISG' (2006) IHR 228ff; see also Franz Jürgen Säcker and others (eds) (n 27) art 4 CISG nos29ff.

[29] See, to this effect, Ulrich G Schroeter, *Internationales UN-Kaufrecht* (7th edn, Tübingen, Mohr Siebeck 2022) 83ff.

[30] Although seven states made such a declaration (Argentina, Belarus, Chile, Paraguay, the Russian Federation, Ukraine and Vietnam: see <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg>, last accessed on September 9, 2025), that will have practical effect in only a few cases today, given that most of them have since switched to freedom of form, even in the case of international contracts.

Civil Code establishes with regard to the interpretation of contractual statements. However, as in Portuguese law, that rule operates subject to the proviso that, if one of the parties had assigned a particular meaning to the contract and the other knew or could not have been unaware of this at the time of its conclusion, the contract is to be interpreted in accordance with that meaning (*falsa demonstratio non nocet*).

The CISG deems parties to be bound by any usage to which they have agreed or by any practices established between themselves (Article 9.1); and it determines that the contract is subject to the usages of international trade (sometimes referred to as *lex mercatoria*) of which the parties knew or ought to have known, and which in international trade are widely known to, and regularly observed by, parties to contracts of the same type, involved in the particular trade concerned (Article 9.2). Failing a stipulation to the contrary, such usages are therefore deemed tacitly incorporated in the contract.

E. Effects of contracts

A reference should also be made to the effects of contracts on relations between the respective parties. One of the differences that distinguish Latin from Germanic legal systems is the transfer of ownership of the thing sold as a consequence of conclusion of the contract of sale, which the former admit[31] (with the exception of Brazil),[32] but the latter reject, in keeping with the principle of separation between contractual transactions that create obligations (*Verpflichtungsgeschäfte*) and transactions that operate the transfer of property (*Verfügungsgeschäfte*).[33] This is perhaps why the CISG eschews any rules on this matter, which accordingly is left to domestic legal systems (Article 4 (*b*)).

However, the Convention does regulate the obligations of the seller and the buyer in Articles 30 and 53, the former being required to transfer ownership and deliver the goods sold to the latter, which is required to pay the price and receive the goods.

F. Change of circumstances

Let us now consider the change of the circumstances on which the parties based their decision to conclude a contract, a matter where domestic legal systems also diverge widely.

The CISG contains no particular rule on this question. To be sure,

[31] See, for example, Article 879(a) of the Portuguese Civil Code (*Código Civil português,* approved by Decree-Law No. 47344 of 25 November 1966).

[32] See Article 481 of the Brazilian Civil Code (*Código Civil brasileiro*, approved by Law No. 10.406 of 10 January 2002).

[33] See, respectively, §§ 433 and 929 of the German Civil Code (*Bundesgesetzbuch*, in the version promulgated on 2 January 2002).

Article 79.1 provides for certain instances where the debtor is released in the event of non-performance if this is due to an impediment beyond his control. However, these do not include, at least expressly, hardship due to a supervening change of circumstances.

The CISG's omission in this respect reflects the lack of consensus between its contracting states on the matter, particularly because under English law, absent a hardship clause, a change of circumstances does not, in principle, constitute sufficient ground for modifying or terminating a contract.[34]

Several authors have nonetheless admitted the application by analogy of Article 79.1 to such situations.[35] The CISG Advisory Council has opined that the Convention governs cases of hardship.[36]

In case law, this solution was adopted, for instance, by the Belgian Court of Cassation, which ruled, with regard to a supply contract for steel piping, that an unexpected 70% increase in the steel price constituted an impediment to performance of the seller's obligation within the meaning of that provision.[37]

There is no strict separation between an impediment in the strict sense, which refers to an impossibility to perform, and a situation of hardship. Instead, these notions reflect a continuum of circumstances that represent varying degrees of difficulty for the party required to perform. However, it remains unclear whether the impediment described in Article 79.1 sufficiently resembles hardship situations to warrant its application in such situations.

