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Articles

POSSIBLE FUTURE WORK BY UNCITRAL IN THE FIELD OF CONTRACT LAW: PRELIMINARY THOUGHTS FROM THE SECRETARIAT

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IT is with pleasure that I have the opportunity to address the topic: *Assessing the CISG and Other International Endeavors to Unify International Contract Law*. My contribution to this issue will briefly consider the various standards relevant to international contract law today, together with the numerous proposals that have been made to further harmonize this important area of law. When considering opportunities for the future, we are often prompted to reflect upon our past achievements. In this regard I will examine the practical steps that UNCITRAL has undertaken to support the implementation of the CISG, and in particular the obligation created by Article 7 for the uniform interpretation of its provisions. I will close by introducing a proposal recently made by UNCITRAL to further efforts in this area. This discussion will, I hope, remind us that the creation of a harmonizing instrument is one possible first step toward actual harmonization which, in practice, requires effective implementation to be truly realized.

In 2013, we anticipate that membership of the CISG will surpass eighty states.¹ This is a remarkable achievement when we consider the history leading to its development. States from every geographical region, every stage of economic development and every major legal, social, and economic system are Parties to the CISG. Looking back in time, when we celebrated the twenty-fifth anniversary of the Convention in 2005, membership of the Convention was approaching seventy states.² Together,

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1. At the time of writing this paper in January 2013, the number of state parties to the CISG stood at seventy-eight. See *Status 1980—United Nations Convention on Contracts for the International Sale of Goods*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Apr. 9, 2013).

2. See Yernej Sekolec, *Welcome Address*, in *CELEBRATING SUCCESS: 25 YEARS UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 18, 19* (2006), available at <http://www.cisg.law.pace.edu/cisg/biblio/sekolec.html>.

these seventy states were said to represent over two-thirds of the total volume of international trade. Since that anniversary, with the inclusion of Japan as a state party,³ and Brazil advanced in its domestic procedures to become a state party,⁴ the total volume of international trade represented is likely to be even greater still. These adoptions combined with the continued withdrawal of limiting declarations in Europe⁵ make it evident that the CISG remains highly relevant for states and the international sale of goods more broadly. We have to be careful not to upset such dynamics.

However, the CISG is not the only instrument that may provide rules for international contracts for the sale of goods. Indeed, a diverse range of instruments have developed since the birth of the CISG in 1980. These instruments include both binding and soft law texts, as well as global and regional initiatives. Depending on the location of contracting parties, and their choice of instrument, a range of rules—including domestic rules—potentially govern international contracts in today's modern commercial world. The CISG is complemented by its "sister" instrument—the United Nations Convention on the Limitation Period in the International Sales of Goods,⁶ regulating the period of time within which a party under a contract for the international sale of goods must commence legal proceedings against another party to assert a claim arising from that contract. There are, of course, a range of other international conventions, covering issues such as transport, finance, and e-commerce, to name a few that are relevant in determining legal rights and obligations in international transactions.

Further, the Unidroit Principles of International Commercial Contracts (Unidroit Principles), which were heavily influenced by the CISG and first released in 1994, recently went through a third revision.⁷ While assessing their actual influence is difficult, we are told that they are increasingly being used by contracting parties as the basis of contracts, not

3. See Press Release, United Nations Information Service, Japan Accedes to the United Nations Convention on Contracts for the International Sale of Goods (CISG), UNIS/L/120 (July 4, 2008), available at <http://www.unis.unvienna.org/unis/pressrels/2008/unisl120.html>.

4. For information on the Brazilian Senate's approval of the Convention, see *Projecto de Decreto Legislativo, Nº 73, de 2012*, SENADO FEDERAL (Oct. 24, 2012), http://www.senado.gov.br/atividade/materia/detalhes.asp?p_cod_mate=104615.

5. For example, Latvia's withdrawal of its "written form" declaration in November 2012. See Press Release, United Nations Information Service, Latvia Withdraws "Written Form" Declaration Under the United Nations Convention on Contracts for the International Sale of Goods (CISG), UNIS/L/177 (Nov. 15, 2012), available at <http://www.unis.unvienna.org/unis/pressrels/2012/unisl177.html>.

6. See United Nations Convention on the Limitation Period in the International Sales of Goods, as amended by the Protocol of 11 April 1980, Apr. 11, 1980, 1511 U.N.T.S. 99, available at http://www.uncitral.org/pdf/english/texts/sales/limit/limit_conv_E_Ebook.pdf.

7. See INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2010), available at <http://www.unidroit.org/english/principles/contracts/main.htm>.

just for the international sale of goods, but for a broad range of international commercial transactions. Much like the CISG, the Unidroit Principles have provided a source of inspiration for the reform of domestic contract laws in a diverse range of countries. However, reflecting their soft law status, the way the Unidroit Principles have been incorporated into domestic legislation has varied, somewhat limiting the potential unifying effect.

