THE GUIDING ROLE OF THE CISG AND THE UNIDROIT PRINCIPLES IN HARMONISING INTERNATIONAL CONTRACT LAW

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Recently, a proposal was introduced in the United Nations Commission on International Trade Law (UNCITRAL) calling for a new project on international contract law. It is the view of this paper that there are more practical, positive, and forward-looking alternatives that build on the existing platform of the CISG and the UNIDROIT Contract Principles, and that UNCITRAL should focus on these alternatives.

I INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (CISG)[1] and the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts (UNIDROIT Contract Principles or UPICC)[2] stand as the cornerstones in the efforts by the international community to harmonize and modernize international contract law.

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1 See United Nations Convention on Contracts for the International Sale of Goods, 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) [hereinafter CISG], available at <www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

2 See International Institute for the Unification of Private Law (UNIDROIT), *Principles of International Commercial Contracts* (2010 ed) [hereinafter UNIDROIT Contract Principles], available at <www.unidroit.org/english/principles/contracts/main.htm>.

Recently, a proposal was introduced in the United Nations Commission on International Trade Law (UNCITRAL) calling for a new project on international contract law. The United States opposes this proposal for the following reasons:

- the CISG and the UNIDROIT Contract Principles address well the needs in this area and have been remarkably successful;
- the negotiation and preparation of a new instrument is not feasible;
- a new instrument might have a negative impact on the adoption of the CISG and the application of the UNIDROIT Principles;
- there is no demonstrated desire for this project from those whose transactions would be governed by it; and
- there are other, more practical and efficient ways to update and harmonize international contract law.

II SUMMARY

In April 1980, the CISG was adopted at a diplomatic conference convened by the UN General Assembly, after a half-century of work in the international arena, including a decade of work in UNCITRAL.[3] In 2011, UNIDROIT approved a third edition of the UNIDROIT Contract Principles, after more than three decades of work, including the earlier approval of a first edition of the Principles in 1994 and a second edition in 2004.[4] Taken together, these two instruments provide a comprehensive and modern framework for international sales and contract law.

At its July 2013 session, UNCITRAL decided on the basis of a U.S. proposal to hold a colloquium in 2015 celebrating the 35th anniversary of the CISG.[5] It was pointed out that since a 2005 UNCITRAL colloquium celebrating the 25th Anniversary of the CISG, 16 more states have become party to the Convention, bringing the total number of parties to 79.[6] It was also agreed at the 2013

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3 See Peter Schlechtriem *Uniform Sales Law: The Un-Convention on Contracts for the International Sale of Goods* (Peter Doralt & Helmut H Haschek eds, 1986) 17-21; John O Honnold *Uniform Law for International Sales Under the 1980 United Nations Convention* paras (Harry M Flechtner ed, 4th ed, 2009) 4-10.

4 The third edition of the UNIDROIT Contract Principles was officially adopted by UNIDROIT in May 2011. See Governing Council of UNIDROIT, Summary of Conclusions, para 6 (May 2011), available at <www.unidroit.org/english/documents/2011/cd90-conclusions-e.pdf>. As stated in the Preamble, "[t]he main objective of the third edition of the UNIDROIT Principles was to address additional topics. ... Thus 26 new articles have been added dealing with restitution in case of failed contracts, illegality, conditions, [and] plurality of obligors and obligees," UNIDROIT Contract Principles, Preamble.

5 Rep of the UN Comm'n on Int'l Trade Law, 46th Sess, 8-26 July 2013, para 315, UN Doc A/68/17, GAOR, 68th Sess, Supp No 17 (2013) [hereinafter Report of the 46th Session].

6 See Proposal by the Government of the United States Regarding UNCITRAL Future Work, UN Doc A/CN.9/789, 10-11 (13 June 2013) [hereinafter US Proposal on UNCITRAL Future Work],

Commission session that the scope of the 2015 colloquium would look at the Convention broadly, including the complementary nature of the UNIDROIT Contract Principles.[7]

States further agreed that the colloquium would address aspects of a proposal made at the 2012 session of the Commission calling for consideration of a new comprehensive codification of contract law rules and principles for business-to-business international transactions.[8] The CISG was stated by the proponents of the proposal to be "merely a sales law" and "a piecemeal work, leaving important areas to the applicable domestic law."[9] The UNIDROIT Contract Principles were characterized as "a soft law instrument" with a "mere opt-in scheme."[10] At the 2012 Commission session, a number of delegations, including the United States, expressed clear opposition to any effort to develop a new framework for international contract law, given the wide acceptance of CISG and the UNIDROIT Contract Principles and the unlikelihood of achieving a much-expanded new treaty on a broader range of issues. Nonetheless, the Secretariat was requested "to organize symposiums and other meetings ... to assist the Commission in the assessment of the desirability and feasibility of future work in the field of general contract law."[11] In part to fulfill this mandate, UNCITRAL co-sponsored a symposium entitled "Assessing the CISG and Other International Endeavours to Unify International Contract Law" at the Villanova University School of Law,

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available at <www.uncitral.org/uncitral/commission/sessions/46th.html>. For the parties to the CISG see *Status 1980 - UN Convention on Contracts for the International Sale of Goods*, available at <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.

7 Report of the 46th Session, above n 5, para 315.

8 See Possible Future Work in the Area of International Contract Law: Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law, 1, 7-8, UN Doc. A/CN.9/758 (8 May 2012) [hereinafter *Swiss Proposal*] available at <www.uncitral.org/uncitral/commission/sessions/45th.html>. The proposal would exclude business-to-consumer transactions. See Ingeborg Schwenzer "Who Needs a Uniform Contract Law, and Why?" (2013) 58 Vill L Rev 723, 729 ("Like the CISG, the instrument on general contract law should be confined to b2b contracts without touching business-to-consumer (b2c) relationships"). Professor Schwenzer served as a member of the Swiss delegation to the 2012 Session of the Commission and introduced the Swiss proposal. Article 2 of the CISG provides that the Convention does not apply to sales of goods bought for individual, family, or household purposes.

9 Swiss Proposal, above n 8, at 3.

10 Ibid at 5.

11 See Rep of the UN Comm'n on Int'l Trade Law, 45th Sess, 25 June–6 July 2012, paras 127–132, UN Doc A/67/17, GAOR, 67th Sess, Supp No 17 (2012) [hereinafter Report of the 45th Session] (summarizing debate).

United States, in January 2013, and held an expert meeting on contract law at the UNCITRAL Regional Centre for Asia and the Pacific in February 2013.[12]

Based on the discussions at these meetings, the United States continues to oppose a new framework on international contract law for the same reasons. The UNIDROIT Contract Principles already provide a useful complement to the CISG. At both its 2007 and 2012 sessions, the Commission endorsed the UNIDROIT Contract Principles - commending them for their intended purposes, identifying them as complementary to the CISG, and congratulating UNIDROIT on preparing "general rules for international commercial contracts."[13] Moreover, an initiative on the scale proposed would be an enormous project, consuming considerable resources of both international organisations and states for many years, with limited likelihood of success. The scope of the CISG was intentionally limited to exclude issues on which a consensus could not be reached, and we have seen no evidence that those differences have fundamentally changed in recent years.

We believe that there are more practical, positive, and forward-looking alternatives that build on the existing platform of the CISG and the UNIDROIT Contract Principles, and that UNCITRAL should focus on these alternatives.[14]

III IS A NEW FRAMEWORK NECESSARY AND FEASIBLE?

At its July 2013 session, the Commission reviewed the general criteria for assessing whether legislative work should be undertaken "in light of the increasing number of topics referred to UNCITRAL for consideration" and "[b]earing in mind the scarce resources ... and particularly the limited conference room time available."[15] The Commission decided that work should only proceed if:

(1) the topic is "amenable to harmonisation and the consensual development of a legislative text";

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12 See Rep of the 46th Session, above n 5, para 314. The papers relating to the Villanova symposium are published in Issue 58:4 of the Villanova Law Review.

13 See Rep of the 45th Session, above n 11, para 140 (endorsing the 2010 edition of the Principles); Rep of the UN Comm'n on Int'l Trade Law, 40th Sess, 25 June–12 July 2007, para 213, UN Doc A/62/17 (Part I), GAOR, 62d Sess, Supp No 17 (2007) (endorsing the 2004 edition of the Principles).

14 US Proposal on UNCITRAL Future Work, above n 6, at 10-11.

15 Report of the 46th Session, above n 5, paras 294, 303. At its 2011 session, the Commission agreed to reduce its entitlement to conference services to a total of 14 weeks per year "in view of the extraordinary constraints placed on the Commission and its secretariat to reduce regular budget expenditures during the 2012-2013 biennium." See Rep of the UN Comm'n on Int'l Trade Law, 44th Sess, 27 June– 8 July 2011, para 347, UN Doc A/66/17, GAOR, 66th Sess, Supp No 17 (2011).

(2) "the scope of a future text and the policy issues for deliberation were sufficiently clear";

(3) "a legislative text on the topic would enhance modernization, harmonisation or unification of the international trade law"; and

(4) legislative development would not "duplicate legislative work on topics being undertaken by other international or intergovernmental bodies."[16]

Applying these criteria, the original proposal did not clearly delineate the scope of a future text and the policy issues for deliberation. The proposal called for UNCITRAL to establish a new mandate for work to be undertaken but is couched in general terms and only requested that states discuss what particular form UNCITRAL's future work on international contract law might take. The proponents have clarified in the subsequent meetings that they envision a binding convention like the CISG, except that it would apply to all kinds of international contracts and not just to sales.[17] This paper evaluates the proposal on that basis. In all events, the possible alternative solution of developing a set of non-binding rules on general contract law would duplicate and reopen the same issues already addressed in the UNIDROIT Contract Principles.[18]

In our view, the case has not been made for a new comprehensive codification of contract rules in the form of an international convention for the following reasons:

(1) The need for a new international contract law framework has not been demonstrated (taking into account the existence of the CISG and the UNIDROIT Contract Principles, and the ability of parties to designate the UNIDROIT Principles as the law governing their contract).

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16 Report of the 46th Session, above n 5, paras 303-04. See also ibid, paras 310-332 (reporting conclusions concerning ongoing and possible future legislative work).

17 See Schwenzer, above n 8 at 728 (2013) (Asserting that the scope and nature of the proposed instrument should be similar to the CISG, "except that it should apply to all kinds of contracts and not just to sales").

18 See Anna Venzenano "The Soft Law Approach to Unification of International Commercial Contract Law: Future Perspectives in Light of UNIDROIT's Experience" (2013) 58 Vill L Rev 521, 527 ("[I]t would appear to be unwise to duplicate efforts at a global level and start developing yet another set of non-binding rules with a potentially universal application on the same issues already addressed by the PICC"). Proponents of a new contract law initiative are of the same view. See eg Pilar Perales Viscasillas "Applicable Law, the CISG, and the Future Convention on International Commercial Contracts" (2013) 58 Vill L Rev 733, 737 ("[A] model law would not be a good tool for a general contract law instrument ... [since the] UPICC is already a 'model law' available for the states. ... [T]he need for another optional instrument is unconvincing given the variety of options available to businesses.") (footnote omitted).