Furthermore, it remains unclear what effects should be assigned, under the Convention, to the occurrence of situations of this kind. Article 79.1 does not seem to provide sufficient grounds for imposing a duty to renegotiate the contract, or for empowering courts or arbitral tribunals

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[34] Hannes Rösler, 'Hardship in German Codified Private Law: In Comparative Perspective to English, French and International Contract Law' (2007) 15 European Review of Private Law 483ff.

[35] See Steffan Kröll and others (n 1) art79 nos78–86; and Larry DiMatteo, 'Excuse: Impossibility and Hardship' in DiMatteo and others (eds), I*nternational Sales Law. Contract, Principles & Practice* (Baden-Baden, 2016) 665–712.

[36] See the CISG Advisory Council Opinions Nos. 7 and 20, available at <https://cisgac.com/opinions/>, last accessed on September 8, 2025. For a critical assessment of the latter opinion, see Hüseyin Can Aksoy, 'Elephant in the Room: CISG, Hardship, and Uniform Application' (2023) 34(3) European Business Law Review 463ff.

[37] See the judgment of 19 June 2009, *Scafom International B.V. c. Lorraine Tubes S.A.S.* C.07.0289.N, available at <https://cisg-online.org/files/cases/7880/translationFile/1963_18923774.pdf>, last accessed on September 8, 2025. For criticism of this decision, see John O Honnold and Harry M Fletcher (n 1) 842 (classifying it as the 'most wrong-headed decision on this issue to date'); and Ulrich G Schroeter (n 29) 321.

to adapt or terminate the contract,[38] as was acknowledged by the CISG Advisory Council.[39]

A debtor facing a hardship situation is thus left, under the CISG, with a sole remedy: the temporary exemption from liability for non-performance, as outlined in Article 79.1. Its counterparty may, in turn, terminate the contract, pursuant to Article 79.5, provided that the Convention's requirements for such termination are satisfied. It remains however to be demonstrated that: (a) this approach is the most suitable one for hardship situations, particularly when compared to the broader range of solutions provided by Civil Law systems, which include the renegotiation and adaptation of contracts; and (b) that such an approach is even compatible with the Convention's general preference for the preservation of contracts over their termination.

In light of the above, it comes as no surprise that one of the Convention's architects, the late John Honnold, characterised Article 79 as 'the least successful component of the half-century of work towards international uniformity that culminated in approval of the text of the CISG'.[40]

G. Performance and non-performance

In the CISG, the concept of 'breach of contract' includes failure, by either the seller or the buyer, to perform any of their obligations arising under the contract or the Convention (Articles 45 and 61).[41] In the event of non-performance by the seller, the buyer is in principle entitled to require performance of its obligations (Article 46.1). However, Article 28 significantly curtails specific performance, by determining that:

> *If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.*

The admissibility of specific performance of contractual obligations is therefore subject to the *lex fori*. This, of course, reflects the different approaches taken on this matter by national legal systems and the unfeasibility of establishing an autonomous substantive rule in the Convention. By virtue of Article 28, the differences between national legal systems in respect of this matter have therefore been preserved. In particular, the admissibility of an efficient breach of contract, as enshrined

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[38] To this effect, John O Honnold and Harry M Fletcher (n 1) 842; Ulrich G Schroeter (n 29), 321.

[39] See CISG Advisory Council, *CISG Advisory Council Opinion No. 20* (CISG 2020) ss 11-3.

[40] John O Honnold and Harry M Fletcher (n 1) 819.

[41] Jürgen Basedow, 'Towards a Universal Doctrine of Breach of Contract: The Impact of the CISG' (2005) 25(3) International Review of Law and Economics 487.

in certain Common Law systems, is retained.