Finally, and of no less importance, are the range of regional initiatives currently being taken with respect to contract law approaches. Examples of work being done in this area include: the Draft Common European Sales Law (CESL), embodying contemporary efforts to harmonize contract laws in Europe; the Preliminary Draft Uniform Act on Contract Law developed in OHADA; and of course the Principles of Asian Contract Law (PACL), on which Professor Shiyuan Han is providing an update today.

My focus in this presentation does not include a detailed analysis of how these various instruments work together in providing a legal framework for international contracts. Needless to say, however, it is the simple existence of these numerous instruments which, at the very least, creates the impression of a complex web of international standards interacting with domestic and regional contract law. This has no doubt contributed to calls for further harmonization, and indeed unification, of international contract law.

The idea of further harmonization in the area of international contracts is not new. Indeed, even at the time of the diplomatic conference in 1980 that led to the finalization of the text of the CISG, when agreed positions could not be reached on certain elements even at that late stage, there were concerns about the scope of the CISG and the fact that it did not provide rules for the entire life-cycle of an international sales contract. The so-called “gaps” in the CISG have, of themselves, been the catalyst for calls for further work in this area. To some extent, through the work of Unidroit, that call has been answered in the form of the Unidroit Principles. In this sense, the Unidroit Principles can be considered a complementary instrument to the CISG. UNCITRAL acknowledged this relationship as part of its 2012 endorsement of the “use of the 2010 edition of the Unidroit Principles of International Commercial Contracts, as appropriate, for their intended purposes.”⁸

Professor Joachim Bonnell has written extensively on ideas to integrate and formalize the relationship between the CISG and the Unidroit Principles. His ideas include having UNCITRAL recommend use of the Unidroit Principles to interpret and supplement the CISG.⁹ As part of this recommendation, the Unidroit Principles would only be used where the

8. Rep. of the U.N. Comm’n on Int’l Trade Law, 45th Sess., June 25–July 6, 2012, ¶¶ 137–40, U.N. Doc. A/67/17; GAOR, 67th Sess., Supp. No. 17 (2012).

9. See Michael Joachim Bonnell, *The CISG, European Contract Law and the Development of a World Contract Law*, 56 AM. J. COMP. L. 1, 27 (2008).

issue at stake falls within the scope of the CISG and where the individual provisions of the Unidroit Principles referred to can be considered an expression of a general principle underlying both instruments. Professor Bonnell has suggested that such a formal recommendation would help to promote uniformity in the application of the CISG and at the same time ensure that, in practice, recourse to the Unidroit Principles is made only within the limits of, and on the conditions provided by, Article 7 of the CISG.¹⁰

UNCITRAL, however, has not embraced a solution of this type. It considered the issue of integration of the CISG and the Unidroit Principles in 2007, as part of its endorsement of the 2004 Principles.¹¹ It, however, observed that the CISG already contains comprehensive rules on contracts for the international sale of goods that, when properly applied, exclude application of the Unidroit Principles. The Commission further noted that questions concerning matters governed by the CISG not expressly settled in it were to be settled, as provided in Article 7 of the Convention, in conformity with the general principles on which the Convention was based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. Thus, the optional use of the Principles was subordinate to the rules governing the applicability of the CISG.

Professor Bonnell has also suggested reproducing the Unidroit Principles in the form of a model law to be applicable unless the parties have excluded its application.¹² Bonnell considers that the direct involvement of governments in preparing such a model law would enhance the authority of the Unidroit Principles. He also considers that, given the non-binding nature of a model law, such an approach would minimize the risk of the Unidroit Principles losing their innovative characteristics and being reduced to the lowest common denominator. This concept of a practical link between the CISG and the Unidroit Principles, in the form of a model law, which has proven to be a type of harmonizing instrument that is popular with states, is a suggestion worthy of further consideration in the current discussion.

With respect to Bonnell's proposed elevation of the Unidroit Principles to a model law, he considers that this could be a stand alone undertaking or alternatively undertaken in the context of a broader and even

10. *See id.*

11. *See* Rep. of the U.N. Comm'n on Int'l Trade Law, 40th Sess., ¶ 211, U.N. Doc. A/62/17; GAOR, 62nd Sess., Supp. No. 17 (2007).

12. *See* Michael Joachim Bonnell, *Towards a Legislative Codification of the Unidroit Principles?*, in MODERN LAW FOR GLOBAL COMMERCE: PROCEEDINGS OF THE CONGRESS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW HELD ON THE OCCASION OF THE FORTIETH SESSION OF THE COMMISSION 230, 238 (2007), available at http://www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf.

more ambitious project, such as the preparation of a “Global Commercial Code.”¹³

The idea of a Global Commercial Code re-entered the spotlight in 2000 through comments made by former Secretary of UNCITRAL Gerold Herrmann.¹⁴ He suggested that a Global Commercial Code would, through a single binding global reference law, provide a coherent and consistent body of commercial law and therefore certainty in the rights and obligations of parties to commercial transactions.

