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A NEW GLOBAL INITIATIVE ON CONTRACT LAW IN UNCITRAL: RIGHT PROJECT, RIGHT FORUM?

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I. IS A NEW GLOBAL INITIATIVE NEEDED AND FEASIBLE?

AT its 45th meeting last summer, the United Nations Commission on International Trade Law (UNCITRAL) considered a proposal for possible future work in the area of international contract law.[1] The proponents suggested that there is an urgent need for a new "global initiative" in UNCITRAL to further harmonize contract law in order to significantly boost international trade. Although the chair of the Commission ultimately ruled that there was a prevailing view in the room in support of further exploratory work in this area, the response among participating states was quite mixed. A number of delegations—including that of the United States—expressed strong reservations about undertaking such a project.[2]

The U.S. government has considered carefully the proposal presented to the Commission. We have consulted extensively with key domestic stakeholders on this issue. In October 2012, it was the subject of a panel at the annual meeting of the State Department's Advisory Committee on Private International Law (which includes academicians, practitioners, and representatives of business interests).[3] At that meeting, the proposal made to UNCITRAL was not supported. The Executive Committee of the Uniform Law Commission (ULC)—the organization that co-developed, with the American Law Institute, the Uniform Commercial Code in the United States—recently adopted a resolution stating that the ULC op-

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1. *See* UNCITRAL, *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*, U.N. Doc. A/CN.9/758 (May 8, 2012) [hereinafter *Swiss Proposal*].

2. A summary of the debate is contained in the Report of the United Nations Commission on International Trade Law. *See* Rep. of the U.N. Comm'n on Int'l Trade Law, 45th Sess., June 25–July 6, 2012, ¶¶ 127–32, U.N. Doc. A/67/17; GAOR, 67th Sess., Supp. No. 17 (2012) [hereinafter Report of 45th Session] (summarizing debate). Several delegations expressly objected to the ruling of the Chair as not accurately reflecting the opinions voiced during the debate and—unusually—those objections were recorded in the official Report of the Commission.

3. The State Department's Advisory Committee on Private International Law (ACPIL) holds a plenary meeting annually. *See Private International Law*, U.S. DEP'T OF STATE, www.state.gov/s/l/c3452.htm (last visited Apr. 4, 2013) (providing information regarding ACPIL, including summary of October 11–12, 2012 annual meeting).

poses 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.[4]

On the basis of these consultations and other analysis, it is our view that the time is not right for undertaking a global initiative. We reach this conclusion because:

1. The need for an initiative of the scale proposed has not been demonstrated (taking into account, inter alia, the availability of the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles)[5] and the ability of parties to designate those Principles as the law governing their contract).

2. We are not aware of demand for such a major initiative from U.S. parties to international commercial contracts.

3. Even if the international legal system would be better if a broad instrument of the sort advocated by the proponents were successfully drafted and adopted, it is likely that the attempt to draft and adopt such an instrument would expend considerable institutional resources of UNCITRAL and its member states, detracting from UNCITRAL's continuing efforts to achieve broader adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG), as well as other projects of UNCITRAL. Moreover, we conclude that such an initiative would have little chance of coming to a successful conclusion at this time.

A. *Need for a New Global Initiative?*

Currently, the global harmonization and unification of international commercial law relies primarily on two key international instruments: the CISG[6] and the UNIDROIT Principles.

With respect to the CISG, UNCITRAL is engaged in an ongoing effort to promote the treaty's worldwide ratification and uniform implementation. The CISG was the culmination of a half-century of work by the international community, including a decade of work in UNCITRAL. At the 2005 UNCITRAL Colloquium celebrating the 25th anniversary of the CISG, the Convention was recognized as probably the single most successful treaty in the history of modern transactional commercial law.[7] Since that colloquium, fifteen more states have become party to the Convention,

4. *See* UNIF. LAW COMM'N, MINUTES: MID-YEAR MEETING OF THE EXECUTIVE COMMITTEE (2013), *available at* http://www.uniformlaws.org/shared/docs/executive/2013jan12_EC_Min_Midyear_Final.pdf.