In any case, under the Convention the buyer cannot require specific performance by the seller of its obligations whenever it 'has resorted to a remedy which is inconsistent with this requirement' (Article 46.1, in fine). This would be the case, for example, of termination of contract, compensation of the buyer's expectation interest or reduction of the agreed price.[42]

If the seller fails to perform any of his obligations under the contract of sale or the CISG, the buyer is entitled, in addition to requiring performance of the obligation on the terms described, to exercise the rights of substitution and repair of the goods, to a reduction in the price and, when the respective pre-conditions are met, to the avoidance of the contract, as well to claim compensation for damages (Articles 45 to 52).

If the buyer fails to perform any of his obligations, the seller is in turn entitled to require him to pay the price, to take delivery of the goods or to perform his other obligations, to the avoidance of the contract if the respective pre-conditions are met, to specify the form, measurement or other features of the goods himself, and to claim compensation for damages (Articles 61 to 65).[43]

Under the CISG, damages payable for non-performance include both the loss caused to the other party by the defaulting party and the lost profits which the former suffered as a consequence of breach of contract (Article 74). The Convention therefore enshrines the principle of full compensation (*Totalreparation*).[44] However, damages payable are purely compensatory: there is no place, under the Convention, for the imposition of restitutionary damages, based on profits earned by the defaulting debtor, still less for punitive damages intended as a penalty for non-performance.[45]

Except in the situation envisaged in Articles 79 and 80, the duty to pay compensation is independent of the debtor's fault. The Convention accordingly enshrines a strict liability of the defaulting debtor, in line with the solution generally adopted by Common Law systems.[46] This circumstance, among other things, may explain the abovementioned tendency observed in certain European countries for parties to exclude,

[42] See Steffan Kröll and others (n 1) nos 13-16.

[43] See, on this matter, Peter Huber, 'CISG – The Structure of Remedies'(2007) 71(1) RabelsZ 13–34.

[44] See, to this effect, Ulrich G Schroeter (n 29) 326.

[45] See, to this effect, Michael Bridge, 'Remedies and Damages' in Larry A DiMatteo and others (eds), *International Sales Law—Contract, Principles & Practice* (Baden-Baden, 2016).

[46] See, to this effect, Ingeborg Schwenzer and others (eds), *Kommentar zum Einheitlichen UN-Kaufrecht* (6th edn, Verlag C. H. Beck München & Helbing Lichtenhahn Verlag Basel 2013) 1012.

under Article 6, the applicability of the Convention to contracts for the international sale of goods.[47]

With regard to the causal link required in order for compensation for non-performance of the contract to be awarded, the CISG adopts the foreseeability test enshrined in English and United States law. Under Article 74 of the Convention, compensation may not therefore exceed the loss suffered and the loss of profit that the defaulting party foresaw or ought to have foreseen upon concluding the contract as possible consequences of his breach, taking into account the facts of which he was or ought to have been aware.

The CISG accordingly excludes compensation of consequential losses (*Folgeschäden*) resulting from non-performance of the contract, not foreseen or foreseeable at the time of conclusion of the contract (for example, the complete destruction of the buyer's factory or other goods as a result of a defect existing in a machine installed there by the seller).

As for the defective performance of the contract, the CISG's rules are based on the idea that the qualities of the thing sold, guaranteed by the seller or presupposed by the buyer, are part of the contractual agreement, meaning that the Convention does not differentiate between delivery of defective goods and delivery of an *aliud*.[48]

To this effect, Article 35.1 of the Convention enshrines the seller's obligation to deliver goods 'of the quantity, quality and description requ ired by the contract'; and Article 36.1 determines that the seller is liable for any 'lack of conformity' that exists at the moment when risk passes to the buyer.[49]

Accordingly, if the goods do not conform with the contract, Article 46.2 entitles the buyer to require the seller to deliver substitute goods, if such a lack of conformity constitutes a 'fundamental breach of contract': within the system of the Convention, such non conformity is a form of non-performance. The buyer may also require the seller, under Article 46.3, to remedy the lack of conformity by repair, unless this is unreasonable, having regard to all circumstances.