The development of a Global Commercial Code would involve review and consolidation of the alternative “competing” texts in the light of modern trends and usage. The broad acceptance and success of the CISG in so many countries is considered by a number of commentators to indicate a need for a Global Commercial Code. It is felt that the need for such an instrument has continued to grow with expansion in communications and cross-border commerce. It has been suggested that a Global Commercial Code could be prepared by UNCITRAL in cooperation with other interested international organizations.

While Professor Bonnell envisages the incorporation of the Unidroit Principles into a Global Commercial Code in the form of a model law or similar non-binding representation, an alternative view has been expressed by Professor Ole Lando. Professor Lando considers that, as part of a Global Commercial Code, the Unidroit Principles should be mandatorily applied to international contracts.¹⁵ To achieve maximum uniformity, in Lando’s view, a global market requires one law—including general principles of contract law—with the Unidroit Principles, to be elevated as binding upon courts and tribunals, an integral inclusion in that Code.

There will no doubt be continued debate about whether such harmonization is a worthy and achievable objective. As Professor Henry Gabriel has written,¹⁶ because uniform laws reduce transaction costs by providing known default rules, this is often reason enough to choose a uniform legal regime and justify the time-consuming and expensive efforts of undertaking uniform law projects at both the domestic and international levels.

Many commentators believe that the proliferation of diverse legal rules that have developed, and continue to be drafted today, imposes serious costs on enterprises doing business in more than one jurisdiction. At

13. Bonnell, *supra* note 9, at 27.

14. See Gerold Herrmann, *The Future of Harmonisation and Formulating Agencies: The Role of UNCITRAL*, in FOUNDATIONS AND PERSPECTIVES OF INTERNATIONAL TRADE LAW 28, 36 (Ian Fletcher, Loukas Mistelis & Marise Cremona eds., 2001).

15. See Ole Lando, *Tradition Versus Harmonization in the Recent Reforms of Contract Law*, 3 COLLECTED COURSES XIAMEN ACAD. INT’L L. 87, 95 (2010).

16. See Henry Gabriel, *Choice of Law, Contract Terms and Uniform Law in Practice*, in MODERN LAW FOR GLOBAL COMMERCE: PROCEEDINGS OF THE CONGRESS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW HELD ON THE OCCASION OF THE FORTIETH SESSION OF THE COMMISSION 224, 228 (2007), available at http://www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf.

the same time concerns have been expressed, for example by Gerhard Wagner,¹⁷ that harmonization efforts while of considerable merit, can remove the benefits of experimentation, learning, and adaptation facilitated by the range of diverse instruments that currently exist.

Along with varied views on the costs and benefits of harmonization efforts, there will also be continued debate about what form harmonization efforts should take and if the idea of a Global Commercial Code is a desirable and feasible objective.

The merits and drawbacks of international harmonization through hard and soft law have been discussed extensively in academia. The benefits of a soft law approach, with more open and flexible rules, able to be developed, updated, and amended without a formalized codification procedure are well articulated. When compared with a formal law-making process, known to be slow, expensive, and full of compromise, including concerns that legal certainty and foreseeability of outcomes may actually be sacrificed in order to achieve the harmonization goal, a soft law option may appear, *prima facie*, very appealing. There are, of course, persuasive counter-views that soft law rules, which do not go through a formalized codification procedure, with the broad participation of states with different legal traditions and expectations, lack the authority, security, and predictability that an internationally developed codification of black letter rules offers—and therefore do not ultimately achieve harmonization. These conflicting views will no doubt continue to be expressed and challenged—both within the academic communities and between states.

Recognizing these issues, even strong advocates of a Global Commercial Code such as Ole Lando have recognized that an iterative approach towards a Global Commercial Code may be necessary. Professor Lando suggests that the development of a set of core principles for international contract law would be a useful first step, and would lay the groundwork for a Global Commercial Code to be developed in due course.¹⁸

Lando has identified eight basic principles addressing: freedom of contract; *pacta sunt servanda*; informality; unilateral promises; good faith and fair dealing; reliance; reasonable foreseeability; and proportionality that could be introduced to “penetrate” the law of contracts of the world.¹⁹ If widely accepted, Lando suggests that these principles would be taken into account by national and international legislators when they reform their contract laws, and might even be applied by the courts to inter-

17. See Gerhard Wagner, *Transaction Costs, Choice of Law and Uniform Contract Law*, in MODERN LAW FOR GLOBAL COMMERCE: PROCEEDINGS OF THE CONGRESS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW HELD ON THE OCCASION OF THE FORTIETH SESSION OF THE COMMISSION 39, 40 (2007), available at http://www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf.

18. See Lando, *supra* note 15, at 95.

19. See Ole Lando, *CISG and its Followers: A Proposal to Adopt Some International Principles of Contract Law*, 53 AM. J. COMP. L. 379, 401 (2005).

pret or supplement international uniform law instruments and their domestic law.²⁰

Jan Smits has similarly advocated a step-by-step approach towards achieving uniformity. He considers that a model should be adopted which allows for amendment and correction at an early stage, allowing businesses to get acquainted with a new contract law regime before it is mandatorily applied.²¹ In this sense an optional contract code is suggested, which Smits considers would allow harmonization to take place from the “bottom up.”