(2) A new initiative of the scale proposed would have little chance of coming to a successful conclusion at this time.

(3) In the meantime, such a new instrument may inadvertently have a negative effect on the adoption of the CISG or the application of the UNIDROIT Principles.[19]

A Need

The possible value of a new global contract code as either a non-binding or binding mandatory instrument was considered at the 2005 UNCITRAL colloquium celebrating the 25th anniversary of the CISG. At that conference, Professor Herbert Kronke, then Secretary General of UNIDROIT, advised against being seduced by what he termed "the never-subsiding charm of codes."[20] He urged that the focus of private international law formulating agencies be on the effective implementation of existing instruments in the field of international contract law.[21]

1 CISG

At the 2005 colloquium Professor Kronke cited the CISG as probably the single most successful treaty in the history of modern transnational commercial law.[22] At that time, it was recognised that together the share in cross-border trade of the then 63 contracting states to the CISG represented over two-thirds of the total volume of

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19 US Proposal on UNCITRAL Future Work, above n 6, at 10-11.

20 Herbert Kronke "The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond" (2005) 25 JL and Com 451, 462–463. Professor Kronke notes that "[w]hile Professor Bonell is envisaging the [UNIDROIT Contract Principles] assuming that function in maintaining their present status of soft law, Professor Lando insists on their being elevated to binding rules, to be mandatorily applied to non-domestic and non-inter-European transactions." Ibid at 463. The need and feasibility of a global contract code was again discussed at the UNCITRAL Congress "Modern Law for Global Commerce", 9-12 July 2007, Vienna. See Michael Joachim Bonell "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, 238-9 (2007), available at <www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf>. Professor Bonell concluded that:

> The Unidroit Principles, prepared as a soft-law instrument, have been very favourably received in practice. To transform them into binding legislation in the form of an international convention is neither feasible nor recommendable.

Ibid at 239. He continued to suggest that UNCITRAL might prepare, in cooperation with other interested international organisations, a global commercial code to be adopted in the form of a model law (and not a treaty) which refers to the UNIDROIT Contract Principles as its general contract law. Ibid.

21 Kronke above n 20, at 463-464.

22 Ibid at 451.

international trade.[23] Today, with 80 contracting states, including Japan (accession in 2008) and Brazil (accession in 2013), that share likely represents a significantly greater percentage of the total volume of world trade.[24]

At the 2005 colloquium, it was also generally recognised that the CISG provides an equitable and modern framework for the contract of sale, which is the backbone of international trade in all countries. State parties range from the least economically developed to the most developed, and all major legal traditions of the world are represented among them. As Jernej Sekolec, then Secretary of UNCITRAL concluded in his welcoming address, "[t]his makes the Convention a world sales law and the experience with the Convention guarantees that the membership of the Convention will continue to grow."[25]

During the recent discussion on whether a new initiative is appropriate, there appears to be universal agreement concerning the positive effect that the CISG has had on the development of international contract law. For example, at the Villanova symposium, Professor Anna Veneziano, the Deputy Secretary General of UNIDROIT, aptly summarized the effect of the CISG as follows:[26]

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23 See Jernej Sekolec "Welcome Address, 25 Years UN Convention on Contracts for the International Sale of Goods" (2005) xv JL & Com available at <www.cisg.law.pace.edu/cisg/biblio/sekolec.html>.

24 See Press Release, United Nations Information Service, Brazil accedes to the United Nations Convention on Contracts for the International Sale of Goods, UNIS/L/182 (5 March 2013), available at <www.unis.unvienna.org/unis/pressrels/2013/unisl182.html>; Press Release, Japan Accedes to United Nations Convention on Contracts for the International Sale of Goods, UNIS/L/120 (4 July 2008), available at <www.unis.unvienna.org/unis/pressrels/2008/unisl120.html>.

25 Sekolec, above n 23, at xv.

26 *See* Veneziano, above n 18, at 522-523 (footnotes omitted). Several papers presented at the UNCITRAL Congress on Modern Law for Global Commerce, *supra* note 20, further highlight that parties are increasingly selecting the CISG to govern their international contracts. See, eg Harry M Flechtner *Changing the Opt-Out Tradition in the United States*, (2007), available at <www.uncitral.org/pdf/english/congress/Flechtner.pdf>; Eckart Brödermann *The Practice of Excluding the CISG: time for change?* (2007) available at <www.uncitral.org/pdf/english/congress/Broedermann-rev.pdf>. Also of significance is the number of declarations that have been withdrawn by states, including the recent withdrawal of declarations regarding Article 92 of the CISG by Denmark, Finland, and Sweden. These states all ratified the Convention subject to a declaration pursuant to Article 92, that they would not be bound by Part II (Formation). See United Nations Convention on Contracts for the International Sale of Goods: Declarations and Reservations, United Nations Treaty Collection (1 January 2014, 5:00 PM), <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en#bottom> (reporting notification of withdrawal of declarations under Article 92 made by Finland on November 28, 2011, Sweden on May 25, 2012, and Denmark on July 2, 2012). Also recently, Latvia, China and Lithuania have withdrawn their "written form" declaration under articles 12 and 96 of the CISG, thereby joining the vast majority of states that allow freedom of

> The Convention indeed constitutes an extraordinary achievement not only for the unprecedented width of its scope of application and the high number of states from all continents which participated in the Diplomatic Conference in Vienna, nor just for its subsequent undeniable success in terms of ratifications and its practical application. Perhaps even more significantly, it has played a major role in building a universally shared vocabulary and a common denominator of rules which have since represented the basis for any academic discourse on international contract law, as well as serving as a model for national legislation and international and supranational instruments alike. Last but not least, it has offered the opportunity to develop various methods to strive for uniformity in the interpretation by domestic courts and arbitral tribunals in different jurisdictions.

2 UNIDROIT Contract Principles

At the 2005 colloquium, Professor Kronke also addressed the complementary effect of the binding nature of the CISG and the non-binding nature of the UNIDROIT Contract Principles. He concludes:[27]

> What we see looking at the two instruments - the CISG as the mother of all modern conventions on the law of specific contracts and the UPICC as the (inevitably) soft-law source of modern general contract law - are neither competitors nor apples and pears. What we see is actually, and even more, potentially, a fruitful coexistence . . . . [T]he UNIDROIT Contract Principles are, obviously, complementary in that they address a wide range of topics of general contract law which neither the CISG nor any other existing or future convention devoted to a specific type of transaction would ever venture to touch upon.

In its current form the UNDROIT Contract Principles can be used for diverse purposes. As pointed out above, UNCITRAL, when endorsing the UNIDROIT Contract Principles "commend[ed] the use" of the Principles "as appropriate for their intended purpose" as set forth in the Preamble.[28] The Preamble states that:[29]

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contractual form. See ibid (reporting notification of the withdrawal of the declaration by Latvia on November 13, 2012, China on 16 January 2013, and Lithuania on 1 November 2013).

27 Kronke, above n 20, at 458-459. The CISG is binding by force of law unless the parties exclude the application of the Convention pursuant to Article 6 (the so-called out-out solution). The UNIDROIT Contract Principles are applicable only if the parties have agreed on their application (opt-in).

28 See Report of the 45th Session, above n 11, para 140; Report of the 40th Session, above n 13, para 213.

29 UNIDROIT Contract Principles, above n 2, Preamble.

> They shall be applied when the parties have agreed that their contract be governed by them.
>
> They may be applied when parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like ... [and] when the parties have not chosen any law to govern their contract.
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> They may be used to interpret or supplement international uniform law instruments ... [and] to interpret or supplement domestic law.
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> They may serve as a model for national and international legislators.

Today, more than 300 published decisions rendered worldwide refer one way or the other to the UNIDROIT Contract Principles.[30] As has been pointed out, "since most of the decisions relating to the UNIDROIT Principles are arbitral awards which are not published, the total number of decisions referring ... to the UNIDROIT Principles is considerably greater."[31] Professor Veneziano appropriately concludes "[a]lmost twenty years after the publication of their first edition, it is fair to say that the PICC, notwithstanding their non-binding nature - or maybe precisely as a consequence of their soft law character - have enjoyed great success when compared with other international uniform law regulations (including the ones which have binding force)."[32]

3 What Are the Needs of Business?

Obviously, it is important that any new product reflect the needs of cross-border commerce; otherwise, the parties will simply choose other options as the governing law (either by opting out or in). Based on our consultations and other analysis we have found no support for a new initiative, nor concerted views from the business community that significant transactional impediments exist which could justify such a project. In business-to-business international transactions (the focus of the proposal for additional work), it would appear that the market is operating effectively and that differences in contract law do not pose a serious obstacle to cross- border trade.

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30 For international case law and bibliography relating to the UNIDROIT Principles, see UNILEX on CISG and UNIDROIT Principles, http://www.unilex.info (last visited Sept. 12, 2013).

31 Ibid. See also Veneziano, above n 18, at 525.

32 Ibid. See also Kronke, above n 20, at 453-5 (referencing standard form contracts that refer to the UNIDROIT Contract Principles directly).

(a) US Consultations

The US government has consulted extensively with key US stakeholders focused on international contract law and the sale of goods and we have found no support for a new initiative on international contract law. In October 2012, the proposal in UNCITRAL was the subject of a discussion at the annual meeting of the State Department's Advisory Committee on Private International Law (which includes academicians, practitioners, and representatives of business interests).[33] At that meeting, the proposal for a new contract law text was not supported.[34] Subsequently, the Executive Committee of the Uniform Law Commission (ULC) - the organisation that co-developed, with the American Law Institute, the Uniform Commercial Code in the United States - adopted a resolution stating that the ULC opposes the proposal made in UNCITRAL because the project is very unlikely to be successful and because an attempt to develop the type of instrument proposed would not be a prudent use of resources.[35] On this basis, it is our view that the time is not right for undertaking a new initiative on international contract law.

(b) Surveys

Proponents of a new initiative generally assert that "[d]ifferent surveys conducted during the last years revealed that traders themselves conceive differences in contract law as one of the main obstacles for cross-border transactions."[36] We are not aware of any significant surveys that have been conducted on a global basis that would support such a proposition. The proponents appear to be referencing surveys conducted in the context of the European Commission proposal for a regional Common European Sales Law (CESL).[37]

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33 The Department of State Advisory Committee on Private International Law (ACPIL) holds a plenary meeting annually. See Private International Law, US Dep't of State, <www.state.gov/s/l/c3452.htm> (last visited 22 August 2013) (providing information regarding ACPIL, including a summary of 11-12 October 2012 annual meeting).

34 See ibid (reporting that the "proposal was not supported; participants questioned the need for and feasibility of such an endeavor").