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

6. *See* United Nations Convention on Contracts for the Int'l Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG], *available at* http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf.

7. *See* Herbert Kronke, *The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond*, 25 J.L. & COM. 451, 458–59 (2005).

bringing the total number of states to seventy-eight.[8] The success of the Convention can be gauged by the fact that it has proved acceptable to nations with different legal systems, varying levels of economic development, and diverse political systems. It is said that the CISG has become the *lingua franca* of sales.[9]

As was discussed during the 2005 UNCITRAL Colloquium, the focus of UNCITRAL in this area has been to promote global awareness of the CISG and to facilitate uniform interpretation and application of its provisions.[10] Pursuant to decisions by the Commission, including in 1998 and 2009, the UNCITRAL Secretariat is devoting resources to developing and maintaining the CISG Digest and Case Law on UNCITRAL Texts (CLOUT) in the six official languages of the United Nations.[11] The system relies on a network of national correspondents designated by those states that are parties to the CISG and other instruments.[12]

The 2005 UNCITRAL Colloquium also highlighted the widespread use of the UNIDROIT Principles as a complement to the CISG. In 2007 and 2012, UNCITRAL concluded that the 2005 and 2010 editions, respectively, of the Principles "complement a number of other instruments including the United Nations Convention on Contracts for the International Sale of Goods (1980)," and further "commend[ed]" the use of the Principles as appropriate for their intended purposes, which are reflected in the Principles' Preamble:

> They shall be applied when the parties have agreed that their contract be governed by them.
>
> They may be applied when the 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.
>
> They may be used to interpret or supplement international uniform law instruments. . . . [And] to interpret or supplement domestic law.

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8. *See Status 1980—United Nations Convention on Contracts for the International Sale of Goods*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Apr. 4, 2013) (listing parties to CISG).

9. *See, e.g.*, Hiroo Sono, Contract Law Harmonization and Non-Contracting States: The Case of the CISG 1 (July 9–12, 2007), *available at* http://www.uncitral.org/pdf/english/congress/Sono_hiroo.pdf (providing text of presentation given at UNCITRAL Congress Modern Law for Global Commerce).

10. *See* Jernej Sekolec, *25 Years UN Convention on Contracts for the International Sale of Goods: Welcome Address*, 25 J.L. & Com. xvii (2006), *available at* http://www.cisg.law.pace.edu/cisg/biblio/sekolec.html.

11. *See* Report of 45th Session, *supra* note 2, ¶¶ 149–53, 157.

12. *See id.* ¶¶ 150–52.

> They may serve as a model for national and international legislators.[13]

The UNCITRAL 1985 Model Law on International Commercial Arbitration[14] and the 2010 UNCITRAL Arbitration Rules[15] specify that the arbitral tribunal shall apply the rules of law designated by the parties as applicable to the dispute. In this context, the term "rules of law" refers to non-state law such as the UNIDROIT Principles. Moreover, there are contemporary international efforts to promote the availability and use of rules of law. For example, the Hague Conference on Private International Law is developing principles on choice of law in international commercial contracts, and those draft principles endorse giving effect to 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."[16] That definition of rules of law includes the UNIDROIT Principles, enabling parties who so desire to have their contracts governed by the UNIDROIT Principles.[17]

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13. *See* INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, *supra* note 5, at pmbl. (providing 2010 Commission decision); Rep. of the U.N. Comm'n on Int'l Trade Law, 40th Sess., June 25–July 12, 2007, ¶ 213, UN Doc. A/67/17 (Part I); GAOR, 62d Sess., Supp. No. 17 (2007) (reporting 2007 Commission decision).

14. *See* UNCITRAL, UNCITRAL Model Law on International Commercial Arbitration art. 28 (1985) (as amended in 2006), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

15. *See* UNCITRAL, UNCITRAL Arbitration Rules art. 35(1) (2010) (as revised in 2010), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html.

