LEANDRO TRIPODI

Uniform Sales Law in the 21st Century: Aging and Renovation of the CISG

(O Direito Uniforme da Venda no Século 21: Caducidade e Renovação da CISG)

Tese de Doutorado

Orientadora: Professora Associada Maristela Basso

FACULDADE DE DIREITO DA USP

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Tese apresentada à Faculdade de Direito da Universidade de São Paulo como parte dos requisitos para obtenção do grau de Doutor em Direito (Doutorado Direto)

Área de Concentração: Direito Internacional

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In Memoriam

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Many difficult problems arise regarding the verifiability of beliefs. We believe various things, and while we believe them we think we know them. But it sometimes turns out that we were mistaken, or at any rate we come to think we were. We must be mistaken either in our previous opinion or in our subsequent recantation; therefore our beliefs are not all correct, and there are cases of belief which are not cases of knowledge. The question of verifiability is in essence this: can we discover any set of beliefs which are never mistaken or any test which, when applicable, will always enable us to discriminate between true and false beliefs? Put thus broadly and abstractly, the answer must be negative. There is no way hitherto discovered of wholly eliminating the risk of error, and no infallible criterion. If we believe we have found a criterion, this belief itself may be mistaken; we should be begging the question if we tried to test the criterion by applying the criterion to itself.

Bertrand Russell (1921)

RESUMO

TRIPODI, Leandro. **O Direito Uniforme da Venda no Século 21**: Caducidade e Renovação da CISG. 2014. Tese (Doutorado). Faculdade de Direito, Universidade de São Paulo, São Paulo, 2014.

A Convenção das Nações Unidas sobre os Contratos de Compra e Venda Internacional de Mercadorias de 1980 (CVIM ou CISG) atingiu sua caducidade em virtude: 1) das profundas modificações ocorridas no comércio internacional desde sua adoção; 2) de seu diálogo insatisfatório com outras fontes do direito do comércio internacional; 3) da necessidade de incorporação de objetivos fundamentais da comunidade internacional; 4) da necessidade de uma nova configuração institucional a fim de promover sua adequada aplicação mundialmente. Por tais razões, sugere-se que futuros trabalhos na Comissão das Nações Unidas para o Direito Mercantil Internacional (CNUDMI ou UNCITRAL) levem a uma renovação da CISG com o propósito de adaptá-la às características do comércio mundial no século 21, em particular com respeito: 1) à considerável dificuldade em se separar o comércio de bens do comércio de serviços; 2) à maior importância dada à autonomia da vontade e a regras privadas aplicadas por árbitros internacionais sem a direta participação do Estado; 3) à necessidade de promover o desenvolvimento sustentável em conexão com a responsabilidade social corporativa; 4) à necessidade de melhorar a aplicação uniforme (ou adequada) do direito da compra e venda internacional em virtude do surgimento de instrumentos regionais e da tendência domesticista dos tribunais nacionais. De acordo com as conclusões da presente tese, os futuros trabalhos a serem conduzidos na UNCITRAL devem ser levados adiante segundo as seguintes premissas: 1) os trabalhos já realizados pela UNCITRAL na área do direito do comércio internacional devem ser preservados e levados adiante; 2) futuros trabalhos na área do direito da compra e venda internacional devem assumir a forma de uma nova convenção internacional que contenha princípios gerais do direito dos contratos assim como regras para a compra e venda de mercadorias e serviços; 3) tal nova convenção deve promover a arbitragem como método de resolução de controvérsias, tendo em vista que a arbitragem apresenta maiores chances de produzir uniformidade de aplicação do que os tribunais nacionais. Propõe-se

que a nova convenção seja denominada de Convenção sobre os Contratos de Compra e Venda de Mercadorias e Serviços (CISGS). Também se propõe que seu texto seja redigido conjuntamente pela UNCITRAL e pelo Instituto Internacional para a Unificação do Direito Privado (UNIDROIT). A CISGS deverá futuramente substituir a CISG. Porém, até que a CISGS entre em vigor e seja adotada por um número relevante de Estados, a CISG continuará a fornecer regras padrão para a compra e venda internacional de mercadorias.

Palavras-chave: Comércio internacional. Contratos. Cooperação econômica internacional.

ABSTRACT

TRIPODI, Leandro. **Uniform Sales Law in the 21st Century**: Aging and Renovation of the CISG. 2014. Thesis (Doctorate). Faculty of Law, University of São Paulo, São Paulo, 2014.

The United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) has become old to the extent that: 1) fundamental changes have affected international trade since its inception; 2) it has proved to poorly interact with other sources of international trade law; 3) it needs to incorporate fundamental objectives of the international community and 4) it deserves a new institutional framework to ensure its proper application on a global basis. On such grounds, it is suggested further work at the United Nations Commission on International Trade Law (UNCITRAL) ought to be carried out for the purpose of renovating the CISG and adapting it to the requirements of world trade in the 21st century, due in particular to: 1) considerably increasing difficulty in severing sales of goods from sales of services; 2) greater importance given to party autonomy and to privatized rules applied by international arbitrators without direct participation of the state; 3) the need to promote sustainable development in connection with corporate social responsibility; 4) the need to further the uniform (or proper) application of international sales law in the light of the emergence of regional instruments and the homeward trend of national courts. According to the findings of the present thesis, further work at UNCITRAL must be carried out according to the following premises: 1) the work already done by UNCITRAL in the field of international sales law must be preserved and carried forward; 2) further work in the field of international sales law must be envisaged in the form of a new convention that encompasses principles of contract law as well as rules on contracts for the sale of goods and services; 3) such new convention must promote arbitration as a dispute resolution method, on the ground that arbitration is more likely to provide uniformity of application than national courts. It is proposed the new convention be named as the Convention on Contracts for the International Sale of Goods and Services (CISGS). It is also proposed its text be jointly drafted by UNCITRAL and by the International Institute for the Unification of Private Law (UNIDROIT). The

CISGS is intended to replace the CISG in due course. However, until the CISGS enters into force and is adopted by relevant membership, the CISG will continue to provide default rules for the international sale of goods.

Keywords: International trade. Contracts. International economic cooperation.

RESUMÉ

TRIPODI, Leandro. **Le droit uniforme de la vente dans le XXI^e^ siècle**: caducité et rénovation de la CVIM. 2014. Thèse (Doctorat). Faculté de Droit, Université de São Paulo, 2014.

La Convention de Vienne sur les Contrats de Vente International de Marchandises (CVIM ou CISG) est devenue âgée à cause de: 1) les profondes modifications qui ont eu lieu au commerce international depuis son adoption; 2) son dialogue insuffisant avec d'autres sources du droit du commerce international; 3) la nécessité d'incorporation des objectifs fondamentaux de la communauté internationale; 4) la nécessité d'une nouvelle conformation institutionnelle afin de promouvoir son application appropriée au niveau mondial. Pour ces raisons, il est proposé que des travaux futurs à la Comission des Nations Unies pour le Droit Commercial International (CNUDCI) soient conduits avec le but d'adapter la Convention à des caractéristiques du commerce mondial au XXI^e^ siècle, en particulier en ce qui concerne: 1) la considérable difficulté pour dégager le commerce de marchandises et ceux de services; 2) la grande importance donnée à l'autonomie de la volonté ainsi que les règles privées appliquées pour les arbitres internationaux sans participation directe de l'État; 3) la nécessité d'application plus uniforme (ou appropriée) du droit de la vente internationale à la suite de l'apparition des instruments régionaux ainsi que de la tendance non-uniformiste des tribunaux nationaux. Selon les conclusions de cette thèse, les travaux futurs à la CNUDCI doivent être conduites conformément à des premises suivantes: 1) les travaux déjà réalisés par la CNUDCI doivent être préservés et portés en avant; 2) des travaux futurs dans le domaine du droit de la vente internationale doivent revêtir la forme d'une nouvelle convention internationale qui contienne principes géneraux du droit des contrats ainsi que des règles pour la vente de marchandises et services; 3) telle nouvelle convention doit promouvoir l'arbitrage comme méthode de résolution des différends, étant donné que l'arbitrage présente plus de chances de produire l'uniformité d'application que les tribunaux nationaux. Il est proposé que la nouvelle convention soit nomée Convention sur les Contrats pour la Vente Internationale de Marchandises et Services (CVIMS). Par ailleurs, il est proposé que son texte soit rédigé en coopération entre la CNUDCI et l'Institut International pour l'Unification du Droit Privé (UNIDROIT).

La CVIMS doit remplacer à l'avenir la CVIM. Pourtant, jusqu'à ce qui la CVIMS soit en vigueur et soit adoptée pour un nombre considérable d'États, la CVIM continuera à fournir des règles supplétives pour la vente internationale de marchandises.

Mots-clés: Commerce international. Contrats. Coopération économique internationale.

LIST OF ABBREVIATIONS

Amending Protocol	(Hypothetical) Amending Protocol to the CISG
CBD	Convention on Biological Diversity of 1992
CESL	Common European Sales Law
CIETAC	China International Economic and Trade Commission
CISG	Convention for the International Sale of Goods
CISG AC	CISG Advisory Council
CISGS	(Proposed) Convention for the International Sale of Goods and Services
Code	Global Commercial Code
DCFR	Draft Common Frame of Reference
Draft	(Proposed) Draft Convention for the International Sale of Goods and Services
EU	European Union
FCCC	Framework Convention on Climate Change of 1992
FDI	Foreign Direct Investment
GPS	Global Positioning System
HCCH	Hague Conference on Private International Law
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
ICC	International Chamber of Commerce
ICT	Information and Communication Technologies

IoT	Internet of Things
IP	Internet Protocol
ITU	International Telecommunication Union
IUCN	International Union for Conservation of Nature
Limitation Convention	Convention on the Limitation Period in the International Sale of Goods of 1974 as amended by the Protocol amending the Convention on the Limitation Period in the International Sale of Goods of 1980
Montreal Convention	Convention for the Unification of Certain Rules for International Carriage by Air of 1999
NCEs	National Centers of Expertise
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
NGO	Nongovernmental Organization
OECD	Organization for Economic Co-operation and Development
OEM	Original Equipment Manufacturer
OHADA	Organization for the Harmonization of Business Law in Africa
PECL	Principles of European Contract Law
PSS	Product-Service System
Report	The Schmitthoff Report (In: A/6396; UNGA, 1966)
RCADI	*Recueil des Cours de l'Académie de Droit International de la Haye* (Collected Courses of the Hague Academy of International Law)
RFID	Radio-Frequency IDentification
Recommendation on the New York Convention	Recommendation Regarding the Interpretation of Article II (2), and Article VII (1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (UNCITRAL, 2006)

Rijn Blend Case	Netherlands Arbitration Case No. 2319 of 15 October 2002 (CIETAC, 2002)
Swiss Proposal	Proposal by Switzerland on possible future work by UNCITRAL in the area of international contract law (A/CN.9/758; UNCITRAL 2012a)
UCC	Uniform Commercial Code
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
UNECIC	United Nations
UNIDROIT	International Institute for the Unification of Private Law
UPICC	UNIDROIT Principles of International Commercial Contracts
VCLT	Vienna Convention on the Law of Treaties of 1969
Warsaw Convention	Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929
Warsaw System	Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929 in addition to amending and supplementing instruments thereto
WTO	World Trade Organization

SUMMARY

1 INTRODUCTION

> This measure is, in fact, the need for each other's services which holds the members of a society together; for if men had no needs, or no common needs, there would either be no exchange, or a different sort of exchange from that which we know.
>
> **Aristotle** (1893)

Human interaction is based on exchange. Exchange is the "fundamental social relation" (MISES, 1998, p. 195). We exchange both incorporeal and corporeal things. Instances of exchange of incorporeal things are, for example, the exchange of unarranged thoughts (e.g., when one asks somebody on the street to “watch it” or to be more civil), opinions (such as in a class, a dinner, an online forum), arguments (such as in political debate or court), etc., or simply when we offer an image of ourselves and what we do. We exchange incorporeal things when we exchange gestures and acts, such as a glance, a nod or a handshake, with any possible meaning that entails (or in some cases, without any meaning at all). On the other hand, instances of exchange of corporeal things are those where we exchange “things proper”, that is, things which are not part of our living bodies but can be touched and measured.

We exchange things both voluntarily and involuntarily. We exchange things involuntarily when we sneeze around others, or when someone accidentally overhears us talking to ourselves aloud, or when someone haphazardly peeks a glimpse at us[1]. Voluntary exchange is more complicated and normally involves reciprocal will or

[1] Instances of voluntary-involuntary exchange are often associated with unilaterally-declared war, crime (such as rape or robbery) or other kinds of social misconduct, such as when someone listens to loud music in a bus, or otherwise to actions that cause potential discomfort to others.

“intentional mutuality" (MISES, 1998, p. 195). Voluntary exchange is often associated with economic value of both corporeal and incorporeal things: “[w]hat gratifies less is abandoned in order to attain something that pleases more” (MISES, 1998, p. 97). Economic value is assigned to things by those who carry out the exchange according to their own subjective assessment or opinion, though the latter might be intricately related to those of others not taking part of the exchange[2]. We barter things or exchange them for money; an exchange of a thing, be it incorporeal or corporeal, for money is a sale. The sale of goods is the exchange of things proper for money. It is the most basic — and most important form of — economic exchange and therefore, the most important type of contract[3].

Voluntary exchange of things proper for money, that is to say, the sale of goods, has always been subject to mutually-accepted, mutually-known rules and terms. The degree to which those rules are mutually accepted and known greatly varies according to the circumstances. Lack of mutual knowledge and acceptance of the rules applicable to the sale of goods not always prevents parties from effecting an exchange. There is a threshold beyond which lack of mutual knowledge and acceptance of rules will cause a party to retreat from an exchange; this threshold, however, is completely unclear from a theoretical point of view. All theoreticians of commercial law as well as policymakers can do, either at the international or the domestic level, is to seek and improve the degree of mutual knowledge and acceptance enjoyed by the rules that govern the sale of goods. This must be done in order to avoid that parties decline to perfect exchanges as a consequence of poor conditions towards agreement on the applicable rules.

The existence of shared and commonly understood rules of commerce goes back beyond memory or record. They do not confine to the territory or people of a nation or sovereign. They have since ancient time been able to transcend otherwise awkward human

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[2] According to Mises (1998, p. 92), “[g]oods, commodities, and wealth and all the other notions of conduct are not elements of nature; they are elements of human meaning and conduct. He who wants to deal with them must not look at the external world; he must search for them in the meaning of acting men”. Thus a car price list is put together based on prices set by real car exchanges.

[3] Hence, "[*i*]*nternationaux ou non, les échanges économiques trouvent leur principal moule contractuel dans la* vente" (GOLDMAN, 1963, p. 178); and "[t]he contract of sale is a dominant contract in every legal system" (RAMBERG, 2013, p. 682). By the same token, Kronke (2002, p. 293) speaks of the '"back-bone' function of the sales contract".

differences such as those concerning ethnicity, language and creed. Dealers will deal in silence if they have to[4].

Since time immemorial human beings have traded with different cities and peoples. In Antiquity, the great merchant peoples of Sumer, Phoenicia, Greece, Persia, Egypt and Rome practiced trade between themselves as well as with others. The commercial renaissance of the Middle Ages reawakened men's trading spirit. The Age of Discovery was marked by the creation of new markets and by unheard-of increase of long-distance trade. The commercial renaissance has introduced profound changes in the Law. The Roman *ius civile*, developed by and for landowners to meet their need of exchanging land, animals and slaves, was not enough for the necessities of medieval merchants. Nor were the rather archaic usages of maritime commerce. Impelled by necessity, these merchants came up with informal rules, born of practice and adapted to their own reality[5]. The medieval *Lex Mercatoria* was thusly born. It was characterized by: 1) independent and efficient jurisdiction; 2) informal sanctions (applied by the community of merchants and consisting in being expelled from the market) and 3) predictability and legal certainty.

It was in the same period that indirect norms — those which are intended for the determination of the applicable rules to a dispute — were developed. Responsible for such innovation were medieval glossators, among which Bartolus of Sassoferrato. Indirect norms also do not derive from Roman Law (BASSO, 2009). Plurilocalized disputes between merchants were common at the time. This of course derives from the fact that

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[4] Thus the commerce between the Sea Peoples was carried out by one group of traders placing goods at the disposal of their counterparts and retreating to a distance, after which the second group would place other goods at the same site in return, and both groups would take iterations of coming to-and-fro to the site where the goods were placed, until the first group (the proponents, so to speak) would retrieve the goods offered in barter for their shipment, and leave without uttering a word.

[5] According to a coeval report, the *Lex Mercatoria* or Law Merchant of the Middle Ages is distinct from the common law in at least three respects: "First, it generally delivers itself [of a judgment] more quickly. Second, whoever pledges someone to answer for a trespass, covenant, debt, or detinue of chattels pledges the whole debt, damages, and costs of the plaintiff, if the one pledged is convicted and does not have enough [to pay the judgment] within the bounds of the market. And if the one pledged happens to be first attached by gage or by chattels and afterwards he takes the gage away, when the market-reeve lets him take it outside the bounds of the market on account of such a pledging, the pledge should answer the court or the plaintiff for a gage of this sort or its value. And [the law of the market] differs in a third way because it does not admit anyone to [wager of] law on the negative side, but in this law it always belongs to the plaintiff to prove, for example, by suit or by deed or both, and not to the defendant" (LITTLE RED BOOK OF BRISTOL, 1998).

trade does not content itself with frontiers or barriers. Medieval fairs were often situated across significant distances. Trade routes stretched towards faraway lands.

In ensuing centuries, trade — especially international trade — began to amass widespread faith. "[A] kingdom that has a large import and export, must abound with more industry, and that employed upon delicacies and luxuries, than a kingdom which rests contented with its native commodities" (HUME, 1993, p. 154-166). Shortly afterwards, Constant (1819) would proclaim that, though a happy accident in ancient times, trade had become the normal state of affairs and the true life and only aspiration of nations. In the twentieth century, a global market emerged from earlier developments. It is characterized by a worldwide space of circulation of capital, persons and goods. In the face of states' resistance at both the local and the international level, Phillipe Kahn (1982, p. 99) has attested "*l'existence d'un espace international, transnational, mondial, dans lequel travaillent des agents économiques de natures diverses*".

In lieu of the positivistic codification movement of the 19th century[6], a new normativity has arisen in connection with 20th-century globalization[7]. It draws on the characteristics of the medieval Law Merchant (infra Chapter **3**). This neomedieval law of contemporary traders has found an ideal "*terroir*" in the globalized economy of post-industrial days (BAPTISTA, 2011, p. 65). The reconstruction of trade law normativity in the 20th century has rekindled merchants' preference for independent and genuinely transnational jurisdiction[8]. The conclusion of successive international agreements on

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[6] The positivistic turn and the ensuing codification movement (which was essentially internally-driven) can be seen as a consequence of the commercial expansionism of the 17th and 18th centuries: "The transformation of commercial self-regulation into state law can be attributed to far-reaching changes in the historic environment: the consolidation of nation states generated a vivid interest of national governments in the profitability of economic operations and prosperity but only within their respective territories. Mercantilist governments adopted measures to improve the situation at home, not the wealth of other nations" (BASEDOW, 2008, p. 706).

[7] By globalization one understands the process of "intensification of global interconnectedness, in which capital, people, commodities, images and ideologies move across distance and physical boundaries with increasing speed and frequency" (BERMAN, 2005). Of course we speak of such a process in the context of the transition between the 20th and the 21st century — as a consequence of post-industrialism.

[8] In the context of 21st-century international trade, genuinely transnational jurisdiction means one which does not base itself on the logic of the existence of borders. Gaillard (2009, p. 41) thus portraits the evolution of arbitration from a state-centric view towards one which tends to tear off any bonds with the international society of states (infra **3.1.1.1**): "[*d*]*'une représentation monolocalisatrice de l'arbitrage centrée sur la notion de siège, on est ainsi passé à une représentation multilocalisatrice (ou westphalienne), puis à une représentation transnationale de l'arbitrage qui ne conçoit plus chaque Etat de manière isolée*

arbitration spanning over six decades since the Treaty of Montevideo of 1889 came to a climax in 1958 with the adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereinafter, the "New York Convention"). The New York Convention has since become a symbol of the coexistence between arbitration and state jurisdiction.

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Trade, and especially the sale of goods is as universal as a human fact can be. As such it could hardly escape the interest of nations, so much within domestic jurisdiction as in their foreign relations. A sale of goods is international as long as it is governed by the Law of Nations, that is, as long as it occurs "betwixt nation and nation" (BENTHAM, 1823, p. 9). The conditions for a sale of goods to be governed by the Law of Nations is defined by the Law of Nations itself[9]. As nations became increasingly cooperative over time, the sale of goods, as well as other forms of trade-related international contracting, landed a secure place on the agenda of international cooperation. Bolstered by the creation and expansion of international organizations, international cooperation in general, and in matters relating to the law of commercial contracting and the sale of goods in particular, has come to bloom in the twentieth century. Three permanent fora have been instrumental for the advance of cooperation on international contract law.

The oldest of these fora is the World Organization for Cross-Border Cooperation in Civil and Commercial Matters, widely known as the Hague Conference on Private International Law (hereinafter, the "HCCH"). The HCCH was established in 1893 and became a permanent organ in 1951. The second-oldest is the International Institute for the Unification of Private Law (hereinafter, "UNIDROIT"), established in 1926, re-established in 1940 after the demise of the League of Nations, and headquartered in Rome. The

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mais qui se préoccupe des tendances susceptibles de découler l'activité normative de la communauté des Etats".

[9] The problem of the internationality of a contract of sale is complex and has been addressed by many commentators since, at least, Rabel (1964).

youngest of them is a subsidiary body of the United Nations General Assembly (hereinafter, "UNGA") known as the United Nations Commission on International Trade Law (hereinafter, "UNCITRAL", or, unless otherwise apparent, the "Commission"), whose Secretariat also functions as the International Trade Law Division of the United Nations Office of Legal Affairs. UNCITRAL was established in 1968 and is presently headquartered in Vienna.

Unlike the HCCH and UNIDROIT, UNCITRAL is not an international organization. It is a branch of the United Nations Organization. It does have, however, a specific membership, which is limited to 60 states (UNCITRAL, 2013, p. 2). UNCITRAL is a particular instance of the "growing complexity" of the structure of international organizations, and an example of their implicit powers in creating specialized bodies as well as of their functional competence, which is a result of the specialization principle (R.-M. DUPUY, 1988, p. 23-24).

The three abovementioned fora have different, yet partly overlapping, scopes and purposes[10]. In common, they all promote international cooperation on the law of commercial contracting[11]. Notably, UNIDROIT and UNCITRAL have produced important texts dealing with substantive aspects of international contract law[12]. Among the various substantive law texts arising from the effort of the these institutions in the field of contract law, the one which has the largest number of states parties is the UN Convention on Contracts for the International Sale of Goods (hereinafter, the "CISG" or, short of other

[10] The HCCH aims at developing international conventions in three principal areas: a) international protection of children, family and property relations; b) international legal cooperation and litigation and c) international commercial and contract law (HCCH, 2014). In turn, UNIDROIT develops different types of legal instruments concerning commercial and, sometimes, non-commercial matters (with an occasional incursion into public law) regarding which states are likely to accept harmonized or unified rules (UNIDROIT, 2014). Whereas UNIDROIT is primarily interested in the uniformization of substantive rules, the HCCH often pursues the uniformisation of procedural and choice-of-law rules, especially in the field of contract law.

For a critical, comparative assessment of the role of each of the above entities, see Arroyo (2010).

[11] The HCCH has produced two international conventions on the law applicable to the international sale of goods, one in 1956 and one in 1986. The 1986 Convention on the Law Applicable to Contracts for the International Sale of Goods is in force for seven state parties as at the beginning of 2014.

[12] The widely known UNIDROIT Principles for International Commercial Contracts (hereinafter, the "UPICC") must not cloak UNIDROIT's contribution to other areas of contract and commercial law, such as agency, securitized transactions, factoring, franchising and so on.

indication, the "Convention")[13]. The CISG is "the most significant piece of substantive contract legislation in effect at the international level" (LOOKOFSKY, 2000, p. 18).

This thesis deals with uniform sales law in a changing environment and focuses on the aging (1.1) and renovation (1.2) of the CISG. It abides by certain methodological decisions and rules (1.3).

1.1 UNIFORM SALES LAW AND THE CHANGED CIRCUMSTANCES OF INTERNATIONAL TRADE

The CISG was concluded in 1980; war had just broken in Afghanistan. The external aggressor, at the time, was the Soviet Union. Resisting the Soviets were the Afghani Mujahedeen, supported by the United States. As a consequence of this antithetic Vietnam proxy war, US president Jimmy Carter declared an economic embargo on the USSR and a boycott on the 1980 Moscow Olympics. As is known, the Mujahedeen (among whom Osama Bin Laden), then US allies, spawned modern-day Taleban and Al Qaeda. In the same year of 1980, the world had 11.2 million cell phone subscribers. This number has grown more than 60.000% all the way up to the 1-1 cell phone/human being rate, to be reached in coming years (ITU, 2013). The first personal computer saw the CISG at its first anniversary; the first website, at its tenth. The same world of 1980 is not the same anymore.

When the discussions that led to the adoption of the CISG started in 1968, international trade in merchandise as a percentage of the world's Gross Domestic Product was a meager 18%. In 1980, it had already risen to 35%. It reached 50% in 2007 and again in 2012. From a low-ranking concern for many countries in the late 1960s, transboundary trade in merchandise has become a strategic global issue, as it now accounts for one half of the world's economy. Much environmental impact has been attributed to international

[13] As at the time of writing, the CISG had 81 contracting parties.

economic activity, in particular to ship transport. As a consequence, rules that may have an effect on the performance of global trade in goods, or tip its balance, are no longer of interest only to a few trading nations. They now constitute a global policy issue that affects all economies and societies to varying, if non-negligible, degrees. Many of those who during the 1960s and 1970s were not particularly interested in the kind of discussion that led to the adoption of the CISG are no longer nonchalant.

The share of industrial countries in world exports of manufactured goods has declined from roughly 85% in 1955 to less than 70% in 2006, whereas their exports of agricultural products have bumped from 40% to 60% over the same period. Developing[14] economies accounted in 2006 for more than 30% of world exports of manufactures: more than 50% of office and telecommunications equipment; and between 50% and 70% of textiles and clothing. According to a comprehensive study on trade and globalization conducted by the World Trade Organization (hereinafter, the "WTO") (2008, p. xiii):

> The domination of developed countries in world exports of manufactures has been greatly diluted, first in labour-intensive goods (such as textiles and clothing) and subsequently in electronic products and capital-intensive goods (such as automotive products).

By the same token, the WTO identifies three major technological factors that, in its opinion, constitute the drive behind the creation of today's globalised economy. Those are: the development of the jet engine; containerization in international shipping[15]; and the digital — Information and Communication Technologies (hereinafter, "ICT") — revolution. While it is true jet engines and containers were already in widespread use in

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[14] There is no worldwide consensus as to the criteria for designating countries as either developed or developing. In the practice of the United Nations Conference on Trade and Development (hereinafter, "UNCTAD"), "Israel and Japan in Asia, Bermuda, Canada, Greenland, Saint Pierre et Miquelon, and the United States in northern America, Australia and New Zealand in Oceania, and Europe are considered 'developed' regions or areas", all others being considered as developing countries with the exception of those seen as transitioning from centrally-planned to market economies (UNCTAD, 2014). The author will not attempt at a better definition: one knows a developing country when one sees it.