35 See Unif Law Comm'n, Minutes: Mid-Year Meeting of the Executive Committee 8 (2013), available at <www.uniformlaws.org/shared/docs/executive/2013jan12_EC_Min_Midyear_Final.pdf>.

36 Swiss proposal, above n 8, at 2. The proponents did not identify the specific surveys they were relying upon.

37 Professor Schwenzer in the Villanova symposium cited a Clifford Chance survey as support for the proposition that differences in contract law act as a barrier to trade. See Schwenzer, above n 8, at 723. For the survey see Stefan Vogenauer and Stephen Weatherill "The European Community's Competence to Pursue the Harmonisation of Contract Law - An Empirical Contribution to the Debate" in Stefan Vogenauer and Stephen Weatherill (eds) *The Harmonisation of European Contract Law: Implications for European Private Laws* (Business and Legal Practice, 2006) 105, 117-136. The survey involved 175 businesses across eight European countries and concludes that 83% of those businesses surveyed would welcome an EU contract law but only if it is optional.

While these surveys may support the view that differences in mandatory consumer protection laws pose an obstacle to cross-border business-to-consumer trade in Europe, they do not establish that differences in contract law pose a significant obstacle to cross-border business-to-business trade (the focus of the UNCITRAL proposal) across the European Union, let alone outside of that region.[38] Moreover, the addition of one more set of international contract rules, given the existence of party autonomy and the right to choose the applicable law and "rules of law" for an international transaction, could serve to exacerbate the number of "differences in contract law" by adding yet another alternative.[39] The main problem with the current system is arguably too much choice.

(c) Views of the ICC

Our conclusion is supported by the views of the International Chamber of Commerce (ICC) (representing hundreds of thousands of businesses in more than 120 countries) offered in the context of the European Commission proposal for the CESL.[40] In July 2013, the ICC circulated a letter urging members of the European

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Ibid at 120, 125-30. But the authors did not draw a distinction between business-to-business transactions (the focus of the proposal for additional work in UNCITRAL) and business-to-consumer transactions. The authors state: "It is also pertinent to note the questions we did *not* ask. ... [W]e constantly referred to 'cross-border transactions' without distinguishing B2B and B2C transactions." Ibid at 138 (emphasis in original).

38 See, eg The Swedish Government's views on the Green Paper on European contract law, 2-3 (2011), available at <http://ec.europa.eu/justice/news/consulting_public/0052/contributions/286_en.pdf> ("Sweden has solicited opinions on the alternatives presented in the Green Paper from, among others business organisations representing both large and small companies. The majority of those organisations questioned the need for a European contract law instrument for commercial relations. In this connection, they have particularly highlighted freedom of contract and the importance of standard contracts and the CISG to parties in international trade. ... In consumer relations it is more obvious that divergent regulations can constitute a problem in cross-border trade").

39 Some proponents of a new initiative in UNCITRAL acknowledge that differences between contract laws in different countries do not constitute a major obstacle to cross-border business-to-business trade in Europe. See Rafael Illescas Ortiz and Pilar Perales Viscasillas "The Scope of the Common European Sales Law: B2B, Goods, Digital Content and Services" (2012) 11 J Int'l Trade L & Pol'y 241, 242-243 ("The differences between contract laws in different countries do not constitute a major obstacle to cross-border trade, and it is not entirely correct to state that the search for the applicable law is a barrier to trade").

40 The ICC has developed a number of standard term contractual rules that have contributed to the harmonisation of international commercial law, such as the INCOTERMS and the Uniform Customs and Practices relating to Documentary Credits (UCP). UNCITRAL has endorsed both instruments concluding that they constitute "a valuable contribution" to facilitating the conduct of global trade. See Rep of the 45th Session, above n 11, para 144 (endorsing ICC INCOTERMS 2010); Rep of the UN Comm'n on Int'l Trade Law, 42d Sess, June 29-July 17, 2009, paras 356-57, UN Doc A/64/17, GAOR, 64th Sess, Supp No 17 (2009) (endorsing ICC Uniform Customs and Practices for Documentary Credits (UCP 600)).

Parliament to remove business-to-business sales from the scope of the CESL.[41] The letter stated:[42]

> Contrary to the assertions of the European Commission, ICC has found no evidence that companies, including small- and medium-sized enterprises (SMEs), are being hindered significantly in cross-border EU business activities as a result of the different legal systems among EU member states, provided that national legal systems have a foundation in the principle of freedom of contract.
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> ...
>
> CESL risks increasing legal uncertainty and transaction costs. The addition of a new, optional sales law instrument risks considerably increasing legal uncertainty for companies, rather than reducing it.
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> ...
>
> Freedom of contract should be preserved. ... It is a determining principle of contract law in all European legal systems that enables businesses to conduct cross-border commercial transactions based on self-negotiated contracts or standard contracts and general terms and conditions of businesses relatively easily.

Earlier the ICC observed that:

> [T]he [European Commission] Green Paper does not give enough weight to the UN sales convention (CISG), which should be the law governing cross-border sales both within the EU and between the EU and third countries. The convention has so far been ratified by 76 [now 80] countries around the world, among them all but four European countries. Although it is limited to business-to-business trade in movables it represents a huge step towards a global sales law. For European businesses it has meant a significant simplification of cross-border trade, both within and outside the EU. If a further level of contract law in general and sales law in particular were to be introduced in the EU, there is a risk that this would complicate rather than simplify the legal situation for European business. We also wish to point out that ratification of CISG by the remaining EU member states would be a significant step in simplification of the cross-border trade in the EU.[43]

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41 *See ICC urges Members of the European Parliament to remove B2B sales from scope of Common European Sales Law*, (8 July 2013), available at <www.iccwbo.org/News/Articles/2013/ICC-urges-Members-of-the-European-Parliament-to-remove-B2B-sales-from-scope-of-Common-European-Sales-Law/>.

42 Ibid.

43 See *ICC Response to European Commission Green Paper on European Contract Law* 1-2 (January 2011), available at <www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2011/ICC-Response-to-European-Commission-Green-Paper-on-European-Contract-Law,-

The ICC also noted that:[44]

> [T]he UNIDROIT principles already provide an "optional instrument" for business-to-business contracts, and that the freedom to choose the applicable law also means that all available national laws can be seen as "optional instruments."

Based on these observations, a demonstrated desire for a new initiative on contract law does not appear to exist on the part of those whose transactions would be governed by it.

4 Recognition of Rules of Law

Proponents of a new initiative on international contract law state that "UNCITRAL may wish to remain conscious that many courts will decline to give effect to a choice of law in favour of a soft law instrument."[45] Nonetheless, a significant development in the choice of applicable contract law is the progressive recognition of the freedom of parties to choose as the governing law of the contract not only state law, but also rules of law, such as the UNDROIT Contract Principles.[46]

While such recognition is growing, the concept is more widely accepted in arbitral tribunals than courts. Accordingly, the Preamble to the UNIDROIT Contract Principles states that "[p]arties who wish to choose the UNIDROIT Principles as the rules of law governing their contract are well advised to combine such a choice-of-law clause with an arbitration agreement."[47] In arbitration practice, the ability of parties to refer to rules of law to govern their contract has become increasingly well-recognised. For example, "[t]he reference to '*rules of law*,' rather than merely '*law*,' [in Article 28(1) of the UNCITRAL Model Law] has been interpreted as permitting parties validly to select non-national legal systems in their choice-of-law agreements."[48] Similarly, the 2010 UNCITRAL Arbitration

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2011/>. Within the European Union, only the UK, Ireland, Portugal and Malta are not parties to the CISG.

44 Ibid at 2.

45 See Swiss Proposal, above n 8, at 5.

46 See Permanent Bureau of the Hague Conference, *Feasibility study on the choice of law in international contracts - special focus on international arbitration*, Prel Doc No 22 C (March 2007) available at <www.hcch.net/upload/wop/genaff_pd22c2007e.pdf>.

47 UNIDROIT Contract Principles, above n 2, Preamble, part 4a.

48 Gary B Born II *International Commercial Arbitration* (2009) 2144 (emphasis in original). The UNCITRAL Model Law on International Commercial Arbitration (1985) (as amended in 2006), is available at <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>.

Rules (Article 35(1)) specify that "[t]he arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute."[49] Many institutional arbitration rules permit the tribunal to apply directly the UNIDROIT Contract Principles even in the absence of a choice of law. For instance, Article 21(1) of the 2012 ICC Arbitration Rules provides that "[t]he parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate."[50]

In international litigation, however, the ability of parties to refer to rules of law to govern their contracts is more limited. As the Preamble to the UNIDROIT Contract Principles notes:

> [F]reedom of choice of the parties in designating the law governing the contract is traditionally limited to national laws. Therefore, a reference by the parties to the Principles will normally be considered to be a mere agreement to incorporate them into the contract, while the law governing the contract will still have to be determined on the basis of the private international law rules of the forum. As a result, the Principles will bind the parties only to the extent that they do not affect the rules of applicable law from which the parties may not derogate.[51]

In this regard, the Rome I Regulation permits the parties to incorporate by reference a non-state body of law into their contract.[52] The Inter-American

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49 UNCITRAL Arbitration Rules (as revised in 2010), art 35(1), available at <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html>.

50 Int'l Chamber of Commerce, Rules of Arbitration, art 21(1) (2012), available at <www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/ICC-Rules-of-Arbitration/#>. See also Int'l Ctr for Dispute Resolution, Arbitration Rules, art 28(1) (2009), available at, <www.icdr.org>; London Court of Int'l Arbitration, LCIA Rules, art 22(3) (1998), available at <www.bu.edu/lawlibrary/PDFs/research/portals/pdfs/lcia_rules_arbitration_english.pdf>; Austl Ctr for Int'l Commercial Arbitration, Acica Arbitration Rules, art 34.1 (2005), available at <www.acica.org.au/downloads/ACICA_Arbitration_Rules.pdf>; NETH Arbitration Inst, NAI Arbitration Rules, art 46 (1998), available at <www.asser.nl/default.aspx?site_id=6&level1=14433&level2=14445>; Stockholm Chamber Of Commerce, SCC Arbitration Rules, art 22(1) (2010), available at <www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler%20eng%20ARB%20TRYCK_1_100927.pdf>; Vienna Int'l Arbitral Ctr, Rules of Arbitration & Conciliation, art 27 (2013), available at <www.viac.eu/en/arbitration/arbitration-rules-vienna/93-schiedsverfahren/wiener-regeln/144-new-vienna-rules-2013#ApplicableLawAmiableCompositeur>; World Intellectual Prop Org, WIPO Arbitration, Mediation,& Expert Determination Rules & Clauses, art 59 (2002), available at <www.wipo.int/freepublications/en/arbitration/446/wipo_pub_446.pdf>.