16. HAGUE CONFERENCE ON PRIVATE INT'L LAW, DRAFT HAGUE PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL CONTRACTS art. 3 (2012), *available at* http://www.hcch.net/upload/wop/contracts2012principles_e.pdf. The Draft Hague Principles were initially approved by the Special Commission on Choice of Law in International Contracts held in The Hague on November 12–16, 2012. The Principles will be considered for final approval by the Council on General Affairs and Policy (the Conference's governing body).

17. Many institutional arbitration rules permit the tribunal to apply directly the UNIDROIT Principles even in the absence of a choice of law. For example, Article 21(1) of the ICC Rules provides "[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." *See* INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION art. 21(1) (2012), *available at* http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/ICC-Rules-of-Arbitration/#top; *see also* INT'L CTR. FOR DISPUTE RESOLUTION, ARBITRATION RULES art. 28(1) (2010), *available at* http://www.internationalarbitrationlaw.com/icdr-arbitration-rules/; LONDON COURT OF INT'L ARBITRATION, LCIA RULES art. 22(3) (1998), *available at* http://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* http://www.acica.org.au/downloads/ACICA_Arbitration_Rules.pdf; NETH. ARBITRATION INST., NAI ARBITRATION RULES art. 46 (1998), *available at* http://www.asser.nl/default.aspx?site_id=6&level1=14433&level2=14445; STOCKHOLM CHAMBER OF COMMERCE, SCC ARBITRATION RULES 2010 art. 22(1) (2010), *available at* http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler%20eng%20ARB%20TRYCK_v1_100927.pdf; VI-

We do not think the case has been made that the current international framework is inhibiting trade or presents transactional problems to such a degree that a major international negotiation—which assuredly would be a difficult, lengthy exercise—is warranted. We have thus far not heard requests for such an initiative from U.S. practitioners or their clients—those directly involved in international sales transactions. Moreover, there is a risk that a global undertaking to revise and expand the CISG could have a chilling effect on further action by states to ratify or accede to the 1980 instrument.

As discussed at the 2005 Colloquium, the CISG was never intended to stand alone as a comprehensive framework: from the outset states envisioned that it would coexist with, and complement, other sources of law, as well as with private self-regulation and party autonomy.[18] More recently, at the 2007 UNCITRAL Colloquium on Modern Law for Global Commerce it was observed that parties are increasingly selecting the CISG to govern their international contracts.[19] Initiating a new global initiative at this point in time designed to change the CISG could slow that promising trend.

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enna Int'l Arbitral Ctr., Rules of Arbitration & Conciliation art. 22(2) (2012), *available at* http://www.viac.org.vn/Uploads/Quy%20tac%202012%20Eng%20-%20Final.PDF; World Intellectual Prop. Org., WIPO Arbitration, Mediation, & Expert Determination Rules & Clauses art. 59(a) (2009), *available at* http://www.wipo.int/freepublications/en/arbitration/446/wipo_pub_446.pdf.

On a regional level, the 1994 Inter-American Convention on the Law Applicable to International Contracts states in Article 9 that "[i]f the parties have not selected the applicable law . . . . The Court . . . shall also take into account the general principles of international commercial law recognized by international organizations." Inter-American Convention on the Law Applicable to Int'l Contracts art. 9, Mar. 17, 1984, 33 I.L.M. 732. Article 10 further recognizes 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." *Id.* art. 10. The references to general principles of international commercial law include the UNIDROIT Principles. On a domestic level, Comment 2 to U.C.C. § 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 recognized bodies of rules or principles applicable to commercial transactions . . . [such as] the UNIDROIT Principles of International Commercial Contracts." U.C.C. § 1-302 cmt. 2 (2001).

18. *See generally* Filip De Ly, *Sources of International Sales Law: An Eclectic Model*, 25 J.L. & Com. 1 (2005).

