CHAPTER 11

HARMONISATION OF INTERNATIONAL CONTRACT LAW – DREAM OR REALITY?

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I INTRODUCTION

One of the very important achievements of UNCITRAL was the creation of the CISG. It fits well into – what might be called Globalisation – which is not only an economic process but also a legal one. We have also seen a gradual change in domestic laws adjusting to the needs of a global economy. However total harmonisation of contract laws has not eventuated and is still a dream. The main problem is that the dream to achieve a global contract law is dependent on political issue. It requires consensus by sovereign legal systems which is arguably never possible. It was not possible when the CISG was drafted and is not possible now as the failure of Swiss Proposal as well as the efforts of the EU demonstrated.

Harmonisation is not a product but rather a process which depends on planning by relevant organisations such as UNCITRAL and importantly the delineation between conventions and soft laws. The importance of understanding what is politically possible as well as understanding what instrument covers the need of the user is essential. There is no debate that in recent years an unprecedented number of international organisations were involved in attempting to harmonise areas of law such as contract law. The most successful convention is the CISG and in the area of soft law the UNIDROIT Principles of contract law stands out.

As far as conventions are concerned the success of the CISG can be measured by the fact that so far 83 countries have adopted the convention and currently there are ongoing discussions within ASEAN countries to adopt the CISG. These

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discussions have been successful as Viet Nam has adopted the CISG and will become the 84th convention country on 1 January 2017 when the CISG enters into force. In effect Viet Nam is the second ASEAN Member State after Singapore to become a party to the CISG, and the fourteenth State in the Asia Pacific Region.

Based on these adoption statistics, it is estimated that 80% of the world's trade in goods is potentially governed by the CISG.[1] Furthermore the gradual removal of reservations by contracting states has contributed to an internal harmonisation of the CISG. In essence the CISG has reduced barriers to trade. This has been noted in the forty-eight session where the discussion "has stressed its importance both as a treaty providing default rules for contracts for international sale of goods and promoting party autonomy in cross-border transactions."[2] A further fact pointing to its success is – as noted by the working group[3] - that the CISG has been used as a model for law reform. This is specially so in relation to article 7 which has found its way into many model laws and conventions.

The only blemish one could argue is firstly that the CISG is still too many times excluded and secondly the United Kingdom has not found it necessary to adopt the CISG. An argument often used in not ratifying the CISG is that it would impose a greater burden on those giving legal advice and increase transaction costs. Arguably this argument is a rear-guard action by those who have not yet understood that it does the opposite namely reduces transaction costs specifically if the other contractual party also is part of the CISG regime.

This paper will touch briefly on the issue of expanding the CISG to a contract law and also where regional development fits into the harmonisation of contract law and specifically how reginal soft laws coexist with the CISG. This paper argues that these issues can be put to bed as they offer no improvement on the current form of the CISG. In essence they are distractions as the attempts by the EU have shown.

The second issue is whether the CISG is able to be ratified by the UK despite the reasons given that it would not be suitable to specifically resolve commodity trade issues. In essence the argument of this paper is that the CISG - should it be adopted - would operate as part of English law, rather than as an alternative to it.

1 Ingeborg Schwenzer and Christopher Kee "International Sales Law – The Actual Practice" (2011) 29 Penn State International Law Review 425 at 428.

2 Forty-eight session Vienna, 29 June-10 July 2015 A/CN.9/849.

3 Forty-eight session Vienna, 29 June-10 July 2015 A/CN.9/849.

The third issue will address the reason why currently the CISG must leave issues like transfer of property and validity of contract to domestic law or at best devise a model law which is acceptable by most jurisdictions. Many jurisdictions have adopted each other's law reforms and have in essence created a harmonised law on a specific topic matter. This is not impossible as the development of the Himalaya clauses in shipping contracts has shown. The development started in England and is now the current state of law in most common law and civil law jurisdictions.

It will be argued that the strength of the CISG is that a new generation of legal professionals is emerging which is very aware of the advantages of the CISG and will promote its usefulness. It will hopefully reduce automatic exclusions of the CISG in the drafting of contracts.