[15] The "containerization revolution" had as one of its effects the fostering of the development of Asian ports and Asian manufacturers. It has also almost annihilated the locality of markets, which became essentially global due to the cheap cost and large availability of container transportation (LEVINSON, 2006). However, the "golden age of globalization" brought about by the economies of scale due to cheap sea shipping may be coming to a stall, as further opportunities for improving efficiency in container transportation wane (LEVINSON, 2008). The present author believes, however, that increased added value in traded merchandise can make up for the stagnation of shipping capacity, if not totally.

Bernhofen, El-Sahli and Kneller (2013) have found in a study on the economic effects of the containerization revolution that the "container variable" weighs considerably more than trade liberalization measures introduced by bilateral and multilateral international agreements.

1980, the combination between all of these key factors for economic globalization was nothing but mild before, at least, 1990 (LEVINSON, 2006, p. 12):

> Combined with the computer, the container made it practical for companies like Toyota and Honda to develop just-in-time manufacturing, in which a supplier makes the goods its customer wants only as the customer needs them and then ships them, in containers, to arrive at a specified time.[16]

On the political side, the WTO highlights historical facts relevant for international trade that either had not happened, or whose effects could not have been felt, in 1980: China's economic reforms, which started in 1978, the fall of the Berlin Wall, which took place in 1989, and the collapse of the Soviet Union towards the end of the 1980s. Hence, the facts that have shaped and will continue to shape global trade and economy in the 21st century are, by and large, fresher than the CISG.

Globalization has also introduced greater interdependence between economic agents. Interdependence of economic agents translates into the interdependence of their contracts. Decentralized manufacturing and the transition from an industrial to a service economy have had a deep impact for both economic agents and economic transactions. Production chains have become less stable and are now characterized by pulverization and the volatility of business links, as well as by a network architecture[17]. Contracts involving both complexity (sale of goods combined with the provision of services, agency, franchise, licensing, etc.) and colligation (i.e., contracts bearing ties with each other) have become commonplace. The contract is now an instrument of innovation and competition, not only of the circulation of merchandise (FERRARESE, 2000).

The development of global value chains is also a product of post-CISG years. UNCTAD (2013, p. 141) gives the following example:

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[16] Levinson goes on to say that "[s]uch precision, unimaginable before the container, has led to massive reductions in manufacturers' inventories and correspondingly huge cost savings. Retailers have applied these same lessons, using careful logistics management to squeeze out billions of dollars in costs" (LEVINSON, 2006, p. 12).

[17] Networks have been pointed out as the subjacent architecture of contemporary society even before the advent of the Internet by Craven and Wellman (1973). Wellman (1979) refers to the weakening of hierarchized structures and the rise of a social organization based on networks and networks of networks. Castells (1996, p. 500) summarizes: "[n]etworks constitute the new social morphology of our societies, and the diffusion of networking logic substantially modifies the operation and outcomes in processes of production, experience, power and culture".

> [...] IBM (United States) has moved from a structure defined by regional divisions in the 1960s and 1970s (with product sales in 150 countries), through a globally integrated firm in the 1980s and 1990s, to one in which "supply chain management analytics" within a network structure are at the heart of how it operates today. Along the way, it has integrated over 30 supply chains into one and focuses particular attention on areas such as risk management, visibility, cost containment and sustainability.

Sustainability was also not a concern of multinational enterprises in 1980. The fatal gas leakage of Bhopal happened in December of 1984. The currently accepted concept of sustainable development came to be established not earlier than 1987 (infra **5.6**). Sustainable development has grown to become a core concern of the international community. It now reaches beyond discourse and influences foreign investment policies. Countries increasingly target foreign investments that can improve their social and environmental well-being, which in turn leads enterprises to adjust their business models so as to slot in corporate social responsibility standards. International investment agreements tend to include provisions that refer to the protection of health, safety, labor rights and the environment (UNCTAD, 2013). Whether one likes it or not, old-fashioned, business-as-usual international trade has fallen into disrepute. However, this new scenario was not the one inspiring the drafters of the CISG, who could have only been concerned with the traditional needs of traditional traders.

Commercial investment flows have also changed quite substantially since 1980. Developing countries have for the first time in 2012 surpassed developed countries as recipients of foreign direct investment (hereinafter, "FDI") flows. Their investment outflows have accounted for 31% of the world total that year. BRICs countries' figures rose from US$ 7 billion in 2000 to US$ 145 billion in 2012 — China being the second host economy (followed by Brazil) and the third investor economy, outranked only by the US and Japan (UNCTAD, 2013).

The atmosphere leading up to 1980 was in turn a very different one. Developing countries in Asia and Latin America were looked at with a mix of benevolence and disdain. In less than 40 years, Asia is the main global hot spot for trade, investment and profit. Asia-Pacific airlines have the strongest aggregated cash flows in the world (IATA, 2012). The top 10 ports in the world by trade volume are now Asian ports (Rotterdam ranks 11th and Hamburg, 14th) (SALISBURY, 2013). Africa has received US$ 50 billion in FDI in

2012, experiencing a 5% growth which also affected consumer-oriented manufactures and services (UNCTAD, 2013).

International trade has changed rapidly from 1980 until now and it will continue to change. Changes affecting international trade in latter decades are structural, not only of order of magnitude. The following factors indicate the CISG, a work in international trade law[18] developed from 1968 through 1980, whose roots bear on precedents dating from the 1930s, should be considered eligible for revision:

1) The CISG is the product of an outdated reality under which the world was chiseled into two markedly opposing blocs, a capitalist and a socialist one, in which context the need for common rules for commercial contracts represented primarily an attempt to reconcile capitalist and socialist views. In today's world, the capitalist/socialist divide is substantially weaker and this could reflect on the negotiations if the CISG were to be redrafted;

2) While many goods which were in trade in 1980 continue to be bought and sold internationally, the enormous value added to manufactured goods in terms of new technology means new rules may have to be developed that suit highly technological goods[19] (infra **2.3**);

3) The ICT digital revolution has introduced dramatic changes in communications technology, which in turn have created new problems not adequately addressed by the CISG. While the United Nations Convention on the use of Electronic Communications in International Contracts (hereinafter, "UNECIC") was designed to cure this deficiency, it is not an integral part of the CISG and may be the first step of a fragmentary revision of the CISG which could compromise its integrity (infra **4.2**);

4) The role of developed and developing countries in international trade has shifted significantly since 1980, with developed countries expanding their share in the trade of

[18] For a definition of international trade law in connection with UNCITRAL's mandate, see UNGA (1966).

[19] A report by a large global financial institution indicates that, in the 30 years beginning in 2014, high-tech goods will lead the growth of international trade (HSBC, 2014).

agricultural products and developing countries increasing their exports of manufactures, including capital-intensive goods; a new balance in the drafting of rules for the international sales of goods might have to be sought as a consequence of those shifts.

1.2 THE CHALLENGE OF RENOVATING THE CISG

Renovation of the CISG can be understood in a broad or in a specific sense. In a broad sense, renovation is accomplished by means of renewed interpretation (e.g., court decisions, arbitral awards applying the CISG, innovative commentary or opinions of the CISG Advisory Council[20]) or by the introduction of new instruments designed to supplement the CISG. Renewed interpretation cannot modify the text of the CISG, which remains unaltered, yet it can introduce changes in the way the CISG is applied or expected to be applied by judges and arbitrators. New instruments on the other hand, like treaties such as the UNECIC, recommendations, guidelines, model laws or the like, while also not modifying the CISG itself, may add new norms or purport to provide an "official" interpretation of the CISG which, in practice, might amount to modification[21]. In the broad sense, therefore, renovation of the CISG has been and is ongoing.

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[20] The CISG Advisory Council (URL: http://www.cisgac.com; hereinafter, the "CISG AC" or, without further reference, the "Council") is a private body of scholars who specialize in international commercial with special emphasis on the CISG. Their Opinions and Declarations are deemed to have authoritative value within the CISG community of experts and may be used by adjudicators. The creation of the CISG AC as a private body composed of individual experts appearing in their personal capacity follows the rejection by UNCITRAL of the creation of a permanent editorial board in 1988. The permanent editorial board would have the incumbency of reporting on national court decisions on the CISG. Such proposal was rejected on technical, organizational, and substantive grounds, especially the ground that it was "too ambitious or at least premature" (UNCITRAL, 1989, p. 16). It was said on the occasion that "the proposal would be reconsidered in the light of experience gathered in the collection of decisions and dissemination of information" (ibid., loc. cit.). However, a recent a proposal that the UNCITRAL Digest should "note diverging case law" and provide "guidance as to the interpretation of the Convention" (UNCITRAL, 2003, p. 463) was also met with dismissal (BAZINAS, 2005).

See also Karton and de Germiny (2009, p. 452 et seq.) on the background of the CISG AC and its creation by initiative of Professors Albert H. Kritzer and Loukas Mistelis.

[21] See for detailed discussion of such alternatives infra Chapter **4**.

In a specific sense, however, renovation can only be pursued by amendments to, or by substitution of the CISG altogether by a new convention whose entry into force and progressive adoption would gradually displace the CISG — much in the way as the CISG has done in relation to the Hague Uniform Sale Laws of 1964[22]. As every legislative work has to be revised, renovation of the CISG will take place sooner or later. This thesis will explore the possibility of the CISG's renovation[23] predicated on the fact that its aging is becoming significant enough to warrant enlisting it for either an amendment, or preferably substitution process.

This thesis purports to make no prediction as to when renovation, strictly speaking, of the CISG should or will take place, although it suggests work on the subject should start at once as it may take decades to complete: "[l]aws speedily become obsolete but are slowly revised" (ROSSET, 1992, p. 691). However, as René David (1987, p. 58) reminds us, there is no benefit in making short work of it: "[*l*]*es travaux d'élaboration d'une Convention internationale sont nécessairement lents ; il convient du reste qu'ils ne soient pas faits avec trop de hâte*". The possibilities hereby explored demand patience and a progressive construction (infra Chapter **4**).

In no accurate comparison, but perhaps a plausible one, renovation of the CISG may be in such an analogous stage as that where the path that led up to the CISG was when Ernst Rabel published his *Das Recht des Warenkaufs* in 1936[24]. In fact, Schwenzer, Hachem and Kee's *Global Sales and Contract Law* (2012) is the greatest landmark in comparative contract law since Rabel's work was published, and might sit at the foundation

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[22] By "Hague Uniform Sale Laws" (or simply "Hague Laws") I refer collectively to the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) and the Convention Relating to a Uniform Law on the International Sale of Goods (ULIS), done at The Hague on 1 July 1964. On the normative nature of the Hague Laws as compared to that of the CISG, see Bergsten (2009).

[23] Unless otherwise stated, "renovation" in this thesis is understood in the specific sense hereby presented.

[24] Ernst Rabel was born in Vienna in 1859 and was the co-founder of the Institute for Legal Comparativism of the University of Munich. Though a baptized Catholic, he was forced to step down from office under the effect of the Nuremberg Laws (with his works being banned in the Reich) and eventually emigrated to the United States. He is widely considered to be the founder of modern German Comparative Law and one of the champions of the functional comparative method (RÖSLER, 2006). Rabel's work in Comparative Law can be seen as consequential to a movement which, perhaps in reaction to excessive nationalism, pleaded for "the total, or at least substantial unification of all civilized legal systems" (SCHLESINGER, 1980, p. 33). Such movement was greatly heaved by the First International Congress of Comparative Law which took place in Paris in 1900. With time the idea of radical unification of the law came to be recognized as obsolete (ibid., loc. cit.) (infra **3.2.3**).

(at the substantive level) of new work that leads to substantial amendment to, or replacement of the CISG (infra Chapter **6**)[25]. One may hope, and the present author actually believes, that this should be a very pessimistic assessment time-wise, and that even though no hurry is called for, a new convention might be in existence by 2030 (infra **4.5.5**).

From an operational point of view, however, renovation will only occur once stakeholders are convinced of the necessity of substantial amendment to the CISG or of its replacement altogether. Stakeholders for this purpose include:

1) UNCITRAL Member States, which are characterized by their difficulty to deal with complex technical matters and a lack of resources;

2) The international trade community, which is driven by a perception of potential economic advantage;

3) The Secretariat of UNCITRAL, which is driven by the perception of likely acceptance, or the success or failure in the work to be carried out, as well as a lack of resources[26];

4) The CISG legal community, which is driven by expertise and opinion.

This thesis presents a case on behalf of renovation of the CISG. In the political arena of the United Nations, renovation of the CISG ought to start with an assessment of the considerations put forward in its three recitals. First, the "broad objectives" of the New International Economic Order; secondly, development of international trade on the basis of equality and mutual benefit; thirdly, the removal of legal barriers to international trade by means of adoption of uniform rules. Based on the performance of international trade since 1980, were the expectations of member states, as well as international traders, expressed in

[25] See David (1987, p. 56 et seq.) on the importance of the realization of relevant comparative law studies in preparation for the drafting and adoption of uniform law conventions.

[26] The proposals made in the present thesis (infra Chapter **4**) might warrant the inclusion of UNIDROIT as a stakeholder side by side with UNCITRAL's Secretariat.

the recitals of the CISG, fulfilled? If so, was this fulfillment a consequence, in whole or in part, of the CISG? These questions are, as one can see, rather thorny and not particularly easy to answer (infra Chapter **2**). Nonetheless, evading the need of properly assessing the causes and consequences of the CISG amounts to ignoring the opportunity of further promoting the healthy growth of international trade.

In what follows, this thesis discusses the value of a new convention that would replace the CISG in providing uniform rules for the international sale of goods. Such proposal is predicated on the convenience of renovating the CISG in light of the changed circumstances of international trade (Chapter **2**). It will thereupon address the role and place of the CISG and any such new convention, given the current state of international law (Chapter **3**). Chapter **4** will in turn address the feasibility, methodology and working processes involved in renovating the CISG. Finally, Chapter **5** will discuss the parameters, groundwork and guidelines for a new convention. Chapter **6** will present concluding remarks.

1.3 METHODOLOGY ADOPTED IN THE PRESENT THESIS

In the course of this work, the author has endeavored not to write anything except what was useful and necessary to advance the author's point of view, under the light shed by reliable authorities[27]. If something which was not useful or necessary was said, or if one or more important authorities are missing, or if the author has misinterpreted an authority's statements in any way, the reader is presented with excuses. The author has made all efforts to avoid repeating himself or tackling matters better addressed in textbooks. In this particular connection, the reader is assumed to be familiar with the subject-matter to the extent required to understand that which is proposed.

[27] The author has been judicious in choosing from available sources, particularly doctrinal sources. In most cases, the author has seen to the fact that the commentator, or at least one among the commentators, is a specialist held in high regard in his or her field.

In order to avoid exceeding the thesis' scope, the author has made a few methodological decisions:

1) Since this thesis is about the CISG and not the theory of international trade law, the author has limited himself to understanding international trade law as an array of rules and institutions which operate in a relational, but not necessarily harmonious or homogeneous manner[28] (infra Chapter **3**);

2) As a consequence, the author has not considered international trade law as — but by no means refuses it to be — a doctrine, an autonomous legal system independent of national law (a *troisième droit* or a New *Lex Mercatoria*), by which reason the author has not interested himself too profoundly in most bibliography dealing with such controversy[29];

3) By the same token, the author has not echoed the thriving scholarly work in current-day legal sociology, legal anthropology and the general theory of law which deals with pluralism of legal orders, transnational legal pluralism, interlegality, etc., as outstanding as it may be[30];

4) Save for passages where it was highly instrumental, the author has skipped any discussion as to the advantages or disadvantages of legal unification per se[31]; the author's plan is to discuss the renovation of the CISG, not broader unification or uniformization projects. In this connection the author assumes that, since the CISG is already a *fait accompli*, there is no need to reinvent the wheel;

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[28] On the "coherence" and "uniformity" of the transnational law of commerce see Loquin (2005).

[29] However, some such bibliography is, for ineluctable reasons, quoted at Chapter **3** below.

[30] See, inter alia, Zumbansen (2008) for an analysis of the impact of transnational law on key issues of International Law such as *Lex Mercatoria*, corporate governance, public international law and human rights; Zumbansen (2010) for the relationship between the sociological approaches to legal pluralism and the fragmentation of International Law; Twining (2009-2010) for a comprehensive review of legal pluralism as well as a restatement of the literature; and Santos (1987), for a seminal work on the postmodern conception of Law.

[31] For a thorough analysis on the subject, see Andersen (2007) as well as the proceedings of the UNCITRAL Congress on Modern Law for Global Commerce (UNCITRAL, 2011). Schwenzer (2013a) discusses in different scenarios the hurdles posed by poor unification of contract law to international businesses.

Efficiency and all that is concerned with the economic analysis of the law of international sales (which is the subject of, inter alia, GILLETTE; SCOTT, 2005 who address the "incentives" of international sales law drafters and explain why they reach "suboptimal" solutions) is also outside the scope of the present research. Those interested in such debate are referred to Spagnolo (2014) who deals with it from a wide variety of perspectives.

5) The author has adopted an overall very pragmatic point of view in dealing with legal sources, preferring to give due consideration to all of them so long as they actually appear in arbitral and judicial practice, especially in connection with the CISG[32];

6) The author has not considered arguments relating to consumer (B2C) but only to wholesale or business-to-business (B2B) sales.

Had not such parsimonious stance been taken, it would hardly be possible for the author to discuss the aging and renovation of the CISG, a subject which by the way lies on rather uncharted territory.

As far as formalities go, the rules laid out by the Brazilian Association of Technical Standards (known by their Portuguese acronym ABNT[33]) for the preparation of scholarly work, as well as the formatting requirements set forth by the author's University[34] and Faculty of Law[35], were followed here to the best of the author's ability. Save for unintentional mistakes, only works effectively mentioned or quoted from in the present thesis have been listed in the Bibliography thereto.

[32] As a theoretical underpinning for this treatment the author refers to Sacco (1991, p. 345): "[w]hatever influences interpretation is a source of law".

[33] As presented in Universidade de São Paulo (2009).

[34] Resolução No. 6542, of 18 April 2013.

[35] Regulamento do Programa de Pós-Graduação em Direito.

2 AGING OF THE CISG: GROUNDS FOR THE NEED OF RENOVATION

> Instead of selling airlines first engines and then parts and service, Rolls-Royce has convinced its customers to pay a fee for every hour that an engine runs. Rolls-Royce in turn promises to maintain it and replace it if it breaks down. “They aren't selling engines, they are selling hot air out the back of an engine,” says an investment analyst.
>
> **The Economist** (2009)

The question someone confronted with the idea of renovating the CISG asks is, why reform a very successful legal text, adopted by more than 80 countries, which has been in force for 25 years and amasses praises from scholars all over the world[1]? "If it isn't broke, don't fix it", says conventional wisdom. Yet this is also a comfort zone argument. Many have got used to think of the CISG as a safe harbor and will not really be prepared to abandon it unless so forced by circumstance.

While there is no definitive answer as to a *need* to renovate the CISG either by reforming it, or by replacing it with some other international legal text, there is no doubt that, as happens with every human creation, the CISG is impermanent and subject to

[1] Henry Deeb Gabriel (2013, p. 661), while recognizing that the CISG is "now showing its age", maintains that a CISG revision or expansion project would face problems such as "a lack of resources, a clear articulation of the need for the project, the inability to define its scope, and the likelihood of widespread ratification within a reasonable time". It is the aspiration of the present author to address most of his concerns in the course of the present thesis.

change and rectification. In fact, with every piece of legislation, be it domestic or international, comes either of the following certainties:

1) That it is bound to be forgotten, and cease to be applied; or

2) That it is bound to be reformed, and most likely, replaced.

There are, of course, legislative works that last forever, even though they may no longer be in force in any place or as between any people. Yet they do not survive as a piece of legislation per se; instead, they acquire a status as part of legal history and become an addition to the heritage of mankind's legal past.

Now, which case is the CISG's? Its odds of being dismissed and forgotten as a legal instrument are rather faint, at least in the short historical run. It is already part of the legal heritage of trading nations, given its impact in the field of contract and commercial law in multiple countries and arenas. Therefore, it seems to be destined at some point for either reform or replacement. The problem is: how do we determine which, and when? Do we even have to care about it? Should we not just leave it alone and allocate our time and effort to some other work of greater importance to international trade?

This Chapter questions whether there is an appeal to renovate the CISG which could strike a balance in the stakeholder (supra **1.2**) equation and drive stakeholders to commence working on a project for renovation (2.1). It will then address the shortcomings of the Convention which better demonstrate that it must not be regarded as a permanent work done by international legislators (2.2). In particular, changed economic circumstances that affect international trade, such as an ever more intricate interplay between goods and services in the post-1980 period, have to be taken into consideration (2.3).

2.1 THE QUEST FOR AN APPEAL TO RENOVATE THE CISG

A proposal by Switzerland "on possible future work by UNCITRAL in the area of international contract law" (hereinafter, the "Swiss Proposal", or simply "Proposal") was filed with UNCITRAL in 2012. The Swiss Proposal brings to the attention of the international community the need to "assess [the] operation of CISG" and the "desirability of further harmonization and unification of related issues of general contract law" (UNCITRAL, 2012a, p. 6). It speaks of "an urgent need for a global reflection on the further unification of contract law beyond the endeavors already carried out by UNCITRAL" (UNCITRAL, 2012a, p. 8).[2] The scope of the Swiss Proposal is not rigorously delineated[3]; it calls for interpretation. The Swiss Proposal may pragmatically be interpreted as a claim, not to further uniformize international contract law, but as providing an opportunity to renovate the CISG (**2.1.1**). In order to further evaluate current conditions for renovation of the CISG to take place, it is helpful to analyze the conditions that led to the CISG being developed in the first place (**2.1.2**).

2.1.1 The Swiss Proposal: a Claim to Renovate the CISG?

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[2] Throughout this thesis, the words *harmonization*, *uniformization* and *unification* (and related words) are used rather loosely and often interchangeably. The subtle distinctions in meaning will become apparent, if so, against the context of each section or paragraph. That said, the author will provide a definition for each of the these terms in order that the author's understanding is presented in a clear and distinct manner.

1) Harmonization: convergence of national legislation on a given subject-matter resulting from different kinds of processes, including the adoption of model laws, directives or similar instruments;

2) Uniformization: adoption, by two or more nations, of different kinds of international treaties containing uniform rules of common interest;

3) Unification: adoption, by two or more nations, of national legislation held in common, or of supranational regulations of mandatory observance, by means of mutual agreement.

Harmonization and uniformization, in the context of international trade law and in the meaning stated above, may be conjunctly described as methods for legal approximation (KULESZA, 2014). As opposed to legal diffusion, all three processes above occur deliberately. They follow "a deliberate goal, not a side-effect of conquest or colonisation. The defining element is the *voluntarily sharing of laws*" (ANDERSEN, 2007). See also Schlesinger (1980, p. 32 et seq.).

[3] As it "did not suggest how the possible future work should be conducted" (SCHWENZER, 2013a, p. 727).

Rather than a direct claim specifically for the renovation of the CISG, the Swiss Proposal is a general statement (UNCITRAL, 2012a, p. 3):

> [T]hat UNCITRAL ought to discuss and assess whether the practical needs of today's and tomorrow's international business communities might not be better served by uniform rules covering the full array of legal issues that arise in a contractual business to business (b2b) relationship.

Calls for further legal harmonization and, indeed, unification in the area of international contract law at UNCITRAL are not new and were present at the very moment the CISG was enacted (SORIEUL; HATCHER; EMERY, 2013). They go back to the time of the Hague Laws[4] and are an offspring of the unification movement that flourished in the turn from the 19th to the 20th century in comparative law (infra **3.2.3**).

Apparently, some commentators consider there is never enough harmonization. This thirst for unified law often relies on ready-made tenets. The Swiss Proposal, for instance, assumes that "different domestic laws form an obstacle for international trade as they considerably increase transaction costs for market participants" (UNCITRAL, 2012a, p. 2) and suggests interests of international traders may "be better served by uniform rules covering the full array of legal issues that arise in a contractual business to business (b2b) relationship" (UNCITRAL, 2012a, p. 3).

The text which comes closest to an official commentary on the Hague Laws (TUNC) gives a very similar explanation — except in 1964 language — for the need to uniformize the law governing international sales contracts[5]. Partway through his explanation, Professor Tunc too states that "[a]n even more radical unification of the law of sale might seem desirable". This in his opinion would fulfill that which was predicted by Cicero, that Roman law was to be "*sed et apud omnes gentes, et omni tempore*" (TUNC, p. 4) — in a reference to the hypothetical ubiquity and permanence of uniform law. As

[4] The author does not intend to draw a historical outline of the evolution of the idea of unification of the law of international trade. All that must be said here is that the efforts in international contract law which resulted in the CISG go back, at the very least, to the 1917 attempt to draft a Franco-Italian Law of Obligations (BERGER, 2010).

[5] E.g., "[i]f the parties to a contract of sale have not expressly settled the law applicable to their contract, this law will be entangled in all the doubts which are involved in the application of the private International Law of different municipal laws"; "[t]he application of these peculiar rules to a foreign party often results in snares and traps"; "[t]he possibility of such errors discourages many enterprises from engaging in international operations" (TUNC, 1964, p. 2-4).

argued by the present author, however, uniform law is no different than any other law and its ubiquity and permanence are nothing but an unrealistic presumption of the intellect.

Unfortunately, there is no empirical evidence on which to base assumptions of either compelling need for, or permanence of uniformity and uniform law; they are merely assumptions, or sheer beliefs at worst[6]. Enterprises (and the economy as whole) can benefit from legal diversity as they can from legal uniformity: "diversity of laws per se holds advantages by facilitating a choice of law to suit a particular transaction, or even a particular sector" (SPAGNOLO, 2014, p. 146)[7]. On the other hand, producing uniform law (textual uniformity) is not the same as producing uniform results and predictable outcomes (applied uniformity). As Andersen (2007, p. 41 and 44) states:

> Any promulgated text of law is just words until it is applied as law. And any drafted text purporting to be a uniform law is nothing until it is applied uniformly as law. It is in the sphere of application that uniformity is created, not in that of drafting. [...] Textual uniformity is thus not uniformity at all, but an expressed goal towards it.

Legal certainty (or the lack thereof), understood as the production of uniform and predictable decisions, is not in the law, but in the adjudicator[8]. It escapes the control and

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[6] Though almost universally assumed as an obvious fact and thus taken for granted, there is no proof that diversity of legal systems constitutes, in and of itself, a barrier to international trade. As Wagner (2007, p. 41) explains in a nutshell: "a quantitative analysis of the relative costs and benefits of legal diversity and legal unity does not exist and is impossible to come by. There is simply no way of measuring with any exactness the benefits and costs both of legal harmonization and of legal diversity in order to compare the two". Henry Deeb Gabriel would believe, in regard to assertions of the Swiss Proposal that international trade is hampered by diversity of laws and that international contracts are governed by a closed circle of domestic laws, that "[e]vidence suggests just the opposite". He argues that parties are not primarily concerned with the applicable law of the contract; that nothing suggests that parties are unhappy with their current applicable law choices; and that there is also nothing to suggest that they would change their current choices vis-à-vis the advent of further uniformization of contract law.

[7] As a clue, 43% of entrepreneurs have pointed out in an Oxford survey that differences in European civil justice systems have minimal or no financial impact on their businesses, with almost a quarter dissenting from the concept of a harmonized European civil justice system (VOGENAUER, 2008, p. 41). A more recent survey in the EU indicated that contract law issues rank only third on the list of concerns of businesses doing cross-border trade (the top item being tax, followed by formal requirements issues). As for companies who stated that contract law barriers hinder business at least not very often, those amounted to 64%. Not more than 38% favored the adoption of optional EU contract law and a meager 35% anticipated any benefits deriving from it (FLASH EUROBAROMETER, 2011). See also Smits (2011, p. 48) with regard to other surveys and the conclusion that "the anecdotal and empirical evidence about the effect of uniform law does not clearly point in one direction or another". According to the same author, "[e]mpirical, economic and behavioural analysis confirm that it is difficult to establish the exact relationship between legal diversity and the enhancement of the economy through transfrontier contracting" (ibid., p. 51).