51 See UNIDROIT Contract Principles, above n 2, Preamble, part 4a.

52 See Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations, 2008 OJ (L177/6) [hereinafter Rome I Regulation]. Recital 13 states that Rome I "does not preclude parties from incorporating by reference into their contract a non-state body of law. ..." Ibid, Recital 13. During the negotiations

Convention on the Law Applicable to International Contracts (Mexico City Convention) is more permissive in recognizing the ability of the parties to select the applicable law.[53]

In the Hague Conference on Private International Law (Hague Conference), states are engaged in a work in progress designed to promote party autonomy and as part of that work recognize and promote use of rules of law, such as the UNIDROIT Contract Principles. The draft Principles on Choice of Law in International Contracts endorse recognizing the choice of parties to have their contract governed by "rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules."[54] The definition of rules of law includes the UNIDROIT Contract Principles, enabling parties who so desire to have their contracts governed by the UNIDROIT Contract Principles.

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concerning Rome I, a proposal to allow parties to choose non-state norms was rejected. See Ole Lando and Peter A Nielsen "The Rome I Regulation" (2008) 45 Common Mkt L Rev 1687, 1694-98; K Boele-Woelki and Vesna Lazić "Where Do We Stand on the Rome I Regulation?" in K Boele-Woelki and F Grosheide (eds) *The Future Of European Contract Law* (2007) 19, section 3.4.

53 Inter-American Convention on the Law Applicable to Int Contracts, 17 March 1994, 33 ILM 732. The Convention states in Article 9 that "if the parties have not selected the applicable law ... . The Court ... shall also take into account the general principles of international commercial law recognised by international organisations."

Article 10 further recognises that "principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case." The references to general principles of international commercial law include the UNIDROIT Principles. See Maria Mercedes Albornoz "Choice of Law in International Contracts in Latin American Legal Systems" (2010) 6 J Priv Int'l L 23, 27. On a US domestic level, Comment 2 to UCC § 1-302, as revised in 2001, states that "parties may vary the effect of [the Uniform Commercial Code's] provisions by stating that their relationship will be governed by recognised bodies of rules or principles applicable to commercial transactions ... [such as] the UNIDROIT Principles of International Commercial Contracts." UCC § 1-302 cmt 2 (2001).

54 Draft Hague Principles on the Choice of Law in International Commercial Contracts [hereinafter Hague Principles on Choice of Law], At its April 2013 meeting, the Hague Council on General Affairs (the Conference's governing body) welcomed the work carried out on the Hague Principles by the Working Group on Choice of Law in International Contracts (individual experts) and by the Special Commission of the Hague Conference at a meeting in November 2012. The Council mandated the Working Group to prepare a draft Commentary, circulate it to all members and observers for comments, finalise the draft Commentary in light of these comments and present a draft of the Commentary and the Hague Principles to the Council for consideration. See Council on General Affairs and Policy of the Conference, Conclusions and Recommendations, para 7 (April 9-11, 2013). Documents concerning the proposed Hague Principles on Choice of Law are available at <www.hcch.net/index_en.php?act=text.display&tid=49>.

During deliberations at a November 2012 meeting of a Special Commission of the Hague Conference concerning the draft Principles, states recognised that in contracts between parties whose legal systems may not be fully developed, the use of rules of law may enable parties to select neutral principles such as the UNIDROIT Contract Principles, rather than debate the merits of choosing the law of one state over another. Also, reluctance to embrace this concept is more justifiable for business-to-consumer transactions (which are included within the scope of the Rome I Regulation) than business-to-business transactions (the subject of the Hague Principles on Choice of Law) inasmuch as consumers in some jurisdictions may be considered to need the help of the state to avoid unfortunate choices of one-sided "rules of law" than are businesses, who can be expected to take care of their own interests more effectively (and decline to agree to a disadvantageous set of rules of law just as they would decline to agree to the disadvantageous state law).[55]

When completed, the Hague Principles on Choice of Law will likely not only assist in expanding the operative effect of the designation of rules of law beyond international arbitration and into the judicial domain, but also increase the use of the UNIDROIT Contract Principles. As Professor Geneviève Saumier, the Chair of the Drafting Committee at the Hague Conference Special Commission deliberations, rightly concluded: "[i]n that sense, the Hague Principles and the UPICC, in combination, may be worth more than the sum of their parts."[56]

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55 As originally drafted, the Hague Principles on Choice of Law simply stated that "a reference to law includes rules of law," consistent with arbitration law and rules generally. During the Special Commission deliberations, the European Union proposed deletion of the provision on the grounds that there are many different forms of non-state rules of law, including international instruments like the UNIDROIT Contract Principles, however there are also rules of law developed by industries and interested parties which are not generally accepted. Many other delegations argued that deletion of the provision would be a step backwards for an instrument intended to promote party autonomy principles for future development. The United States pointed out that a distinction could be drawn between rules of law created by distinguished international organisations and industry or transaction specific rules. The compromise solution was reached in a new Article 3, which only allows parties to choose rules of law that constitute a "set of rules," which are "generally accepted" as "neutral and balanced" such as the UNIDROIT Contract Principles. See Permanent Bureau, Report of the November 2012 Special Commission Meeting on the Choice of Law in International Contracts, paras 12-17 (February 2013). See also Symeon C Symeonides "The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments" (2013 61 Am J Comp L 873 available at <http://comparativelaw.metapress.com/content/p58232663862g73r/fulltext.pdf> (Professor Symenides served as the representative of the then Presidency of the European Union Council at the Special Commission deliberations).

56 Geneviève Saumier "Designating the Unidroit Principles in International Dispute Resolution" Unif L Rev (2012) 533, 547, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012285> (Professor Saumier served as a member of the Canadian delegation for the Hague Conference Special Commission deliberations.). Like UNIDROIT, the Special Commission

5 *Means of Interpreting and Supplementing Uniform Law*

At the 2005 colloquium, Professor Kronke also discussed the issue of whether the UNIDROIT Contract Principles may be referred to when interpreting other instruments, such as under Article 7(2) of the CISG. He points out:[57]

> The controversy turns on Article 7(2) CISG - and similar provisions in a number of other conventions - and the question whether "the general principles on which it is based" must be construed in a narrow sense so as to refer only to general principles encapsulated in the CISG itself or, in any event, crystallized at the time when Article 7 was crafted at the 1980 Diplomatic Conference. While there continues to be authoritative support for this view the more widely held and, it is submitted, preferable opinion sees "the general principles" referred to in, for example, Article 7(2) CISG as the essence of transnational contract law as it is evolving over time and across subject matters.

He further observes:[58]

> What must be shown in the case at hand is, obviously, that the issue at stake (e.g. compensation of the other party in case of nonperformance) falls within the scope of the CISG and that the relevant provisions of the UPICC do express the "general" principles on which the CISG is based.

In 2010, UNIDROIT initiated a project to develop model clauses that would ensure that the UNIDROIT Contract Principles would govern the contract, including as a means of supplementing and interpreting the CISG. With regard to the CISG, it was observed that:[59]

> [I]n actual practice both judges and arbitrators ... increasingly resort to the UNIDROIT Principles to interpret and supplement the CISG. ... There are cases where recourse to the UNIDROIT principles has been justified on the ground that the individual provisions of the UNIDROIT Principle invoked as gap-fillers could be

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determined that a soft law approach - involving principles - is preferred in developing an instrument on choice of law in international commercial contracts. See Report of Special Commission Meeting, above n 55, paras 6-7.

57 Kronke, above n 20, at 457-458 (footnotes omitted).

58 Ibid at 458. See also John O Honnold "Uniform Laws for International Trade: Early 'Care and Feeding' for Uniform Growth" (1995) 1 Int'l Trade and Bus L J 1, 6 available at <www.cisg.law.pace.edu/cisg/biblio/honnold3.html> (discussing negotiating history of CISG Article 7(2)).

59 UNIDROIT Rapporteur M J Bonell "Model Clauses for Use of the UNIDROIT Principles of International Commercial Contracts in Transnational Contract and Dispute Resolution Practice" 14-16 (Study L – MC Doc 1 Rev, 2013) available at <www.unidroit.org/english/documents/2013/study50/mc/s-50-mc-01rev-e.pdf>.

> considered as an expression of general principles underlying both the UNIDROIT Principles and the CISG. ... On other occasions the UNIDROIT Principles have been applied as evidence of "usages widely known in international trade" according to Article 9(2) of the CISG.

It was further recognised, however, that the "[p]arties to an international sales contract governed by the CISG may wish to stipulate either in their contract or after the commencement of a court or arbitral proceedings that the CISG should be interpreted or supplemented by the UNIDROIT Principles" in order to "ensure that judges or arbitrators, when faced with ambiguities or veritable gaps in the CISG, will primarily resort to the UNIDROIT Principles to settle the issues and turn to domestic law only as a last resort."[60]

In May 2013, the UNIDROIT Governing Council approved Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts (Model Clauses) that include provisions to enable the parties to an international sales contract to stipulate in their contract that the CISG should be interpreted and supplemented by the UNIDROIT Contract Principles.[61] UNIDROIT explained that, "[b]y using this Model Clause the parties would impliedly derogate from Article 7(2) CISG by indicating that gaps in the Convention are to be filled in conformity with the UNIDROIT Principles and as a last resource with reference to the applicable domestic law."[62]

The Model Clauses should further enhance the implementation and use of the UNIDROIT Contract Principles, including as a means of interpreting and supplementing the CISG.[63]

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60 Ibid at 17-18 (also citing examples where these clauses have been employed in practice).

61 UNIDROIT, Model Clauses for the Use of the Unidroit Principles of International Commercial Contracts, 20-22 (Model Clauses Nos 4(a) and 4(b)) (2013), available at <www.unidroit.org/english/modellaws/2013modelclauses/modelclauses-2013.pdf> (providing clauses where CISG applies as a matter of domestic law governing the contract). See also ibid at 16-19 (Model Clauses Nos 3a and 3b) (providing clauses where CISG applies as a result of a choice of law by the parties even though the CISG would not otherwise govern as a matter of domestic law).

62 Ibid at 21. As discussed above, above n 27, Article 6 of the CISG broadly allows parties to exclude the application of the CISG or derogate from its provisions.

63 At its July 2013 plenary session, UNCITRAL requested that these issues be discussed at the Colloquium celebrating the 35th anniversary of the CISG or at another event. See Report of the 46th Session, above n 5, para 253. Additional work on gap filling rules is also contemplated in the commentary concerning the Hague Principles on Choice of Law. See Hague Bureau, Consolidated Version of Preparatory Work Leading to the Draft Hague Principles on Choice of Law in International Contracts, paras 43-44 (October 2012).

6 Regional Initiatives

Another justification cited by the proponents for a new initiative on international contract law is that regional initiatives are being developed that would "lead to fragmentation" and as a result "international contracting may become even more complicated."[64] The proponents cite in particular the Draft Common European Sales Law (CESL),[65] the Draft Uniform Act on Contract Law being developed in the OHADA,[66] and the draft Principles of Asian Contract Law (PACL).[67] While a comprehensive discussion of regional sales and contract law reform initiatives is beyond the scope of this paper, we do not think that these regional initiatives provide a justification for a new global contract law initiative.[68] Moreover, they demonstrate the difficulty of the undertaking involved in trying to harmonize international contract law.