At the outset some important points need to be understood in relation to either ratify the CISG or include the CISG as the choice of law into a contractual term. First the CISG does not suit every sales transaction. If a party wishes to be able to terminate the contract for any deviation which is a strict interpretation of the contract is desired, the CISG should not be the preferred choice of law. English law as an example is better suited for this purpose specifically in commodity trades. That said it does not mean that the CISG is not capable of governing commodity trade. On the contrary several well-argued cases are to be found on the Pace CISG Website.[4]

On the other end of the spectrum if performance is the culmination of discussions the CISG is a very useful instrument and should be the choice of law. The reason simply is that the CISG pursuant to article 8 allows not only for objective interpretation but also for a subjective one. In other words not only customary practices pursuant to article 9 but also pre-contractual, contractual and post-contractual conducts are taken into consideration when interpreting a contractual relationship. Common law as an example bases its interpretation on the objective approach and only recently - as an example in Australia - had the post contractual conduct be included in the interpretive regime.

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4 As an example see Germany 8 February 2006 Appellate Court Karlsruhe (*Hungarian wheat case*) <http://cisgw3.law.pace.edu/cases/060208g1.html> United States 19 July 2007 Federal Court of Appeals [3d Circuit] (*Valero Marketing & Supply Company v Greeni Trading Oy*) <http://cisgw3.law.pace.edu/cases/070719u2.html>.

II EXPANDING THE CISG AND FOSTER REGIONAL HARMONISATION OF CONTRACT LAW

Two issues are at "play" here; first to expand the CISG and secondly to foster regional harmonisation. It is without doubt that UNCITRAL'S philosophy of promoting the balanced development of international trade on the basis of equality, mutual benefit and co-operation is echoed in the Preamble of the CISG.[5]

2.1 Expand the CISG

As to the first point the expansion of the CISG has been unsuccessfully proposed through the Swiss initiative at the 45th meeting at UNCITRAL. The reaction was very mixed to say the least. The chair ultimately ruled that there was a prevailing view in support of further exploratory work.

However, at a conference held at Villanova University in 2013 Keith Loken and others clearly rejected such a notion. Loken even noted that a "number of delegations" – including that of the United States – expressed strong reservations about undertaking such a project.[6] He furthermore noted that "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."[7] This reflected an unusual discord amongst member states.

The Swiss Proposal does have a valid point considering that Rosett already in 1984 suggested that any international convention harmonising international trade law can easily become a static monument that is soon out of step with new developments.[8] Furthermore the CISG is not the perfect product either. As Professor Kronke noted:[9]

> most of us would agree by and large that there are "open," deliberate gaps and - defying, much to the wonderment on the part of some professional commentators,

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5 Juana Coetzee and Mustaqeem de Gama "Harmonisation of Sales Law: An International and Regional Perspective" (2006) 10 Vindobona Journal of International Commercial Law and Arbitration 15 at 20.

6 See K Loken "A new Global Initiative on Contract Law in UNCITRAL: Right Project, Right Forum?" (2013) 58 Villanova Law Review 509.

7 Ibid at 509, fn 2.

8 See Arthur Rosett "Critical Reflections on the United Nations Convention on Contracts for The International Sale of Goods" (1984) 45 Ohio State Law Journal 265 at Section IV <www.cisg.law.pace.edu/cisg/biblio/bib2.html>.

9 See Herbert Kronke "The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond" (2005-06) *25* Journal of Law and Commerce 451 at 453.

> logic - "hidden" gaps, in Professor Loewe's metaphoric language *absent* Yetis and *virtual* Loch Ness monsters, lack of clarity or disclosed or undisclosed compromises, as they are regularly generated in complex intergovernmental negotiations.

These observations are indeed true but equally correct are Eiselen's observations:[10]

> The CISG has one major advantage over most other instruments of international harmonisation: the functioning of the principle of party autonomy. It is one of the underlying principles of the CISG, as of most national laws, that in matters of contract the parties are autonomous in realising the relationships between them and that there is relatively little mandatory law that cannot be changed, modified or excluded by the parties themselves. This allows parties to bypass or exclude the CISG where its provisions are inapposite to their situation and to structure their own solutions, that is if the parties are even aware that the CISG may be applicable.