My contribution to this discussion is not to promote a particular course of action or outcome in favour of another. What I will say, however, is that there are clearly a multitude of worthy ideas in circulation—and it is a legitimate and worthwhile exercise to examine and debate these ideas to determine what further work, if any, should be done in the area of international contract law. What I can add to this discussion is some comments on the process and elements that will be fundamental to successful work in this area and perhaps, more importantly, emphasize that the creation of a text or instrument is only one (possibly small) element in achieving harmonization. The implementation and creation of unified “laws in action” is a crucial element which is unfortunately often overlooked in such discussions.

If it was ultimately determined that a harmonization effort in some form or another would be of benefit, there are several ways in which UNCITRAL could uniquely contribute to the development of such a text.

With the benefit of a clear and established commitment and leadership from member states, where scarce resources are efficiently and effectively directed towards identified and agreed priorities, UNCITRAL is undoubtedly a competent forum to develop modern harmonizing instruments in this area. I am not going to recite a list of our achievements. I do note, however, that some instruments have, for a variety of reasons, enjoyed smoother paths to creation than others. UNCITRAL takes these experiences, learns from the various challenges and successes, and applies the knowledge gained in developing the approaches to the creation of new instruments.

Enjoying universal participation, UNCITRAL allows member states with varied expertise and experience to share with others, to express their aspirations or concerns, and to state the conditions under which they could accept certain texts. In doing so, UNCITRAL can ensure that any instrument developed reflects a fair balance between the competing do-

20. *See id.* at 384.

21. *See* Jan Smits, *Economic Arguments in the Harmonization Debate: The Practical Importance of Harmonization of Commercial Contract Law*, in *MODERN LAW FOR GLOBAL COMMERCE: PROCEEDINGS OF THE CONGRESS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW HELD ON THE OCCASION OF THE FORTIETH SESSION OF THE COMMISSION 46*, 52 (2007), available at http://www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf.

mestic legal traditions to ensure the use of these instruments facilitates international trade and provides predictable and fair outcomes for commercial entities.

The value of having the preparatory work being undertaken in the six official languages of the United Nations should not be underestimated. Such a process, while expensive and time consuming, aids understanding and interpretation of complex legal issues. This is clearly a better process than having a final text produced in a single language then later translated, with limited opportunities to ensure that concepts are accurately represented and understood.

A further element that will be crucial to the success of the development of any further harmonizing instrument on international contract law will involve effective engagement and coordination with the other private law formulating agencies. This is an area where UNCITRAL has worked successfully in the past in terms of drawing on the experience and expertise of other agencies, and making sure that we make the best use of our limited resources. I am confident that further work on contract law would allow us to build upon these established relationships, in particular with Unidroit, in the development of the desired instrument.

Of equal importance will be outreach to the regional integration and economic cooperation organizations and law reform bodies who are undertaking efforts in contract law reforms. We must recognize that these bodies have contemporary perspectives to bring to bear on the issues that require examination and we would be short-sighted not to avail ourselves of opportunities to engage with them and become informed of their experiences in these areas.

The combination of these processes may not, of themselves, ensure the development of the very “best” law (however such an assessment might be made) that might otherwise be produced in a purely academic exercise. However, I believe that UNCITRAL’s processes and work methods are capable of producing texts that can achieve harmonization, and that can facilitate international trade. That, of course, is the core business of UNCITRAL.

Formulating a harmonizing instrument, of itself, is only part of the story. Harmonization is only truly achieved through implementation—being the adoption of such laws, their consistent interpretation, and practical application to commercial transactions.

Promoting the adoption of texts is an increasingly important focus of UNCITRAL, including educating stakeholders on the existence and benefits of the respective harmonizing instruments produced under our auspices. A large part of this education process includes facilitating an understanding of the processes and costs of the effective realization of implementation and the actual adaptation requirements of the reforms (which can differ markedly from the perceived adaptation requirements). This process commonly happens through conducting and participating in

seminars (regional and national), briefing missions, and training courses, and often is delivered in conjunction with other organizations. The unfortunate fact is that, increasingly, the scarcity of resources sometimes prevent the secretariat from meeting the demand for these services, thereby undermining our ability to effectively promote texts.

As has been widely acknowledged, the preparation of a substantive uniform text is a time consuming and costly undertaking. As an example, I recall Gerold Herrmann stating that the estimated cost of preparation of the CISG to the United Nations alone was in the realm of 6 million U.S. dollars.²² In 1980, that was probably regarded as a considerable amount. In retrospect, it may also illustrate the cost-effectiveness of the process. In any event, we must ensure that adequate resources are available for promotion of the end product to relevant stakeholders after a significant investment—to not do so would be wasteful, and would jeopardize the ultimate success of the entire undertaking. This is a matter that we need to be mindful of, even in these early exploratory discussions considering harmonization opportunities.