[8] Thus, "[o]utcome uncertainty is often a different matter than legal uncertainty" (ROSSET, 1992, p. 688); and "[t]he essence of the problem of the CISG's divergent interpretation lies with the interpreters

will of the lawmaker, especially at the international level, where private adjudicators (i.e., international arbitrators) are ubiquitous and given absolute independence except to the extent that they owe allegiance to a mandate from the parties. At this point in time, there is enough uncontestable evidence that non-uniform application is capable of jeopardizing the CISG's uniform character[9]. Further producing uniform rules on a "full array of issues" that arise in international trade, on the other hand, could go on forever, and is fraught with difficulties reaching well beyond those already harsh experimented in the field of international sales law.

Harmonization and unification of private law must be, and are in actuality, driven by a belief, or "shared perception" (HARTKAMP, 2002, p. 2), that they are useful. They are not truly substantiated by compelling evidence of the need to proceed with them, of whichever nature that evidence might be (economic measurements or other indications, reports from trade associations after polling their constituencies, obdurate political argument, and so on). As the Minister of Justice of the Netherlands has pointed out in his opening statement to the Hague Conference of 1964 (DIPLOMATIC CONFERENCE ON THE UNIFICATION OF LAW GOVERNING THE INTERNATIONAL SALE OF GOODS, 1964, p. 4-6):

> It is easy to understand that the need for unification is felt in all fields where international interests are greatly involved. [...] [I]n these days it is universally recognized that to facilitate and to encourage international business relations, is to contribute to the safeguarding of peace and the spread of prosperity.

If and to what extent uniform law will contribute to those aims is, again, not an easy question to answer (if at all possible, scientifically speaking), but the relevant point to be made here is that a need for unification is perceived or "felt" as put above, and not scientifically demonstrated. The reason for such perception is that codification of International Law is the brick-by-brick construction of a legal heritage to be shared by all peoples and is more likely than not to be the law of the future (or at least, its core[10]). This may be as persuasive a policy argument as any, and one may choose how much weight one

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themselves; its nature is substantive and not structural" (FELEMEGAS, 2000-2001). Throughout this thesis, an adjudicator means either an arbitrator or a judge.

[9] See in general Ferrari (2009).

[10] See infra at **5.3.2**.

wants to attach to it, and yet it is the only explanation for the drive to unify the law of contracts at the international level.

The Swiss Proposal, one may argue, claims for further development of this "project", on the basis of a broadened range of issues, especially in relation to general contract law[11]. The tenets set forth by Switzerland, however, to support its conclusions are basically the same that have been used to encourage uniformization of the laws of international trade way before the advent of the CISG. The Swiss Proposal does not entail an innovative approach towards uniform sales law drawing on the experience of both failures and successes of the last 50 years, that is, since the Hague Laws were made.

In the present author's opinion, and in light of the foregoing argument, there are two ways in which the Swiss proposal can develop into effective outcomes, provided that stakeholders are convinced to adhere to it:

1) Provided that it is interpreted as a call for renovation of the CISG, during which process a broadening of scope and issues covered could be discussed, and perchance implemented;

2) As a statement in opposition to the regionalization of uniform law, whose effects the Proposal describes as leading to fragmentation, confusion, and impaired predictability (UNCITRAL, 2012a, p. 7). In this case, its effect will be primarily "negative", that is, it will be addressed at regional international organizations and arrangements, and taken as an indication that the "global" regime[12] opposes, or at least finds itself in overt conflict with,

[11] The need, or indeed the possibility, to harmonize general principles of contract law is open to vehement disputation. The scope of any harmonization process which is born as an outcome of the Swiss Proposal must thus be carefully scrutinized. It is never enough to remember that, in preparation for drafting processes, "[t]he *choice of subject* is the first step and it is this step where in the past most mistakes have been made and where we are likely to make mistakes in the future" (KRONKE, 2002, p. 290).

[12] The one established by the United Nations, that is to say, the CISG. This interpretation would amount to a curious development on behalf of UNCITRAL as the CISG is assumedly not at conflict with regional regimes. It expressly gives uniform regional laws precedence over its own text (Article 90 CISG). On purported "soft" modifications of the CISG carried out by UNCITRAL, see infra at **4.4**.

the proliferation of regional uniform law[13] (see infra at **3.2.3** for the opinion of the present author on the matter).

Even if the first of the above interpretation succeeds, though, it is still to be argued whether a new round of negotiation on international sales law should focus on settling issues not covered by the CISG (as the Proposal suggests), on adjusting the provisions of the CISG to developments brought about, e.g., by case law, or on framing a new legal instrument altogether which would address international sales law in the context of general contract law — or yet another avenue. The present author argues that, in light of the shortcomings of the 1980 text of the CISG as already pointed out and further on developed (infra **2.2** and **2.3**), a new round of cooperation should focus on drafting a new[14] Convention on the International Sale of Goods and Services, though without completely forsaking the "old" CISG.

Furthermore, in very same scenario, the question as to whether there is a "claim" or "demand" for such renovation remains unanswered. Stakeholders other than Switzerland and UNCITRAL might not agree to carry on with the Swiss Proposal at all, even if interpreted in the above suggested fashion. This, for instance, is the clearly asserted position of the United States. Members of its Office of Private International Law have published on the Swiss Proposal. One of them states: "[w]e are not aware of demand for such a major initiative from US parties to international commercial contracts" (LOKEN, 2013).

Another officer criticizes the Swiss Proposal for mentioning allegedly unsubstantiated surveys which would reveal that "differences in contract law are one of the main obstacles for cross-border transactions" (UNCITRAL, 2012a, p. 2). He remarks: "[t]he proponents [of the Swiss Proposal] did not identify the specific surveys they were

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[13] The CISG Advisory Council has issued its Declaration No. 1 (2012) opposing regional initiatives for the unification of contract and business law such as those conducted by the Organization for the Harmonization of Business Law in Africa (hereinafter, "OHADA") (with the Uniform Act on General Commercial Law), the European Union (infra footnote **16**) and Asian countries (with the Principles of Asian Contract Law).

[14] It is a noteworthy fact that the CISG has arisen from UNCITRAL's design to revise the Hague Laws, the decision to draft a new convention altogether being a later development (SCHLECHTRIEM, 1987, p. 31; HONNOLD, 2009, p. 9).

relying upon"[15]. This criticism has merit, as discussed above. The officer adds, however, that consultations and analyses of the Office of Private International Law indicate "no support for a new initiative". He has not encountered "concerted views from the business community that significant transactional impediments exist that could justify such a project" (DENNIS, 2014, p. 124).

However tendering the opinions of the International Chamber of Commerce (hereinafter, "ICC"), Dennis is mistaken in accounting for them as relating to the Swiss Proposal as they are actually intended against the proposed Common European Sales Law (hereinafter, "CESL"[16]). As to the relevant consultations, they refer to the Swiss Proposal as a plan "for a new contract law text" and not for the renovation of the CISG (DENNIS, 2014, p. 127). The unfavorable opinion of the Uniform Law Commission, which he cites, predicated on the fact that the Swiss Proposal would lead to a "binding international agreement that would essentially be a restatement of contracts on an international scale" (UNIFORM LAW COMMISSION, 2013, p. 8) and not to a renovation of the CISG. It will remain to be seen whether theses opinions may change if the Swiss Proposal were to be reconsidered as a plan for renovating the CISG, as discussed in the present thesis — therefore significantly more limited in scope in comparison to a global restatement of contract law[17].

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[15] Surveys on the CISG so far have concentrated on aspects related to choice of law and the preference of parties to opt for, or out of, the CISG. One recent survey of this kind has turned up 640 "usable answers" (SCHWENZER; KEE, 2011). This number may be regarded as either unimpressive or spectacular, depending on how one looks at it; there is no serious statistical underpinning to support either conclusion. The survey has corroborated other kinds of evidence about a few relevant facts, but reached no definitive answer regarding choice of law preferences in international trade.

[16] The proposal for the implementation of the CESL by the European Union (hereinafter, the "EU") has been subject to heated controversy. Even though the CESL — an opt-in instrument which applies to small and medium-sized enterprises as well as consumer transactions — may be more of a modern text than the CISG. Its scope of application (ORTIZ; VISCASILLAS, 2012) covers the sale of goods, digital content and related services (infra **2.3**). However, its potential implementation has been questioned for many reasons. Vincent Heuzé is among the harshest critics of such initiative. "*Le « droit commun europeén » ne prétend se substituer à rien : il viendrait seulement s'ajouter à ce qui existe, en s'intercalant, sous la forme d'un instrument optionnel, entre le régles de sources nationales et celles de la Convention de Vienne*", he argues (2012, p. 1226). More importantly, EU authority under EU treaties to implement the CESL as uniform regional law is disputed (ibid, p. 1228-1229).

For a favorable view on the CESL, see e.g. Fauvarque-Cosson (2014). On alleged improvements of the material provisions of the CESL over those of the CISG see generally Magnus (2012), who finds any such improvements to be rather unimportant (save for the CESL's explicit provisions on interest rates).

[17] In fact, the allegedly "overly ambitious" and "unclear" character of the Swiss Proposal was pointed out by delegates to UNCITRAL's 45th Session, where a debate on the Proposal was held, as possibly the main reason for opposing it. "A number of delegates expressed clear opposition and strong reservations

What must be asked is where such kind of demand as expected by the above observers, be it for a Global Commercial Code (infra **3.2.3**), or for renovation of the CISG, would have to come from, how strong would it have to be in order to trigger stakeholder reaction and to whom it would have to be addressed, if ever methodically organized. But if harmonization and unification are not real *needs* but derive instead from a "shared perception" of its usefulness, we are talking more of convenience and feasibility than "demand". Hefty crowds will never take to the streets all over the world to claim that UNCITRAL undertakes a revolutionary unification of contract law on a global basis or, for that matter, that the CISG be immediately renovated[18]. Justification and initiative for such kind of project are at the behest of responsible scholars and international leaders who feel such work as necessary and that its costs will pay off in the form of a step (or a leap) forward in the legal development of mankind[19].

One way to find out whether or not there are sufficient grounds to pursue either a renovation of the CISG, or any new work on contract law at all at UNCITRAL is to look back at the appeal that generated the CISG itself.

2.1.2 The Appeal that Resulted in the CISG

An inquiry into the immediate causes that were responsible for the appearance of the CISG may help establish whether similar conditions can be verified today that would warrant serious consideration about its renovation. If there are measurable conditions going back to the period of preparation of the CISG (i.e., the stretch of time just before the establishment of UNCITRAL in 1966 and the conclusion of the CISG in 1980) that can be

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with regard to further work in the field of general contract law" (UNCITRAL, 2012c, p. 31-32). As a result, the debate on the Proposal could not be characterized as "reflecting a prevailing majority view in favour of additional work" (ibid., loc. cit.).

[18] See Kronke (2002, p. 290) for the remark by "a senior Department of Trade and Industry official" that the United Kingdom would be willing to ratify the CISG as soon as "angry masses take to the streets" demanding that such ratification be effected.

[19] In this sense, "[i]t is serendipitous, but also quite logical, that the needs of international commerce would also promote a widespread sense of shared purpose and understanding" (FELEMEGAS, 2000-2001).

definitely identified as those creating the need or demand for a uniform convention on sales, there is the possibility that comparison sheds light on the need for its renovation either at the present time or in the near future. In this connection, the Schmitthoff Report of 1966 (**2.1.2.1**) and the proceedings of UNCITRAL's First Session (**2.1.2.2**) are the primary documents worth analyzing.

2.1.2.1 Analysis of the Schmitthoff Report

The earliest official document available that testifies to the conditions bringing about the preparation and, eventually, the enactment of the CISG, is perhaps the Report of the Secretary-General of the United Nations to the General Assembly in its Twenty-first Session (UNGA, 1966, hereinafter the "Report"). The Report essentially relies on the authority of Professor Clive Schmitthoff to put forward a plan for the creation of UNCITRAL[20]. It is a very comprehensive report that does not focus solely on the sale of goods or other issue falling under the auspices of the Commission. Nevertheless, the international sale of goods is the first entry[21] on a list of examples containing topics that would fall within the scope and notion of "international trade law", the Commission's field of activity (UNGA, 1966, p. 3). This is but a natural development: the sale of goods is the most fundamental form of contract — not only — in international trade (supra Chapter **1**).

According to the Report, methods and approaches used in the harmonization and unification of the law of international trade are complementary to one another. According to the Report, methods include the preparation of international treaties and agreements, the

[20] UNCITRAL's creation came about as a development of the so-called Hungarian Proposal, which gained momentum after being co-sponsored by several countries (UNGA, 1966). The Hungarian Proposal takes note of the need for further international cooperation "for [the] progressive development in the field of private international law with a particular view to promoting international trade" (UNCITRAL, 1971, p. 5). It relates, as an inspiration, to the work of the International Law Commission for the codification of International Law.

[21] The second one, formation of contracts, ended up merging with the first (infra **5.5.1**).

formulation of model laws and uniform laws[22] and the restatement of commercial customs and practices (UNGA, 1966, p. 20-21). Approaches are described as: harmonization carried out by contiguous countries; or by countries with similar socioeconomic systems (i.e., capitalist or centrally-planned) or belonging to free-trade areas or common markets; or across countries with a comparable degree of economic development; or on a worldwide scale. This description remains valid as a theoretical framework. Of course, the CISG is an expression of the method of preparation of treaties and agreements as seen from the approach of worldwide harmonization (UNGA, 1966, p. 21).

Nevertheless, the Report does not discuss in detail what demand or *need* would rationalize or give good reason for the carrying out of harmonization projects. It bases itself on the idea that international trade can be fostered by the removal of obstacles such as conflicts and divergences between the laws of different states (supra **2.1.1**). Such a lack of preoccupation with a deeper justification for harmonization processes is a symptom that such processes are carried out as a result of *consensus*. The Report does, however, indicate that some topics are more suitable than others for harmonization or unification. Those that are suitable are all contained in "technical branches of the law [rather] than in subjects closely connected with national traditions and basic principles of domestic law"[23] (UNGA, 1966, p. 21). As Bergsten (2009, p. 6) explains, "[u]nification takes place, therefore, in a middle ground of differences in the law that cause significant difficulties, but in which the differences are not excessive"[24].

In pointing out which branches are suitable for harmonization and unification, the Report stresses that an unification process is only desirable where there is "economic need", so that unification would be beneficial for international trade. It neither gives a hint, nor prescribes a method, for identifying such a need or a benefit (UNGA, 1966, p. 21).

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[22] Uniform laws, such as implied by the Report, are understood in the sense they used to be at the time, ergo, of domestic laws enacted by states who became signatories to a convention carrying the uniform law as an annex.

[23] According to the Report, general contract law is a suitable topic for harmonization, but only to the extent it is relevant for international trade, such as in the case of frustration or *force majeure*, or the statute of limitations (UNGA, 1966, p. 22). See supra footnote **11**.

[24] Cf. also Mateucci (1961, p. 285): "[*l*]*'unification à l'échelle universelle porte sur des matières qui, d'une part, présentent un intérêt pour tous les pays participant aux échanges internationaux et qui, d'autre part, n'affectent pas profondément les principes généraux des différents systèmes juridiques*". Mateucci refers to matters of "*droit nouveau*" (new law) which do not affect deeply ingrained principles or traditions of national legislation (op. cit., p. 286)

Nonetheless, it states that regarding those topics, "worldwide unification may be desirable and feasible" (UNGA, 1966, p. 24). The Report also points out that unification measures radiate into the domestic law of states, which is certainly one of the reasons that makes it desirable. The Report is in a sense oblivious on feasibility; this is a symptom that feasibility is based on *persuasion*.

In the report, Professor Schmitthoff refrains from being specific as to suggesting priorities for UNCITRAL's work following its creation. He nevertheless points to areas in which unification had been successful in the past — above all, the international sale of goods. He also enumerates areas where unification would be "beneficial to international trade" (e.g., agency, joint venture and corporate law), but does not discuss the reasons on account of which such unification is beneficial. This is still another indication that scientific evidence of necessity is not at the foundation of legal unification and harmonization projects.

In discussing which predicaments put themselves in the path of unification, the Report gives hints as to the forces that actually lead to its realization. Predicaments are summarized as: 1) the lack of authority and membership of formulating agencies; 2) the underrepresentation of developing countries; 3) the geographical confinement of membership and 4) the lack of coordination and cooperation between existing agencies[25], none of which commanded worldwide acceptance at the time (UNGA, 1966, p. 22).

While not all of these shortcomings have been surpassed with the implementation of UNCITRAL, the latter has been effective in carrying out the project that culminated in the conclusion of the CISG in 1980. Part of the explanation for that is simply that UNCITRAL was able to produce effective concertation between stakeholders (supra **1.2**) and to have them agree on an ambitious project for the unification of international sales law[26]. But how did UNCITRAL manage do that? Another document from the same juncture may turn up useful information.

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[25] See infra at **4.5.1**.

[26] As it is apparent from first-hand accounts, this was not an easy task. UNCITRAL was not taken seriously at first and grew to gather acceptance from UN bodies as well as external organs. This process is thus portrayed by former UNCITRAL Secretary Kazuaki Sono (2003): "[i]n the early 1970s, the Commission, now popular by the name of UNCITRAL, was not well known even at the United Nations Headquarters. Diplomats stationed at diplomatic missions were conversant with the international law and

2.1.2.2 The work of UNCITRAL's First Session

Following its establishment in 1966, UNCITRAL held its First Session in New York City from 29 January to 26 February 1968 (UNCITRAL, 1971, p. 72). Discussions as to the methods used for the establishment of a programme of work for the Commission started by drawing on past experience of the International Law Commission[27]. It was pointed out that in 1949 the International Law Commission picked a certain number of topics out of those pertaining to the codification of International Law and then decided to assign priority to some of them[28]. The same approach prevailed at UNCITRAL. Accordingly the Commission, acting in good judgment as an ensemble of representatives of its membership and with assistance from non-governmental observers, would pick topics for unification and list them in order of priority. After discussion, it was noticed that "there were certain topics on whose inclusion a wide measure of agreement existed in the Commission" (UNCITRAL, 1971, p. 75). From this excerpt, one sees clearly that the idea of consensus is the basis for the implementation of harmonization processes at UNCITRAL since its creation.

The international sale of goods appears to have been the topic most frequently suggested at the occasion[29]. It ended up ranking first on a list of topics adopted by means of a working paper drawn up "[f]ollowing informal *consultations* between members of the Commission" (UNCITRAL, 1971, p. 77; emphasis added). On that occasion, "[b]y common consent, high priority was given to work on uniform law for international sales"

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international relations but not with the law of international sale of goods. Some wondered why pharmacists from all over the world assemble at the United Nations to discuss the period of prescription. Many wondered if international legislation of private law nature, which requires professional precision away from political influence, can meaningfully be undertaken at the United Nations which deals with peace. Moreover, in the field of private law, there were already well-established international bodies such as the International Institute for the Unification of Private International Law (UNIDROIT) and the Hague Conference on Private International Law (the Hague Conference)". On the different, yet partly overlapping, roles of UNCITRAL, UNIDROIT and the HCCH, see supra Chapter **1**.

[27] Professor Schmitthoff seemed to be very proud to think of the International Law Commission as a benchmark. He states that, at its First Session, UNCITRAL gave a technical and non-political character to its work, and thereby "placed itself on the same high level as the International Law Commission" (1968, p. 217).

[28] Those being the law of treaties, arbitral procedure and the regime of the high seas (UNCITRAL, 1971, p. 75).

[29] Cf. Honnold (2009, p. 9): "[a]t UNCITRAL's first session, by common consent, high priority was given to work on uniform law for international sales".

(HONNOLD, 2009, p. 9). The list of priorities enshrined the international sale of goods, international payments and commercial arbitration, in this particular order. The working paper also prescribed that the method of work should be suitable to the topic under consideration. By combining these two factors it follows that no harmonization methods or approaches should be ruled out where the international sale of goods in concerned. It then became "the aim of the Commission" to further the harmonization and unification of the law of international sales, an aim which member states were invited to take into account (UNCITRAL, 1971, p. 79) and one with which to be concerned "in the first instance" (UNCITRAL, 1971, p. 82). From then on, the much well-known history of the CISG unfolds.

Put simply, the CISG derives from a choice made at the early stages of UNCITRAL by a qualified roster of legal experts, diplomats and other participants[30] who, after a series of consultations, took the position that the subject was an important topic to which to give priority. They also decided to adopt the most daring harmonization method — the international convention. No oracle was conferred with; no input from flocking hordes was taken. This "gentlemen's agreement" is not, it appears, based on solid economic evidence quantifying the advantages, if any, that could arise out of the unification work; nor, quite importantly, does it have to be. It is based on persuasion[31] (in the vocabulary of the Report, informal consultations) and a shared and common perception that promoting uniform commercial law is, to some extent if not to every extent, a useful step in fostering international exchange[32] even though the numbers to support that conclusion may be missing (and, most likely, will continue to be missing)[33]. The overall sentiment is thus portrayed on a first-hand account: "[...] there was never any doubt as to whether it would be desirable for there to be uniform law on the subject of the international sale of goods.

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[30] Honnold (2009, p. 7) notices that, at the time, "UNCITRAL representatives proved to be a wholesome mix of academic specialists in commercial and comparative law, practicing lawyers and members of government ministries with years of experience in international lawmaking".

[31] Hence "[t]he legitimacy of [UNCITRAL's] work requires the existence of a universally perceived need for rules that facilitate the conduct of international trade. The only weapon of UNCITRAL is one of persuasion" (VIS, 1995, p. 15-16).

[32] A criterion which has to be relied upon mostly in hindsight (KRONKE, 2002, p. 294).

[33] Andersen (2007) posits that alongside the political goal of facilitating international exchange, also a "lawmaking goal" (a micro-goal) exists, of " establishing clear, flexible, modern and fair rules that can be applied across borders [...] tied to the question of predictability and certainty, foreseeability and insight" (ibid., p. 20).

The only question was how to bring this about" (BERGSTEN, 2009, p. 10)[34]. Such absence of doubt, or rather certainty in the minds of those who decided to take on the challenge of harmonizing the law of international sales is the very thrust behind the appearance and development of uniform sales law[35]. Without a doubt the same thought also inspired Ernst Rabel and previous international lawyers who envisioned the construction and progressive development of the law of international trade.

With the above, no suggestion is implied that unification only happens when and as long as a few organized members of international bureaucracy are in the mood for it. The cause for such processes lies always in a "sociological phenomenon" (SCHMITTHOFF, 1982, p. 248) and is certainly a complex one. Stakeholders such as entrepreneurs can only be represented so effectively in the arena of international regulation and diplomacy. In this connection, a great deal of credit has to be placed on those who felt developing countries and small businesses would be the primary beneficiaries of UNCITRAL's work in striving to expand the success of uniform sales law. That, notwithstanding those who were possibly eager to come up with measures that could assure newly-emancipated countries would not be too fast to legislate on their own and deviate from the concepts and frameworks of the developed and "civilized" (infra **3.1.2.1**) — to the detriment of the former and their welfare.

Of course, the establishment of a Commission that is supposed to deal with matters pertaining to the advancement of formulation and coordination in regard to the laws of international trade requires that the Commission itself exercises judgment on which projects to undertake. This is best achieved, as Professor Schmitthoff points out in his report, by supplying the Commission with advice from experts in the field, including those

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[34] Cf. the letter of, presumably, Prince Albert of Saxe-Coburg and Gotha (1819-1861), Consort of the United Kingdom, quoted by Levi (1863, p. x): "[i]t cannot be doubted that uniformity in the laws by which commerce is regulated in different countries would be, if it could be obtained, of immense advantage to commerce generally. The question would be as to the mode of attaining this uniformity".

Cf. also David (1968, p. 305): "[*u*]*ne certaine unification internationale du droit, portant sur les régles de conflit ou sur les régles de fond applicables aux rapports de droit internationaux, est souhaitable du point de vue de la pratique. Chacun le reconnaît aujourd'hui, et nulle considération de doctrine ne s'y oppose. Le probléme qui est posé par l'unification internationale du droit est en conséquence un simple probléme de méthode : comment réaliser cette unification* ?".

[35] One might say that the "rules of the game" governing the decision to produce unified law are such that we are not quite aware of and cannot formulate precisely. They could be implicit rules or "cryptotypes" whose operation leads to the appearance of an unification movement, "even though a good explanation of the need for it is given by none" (SACCO, 1991, p. 386).

of developing countries, who are to be assigned the responsibility of actively deciding on the Commission's agenda (UNGA, 1966, p. 24). This has not changed since 1964; it is still the duty of all involved with UNCITRAL's work to point out priorities in terms of what is convenient and feasible in order to increase the legal patrimony of international trade — in the best interests of the international community. Reduction of transaction costs apart, one must not be forgetful of the "moral dimension" of harmonization (KRONKE, 2002, p. 287).

Such decisions, however, are not likely to be based on empirical evidence of economic gain deriving from the adoption of harmonized instruments or rules; nor of businesspeople support (let alone demand) or of political need for the same undertakings, except in very specific situations where some of those elements (but hardly all of them) are present. The availability of empirical evidence supporting harmonization of the law of international trade was and still is curtailed on account of such factors as:

1) The lack of means to supply precise information as to the impact and effects of choice of law and of the adoption of uniform law on the economic balance of international trade, resulting invariably in a decision-making process oriented by argumentative policy considerations;

2) Underrepresentation of businesspeople of several sizes, economic and national backgrounds and trades in international formulating agencies, which are almost exclusively represented by experts or diplomats who cannot devote such time as is needed for the full accomplishment of such mandate[36];

3) Lack of proper understanding from political leaders and diplomats about the stakes involved in the work of harmonizing and uniformizing international trade law. Such work is not seen as a priority exactly because of, inter alia, the difficulty in demonstrating

[36] Hence "[i]n the Working Groups, national representatives come together from all parts of the globe, from diverse legal and linguistic backgrounds, for annual sessions of two or three weeks. All of the representatives have primary, full-time responsibilities in their Universities or Ministries. For these reasons, progress at the legislative sessions has depended on preparatory materials provided by the Secretariat" (HONNOLD, 2009, p. 8).

improved efficiency or potential economic gain expected or attained for either nations or businesses by virtue of the adoption of uniform rules.

It may be argued traders will adopt uniform rules (e.g., customs and practices, trade terms or model clauses) when they want or need to[37], without aid from states or international organizations, and that efforts like that which resulted in the CISG are, therefore, moot and represent a waste of time and resources[38]. The problem with this argument is that it too is anecdotal; until thorough surveys are carried out that indicate which are the factual preferences of businesses[39] as to a choice of applicable law, or the economic consequences of legal uniformity vis-à-vis diversity for the economy of international trade, there is simply no way to either support or oppose claims for uniformization based on irrefutable arguments derived from field measurements and data. One is left with feasibility and convenience after all.

2.2 CRITICISM OF THE CONVENTION

The CISG has, more often than not, been praised for its qualities, which are countless and undeniable, but a few criticisms to it are well worthy of consideration. A few (or many[40]) open-ended provisions exist in the CISG that cause more problems than provide solutions when it comes to their application. Open-ended provisions are a result of

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[37] See, e.g., Kahn (1964).