Simply put the question again can be posed namely why change a flexible instrument when it is not needed? Just because the CISG is incomplete is not a negative argument because the gaps can be filled by either drafting the contract to overcome the gaps or simply relying on the underlying law in the relevant seat or jurisdiction.

One fact is obvious that if any changes are made to the CISG two instruments would in effect be in operation. The question is – and it has not been tested – how many current CISG states would abandon the "old" version for the new one? The closest one can answer this question is by simply looking at maritime law where several versions are currently operational namely the Hague Rules, the Amended Hague Rules, the Hamburg Rules and now the Rotterdam Rules. It is very unlikely that eventually only one rule would be in use as every new rule appears to have declining accession rates. In addition it is worthwhile to remember that the UNCITRAL Electronic Commerce Convention of 2005 was intended to amend the CISG "but quickly morphed into a free-standing instrument because of the fear of reopening the CISG."[11] It is argued that the same concerns are still valid today. Arguably proponents of changing or amending the CISG need to remember the very reasons the CISG was drafted and had such a great success namely:[12]

10 See Sieg Eiselen "Adopting the Vienna Sales Convention: Reflections Eight Years down the Line" (2007) 19 SA Mercantile Law Journal 14 at 17.

11 See Henry Gabriel "UNIDROIT Principles as a Source for Global Sales Law" (2013) 58 Villanova Law Review 665.

12 See Eiselen, above n 10, at 25.

> The main advantages of the harmonisation of international sales law remain unchanged: legal certainty, the lowering of transaction costs, the suitability of the CISG for international trade, the balancing of the interests of the parties, as well as the policy reasons... . In short, the case for adopting the CISG in [any country in an unchanged form] remains strong.

In addition and furthermore besides the CISG, UNIDROIT covered contract law - as opposed to only sales law - in the non-binding UNIDROIT Principles. It is of value to remember what Herbert Kronke already noted in 2005 namely:[13]

> 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.

As already noted above it is obvious that the astute drafter of a contract has the ability - due to the principle of party autonomy – to fill the gaps in the CISG either through the UNIDROIT Principles or at least as a default position leave it to the otherwise applicable domestic law. Karrer already in 2004 noted that:[14]

> To a unified sales law such as the CISG one can try and add a "general part" of contract law. This is what happened in Art. 1 of the UCC, and now also with the UNIDROIT Principles which may be seen as a general part of the CISG.

This argument is still valid today.

In sum two points are of interest. First; topics which are not governed in the CISG or any other convention are not included for a very good reason. To reach consensus is difficult and requires patience and a lot of time which is better spent on other more pressing issues such as cross border insolvency. Secondly the most important point is that the two instruments such as the CISG and the UNIDROIT Principles are complementary. It would indeed be a waste of time and scarce resources for UNCITRAL to reinvent contract law and attempt to draft a new convention as indicated by the Swiss proposal. The efforts in the EU in drafting a common European Contract law should be a lesson to be learned. Several major

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13 See Kronke, above n 9, at 458-59.

14 See Pierre Karrer "Internationalization of Civil Procedure - Beyond the IBA Rules of Evidence" (2004) 9(4) Uniform Law Review 893 at 895.

attempts have been made starting with The Principles of European Contract law (PECL), the Common Frame of Reference (CFR) and now the Common European Sales Law (CESL). Much work has gone into the drafting of the three EU instruments and what can be said is that UPICC overshadows PECL and the CFR and no doubt CESL. It can be confidently stated that all three instruments will collect dust on a shelf and that the creation of a unified EU contract law remains a distant dream.

However there is another option to increase the coverage of the CISG. It does require the drafting of a new convention on the lines of the Cape Town Convention which in essence introduced a new aspect to convention namely law reform in a discreet area. The Convention has core elements and attached to it are Protocols such as the aircraft Protocol and the space Protocol. It allows country in essence to choose which of the specific Protocols is of interest.