This is a very different system from the rules laid down, for example in Articles 913 *et sequitur* of the Portuguese Civil Code for the sale of defective things, which are based, as regards the sale of specific things, on the voidability of the contract on the grounds of error or deceit (dolus).

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[47] See, to this effect Steffan Kröll and others (n 1) art74 nos11.

[48] Expressly in this sense, see the *Cobalt sulphate case* VIII ZR 51/95 (1996) Bundesgerichtshof.

[49] See Bruno Zeller, 'Conformity of Goods' in Larry A DiMatteo and others (eds), *International Sales Law—Contract, Principles & Practice* (Baden-Baden, 2016) 379-403.

Under Portuguese law, the buyer is also entitled to demand that the seller repair the thing or, if necessary and if it is fungible in nature, to replace it; but this obligation does not exist, as established in Article 914, 'if the seller was unaware, through no fault of his own, of the defect in the thing, or its lack of quality'.

In the European Union, the rules on the sale of consumer goods and the related guarantees, established in Directive 1999/44/EC, subsequently replaced by Directive (EU) 2019/771, approximate in several regards to the rules in the CISG just described.[50] One of the core points of the Directives is the seller's 'obligation of conformity', requiring the goods sold to conform with the contract.[51] As a consequence of this obligation, the delivery of defective goods by the seller constitutes a form of contractual non-performance, for which the seller is liable.[52] This solution is based on the idea, which was also adopted in the Convention, whereby the qualities of the thing sold, guaranteed by the seller or presupposed by the buyer, are part of the contractual agreement. In this regard, the rules adopted by the Directives can be traced directly back to the CISG.[53]

This explains why in Portugal, Article 2.1 of Decree-Law 67/2003, of 8 April, which transposed Directive 1999/44/EC, enshrined rules on the sale of consumer goods much closer to those of the Convention than to the country's own domestic law, by providing that '[t]he seller has the duty to deliver to the consumers goods which conform with the contract of sale'. In turn, Decree-Law 84/2021, of 18 October, which transposed Directive (EU) 2019/771, lays down in Article 5 that '[t]he professional must deliver to the consumer goods that comply with the requirements of Articles 6 to 9, without prejudice to the provisions of Article 10'. It is further established, in Article 6 of the same Decree-description, type,

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[50] See, to this effect, Jürgen Basedow, *EU Private Law. Anatomy of a Growing Legal Order* (Cambridge, 2021) 101. On Directive 1999/44/CE and its transposition, see, Dirk Staudenmayer, 'Die EG-Richtlinie über den Verbrauchsgüterkauf' (1999) NJW 2393ff; Dirk Staudenmayer, 'The Directive on the Sale of Consumer Goods and Associated Guarantees — a Milestone in the European Consumer and Private Law' (2000) Eur. Rev. Priv. Law 547ff; Paulo Mota Pinto, 'Conformidade e Garantias na Venda de Bens de Consumo. A Directiva 1999/44/CE e o Direito Português' (2000) Estudos de Direito do Consumidor 197ff; and Claus-Wilhelm Canaris, 'A Transposição da Directiva Sobre a Compra de Bens de Consumo Para o Direito Alemão' (2001) 3 Estudos de Direito do Consumidor 49ff. With regard to Directive (EU) 2019/771 of 20 May 2019, see, Jorge Morais Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services — Overview of Directives 2019/770 and 2019/771' (2019) 8(5) Journal of European Consumer and Market Law 194–201; and Mafalda Miranda Barbosa, 'O futuro da compra e venda (de coisas defeituosas)' (2019) 79 III-IV Revista da Ordem dos Advogados 723–52.

[51] Directive 1999/44/EC of 25 May 1999 art2 para1; Directive(EU) 2019/770 of 20 May 2019 art5.

[52] Directive 1999/44/EC of 25 May 1999 art3 para1; Directive(EU) 2019/770 of 20 May 2019 art10 para1.