19. Several papers presented at the UNCITRAL Congress on Modern Law for Global Commerce at the 40th Annual Session of UNCITRAL (Vienna, July 9–12, 2007) addressed the CISG's increased use. *See, e.g.*, Harry M. Flechtner, Changing the Opt-Out Tradition in the United States, (July 9–12, 2007), *available at* http://www.uncitral.org/pdf/english/congress/Flechtner.pdf (providing text of presentation); Eckart Brödermann, The Practice of Excluding the CISG: Time for Change? (July 9–12, 2007), *available at* http://www.uncitral.org/pdf/english/congress/Broedermann-rev.pdf (same).

B. *Feasibility of a New Global Initiative?*

It is also necessary to consider whether it is feasible to achieve the ambitious goals that the proponents of the initiative have identified. If this ambitious initiative were launched, what might be achieved?

It is not clear what the expected product of global negotiations might be.[20] The topics of contract law that have been proposed for such an initiative are already substantially covered in the UNIDROIT Principles.[21] There would appear to be little value in having UNCITRAL duplicate UNIDROIT's work by developing a competing non-binding instrument. Moreover, the proposal submitted to UNCITRAL characterizes the UNIDROIT Principles' status as a soft law instrument as being a perceived shortcoming.[22]

The merits of a new global commercial code as either a soft law or a hard law instrument were addressed at the UNCITRAL Colloquium celebrating the 25th Anniversary of the CISG. At that gathering, Professor Herbert Kronke, then Secretary-General of UNIDROIT, reviewed what he termed "the never-subsiding charm of codes" and concluded that the time would be better spent on, inter alia, greater cooperation with respect to existing instruments.[23] He also emphasized the complementary nature between the binding nature of the CISG and the non-binding nature of the UNIDROIT Principles:

> 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

20. *See Swiss Proposal, supra* note 1, at 7.

21. The proponents of a global initiative acknowledge that the UNIDROIT Principles "now cover all areas that are perceived as contract law in most legal systems." *Id.* at 4.

22. *See id.* at 5. The Hague Conference on Private International Law has determined that a soft law approach—involving principles—is preferred in developing an instrument on choice of law in international commercial contracts. *See* HAGUE CONFERENCE ON PRIVATE INT'L LAW, *supra* note 16.

23. *See* Kronke, *supra* note 7, at 462–63. Professor Kronke points out that "While Professor Bonell is envisaging the [UNIDROIT 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." *Id.* at 463; *see also,* Michael Joachim Bonell, Towards a Legislative Codification of the UNIDROIT Principles? (July 9–12, 2007), *available at* http://www.uncitral.org/pdf/english/congress/Bonell.pdf (providing text of presentation).

> other existing or future convention devoted to a specific type of transaction would ever venture to touch upon.[24]

The negotiations relating to the CISG demonstrate the difficulty of the task. 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 validity, including mistake, and agency were left out of the CISG because they were not at that time considered suitable for harmonization.[25] Though a few states may have done so, we are not aware of, in the years since those negotiations, states reaching a broad consensus on the many very challenging issues deliberately left out of the CISG or insufficiently addressed by the CISG, or that such a consensus is likely to be found in a new global negotiation.

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24. Kronke, *supra* note 7, at 458–59. Professor Kronke continues with an example concerning the concept of good faith:

> While it is true that governments would be well-advised not to again discuss, for example, the concept of good faith in the context of developing rules for a *specific* transaction, as they did in Vienna where they finally settled on papering over disagreements in Article 7 CISG, we can say so only now that we have discovered an alternative vehicle for the promotion of that concept: Article 1.7 UNIDROIT Contract Principles.

Id. at 459.

25. For example, 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) these issues rarely arise, and that there was no indication that differences in the laws with respect to contract validity 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

> [i]t is by the extensive or the restrictive interpretation of such rules that many legal systems have effected 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.