2.2 Regional Developments

In relation to regional developments there is no debate that a harmonised contract law within a region is of benefit to inter- and intra-state trade to and in the region. This goal can be achieved if a region simply adopts the CISG as it is currently the case in East Asia but unfortunately not in ASEAN.

The scope and application of the CISG undoubtedly leaves room for regional harmonisation efforts. However two issues need to be kept in mind. First is there enough difference or uniqueness in a region to warrant the creation of a unique regional contract law? Bell does not think so. He argued that:[15]

> There is no good reason to consider a regional harmonisation of the laws of sale of Asia but many good reasons why the CISG should be adopted more widely in Asia. My main hope is that through the adoption of the CISG and of other international commercial law treaties, an international practice of commercial law will be developed in Asia by Asian lawyers and that lawyers here will soon acquire the international and comparative law expertise that will allow us to compete better with American and European practitioners of international commercial law.

The second point which needs to be considered when envisaging the creation of a regional harmonised contract law is the question of coexistence between the CISG and the otherwise applicable regional law. If the regional law is drafted as a model law its existence depends on parties incorporation it as part of their

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15 See Gary Bell "Harmonisation of Contract Law in Asia - Harmonising Regionally or Adopting Global Harmonisations - The Example of the CISG" (2005) Singapore Journal of Legal Studies 362 at 372.

contractual obligations. This option - looking back at all contract model laws - appears not to provide much confidence because none of the contract model laws expect perhaps the UNIDROIT Principles has achieved much success.

The question must be asked; what is the advantage in facilitating a development of a new principle such as the principle of Asian Contract law[16] when every member of the region already has ratified the CISG? The problem is obvious namely how the new system of contract law will sit next to the CISG which is already part of the domestic system. In effect such a law will only produce a soft law as noted above and again looking at the efforts of the EU will never gain tractions. Besides why create a problem where none existed before.[17] Arguably it is not helpful to argue that:[18]

> The effort that goes into initiatives such as CESL, … is a valuable contribution to the harmonization of commercial law, not least for the boost it give to comparative legal scholarship.

It is true that efforts of the EU and other organisations drawing up soft law are a valuable contribution to legal scholarship but nothing more. It overlooks the reason why harmonising sales law and even better contract law is important. It is not an academic exercise but a contribution to practical solutions which are not only palatable to business but also to governments in order to facilitate global trade.

The alternative is to develop a home grown system such as in the OHADA group of nations which heavily relied on the inspirations from the CISG. The contract law took the form of a treaty between the participating nations and as a result a supranational court was introduced. The problem is that within each state the domestic system of laws still is valid but international and interstate issues are subject to the harmonised law. The bedding in process has taken some time to come to fruition but there are now signs that it is working. Domestic courts are referring treaty issues to the supranational court.[19]

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16 See Shiyuan Han "Principles of Asian Contract Law: An Endeavour of Regional Harmonisation of Contract Law in East Asia" (2013) 58 Villanova Law Review 589.

17 For further reading see B Zeller "Recent Developments of the CISG: Are Regional Developments the Answer to Harmonisation?" (2014) 18 Vindobona Journal of International Commercial Law and Arbitration 111 and B Zeller "Regional Harmonisation of Contract law – is it feasible?" (2016) 3(1) Journal of Law, Society and Development 85-98.

18 CISG Advisory Council Declaration No 1 <www.cisg.law.pace.edu/cisg/CISG-AC-dec1.html>.

19 See B Zeller "Mining Projects in OHADA: The Legal and Judicial Climate" in Gabriel Moens and Philip Evans (eds) *Arbitration and Dispute Resolution in the Resources Sector: An Australian Perspective* (Springer International Publishing, Switzerland, 2015) 231 at Chapter 12.