[38] As disclaimed supra at **1.3**, this thesis will not discuss efficiency as connected to legal uniformity. Suffice it to say that Gillette and Scott (2005, p. 455), relying on an economic analysis of international sales law, argue that "creating good default rules [for international sales law] may not be cost-justified" as " the costs of creating complex rules for modern, heterogeneous economies exceed the social gains". The reader is referred to Spagnolo (2014) for complete and authoritative discussion of the issue.

[39] One extra difficulty is that even businesspeople do not really base their applicable law preferences always on persuasive and measurable arguments, unless in specific cases where they have outstanding legal advice and are able to compare the possibilities at hand with a view to making an informed, optimal decision.

[40] If one considers the use of "reasonableness" standards as giving rise to open-ended provisions, then nothing less than 21 CISG articles (i.e., approximately 1 out of 5) are at stake.

time pressure and the difficulty in reaching compromise during diplomatic conferences at which such international texts as the CISG are adopted.

After grueling discussion, compromises are finally reached, yet they are not always clear. Besides clear compromises, covert, ambiguous and "illusory" ones may be identified in the CISG. This is why Professor Eörsi (1983, p. 340), who presided over the Vienna Conference of 1980 (UNCITRAL, 1991, p. xv), playfully states that "the final day or two of such conferences should be eliminated because that is the time when texts are exposed to irreparable improvisations and hasty decisions". Referring in particular to the drafting process of Article 25 CISG[41], which defines a fundamental breach of contract, he recounts:

> The clarifications in the text thus created new questions, and in the meantime the number of the words increased from 37 to 65. And all this out of a desire to define at a high abstract level something that cannot be defined at all. [...] [T]he explanatory criterion is first phrased in a puritan, simple way; later — impelled by dissatisfaction — it becomes decorated with flowery elements until it develops into a text that cannot be further developed but still lacks something. [...] After all that, it is mere chance in which phase the text happens to be when the conference comes to an end. In the case of the 1980 U.N. Conference, it was an unlucky moment.[42]

Inherent defects of diplomatic conferences, such as their narrow duration, will still be there when another diplomatic conference is held to discuss a renovation of the CISG. Hopefully though, there is enough to learn from the past so as to avoid naively repeating some mistakes, whilst making progress on the benefits already attained.

The existence of open-ended provisions, such as Article 25 CISG, and standards, such as those of the reasonable person and reasonable time[43], is probably the most often

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[41] "Article 25: A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."

[42] Eörsi got over the awkwardness and tribulations of the drafting process of the CISG by ingenuously recodifying the conversations of a drafting session in his parody *Unifying the Law: A Play in One Act, With a Song* (EÖRSI, 1977). His humorous farce is reproduced as Annex A to the present thesis for the benefit (why not amusement) of all those who might one day be involved in the drafting of a uniform law convention.

[43] Of course, these standards may also be seen as the very advantages that render the Convention adaptable to a variety of situations. This is exactly the opinion of Schwenzer and Hachem: "[r]ealistically, any uniform law has to rely on a certain imprecision. If a law is intended to be flexible enough to adapt to new factual and legal developments in decades to come it has to leave room for interpretation" (2009, p. 469). The same authors recognize that this "flexibility" stems largely from the fact that, despite drafters'

criticized, but by no means the only, weakness of the CISG[44]. Open-ended provisions are an intrinsic deficiency of the Convention — which on the other hand provide it with outstanding flexibility (infra **5.3.2**). Other indications are more symptomatic of its aging. They point to the fact that the CISG must be seen as a work in progress, rather than a definitive text. The CISG's provisions on the formation of the contract (Part II of the Convention) comprise only one fashion in which contracts may be concluded, and one which is not necessarily common in international practice (2.2.1). Part III of the Convention, which deals with the obligations of buyer and seller, is ill-adapted to complex situations involving third parties, which have become commonplace in virtue of the globalization of value chains and production networks (2.2.2).

2.2.1 Formation of the Contract

Part II of the CISG, dealing with the formation of the contract, has been criticized for several reasons. Such reasons include the fact that many areas are not dealt with in it, such as validity[45], agency and precontractual duties, problems arising in connection with open-priced contracts, the incorporation of standard terms (the so-called battle of forms), electronic commerce, along with sundry ambiguities and controversies related to the mechanism of offer and acceptance, which is the one espoused by the CISG (see FARNSWORTH, 1984; SCHWENZER; MOHS, 2006). Many issues not covered by the CISG, in particular those more clearly associated with domestic law (such as fraud,

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efforts towards equilibrium for the sake of avoiding a biased text, at the end of the day the CISG was shaped more according to the Civil Law tradition than otherwise (id., p. 468). Spagnolo (2014, p. 73) on the other hand views such openness as relating to the fact that the CISG was designed to "withstand long periods without amendment".

[44] Other frequent criticisms involve the "incompleteness" of the Convention (infra **2.2.1**), the possibility of concurrent remedies between the CISG and domestic law (i.e., remedies that are not provided for in the CISG but are available under domestic law thereby posing challenges to the uniformity of solutions), and so on. See generally Schwenzer and Hachem (2009) as well as references therein.

[45] See Bergsten (2009, p. 25-27) on the reasons explaining the exclusion of validity from the draft text of the CISG. UNCITRAL Working Group II has deliberately dismissed a proposal for "the unification of certain rules relating to validity of contracts of international sale of goods" (UNCITRAL, 1977).

capacity or illegality), were not incorporated because they were arguably too disputatious for states to agree upon. If that is true, there can be no serious hope that odds have improved so much as to warrant agreement on them today — even though we will never know unless we try.

In order to resolve the issues which instill criticism on CISG provisions on contract formation, one must resort to the gap-filling mechanisms the CISG provides for, such as rules of private international law (which ultimately lead to the application of domestic law) as well as general principles of law[46]. For instance, the UNIDROIT Principles of International Commercial Contracts contain provisions on validity and illegality. The UNECIC addresses issues related to contracts concluded by electronic means of communication. In, general, it is the opinion of Schwenzer and Mohs (2006, p. 246) that "the CISG has proven flexible enough to deal with all of these [controversial] issues despite their lack of contemplation at the time of drafting"[47]. Evidently, no legal text is immune to the need of being supplemented by external sources[48] and few can claim to be as flexible as the CISG to accommodate change and variety.

However, apart from issues outside of the CISG's scope or not expressly settled in it, and from those not still on the agenda by the time it was drafted (such as the conclusion of overseas contracts by means of electronic communications), it must be recognized the CISG has adopted too much of an unfashionable approach to contract formation. This is explained by the fact that Part II of the CISG remotely originates in the work on a draft Uniform Law on International Contracts by Correspondence, which in turn drew on the dynamics of 19th-century international trade (FARNSWORTH, 1962; FARNSWORTH, 1986).

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[46] See infra at **3.3.**.

[47] The same conclusion was reached by Meyer (2009) who after factoring in aspects which evidence the aging of the CISG and recognizing that the Convention "has not been blessed with immortality" (id., p. 342), contends that already existing and generally accepted interpretation techniques ensure acceptable results. The same author claims for "constructive interpretation" and "progressive development of the law" in regard to the CISG and exhorts judges to "perform a dynamic, creative task" in applying the CISG. That said, he deprecates "rampant judicial activism" (id., p. 330). According to the author, though creative, judges must be "cautious" and confine themselves to dogmatically incorporating the overall concept of the Convention while avoiding liberal interpretation of its wording (2009, passim). One may wish that happens.

[48] As put by Spagnolo (2014, p. 69), "it must be remembered that an incomplete scope is also a feature of most laws".

Already in 1934 the work on formation of contracts was taken apart from the work on sales provisions, and it remained so until 1978 (infra **5.5.1**). It might have been the ugly duckling in the process[49]. This lesser importance, as it were, given to formation has had the consequence that formation provisions could not evolve at a commensurate pace with those relating to sales. In point of fact, many questions arising today in relation to the CISG were levied already in relation to the Rome Draft of 1936 (compare, e.g., FARNSWORTH, 1962 to FARNSWORTH, 1986 and SCHWENZER; MOHS, 2006).

Even though the Rome Draft of 1936 no longer envisaged conclusion of contracts solely by correspondence, it still kept a correspondence approach to formation[50]. This can be seen from Article 3 of the Rome Draft, which provided that a communication (FARNSWORTH, 1962, p. 312):

> [S]hall not constitute an offer [...] unless the terms of the contract are sufficiently detailed to permit its conclusion by acceptance and unless the person who makes the communication must be considered as having the intention to bind himself.

The above provision sounds hauntingly familiar to someone whose ear was trained in CISG language. In fact, it sounds like a twist-and-turn rescript of Article 14 CISG[51]. Not only the same elements are present in the wording of the CISG, such as hard-to-distinguish *sufficient definiteness* not to speak of almost numinous *intent to be bound*, but the "events capable of legal significance" — to use Farnsworth's language[52] — still remain the same. They remain attached to the image one makes of correspondence situations. Even the treatment dispensed by the UNECIC, as soon as it speaks of "communications", can be

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[49] Proposals that would deviate from the offer-and-acceptance scheme, such as the one to deal with contracts that "resulted from, for example, lengthy negotiations and the signing of a single document" were opposed on grounds such as that they "could not apply to the formation of all contracts" or, more broadly, because they were irreconcilable with already existing text or were not prone to an accurate formulation (UNCITRAL, 1981, p. 38-39).

[50] The offer and acceptance model is also the main assumption behind the classic study on formation of contracts chaired by Schlesinger (1964).

[51] "Article 14: (1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price. (2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal."

[52] "(1) [T]he offeror dispatches his offer to the offeree; (2) the offer reaches the offeree; (3) the offeree dispatches his acceptance to the offeror; and (4) the acceptance reaches the offeror" (1962, p. 314).

mapped to an idea of correspondence which is pretty much the same as that of the early Rome Draft of 1936.

Of course, it is hard to imagine that any international parties will conclude a contract for the sale of goods (or any other contract) without communicating with each other and, more often than not, also exchanging commercial correspondence either electronically or otherwise. But the odds this happens with the diplomatic precision described in the relevant provisions of the CISG and also of its predecessors are optimistic at best. Formation of contracts in commercial practice is a highly uneven phenomenon and hardly a reproducible experiment that follows the recipe prescribed in the CISG. In many cases, looking for a pin in a haystack is easier than scouring the parties' exchange in search for an offer and corresponding acceptance (as well as the intent to be bound by the offeror and the offeree's assent, which normally have to be presumed). In addition to that, not always is a contract for the sale of goods merely that, it may be just one particular aspect of a much more complex transaction, such as a framework contract (SCHLECHTRIEM, 2005a, p. 184-185; SCHWENZER; MOHS, 2006).

Not only may such complex transactions not have clear-cut matching offer and acceptance pairs displaying an intent to be bound and the assent by the offeree, they may also be so complex that no one is even likely to relate its mechanics to contract formation by correspondence at all. In actual international commercial practice, parties often resort to letters of intention, heads of agreement, memoranda of understanding and other paperwork, which may involve several rounds of negotiation and ongoing exchange of intent (BAPTISTA, 2011). This renders the work of singling out offer and acceptance rather troublesome and, often times, "difficult, if not impossible" (SCHWENZER; HACHEM; KEE, 2012, p. 153). Worse still, such work may pretty much become an "arbitrary legal operation" (SCHLECHTRIEM, 2005a, p. 178).

International contracts may be concluded either instantaneously, as if orally or in a single document signed by both parties, by interval (*ex intervallo*), as when offer and acceptance are exchanged within a reasonable amount of time, or by extended interval (*ex intervallo temporis*), as when a complex set of documents is prepared until both parties are certain about their being part of the contract (BASSO, 2002). The offer and acceptance approach adopted by the CISG is a classical approach which is just too classical to fit the needs of 21st-century contract formation in international trade. The fact that the

precontractual phase is gradually merging into the formation phase as previously known, with different kinds of documents not easily categorized being exchanged by the parties, creates a grey area of undifferentiated statements and manifestations which may or may not amount to either an offer or an acceptance. This renders the mechanism an "archaic" one, which is being abandoned by the Common Law tradition even at the statutory level[53], as well as by more recently produced uniform rules at the international level[54] (SCHWENZER; HACHEM; KEE, 2012, p. 130-131).

2.2.2 Obligations of the Parties

Though the CISG sticks for most of the time to a simple buyer-seller bipolar model[55], reality of economic operations persistently runs in the opposite direction. Not only contracts become more complex because they involve multiple obligations only one of which is buying and selling, they also increasingly enshrine a web of other participants each of which is critical for the success or failure of the obligational process. Traditionally, sales transactions always tended to involve third parties such as carriers, bankers and insurers — not to speak of brokers and agents —, yet more and more the concept of third party is becoming blurred. Is another company of the same group as one of the parties a third party? To which extent may the acts of an agent affect the principal's liability[56]? May

[53] See Uniform Commercial Code (hereinafter, the "UCC") § 2-204(1)-(2), which state that "[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract" and that "[a]n agreement sufficient to constitute a contract of sale may be found even though the moment of its making is undetermined", respectively.

[54] Such as the UPICC, Article 2(1)(1) ("[a] contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement"); the Principles of European Contract Law (hereinafter, the "PECL"), Article 2:101(1) ("[a] contract is concluded if: (1) the parties intend to be legally bound, and (b) they reach a sufficient agreement — without any further requirement"); and the Draft Common Frame of Reference (DCFR), Article II.-4:101, with similar provisions.

[55] By authority of its Article 4, the CISG concerns itself only with "the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract".

[56] See on the issue UNIDROIT's Convention on Agency in the International Sale of Goods (1983). The Convention is not in force. As to its status as a supplementing instrument to the CISG, see infra **4.2**.

sub-purchasers or upstream suppliers become involved in the relationship between buyer and seller in such a way as to interfere in the latter's sphere of liability and risk?

Third-party rights and claims are not extraneous to the CISG. But in essence, the CISG concerns itself with claims as to the property, including intellectual property, in the goods sold. The influence third parties such as upstream suppliers or carriers may have as to the rightful performance of the contract is only poorly addressed by Article 79(2) CISG[57], a nebulous provision which has been interpreted in rather misleading ways. In the best of scenarios, this provision is only concerned with force majeure or similar impediments to performance. The CISG does not address, for instance, joint and/or several liability[58]; assignment of rights; illegality; or any other relevant aspect of third-party involvement in, or with, the contract of sale concluded between buyer and seller.

This might not have been such an ungainly disadvantage had not the framework of international business enterprises changed so drastically since the time of the CISG's inception. The CISG relies on "classical" rules, tailored to an unspecific sales transaction involving a definite buyer, a definite seller and definite goods, with almost no outer "noise", that is to say, no integrated view of the sales operation within the framework of any wider context — except for the practices established between the very parties to the transaction in regard to similar operations they have carried out in the past, or the usages of the relevant trade sector (taking buyer and seller essentially as members of their respective "guilds")[59].

The structural evolution of international trade from a company and industry point of view, unfortunately, challenges this classical, old-economy outlook to the extent that, while buying and selling is still the fundamental international business operation, it is no longer a product of isolated, point-to-point overseas merchantry. Buyer and seller are now entangled in a web of totally or partially independent — yet always interdependent —

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[57] "Article 79: [...] (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if: (a) he is exempt under the preceding paragraph; and (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him. [...]"

[58] One German court has addressed the issue of joint liability in a case involving the CISG and found it to be governed by the subsidiary domestic law — in that case, German Law (LANDGERICHT MÜNCHEN, 1996).

[59] See Articles 8 and 9 CISG; infra at **3.3**.

participants which purchase and sell within production networks. While the *internationalization*[60] of companies is not that much of a recent phenomenon[61], their *globalization*, meaning the integration of leadership, development and sourcing, is not only a new, but an ongoing process, especially since the early 1990s.

The historical evolution of value chains and production networks has experienced a significant shift since the period of drafting of the CISG. Developing economies have largely abandoned an import-substituting industrialization (ISI) model towards export-oriented industrialization (EOI)[62], with corresponding changes in their trade profile, from exporters of primary goods to exporters of manufactured goods, and from high-*volume* importers to high-*value* importers[63] (supra **1.1**). This is associated not only with a geographical redistribution of manufacturing processes, but also has redefined power allocation down the chain from producers to retailers and thenceforth, to buyers and consumers. Until the 1970s, world trade was based on producer-driven transnational power and a highlighted role of state power in shaping national competitiveness. From the 1980s onwards, new governance models have arisen, with lead firms no longer exercising vertical control, and power distributed across a web of independent, yet interconnected actors that conduct B2B (procurement, logistics and administrative operations) transactions by e-commerce channels (GEREFFI, 2001)[64].

Today, even local specialized production clusters or other relational networks are placed amidst global networks that link them together from the point of view of both technology and related exchanges. So-called original equipment manufacturers

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[60] By internationalization of companies one understands the extension of production, trade and investment across national boundaries (DICKEN, 1998, apud STURGEON, 2010).

[61] Chandler Jr. (1977) has defined the "modern business enterprise" as a company with multiple units established in different locations, handling different types of economic activities and operating under hierarchized multilevel management. Over time, such large, vertically-integrated enterprises have split down into multiple autonomous and diversified companies which supply not only the companies they have originated from, but also former competitors as well as other customers. The "modern" giant of 1977, which performed multiunit internalized international operations in goods and services, is nowadays recognized as the "dinosaur" (STURGEON, 2010). It ended up giving way to other kinds of arrangements and governance models.

[62] In Brazil, and Latin America in general, both models mingle and compete with each other.

[63] Constant modifications and shifts between the role of importers and exporters of goods and capitals experienced by developed and developing countries in the post-CISG period render the debate (see SCHWENZER; HACHEM, 2009 and references therein) about the CISG being either too seller- or too buyer-friendly moot, or at least are able to significantly change each party's angle at it.

[64] On the influence of ethical standards on inter-firm governance of value chains, see infra at **5.6**

(hereinafter, "OEM"s) are no longer responsible for most of the design and technology involved in their developing processes, to the point that some of them, especially in the digital sector, carry out only lead operations (such as brand management) and rely completely upon outdoor manufacturing (STURGEON, 2010).

This means in the real world, international sales no longer occur, paradigmatically, between unrelated, isolated, standalone companies spread across different countries, or between related parties belonging to the same "dinosaur" enterprise (in which case the applicable law is not really a subject of interest). Once the rule, those operations have increasingly become the exception. B2B operations nowadays take place most typically between a lead firm (not necessarily the most economically powerful within or outside the context of the operation) and a first- (turn-key) or low-tier (component) supplier; or between a retailer and a lead firm. Firms may also swing between these roles from time to time, causing new shifts in the chain's governance structure (STURGEON, 2010).

In each case, the objectives intended by the parties to the transaction can be very different. Turn-key suppliers are on-demand manufacturers, but are largely responsible for their product. Their customers are interested, therefore, not only in the *purpose*[65] of the goods sold, but also in the design, market strategy and innovation. As first-tier, or sometimes "full package" or "total solution" suppliers[66], they must exceed expectations nine times out of ten[67]. The perceived value of goods no longer attaches only to the purpose (the utilitarian or "efficient" component), but to a host of other multisensory and emotive dimensions[68] (the hedonic component or buyer-driven value) involved in the act of purchasing. This is what the lead firm (the buyer in the B2B transaction) will look forward to obtaining, so as to pass it along the chain down to the end consumer. Lower-tier

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[65] As this thesis argues (infra **2.3.2**), purpose is the core concept of conformity provisions in the CISG, which, in turn, are the core of the CISG itself.

[66] For instance, Celestica, Dana and Delphi (STURGEON, 2010).

[67] "Turn-key suppliers provide a wide range of production-related services, including logistics, process engineering, component purchasing, manufacturing, assembly, packaging, distribution, and even after-sales service, while lead firms provide the innovative muscle and marketing clout to drive and define the market for new products" (STURGEON, 2010, p. 13).

[68] See, e.g., Arnold and Reynolds (2003) as well as references therein.

component suppliers[69], on the other hand, will deliver not only purpose, but also reliability and sometimes, public reputation[70].

The way this new reality fits rather problematically into the framework of the CISG has surfaced both in real and simulated practice[71]. True, the CISG is prepared to govern sales transactions which involve on-demand manufacturing, provided that the buyer does not supply a substantial part of the materials needed for production (in which case the contract would be rather seen as an agreement for the provision of manufacturing services). How this is going to play out in practice vis-à-vis the growth of outsourcing and third-party manufacturing as well as the splitting down of formerly integrated, vertically-oriented value chains and production networks is uncertain. Especially, because the interpretation given to the word "materials" in Article 3(1) CISG[72] by courts applying the Convention is unclear[73]. Such provision may be interpreted as encompassing not only actual supplies, but also design specifications or plans and instructions given by the buyer, as decided by courts in Switzerland and Germany (UNCITRAL, 2012b, p. 20) (infra **2.3.1**).

But the real question is whether the CISG, though nominatively the governing law for goods manufactured on demand, is really adapted, or flexible enough to adapt (at the substantive provision level) to fit such kind of economic organization. After all, its unfitness and outdatedness may be one of the reasons to explain why the CISG is so often times opted out of — in this hypothesis, based on market considerations of key participants[74]. This possibility means the suitability of the CISG (and hence its real, not just theoretical, applicability) would be restricted to old-economy sales, only or for the most part.

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[69] E.g., Intel or Microsoft (STURGEON, 2010).

[70] The laptop computer on which this thesis was written has, in addition to the name of its OEM, two stickers, one informing the manufacturer of the microchip, the other that of the operating system.

[71] In fact, all Willem C. Vis Moot problems from the 16th Moot onwards have been dealing in one way or another with the conflict between the new reality of economic exchange and the old-fashioned framework of the CISG. See Barrington, Casado Filho and Finkelstein (2013).

[72] "Article 3: (1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production. [...]."

[73] In classical private international legal terminology the act of applying Article 3 CISG corresponds to "qualifying" the contract as a sales contract or as a contract for the supply of services, thereby determining the applicable law in light of the contract's legal nature.

[74] Accounts on the exclusion of the CISG, though sometimes profound (e.g., SPAGNOLO 2009a; SPAGNOLO, 2009b), cannot be so pervasive as to disclose the specific reason behind each opting-out party's decision to exclude the application of the Convention.

A look at a few cases listed in the 2012 UNCITRAL Digest on the CISG (UNCITRAL, 2012b, p. 30) may demonstrate the problems incurred in dealing with third-party issues under the Convention. For instance, in one US case[75], an overseas sale of software between a US seller and a German group of companies (the contract being signed by a US-based wholly-owned subsidiary of the German mother company) resulted in a finding of lack of jurisdiction in view of the fact that the CISG only applies to the relationship between buyer and seller. As, in the opinion of the court, the relevant place of business of both parties was located in the United States, court found the CISG did not apply to the contract and the plaintiff was left with no case.[76]

Another US case illustrates particularly well the unsuitability of the CISG to the complex value chain economy which characterizes today's international trade. The plaintiffs, Caterpillar and CMSA, were respectively a lead company (OEM) and an upper-tier supplier of truck bodies (Westech, another upper-tier supplier of truck bodies, did not become a party to the lawsuit). The defendants, Usinor (France), Usinor USA (a wholly-owned subsidiary) and their distributor Leeco, were respectively an OEM, a lower-tier (basic materials) supplier and a marketer or reseller. The controversy revolved around a purchase operation for Creusabro 8000 steel manufactured by the Usinor group. The court narrates (UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, 2002):

> After entering into contracts with its customers to sell the lighter weight truck bodies, Caterpillar issued purchase orders to CMSA and Westech for completed truck bodies. CMSA and Westech then issued purchase orders to Leeco for Creusabro steel to be used in fabricating the truck bodies [reference removed]. Plaintiffs assert that the Usinor Defendants instructed CMSA and Westech to buy the Creusabro from Leeco.

Once plaintiff's use of the Creusabro steel supplied brought about performance issues (lack of compliance with previously agreed specifications and problems in matching a sample provided) and an attempt by defendants to suggest an increased-cost approach

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[75] United States District Court for the Middle District of Pennsylvania (2006).

[76] Also of interest are, inter alia, Oberlandesgericht Stuttgart (2000) and Cour d'Appel de Colmar (2000). In both cases, the court applied the CISG with due regard for its Article 10, after finding that the seller was actually a foreign company despite its being represented by a national subsidiary in buyer's country.

failed, the plaintiffs gave up the Creausabro and tried to return the unused stock — selling it for scrap after refusal by the defendants to take redelivery.

The court established that an agency relationship existed between Usinor, the principal, and Usinor USA (as a co-principal and agent) and Leeco (as an agent). While recognizing that under its Article 4[77] the CISG does not apply to non-privity parties, the court decided the CISG would govern the claim by CMSA towards Usinor. The latter was considered to be a party to the transaction under US agency law, whereas Catterpillar's claim could only be brought under US (Illinois) law as it never purchased the Creusabro. This means the court decided to break down the applicable law between claims, not because of the remedies sought, which were essentially the same (i.e., damages for lack of conformity), but owing to the fact that the CISG is in effect based on privity of contract between buyer and seller.

Reorganization of company networks and value chains in the last 34 years has left the text of the CISG in the dust of an old economic reality. The CISG has to adapt to new forms of contract formation as well as to the reality of complex value chains where buyer and seller are no longer the only relevant parties to a sales transaction, especially in international trade.

2.3 CISG AND THE SERVITIZATION OF GOODS

A strange phenomenon has affected company rankings in the last 20 years. As of 2013, the world's largest companies by market capitalization include such enterprises as Apple (1st), Google (3rd) and Microsoft (8th). Tech and tech-related companies are the top risers coming out of the 2009 crisis (PRICEWATERHOUSECOOPERS, 2013). Certainly,

[77] "Article 4: This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold."

these companies do sell overseas, but unlike their 1980 predecessors, they deal in goods whose only purpose is to feed their customers services, or in services which attach at once with their customers' goods.

Of course, 1980 was no stranger to the trade in services in the international marketplace. Those services were mainly banking and finance, telecommunications and shipping, though. The world was not yet under an invasion of goods which can offer such a diverse range of services in one device and bear global connectivity (though the TV set, the radio set, the telephone, and the Telex machine for instance, were already marketed in 1980).

Computer technology is now everywhere. It has forayed into "traditional" markets such as the automotive, capital goods and domestic appliances. Built-in electronics have invaded cars and planes, industrial equipment, households and offices, channeling all kinds of services via touch screens and mobile phone networks. The Internet links together goods and people, and will do so more and more in the years to come.

With computer technology comes inevitably software and, often times, training and increased maintenance costs (e.g., support and updates). From the point of view of sales law, the economic balance between the hardware (goods, strictly speaking) part and the service part involved in the sale is more and more unclear. The value invested in furnishing a machine with proper software and data can be several times greater than the one spent in parts — and it is still a machine, or in other words, a good. Also, built-in computer technology affects the purpose of the goods sold. Without properly working software, a good may have its market value severely diminished, or be a meaningless assembly altogether. Many goods today serve only as a substratum for software to operate, and their purpose will be that of the software that operates on it — which may vary greatly, or even be indistinct from the point of view of the manufacturer.

The combination of goods and services in the same economic transaction has been dubbed by economists the "servitization" of products, whose classical definition, dating back to the late 1980s, refers to the replacement of an offer of goods *or* services by an "offer [of] ‘bundles’ consisting of customer-focused combinations of goods, services, support, self service, and knowledge” (VANDERMERWE; RADA, 1988, p. 316). Servitization has been recognized as "the innovation of an organization’s capabilities and

processes" (BAINES; LIGHTFOOT; KAY, 2009, p. 1207) and hence has been keenly pursued by companies everywhere.