[53] For further reading on this point, see Moura Vicente, 'Desconformidade e garantias na venda de bens de consumo: a Diretiva 1999/44/CE e a Convenção de Viena de 1980' (2001) 2(4) Themis 121–44.

quantity and quality, and present the functional capabilities, compatibility, interoperability and other characteristics established in the contract of sale; (b) they are suitable for any specific purpose to which the consumer puts them, in accordance with the agreement previously reached between the parties; (c) they are delivered together with all accessories and instructions, including for installation, as stipulated in the contract of sale; and (d) they are supplied with all updates, as stipulated in the contract of sale'. Similar solutions have in the meantime been enshrined in the legal systems of several other European countries.[54]

Under the CISG, termination due to non-performance (termed 'avoidance' in the English language version) is only admitted in cases of fundamental breach of contract, and may take place by mere declaration by one of the parties to the other.[55]

A breach of contract is deemed to be fundamental, according to Article 25 of the Convention, 'if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result".

This concept is notoriously vague. Two elements may nevertheless be gleaned from it: (a) causation of harm resulting in 'substantial deprivation' of that which one of the parties could have expected from the contract; and (b) the 'foreseeability' of that result. The former should be deemed to occur when the creditor loses interest in the performance by virtue of the breach of contract; the latter, when a trader reasonably familiar with the market, placed in the same circumstances, would have foreseen the result of the breach of contract that occurred.[56]

Court decisions have distinguished between several types of cases with regard to application of this concept.[57] Definitive non-performance

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[54] See, for example, the Dutch Civil Code (*Burgerlijk Wetboek*), Article 7:17: 'The thing delivered must conform with the contract'; the German Civil Code (*Bundesgesetzbuch*), § 433: 'The seller is to procure the thing for the buyer free from material defects and defects of title', and § 434 (1): 'The thing is free from material defects if, upon the devolution of the risk, if it has the agreed quality. If the quality has not been agreed, the thing is free of defects 1. If it is suitable for the use presupposed in the contract, or 2. If it is suitable for the usual use and is of the quality which is usual in things of the same kind and which the buyer may expect by virtue of its nature'; and the Italian Consumer Code (*Codice del Consumo*, approved by decreto legislativo of September 6, 2005, No. 206), Article 129 (1): 'The seller is obliged to deliver to the consumer goods that conform with the contract of sale'.

[55] See Articles 49.1 and 64.1 of the CISG, available at <https://cisg-online.org/cisg-article-by-article>, last accessed on September 8, 2025.

[56] See Steffan Kröll and others (n 1) art 25 nos 20-6.

[57] See Ulrich Magnus, 'Performance and Breach of Contract', in Larry A DiMatteo and others (eds), *International Sales Law—Contract, Principles & Practice* (Baden-Baden, 2016) 467–98, at 472f

of the obligation and refusal to perform are generally deemed to be a fundamental breach of contract.[58] But mere late performance will only be classified as such if the moment when performance was due was essential by virtue of a stipulation by the parties or the circumstances of the contract.[59] Delivery of defective goods only constitutes a fundamental breach if they cannot be used by the buyer, even if they have to be repaired for this purpose.[60] The impossibility of transferring ownership of the goods sold, for example because they were stolen, also constitutes a fundamental breach of contract.[61]

The CISG therefore sets the bar rather high for a situation to be classified as a fundamental breach of contract; avoidance of the contract is accordingly envisaged as an *ultima ratio*.[62]

The restriction on the exercise of the right to avoidance resulting from this approach reveals the *favor contractus* underlying the Convention.[63] This is justified by the concern to avoid the waste of economic resources involved, for example in the termination of the contract and the delivery of substitute goods. This is why, under the Convention, priority is given to the repair of the goods sold, the compensation of the buyer and the reduction of the agreed price.[64]

The CISG admits immediate avoidance of the contract in the event of an anticipatory breach or anticipatory non-performance by one of the parties, deeming such a situation to be equivalent, in terms of its effects, to the non-performance of the contract, provided the requirements for fundamental breach are met. Article 72.1 makes this clear: 'If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided'.