Of course, without effective implementation, the adoption of any harmonizing instrument amounts simply to harmonization “on paper,” and may not have any practical positive impact on legal predictability sought by commercial parties to international transactions. Some commentators will suggest that only the existence of a competent court, binding on all states’ parties, to interpret an international instrument such as the CISG would achieve legal certainty and predictability of outcomes for commercial parties. Without such a court, they say that the application of laws will invariably differ between jurisdictions—reflecting not only the different legal traditions, and varied rules of procedure and evidence, but also the varied capacity of courts, resulting in different interpretations and solutions.²³

I would not agree that a single review court is necessary, but I think it is true to say that the CISG will, in the long run, only be successful in harmonizing the law of international sale of goods if courts in adopting states are consistent in interpreting its provisions.²⁴ If, instead, they insist on looking at the Convention through the lenses of their differing domes-

22. See Herrmann, *supra* note 14, at 33.

23. For a brief list of proponents of a review court, see Camilla Baasch Andersen, *Applied Uniformity of a Uniform Commercial Law: Ensuring Functional Harmonisation of Uniform Texts Through a Global Jurisconsultorium of the CISG*, in *THEORY AND PRACTICE OF HARMONISATION* 30, 39 n.36 (Mads Andenas & Camilla Baasch Andersen eds., 2011).

24. See, e.g., John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, in *PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 115, 147 (2002), cited in Alexander S. Komorov, *Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7(1)*, 25 *J.L. & COM.* 75, 75 (2006).

tic laws, thus creating divergent precedents, uniform law will not be achieved and the benefits of a harmonized regime will not be realized.²⁵

This is, of course, not a new observation, and the drafters of the CISG addressed this issue through Article 7, which, as you know, states that, in interpreting the Convention, “regard is to be had to its international character and to the need to promote uniformity in its application.”²⁶ While most of the CISG concerns the actions of contractual parties, this article imposes a public international law obligation on states, through their courts, to properly interpret the Convention. Unfortunately, many states appear to forget or fail to realize that they have a treaty obligation in this area, giving no further thought to the Convention after its adoption and leaving questions of interpretation entirely to courts with no guidance or instruction.

There is general agreement that the Article 7 obligation requires interpretation that is autonomous, without regard to national law, and that takes into account foreign case law.²⁷ So, are courts interpreting CISG cases in line with this standard? When looking at this question, scholars tend to take two approaches.

The first method is primarily quantitative, basically counting the number of cases that cite foreign authorities. The idea here is that if a court cites foreign case law, it is obviously meeting part of the Article 7 requirement. Under this test, there is little evidence that states and their courts are achieving great success. While the total number of CISG cases identified as citing foreign case law has risen, this number as a percentage of all identified CISG cases appears to have remained static from the late 90s until today.²⁸ Thus, in relative terms, foreign case law is not being cited any more today in CISG cases than it was in the last millennium.

A second common method to examine whether courts are interpreting the CISG in line with Article 7 is to track the persistence of homeward bias in significant case law. This is, obviously, a more qualitative approach. I probably don’t have to tell this audience, but courts are not faring much

25. See, e.g., John O. Honnold, *The Sales Convention in Action—Uniform International Words: Uniform Application?*, 8 J.L. & COM. 207, 208 (1988).

26. U.N. Comm’n on Int’l Trade Law, United Nations Convention on Contracts for the International Sale of Goods art. 7, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG], available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

27. See, e.g., Spiros V. Bazinas, *Uniformity in the Interpretation and the Application of the CISG: The Role of CLOUT and the Digest*, in CELEBRATING SUCCESS: 25 YEARS UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 18, 19 (2006), available at <http://www.cisg.law.pace.edu/cisg/biblio/bazinas.html>; JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 92 (Harry M. Flechtner ed., 4th ed. 2009); Ingeborg Schwenzer & Pascal Hachem, *Article 7*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 120, 124 (Ingeborg Schwenzer ed., 3rd ed. 2010).

28. See Larry A. DiMatteo, *Case Law Precedent and Legal Writing*, in CISG METHODOLOGY 113, 130 (André Janssen & Olaf Meyer eds., 2009).

better under this test. Even in states with highly developed legal systems, there is still a significant amount of case law exhibiting a startling level of homeward bias.²⁹

I don't mean to paint too grim of a picture. The CISG is widely used and well applied in many jurisdictions. Furthermore, as mentioned, the total number of cases citing the CISG and citing foreign case law is rising, and there is very promising anecdotal and statistical evidence that legal practitioners are becoming more familiar with the CISG and more amenable to its use.³⁰ That said, lack of visible progress in implementation is disturbing and, what is more, neither of the scholarly approaches I have mentioned take into account the even less-visible situation where courts apply national law in cases where the CISG clearly should apply, a practice that unfortunately persists.³¹

While the CISG can be considered a success when measured by the number of adopting states, its huge impact on domestic law reform, or the total number of cases citing its provisions, there is less certainty and great room for improvement if we are to consider the quality of the cases implementing the Convention. UNCITRAL and the UNCITRAL secretariat have long been aware of the potential problems caused by poor implementation of the CISG and have pursued multiple strategies in attempting to aid states and courts in implementation. The two most significant are the Case Law on UNCITRAL Texts (CLOUT) system and the UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (CISG Digest).