The CISG is a pre-servitization legal text. Its approach to goods considers it possible to attain a clear estimation of the goods component and the service component involved in a sales transaction. Such estimation is in turn used to make a decision on the applicability of the Convention (2.3.1). The CISG also embraces the premise that goods have a sufficiently definite purpose, which is considered as the prevailing factor in determining their conformity to the contract, should contractual provisions to that effect be absent or insufficient (2.3.2). Non-servitized products *par excellence*, such as basic materials, are not the CISG's forte on the other hand (2.3.3).

2.3.1 The Erratic Balance Between the Goods and the Service Components

Legal scholars may not have appropriated the language yet, but the business world does not sell products anymore, they sell Product-Service Systems (hereinafter, "PSS"s). A PSS derives both from the servitization of products and from the productization of services. Pure services and pure products are at the rarefied ends of a spectrum (WONG, 1998, apud BAINES et al., 2007) [78] — or a goods-services continuum. In order to be put to use, an equipment or asset has not only to be purchased, but provided with consumables, permanent monitoring and servicing, and be disposed of ecologically in due course. Buyers and sellers have come to perceive that the asset itself is no longer important; instead, they consider the solution (e.g., for an industrial lathe, its "lathing capabilities") it is able to provide. Old-fashioned purchases have turned into ownerless leases, take-back sales and

[78] Hence, "'[p]roduct' and 'service' appear no entirely separated fields but rather two poles of the same axis called means for adding value" (GOEDKOOP, 1999, p. 25). Even at one end of the spectrum it is rare (or even impossible) for products to have no service value attached at all. At least, the value of the selling activity is attached and, in international trade, also shipping, credit and insurance (BERMAN; KAUFMAN, 1978). Such service value is in fact destined to perfect the execution of a sales contract (KAHN, 1964, p. 1), though it is not the kind of service value which is at stake when one speaks of servitization.

similar arrangements. The selling of access, capabilities, performance or an "experience" rather than goods in themselves, is on the basis of the transition from a linear (one-way or "take-make-dispose") to a circular economy where waste will not exist because goods are consistently subjected to reuse, refurbishment or remanufacture (WORLD ECONOMIC FORUM, 2014). In some cases, focus is chiefly on the product, but an array of services is sold alongside it as a "package", including maintenance, repair, reuse or recycling, optimization, etc. In other cases, the focus on the solution is so strong as to warrant an almost all-service approach to the operation, such as when focus is directed to results. But even in such cases, goods are always involved.

Companies from all sectors[79] turn to hybrid value creation for economic, strategic and environmental reasons, both in the B2B and B2C markets. As manufactured goods present increasingly shrinking yields, product-service combinations offer profitability offsets. Such combinations are also less prone to fluctuations in the economy. They provide firms with differentiation strategies, since the service component is less visible and more difficult to imitate — in such a way manufacturers can increase their ability to cope with the challenges of globalization. Sellers have a better shot at satisfying their clients as they offer customized instead of one-size-fits-all solutions (VELAMURI; NEYER; MÖSLEIN, 2011). Servitization is also connected to concerns of both producers, governments and the market at large with sustainability (supra **1.1**; infra **5.6**). As Baines et al. (2007, p. 1548-1549) summarize:

> There are a wide range of benefits of a PSS; to the producer it means an offering of higher value that is more easily differentiated, to the customer it is a release from the responsibilities of asset ownership, and to society at large a more sustainable approach to business.

It is becoming ever more difficult to come across "pure" products and services. It is also becoming difficult to distinguish between them. In an economy where manufacturers gradually enhance the service content of their products as a way of adding value and increasing profits, as well as improving competitiveness and sustainability, it is not easy to see how legislators would be better off sticking to a traditional, disjointed notion of products and services. As companies in different sectors gradually adhere to new concepts

[79] More than 85% of European manufacturers offer some service alongside their products (LAY et al., apud VELAMURI; NEYER; MÖSLEIN, 2011).

of mixed product-service content — even adapting the everyday language used to interact with customers and partners, as well as their management approaches to values, corporate knowledge and performance —, lawmakers (including international lawmakers) will have to cope and follow suit.

A "product" and a "purchase", especially in the B2B sector, have turned into a complex set of relations — including the provision of parts, consumables, servicing, involving a web of demand signals, feedbacks and responsibilities split between the customer, the OEM and their partners in order to support both the customer and the asset's operation via local and remote monitoring and maintenance. As different participants are involved, not only buyer and seller are relevant to the operation, but also third parties such as industry partners of each of them. In most cases however, a sale — in the legal sense — is still in place. The operation has not necessarily become a different kind of contract, such as a rent or lease: "in most cases of product-centric servitization, ownership is transferred from the OEM to either the customer or a third party such as a financial partner[80]" (BAINES; LIGHTFOOT; KAY, 2009, p. 1210). Only it now includes a complete portfolio of services alongside the "asset", or the goods as one would say in CISG language.

Due to the expansion of such strategies, the relationship between buyers and sellers has changed. In traditional, old-economy sales, the contact between buyer and seller would be often times sporadic and cease — sometimes, rather rapidly — as the goods were taken over and resold or otherwise used or consumed, or upon expiration of a manufacturer's period of guarantee or a cut-off period such as that of Article 39(2) CISG[81] — or (probably, at the latest) a limitation period. Save for exceptions, a typical commercial relationship in traditional terms would not gravitate around the *same* product or batch sold for an extended period of time. With the growth of servitization and PSSs, the manufacturer's focus shifts from "traditional" concerns such as price versus costs, quality and delivery, into new perspectives such as the integration of processes, or the broadening of supply and delivery chains. This is simply because manufacturers now have to interact

[80] In the case of transfer of property to a third party there is of course no sale in the legal sense. A secured transaction (UNCITRAL, 2010) ought to be in place.

[81] "Article 39: [...] (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee."

"closely with customers throughout an extended lifecycle, and so [have] many more demand signals against which to respond" (BAINES; LIGHTFOOT; KAY, 2009, p. 1211).

Buyers and sellers interact in a more complex and sophisticated way. Customers used to have reduced upstream influence in the preparation and design of products, which were mostly ready-made in a producer-driven economy. With servitized products, the customer, including the end-user (be it a consumer[82] or a business) has many more opportunities to interact with those involved in product development and design (MORELLI, 2002). This poses challenges as to the legal nature of the operation, inasmuch as customer participation in the manufacturing process tends to characterize it as a manufacture under request, which may or may not be considered a sale of goods under the CISG.

As a consequence, it becomes very difficult to draw the line when Article 3(1) CISG is involved. In principle, the text of the provision refers to "materials", but if this reference is to be understood as to the overall economic worth of a buyer's input, we are left with the difficult task not only to assess it, but also to decide whether or not the CISG applies as a matter of law. Even as far as tangible materials are concerned, they may carry considerable immaterial value due to "know-how or even the industrial property rights on which their production was based" (SCHWENZER; HACHEM, 2010a, p. 66)[83]. This would be the case where a customer (in this case, an OEM) orders the manufacture of a product whose core element — a chip, for instance — is supplied by the customer which bears high economic value because of the particular information it contains (say, proprietary circuit design or low-level software). If the chip's economic value is to be taken into account, will it qualify as a "substantial part" of the materials provided by the buyer, thereby displacing the application of the CISG, despite it being only a tiny part if physically compared to the final product? Or should we dismiss the rule of Article 3(1) CISG on the grounds that the chip's intrinsic value, without the information it bears, would hardly be appreciable?

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[82] Instances where a consumer has upstream influence on the value chain include custom-ordering cars on an OEM's website or defining materials to be used in the production of furniture from a generous palette of available choices.

[83] Cf. CISG AC (2004): "[t]he words 'materials necessary for such manufacture' in Article 3(1) CISG do not cover drawings, technical specifications, technology or formulas, *unless they enhance the value of the materials supplied by the parties*" (emphasis added).

Even though Article 3(1) already poses difficult questions, those shy in comparison with the ones brought about by its subsequent paragraph. Article 3(2) CISG[84] is based by hypothesis on the assumption that products and services hold between themselves an either-or relationship. That is because under Article 3(2) one must be able to establish the "preponderant part" of the obligation as either the delivery of goods, or the "supply of labor or other services"[85].

Too bad, the CISG does not advance any definition of good; we must look for one from external sources. One possible avenue, and probably the most appropriate, is to equate "goods" with a "product". This is the most likely definition to have occupied the minds of those drafting the CISG. Attention is nevertheless to be paid to the change between the Hague Laws and the CISG in their French versions, from "movable objects" (*objets mobiliers*) to "goods" (*marchandises*). This was meant to broaden the scope of the term and provide it with a hint towards elastic interpretation. On the basis of such interpretation, software is more often than not considered to be a good under the CISG despite the prevailing conception that, under the Convention, "goods are basically only moveable, tangible objects" (SCHLECHTRIEM, 2005b, p. 28; see also HONNOLD, 2009, p. 55-56)[86].

Even if one equates goods and products, a product is though yet to be defined. A persuasive definition is given by Goedkoop et al. (1999, p. 19): "a tangible commodity manufactured to be sold [...] capable of falling onto your toes and of fulfilling a user's need". So are, for instance, a brick, a computer, coffee powder and raw materials. The authors, however, leave outside the concept the fact that a product may possess pre-defined specifications, in view of today's "shift towards ultra-lean and flexible production networks [which] offers a more open customer interaction". A service, on the other hand, is an activity with intrinsic economic value, directed towards others, usually on a commercial basis. It is essentially intangible and does not fall onto your toes. Shoe polishing is one of

[84] "Article 3: [...] (2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services."

[85] Schlechtriem's warning before the Convention entered into force is now more worthwhile than ever: "[t]his provision is likely to prove difficult to interpret and to apply" (1986, p. 31).

[86] Bergsten (2009, p. 24) relies on the fact that intangible assets such as stocks and shares are excluded from the application of the Convention in order to argue that "the item need not be in tangible form to be 'goods'".

the examples given[87]. The authors also devise product systems, such as all products contained in a kitchen, and put forward — maybe the earliest — definition of a PSS, which they claim is "a marketable set of products and services capable of jointly fulfilling a user's need [...] provided by either a single company or by an alliance of companies" (GOEDKOOP et al., 1999, p. 18). The authors mention as an example a catering company providing catering services inside of a train as an instance of a PSS[88].

Catering, in general, makes a very suitable case for revealing the difficult balance between goods and services in a commercial transaction. As companies seek to add value to international events, they look for new technology and upscale products such as delicate foodstuffs and premium beverages, which are capable of highlighting the image and brand of the company before its clientele and commercial partners. Suppose a company organizes an international event and concludes a catering contract with a supplier, which undertakes to provide both service and goods. Suppose, on the service side, that the supplier will provide location, staff and decoration. On the goods side, the supplier will provide foods and beverages. It will network with associate suppliers in order to perform the contract, but this will be transparent to the client — which will sign a single contract with a single company. Now, suppose the client may choose between caviar brands A and B. If the client chooses brand A, the service component in the contract will prevail; if they choose brand B, the goods component will prevail. The applicability of the CISG would then be determined by this "caviar effect". Suppose now the client has chosen caviar of the brand A, but can only order so many wine bottles before the goods component becomes preponderant. One extra bottle of wine will trigger application of the CISG. This could be dubbed the "wine bottle paradox"[89]. But not only catering is the problem.

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[87] Shoe polishing still involves the transfer of at least one product from seller to buyer (shoe polish). Sharpening knives, adjusting a watch or installing a software package could me more appropriate, as are transporting buckets (GOEDKOOP et al., 1999, p. 17).

[88] The archetypical PSS, however, may be absolutely prosaic: "going back in time, the first pizza delivery service, a classic product-service combination, was radically innovative. Very often one does not seem to realize the extent of value innovation in this product-service offering. By delivering the pizza to [a] customers' home, the first delivery service broke the existing industry-specific procedure that people go to a restaurant. It also created a whole new market. Today one cannot imagine a world without pizza delivery" (VELAMURI; NEYER; MÖSLEIN, 2011, p. 5).

[89] One of the proposed ways to deal with a situation where the goods part can be clearly distinguished from the services part in a contract is to carry out a *dépeçage*, that is, to piece out the contract into sections governed by different applicable laws (SCHLECHTRIEM, 1986). This solution, which might as

Today, goods and services have merged into productized services and servitized products, which combine into PSSs with varying shares of "pure goods" and "pure services". They are no longer provided by a single company which procures and manufactures the goods and/or provides the service, but by a strategically aligned pool of partners both of the seller, as well as of the buyer — provided that the latter is also a business. Unlike the old-economy concept of distinctly tangible, as opposed to the definitely intangible, today's economy is based on a gradual smearing of the border between product and service. If nobody will doubt the purchase of raw grains alongside a ship will have a prevailing tangible component, things are less well-defined when goods of somewhat higher added value are involved.

In practice, many courts and tribunals may be willing to overlook the issue, especially if the parties are not especially concerned with, or aware of it. For instance, an arbitration tribunal acting under the rules of the China International Economic and Trade Arbitration Commission (hereinafter, "CIETAC") has not discussed the fact that a service component might have been relevant to determine the applicability of the CISG, even though the controversy revolved largely around services included in the contract — namely, the supply of technical advice, installation, testing and adjusting, training, providing of technical services, fine-tuning, etc. (CIETAC, 2005). Those services had been contracted for alongside the purchase of a filling-and-sealing machine, but not listed out in the contract as such (i.e., they were included in the total price for the transaction but not separately priced). This latter fact certainly creates difficulties for appraising the economic value of the services part, calling in all likelihood for an expert opinion and therefore, raising the costs involved in the arbitration. However, a precise evaluation might well have lead to a different result in the proceeding, should the rules to be followed in deciding the matter be not those of the CISG, but of domestic law[90].

More important than to decide whether the CISG applies or should apply to a particular transaction is to question whether its rules are well adapted to face the reality of

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well be seen as giving rise to unnecessary complexity, becomes above all impractical as the goods and services components mingle together and become largely indistinguishable.

[90] An argument that domestic law rules, because of their increasing similarity to the CISG, would not in general lead to essentially different results must be dismissed. Suffice it to evoke the arguments set forth by Schwenzer and Hachem (2005, p. 464-466) on the shortcomings of Brazilian and Swiss domestic law on sales.

the servitization of products. After all, the rules of the Convention are widely "tailored to the handling of tangible objects", and their application to intangibles, such as software to be transferred on line, will be subject to "appropriate accommodation", and often based on considerations of comparative advantage with regard to domestic law (SCHLECHTRIEM, 2005b, p. 30).

The rules of Article 3(1) and (2) CISG may, therefore, translate into additional opportunities for law shopping in international arbitration and litigation — paradoxically, a problem which the CISG has intended to solve — as servitization and PSSs become ever more prominent in B2B trade. On the other hand, rules ill-suited to govern transactions that involve services or certain kinds of on-demand manufacture may give rise to unreasonable solutions and, in the long run, weigh down the usability of the CISG by adding to its already relevant opt-out rate.

In what follows, the present thesis discusses the CISG provisions on conformity, which are based on the concept of purpose in the goods sold.

2.3.2 The Concept of Purpose in Article 35 CISG

The CISG is based on the idea that the seller must deliver conforming goods. Under Article 35(1) of the Convention[91], conformity is primarily gauged against the parties' agreement. However, the parties' agreement is seldom sufficient to allow for complete evaluation of their intent. "Even a carefully prepared contract will often fail to express the parties' most basic expectations [...] because the parties assume that these points are so obvious that they 'go without saying'" (HONNOLD, 2009, p. 328). This puts into play the provisions of Article 35(2) CISG[92], which set out presumed implications deriving from the

[91] "Article 35: (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. [...]"

[92] "Article 35: [...] (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would

parties' agreement and are aimed at aiding the interpreter in properly construing their expectations on the conformity of the goods involved (HONNOLD, 2009). The present author will give particular attention to Article 35(2) subparagraphs (a) and (b).

The basic idea enshrined in Article 35(2), subparagraphs (a) and (b), is that of the purpose of the goods sold. Article 35(2)(a) refers to what is commonly understood as the goods' "general purpose". Article 35(2)(b) encompasses the "particular purpose" intended by the parties, provided they were both reasonably aware of it at the moment when the contract was concluded. This thesis will relate the concept of purpose in Article 35(2)(a) and (b) to complex goods (2.3.2.1), multipurpose goods (2.3.2.2) and indefinite purpose goods (2.3.2.3) in an attempt to demonstrate that the notion of purpose is no longer capable of capturing what really matters in terms of conformity in the international sale of goods.

2.3.2.1 Complex goods

Complex goods are products which require procurement of parts and services from a complex supply chain for their manufacture, maintenance and disposal. A car, a plane or a computer are paradigmatic examples of complex goods. They are composed of numerous parts, require several stages of production and advanced project design, with the product being the result of efforts of a set of companies which deliver value to an OEM or act under its steering or leadership. A couch, a baseball bat or invisible tape are not usually thought of as complex goods, while a conventional TV set would stand midway through complex and non-complex. Raw chemicals and window panes would be non-complex whereas last-generation cosmetics and intelligent windows are rather complex.

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ordinarily be used; (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement; (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model; (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods."

The divide between complex and non-complex goods is not a clear one[93]. Let us take a fork as a primary example of a non-complex good, and a personal computer as an example of a complex good. At the risk of performing an exercise in futurology, it is submitted forks will become more important than personal computers in the next few decades. That is because product complexity will transition between the "classical" concept outlined above to a new concept based on the amount of information needed to produce and operate a product, on the one side, and the amount of data the product can generate on the other. Forks will be used to eat, but they will also be used to measure calories and the composition of food eaten (fats, sodium, cholesterol); the time one spends in eating, the interval between mouthfuls; the hour of having lunch and dinner, and the regularity thereof; issue warnings to the user as to their dietary limitations; suggesting meals and menus under a nutritionist's supervision; and even detecting different kinds of illnesses in the user[94]. Now, what will be a personal computer worth in a few years? Even though "[t]he technology deathbed is a curious piece of furniture", personal computers as we know them will not last very long (SABHLOK, 2013). Today's fork and personal computer alike will resemble archaeological finds in not too many years.

Smart object interconnectivity is the basis of a new reality which, although it might seem distant at first, already lurks around the corner — with 2025 as an estimation of when food packages, for instance, will have Internet nodes (NATIONAL INTELLIGENCE COUNCIL, 2008). The essential building blocks for this technological twist are already, and widely available (EUROPEAN COMMISSION, 2009, p. 9). Based on data by Ericsson, the number of Internet-connected devices has already surpassed that of human beings and by 2020, about 20 billion devices will be connected to the Internet. Cisco estimates US$ 14.4 trillion in net profit in the next ten years are available to corporations should they connect more devices to the Internet (RAYMOND JAMES, 2014).

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[93] Complex goods normally have more added value to them than non-complex goods, but this is not the most helpful way of thinking about complex goods given that a non-complex good, such as a wrist watch, may cost several times as much as a car — depending on the wrist watch and the car. In principle however, product complexity should translate into added benefits for the end customer, much in the way a square meter of coral reef can host more life than a square kilometer of flat seafloor.

[94] For those who imagine that it will take forever until forks start issuing signals about what you eat and how you feel, the author could have said somewhere in the 1990s that he would bite his elbow the day cell phones took pictures. Check Colon (2014) and Hapi.com (2014).

Smart objects will contain not only wireless technology, such as Radio-Frequency IDentification (hereinafter, "RFID") tags[95], actuators and sensors, as well as memory, but new capabilities not entirely understood to date. Amongst others, "[a]utonomous and proactive behavior, context awareness, collaborative communications and elaboration are just some required capabilities" (ATZORI; IERA; MORABITO, 2010, p. 2789). RFID is the first illustration of intelligent technology that will allow for "ubiquitous network societies" in which "almost every aspect of an individual's life and work environments would be linked to an omnipresent, 24/7 global network" (OECD, 2008).

This interoperability will be based on an open, solidly standardized, lightweight, scalable end-to-end Internet Protocol (hereinafter, "IP") architecture, in contradistinction to today's "host-to-host" communication. Smart objects will affect not only household goods and domestic life, e.g., by home automation. They will also venture into numerous B2B applications, such as building and factory automation and monitoring and help us create, and deal with, "smart cities, structural health management systems, smart grid and energy management" as well as transportation (DUNKELS; VASSEUR, 2008). With time, all or nearly all objects will produce information that will feed throughout the Internet to reach other objects and people located on the social web. They will not only "blog" their information down the stream, but keep track of their embedded histories (where they are and have been)[96], and possess "agency" properties", or "semantic weight", that is, they will have an active voice in order to prompt or foment user action and deliver meaningful perspective to social interaction (BLEECKER, 2006).

Based on end-to-end IP architecture and RFID technology, the so-called Internet of Things (hereinafter, the "IoT")[97] will map the real into the virtual world, by connecting uniquely identifiable smart objects on a global scale. An ecosystem of things, the IoT is a "global infrastructure of networked physical objects" (KORTUEM et al., 2010, p. 30). It shall be a things-driven network instead of a human-driven network, hence its name. It is

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[95] Bruce Sterling places the origin of his so-called Spimes (objects he considers as a new visionary paradigm of sustainable objects) in 2004, when the United States started using RFID tags in its military devices (2005, p. 12). He guesses that in 30 years (as of 2005), Spimes will be all around us (ibid.).

[96] A real and current example of objects that deliver their real-time location on the Internet can be found, for example, on FlightRadar24 (2014).

[97] The term was coined by Kevin Ashton, a brand manager with Procter&Gamble, in 1999 (EUROPEAN COMMISSION, 2009)

speculated IoT connectivity will give rise to an "incredibly wide range of application scenarios"[98] in both the household and business environments such as assisted living, enhanced learning and e-health, in addition to intelligent logistics as well as business and process management. Only few of those capabilities are already available to society, which means the margin for innovation is huge. Many companies are already tapping into innovation opportunities connected to the IoT (ATZORI; IERA; MORABITO, 2010).

For instance, assisted driving will enable carriers managing information about the delivery of goods — time of delivery, delays and incidents — to connect with warehouse systems in order to supply updated information on availability and stock refilling (ATZORI; IERA; MORABITO, 2010). RFID-based tracking and monitoring of environmental parameters (e.g., temperature, acceleration and humidity) will help avoid spoilage of perishable goods, reducing the number of unsalable items and improving the quality of units sold (DADA; THIESSE, 2008).

Similar resources will be deployed to improve object visibility, that is, the information on "what, when, where and why" of any asset at any point in time, with participants possessing a legitimate interest across the supply chain having access to it (EUROPEAN COMMISSION, 2009, p. 19-20). This will provide "anytime, anywhere, anymedia, anything" communication (ATZORI; IERA; MORABITO, 2010, p. 2803) within production networks and value chains. Process-aware smart objects will be developed in such a way as to understand organizational processes and provide workers on the factory floor with guidance on tasks, deadlines and help them reach better workplace decisions (KORTUEM et al., 2010, p. 34-35).

The rise of IoT ushers in a new generation of complex goods that are characterized by intensive informational support, allowing for substantial generation and exchange of information with other nodes of a technosocial web of things and people: smart goods. Their information-intensive character is not a mere extension or deepening of the use of information in complex goods of previous generations. They will differ from earlier complex goods in that their handling of the information flow is active and less human-

[98] For an account of quite a few smart-X applications of the IoT, see Varmesan and Friess (2014).

dependent (less "powered by muscle"), and that their properties will allow them to actively interfere in technosocial interaction and processes.

Tentatively, three generations of complex goods may be identified, as follows:

1) An earlier account of complex goods may be summarized as referring to a differentiated product, which is new and technically complex, constituting an initial purchase by the customer and intended for a new application, requiring specialized installation and technical after-sales service (HILL, 1972). While groundbreaking at the time, this definition describes a run-of-the-mill purchase in today's B2B world;

2) A second generation takes into account two factors: "the number of functions the product performs (product complexity) and the number of technologies or functional specialties across which the project must be managed (management complexity)" (GRIFFIN, 1993, p. 115). From this perspective, total complexity is a combination of functional and technological complexity, and complex goods normally perform a number of different functions;

3) The third generation of complex goods is based on information, Global Positioning System (hereinafter, "GPS"), drones, 3-D printing and nanotechnology[99]; focus is no longer on the good itself, but on how actively it interacts with other goods and people, how much data it is able to blog into the Internet and how visible it sits along the mapping of the real into the virtual world. Our relationship with them will be primarily digital[100].

The third generation of complex goods fundamentally differs from previous generations because third-generation complex goods are not standalone goods, they are interfaces or "protagonist[s] of a documented process" (STERLING, 2005, p. 77). They only exist inside the web of things. Their economic worth no longer lies in what they

[99] On the relationship between nanotechnology and the IoT, see Miller and Kearnes (2012).

[100] As Sterling anticipates (2005, p. 94): "I have an Internet of Things with a search engine. So I no longer hunt anxiously for my missing shoes in the morning. I just Google them".

deliver to the user, but in what they exchange with the world. Such a tiny piece of the web of things can be a milk jug, an airplane seat or a fish-gutting industrial cutter. The way these things will interact with others in a smart way using artificial intelligence, nanotechnology and the IoT as a platform is far from clear at this point. But it is likely that they will.

In such a scenario, the concept of "purpose" in a good, such as the CISG adopts in its Article 35, is no longer valid as a yardstick for conformity. No doubt, things will continue to have a purpose, as all human actions have a purpose and goods result from human action. But as far as the sale of goods is concerned, purpose only serves as a standard for standalone goods. That is because, when goods start to interact with each other, they fall short to a great extent of the economic value attached to their purpose. Their worthiness (and therefore, their price and merchantable character) is diverted towards circumstantial properties to the point that it almost lives and dies with them. In other words, their "smart value" overwhelms their "purpose value". The fork's intended purpose of serving food to one's mouth is obliterated, from an economic perspective, by its ability to monitor users and generate information about them and their process of eating. This, of course, is not its purpose; it is still a fork, hence its purpose is still serving food to one's mouth. But such untroubled certainties as we might have had under the CISG, such as that "machinery is bought for use in production" (HONNOLD, 2009, p. 331) are, at this point, already wrecked merely by the anticipation of future developments in nanotechnology and the IoT.

Let us bring another bottle of wine to the table. This one is sponsored by Bruce Sterling, a visionary. It is a bottle of Sangiovese. By staring at the bottle, Sterling highlights the fact that the wine's label points to a website. As he puts ourselves as end-users of "Gizmos", who have crossed a line of no-return in relation to computer dependency, he notices we are seldom removed from a computer device (in his case, and at the time he was having the Sangiovese somewhere in California, a laptop).

He also notices that the wine's website prompts the customer to learn how to pronounce its name; how to prepare a tasting reception, while offering further information about wine varieties; it seeks to educate the user. On top of the bottle, which is pretty much a prehistoric artifact, wine manufactured from machine-cultivated grapes and treated as a mass-consumption product shipped around the world, the Sangiovese offers functionalities

that go above and beyond what the end-user is able to explore. This, according to Sterling, is the sign of a future where the "metrics count for more than the object they measure" (2005, p. 23). It is a future where everyone is dragged into the mire of digital interaction, where "the older roles of buyer, seller, producer, developer are all melted down in the informational stew" (STERLING, 2005, p. 20).

Now, how are we supposed to appraise the economic value of this bottle of wine? What is, in fact, its purpose, that for which goods of the same description would ordinarily be used, as the CISG says? Are we not at a loss to find it out? Drinking does not seem to be the answer, as it is now only one aspect of the process of enjoying what it can offer. It is more like having an experience, coming into contact with a different culture, learning something about a foreign language, enlightening oneself *while* having a nice bottle of wine. We have certainly come a long way from the Biblical wedding, the medieval tavern or even the interconnected world of mass manufacture and sea shipping of the 1960s and 70s. We no longer confine the economic satisfaction of our needs to a neat purpose served by each product individually and unequivocally, and not served by any two goods in the same precise way.