It should be noted that the Convention does not here call for certainty that the contract will not be performed, resulting, for instance, from a statement by the debtor that he will not perform the obligation: a reasonable degree of likelihood that this will happen is sufficient. For this

[58] See the decision of the Oberlandesgericht München 7 U 2959/04 (2004).

[59] See the decision of the *Diversitel Communications Inc. v. Glacier Bay Inc.* [2003] Ontario Judgments No. 4025.

[60] See, declining the application of Article 25, the German Supreme Court's decision cited above (n 48).

[61] For a case where the issue arose see, Stolen car case VIII ZR 268/04 (2006) Bundesgerichtshof.

[62] See Peter Huber (n 43) 18; Ulrich G Schroeter (n 29) 166ff; Alexandre de Soveral Martins, *Compra e venda internacional de mercadorias: a CISG* (Almedina 2021) 84.

[63] See also, to this effect, Joana Campos Carvalho, 'Fundamentos e resolução por incumprimento: comparação entre o Direito português e a Convenção de Viena Sobre os Contratos de Compra e Venda Internacional de Mercadorias' (2015) 16 Themis175–242, at 183.

[64] See Steffan Kröll and others (n 1) art46 no33.

reason, at least potentially, this is a very far-reaching provision.

At the request of certain developing countries, however, steps were taken to mitigate the more serious effects of this provision, by laying down in para. 2 of Article 72 that, if it has the necessary time, the party seeking to avoid the contract must first notify the other of this, in order to permit him to provide adequate assurances of the correct performance of his obligations. This proviso does not apply, nonetheless, if the debtor has stated that he will not perform his obligations. This rule is therefore yet another example of a compromise solution.

H. Impossibility of performance

We shall now consider the situation of a supervening impossibility of performance of contract. In this regard, Article 79.1 of the CISG lays down that:

> *A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of conclusion of the contract or to have avoided or overcome it, or its consequences.*

This provision encompasses situations of non-performance by the debtor through no fault (lato sensu) of his own, in particular due to unforeseeable circumstances or force majeure, a third-party fact or the application of legal rules.[65] Hardship, according to the point of view expressed in a significant part of legal literature, is not included here.[66]

The provision in question lays down an exception to the principle of strict liability adopted in the Convention. In practice, however, this means little, as the courts have only rarely excused a debtor on these grounds.[67] This is partly because the preconditions for such an excuse are very strict. They include: (a) the occurrence of an impediment beyond the debtor's control (a natural disaster, an act of violence, a strike, an embargo, etc.); (b) the unforeseeability of that impediment at the time of conclusion of the contract; (c) the inevitability and insuperability of that impediment through measures the debtor can reasonably be expected to take; and (d) a causal link between the impediment and non-performance of the obligation.

It should moreover be noted that, under Article 79.5 of the Convention, the debtor remains obliged to perform its obligation, and is only released from the duty to pay compensation to the creditor. It may therefore be required to perform that obligation, if in the meantime that

[65] See Maria Ângela Bento Soares and Rui Moura Ramos (n4) 214.

[66] See section II.F above. To this effect, see also Sánchez Lorenzo, 'La frustración del contrato', in Sixto Sánchez Lorenzo (ed), *Derecho Contractual Comparado. Una Perspectiva Europea y Transnacional vol II* (3rd edn, Madrid, Civitas 2016) 742ff.

[67] See, to this effect, Franz Jürgen Säcker and others (eds) (n 27) art 79 CISG no1.

becomes possible.