The CLOUT system is a publicly accessible collection of case abstracts on UNCITRAL texts, in particular the CISG.³² The theory behind the CLOUT system is simple enough. By making abstracts of cases interpreting UNCITRAL texts, in this case the CISG, available in the six UN languages, it makes it possible for courts and legal practitioners around the globe to take those decisions into account, thus facilitating autonomous and uniform interpretation. There are now several other admirable sys-

29. See, e.g., Franco Ferrari, *Homeward Trend: What, Why and Why Not*, in CISG METHODOLOGY 171, 185–92 (André Janssen & Olaf Meyer eds., 2009) (detailing example of homeward trend in U.S. case law).

30. See Lisa Spagnolo, *Green Eggs and Ham: The CISG, Path Dependence, and the Behavioural Economics of Lawyers' Choice of Law in International Sales Contracts*, 6 J. PRIVATE INT'L L. 417, 424 n.35 (listing studies showing increased exposure in American law schools); *id.* at 427–28 (noting decreases in opting-out rates in United States and Europe).

31. While evidence of this sort is difficult to gather, practitioners and judges at UNCITRAL-sponsored trainings often anecdotally recount instances where courts should have applied the CISG, but it was not plead, or it was ignored by the court. This type of anecdotal evidence is also found in academic literature, where it is asserted that the CISG is little-known in some contracting states. See Spagnolo, *supra* note 30, at 421–23 (citing various academic papers).

32. See *Case Law on UNCITRAL Texts*, UNCITRAL, http://www.uncitral.org/uncitral/en/case_law.html (last visited Apr. 9, 2013).

tems that complement CLOUT and also make consideration and application of foreign case law on the CISG possible.

In general, these case databases have been very successful in compiling case information. The CLOUT system, which relies on a network of national correspondents for case abstracts, currently has over 700 CISG cases. The Pace CISG database has over 2,500.³³ Despite these numbers, there are obvious limits on what these databases can accomplish in terms of harmonizing interpretation.

First, there are now so many cases in these databases that courts attempting to evaluate the foreign case law found in them may suffer from information overload, making the task of interpreting the CISG more difficult while it should be easier. Secondly, and I will say more on this in a moment, the availability of more cases by definition also means the availability of more divergent views, all of which should be considered by a court when rendering a decision, once again increasing the difficulty of interpretation.

In addition, with regards to CLOUT specifically, there is always the issue of the timeliness of reported abstracts. This delay is not only due to dependence on national correspondents but also the significant resources required for translation and publication. The existence of sufficient resources is a significant issue for the CLOUT system, and I imagine for the other databases as well. Over time, lack of resources has meant that it is difficult to keep CLOUT's interface up to date, a deficiency which hinders usability. This problem has become so significant of late that the UNCITRAL secretariat has redirected a small portion of its limited resources to an update of CLOUT's user interface. While we hope that this update invigorates CLOUT in the short term, the system's long-term viability will be dependent on increased financial support from states and the commitment and energy of national correspondents.

Some of the CLOUT system's limitations have been addressed by UNCITRAL's other major effort in this area, namely the CISG Digest, a project with which many of the speakers at this conference have assisted over the years.³⁴

The Digest is a significant contribution to uniform interpretation in that it significantly reduces the burden on courts and legal practitioners to search and analyze all CISG jurisprudence. On an article-by-article basis it concisely digests cases, highlighting divergences and identifying interpretive trends. In this way, the CISG Digest certainly helps address the problem of information overload and, at the very least, enables courts to quickly identify and assess interpretative divergences. The latest version of

33. See Albert Kritzer, *CISG Database*, INST. INT'L COM. L., <http://www.cisg.law.pace.edu> (last updated Apr. 3, 2013).

34. See United Nations, UNCITRAL DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (2012), available at http://www.uncitral.org/uncitral/en/case_law/digests.html.

the Digest was published electronically last year and is now also available in print thanks to the University of Pittsburgh Journal of Law and Commerce.

Nonetheless, while both the CLOUT system and the Digest are important strategic tools to assist in uniform interpretation, the lack of substantive progress I mentioned earlier can only be an indication that additional efforts are required. Certainly, interpretive divergences remain. Consider, for example, the impact of differing approaches on key concepts and issues such as burden of proof, estoppel, and whether computer software is a “good” covered by the Convention.³⁵ The fundamental hurdle seems to exist in moving from a situation where foreign case law is available and cited to one in which courts in practice always refer to the CISG when it is applicable and are effectively guided in interpreting its provisions in a uniform manner.