That which applies for a fork or a wine bottle is no less valid for industrial machinery; for instance, a paver. An IoT-era paver will not be worth anything as such unless it is able to connect with other pavers, construction management, contracting officers, its own manufacturer and maintenance providers and maybe even the workers' union, labor and environmental authorities as well as civil society organizations and individuals interested in monitoring the paving project and whatever comes its way. The mere fact that it *paves*, or how efficiently or tidily does it do so, is not sufficient to account for its economic value and, therefore, its conformity for the purposes of the sale of goods. To say its purpose, after it incorporates so many other functionalities, is to pave *while* correctly broadcasting and collecting all kinds of information about itself, the worker in it, the ground below it and its efficiency as a paving machine, as clever a move as it may seem, is ultimately no more than an attempt to adapt the facts to the law. As such it is, in the present author's opinion, ineffective.

2.3.2.2 Multi-purposed goods

Even before there were servitized goods, PSSs and the kind of complex goods that will become commonplace with the rise of IoT, we already produced goods with ambivalent or manifold purposes. Let us take a paradigmatic, prehistoric multi-purposed good: the ceramic bowl. The present author has seen ceramic bowls being used to hold just about anything, from miniature soap bars and house and car keys to a prosaic instant noodle or a *moqueca* — a traditional dish from Bahia. A painter might use them to hold inks or dyes or solvents, whereas a hairdresser will harbor gels or waxes or "volumizers" in them. Native peoples might use ceramic bowls to drain the blood out of a sacrificed animal or the water out of a coconut. But ceramic bowls are often used for merely decorative purposes. They are embellished with patterns and varnish and bas-reliefs, and shaped in a million different attractive ways. In this case, they are not used to hold anything, but to adorn, garnish and beautify, or as a paperweight if one likes. A ceramic bowl is not like a TV; a TV is for watching, or at least it used to be.

Now, what if one buys a merely decorative ceramic bowl and decides to pour soup in it? Can it have a hole at the bottom? If it does have a hole, or teems with tiny holes like a sieve because the designer intended it that way, is it a non-conforming bowl? The reader will argue that this bowl has a particular purpose, such as provided for in Article 35(2)(b) CISG, and that its particular purpose is a decorative one. But what if one wants to buy well-decorated bowls to eat soup from them, who is to decide whether one stashes dried flowers or serves oneself soup in their own bowl? Now, what if the bowl is so thin that it breaks down under the soup's weight? What if it contains heavy metals (say, lead) in a dangerous percentage that could contaminate the soup? What if the soup stains it and it changes colors?

Let us take a look at what happens when a court or an arbitral panel is faced with multi-purposed goods in order to decide a case under the CISG. This has happened, for instance, in a famous arbitration conducted under the auspices of the Netherlands Arbitration Institute (2002; hereinafter, the "Rijn Blend case"). The arbitrators, faced with the need to determine the conformity of a certain type of oil condensate (the Rijn Blend) to the contract between the parties, had first to ascertain whether or not it served multiple

purposes or a fixed purpose. However, after determining it was a fixed purpose, the arbitral tribunal proceeded to discuss the applicability of tests different than the one established in Article 35(2)(a) CISG — namely, the merchantability, the average quality and the reasonable quality tests[101]. None of these tests, despite linked in one way or another to the drafting history of the CISG, appear in the plain text of the Convention. The tribunal then concluded the condensate should be of reasonable quality, which was found to be the correct standard under Article 7(2) CISG[102], the Convention's gap-filling provision. The arbitrators were, however, filling a gap that does not exist, because Article 35(2)(a) CISG could not have a clearer wording. It is not lacunose; instead, it is just difficult — and will become ever more difficult — to reconcile with commercial reality, and hence prone to give rise to judge-made solutions.

Obviously, these are only illustrations, intended at showing that multi-purposed goods are not necessarily trendy, groundbreaking inventions. It cannot be argued that the CISG has become outdated by not being suitable to govern sales of bowls (although crude oil condensates could make a slightly better case). The point is that bowls and condensates are just the tip of the iceberg. What really matters is that more and more goods are becoming "bowly", or multi-purposed. The prototype of today's multi-purposed good is neither the ceramic bowl, nor the oil condensate, but the smartphone − the Swiss Army knife of today's "mixed reality", homo-heterogeneous society.

An example of ubiquitous computing, smartphones have incorporated functions from other devices such as the mobile phone, personal digital assistant, GPS navigators, portable music players and the personal computer. Its portfolio embeds voice and text communication, images, maps, Web surfing, social networking, e-mail, music, games, clock and countless other applications (or "apps") on a truly multifunctional, individual, carry-around device. A smartphone can satisfy its owner in a million different ways. It is

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[101] See text of decision for a detailed account of such theories and their supporters. See also Saidov (2013) and, particularly, Schwenzer, Hachem and Kee (2012, especially p. 377-382). The main point to be made in relation to concepts that vary from that established in the CISG (purpose) is that they are not interchangeable. For instance, a luxury boat that presents blistering on the hull will still sail, but it will not be of merchantable quality (SCHWENZER; HACHEM; KEE, 2012, p. 390); poor quality goods may be fit for their purposes, but will not be of average, and sometimes not of reasonable, satisfactory or acceptable quality.

[102] "Article 7: [...] (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

pretty much up to him or her to decide on their functionalities of choice at any given time (BARKHUUS; POLICHAR, 2010):

> Multiple functions enable users to do the same task in different ways and to blend functions in new and unique ways. Users can add functionality to their devices, and they can choose to ignore a function that is not relevant to them.

This leads to the conclusion that smartphones are not popular despite its multiplicity of functions, but exactly *because* of it. Users have integrated smartphones into everyday life, deploying them in ways convenient under the circumstances. A very interesting aspect of Barkhuus and Polichar's survey with 21 smartphone users is what the authors note as "compromising". Users are not always happy with all the functions that they could expect their smartphones to perform. Whether the defect relates to a lack of voice recognition when dialing, a "buggy" spell check or cut-and-paste function, too mild a ringtone or cameras that did not live up to initial expectations, users were always forthcoming in seeing those as acceptable tradeoffs and compromising around them. They would perform the desired activity on a computer and not see the defect as a nuisance, but as a call for "adjustments": "our participants were still willing to use applications that had flaws" (BARKHUUS; POLICHAR, 2010).

Such a "bowly" device as a smartphone has so manifold purposes that divining a general or particular purpose for it would be a rather haphazard exercise. If end-users are able to make smartphones "their own" and put in a lot of work in overcoming drawbacks, would a retailer be justified in complaining that a particular batch freezes when a certain app runs on it? Does this defeat any relevant purpose for which the smartphone was intended, whether particular or general? If it impairs merchantability in regard of a few exacting owners, does it impair merchantability for the purposes of the CISG (or reasonable or average quality, depending on which line of thought is followed)? Striking the balance in a claim like this could prove to be a nightmare and the concept of purpose will in all likelihood play a mere supporting role, as with crude oil condensate or bowls. It will give way to more tangible concepts such as efficiency of the transaction and the buyer's expected return in the goods.

However, it could also not be argued that the CISG has become old only because it cannot handle smartphones. A smartphone, let alone bowls and crude oil condensate, is still only one kind of good. The problem is, more and more goods are mimicking the

smartphone, to the extent that goods with multiple purposes will become all-pervading and universal.

Smartphones are a role model for multi-purposed goods. Everything will tend to imitate them. Industrial machinery will imitate smartphones. *There's an App for That* is the title of an article (CANADA'S METALWORKING AND FABRICATING TECHNOLOGY MAGAZINE, 2012) which claims that a certain app for a certain industrial machine "can calculate cutting speed and feed rate based on tool diameter, number of flutes, surface feet per minute, and feed per tooth", in addition to "threading helix angle, tap feed, tap drill diameter, and drill point length". A new feature of the same app includes "chip-thinning factors that can be calculated for radial width of cut, ball nose depth of cut, toroidal depth of cut, and 45-degree lead angles", and not only that.

If you work at the factory floor, "[y]our next operator terminal could be the smartphone in your pocket or the tablet on your desk" (GADBOIS; PAYNE, 2014). Smartphones network more and more with so-called human-machine interfaces ("HDI"s), ever-present and built-in features of all kinds of industrial equipment. As this interaction grows closer and closer, smartphone-like HDIs may simply be the next generation of HDIs. This may not mean that a lathe will start weaving rugs. But it might mean that industrial machines will start incorporating new functionalities, much in the same way as a smartphone can incorporate new apps and widgets, and hence serve other purposes than those they have been serving for a long time.

2.3.2.3 Goods with indefinite purpose

Manufactured goods have in general one or more ascertainable purposes[103]. Basic goods, such as raw ore, oil and crops, or wood, have so many different purposes that their

[103] A screw is an instance of a manufactured good with indefinite purpose. To say that its general purpose is to fix or attach is a truism. Its purpose would be transparent to the manufacturer unless the specifics of the transaction would indicate, at least, a general purpose.

general purpose may not be ascertainable at all. What is the general purpose of soybeans? Elm trunks can be used as lumber, biomass, fodder, in naval construction or simply as wood in a multitude of applications. While it would be possible to speak of a particular purpose for elm, if one had been agreed by the parties as per the wording of Article 35(2)(b) CISG — say, to make coffins —, it is not as easy to speak of a general purpose for it. Fuel and bow-and-arrow manufacture are such disparate uses. Every circumstance of a case should have to be taken into account for determining which one is present, if any.

As raw materials grow value-added, their purpose should become more and more distinguishable. Think of iron ore, which can split into multiple kinds of iron which, in turn, can split into many kinds of steel. AerMet 310 — a type of martensitic alloy steel which contains 0.25% carbon, 1.4% molybdenum, 2.4% chromium, 11% nickel, 15% cobalt with iron making up for the balance — is a candidate for use in armor, landing gear, actuators, ordnance, structural tubing, ballistic tolerant components, jet engine shafts, structural members and drive shafts (CARPENTER TECHNOLOGY CORPORATION, 2007). If purchased by a weaponry manufacturer, a specific purpose for the AerMet 310 will not be clear at first sight, while the sole fact that the buyer is in the arms industry might narrow it down to a few options. But a general purpose (e.g., when purchased wholesale) might be almost impossible to determine. And we are already talking of a very specific kind of steel.

Some goods, even though they may have very high value put into their manufacture, are simply not purpose-oriented. This thesis will classify them as goods with indefinite purpose in order to analyze them against the text of Article 35(2) CISG. Certain types of steel, plastic, glass or chemicals, which may call for innovation and advanced technology in their development and production processes, are still commodity-like goods supplied by low-tier manufacturers in the value chain. They have no "smart value", and are not exactly servitized. Their conformity may only be assessed by means of their specifications ("description", in the language of Article 35(1) CISG), or by comparison with a sample or against potential representations or assurances provided by the manufacturer which happened to be incorporated into the parties' agreement under Article

8(3) CISG[104]. Specifications, however, are not always supplied in enough detail; in some cases, they are unclear, and often disputed between the parties. A sample is also not present in all cases.

These shortcomings are egregiously present in a Belgian court decision. Seller filed a lawsuit claiming payment of an outstanding balance. Its claim was met by a counterclaim by the buyer. The contract called for steel plates following the description "RVS plate AISI316TI + certificate". Buyer complained that the steel plates were "very uneven" and that they caused buyer's punch press to jam. The court found that no specific purpose was provided for, although something in the behavior of the seller could suggest otherwise. Court mentioned Article 8(3) CISG but did not seem to derive any meaningful consequence from it. There was no expert examination. As the court points out, "[i]t may be assumed that the goods should conform to certain basic quality norms". No general purpose for the goods was sought and established by the court; not a particular purpose agreed between the parties was found; and no consequence accrued from the application of Article 8(3) CISG. The court ruled there was insufficient proof of non-conformity and ruled against buyer's claim (APPELLATE COURT ANTWERPEN, 2002).

2.3.3 Non-servitized Goods and the CISG

Notwithstanding purpose, the CISG has long been known for not being the preferred applicable law in the case of raw materials and commodities in general. This thesis will summarize these goods as non-servitized goods, because they are not likely to

[104] "Article 8: [...] (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

suffer the kind of built-in servitization which affects manufactured goods, despite their being subject to some degree of servitization[105].

Even though it may be argued that the CISG could apply to sales of non-servitized goods, the fact is that it is regularly excluded in such cases. Commodity trade is dominated by a few very powerful multinational companies which, even though not necessarily connected to the United Kingdom as a matter of private international law, consistently choose English law as applying to their contracts. This fact has historical roots[106] and is connected with the fact that UK-based trade associations, such as the Grains and Feed Trade Association (GAFTA), the International Cotton Association (ICA), the London Sugar Association (LSA) or the Federation of Oil Seeds and Fats Associations (FOSFA) control virtually all international trade in commodities.

But there are also substantive reasons why commodity traders are not willing to let the CISG apply to their contracts. Sales of commodities may be either definitive — e.g., a brewery purchasing barley as supply for its own processes[107] (ZELLER, 2008, p. 633) — or string or forward sales. In string trading, only the shipper and the end buyer have actual physical contact with the goods; all other parties deal only with documents. Even though this kind of transaction does not fall under the exclusion of Article 2(d) CISG[108] with regard to negotiable instruments (since each buyer can take possession of the goods if they so want), it is more similar to the sale of negotiable instruments than to the general sale of goods. This is because of the heavily speculative character of string trading.

Opinions vary, with some defending that English law is the *de facto* uniform law of commodity trade and that the CISG has "a contractual philosophy that is at odds with the commodity sales world" (BRIDGE, 2003, p. 69) while others point out that "the time has come for commodity traders to [...] consider alternatives to the current legal framework"

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[105] For instance, a supply contract for oil in which the supplier undertakes to provide maintenance for oil pipes and other equipment owned by the buyer would be a kind of servitized sale of goods contract involving raw materials.

[106] See Rabel (1964).

[107] Or, for that matter, a refinery purchasing crude oil condensate for processing in its own facilities.

[108] "Article 2: This Convention does not apply to sales: [...](d) of stocks, shares, investment securities, negotiable instruments or money [...]."

(ZELLER, 2008, p. 639). But the fact is that in commodity trade, the CISG Song[109] is not very popular.

* * *

Squeezed between non-servitized and servitized goods, CISG provisions on conformity — especially Article 35 —, even though they constitute essential provisions, will have ever more restricted use. In case law, purpose already gave way to other concepts borrowed from domestic law (though not necessarily under the homeward trend) such as merchantability or average or acceptable quality, or to new concepts such as reasonable quality. Even though derived from the general principles on which the CISG is based, these concepts are meant to fill no gap as Article 35(2) CISG is not by any standard an open-ended provision and sets forth a clear choice by the legislator — which is nevertheless outdated .

In the context of a renovation of the CISG, Article 35 will have to be redesigned, either by incorporating a proper combination of theories already in use[110] or reaching out to new concepts. A thoughtful suggestion might be to start by Henry Dreyfuss's (1955) archetypical five-point formula for industrial design: utility and safety; maintenance; cost; sales appeal and appearance. This formula might work as the background for a discussion on quality, efficiency and buyer's expected return, with the intent to fancy a substitute for Article 35.

* * *

[109] The CISG Song was authored by Professor Harry M. Flechtner of University of Pittsburgh School of Law in 2005 (UNIVERSITY OF PITTSBURGH SCHOOL OF LAW, 2014) and has been making the upper tier of the Willem C. Vis Moot hit parade ever since.

[110] Saidov (2013, p. 551) submits that a quality test "may be able to provide greater clarity" but is not essential given that "the fitness for the ordinary purposes test will be capable of resolving all cases unless it is interpreted in abstract terms, without regard for the parties' particular circumstances".

This Chapter has addressed reasons on the basis of which work on the renovation of the CISG ought to start without delay. It has not provided all the reasons but only those the present author considers as most compelling. Other reasons that do not relate to the process of aging of the CISG as a legal instrument, or are linked to provisions and aspects not addressed in this analysis, may be found more compelling or equally as compelling by the reader or other commentators[111].

In particular, the present author has not analyzed the way increasing servitization of products and trade in PSSs, the rise of a third generation of complex goods based on IoT technology and the rise to prevalence of multi-purposed goods are going to affect provisions other than Article 35 CISG. All one can say is that they are. The present author has focused on the concept of purpose and therefore, on Article 35 CISG, because the present author believes it to be the throbbing heart of the Convention: "[t]he litmus test for any sales law is the rules on non-conformity of the goods" (SCHWENZER, 2013b, p. 102). If there is something outdated about it, this should be reason enough to worry about the whole of the Convention being outdated. With economic value diverted from purpose, the basis of the conformity test adopted by the CISG (as well as by many domestic laws) falls away, and this must be of obvious concern to lawmakers not only internationally, but also in the domestic sphere. New avenues must be sought to meaningfully reflect the expectations of parties in international trade as to the proper fulfillment of contracts for the sale of goods. It is hoped that policymakers, as well as lawyers, will be open to cope with the challenges brought in the field of international sales law by 21st-century developments in the structure of product manufacture and exchange. Traditional sale of goods — the kind which the drafters of the CISG had in mind — as a species of economic transaction, may be one threatened with extinction (though it will garner no efforts for its saving).

The next Chapter will seek to find out how bad of a worry should wrench the reader. The thesis will change subjects and make an incursion into sheer politics. Many analyses of international sales law, or other private aspects of International Law, fall short of a study that addresses the bigger picture. The present author wants to avoid committing the same mistake. It may not make sense to speak of a renovation of the CISG in a scenario

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[111] A comprehensive description of all aspects of the CISG specifically affected by the passing of time ought to be prepared by UNCITRAL, should it decide to undertake appropriate steps in preparation for a renovation process.

where one more international convention on anything will leave the balance unchanged. It is known that state cooperation has become only one element in global politics and is now a faded remnant of what it used to be at the time the CISG was gestated. This thesis seeks to investigate whether or not it has completely lost effectiveness as a policy instrument for the purposes hereby discussed, or can still be thought of as important in certain regards. The answer to this question can certainly tip the scale of a decision either to renovate, or not to renovate the CISG in spite of the reasons expounded above.

3 THE PLACE OF THE CISG IN INTERNATIONAL TRADE LAW

> La primauté du droit international est d'une importance fondamentale pour l'édifice juridique. Car elle est capable de surmounter la pluralité des ordres juridiques en fournissant une conception unitaire du droit.
>
> **Alfred Verdross** (1926)

International trade law is an umbrella name for a set of norms of a complex nature, both publicly and privately generated, whose purpose is to govern international commercial contracts. However, the rights and obligations arising from such kind of legal relationship are not governed by those norms alone. Other aspects of legal relationships based on an international economic exchange of goods, services and capital which do not refer to contractual obligations may be governed by a number of other rules, both domestic and international. To mention a few, regulatory, criminal or competition aspects involved in a commercial relationship fall outside the scope of what is normally referred to as international trade law. This means international trade law, as a complex array of norms, fits into a wider transnational arrangement of norms of an even more complex palette of origins, which govern other substantive issues involved in international commerce — not to mention procedural and choice-of-law. This only reflects the complex nature of an international legal relationship in general between commercial parties.

From the late nineteenth century through the 1950s and 1960s, the law of international contracting started experiencing an outwards move from the state. This move took place after a period of consolidation of the nation state fueled by the triumph of national sovereignty, in which previously existing custom was absorbed — if not completely — by domestic laws (supra Chapter **1**). Faced with such facts, pioneering international scholars have dedicated themselves to identifying a new place for the law of

international contracting within the legal universe. As it is widely known, the two most important scholars in that regard were Clive M. Schmitthoff and Berthold Goldman[1]; as far as Goldman is concerned, however, this thesis will take account of him in the wider context of the Dijon School.

However, before dealing with Schmitthoff and Goldman, a tribute must hereby be paid to the memory of a habitually overlooked, indeed almost entirely forgotten, Anglo-Italian commercialist and comparatist of the 19th century: Leone Levi. Not only can Levi's ideas be seen as an early expression of those developed particularly by Schmitthoff and the Dijon School in the mid-to-late 20th century, he distinctly anticipated Ernst Rabel's (1964) and Rudolf Schlesinger's (1968) comparative law treatises — which were fundamental in the context of the development of uniform law. Levi's *International Commercial Law*, whose second edition dates from 1863, propagates the idea that "the leading principles of Commercial Law are everywhere uniform" (p. vii) and that national law adapts these principles to fit local requirements and needs[2]. His idea of *international commercial law* is based on the notion that commerce is international in nature, and that traders "are deeply affected by laws and procedures of other states" (1863, p. vii). Taking English law as a benchmark, he undertakes a detailed comparison of several aspects of commercial law across a wide range of national laws, including those of France, Germany, the United States and many others.

Clive M. Schmitthoff (1961) has described international trade law as part of a new international business law, which he saw as a branch of private law, but not as pertaining to private international law[3]. The rise of this new international business law, in his opinion, represented a return to the kind of internationalism which characterized the medieval law

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[1] See, for instance, Berger (2010).

[2] This very idea underlies Schlesinger's quest for a common core of legal systems. In studying the law on formation of contracts though, Schlesinger and his colleagues found mixed results in testing it as a hypothesis. While "areas of agreement" may be "larger than those of disagreement", the complexity of legal systems and of legal issues does not allow for a clear demarcation of such areas (SCHLESINGER, 1968, p. 41). On the use of a *tronc commun* approach for the choice of law in international arbitration (giving rise to many potential problems), see Blackaby et al. (p. 210 et seq.).

[3] The present author believes private international law as the doctrine of conflict of laws has lost much of the prestige associated with it in former decades. One of main reasons for that is both the rise and success of uniform and European law, as well as international arbitration. In the author's opinion, it would be the case of re-standardizing what we call private international law so as to group international private law alongside conflict of laws as well as international arbitration and conflicts of jurisdiction. This would both breathe new meaning into the decadent concept of private international law and stress the private character of international business law and international arbitration.

merchant. Such return to internationalism was prompted by similarities in the commercial experience of many nations, as well as a tendency to "move away from the fetters of national law and to establish a common international content" (1981, p. 219). He divides international business law into two articles:

1) The law of international trade, comprising first and foremost the law of international sales, but also international banking, insurance and carriage of goods;

2) The law of international companies, that is, of companies incorporated in one country and having business interests in others[4].

In Schmitthoff's view, international business law and its public counterpart, international economic law, overlap in two respects. First, in regard to the repercussion of public law (trade) measures on the economic planning of international businesses; secondly, in respect of contracts between states and private law subjects[5]. In his conception, international business law is autonomous[6], based on the principles of party autonomy and recognition of arbitral awards "and *supplemented* by international legislation dealing with specific topics" (1961, p. 36; emphasis added). The supplementary character of international legislation as proclaimed by Schmitthoff is one of the main assumptions of the present thesis. It underlies the present author's conclusion against broad projects for the unification of contract law (infra **3.2.3**).

[4] The Organization for Economic Co-operation and Development (hereinafter, the "OECD") (2011, p. 17) defines multinational companies as "companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. [...] Ownership [of multinational companies] may be private, State or mixed".

[5] Nowadays, also (non-labour) contracts between private parties and international organizations and, after its entry into force, contracts between private parties and the Authority concluded under Part XI of the United Nations Convention on the Law of the Sea must be regarded as pertaining to the same category.

[6] This thesis by no means interests itself in the debate on the autonomy of the New *Lex Mercatoria* as either a doctrine or a body of rules (supra **1.3**). Those interested in the subject are referred to Berger (2010).

In turn, the Dijon School[7] — whose leader and major exponent was Berthold Goldman — has contributed enormously to the study and development of international trade law. In his seminal 1963 work, Goldman seconded Schmitthoff in identifying an outward trend from the state and a new ascendance of norms of somewhat medieval resemblance, that served international commerce and international *commerçants*, whilst being a creation of their own. Although his foremost concern was to argue whether those norms constituted *legal* rules or merely the exercise of contractual freedom, he also noticed that international trade law is more often than not applied by international arbitrators, who are willing to spare no efforts in dodging the application of national law. The difference between his approach and Schmitthoff's resides in the fact that Goldman focuses so much on the usages of international trade and international traders as well as on general transnational principles of law — in contradistinction to international legislation. Kahn summarizes the findings of the Dijon School in the fact that Goldman and his pupils (Kahn included[8]) have — each in his own, yet a consistent way — found "*l'existence d'une juridicité professionelle dans le domaine étudié du commerce international*" (KAHN, 2010, p. 361)[9]. Even though he claims the Dijon School has not disregarded the sources of state or interstate origin, those they had regard for were clearly the ones of *ordre public*, which do not correspond to what Schmitthoff calls international legislation.

The definition of international legislation, as a matter of fact, is one of the pinnacles of Schmitthoff's oeuvre and interests the present author very much: "[b]y international legislation are understood deliberate normative regulations agreed by states. They take the form of conventions or model laws" (SCHMITTHOFF, 1968, p. 210)[10]. International legislation differs from international custom in that custom, even when formulated (i.e.,

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[7] For an historical account of the Dijon School and the birth of their *lex mercatoria* theory going back to Berthold Goldman's Le Monde article on the Suez Canal Company, see Kahn (2010).

[8] In the context of the Dijon School, Kahn authored his famous doctoral study entitled *La Vente Commerciale Internationale* (KAHN, 1961).

[9] Kahn (1961) had previously defended the existence of an international society of buyers and sellers which, though not completely independent from states, is nourished by a special kind of professional solidarity. In Kahn's view, the international sales contract is the very foundation of such a society, which is informed by autonomy and cohesion.

[10] An earlier definition of Schmitthoff's concerning international legislation (a misnomer, he says, as legislation only emanates from sovereign power) is of "deliberate normative regulations devised internationally and then introduced into the municipal law by municipal legislation" (SCHMITTHOFF, 1964, p. 149). This definition conflicts with the different ways by which international legislation and domestic legislation come to terms. This not only goes back to the theoretical argument between monism and dualism (Kelsen vs. Triepel), but more unromantically refers to the methodology of harmonization and unification of the law of international trade (see, e.g., BERGSTEN, 2009).

written down as an authoritative text) and though widely accepted by commercial parties[11], has developed in such a manner that it is neither a consequence of state power nor of the particular historical, economic and political conditions of any given nation. They come together in that they are a product of comparative law and bear a "strange, synthetic character" (SCHMITTHOFF, 1968, p. 211). The present author will most definitely stick to Schmitthoff's definition of international legislation as he provided in his 1968 work. This thesis will also refer by international custom to all other norms that, save for international legislation, constitute what the present author considers to be international trade law. International trade law is thus the sum of international legislation and international (formulated) custom and (unformulated) usages[12] in that which refers to matters of international commercial contracting. International sales law is a subset of international trade law which includes those norms that refer specifically to the sale of goods, whether or not servitized, complex or anything else for that matter.

Nevertheless, though one has to identify and classify norms such as those of international trade law in order to better understand them, the division of law into manifold orders has long proved more fictitious than real. This is true in particular in the transnational arena, that is to say, the human and political space of actions and events which reach beyond national borders (JESSUP, 1956). In a given case, private and public, as well as civil and criminal aspects are frequently intermingled, and the application of a "blend" of norms of different origins is usually required from the adjudicator, especially in international commercial arbitration (BLACKABY et al., 2009, p. 4; supra p. 95). International practice has come a long way to destroy the myth of the "falsely mechanical image of [...] the single rule that alone properly governs the outcome of a legal controversy" (McDOUGAL, apud JESSUP, 1964, p. 352). As Jessup summarizes:

> Granted that some law has geographical, personal or temporal limitations upon its applicability and binding force, and granted also that certain courts are limited to the application — as law — of certain defined or prescribed bodies of rules and principles, nevertheless law in the large

[11] To the extent that "businessmen engaged in international trade expect their contracting parties to conform with them" (SCHMITTHOFF, 1964, p. 149).