U.N. Secretary-General, *Formation and Validity of Contracts for the International Sale of Goods*, ¶ 26, U.N. Doc. A/CN.9/128, annex. II, *reprinted in* [1977] VIII Y.B. UNCITRAL 93, U.N. Doc. A/CN.9/SER.A/1977. States subsequently decided to exclude specific rules on validity with regard to mistake because of their inconsistent treatment under various legal systems. *See Report of the Working Group on the International Sale of Goods on the Work of Its Ninth Session*, Sept. 19–30, 1977, ¶¶ 48–69, U.N. Doc. A/CN.9/142, *reprinted in* [1978] IX Y.B. UNCITRAL 65–66, U.N. Doc. A/CN.0/SER.A/1978 (decision to exclude specific rules on validity, particularly with regard to mistake). Similarly, efforts to address issues related to agency were not successful. *See, e.g.*, Rep. of the Working Group on the Work of Its Sixth Session, Jan. 27–Feb. 7, 1975, ¶ 47, U.N. Doc. A/CN.9/100, *reprinted in* [1975] VI Y.B. UNCITRAL 53 ("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."). UNIDROIT subsequently developed a Convention on Agency in the International Sale of Goods, but only a few countries have ratified it and it has never entered into force. *See* Convention on Agency in the Int'l Sale of Goods, Feb. 17, 1983, 22 I.L.M. 249.

The drafting of the UNIDROIT Principles was achievable for a number of reasons, as pointed out by Professor E. Allan Farnsworth, one of the key contributors to the development of the Principles:

> [D]o we not tremble when we meet at the thought of drafting principles for the entire world? . . . . We do not tremble for at least four reasons. One, we are drafting mere principles and not a uniform law, so that whatever rules we write are only likely to be applied if they find favor with someone concerned with a particular transaction or dispute. . . . Two, most of our principles are unlikely to miscarry because they are framed with evident generality (e.g., "good faith and fair dealing") or they have built-in safety valves (e.g., "unless the circumstances indicate otherwise"), giving them enough flexibility to permit a judge or arbitrator to use common sense in applying them so as to avoid an arbitrary or unfair result. Three, in some instances we have declined to deal with tough questions, as in the area . . . of invalidity on a variety of grounds under the applicable domestic law. And four, . . . UNIDROIT is free to amend the Principles . . . from time to time to take care of problems that later surface.[26]

Moreover, the negotiations were largely conducted by experts who were not representing governments bound by national policies but rather participated in their individual capacities, thereby enjoying more flexibility in developing the Principles.[27] Even so, the negotiations in UNIDROIT regarding the first version of the Principles took fourteen years.

In UNCITRAL, the dynamic would be far different—governments would conduct the negotiations with more direct implications for national interests, and policy positions that must be defended. As a result, reaching consensus would inevitably be more difficult. As Professor Peter Schlechtriem observed with regard to the CISG:

> 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 foreseen by its drafters. This is even more so in the case of codifications based on international conventions, for, while a domestic legislator might

26. E. Allan Farnsworth, *Closing Remarks, Contract Law in a Changing World*, 40 AM. J. COMP. L. 699, 699–700 (1992).

27. *See* Roy Goode, *Rule, Practice, and Pragmatism in Transnational Commercial Law*, 54 INT'L & COMP. L.Q. 539, 553–54, 556 (2005) (stating that 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," while governments can "focus on more specific areas—for example, competition law and consumer protection—where the rules are essentially mandatory rules or rules of public policy rather than dispositive provisions."); *see also* Bonell, *supra* note 23.