Neither the CLOUT system nor the CISG Digest can assist a court if it simply does not know the CISG is the applicable law in a certain case. If a court fails to apply the CISG in this scenario, it is not only a problem of an incorrect legal outcome and a blow to harmonization, but it is a scenario placing the state in violation of its treaty obligations. Furthermore, even if a court does apply the CISG, simply having notice of foreign case law and divergent approaches does not necessarily arm it to choose the approach which is likely to be more harmonizing in the long run.

The accepted wisdom is that foreign CISG case law should be evaluated by courts on a qualitative basis and that better reasoned and more commercially sound approaches should prevail over time.³⁶ This assertion is necessary because it is simply not possible that foreign CISG case law precedent could be assessed and weighed in the manner used by common law courts considering domestic decisions. If this assertion were conclusively true in practice, it would be a superlative method for unifying interpretation.

In fact, however, given the time and resource constraints felt by most courts, one cannot help but wonder if in many cases the wide availability of foreign case law and knowledge of divergent approaches simply serves as a mechanism for a court to pick and choose an approach with which it is most comfortable. If that is the case, I am afraid that choice will likely be the one that reflects the largest degree of homeward bias and not the one that is most well-reasoned.

Even if courts are more responsive to the goal of unification than I have suggested, it is difficult to imagine that judges from various legal systems find it equally easy to weigh the reasoning of foreign courts.

35. See Bazinas, *supra* note 27, at 25.

36. See, e.g., Francesco G. Mazzotta & Camilla Baasch Andersen, *Introduction: The Nature of CISG Case Law: The Key to Uniformity and Many Persuasive Examples for Counsel to Draw From*, in A PRACTITIONER’S GUIDE TO THE CISG xvii, xx (Camilla Baasch Andersen et al. eds., 2010).

Even if courts are capable of undertaking a qualitative review of foreign cases, relying solely on that case law without further investigation or guidance will mean the failure to take into account legal reasoning from jurisdictions whose courts do not produce very detailed legal opinions. Courts in many civil law jurisdictions, including France, produce very brief opinions that may not stand up to more detailed common law opinions even if the legal reasoning behind them is quite sound.³⁷ Less sophisticated reviews of the case law may also give undue weight to the legal reasoning of courts that hear numerous disputes and, correspondingly, produce numerous opinions.

UNCITRAL has long considered the potential value for promoting the uniform interpretation of the CISG and other texts with something beyond a simple and neutral case reporting system. In 1988, it considered a proposal to establish a permanent editorial board that would have compared and analyzed decisions. More recently, when approving the CISG Digest it considered a proposal that the Digest should provide more detailed guidance as to the interpretation of the CISG. Neither of these proposals was adopted.³⁸ In both cases, the Commission was concerned that any evaluation might lead to criticism of national court decisions. It also noted that an editorial board would be difficult to organize in a way assuring viewpoints from all Convention state parties.³⁹ In sum, since the CISG is incorporated into national law, it is easy to understand how the notion of an outside body weighing national court decisions might raise sovereignty concerns, especially if that body does not include a representative from every state party.⁴⁰

The idea of developing an interpretive guide on how provisions of the CISG should be construed (possibly in a similar form to the UNCITRAL legislative guides relating to insolvency and security interests, or recommendations regarding arbitration rules and particular aspects of the New York Convention) is a suggestion that may warrant consideration. However, at this point in the maturity of the instrument and its jurisprudence, this idea would likely raise similar concerns about the need to evaluate national court decisions. It is further recognized that, even in the form of a declaration by the United Nations General Assembly itself, such guidance would at best be persuasive, but not binding, on courts. Nevertheless, there may be merit in examining what value such explanatory memoranda may bring to the CISG or to any future harmonizing effort in the field of international contract law.

37. See Felemegas, *supra* note 24, at 254.

38. See Bazinas, *supra* note 27, at 21, 23.

39. See Rep. of the U.N. Comm'n on Int'l Trade Law, 21st Sess., Apr. 11–Apr. 20, 1988, ¶¶ 107–109, U.N. Doc. A/43/17; GAOR, 43rd Sess., Supp. No. 17 (1988).

40. See Joshua D. H. Karton & Lorraine de Germiny, *Can the CISG Advisory Council Affect the Homeward Trend?*, 13 VINDOBONA J. INT'L COM. L. ARB. 71, 74 (2009).

In the meantime, it is evident that outside actors have been able to develop some of these ideas. As a self-appointed group of experts, the CISG Advisory Council constitutes, of course, a valuable initiative to provide the kind of considered interpretive advice on CISG issues long needed.⁴¹ This advice, however is unofficial and non-binding, and this approach, unfortunately, does not resolve the sovereignty issues at play when looking at the issue from the UNCITRAL perspective.