A good example is the contract law currently in use in OHADA where the coexistence with the CISG is also an issue. It has been argued that in a country where Art. 95 CISG applies; regional sales law can govern the contract.[20] Generally speaking the effect is that the reginal contract law will displace the CISG. In all other cases the CISG will displace the regional contract law. However OHADA has resolved this issue positively through the enactment of the Uniform Acts. Juana Coetzee & Mustaqeem de Gama argue:[21]

> To date only Guinea is party to both the CISG and a member of OHADA. What would therefore be the governing law in a situation where the seller is situated in Guinea and the buyer is established outside the OHADA region? Accordingly to Basedow, both instruments might be applicable, however under Art. 10 of the basic *OHADA Treaty*, the Uniform Act overrides previous or subsequent enactments of internal law. Art. 10 of the *OHADA Treaty* explicitly states that a uniform law adopted pursuant to the *OHADA Treaty* is directly and mandatorily applicable in the member states.
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> The adoption of a uniform law is a relinquishment of sovereignty by the member states contemplated by the *OHADA Treaty*. But it is not clear whether this provision also purports to deal with conflicts between uniform acts and other international conventions or laws to which an OHADA contracting state is a subject. It is arguably open to the OHADA Common Court of Justice and Arbitration to find that the Uniform Acts, under Art. 10 of the basic *OHADA Treaty*, take priority over other international conventions.
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> If the Uniform Acts do not take precedence over international conventions, the conflict would be resolved with reference to the traditional manner in which conflicts between conventions are resolved.

The real question is: will a region such as ASEAN find enough common ground not only to form a contract treaty but also establish a supranational court as in OHADA? Just simply ratifying the CISG seems to be a far easier solution to harmonise a reginal sales law. The view of the CISG Advisory Council on this issue is very pertinent. They note:[22]

> A key attribute of uniformity and harmonization is also simplicity. Increasing legal plurality detracts from that virtue and introduces fragmentation, which is the very thing that uniformity and harmonization seek to avoid.

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20 See Coetzee and Gama, above n 5, at 20.

21 See Coetzee and Gama, above n 5, at 23-24.

22 See CISG Advisory Council Declaration No. 1, above n 18.

In relation to regional developments the view of the Council is the same as they state:[23]

> … the likelihood that regional initiatives would not produce better solutions and, moreover, that those solutions would not have been subject to the same searching inquiry, from delegates drawn from many different countries, as occurred in the case of the CISG. So far as it varies work already done in the area of sales law covered by the CISG, however, it does not promote the cause of harmonization. States may become entrenched behind regional instruments at the expense of participating in the work of *increasing* harmonization of global contract law that has yet to be done to carry forward the achievements of the CISG.

There are emerging regional groups such as the ASEAN and SADC[24] where the CISG has not yet been extensively adopted. This is very fertile ground for UNCITRAL to develop relationships in order to promote a regional harmonised contract law either in the form of ratification of the CISG or at least the use of the CISG as the model for a home-grown system of law reform. This proposal would fit into what is now called the third phase of legal harmonisation namely "the dawn of inter-regionalism."[25] It is however unfortunate that in the end the bureaucratic structure of a country will determine whether the introduction of the CISG is a priority. Eislen in 1999 with the assistance of UNCITRAL made a strong case for the adoption of the 'CISG in South Africa.[26] As of 2016 South Africa has not yet adopted the CISG nor has it found much traction in SADC.

III WHETHER THE CISG IS ABLE TO BE RATIFIED BY THE UK

In order for the CISG to achieve "world dominance" the United Kingdom needs to ratify the convention. Political considerations aside there are no reasons why the CISG should not be ratified. Arguably it would enhance the common law and simplify cross border trade not only within the EU but the rest of the international trade community. Looking back at the development of the CISG - and other conventions and model laws such as the UNIDROIT Principles for that matter - it

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23 See CISG Advisory Council Declaration No 1, above n 18.

24 The Member States of the Southern African Development Community are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe, SADC headquarters are located in Gaborone, Botswana. Only Lesotho and Zambia have ratified the CISG.

25 See José Angelo Estella-Faria "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?" (2009) 14 Uniform Law Review 5 at 7.

26 See S Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa" (1999) 116 South Africa Law Journal 323.

is interesting to note that the United Kingdom played an important role in all the developments but in the end refused to ratify an instrument to which they contributed to greatly.