The maxim *impossibilium nulla obligatio est*[68] does not therefore apply within the scope of the Convention.[69]

III. The concept of contract that emerges from the CISG

In view of the above, it can be seen that, in cases of non-performance, the CISG enables the creditor to hold the debtor liable for such non-performance, irrespective of fault, except in the event of *force majeure* and provided the requirements for this to be deemed relevant are met; it likewise admits avoidance of the contract in the event of a fundamental non-performance, by mere declaration by one of the parties to the other, without granting the defaulting party a period in which to remedy the situation.[70]

The CISG imposes a further significant restriction on specific performance of the defaulted obligation, namely in cases where the creditor can, on reasonable terms, obtain from a third party the performance which has not been rendered, thereby opening the door, whenever the *lex fori* so permits, to an 'efficient breach of contract' by the party which has an economically more favourable alternative.

In view of this normative framework, one may conclude that, in respect of non-performance, the CISG predominantly reflects a Common Law concept of contract.[71] The 'moral vision of the contract' (as it has been

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[68] This maxim was adopted, for example, in Article 790(1) of the Portuguese Civil Code, pursuant to which: 'The obligation is extinguished when performance becomes impossible for reasons not attributable to the debtor'.

[69] See also to this effect, Ulrich G Schroeter (n 29) 171.

[70] Subject, however, to the rule laid down in Article 72(2), as discussed above in section II.G, *in fine*.

[71] See, acknowledging that the rules on non-performance of contract contained in the Vienna Convention and, in its wake, in the *UNIDROIT Principles*, in the *Principles of European Contract Law* and in the *Draft Common Frame of Reference*, were shaped in the image of Common Law systems, Ole Lando, 'Non Performance (Breach) of Contracts' in Arthur S Hartkamp and others (eds), *Towards a European Civil Code* (4th edn, Kluwer Law Intl' 2010) 681ff. See also, to this effect, Ulrich Drobnig, 'General Principles of European Contract Law' in Petar Sarcevic and Paul Volken (eds), *International Sale of Goods: Dubrovnik Lectures* (New York, Oceana 1986) 305ff (with regard to the Vienna Convention); Filippo Ranieri, *Europäisches Obligationenrecht* (Springer Vienna 2009) 709 (stressing the 'function of model' – '*Vorbildfunktion*' – performed by English Law in the shaping of European Civil Law); Jean-Frédéric Carter, *Le traitement de l'inéxecution (La breach of contract)* (thesis submitted to the Université de Lille, 2003, available at <http://edoctorale74.univ-lille2.fr>, last accessed on September 9, 2025); and Carmen Vaquero López, 'La mora en los contratos' in Sixto Sánchez Lorenzo (ed), *Derecho Contractual Comparado. Una Perspectiva Europea y Transnacional vol II* (3rd edn, Madrid, Civitas 2016) 820ff.

called)[72] adopted in Civil Law systems gave way to a vision more centred on its economic effects, such as that underpinning Common Law systems.

It is that same concept that underlies, as we have seen, the Convention's rules on the formation of contracts, in particular in view of the rejection of admissibility of liability based on culpa in contrahendo; it likewise informs the Convention's approach to the relevance of changed circumstances as grounds for adaptation or avoidance of the contract. It has been contended that this is not unrelated to the influence exerted by the United States of America on the formation of the CISG, which in various aspects presents substantial similarities with the rules on sale contained in the US Uniform Commercial Code.[73]

IV. The limits on the unification undertaken by the CISG and its variable geometry

Despite the unequivocal progress it represents in terms of a rapprochement between different legal traditions, there are significant limits to how far the CISG has been able to unify the international rules on the sale of goods.

These limits arise, inter alia, from: (a) the restrictions imposed by the Convention itself on the matters it regulates; (b) the possibility of the parties excluding the applicability of its provisions; (c) the reference to the law applicable by virtue of the private international law rules in force in each contracting state in order to resolve issues not expressly regulated by the Convention; (d) the widespread use, in its text, of indeterminate concepts, such as 'reasonable person', 'reasonable period' and 'fundamental breach'; and (e) the absence of any supranational authority for the interpretation of the Convention.

In addition, the Convention presents a 'variable geometry', in the sense that it establishes a flexible framework that does not apply uniformly to all contracting states due to the reservations made by some of them.