[12] As "even non-codified trade usage is a significant factor in international trade, and often respected by courts even where parties have not specifically agreed to apply them through contract terms or choice of law — for instance, the CISG hierarchy makes it clear that trade usage supersedes the Convention by way of Article 9" (ANDERSEN, 2007, p. 37). For a theoretically consistent description of commercial usages, see Basedow (2008).

> has a certain unity, and no body of law is an island complete unto itself. (1964, p. 342.)

As soon as we recognize that no system of law is an island, there is no point is referring to international trade law, in general, or international sales law, in particular, as an amalgamation (BASEDOW, 2008) of rules dealing purely with the sale of goods or other aspects of the commercial contractual lifecycle. The entanglement between norms of different origins and varied character is a fact that permeates the application of international trade law in day-to-day judicial and arbitral practice. Not only international trade law cannot be isolated and purified in, as it were, a chemical experiment, it does also not exist in a vacuum. Schmitthoff's precise distinction between branches of international trade law, as well as the Dijon School's sharp differentiation of law and custom are no longer helpful.

Therefore, the present thesis describes international trade law as a complex array of norms of an undefined and eclectic nature destined to govern international commercial contracts. International sales law is the projection of this concept onto the realm of contracts for the international sale of goods. As it is perfectly well known, the CISG is merely one of countless norms of which international sales law is constituted. But its place in international sales law (or more broadly, in international trade law) — that is, its role and purposes as well as its relationship with other norms of the same function — have not necessarily been well established.

In the specific context of a discussion about the renovation of the CISG, it is necessary to investigate the possibility that the convention approach (or method; supra **2.1.2.1**) to uniform law, as an expression of state cooperation in matters of private law, has given way (or must do so) to other forms of normative output. This in turn can only be ascertained if one looks into the current importance of, and trends for state cooperation in, the context of global politics, for there is no reason to suppose that international cooperation would be more important for commercial law than for other fields of law or politics (**3.1**). Once this argument is made, there will be room to ask what are the role and purposes of the CISG in the context of 21st-century international trade law (**3.2**) and what its relationship with other norms of international commerce is and must be (**3.3**).

3.1 PLACE OF INTERNATIONAL COOPERATION IN THE 21ST-CENTURY WORLD

The role played by an international convention within a complex array of state and non-state norms intended to govern a given field must somehow line up with the role played by states and international cooperation within the wider framework of global politics. Hence, the place of the CISG in international trade law must in one way or another relate to the role a convention plays in any area of international cooperation[13].

Though non-state actors have gained importance in latter decades, states still hold on to a central position in global politics and International Law, with international cooperation performing a coordinating task. In a seminal work, Wolfgang Friedmann (1964) elaborated on the idea that the nature and configuration of International Law are affected by structural changes in international relations. In order to assess the scope and extent of the function of International Law in international society at present, and in particular the function that an international convention plays, or ought to play, within a complex array of norms such as international trade law, one must investigate the role played by states within global politics (**3.1.1**). This, however, raises the question of how relevant states remain as subjects of International Law (**3.1.2**).

3.1.1 States Still Play a Key Role in Global Politics

In light of the transitional, volatile character of global[14] politics during the last few decades, the political role of states at present is not an easy one to ascertain. Nevertheless,

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[13] See infra at **5.2.2.** for the limits of this assumption.

[14] The present thesis will use the world *global* whenever the widest sense in which politics can be considered, i.e., as encompassing all kinds of actors, subjects and participants (such as, but not limited to states, international organizations, NGOs, corporations, individuals, minorities, peoples and other groups) and all issues and levels — national, bilateral, regional, international, transnational and supranational is

by peering with studies in international relations, three inferences may be drawn. First, despite the fact that there has been a move away from the Westphalian paradigm of the states system, states have by no means become irrelevant to global politics (**3.1.1.1**). Secondly, shifts in power from states to non-state actors have become intertwined with shifts from old traditional powers to new emerging powers (**3.1.1.2**). As a consequence, a new society of states is on the rise, characterized by a new multipolar structural pattern (**3.1.1.3**).

3.1.1.1 Power Shifts to Non-state Actors have not Affected the Primacy of States

The Peace of Westphalia, which in 1648 partitioned Europe into a set of states which claimed absolute power over domestic affairs and, in recognition of no superior authority, considered themselves bound internationally only by their own and only volition, is associated with an international order based on the principles of sovereign jurisdiction, non-intervention and the balance of power. The Westphalian international order was cushioned by an International Law of coexistence, whose principal object was "the regulation of the conditions of mutual diplomatic intercourse and, in particular, of the rules of mutual respect for national sovereignty" (FRIEDMANN, 1964, p. 60)[15]. The International Law of coexistence, as the juridical basis of international society[16], has

implied. The author will avoid using the same word wherever that broad, encompassing meaning is not involved.

[15] By the time Wolfgang Friedmann developed his theory on the International Law of coexistence and the International Law of cooperation, French doctrine, especially R.-M. Dupuy, occupied itself with distinguishing between an international "relational society" as opposed to an "institutional society". Both theories, which are closely related in scope and outlook, belong to a movement of institutional thought and scholarship in International Law which has flourished in the 1960s (LEBEN, 1997).

[16] This thesis refers to international society as a society built by and for sovereign states, in the meaning of Bull (2002). The author shall avoid referring to international society whenever he means the broader international community (in this case, "international community" will be used).

survived way into the 20th century, until being replaced by an International Law of cooperation (supra **1.1**)[17].

In the post-1945 world, the Westphalian paradigm of global politics has changed substantially (ZACHER, 1992). The mainstays of the Westphalian model have sustained great damage due to the fact that, in light of a number of modifications in international political conditions[18], states have been "willing to trade off autonomy against other goals such as the preservation of life, economic welfare, and even ethical values" (ZACHER, 1992, p. 63). This state of affairs is largely based on a set of rules and agreements of a transnational character[19], for whose existence not only the agreement of states, but also pressure by global civil society[20] and approval by public opinion have become essential (KALDOR, 2003).[21]

As Zacher (1993) explains, as a result of trade-offs and international arrangements entered into by states, their political autonomy faces both internal and external constraints. In addition, non-state, transnational actors such as multinational corporations and nongovernmental organizations have acquired considerable importance in the late 20th century. Such phenomena have provoked a departure from the strongly autonomist

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[17] Depending on how one sees international organization, coexistence (or influence, conquest, domination, etc.), rather than cooperation, is still more fitted to describe the states system (or simply, the world). This is particularly true of political realists and religious fundamentalists, especially those who would divide the world into America and the rest (NYE, 2004), Islam and the rest, China and the rest, etc.

[18] Such modifications include, on the military side, increased security collaboration and deterrence due to the great destructiveness of nuclear weapons, the fragility of modern civilization and the escalation of terrorism perpetrated by non-state actors; and, on the economic side, increased economic ties involving trade, investment and finance, leading to a loss of states' autonomy and the emergence of a series of arrangements and institutions which, to a degree, claim control on international economic transactions (ZACHER, 1990, p. 67-75; ibid., p. 80-88). See also Friedmann (1964).

[19] As defined by Onuma (2009, p. 122-123), the word "transnational" encompasses such phenomena as trans-boundary flows of capital and information; the interdependence of nations; the role played by NGOs, private enterprises and other institutions engaged in transboundary activities; global governance and global civil society; and a global epistemological community of experts, inspired by such values as democracy, human rights, market economy, and global environment. It is in this encompassing sense that the author uses it in the present thesis.

[20] Global civil society, for Kaldor, includes both "insiders", such as NGOs (which she refers to as "tamed" social movements), as well as "outsiders" (such as social movements). She criticizes global civil society for being uneven, undemocratic and Northern-driven, but she also points out that it provides possibilities of participation in debates about global dilemmas (KALDOR, 2003, p. 590-591). Whenever global civil society is used in the present thesis, only its organized, permanent actors are implied, such as those that are able to register as observers with international organizations (e.g., UNCITRAL observers).

[21] Compare this to Friedmann's remarks (1964, p. 367) on the importance of international organizations as "tentative expressions on new world-wide interests in security, survival and co-operation for the preservation and development of vital needs and resources of mankind".

paradigm of Westphalian order, under which the state was clearly the supreme, fundamental and in fact the sole important, political entity and actor.

Nevertheless, even in the light of recent developments, states have not become marginal actors of global politics[22]. The Westphalian temple has not collapsed, as Zacher himself points out (1992, p. 100). Even if destabilized, it is not yet a ruin of the modern world. Indeed, especially at the economic level, the role of states has been revitalized in the wake of the 2009 financial crisis. After an epoch of almost three decades marked by the triumph of market forces over state-based financial regulation, the 2009 financial crisis is likely to lead to a comeback of regulatory interventionism with a corresponding diminution in the importance of market mechanisms (GOODHEART, 2011)[23].

3.1.1.2 Shifts Between States Have Become More Relevant than Shifts to Non-state Actors

Shifts in power from states to non-state entities have become intertwined with shifts from old traditional powers to new emerging powers[24]. These are leading not to the demise of the state, but to a structural revision of the concept of, and perceptions about, the Third World as an analytical and political category (HURREL, 2013). They may even be causing

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[22] As said by Onuma (2009, p. 101), "[w]hether one likes it or not, States still occupy the central place of legitimacy". According to Sur (1997, p. 422), even if challenged by fragmentation from the inside, and globalization from the outside, the state is still the "foremost of international institutions", without which International Law cannot be conceived and against which it cannot turn: "[t]he state or barbarism, such is the simple alternative with which international society is faced" (ibid., p. 426).

[23] Hurrell (2013, p. 210) lists further reasons for a rebound towards old-fashioned Westphalian sovereignty in the early 21st century. Among these are a renewed importance of nationalism, national security and nuclear weapons, as well as a "quiet return" of the balance of power. See also Zemanek (1997, p. 128 et seq.).

[24] Onuma (2009) translates these two kinds of shifts into conflicts between the expansion of trans-boundary economic and information activities *vis-à-vis* the sovereign states system; and between Western governments and civil society values (as well as their persistent intellectual and informational hegemony) as against the sense of victimization shared by developing, non-Western nations (as well as their emerging economic and military power).

its disappearance altogether (ZOELLICK, 2010) — nevertheless, this does not seem to be the most likely scenario.

Shifts in power away from states have led to the acceptance that the political management of the world depends not as much on government (i.e., a system of rule which depends on the formal acceptance of a rule-giving authority) as on a broad, global scheme of governance which encompasses not only states but also informal mechanisms of a non-governmental nature, capable of advancing needs and fulfilling wants of persons and organizations within their purview (ROSENAU, 1992, p. 4)[25]. According to Hurrell (2007, p. 95-96), such broad scheme is based on a move:

> [...] outwards from the state and towards the variety of ways in which states interact with a wide range of social actors—through policy networks, public-private partnerships, and policy communities. From the other side, it pushes upwards from society and towards self-organization and decentralized coordination through civil society groups (NGOs, social movements, non-profit and voluntary organizations) and through market-based allocation and various forms of economic governance that do not involve formal state-based rules.

Notwithstanding that, it must be recognized that in recent years, the power shift process outwards from states has given way to shifts between states of different development levels, civilisational identities and regions of the globe. The difference between the power shifts typical of the 1990s and those of the 2000s is that, in the latter decade, the focus is no longer on non-state actors but on emerging powers including, but not limited to, Brazil, India and China, on state-owned enterprises and on the legitimacy deficits of decision-making bodies, which no longer reflect the actual power allocation among its member-states (HURRELL, 2010). As argued supra at Chapter **1**, these shifts both reflect on, and originate from changes in the terms of trade between developed and developing nations.

The mapping of the above concepts and discourse into the discourse of international trade law can be summarized as follows:

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[25] As per another commentator, the acceleration of globalization in the aftermath of the Cold War has given rise to a "new understanding of civil society [which] represented both a withdrawal from the state and a move towards global rules and institutions" (KALDOR, 2003, p. 588).

1) State actors = international legislation;

2) Non-state actors = custom and usages (either formulated or not);

3) Government = CISG + New York Convention;

4) Governance = New *Lex Mercatoria* + national enforcement.

Therefore, even though trade custom and usages must be considered as a relevant part of international trade law, international legislation retains its fundamental role. Government and governance are not mutually exclusive; they coexist and will coexist. So will the CISG, the New York Convention and the New *Lex Mercatoria*, along with national enforcement mechanisms. International legislation, on the one hand, and volatile trade custom on the other have to be balanced in for international trade law to be operational (infra **3.3** and **5.2**).

3.1.1.3 A New, Multipolar Society of States is on the Rise

As a consequence of the redistribution of power between states in the early 21st century, a new society of states is on the rise. This new society of states differs from the one devised by Hedley Bull in the 1970s in the first place because it encompasses a much larger number of states. It is organized on the basis of a new multipolar pattern, though not yet on the basis of a new multilateral system[26] (WADE, 2011).

[26] This thesis refers to a new multipolar pattern as the multipolar patter of the 21st century, as opposed to an old multipolar pattern which is the one already identified by Friedmann in the early post-

The traditional view of a society of states (as opposed to a mere system of states) claims that states, based on their shared interests and values, form a society whose visible traits lie in the existence of common, internationally accepted rules and institutions (BULL, 2002) — for instance, the CISG and the New York Convention. These rules and institutions (for instance, UNCITRAL) in turn provide the operating machinery with which international society governs itself.

In the early 21st century, an enlarged, more diverse and geographically dispersed society of states, with a denser and more complex set of values and interests has seen the light of day[27]. It has to face the challenge of reorganizing the allocation of power within its own ranks and of interacting with a vast array of non-state actors which hold claims to power and legitimacy. It is an outcome of both the power shifts of the 1990s from states to non-state actors and those of the 2000s from old, established powers to new emerging powers which have resulted in the formation of a new multipolar, multicultural global order. Its heterogeneous and contradictory character, which might also be seen as its greatest virtue[28], poses immense analytical challenges. As Hassner (2007) — rather pessimistically — puts it:

> *La difficulté centrale est que ce monde devient à la fois plus dissymétrique ou hétérogène en termes de perceptions et de passions (sous l'influence du ressentiment et de la dimension religieuse) et moins dissymétrique ou inégal en termes de puissance (par la nouvelle efficacité*

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colonial world. In addition, this thesis will refer to a new multilateral system whenever there is need to stress the changing character of the system of interstate cooperation. The new multilateral system enshrines the participation of multiple actors and is interested in welcoming an effective participation of small nation-states and acknowledge the true contribution of different civilizations in the quest for overcoming conflict and disparity among peoples.

[27] As to this enlargement of the international family of nations, Zemanek (1997, especially p. 38 et seq. and p. 112 et seq.) is of the opinion that globally shared values and interests in the context of a large number of states are of a rather limited scope (which accordingly leads to a low degree of integration), a fact which is at variance with the growth of interdependence and the rising of common problems that have to be faced by the international community as a whole. He also points out that, both because of language, and also ethnicity and religion, each area of the world has a different perception of legal concepts, which renders the "unity" of International Law a theoretical construct (ibid., p. 62; infra **3.2.3**). Uniform law can consider itself to be a proud exception.

[28] The year 2001 was both the one of the September 11 attacks as well as the United Nations Year of Dialogue among Civilizations, which was proclaimed amongst other grounds upon "the need to acknowledge and respect the richness of all civilizations, to seek common grounds among and within civilizations in order to address threats to global peace and common challenges to human values and achievements, taking into consideration, inter alia, cooperation, partnership and inclusion" (UNGA, 2000).

> *des « armes des faibles » et la nouvelle difficulté pour les forts d'exploiter leurs avantages matériels).*[29]

Be that as it may, the words cast by Bull (2002, p. 265) about Cold War international society continue to apply to the new multipolar society of states: "[...] there is no clear evidence that in the next few decades the states system is likely to give place to any of the alternatives to it [that have been nominated]". In his analysis, those alternatives include the disintegration of the society of states, or even of the system of states; the emergence of a world government; and a new medieval order, characterized, inter alia, by a prevailing role of transnational organizations in light of the technological unification of the world. Despite the changes in international political conditions that have taken place since, particularly over the last two decades, current evidence is not more compelling in support of any of these alternatives than at the time of Bull's writing, nor has any other significant alternative emerged which would encompass the world at large[30].

The emergence of a new society of states does not affect in any way the existence of a global community, to which it is one among the components[31] — or actually, *the* central component.

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[29] The CISG, it must be recognized, has contributed to reducing the asymmetry of language, information and legal knowledge across its state-parties. It has been an effective way to go about the differences that could prevent parties from entering into exchanges of goods in international trade.

[30] Global democracy and world government stay en vogue, though, as theoretical or prospective alternatives. For a liberal view on world government, see Höffe (1999). For a US-based view on global democracy, see Rawls (2001). For a socialist (or as the authors claim, post-liberal, post-socialist) counterpoint, see Hardt and Negri (2005).

[31] Cf. Friedman's (1964, p. 37-39) approach to international, transnational and supranational society; Bull's (2002, p. 23 et seq.) analysis of the idea of international society, especially his description of the Hobbesian, Kantian and Grotian traditions which spawn respectively realist, universalist and cooperative views on international society; Pierre-Marie Dupuy's (2003, p. 257 et seq.) three views (or *acceptions*) of international community: first, a strict notion based on the legislative competence of states; secondly, a broader community of states based on fundamental interests backed by rights; and thirdly, a global community embracing states as well as the international civil society. See also Onuma's (2009, p. 115 et seq.) three perspectives or "cognitive frameworks" for the understanding of International Law, *à savoir*: international, transnational and transcivilizational, the latter of which is "based on the recognition of plurality of civilizations that have long existed in human history [...] by paying attention to religious, cultural and civilizational diversity of the globe" (ibid., p. 131); which should be done by allowing for the concept of "simultaneous belonging" and by adopting a functional, instead of substantive, notion of civilization (ibid., p. 145 et seq.). The author believes the CISG is a tool in implementing Onuma's idea of transcivilizational International Law, however its renovation is of paramount importance to permit further participation and cooperation between different civilizations.

3.1.2 States Remain the Primary Subjects of International Law

The "classical" conception of International Law as a law between states (such as that espoused by Bentham) has historically been modified in light of the influence of the French sociological school (**3.1.2.1**). Eventually, state-centric and individualistic conceptions of International Law have merged into a contemporary conception which recognizes a variety of International Law subjects other than states (**3.1.2.2**). Still, states remain the main or primary subjects of International Law (**3.1.2.3**).

3.1.2.1 The notion that the state is the only subject of International Law has been overturned

Classical International Law recognized states (in particular, European, or civilized, states) as the *only* subjects of International Law, in spite of *explaining* the state as a confederation of individuals, families and other groups. Hence Vattel's (1758, p. 1) definition of the Law of Nations as "*la science du Droit qui a lieu entre les Nations, ou Etats, et des Obligations qui répondent à ce Droit*"; or von Martens' (1821, p. 10) view of International Law as "*une théorie de ce qui se pratique le plus généralement entre les Puissances et états de l'Europe*". This state-centric, Eurocentric conception derives from the works of earlier internationalists such as Suarez, Gentili, Grotius and Zouche, as well as from historical events such as the Peace of Augsburg of 1555 and the Peace of Westphalia of 1648, and its influence has reached as far down as the Paris Peace Conference of 1919 (GROSS, 1948). Oppenheim (1905, p. 18), at the beginning of the twentieth century, viewed International Law as based on the common consent of a civilized family of nations, which led him to the conclusion that states are "solely and exclusively" the subjects of International Law, with individuals as objects. The classical conception of International Law was, in essence, that upon which the League of Nations was based, as

reflected by the Lotus affair of 1927[32], and that which spawned the Hague Law of 1964 — in that they were both state-centric and Eurocentric.

This classical conception began nevertheless to suffer erosion from the late nineteenth century onwards, as a result of the doctrines of Léon Duguit and the French sociological school — which marshaled the rise of individualism in International Law. The central idea of the French sociological school is that one should pierce the veil of the state and other legal entities and look at the individuals of whom they are made up. On such a basis, Georges Scelle (1933) has envisioned International Law as indeed taking place between the *ressortissants* of different states, instead of between the latter[33]. To his view, it was the individual, "alone capable of willing, alone responsible for his actions and the only subject of International Law to the exclusion of legal entities" (THIERRY, 1990, p. 198) that mattered. Scelle's concept of *droit intersocial*[34] has influenced Phillip Jessup's (1956) concept of transnational law[35]. His work was so influential in France that French law schools refrained from teaching the concept of sovereignty for a certain time (THIERRY, 1990).

It is of course as a consequence — though oblique — of the French sociological school that we must see the rise of the mercatorialists, such as Schmitthoff and Goldman in the 20th century.

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[32] The Lotus affair concerned Turkey's jurisdiction to try a French naval officer for damages arising out of a collision between a French vessel and a Turkish vessel at high sea. The Permanent Court of International Justice has affirmed states' right under International Law to adopt the principles which they regard as best and most expedient in submitting foreign property, persons or acts to their own jurisdiction (PCIJ, 1927, p. 19). Due to the avowal of the primacy of the will of sovereign states as put forward in the Lotus affair, P.-M. Dupuy (2003, p. 399-400) labels interwar states society as the *société du Lotus*: "[*d*]*ans la société du Lotus, le droit s'appuie exclusivement sur la légalité et, par voie de conséquence, sur un régime exclusif de validité formelle des règles juridiques*". Lotus' dicta still echo strongly in international legal scholarship (see ZEMANEK, 1997, p. 70). The CISG has departed from the Lotus society of states in that it recognizes usages and party autonomy, however it is still to find new ways of interacting with non-state norms of international trade.

[33] Onuma (2009, p. 100) provides a middle ground definition: "[i]nternational society is a society where humans are engaged in mutual and common affairs mainly through the institution of sovereign states".

[34] According to Scelle (1933), a *droit intersocial* (of which International Law is a particular occurrence) must be understood as the expression of an overarching legal order called intersocial order, which automatically conditions every subjacent legal order (i.e., those of states and other legal entities).

[35] As has the thought of the Baron F. M. van Asbeck (JESSUP, 1964).

3.1.2.2 Contemporary International Law takes into account both state-centric and individualistic views

The two conflicting, in fact extreme views on International Law previously outlined, one in favor of the state as its only subject, the other extolling the individual to the detriment of the state and other social bodies, have been reconciled over the years by international legal practice. This is especially true after 1945, as demonstrated by the *Reparation* case (ICJ, 1949)[36].

On the one hand, states and international organizations (whose legal personality, even though autonomous, ultimately emanates from states[37]) remain the only subjects allowed to conclude treaties, as reflected by the Vienna Convention on the Law of Treaties (hereinafter, the "VCLT") of 1969, which governs treaties concluded between states, and the Vienna Convention of 1986, which governs treaties concluded between states and international organizations or between international organizations. On the other hand, peoples, minorities and humankind now have rights recognized by international legal texts; the individual, multinational corporations and nongovernmental organizations[38] have acquired either legal standing, or great importance, in International Law.

As explained by Cançado Trindade (2006, p. 51):

> [...] the notion of the practice of International Law has become much more complex, no longer limited to State practice, as in the past. In the World Conferences of our times, States as well as international organizations and entities of the civil society have been contributing to the accelerated development and universalization of International Law, as

[36] The *Reparation* case, which concerned the capacity of the United Nations to bring a claim against a non-member state for injuries suffered by UN agents, has introduced a shades-of-gray approach to the problem of subjects of International Law. In it, the ICJ (1949, p. 178) stated that "[...] the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community". See especially P.-M. Dupuy (2003, p. 107 et seq.).

[37] See Zemanek (1997, p. 107) for a discussion on to what extent international organizations are controlled by the most powerful among their member states.

[38] As to the international legal status of NGOs, P.-M. Dupuy (2003, p. 426) refers to them as actors, but not subjects, or more specifically, as "*contre-pouvoirs sans statut juridique bien défini, autrement que par les diverses formules d''observateurs' dont certaines d'entre elles sont dotées auprès d'un nombre relativement restreint d'institutions internationales*".

> illustrated by the recent cycle of the World Conferences of the United Nations.[39]

International investment law, especially international investment arbitration[40], provides a particularly suitable example of the expansion of international legal personality[41]. In treaty-based international investment arbitration, one of the parties is a sovereign state, or state-owned entity, while the other party is an investor. The investor is usually a national of another state, which in turn is a party to an investment treaty under which arbitration is invoked. The treaty is normally a bilateral investment treaty (BIT) or a framework trade agreement containing investment provisions, such as the North America Free Trade Agreement (NAFTA). The investor may be either a natural person or a company — which may be either publicly — or privately-owned. It acts in full standing as a party to the arbitration, in equal footing with the sovereign state even though the dispute may be governed by public law. In addition, domestic or international pressure groups, often formalized as NGOs, may and do apply for amicus curiae status in some arbitrations thereby attempting to influence the outcome of the dispute, in accordance with their purposes and aims (DUMBERRY; EASTAUGH, 2011).

In international trade law, the transnational trading company is the subject *par excellence* of substantive rights and obligations[42], even if they are provided for in an international convention. It is the buyer and seller of international trade who are at center of every international trade law text, be it agreed upon and enacted by states or otherwise[43]. NGOs such as the ICC, acting in their capacity as observers, have had active performance in the drafting of international trade law treaties such as the New York Convention (BRINER; HAMILTON, 2008) and the CISG[44]. Hence, international trade law is a branch of law where the individual and the NGO play a prominent role regardless of the nature of

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[39] Cançado Trindade (2006, p. 318) does not, however, ignore the fact that states have not been replaced by other subjects of International Law. In his opinion, they "coexist", as legal subjects, with international organizations, individuals and groups.

[40] For a prospective view on developments in international investment arbitration see, e.g., Binder et al. (2009). For companion texts see: Kahn and Waelde (2007); Muchlinski, Ortino and Schreuer (2008).

[41] It is worth noting that the Washington Convention was signed only a year after Friedmann published his 1964 work (LEBEN, 1997, p. 404).

[42] See in this regard Schmitthoff (1961), p. 21.

[43] Of course, states are subjects, or parties, to an international treaty like the CISG; however, this thesis will contend that they are only secondary stakeholders to it (supra **1.2**; infra Chapter **6**).

[44] The active participation of the ICC in the drafting process of the CISG is reflected throughout the Official Records of the 1980 Vienna Conference (UNCITRAL, 1991).

the source of law in question (state or non-state). Moreover, sanction is effectively enforced by individual states as the occasion arises, by the seizing of assets located in their territory. Hence, international trade law, as a complex normative system, is attached to a strict rule of law, which takes advantage of enforcement capabilities of national states.

3.1.2.3 The rise of other subjects has not affected states' position in International Law

Even though other actors and participants have been incorporated into the theory and practice of International Law, states remain its primary subjects. The incorporation of other subjects has not impaired states' ability to shape International Law the way they see fit, even if acknowledging the existence and taking into account inputs from other subjects and actors. International Law at large is still a treaty- and custom-based system, and treaty and custom are generated by states as well as international organizations.[45]

According to P.-M. Dupuy, states are the only sovereign and independent subjects of International Law. They are the only subjects which command all of the prerogatives that a subject of International Law may command[46]. Those prerogatives include membership and full participation in international organizations as well as the exercise of general competences regarding territorial and personal matters. A state is sovereign and independent in the sense that, as a matter of International Law, other states are not

[45] Accordingly, in Onuma's words, "[t]he international perspective will continue to be the most important perspective from which human beings see, recognize, interpret, assess, and seek to propose solutions to, problems beyond the reach of a single nation State" (2009, p. 120). One must not ignore, of course, the subtle and yet ill-defined phenomena of the *jus cogens* and *erga omnes* obligations, which are even more fluid and open-ended than international custom and may ultimately derive not from international treaties or practice (or even *opinio juris*) but from a much vaguer source such as imperatives of justice and morals or a "universal juridical conscience" (CANÇADO TRINDADE, 2006). See also in this respect Lauterpacht (2011, p. 429-430) as to the will of international community as the "initial hypothesis" explaining the objective binding force of International Law (*voluntas civitatis maximae est servanda*).