In a forthcoming paper[27] the authors suggest in the conclusion that:[28]

> Existing analysis has rightly focused on the practicalities of the UK acceding, or not acceding, to the *Convention*. This analysis has largely approached the issue as one of competition. English law and the *CISG* are treated as inherently at odds, leading literature to assess their relative merits, particularly with respect to the commodities trade.
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> This article has made the case for reframing this debate. Rather than focusing on competition, this article advocates a perspective of coherence. Should the United Kingdom adopt the *CISG*, it would not apply in distinction to English law. As a matter of private international law, it would apply as *part of* English law. The *CISG* would represent a discrete part of English private law, as already do the *Sales of Goods Act* and the common law of contract. One or more of these may be relevant to a particular contract, depending on the facts of the case, and depending upon parties' exercise of contractual autonomy. On this view, the long-agitated notions of competition between the *CISG* and English law arguably fall away. The matter is not one *or* the other, but one *and* the other. The real question is whether the *CISG* can work effectively as (one) part of English law, in the regulation of international sales.

Arguably therefore there are no convincing and intellectually valid objections for the United Kingdom to hesitate in adopting the CISG.

IV WHY GAPS IN THE CISG MUST STILL BE LEFT TO DOMESTIC LAW

The starting point on this issue must be the fact that "legal harmonisation can only be attained by standardising legal terms".[29] The success of the CISG is a result of having been able to standardise not only legal terms but also principles. However due to the political aspect in the drafting process standardisation was not possible on all aspects. Arguably therefore gaps are the exception to the rule as otherwise the "birth" of the CISG would have been in doubt.

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27 See Bruno Zeller and Benjamin Hayward "The CISG and the United Kingdom – Applying a More Radical Perspective to a Difficult Practical Problem" (forthcoming).

28 Ibid.

29 See Viola Heutger "Law and Language in the European Union" (2003) 3(1) Global Jurist Topics 1 at 2.

Simply put issues such as validity of contract and transfer of property were and are still considered to be "sacred cows" in many legal systems and hence consensus of a uniform rule on these issues is difficult but not impossible to achieve. In essence to preserve national sovereignty, compromises were not reached in a number of areas which are covered in national law regimes.[30] In essence the question is; what has changed and would a new system that is a comprehensive sales law - or contract law for that matter - overcome the problems as experienced in the drafting process of the CISG?

The answer is simply nothing has changed or at least unlikely to change. One need only look at the reasons why there are gaps in the CISG and arguably the same reasons are still present. However a solution lies within each jurisdiction when any law reforms are undertaken, that is uniformity is achievable when each of the major legal systems modernises its domestic law by taking note of UPICC or the CISG as was the case recently when Germany reformed aspects of their law of obligations.

Some authors on the other hand have advocated that the road to a comprehensive sales law is by developing a Restatement of Sales law or what is termed a "CISG plus "document by stating:[31]

> [Developing a Restatement] is the next logical step in developing a more comprehensive international sales law. This is especially true given the unlikelihood of a formal revision of the CISG or the adoption of a broader international contract or commercial code in the near future.[32]

The problem with this argument is that it does not present anything new. It is - as one might say - simply changing the deckchairs on the Titanic. The efforts in the EU indicate which way such a proposal will go namely to be put on a shelf and gathering dust. UPICC is the only model law which has gained some traction and is still the best option to fill gaps and coexist with the CISG. It is argued that a drafting of a model clause could be a solution. It requires minimal effort it is not costly and represents at least the same chance to succeed than any other model laws or restatements. Simply put the model clause should merge the CISG and UPICC with the purpose of filling the gaps in the CISG.

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30 See Larry DiMatteo "CISG as Basis of a Comprehensive International Sales Law" (2013) 58 Villanova Law Review 691.