It is difficult to see how the CESL provides a basis for a new global contract law initiative since the scope of coverage of the CESL is different from that of the

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64 See Swiss proposal, above n 8, at 7. *See also* CISG Advisory Council Declaration No 1, *The CISG and Regional Harmonisation*, para 5 (3 August 2012), available at <www.cisgac.com/default.php?ipkCat=128&ifkCat=217&sid=217> ("If energy in the area of general sales law were drained away from the CISG by competing regional initiatives, there would be the risk that the influence of certain States in the continuing development of the CISG through judicial interpretation would be lessened").

65 See *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final (11 October 2011) [hereinafter *CESL*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF>.

66 See *Preparation by UNIDROIT of a Draft OHADA Uniform Act on Contract Law*, available at <www.unidroit.org/english/legalcooperation/ohada.htm> (providing draft text and background information). The Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) was formed by an international treaty in 1993 between states of Africa's mid-west and today has 17 member states. Information concerning OHADA is available at <www.ohada.org> (last visited 12 September 2013).

67 See Shiyuan Han "Principles of Asian Contract Law: An Endeavor of Regional Harmonisation of Contract Law in East Asia" (2013) 58 Vill L Rev 589 (discussing ongoing work). Professor Han serves as an organiser of the initiative.

68 It should be recognised that the CISG gives regional uniform sales law precedence over the Convention. Article 94 of the CISG permits the exclusion of the application of the Convention between parties from states which have the same or closely related sales laws. Additionally, Article 90 of the CISG gives priority to international agreements which contains provisions concerning matters governed by the CISG, if the parties to the contract have their places of business in states parties to such agreements. See Luca G Castellani "Ensuring Harmonisation of Contract Law at Regional and Global Level: the United Nations Convention on Contracts for the International Sale of Goods and the Role of UNCITRAL" (2008) Unif L Rev, 115, 121, available at <www.unidroit.org/english/publications/review/articles/2008-1&2/115-126.pdf> ("stress[ing] that the universal nature of the CISG is fully compatible with further regional unification efforts").

proposal for a new contract law initiative in UNCITRAL.[69] Under the European Commission CESL proposal, the new set of rules would operate as an opt-in instrument that can be chosen in cross-border contracts between businesses and consumers (excluded from the scope of the proposal in UNCITRAL) and between business and businesses where at least one of them is a small and medium-sized enterprise (SME).[70] As a result, if the proposed CESL regulation becomes law, European businesses engaged in business-to-business transactions would have the choice between national non-unified law, the CISG, the UNIDROIT Contract Principles, the European Principles in Contract Law (PECL), and if one of the parties is an SME, the CESL. The proposal has been the subject of objection from some governments who have called into question whether differences in contract law pose a genuine obstacle to cross-border trade for both business-to-consumer and business-to-business transactions in Europe.[71] For business-to-business transactions, some observers have questioned whether the new CESL is desirable since the main problem with the current system is too much choice.[72] Others have

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69 The Swiss proposal also referenced two earlier European initiatives, the European Principles in Contract Law (PECL, 1995, 1999, and 2003) and the Draft Common Frame of Reference (DCFR, 2009), commenting that both initiatives have failed to gain widespread support. See Swiss Proposal at 5 ("Although the parties at least in arbitration may choose the PECL, there are no reported cases where this has happened. ... The DCFR was ... met with severe criticism not only with regard to the general idea of the project but especially with regard to drafting and style as well as specific solutions in the area of general contract and sales law").

70 See CESL, above n 65, articles 3-7. Article7(2) of the draft CESL defines an SME as an enterprise with fewer than 250 employees and less than EUR 50 million annual turnover or less than EUR 43 million annual balance sheet total. For a further discussion of SMEs and the CISG, see infra note 108.

71 Several European national parliaments have objected to the legal basis for the European Commission proposal for the CESL on the grounds that it does not comply with the principle of subsidiarity under Article 6 of Protocol No 2 to the Treaty on European Union. See Reasoned opinion by the Bundesrat of the Republic of Austria on the proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 1 Decemer 2011; Reasoned opinion by the Bundestag of the Federal Republic of Germany on the proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 1 December 2011; Reasoned opinion by the House of Commons of the United Kingdom of Great Britain and Northern Ireland on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law, 14 December 2011; Reasoned opinion by the Belgium Senate on the proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 6 Dec 2011. For the proposed regulation to be adopted, it must be approved by both the European Parliament and the Council of Ministers, acting by qualified majority.

72 See, eg The Law Commission of England and Wales and the Scottish Law Commission, *An Optional Common European Sales Law: Advantages and Problems, Advice to the UK Government*, para 7.34 (2011), available at <http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf> ("[T]he main problem with the current system is that there is too much choice. The existence of two separate supranational systems of law to govern cross-border sales contracts [ie the CISG and the CESL] may confuse businesses, and lead

called for the elimination of business-to-business transactions altogether from the scope of the CESL.[73]

We also believe that regional harmonisation may be useful in regions with less developed economies and where the CISG and the UNIDROIT Contract Principles are used as a basis for the reform measures.[74] For example, in 2002, the OHADA requested UNIDROIT to assist in the preparation of a uniform contract law based on the UNIDROIT Contract Principles, and in 2004 an *Avant-projet d'Acte uniforme sur le droit des contrats* prepared by a member of the UNIDROIT Working Group was submitted to the competent organs of OHADA for consideration.[75] Yet, 10 years later that instrument still has not been adopted by the OHADA.[76]

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to more difficult negotiations."); Ulrich Magnus "CISG vs CESL" in Ulrich Magnus (ed) *Cisg Vs. Regional Sales Law Unification: With a Focus on the New Common European Sales Law* (2012) 97, 123 ("For international commercial sales there is no urgent need to enact CESL. CISG with its global range and approach is preferable").

73 See *ICC Urges Members of European Parliament to Remove B2B Sales from the Scope of the CESL*, above n 41. See also Robert Koch "CISG, CESL, PICC and PECL" in *Cisg vs Regional Sales Law Unification: With a Focus on the New Common European Sales Law*, above n 72, at 125, 145 ("[T]he inclusion of b2b transactions into CESL's scope sends the wrong signal to the business community because it produces the negative implication that the CISG has failed, which is false. To the contrary, the CISG has just begun flowering as the growing number of cases and countries ratifying the CISG shows"); Schwenzer, above n 8 at 729 ("It is not possible to juggle the needs of both - consumers and businesses - in one single instrument. The futility of such an endeavour has been demonstrated lately by the draft of a Common European Sales Law") (footnote omitted).

74 See Castellani *Ensuring Harmonisation of Contract Law at Regional and Global Level*, above n 68, at 124. ("Bearing in mind the regional context, it is possible to envisage a two-pronged approach to trade law reform. OHADA and the other relevant regional organisations should consider endorsing and promoting universal uniform trade law texts to establish a minimum standard for regional and global trade. Then, those organisations may work on that standard to further develop texts addressing regional needs").

75 See *Preparation by UNIDROIT of a draft OHADA Uniform Act on Contract Law*, above n 66. See also Claire Moore Dickerson "OHADA's Proposed Uniform Act on Contract Law" (2011) 13:3-4 Eur J of L Reform 462, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2094568> (considering the application of the draft OHADA Uniform Act on Contract Law in countries with a large informal sector).

76 See Marcel Fontaine "Law Harmonisation and local specificities – a case study: OHADA and the law of contracts" (2013) Unif L Rev 50, 64 (explaining the difficulties encountered in attempting to take "'local specificities' into consideration when elaborating harmonized rules"). Professor Fontaine, on behalf of UNIDROIT, prepared the preliminary draft Uniform Act on Contract Law, accompanied by an explanatory note. OHADA has enacted an *Acte uniforme portant sur le Droit commercial général* [Uniform Act on General Commercial Law], (first enacted in 1997 and amended in 2010), available at <www.ohada.org/presentation-generale-de-lacte-uniforme/telechargements1.html>. The Uniform Act includes provisions on general sales law that generally follow the CISG. *See* Ulrich Magnus "Concluding Remarks" in *Cisg vs Regional Sales Law Unification: With a Focus on the New Common European Sales Law*, above n 72, at 147,

With regard to the PACL, the initiative is not intended to create a regional instrument like the CESL or the OHADA draft Uniform Act on Contract law. Instead, as Professor Shiyuan Han (one of the organizers of the initiative) explained at the Villanova Symposium, the PACL "is a private initiative by scholars trying to harmonize rules of contract law, and the aim is to create a model law."[77] Again, it is difficult to see how the existence of the ongoing private PACL initiative would require an international negotiation on contract law in UNCITRAL.

In short, it has not been shown that the current international framework is inhibiting trade or presents transactional problems to such a degree that a major international negotiation is warranted. Both UNIDROIT and the Hague Conference have engaged in important work designed to enhance the effective implementation of both the CISG and the UNIDROIT Contract Principles and the harmonisation of international trade law. We believe that such work should continue.

B Feasibility

Let us examine feasibility. Even assuming (which we do not) that sufficient need for a new initiative on international contract law could be established, is it realistic to assume that these needs would be satisfactorily addressed in a new negotiation for a convention?

1 Preparatory Work of the CISG

The negotiations concerning the CISG highlight the difficulty of the undertaking. The CISG negotiations, building on 40 years of work in other international organisations, still took

10 years of deliberations in UNCITRAL and another five weeks for the text to be finalized and approved at the diplomatic conference held in 1980, in Vienna. The drafters were confronted with widely different legal traditions as well as different approaches to international business transactions and different policy approaches between developing and industrialized countries. Topics such as

149 (noting that the Act "provides for rules on commercial sales which widely copy the CISG"); Swiss proposal, above n 4 at 5 (acknowledging that "the sales part of this act strongly relies on the CISG, although it contains certain modifications").