> 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. So there must be safety valves. They are interpretation and gap-filling. The basis is article 7 of the CISG, the formulation of which can now be found in a number of other international conventions, model laws and drafts.[28]

With regard to the discussion of codifying international commercial law, it has been suggested that the experience of the United States' Uniform Commercial Code (U.C.C.) may be instructive.[29] Yet the United States has never attempted a comprehensive codification of the law governing the sale of goods. Rather, Article 2 of the U.C.C., while codifying many important rules in a systematic way, still relies heavily on general principles of law outside the U.C.C.—which were not the subject of harmonization efforts—to fill its many gaps. Examples include agency; what constitutes an offer to enter into a contract; and the circumstances in which a contract might be avoided on grounds such as mistake, misrepresentation, duress, and illegality. The experience in the United States suggests that certain aspects of contract law are not good candidates for codification. In the 1990s, the American Law Institute and the Uniform Law Commission considered revising Article 2 to cover certain service contracts related to contracts for the sale of goods (i.e., contracts to install, maintain, support, and repair goods). Although drafts were prepared and considered, the effort was quickly abandoned as not feasible.

The difficulties encountered in trying to codify these issues within one common law country suggest that trying to do so internationally—across common law and civil law jurisdictions—would be quite challenging. Within the United States, these topics have been dealt with through approaches such as the Restatement of Contracts, which can address the issues as principles rather than seeking codification as in the U.C.C. Similarly, the limited approach taken with regard to the CISG left these topics to be dealt with internationally in soft law instruments such as the UNIDROIT Principles.[30]

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28. Peter Schlechtriem, *Requirements of Application and Sphere of Applicability of the CISG*, 36 Victoria U. Wellington L. Rev. 781, 789 (2005).

29. *See, e.g.*, Clive M. Schmittoff, Commercial Law in a Changing Economic Climate 30 (2d ed. 1981) ("[The] attempt to draft a world code on international trade law . . . is not an idle dream. . . . [T]here is the example of the Uniform Commercial Code of the United States. It started as an academic venture but became reality when it was adopted by 49 of the 50 jurisdictions of the United States."); *see also* Michael Joachim Bonell, *Do We Need a Global Commercial Code?*, 106 Dick. L. Rev. 87, 89 (2001).

30. Just as the U.S. has had difficulty in developing a comprehensive code of contract law domestically, the European Union has, in the course of considering a series of initiatives, experienced similar problems with the development of a set of uniform regional principles.

In short, the historical example of the CISG speaks for itself. Those negotiations, building on forty years of work in the international arena in other organizations, still took nearly ten years—and elected not to tackle some of the hardest issues.

II. MAXIMIZING PRODUCTIVE USE OF UNCITRAL'S RESOURCES

What, then, might UNCITRAL productively do in the area of international contract law? It is important to recognize that in fact UNCITRAL is already doing a good deal in that regard in line with its primary mandate to promote coordination and cooperation in the development of international trade law:[31]

- encouraging more widespread ratification of or accession to the CISG;[32]
- developing and maintaining the CISG Digest (now third edition) and CLOUT in the six official languages of the United Nations, thereby promoting the uniform interpretation and application of the CISG;[33]
- endorsing the UNIDROIT Principles as complementary to the CISG, including most recently the 2010 edition;[34] and
- endorsing the ICC's Incoterms, including most recently the 2010 edition.[35]

Other UNCITRAL activities could be explored, keeping in mind the factors previously noted: demonstration of need and feasibility; scarcity of resources and competing priorities; and the value of collaboration with other organizations. For example, UNIDROIT is developing model clauses to be used by parties to ensure that the UNIDROIT Principles will govern their contracts.[36] When that project is complete, UNCITRAL may consider whether to endorse them.

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31. Establishment of the United Nations Commission on International Trade Law, G.A. Res. 2205 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6594 (Dec. 17, 1966); *see also* Gerold Herrmann, *The Role of UNCITRAL*, *in* FOUNDATIONS & PERSPECTIVES OF INTERNATIONAL TRADE LAW 28, 34 (Ian Fletcher, Loukas Mistelis & Marise Cremona eds., 2001).

32. *See* Report of 45th Session, *supra* note 2, ¶¶ 159–60.

33. *See id.* ¶¶ 149–53.

34. *See id.* ¶¶ 137–40.

35. *See id.* ¶¶ 141–44. For a comprehensive list of texts of other organizations endorsed by UNCITRAL, see *Texts of Other Organizations Endorsed by UNCITRAL*, UNCITRAL, http://www.uncitral.org/uncitral/en/other_organizations_texts.html (last visited on Apr. 4, 2013).