31 Ibid at 711.

32 Ibid.

However on a realistic note it is argued that domestic reforms either through the judiciary or in the form of statutory changes will or can be the prime mover in this area. The best example – as already noted above - is the exemption clauses in shipping contracts – the Himalaya clause – which has achieved uniformity of interpretation and application. England, the US, Australia, Germany, South Africa, Singapore and Hong Kong - just to mention a few - follow the same application and interpretation of the Himalaya clauses. Considering that the listed countries are common law, civil law and mixed jurisdictions what might look at the beginning as impossible turns out to be achievable. Considering that the Privity of contract rule was amended to accommodate the inclusion of a third party into the benefits of a contract would have been unthinkable in the past. . The interpretation of shipping contracts has also changed and is dominated by what makes commercial sense and what the parties customarily expected - that is subjective knowledge - was assumed. Especially in cases of the common law it is a step away from the restrictive parol evidence rule and a move closer to what article 8 of the CISG mandates.

V WHAT NEXT?

The question is what can UNCITRAL do in this area? It is argued that the efforts should be on a promotional basis such as the hosting of conferences such as the one in Macao where information is shared and hopefully academics will endeavour to research into the possibility of crating uniformity in areas not covered by the CISG but within the mandate of uniformity within the CISG. The judiciary and legal firms will be challenged in their old views and "it might be worthwhile to consider, in addition to the endorsement by UNCITRAL, further measures in order to encourage judges and arbitrators to use the principles of UPICC whenever appropriated"[33] to close the gaps left in the CISG. The "whenever appropriate" is indeed the correct approach as there are views that the UNIDROIT Principles should not be used of their own force to fill gaps left in the CISG.[34] Gotanda argued correctly that:[35]

> [The Principles] help us understand the general principles of the CISG that guide courts and tribunals in resolving matters not expressly dealt with in the convention.

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33 See Jan Ramberg "CISG and UPICC as the Basis for an International Convection on International Commercial Contracts" (2013) 58 Villanova Law Review 681 at 690.

34 See John Gotanda "Using the UNIDROIT Principles to Fill Gaps in the CISG" in D Saidov and R Cannington (eds) *Contract Damages, Domestic and International Perspectives* (Hart Publishing, Portland, 2008) 107 at 108.

35 Ibid at 109.

> In addition, they provide support for solutions to open issues reached through an analysis of the Convention itself.

In sum Gotanda correctly notes that the Principles "can play a role in finding solutions to questions unresolved by the text of the Convention."[36]

There is also a further point which must be considered. It is one thing to ratify the CISG by a country within a region but the real success lies in its application. Looking at countries who ratified the CISG such as China, the United States and Australia - just to mention a few – it took nearly 20 years or more for the judiciary, business and the legal profession to understand the function of the CISG and appreciate its scope and advantage in reducing not only contract costs but avoid the need to understand a foreign law. With the speed of introducing FTA's and now what appears to be the mother of all FTA's the Trans Pacific Partnership (TPP) the luxury of slowly introducing the CISG into a legal system has disappeared. Competition in a shifting global economy indicates that changes need to be bedded down quickly.

It is obvious – as indicated above already – that regional harmonisation cannot waste time to develop a unique ASEAN contract law. The problem is that it might suit ASEAN but it will not advance their aspiration to develop their economy within the global network. Adopting the CISG is a better option and it must be remembered that the weal has already been invented. This has been done by the CISG and UPICC. Interestingly Schlechtriem noted the obvious strength of the CISG when reginal harmonisation is the focal point of discussion. He stated:[37]

> The CISG has left its imprint on a number of international projects for the unification or harmonisation of rules in the field of commercial and general contract law. Basic concepts of the CISG have influenced the development of international or regional projects of unification and harmonisation on two levels. Firstly, the prerequisites for application in its Articles 1-7 have repeatedly been used as a model. Secondly, its substantive law provisions on the contractual relations of the parties to an exchange contract in general and its provisions concerning sales contracts in particular had a noticeable influence on such projects.

In the end after all is said and done the real issue is the application of the CISG. Its uptake by the business community and more to the point the legal profession is essential. Arguably UNCITRAL could encourage governments and legal

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36 Ibid at 122.

37 See P Schlechtriem "Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations" (2005) 10 Juridica International 27 at 28.

professional bodies to invite academics familiar with the CISG to conduct professional development seminars. It certainly would facilitate and speed up the uptake of the CISG in particular through other instruments devised by UNCITRAL.