77 See Han, above n 67, at 589. Professor Han further noted: "The PACL project has not been supported or authorized by any government. It is a purely private initiative that is independent of politics." Ibid at 592.

validity, mistake, and agency were left out of the CISG because they were not considered suitable for harmonisation.[78]

One of the principal negotiators of both the CISG and UNIDROIT Contract Principles, Professor Peter Schlechtriem, described the drafting process of the CISG as follows:

> In weighing the solutions, and especially the compromises, one has to bear in mind that the larger the number of participating states, the more numerous the compromises tend to be. They are, therefore, to a certain extent the price for a worldwide acceptance of the Uniform Law – paid, of course, in advance.[79]

He later observed that chances of being successful with any new renegotiation of the CISG are almost zero. He states:

> No codification is ever perfect, and every legal text therefore needs instruments and concepts that allow adjustments, development and gap-filling to cope with issues not

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78 The negotiating record reflects that issues of substantive validity were generally excluded from the scope of the CISG pursuant to Article 4, based primarily on a Secretariat report finding that: (1) "problems of validity are relatively rare events in respect of contracts for the international sale of goods" and there was no indication "that differences in the laws in respect of these aspects of validity of contracts lead to significant problems in international trade"; and (2) "rules on duress, or similar rules on usury, unconscionable contracts, good faith in performance and the like also serve as a vehicle by which the political, social and economic philosophy of the society is made effective in respect of contracts" and "it is by the extensive or the restrictive interpretation of such rules that many legal systems have affected the balance between a philosophy of sanctity of contract with the security of transactions which that affords and a philosophy of protecting the weaker party to a transaction at the cost of rendering contracts less secure." Rep of the Secretary-General, *Formation and Validity of Contracts for the International Sale of Goods*, paras 18, 20, 26, UN Doc A/CN.9/128, annex II, reprinted in [1977] VIII YB UNCITRAL 92-3, UN Doc A/CN.9/SER.A/1977. States subsequently decided to exclude specific rules on validity for mistake because of their inconsistent treatment under various legal systems. *See* Rep of the Working Group on the International Sale of Goods on the Work of Its Ninth Session, Sept. 19–30, 1977, paras 48–69, UN Doc A/CN.9/142, *reprinted in* [1978] IX Y.B. UNCITRAL 65–66, UN Doc A/CN.9/SER.A/1978. Similarly, efforts to address issues related to agency were not successful. See, eg Rep of the Working Group on the Work of Its Sixth Session, 27 January 27–7 February 1975, para 47, UN Doc A/CN.9/100, *reprinted in* [1975] VI YB UNCITRAL 53 UN Doc. A/CN.9/SER.A/1975 ("There was opposition to a special article on agency relationships in a convention on sales and no consensus was reached on the adoption of this proposal. At the same time it was agreed to delete any reference to agency relationship in other articles of the Convention ..."). The UNCITRAL Yearbooks are available at <www.uncitral.org/uncitral/publications/yearbook.html>.

79 Peter Schlechtriem "From the Hague to Vienna – Progress in Unification of the Law of International Sales Contracts?" in Nobert Horn and Clive Schmitthoff (eds) (1982) 2 The Transnational Law of International Commercial Transactions 125, 132, available at <www.cisg.law.pace.edu/cisg/biblio/schlechtriem13.html>. Professor Schlechtriem served as a member of the delegation of the Federal Republic of Germany at the Vienna diplomatic conference in 1980, and then as a member of the UNIDROIT special Working Group charged with drafting the UNIDROIT Contract Principles.

> foreseen by its drafters. This is even more so in the case of codifications based on international conventions, for, while a domestic legislator might be willing and competent to enact necessary improvements and reforms, the chances that another United Nations conference can be convened on the CISG, that it will reach results, and that all states that have enacted the Convention will also enact reforms, is almost zero.[80]

The proponents of a new initiative on international contract law draw attention to the fact that the CISG does not govern certain important areas, such as validity, but leaves them to domestic law.[81] Professor Ingeborg Schwenzer stated at the Villanova symposium:[82]

> [T]here are some fields where unification is more urgent than in others. The most important area where the gaps left by the CISG are most unfortunate, because they endanger uniformity already reached, are questions of validity.

Yet, questions of validity were expressly carved out in Article 4 of the CISG because there was no consensus on how to proceed. Professor John A Honnold, a key initial drafter of the CISG as the Secretary of UNCITRAL, observed with respect to the scope of the Convention and issues of validity:[83]

> An airplane, it has been said, is a vehicle that almost doesn't fly. The same could be said of international legislation; the Convention scope has been shaped by design decisions that narrow the law's profile and lighten its load.
>
> It would have been folly to try to overturn domestic rules prohibiting and invalidating various types of transactions and contract provisions; the Convention does not intrude on this sensitive domain.

We see no evidence that the circumstances concerning these issues have changed. Professor Di Matteo observed at the Villanova Symposium, in arguing for a more comprehensive hard-soft international sales law with the CISG at its core:

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80 Peter Schlechtriem *Requirements of Application and Sphere of Applicability of* the CISG, 36 VUWLR 781, 789 (2005), available at <www.cisg.law.pace.edu/cisg/biblio/schlechtriem9.html>.

81 Swiss proposal, above n 8, at 2, 6-7.

82 Schwenzer, above n 8, at 729.

83 John Honnold *The Sales Convention: Background, Status, Application* (1988) 8 JL & Com 1, 6, available at <www.cisg.law.pace.edu/cisg/biblio/honnond-background.html>. Professor Honnold further noted, citing his commentary: "Under Article 4, the Convention 'is not concerned with: (a) the validity of the contract or any of its provisions or of any usage . . . .'" Ibid, note 17. See note 3, above for the Honnold Commentary.

> Resorting to well-respected national commercial or contract laws will be necessary in some areas where national laws vary widely. This would be in the areas of defects in consent, validity, and agency contracts. In these areas, it is best to provide a number of options that the parties may select. Use of national laws, international soft laws, and trade practice materials should be reviewed in crafting optional rules that parties may select under the principle of freedom of contract.[84]

In short, the negotiating history of the CISG demonstrates the difficulty of the undertaking. There is no basis for assuming that the issues left out of the CISG could be renegotiated at this time.

2 Negotiating History of the UNIDROIT Contract Principles

Proponents of a new initiative cite the UNIDROIT Contract Principles as evidence that a codification of international contract law is feasible and could be accomplished within a reasonable period of time.[85] In considering feasibility, it is also important to recall that at the time of the drafting of the CISG, UNIDROIT was simultaneously engaged in the preparation of a code on international contract law.[86] Ultimately the drafters decided to opt for a soft law instrument, rather than the traditional model of a multilateral treaty. To quote Professor Kronke:

> [A]reas deeply rooted in legal and cultural tradition and everywhere moulded down to the finest details and leveled to become coherent systems resembling mathematics or philosophy, such as ... general theories of contract are unlikely to lend themselves to successful harmonisation through Conventions. The Principles of International Commercial Contracts acquired *their* cloak because there was no hope whatsoever – as had been discussed at an earlier stage - of a Convention emerging that would contain the general part of the UNIDROIT Conventions dealing with contractual transactions that had entered into force over the years.[87]

Professor Veneziano, further explained at the Villanova symposium:

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84 Larry A DiMatteo "CISG as Basis of a Comprehensive International Sales Law" (2013) 58 Vill L Rev 691,716-17 (2013) (footnotes omitted).

85 See Schwenzer, above n 8, at 730-731; Swiss Proposal, above n 8, at 4-5.

86 See Clive M SchmittHoff *Commercial Law in a Changing Economic Climate* (2d ed, 1981) 26 (Professor Schmitthoff was part of a steering group established by UNIDROIT Governing Council in 1971 to consider the feasibility of such a project.).

87 Herbert Kronke "The Future of Harmonisation and Formulating Agencies: The Role of UNIDROIT" in Lukas Mistelis and Marise Cremona (ed) *Foundations and Perspectives of International Trade Law* (Ian Fletcher, 2001) 59, 64 (emphasis in original).

> This approach was chosen for a number of different reasons. It was felt that the adoption of the CISG had represented the "maximum that could be achieved at the legislative level" through inter-governmental negotiations. ...[88]
>
> This method had the additional advantage of allowing the participants in the working group - composed of renowned international experts with different legal backgrounds and sitting in a personal capacity and not as representative of governments - more freedom in endorsing solutions which, though different from the ones present in their own legal systems, were considered to be either common practice in international transactions or, in some cases, better suited to international commercial contracts. The informal method minimized the political constraints and shifted the focus to the reasonability and economic soundness of the proposed rules. This enabled the drafters to develop over the years a wide set of rules covering virtually all issues which are traditionally ascribed to the general part of the law of contracts and obligations.

Professor E Allan Farnsworth, another principal negotiator of both the CISG, as a member of the United States delegation, and the UNIDROIT Contract Principles as a member of the special Working Group, similarly highlighted the distinctions between the two negotiations:[89]

> While the setting in UNCITRAL was formal (delegates arranged behind placards with names of their countries ...), that in UNIDROIT was informal (with ... easy give and take). While the atmosphere in UNCITRAL was political (because delegates represented governments, which [caucused] in regional blocs), that in UNIDROIT was apolitical (because [of the tradition of that body and because] participants appeared in their private capacity).

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88 Veneziano, above n 18, at 524 (footnotes omitted). See also Bonell, above n 20, at 230 ("[S]ince the negotiations leading up to the CISG clearly demonstrated that this convention was the maximum that could be achieved at the legislative level, Unidroit decided to abandon the idea of a binding instrument and instead merely to 'restate' (or where appropriate to 'pre-state') international contract law and practice").

89 E Allan Farnsworth "The American Provenance of the UNIDROIT Principles" (1998) 72 Tul L Rev 1985, 1988-89, available at <www.cisg.law.pace.edu/cisg/biblio/farns2.html> (footnotes omitted). He further observed that "[t]he influence of the 'industrialized,' the 'developing' and the 'socialist' countries was rarely entirely absent" in the CISG negotiations. Ibid at 1986, note 7. See also Roy Goode "Rule, Practice, and Pragmatism in Transnational Commercial Law" (2005) 54 Int'l & Comp. LQ 539, 553–54, 556 (observing that the Principles demonstrate "that the formulation of international rules of general law, whether relating to international trade or otherwise, is best left to scholars," who have "technical expertise and freedom from political restraints").

Nonetheless, the negotiations of the first edition of the UNIDROIT Principles still took 14 years to complete before being approved by UNIDROIT.[90]

In sum, the existence of the UNIDROIT Contract Principles does not establish that a new convention on international contract law is feasible.

3 How would one modify the CISG?

A proposal for a new Convention raises the question of how any new binding instrument would interact with the CISG. Any attempt to revise the CISG might jeopardize the results that have been obtained over nearly 85 years of work in the drafting and implementation of that instrument. A global undertaking to revise and expand the CISG risks putting a stop to the wide adoption of the CISG and thus to the global unification of sales law.

Similar concerns were expressed in 2001-2002 during UNCITRAL's consideration of proposals to modify the CISG to reflect developments in the field of electronic commerce. A proposal to directly amend the CISG was rejected for several reasons, the first of which was that it could impair the ability to seek ongoing ratifications. There was a serious concern that however narrow the charge might be formulated, a number of provisions would be directly or indirectly affected and the whole fabric would be open to further amendments, without having established the need for such an expansive outcome or project. A proposal to consider a protocol to the CISG, where the scope of the work might better be contained, was dropped after a discussion of how data transactions, software, and other aspects of electronic commerce would be characterized, for example, does software constitute "goods" within the meaning of the Convention and are software transactions "sales" or "licenses" or some mixture. The answers to these questions would to some extent determine the type of law that might be applicable and thus what was appropriately within or without the CISG. Finally, while there was some discussion of several articles of the CISG that could merit reconsideration, there was general agreement that the Convention had long since brought about a significant degree of harmonisation directly and indirectly, and absent a showing of real need to engage in such a complicated exercise, UNCITRAL should develop a stand-alone instrument.[91]

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90 The UNIDROIT special Working Group charged with preparing the various draft chapters of the Principles was initially constituted in 1980.