The most significant of these reservations are provided for in Article 92.1, which permits any contracting state to declare, on signing, ratifying, accepting, approving or acceding to the Convention, that it will not be bound by the provisions of Part II with regard to the formation of contracts, or by Part III, relating to the rights and obligations of the

[72] See, to this effect, Rémy Cabrillac, *Droit européen comparé des contrats* (Paris, 2012) 156. For a detailed exposé of that vision, see Georges Ripert, *La règle morale dans les obligations civiles* (4th ed., Paris, 1949).

[73] See, to this effect, in the more recent literature, Arnald J. Kanning, 'Unification of Commercial Contract Law: The Role of the Dominant Economy' (2021) 85(2) RabelsZ 326–56, at 354.

parties.

V. Conclusion: The inevitable recourse to domestic laws and the emergence of a third way for regulating the international sale of goods

A contractual party established in a state which has made a reservation under the said Article 92 is deemed as based in a non-contracting state with regard to the excluded provisions of the Convention; recourse is therefore needed to rules of private international law in order to determine the applicable legal rules.

Similarly, matters not covered by the Convention (its 'external gaps'), which include, according to Article 4, the validity of the contracts and transfer of ownership over the goods sold, as well as issues included within its material scope of application but which are not resolved by its provisions (its 'internal gaps'), are regulated (in the latter case, only if it is not possible to have recourse, for this purpose, to the general principles inspiring the Convention) by the law applicable in accordance with the conflict of laws rules of the forum state, as determined in Article 7.2.

The Convention accordingly enshrines a *mitigated unification* of the rules on the international sale of goods, which does not dispense with recourse to the national laws designated by the rules of private international law.[74]

Rather than an all-embracing compromise between the Common Law and Civil Law traditions, which in certain fields is practically impossible to reach, the CISG adopts a 'third way' as regards regulation of the matters within its scope, based on combining uniform rules with the domestic legal regimes on sale of goods.

Whilst this approach is perhaps one of the CISG's main advantages, given the neutrality successfully achieved in the provisions of the Convention and the level playing field accordingly enjoyed by parties to international contracts, it is nonetheless a clear limitation imposed on the uniformity of the rules on the international sale of goods, which the Convention's Preamble proclaims as one of its fundamental aims, and on the reduction of the costs and risks involved in the applicability of

[74] See, to this effect, Franco Ferrari, 'CISG' in Jürgen Basedow and others (eds), E*ncyclopedia of Private International Law* (vol 1, Cheltenham, Edward Elgar 2017,) 337ff (341); Franco Ferrari, *Forum Shopping Despite Unification of Law* (Leiden and Boston, Brill 2021), noting, at 173, that 'Private International Law and uniform substantive law created through conventions can and indeed do, coexist'. See also Jürgen Basedow, *Uniform Law* (Tübingen, Mohr Siebeck 2024) 279, acknowledging both that '[d]ue to its fragmentary nature, uniform substantive law is always embedded in national law', and that '[t]he legal analysis of any dispute falling into the remit of an international instrument therefore invariably entails a combination of uniform substantive law and national rules as designated by private international law'.

different laws to international contracts.

It is true that, since the conclusion of the Convention, a substantial amount of literature and case law has developed to interpret its provisions and address its internal gaps, guided by the general principles that underpin it. This has effectively lessened the impact of the said limitation. However, relying on such principles to find solutions that are not explicitly mentioned in the Convention also has its limits.

As it reaches 45 years of existence and nearly 100 contracting states, the CISG may be ripe for higher aspirations, which include further unification of issues of general contract law in respect of which no consensus could be reached between its contracting states almost half a century ago.[75] Such, it is submitted, is UNCITRAL's greatest challenge for the future in respect of the CISG.

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[75] As was suggested in the Proposal by Switzerland on possible future work in the area of international contract law, document No. A/CN.9/758 of 8 May 2012, available at <https://digitallibrary.un.org/record/729645?v=pdf>, last accessed on September 8, 2025.