In addition to its efforts to provide case law and digests, UNCITRAL and the secretariat have adopted other smaller-scale strategies for encouraging uniform interpretation of the CISG. These strategies include ad hoc provision of judicial training, support of educational efforts, such as the Vis Moot, and dissemination of information on scholarly works via the UNCITRAL bibliography. These efforts, however, are modest and are not always a very direct method of assisting courts.

For all of these reasons, the UNCITRAL secretariat has proposed a new strategy for implementation of commercial law reform at the domestic level. In the context of the High-Level Meeting on the Rule of Law, held in September of last year at the 67th Session of the United Nations General Assembly, the UNCITRAL secretariat proposed to states the establishment of national centres of expertise in the field of commercial law. Understanding the strong connection between economic development and rule of law, the General Assembly has acknowledged the importance of UNCITRAL's work in promoting rule of law in the economic field as an important component of promoting the rule of law more generally.

The goal behind the proposed national centres would be to strengthen the nexus between international rule-making in the field of commercial law and national legislation, policy-making, and implementation. This would include, of course, implementation of the CISG, one of UNCITRAL's most prominent texts. As a related proposal, the secretariat described specific functions that could take place in the context of these national centres. Explicitly, they could serve as a mechanism to (a) collect, analyze, and monitor national case law related to UNCITRAL texts, (b) report the findings to UNCITRAL, and (c) address the need of the judiciary to better understand the internationally prevailing application and interpretation of UNCITRAL standards and achieve effective cross-border cooperation.

This is a proposal that obviously goes beyond the current national correspondent system of CLOUT. The idea is that these national centres could serve as a direct resource for judges and practitioners. In fact, these centres could function very similarly to the permanent editorial board I mentioned earlier or even as a kind of domestic CISG advisory body, even endorsing CISG Advisory Council opinions if desired. In addition, they could review decisions and communicate directly with courts failing to ap-

41. See CISG ADVISORY COUNCIL, <http://www.cisgac.com> (last visited Apr. 9, 2013).

ply the CISG where required. By placing these centres at the national level, sovereignty concerns would be mitigated. Furthermore, the staff or researchers in these centres would be better situated to understand domestic law concerns than an international body. Certainly, with its small staff and limits in how it can interact on domestic law issues, the UNCITRAL secretariat has proven to be not adequately resourced or appropriately situated to assist courts globally in the task of uniform interpretation. That said, the secretariat would have an important residual role in the context of a network of national centres of expertise, coordinating their activities and continuing to offer the CLOUT system and other services.

A system of national centres would, of course, raise possible concerns related to homeward bias, but if these centres are staffed by experts in the international trade law field and mandated explicitly to promote uniform implementation of texts such as the CISG, these concerns should be minimized.

The biggest obstacle to such a system is, of course, resources. One of the advantages of UNCITRAL texts is that they do not have direct financial implications for contracting states. That said, states are required to fulfill their international law obligations in any case, including those found in CISG Article 7. These national centres of expertise are one proposed method for assisting them to do that since other, lower-cost, methods have not entirely succeeded. The centres themselves would constitute a cost, and there would also be costs for the UNCITRAL secretariat related to coordination, not to mention the ongoing costs related to its continuing implementation efforts, such as CLOUT.

When addressing this proposal to states, the UNCITRAL secretariat noted that such centres, considering their strong connection to the development of economic rule of law, could rely on the assistance of multilateral and bilateral donors to ensure sufficient human and financial resources. There are many donors available to fund projects related to the rule of law, particularly projects in developing countries and those with economies in transition.

I hope this proposal is of interest to states as they consider possible ways forward in the area of uniform contract law. These centres could be valuable resources for the dissemination and implementation of any texts to be developed or already developed in this area. Furthermore, they would act to continue the development at the national level of international trade law expertise, something necessary to keep the work of bodies such as UNCITRAL vibrant and relevant. Whether or not this proposal is acted upon by states, I hope it will encourage discussion and the development of other strategies as states continue to look at the development of rule of law and uniform international trade law. At the least, I hope it will remind states of their ongoing treaty obligations under the CISG and other trade law instruments.

So, in closing, the calls for further harmonization of contract law raise a number of interesting issues about additional work that can be done in this important area. In considering some of the options that have been proposed, we are reminded of the challenges we have faced not only in the creation of such harmonizing instruments but also the adoption and, possibly most importantly, the implementation of such instruments. We can draw upon the experiences of the implementation of the CISG to chart a way forward for the development of any such future projects in this area.

The challenges that we face in developing a truly harmonizing instrument are well recognized. It is up to us, collectively, to develop creative responses to ensure that the potential of harmonization efforts are fully realized. These opportunities are not only important in considering the creation of new harmonizing instruments, but allow us to reflect upon how well we are doing in fulfilling our mandate with respect to existing instruments and identifying what more can be done. To be effective, meeting these challenges will require the development of innovative solutions, adequate resourcing, and a strong commitment not only from organizations such as UNCITRAL, but also from member states and the broader academic and legal community. Let us hope that, when the opportunity next presents itself for an examination of these issues, we can report concrete progress in this area.