91 See Rep of the Working Group on Electronic Commerce, 38th Sess, 12-23 March 2001, paras 8, 79, 94-118, UN Doc A/CN.9/484. See also Henry Deeb Gabriel "UNIDROIT Principles as a Source for Global Sales Law" (2013) 58 Vill L Rev 661, 665.

As a result, states developed "a stand-alone convention ... without creating any negative interference with the well-established regime of the United Nations Convention on Contracts for the International Sale of Goods."[92] On that basis, in 2005, the United Nations General Assembly adopted the Convention on the Use of Electronic Communications in International Contracts as a freestanding convention.[93]

For similar reasons, during this same timeframe, UNCITRAL decided not to modify the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)[94] to reflect the widening use of electronic commerce. Instead, UNCITRAL issued an interpretative statement to clarify the written form requirements of an arbitration agreement. The history of the debate has been summarized in part by the Secretariat as follows:[95]

> The prevailing view was that, since formally amending or creating a protocol to the New York Convention was likely to exacerbate the existing lack of harmony in interpretation and that adoption of such a protocol or amendment by a number of States would take a significant number of years and, in the interim, create more uncertainty, that approach was essentially impractical. Taking the view that guidance on interpretation of article II, paragraph (2) would be useful in achieving the objective of ensuring uniform interpretation that responded to the needs of international trade, the Working Group decided that a declaration, resolution or statement addressing the interpretation of the New York Convention that would reflect a broad understanding of the form requirement could be further studied to determine the optimal approach.

In 2006, UNCITRAL adopted a recommendation on the interpretation of the requisites for recognition and enforcement of arbitral awards under the New York

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92 See Rep of the UN Comm'n on Int'l Trade Law, 34th Sess, 25 June-13 July 2001, para 294, UN Doc. A/56/17, GAOR, 56th Sess, Supp No 17 (2001). See also Rep of the Working Group on Electronic Commerce, 40th Sess, 14-18 October 2002, para 6, UN Doc A/CN.9/527.

93 United Nations Convention on the Use of Electronic Communications in International Contracts, 23 November 2005, art 20 (entered into force Mar. 1, 2013, 3 parties), GA Res. 60/21, UN Doc A/RES/60/21 (2005) (annex) [hereinafter Electronic Communications Convention], available at <www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html>.

94 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 UNTS 3 [hereinafter New York Convention], available at <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html>.

95 See Note by the Secretariat, *Draft declaration regarding the interpretation of article II, para (2), art VII, para (1), of the New York Convention, para 6*, UN Doc A/CN.9/607 (2006) (summarizing debate in Working Group). For the initial Commission deliberations and the decision entrusting the issue to the Working Group, see Rep of the UN Comm'n on Int'l Trade Law, 32d Sess, May 17-June 4, 1999), paras 347-50, UN Doc A/54/17, GAOR, 54th Sess, Supp No 17 (1999).

Convention.[96] Specifically, UNCITRAL recommended that Article II, paragraph 2, of the New York Convention, which defines "agreement in writing," be applied flexibly, "recognizing that the circumstances described therein are not exhaustive" in light of arbitration agreements that are concluded entirely online.[97]

These same concerns exist concerning the way in which any new instrument attempting to codify international contract law would interact with the CISG and whether it would reopen the entire Convention to amendments. As Professor Henry Gabriel pointed out at the Villanova Symposium, "[t]he particular concern is the possibility of two competing instruments - an original and a revised CISG."[98]

4 Ratification Process

There is also a question as to whether any new convention would achieve widespread ratification within a reasonable period of time. Even if negotiations were eventually successful, the subsequent process of adopting and securing broad adherence to any new convention could take many years, and meanwhile there might be a major disruption of existing international commercial law, as well as the creation of inconsistent duplicative conventions.

In this regard, the CISG's ratification rate with 80 parties over its 33 year history (an average of over two ratifications per year) has been remarkable. The only private international law treaty of general application with a more rapid ratification rate is the New York Convention, adopted in 1958 and now having 149 parties.[99]

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96 For the Commission decision, see Rep of the UN Comm'n on Int'l Trade Law, 39th Sess, June 19-July 7, 2006, paras 177-181, UN Doc A/61/17, GAOR, 61th Sess, Supp No 17 (2006).

97 Recommendation regarding the interpretation of article II, paragraph 2 and article VII, paragraph 1 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2006), available at <www.uncitral.org/uncitral/uncitral_texts/arbitration/2006recommendation.html>. UNCITRAL also recommended that states adopt article 7 of the UNCITRAL Model Law on International Commercial Arbitration as revised, above n 48, which similarly attempts to modernize the form requirement of an arbitration agreement to better conform with international practice. Report of the 39th Session, above n 96, para 181. Earlier, a provision was added to Article 20 of the Electronics Communication Convention, to allow the provisions of that instrument to also be applied to the New York Convention. See above n 93.

98 See Gabriel, above n 91, at 665.

99 See Status, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, available at <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>. The CISG and New York Convention are private international law treaties of general application covering a broad range of industry sectors, in contrast to certain other conventions that are focused on specific issues and narrow industry sectors. See, eg Convention on International Interests in Mobile Equipment, 16 November< 2001 (UNIDROIT). UNIDROIT Conventions are available at <www.unidroit.org> (under instruments).

UNICITRAL has developed other instruments relating to specific issues in international contract law that unfortunately have met with much less success. In 1974, UNCITRAL adopted the United Nations Convention on the Limitation Period on the International Sale of Goods, and in 1980, aligned it with the CISG by means of an amending protocol.[100] Despite the clear intent to have these two instruments operate in tandem, the amended Limitations Convention has been ratified by only 22 states, while the original text of the Limitations Convention has been ratified by 29 states.[101] As Luca Castellani observes, "the public policy concerns associated with limitation may mean that additional caution is necessary when considering supranational uniform texts in this field."[102]

UNIDROIT and the Hague Conference have had similar experiences. The CISG was designed to supersede the two Hague Conventions of 1964 on Uniform Laws on International Sales developed by UNIDROIT, which did not find widespread acceptance.[103] The UNIDROIT Convention on Agency in the International Sale of Goods attempts to reconcile the different legal approaches to agency, but it has never entered into force.[104] Additionally, the 1978 Hague Convention on the Law Applicable to Agency and the 1986 Hague Convention on

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100 See Convention on the Limitation Period in the International Sale of Goods, 14 June 1974, 1511 UNTS 3; Protocol amending the Convention on the Limitation Period in the International Sale of Goods, 11 April 1980, 1511 UNTS 77; Convention on the Limitation Period in the International Sale of Goods, as amended by the Protocol of 11 April 1980, 1511 UNTS 99, available at <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_limitation_period.html>.

101 See *Status, Convention on the Limitation Period in the International Sale of Goods*, available at <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_status.html>. On 1 December 1994, both the original text of the Limitation Convention and the 1980 Protocol entered into force in the United States. See Peter Winship "The Convention on the Limitation Period in the International Sale of Goods: The United States Adopts UNCITRAL's Firstborn" (1994) 28 Int'l Law 1071, available at <http://cisgw3.law.pace.edu/cisg/biblio/winship4.html#3>.

102 Luca G Castellani "An Assessment of the Convention on the Limitation Period in the International Sale of Goods through Case Law" (2013) 58 Vill L Rev 645, 655. See also UNCITRAL's Uniform Rules on Contract Clauses for an Agreed Sum due upon Failure of Performance (1983), available at <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1983 Uniform_rules.html> (attempting to reconcile different legal traditions but failing to have any visible impact on international practice).

103 See Convention Relating to a Uniform Law on the International Sale of Goods, 1 July 1964, 834 UNTS 107; Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 1 July 1964, 834 UNTS 169 (both with 9 parties).

104 See Convention on Agency in the International Sale of Goods, 17 February 1983 (UNIDROIT), 22 ILM 249 (five parties; 10 ratifications required for treaty to enter into force).

the Law Applicable in Contracts for the International Sale of Goods have only been ratified by four and two states respectively.[105]

In short, given the experience of the private international law formulating organisations concerning legislative work on international contract law, we do not believe that the idea of a new convention on international contract law is a desirable or feasible objective.

IV ALTERNATIVES: WHAT NEEDS TO BE DONE?

One last and final question: Are there alternatives that are more practical, positive and forward leaning? We believe such alternatives exist.

A Cooperation

First and foremost, UNCITRAL, and its sibling organisations, UNIDROIT and the Hague Conference, should continue to coordinate and cooperate on all matters regarding international contract law (whether legislative work or promotion of existing instruments), in order to ensure that the organisations' agendas remain complementary. Given the resource constraints that all three organisations face, it remains vital for these organisations to work constructively together, particularly concerning the areas of intersection of the three organisations.[106]

B UNCITRAL

UNCITRAL is already engaged in a number of activities that add value to the existing platform. As noted at the outset, at its July 2013 session, the Commission decided to hold a colloquium celebrating the upcoming 35th anniversary of the CISG in 2015. The Colloquium will provide a unique opportunity to further promote global awareness of the CISG as well as the UNIDROIT Contract Principles.[107]

UNCITRAL has also recently undertaken efforts to promote the CISG at a regional level, such as through the expert meeting on international contract law

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105 *See* Convention on the Law Applicable to Agency, 14 March 1978 (4 parties); Convention on the Law Applicable to Contracts for the International Sale of Goods, 22 December 1986 (2 parties; not in force). Hague Conference Conventions are available at <www.hcch.net/index_en.php?act=conventions.listing>.

106 At its 2013 session, the Commission called on UNIDROIT, the Hague Conference and UNCITRAL to enhance their cooperation by setting priorities based on the expertise within each body and by identifying joint projects where appropriate. Report of the 46th Session, above n 5, para 308.