36. The UNIDROIT Governing Council, at its 91st session in May 2012, decided to set up a restricted Working Group for the preparation of Model Clauses for use by parties intending to indicate in their contract more precisely in what way they wish to see the UNIDROIT Principles of International Commercial Contracts used during the performance of the contract or when a dispute arises. The Working Group, composed of experts in the field of private international law and arbitration, held its first session in Rome February 11–12, 2013. *See Model Clauses for Use by Parties of the UNIDROIT Principles of International Commercial Contracts*,

The United States has long been a strong supporter of UNCITRAL. We consider UNCITRAL a real success story—one of the most practical and productive organs in the UN system. It creates tangible legal products that can have a real impact in promoting international trade, while at the same time contributing to the rule of law globally. This record of achievement continues under the very capable leadership of Secretary Sorieul. Yet UNCITRAL, like other elements of the United Nations, is under increasing budget pressures, as are member and observer states, including developing countries.[37] Thus, it is important that UNCITRAL marshal its resources and be selective in its choice of projects.

One must also take into account competing priorities. With regard to possible new projects, the Commission has expressly assigned priority to another topic, which has broad support particularly among developing countries: microfinance and other means of creating an enabling legal environment for micro, small, and medium-sized enterprises.[38] UNCITRAL held a colloquium on that topic January 16–18, 2013 in Vienna. The Commission also endorsed exploratory work in the area of public-private partnerships and project finance.[39] UNCITRAL will hold a colloquium on those issues in May 2013. With the ongoing work in several working groups, UNCITRAL's resources are already spread thin.

Also, the Commission has in the past recognized that the Secretariat can face resource shortfalls with regard to efforts to promote the ratification and implementation of the CISG.[40] As Gerold Herrmann, then Secretary of UNCITRAL, observed a decade ago regarding such efforts:

> [T]he Secretariat's lack of resources is a particularly disappointing feature here . . . [because] the preparation of a uniform law is an extremely expensive affair (the Sales Convention cost the United Nations alone an estimated 6 million U.S. dollars) which would mean a considerable waste if, for lack of a comparatively minute amount, the text will not be made known to the relevant people.[41]

UNIDROIT, http://www.unidroit.org/english/principles/modelclauses/main.htm (last updated Mar. 26, 2013).

37. In 2011, the United States and other UNCITRAL members had to mobilize to protect UNCITRAL's budget from proposed cuts that would have ended the traditional practice of alternating UNCITRAL meetings between Vienna and New York, a practice that the United States and other UNCITRAL members consider highly important to maintaining the diversity of representation at its meetings, the quality of UNCITRAL's work, and the global impact of its instruments. Those funds were ultimately restored, but only after extensive discussions. *See* Rep. of the U.N. Comm'n on Int'l Trade Law, 44th Sess., June 27–July 8, 2011, ¶¶ 334–44, U.N. Doc. A/66/17; GAOR 66th Sess., Supp. No. 17 (2011).

38. *See id.* ¶¶ 124–26.

39. *See id.* ¶¶ 115–23.

40. *See* Report of 45th Session, *supra* note 2, ¶ 157.

41. Herrmann, *supra* note 31, at 33.

Such efforts are equally important today.

III. CONCLUSION

Achieving further harmonization and unification of international contract law is a worthy goal. However, we must be pragmatic. Key domestic constituencies and trusted advisers tell us that the time is not right for a global initiative, principally because the desired results simply cannot be achieved at this time. If such a major undertaking were to be pursued at the present time, we envisage a contentious, multi-year negotiation that would likely not bring significant results, and at great expense to UNCITRAL and its members. There is also the risk that it could detract from existing efforts to secure widespread adoption of the CISG. The U.S. government believes that there are less ambitious but more practical alternatives for achieving progress in this area, and that UNCITRAL should continue to focus on such alternatives.