107 As noted at the outset, above nn 5-7 and accompanying text, states decided that the 2015 colloquium should look at the Convention broadly including the complementary nature of the UNIDROIT Principles.

held at the UNCITRAL Regional Centre for Asia and the Pacific in February 2013 and its work through the Asia-Pacific Economic Cooperation (APEC) Ease of Doing Business Project.[108] These regional initiatives not only provide an opportunity to promote the CISG as an important law reform measure, but also give states a chance to assess whether ongoing regional initiatives are suitable for integration with the CISG.[109]

Another important function of UNCITRAL is its practice of endorsing instruments of other organisations, consistent with its primary mandate to promote coordination and cooperation in development of international trade law.[110] As discussed above, UNCITRAL has recently endorsed a number of significant instruments in the field of international commercial law, including the UNIDROIT Contract Principles, the ICC INCOTERMS 2010, and the ICC Uniform Customs and Practices for Documentary Credits (UCP 600).[111] At the 2013 session of the

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108 See UNCITRAL Secretariat, Technical Cooperation and Assistance, para 11, UN Doc A/CN.9/775, (May, 2013). As noted therein, the Secretariat in coordination with the Republic of Korea Ministry of Justice has participated in the APEC Ease of Doing Business (EoDB) Project on contract law reform, including through promotion of the ratification of the CISG. The Republic of Korea has held an annual APEC conference on enforcing contracts and sponsored seminars in several APEC member economies including those that are not party to the CISG. The United States hopes to be able to work with the Republic of Korea, other APEC member economies, and the UNCITRAL Secretariat in these efforts in APEC, particularly in light of the decision by UNCITRAL at its July 2013 session, to engage in new work addressing the legal aspects of an enabling legal environment relating to the life cycle of micro-, small-, and medium-sized enterprises (MSMEs). See Report of the 46th Session, above n 5, paras 316-322. This new work in UNCITRAL is closely related to the APEC EoDB initiative and provides an opportunity to promote a range of UNCITRAL conventions and model laws in APEC member economies that would assist MSMEs. For example, application of the CISG gives MSMEs the opportunity to perform international trade on already-established grounds with already-developed trade customs and without the obstacles presented by the risk of having to deal with a different legal system, increased costs, and lack of information. See Luca G Castellani "Promoting the Adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG)" (2009) 13 Vindobona J Int'l Com L & Arb, 241, 247, available at <www.cisg.law.pace.edu/cisg/biblio/castellani.html> (Since MSMEs "especially in developing countries, have limited access to expert legal advice when drafting their contracts and little influence on the choice of the law applicable to the contract, they would take advantage correspondingly from the application of the CISG.") Thirteen of the 21 APEC member economies are parties to the CISG.

109 Another successful regional initiative has been the joint project between UNCITAL Secretariat and the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) on the implementation of the CISG and the system of international commercial arbitration in Southeast Europe. *See* Secretariat Report on Technical Cooperation and Assistance, above n 108, at 12.

110 For the UNCITRAL mandate, see Establishment of the United Nations Commission on International Trade Law, GA Res 2205 (XXI), Sec. II, para 8, UN GAOR, 21st Sess, Supp No 16, UN Doc A/6594 (17 Dec 1966).

111 See above nn 13, 40 and accompanying text. For a comprehensive list of texts of other organisations endorsed by UNCITRAL, see Texts of Other Organisations Endorsed by UNCITRAL, available at <www.uncitral.org/uncitral/en/other_organisations_texts.html> (last visited on 12 August 2013).

Commission, the United States suggested that UNCITRAL might consider endorsing the UNIDROIT Model Clauses for Use by Parties of the UNIDROIT Contract Principles.[112]

The most crucial work of UNCITRAL concerning international contract law lies in its ongoing effort to maintain uniformity in interpretation and application of the CISG. In this regard, the development of the Case Law on UNCITRAL Texts (CLOUT) system[113] and the UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (CISG Digest)[114] has been of immense importance.[115] The process utilizes the private sector in maintaining uniformity through a network of national correspondents that generate case abstracts in the six official languages of the United Nations.[116]

UNCITRAL might explore other means of promoting and maintaining uniformity in the interpretation of the CISG. The Secretariat has recently proposed the establishment of a system of national centers of expertise in the field of commercial law that go beyond the current national correspondent system of CLOUT. According to the Secretariat, the system would "(a) collect, analyze, and monitor national case law ..., (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."[117]

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112 See above nn 59-63 and accompanying text for the UNIDROIT Model Clauses.

113 *Case Law on UNCITRAL Texts (CLOUT)*, available at <www.uncitral.org/uncitral/en/case_law.html>.

114 *UNCITRAL, Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, available at <www.uncitral.org/uncitral/en/case_law/digests.html>.

115 See, eg 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* (2005) 18, 25-26, available at <www.cisg.law.pace.edu/cisg/biblio/bazinas.html>.

116 The CLOUT system currently has over 700 CISG cases. See above n 113. The Pace CISG data base is even more extensive with over 2900 cases. See Albert H Kritzer *CISG Database* INST Intl Com L, <www.cisg.law.pace.edu> (last visited 1 January 2013).

117 See Renaud Sorieul, Emma Hatcher and Cyril Emery "Possible Future Work by UNCITRAL in the Field of Contract Law: Preliminary Thoughts From the Secretariat" (2013) 58 Vill L Rev 491, 505-507. The proposal was initially made in the context of the High-Level Meeting on the Rule of Law, held in September 2012 at the 67th Session of the United Nations General Assembly. See Report of the 45th Session, above n 11, para 220.

As the Secretariat has noted, the biggest obstacle to such a proposal in UNCITRAL would be resources.[118] At its 2013 session, the Commission also acknowledged once again the need for further resources to sustain the CLOUT system. Thus, it is important that UNICTRAL marshal its resources and be selective in its choice of future work.[119]

C UNIDROIT

UNIDROIT is also engaged in a number of activities that promote the harmonisation of international contract law. Most significantly, the UNIDROIT Governing Council has requested that the Secretariat continue providing the highest priority to the promotion of UNIDROIT instruments, including the UNIDROIT Contract Principles.[120]

The United States has encouraged UNIDROIT to consider additional ways to increase the visibility and usage of the UNIDROIT Contract Principles:

> [W]e believe that UNIDROIT should undertake a study to identify steps that could lead to more widespread use of the Principles. The study should include outreach to the private sector, to examine current practice regarding use of the Principles in cross-border transactions and to identify what barriers might exist to increased use. (We note that some studies on private sector usage have occurred in the past, but up-to-date information on private sector views would be valuable.) Similarly, the study should include outreach to governments - both UNIDROIT member states and non-member states - to ascertain the degree to which the Principles are taken into account in the context of legislative reform efforts and to identify any obstacles to increased use. ... Moreover, the topic of increasing visibility and usage of the Principles could be included on the agenda of General Assembly meetings, to encourage discussion among member states regarding further steps that could be taken.[121]

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118 Sorieul above n 117 at 506. Additionally, the proposal raises the issue of whether such a system would create a "homeward bias" if the national centres were to communicate directly with the Courts. Ibid. In this regard, the CISG Advisory Council, a private initiative, seeks to give practical assistance to courts and tribunals through non-binding opinions on particularly important aspects of the CISG. See CISG ADVISORY COUNCIL <www.cisgac.com> (last visited 2 September 2013).

119 UNCITRAL has faced resource shortfalls in this regard for a number of years. See Gerold Herrmann "The Role of UNCITRAL" in Ian Fletcher, Loukas Mistelis & Marise Cremona (eds) *Foundations & Perspectives of International Trade Law* (2001) 28, 33.

120 See Governing Council of UNIDROIT, Summary of the Conclusions, 92d Sess, Rome, 8-10 May 2013, para 25, [hereinafter UNIDROIT Governing Council, 92d Session], available at <www.unidroit.org/english/governments/councildocuments/2013session/cd92-misc02-e.pdf>.

121 See Comments received by the Secretariat, Item No 13 on the agenda; Draft Triennial Work Programme 2014 -2016, Annex III at 14, 16 (United States) (April 2013), available at

UNIDROIT is also considering possible revisions to the UNIDROIT Contract Principles for long term contracts. At its May 2013 session, the UNIDROIT Governing Council authorized the Secretariat to undertake preliminary work to identify issues related to investment and other long-term contracts not adequately addressed in the 2010 edition of the UNIDROIT Contract Principles.[122]

UNIDROIT and UNCITRAL might consider a joint project on long term contracts. Others have suggested that work might be undertaken in this field in UNCITRAL, including on international distribution and franchising contracts.[123] Moreover, at the May 2013 Governing Council meeting, UNIDROIT supported the idea of substantive cooperation with UNCITRAL on future projects.[124] Subsequently, at the July 2013 session of the Commission, there was broad support for the preparation of a joint report by the Secretariats of UNCITRAL and UNIDROIT highlighting possible joint projects that would be considered at the next session of the Commission in 2014.[125] Again, the same considerations should apply to any proposal for a new joint project: demonstration of need and feasibility, scarcity of resources, and competing priorities.[126]

D Hague Conference

As discussed above, the Hague Conference's ongoing work on the Principles on Choice of Law in International Contracts is a key development in the

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<www.unidroit.org/english/governments/councildocuments/2013session/cd92-13add-e.pdf>. UNIDROIT undertook a formal study in September 1996, circulating a questionnaire to 1000 individuals who had shown interest in the UNIDROIT Contract Principles. The responses denoted a great success. See Michael Joachim Bonell "The UNIDROIT Principles in Practice - The Experience of the First Two Years" (1997) Unif L Rev 34, 38-39, available at http://www.cisg.law.pace.edu/cisg/biblio/pr-exper.html.

122 See UNIDROIT Governing Council, 92d Session, above n 120, para 10; UNIDROIT Secretariat, Possible future work on long-term contracts, CD (92) 4 (b) (March 2013), available at <www.unidroit.org/english/governments/councildocuments/2013session/cd92-04b-e.pdf>.

123 See Viscasillas, *Applicable Law, the CISG, and the Future Convention*, above n 18, at 738 (Noting that "a less ambitious project is also possible. UNCITRAL might focus its work on specific contracts such as international distribution contracts."). In 2007 UNIDROIT published a second edition of a Guide to International Master Franchise Agreements. See UNIDROIT Franchising Guide (2nd ed) available at <www.unidroit.org>. Additionally, at its 2013 session, UNCITRAL decided to undertake exploratory work on whether to engage in further work on public private partnerships. See Report of the 46th Session, above n 5, paras 327-31.

124 See UNIDROIT Governing Council, 92d Session, above n 120, para 35.

125 See Report of the 46th Session, above n 5, para 254.

126 See above nn 15-16 and accompanying text.

harmonisation and modernisation of international contract law.[127] When that work is completed, UNCITRAL should give consideration to endorsing those Principles.

V CONCLUSION

In conclusion, the CISG and the UNIDROIT Contract Principles have been remarkably successful in modernizing and progressively harmonizing international contract law. We do not believe that a new initiative on international contract law is needed or feasible at this time. If a new initiative were to be pursued now, we envisage a contentious, many-year negotiation that would likely not bring worthwhile results, and at excessive cost to international organisations and states. Moreover, there is no demonstrated desire for this project from those whose transactions would be governed by it. Pursing a new initiative now could also detract from existing efforts to secure broader adoption of the CISG and use of the UNIDROIT Contract Principles.

Most importantly, there are more practical, positive and forward-looking alternatives that will improve and harmonize international contract law by building on the existing platform of the CISG and UNIDROIT Contract Principles. UNCITRAL, UNIDROIT and the Hague Conference should pursue these alternatives.

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127 See above nn 54-56 and accompanying text for the draft Hague Principles on Choice of Law.