[46] Only states, those "awful entities with effective means of violence capable of killing thousands of people", bear the legitimacy to decide on issues of life and death (ONUMA, 2009, p. 154). Cf. also Zemanek's (1997, p. 43) remark that the state is the only entity with "original" power in spite of their sovereignty being subject to International Law.

supposed to interfere in its internal or external affairs. All states are equal from a legal point of view, whereby all of them hold equal claim to their rights being respected by other states as a matter of reciprocity. Or as Dupuy (2003, p. 98) would put it: "[*t*]*ous les Etats naissent libres et égaux en droit*". To legal equality of states their size, population and system of government are immaterial (UNGA, 1970). Every state deserves equal treatment from the established international legal order. Equality of states avoids the application of double standards based on the degree of development and power of each of them. It also enables the existence of minimum standards which states are required to respect in dealing with other states as well as private entities or individuals (P.-M. DUPUY, 2003).

While states are the main subjects of International Law, international cooperation, especially at the multilateral level[47], is the activity of which a very significant part of International Law breeds out.[48]

The transition from an international society of conflict and coexistence to a society of cooperation, with a corresponding shift in the theoretical paradigm of International Law, was studied markedly by Friedmann (1964)[49]. In his view, cooperation is as suited as conflict for the pursuit of the national interest of states; however, whether cooperation or conflict prevail has become a question of survival for mankind. Cooperation is based on the existence of a community of interests between nations[50]. The International Law of cooperation acts both at the universal and the regional levels[51]. The vertical expansion of

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[47] Multilateralism, as a general concept, is used as a synonym with international cooperation of multiple parties (states and international organizations, the latter acting as either parties or, more often, as platforms for collective decision-making, or both) sometimes resulting in treaties open for ratification by interested parties (states and/or international organizations). It is in this general sense that the author employs the word in the context of uniform sales law. Strictly speaking, multilateralism refers to processes of international cooperation whereby complex arrangements of rules (treaties and other) and institutions (courts and/or tribunals, managing and enforcement agencies, conferences and meetings of the parties, etc.) arise in connection with a particular issue-area of international affairs.

[48] In Jessup's words: "[i]t would be safe to say that at least a very large number, if not all, of the great multilateral lawmaking treaties were finally drafted in and out of international conferences with much give and take in the common interest of finding a uniform rule for some particular activity — a rule which had to be a compromise among conflicting interests and positions, since, if this were not true, the need for concluding a convention to establish a uniform rule would not have arisen" (1964, p. 364).

[49] Friedmann's (1964) perception contrasts rather sharply with that of Zemanek (1997) to the extent that the latter does not perceive post-1945 international society as substantially different from pre-World War I international society, as he claims that only few powers have been transferred to rather weak international institutions.

[50] Cf. Bull (2002).

[51] As for the coexistence between regional and global uniform sales law see supra at **2.1.1** and infra at **3.2.3**. See also Article 90 CISG which deals with the so-called "conflict of conventions" (i.e., the

International Law, by its encompassing of a broader range of issues and subjects (international organizations, private groupings and individuals), as well as its horizontal expansion caused by the accession of new members (which did not previously belong to the small club of Western states) to the international family of nations both contribute to the paradigm shift from coexistence to cooperation. Participation and membership in cooperative endeavors becomes both a privilege and a necessity, while non-participation transforms into effective sanction.[52]

As explained by Ago (1988), the rise of international cooperation society, though perhaps based on collective security reasons, was also motivated by a series of hidden tensions and potential evils. The ambiguity of scientific progress; unevenness in the distribution of goods and the mismatch of living standards between peoples and individuals; the displacement of great human masses giving rise to large contingents of disinherited or de-settled populations; general aspirations to dignity, liberty and fundamental rights; a sudden and massive process of decolonization; great levels of interdependence and demographic growth, constitute the driving force behind the gradual institutionalization of international community. This institutionalization has resulted in the establishment of a series of international organizations, of either specific or universal scope, through which international cooperation has come to be pursued (AGO, 1988, p. 9-11). International organizations have a separate existence from states which create them, however their competences may be limited by the will of those states (R.-J. DUPUY, 1988).

In the field of economic affairs, international cooperation in the twentieth century has seen four hallmarks:

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application of the CISG versus any other international arrangements such as, e.g., regional, bilateral or otherwise). For problems arising in connection with Article 90 CISG see Ferrari (2005).

See supra **2.1.2** for non-global approaches to legal harmonization according to the Schmitthoff Report, which gave rise to the creation of UNCITRAL.

[52] An example being Paraguay's suspension from MERCOSUR and UNASUR. More recent authors dispute that non-participation has become an effective sanction. See, for instance, Leben (1997).

1) the establishment of the so-called Bretton Woods System, comprising the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD), in 1944[53];

2) the conclusion of the General Agreement on Tariffs and Trade (GATT) in 1947[54];

3) the establishment of the United Nations Conference on Trade and Development (UNCTAD) in 1964[55];

4) the conclusion of GATT 1994 and the establishment of the World Trade Organization (WTO), as a result of the Uruguay Round of Multilateral Trade Negotiations[56].

In the context of uniform sales law, seen as a complex array of state and non-state norms, international cooperation is useful to the extent that it can generate norms which are suited to coordinate among various kinds of sources of which such array is composed. The benefits of international cooperation in the field are fully achieved only if states are

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[53] The basis for the convening of the United Nations Monetary and Financial Conference (known as the Bretton Woods Conference) was "the recognition that the postwar world would stand in great need of some stabilizing influence in the international financial field". The Conference was convened with a view to "removing the monetary disorders and obstructions that stifled world trade in the 1930's" (UNITED NATIONS MONETARY AND FINANCIAL CONFERENCE, 1948, p. v-vi). The words of the president of the United States at the time, Franklin Delano Roosevelt, are clarifying as to the Conference's gist: "[...] the economic health of every country is a proper matter of concern to all its neighbors, near and distant. Only through a dynamic and a soundly expanding world economy can the living standards of individual nations be advanced [...]" (Ibid., p. 71).

[54] In its preamble, the GATT 1947 states that parties to it decided to enter into "reciprocal and mutually advantageous arrangements" directed to trade liberalization with the purpose of "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods" (WTO, 1986, p. 1).

[55] The establishment of UNCTAD may be seen as a reaction of developing countries (the G-77) to the operation of the Bretton Woods System as well as GATT 1947. This idea was expressed at UNCTAD by India's prime minister S. Indira Gandhi in the following words: "[t]hese institutions [those of the Bretton Woods system] were meant primarily to promote the interests of advanced countries. At that time [i.e., in 1944] the majority of today's developing countries were not independent, so their legitimate interests went unrepresented and the internal contradictions inherent in the system soon became apparent"; "[...] GATT's attempt at tariff reduction and trade liberalization include mainly those goods which interest industrially developed countries" (GANDHI, 1983).

[56] The Uruguay Round attempted principally at expanding GATT 1947 to other areas such as trade in services, international investment and intellectual property rights. For a comprehensive review on WTO law see Matsushita, Schoenbaum and Mavroidis (2006).

available to appreciate inputs from a vast set of actors and channel them into a variety of institutionalized outputs by means of procedures oriented by the pursuit of the interests of humankind — instead of national interest. Membership and participation in the processes involved are not restricted to states. Non-state actors must be, first, taken into account and secondly, allowed to weigh in throughout formulation, application and reform of institutionalized outputs, either via consultation or direct participation. The history lying behind the preparation of the CISG (supra **2.1.2**) is a clear example of international cooperation based on the most evolved standards known in International Law. The desire to exchange as materialized in the international sale of goods, as an expression of the most fundamental human and social relation (supra Chapter **1**), lies at the bottom of a community of interests between all nations of the globe. This goodwill is certainly not going to disappear in the event of a process of renovation of the CISG.

Furthermore, the transition from a West-centric international society to a complex society with superimposing international, transnational and supranational layers which obeys a new multipolar pattern leads to the need of International Law being redesigned accordingly. Legitimacy of International Law must be pursued globally, across the international, transnational and trans-civilisational dimensions. This enlarged perspective impacts the development of International Law as well as of international legal scholarship, which must take account of the aspirations and expectations of a great number of peoples who have remained largely ignored in the past — and seek their acknowledgment. It also calls for a re-conceptualization, inter alia, of the classical theory of sources of International Law, with a view to their expansion and diversification (ONUMA, 2009)[57].

The process of drafting and enacting of the CISG are uncontestable examples of a work that took on a broad perspective of International Law. The participation of over 60 countries from all regions of the globe; an active representation of concepts stemming from different civilizations[58]; experts from diverse backgrounds teaming up to draft and discuss the text all illustrate and help explain the CISG's enticing power over people from all over

[57] As Cançado Trindade states (2006, p. 182): "[i]t is nowadays generally acknowledged that the universality of International Law can recognizedly [sic] be achieved only on the basis of pluralism, mutual respect for cultural diversity, and the pursuance of common aims, converging ultimately into the welfare of humankind".

[58] On the participation of delegates from several different traditions and the issues related to each tradition's angle, see Garro (1989).

the globe. The challenge to be faced in a renovation process is to move further with two important aspects: first, the transcivilizational dimension; secondly, the protection of the interests and welfare of mankind (infra Chapters **5** and **6**).

Before concluding the present section a few words are apropos on the apparently irreconcilable accounts of International Law and international relations outlined above. The narrative of international relations speaks of emerging powers as against established powers; of the mismatch between a new multipolar global society and an old-fashioned multilateral system[59]. International Law claims that all states are born equal and have an equal claim that their sovereignty be respected as a matter of legal right.

There is no contradiction between the two narratives. They just treat the same scenario based on different premises[60] and attribute different weights to values as opposed to facts (or politics). International Law and international relations are both descriptive and normative at the same time. However, International Law is *much more* normative than descriptive, and much more so than international relations — and vice-versa. This is no reason for one to build a "wall" between the two approaches, for this would impair the understanding of the "interrelationships between the multiple factors which contribute to the unending processes of legal evolution" (JESSUP, 1963-1964, p. 2).

In regard to equality of states it is, as P.-M. Dupuy explains (2003, p. 99), a legal fiction asserted by International Law irrespective of the fact that international society may be utterly asymmetrical in the way of power:

> *On ne doit par conséquent pas, du moins pas dans le cadre de l'analyse formelle qui nous occupe pour l'instant, s'arrêter à la distorsion existant entre l'affirmation juridique de l'égalité des Etats et la réalité effective (économique, stratégique, etc.) de leur profonde inégalité. Ce serait trahir l'objet même du recours à la fiction juridique de l'égalité*

[59] One must recognize that, even though other bodies may lag behind, UNCITRAL has expanded its membership from 29 to 60 states from 1966 to the present day. UNCITRAL membership is "[s]tructured to ensure that the various geographic regions and the principal economic and legal systems of the world are represented" (UNCITRAL, 2013, p. 2).

[60] Or "optics" (KEOHANE, 1997).

> *souveraine auquel il est procédé pour faire que ce qui est sans doute faux dans les faits devienne vrai dans le droit* [...].[61]

To sum up what was discussed in the present section, it is submitted that states have a central role in global politics and are the primary subjects of International Law. This does not mean that they are the *only* actors of global politics or subjects of International Law. International organizations, multinational corporations, NGOs and individuals[62], in particular, are other relevant political actors and, to a limited extent, international legal subjects[63]. In light of this it is submitted that the society of states has a *central* role in global politics and International Law, in the sense that there are no other actors, or subjects, which in and of themselves are more relevant than states. Yet states are part of a complex array of actors, private and public, of many different sorts, of whose activity International Law in general, and uniform sales law in particular, is an outcome. This matter will be addressed in turn.

In the 21st century, International Law must undergo a major redesign in order to cope with a new multipolar pattern of global society. Such redesign must comply with a transcivilisational view of human affairs in pursuit of global legitimacy, both procedural and substantive. In the present century only global legitimacy, pursued in the context of a new multilateralism, can lead to universal acceptance (VIS, 1992) of international norms. Uniform sales law, notwithstanding its complex nature and specific scope is not an exception, especially regarding the part of it — namely, international legislation — which depends upon states for its formulation and implementation (of which the CISG stands out as the primary specimen).

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[61] Zemanek (1997, p. 43) recalls Bartolus of Sassoferrato's 1354 excerpt in which he already claims legal equality of *pares*; Cançado Trindade (2006, p. 198-199) rememorizes the role of Brazilian jurist Ruy Barbosa at the Second Hague Peace Conference in advancing the equality of states under International Law.

[62] See Onuma (2009, p. 129).

[63] As Cançado Trindade summarizes: "[w]ith the increasing participation, in International Law-making and application, of peoples and individuals as subjects of International Law, along with States and international organizations, International Law nowadays concerns everyone" (2006, p. 59). On the dangers posed by an exclusively power-based analysis, in connection with a legal positivist approach which leads to a "strictly inter-State perspective of International Law", see ibid., p. 79 et seq.

3.2 ROLE AND PURPOSES OF THE CISG

It is time to call into question how neatly the CISG fits into a rather chaotic "spaghetti bowl"[64] of international sales, and more generally, international trade norms. Does it occupy the place it is expected, or supposed to occupy? An international convention containing contract law rules is an exceptional instance of international treaty dealing with private commercial issues. Except for International Law at large, is it part of anything that can be called a *system*? How does it relate to other important texts of international character, considering the vast amount of treaties and other agreements produced in maritime and sea law, environmental law, labor and human rights, trade, interstate relations and so on? One cannot argue that, because they cover different subject-matters, they bear no significant relationship to the CISG.

In order to elucidate the CISG's relationship to other norms of international trade and otherwise International Law, one has to question initially what are its role and purposes. For such an inquiry to produce meaningful outcomes the CISG must be submitted to a split analysis: it has to be considered separately as a legal phenomenon and as a legal text. This separation is based on two reasons: first, the CISG has different purposes as a landmark of international trade law on the one hand, and as an international convention on the other; secondly, its success or failure in one of those capacities are not necessarily the same as in the other. The success of the CISG as a landmark is consequential to its success as a legal text; in other words, the fact that the CISG was successful as an international convention magnified it into a landmark, but the CISG as a landmark has freed itself from the CISG as a text — in other words, as an idea the CISG is much more powerful than as a treaty. Renovation of the CISG in this perspective is the pursuit of a challenge to retain its success as a landmark, while at the same time rebuilding its as a text.

As a legal phenomenon, it is submitted that the CISG has the following purposes:

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[64] The expression "spaghetti bowl" in connection with international trade was coined by Bhagwati (1995) and refers to a "dilution of the multilateral trading regime by the spaghetti bowl of preferential trading arrangements" (ibid., p. 20).

1) Provide innovation, simplification, evolution and accessibility for international sales law[65], introduce new language and forge simple, forward-looking new concepts for the international sale of goods;

2) Contribute to the overcoming of civilisational differences by providing shared rules concerning trade in merchandise, one of the oldest forms of intercourse between human societies, and still essential to the 21st-century global economy[66];

3) Acting as a centerpiece for the normative regulation of international sales contracts, due to its nature as a private law convention, enacted and enforced by states under coercive mechanisms (infra **5.2**).

As a legal text, the CISG has the following purposes, which are consonant to its purposes as a legal phenomenon:

1) Simplify the legal environment for the cross-border sale of goods — which is especially critical for small businesses — by providing clear and understandable rules which are readily accessible and prone to attract attention from academia, practitioners and courts[67];

2) Help bridge the civilizational gap in different areas of contract law, by shaping and inspiring solutions for other kinds of international contracts, such as distribution, agency, franchise and so forth, based on either analogous application or the CISG's general principles and basic rules;

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[65] Including by formulating existing usage: "[i]n this respect the purpose of the CISG is not only to create new, state-sanctioned law, but also to give recognition to the rules born of international commercial practice and to encourage national courts to apply them in a functionally uniform manner through a form of *jurisconsultorium*" (MAZZACANO, 2006, p. 3).

[66] As Andersen (2007, p. 14) remarks: "[t]he dissemination of concepts and ideas, which leads to a desire for and the possibility of the creation of uniform laws, is undoubtedly an example of diffusion of culture, ideology, and — to some extent — law".

[67] See e.g., Butler (2013): "[b]usinesses favour a world without legal complexity. They would welcome a world with one simple, neutral legal system that fully meets their needs". Though as a point of principle the present author does not oppose regional approaches to uniformization (see especially infra at **5.3.2**), one has to recognize that the simplicity and neutrality of rules is critical for international businesses of any size.

3) Serving as a role model for international formulating activity as well as national legislation on sales and also on contracts in general[68].

To the objectives outlined above a very important one must grapple in the event of renovation: channeling the effectiveness of international regimes such as the trade, environmental and human rights by introducing rules compatible with them into the realm of international private law, by sanctioning the behavior contrary to those regimes (infra **5.6**).

Before examining the purposes of the CISG as an applicable law to contracts of sale, it is inevitable to say a few words on the political aspects of its application. Was (or is) the CISG designed to apply or not to apply? Should the true aspiration of the CISG community be for its universal or scarce, occasional application?

The party autonomy rule in Article 6 CISG[69], which enables parties to exclude the Convention or vary the application of any of its provisions makes it "doubtful whether the negotiating States actually intended to create uniform laws in the classical sense of binding regulatory instruments" and renders the CISG "a type of limited lawmaking treaty" (ŠARČEVIĆ, 2003, p. 9). By the same token, it is beyond argument that the CISG contains default rules (*règles supplétives*) and it is often said to be "designed primarily to serve as a *supplementary* regime which fills contractual 'gaps'" (LOOKOFSKY, p. 47).

The answer admits two approaches, one inflationary[70], one residualist. The inflationary approach maintains that giving the CISG the broadest possible application is the only way to do justice to its role as both a legal phenomenon and a legal text. The residualist approach would content itself with the CISG's application to those cases where the absence of a choice of law corresponds to an economic failure which can be remedied

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[68] This purpose has been particularly well met. Schwenzer and Hachem (2009, p. 461-463) list the set of international principles, European instruments, regional uniform laws and domestic law reforms that have leaned on the CISG as a role model. On the rise of regional uniform law instruments and their potential impacts, see Butler (2013) and Castellani (2013).

[69] "Article 6: The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."

[70] The present author has elsewhere defined International Law as an inflationary cognitive space informed by the Idea of the Good.

by international legislation. For those studying the CISG it is almost impossible not to care about taking sides in the above divide.

This thesis will assume an inflationary stance under which the CISG is the centerpiece of an array of norms that constitute international sales law[71]. The present author does not believe that the rule of Article 6 has the political consequence and meaning that the application of the CISG should restrict itself to those cases where parties were not able to agree on the applicable law[72]. Under an inflationary approach, application of the CISG should be desired and hoped for. It is only under such an approach that a case for the immediate renovation of the CISG makes sense; for, if a residualist approach is espoused, a case for deferring renovation is inevitably in place. That is because, if the CISG fulfills *only* a role as a default text, its rules are as good as any. There ought to be no hurry spending time and effort to address its renovation, which would thus rank low in the priorities of UNCITRAL.

However one may hope that the CISG applies to all cases or to no case at all, a question remains as to its nature: is it a hard law, or a soft law instrument? A given state's adoption of the CISG is voluntary as under the sovereignty principle, every state has the power to conclude treaties or to refrain from concluding them. Once the CISG is in force in regard to a given state it becomes obligatory for such state which is bound to perform the CISG in good faith under Article 26 VCLT[73]. However obligatory for the state which became a party to it, commercial parties from such state are not obliged to adopt the CISG as under its Article 6 the CISG is "dispositive" (FERRARI, 2001). Parties from states in regard to which the CISG is a binding treaty may displace its application by contracting out of it. Thus, the CISG becomes again voluntary. If the parties have however concluded a sales contract but failed to exclude the CISG as governing law, the CISG becomes obligatory once again. It is this kind of strange pendular, ambiguous movement between

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[71] Such an inflationary stance is in no contradiction with the supplementary character of the CISG, for the latter refers to the CISG's scope, content and application, not to its role and purposes as defined in the present section.

[72] In addition, of course, to those where they have explicitly or impliedly chosen the CISG as the applicable law.

[73] "Article 26: 'PACTA SUNT SERVANDA': Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

binding and dispositive that makes the CISG so much of an eccentric creature among international treaties.

Between binding and dispositive spring up voluntary and persuasive. Investigating the CISG's function or purpose as binding instrument (**3.2.1**) or persuasive authority (**3.2.2**) should also shed light on the issue of its impending renovation.

3.2.1 The CISG as Hard Law

Portraying the CISG as either hard[74] or soft law[75] depends on the observer and its corresponding time — it thus comes across as a rather relativistic task. There is no way the CISG can be asserted as a hard binding instrument or a soft persuasive authority beyond argument and inquiry. This is shared with other international instruments at large and not

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[74] Within the meaning adopted in the present thesis, *hard law* refers to a legal norm which, under the circumstances, is binding on the adjudicator.

[75] *Soft law* instead refers to a legal norm which, within the context involved, is of optional, narrative, suggestive or informative character, and whose application is voluntary rather than binding under the circumstances (BASSO, 2009). The general characterization of hard law and soft law depends upon both the *instrumentum* (e.g., a treaty such as the CISG is to be considered hard law as an instrument) and the *negotium*. Hard law instruments such as treaties may be of "soft formulation" such as when contracting parties "choose to resort to a binding legal instrument but soften its content by ensuring that it does not lay down any specific obligation and design it in such a way that the addressee retains a right to opt out or to define its scope of application" (D'ASPREMONT, 2008, p. 1084). Notably, the CISG's actual addressees (commercial parties, at least as far as Parts II and III of the Convention are concerned) retain a right to opt out from its application under its Article 6 which means that, without considering any specific scenario, the CISG must be considered as a soft law *negotium* contained in a hard law *instrumentum*.

Historically, soft law has emerged from a "common law approach" to the difficulties in securing consensus on binding obligations between states of diverging political mindsets. "If sufficient leeway is left to the individual actors, more specific rules may gradually lead to the development of new rules of customary international law. This 'common law approach' thus amounts to laying down rules of 'soft law' [reference omitted]. Such rules may figure as well in instruments concluded in the form of binding treaties as well as in instruments whose very title 'guidelines' or 'declarations of principles' indicates their non-binding character. In treaties, the non-binding character of such rules is shown by the use of 'should' instead of 'shall', e.g., in most, but not in all articles of the Convention on a Code of Conduct for Liner Conferences [reference omitted] or by the insertion of words like 'as far as possible', etc." (SEIDL-HOHENVELDERN, 1979, p. 192). For the purposes of the present thesis the author will refer to the CISG as soft law given its persuasive authority, based not only on the "professional standing" (BJORKLUND; REINISCH, 2012, p. 118) of those who prepared it but also on the deference enjoyed by its mother organization — namely, UNCITRAL.

restricted to the CISG (SPAGNOLO, 2014b)[76]. However, in the case of the CISG, there is one additional difficulty because its flexibility is considerably augmented by the party autonomy rule of its Article 6. Scrutinizing its hardness or softness from as many angles as possible is the only way to discuss and assess the quality of the CISG's party autonomy rule and flexible character, which is undoubtedly one of its main features to be retained in the event of renovation.

A first scenario where the CISG appears as hard law occurs when states consider it as an ordinary, run-of-the-mill international treaty. Given that the conditions for the CISG's entry into force as a treaty are fulfilled in regard to a state-party, such state-party will regard the Convention as a binding international obligation no different than other international obligations with which the same state may or may not comply depending on several factors. Whether or not a particular state complies with the CISG considered as an international treaty from a state-party point of view is irrelevant to the determination of its character as hard law in such a scenario (since states can on occasion illegally, or sometimes legally[77], fail to comply with international treaties).

The rule of Article 6, therefore, is not relevant for states as stakeholders, except to the extent that they represent other stakeholders — traders — or are represented by yet other stakeholders — experts — in the process of negotiation of the CISG as an international treaty. From a strictly state-party point of view, there is probably no need to depart from the idea that the CISG be considered as binding law and that parties have no leeway to modify it. Party autonomy is in the direct interest of traders rather than that of states.

A second scenario where the CISG appears as hard law comes about from the point of view of parties to a lawsuit involving the CISG, provided that no exclusion of its text has been carried out[78]. Such parties will consider the CISG as a binding legal obligation

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[76] Spagnolo (2014b) proceeds with an analysis of scenarios under which the CISG can be considered hard(er) or soft(er) on a "sliding scale" depending on particular settings. The present thesis intends to discuss the same issue in a different way, which is why the author does not simply refer the reader to Professor Spagnolo's work (even though the reader is definitely encouraged to do so).

[77] Articles 61 et seq. VCLT.

[78] If variations have been carried out, the reader is for the purposes of this analysis requested to consider the text of the CISG as modified by the variations agreed by the parties instead of the unaltered text of the CISG.

which has to be complied with and cannot be circumvented except by mutual agreement. They will expect courts to apply the CISG according to its binding nature as an internationally agreed convention and not to depart from its provisions. The radical possibility contained in Article 6 allowing exclusion of the CISG would also be irrelevant in such a scenario, unless the parties agree to exclude the CISG *ex post facto* (i.e., after the contract was concluded or a dispute has arisen).

A third scenario where the CISG would be regarded as hard law appears when a state court has to apply it either by the binding force of the CISG as an international treaty of the relevant state, or by the relevant state's rules of private international law[79] — provided that such private international law rules are binding on the court. The court will picture the CISG as the law that has to be applied and cannot be contracted out of, and hence as hard law, unless in interpreting the parties' intentions the court concludes that they have excluded the CISG as the applicable law[80]. The possibility of exclusion enshrined in Article 6 will only be relevant in the latter case; otherwise, it will be irrelevant.

3.2.2 The CISG as Soft Law

The CISG is most likely to be viewed as soft law in international arbitration, as it is in international arbitration that soft law, at least as an expression of commercial law or of the New *Lex Mercatoria*, finds its natural habitat. There is "natural affinity between international arbitration and soft law" as in international arbitration, "customary law, including business customs trade usage, and commercial practice, should, in certain contexts, be given more weight than the default rule provided by a convention or code" (DIMATTEO, 2013, p. 5-6).

[79] Article 1(1)(a) and (b) CISG.
[80] The same proviso in the event of modification applies.

In an international arbitration scenario, both the expectations of the parties and the arbitrators' stance point toward a flexible and eclectic use of rules of various origins and different persuasive power[81]. Hence, in international arbitration the CISG is not likely to be regarded as a law that has to be complied with and from which one cannot depart (i.e., strictly as a convention or code). It will be regarded as one out of several relevant sources for the settlement of a dispute. It is therefore in international arbitration that the CISG burgeons most genuinely as the centerpiece — though nevertheless only one — of an array of sources of international sales law[82].

Notwithstanding that, the fact that the CISG is softer from the point of view of arbitrators and parties in arbitration than that of courts or parties in litigation does not stem from Article 6 CISG. It stems from the natural flexibility of arbitration, the protection it enjoys from the international society of states and the mindset of international traders who are used to resorting to arbitration for the settlement of their disputes. Failing a provision to the effect of building party autonomy into the CISG, it would not lose its character as international soft law in international arbitration[83].

In yet another scenario, the CISG may be considered as soft law from the point of view of national legislators pursuing a model for the reform of the domestic law of sales. Even though the CISG was not intended as a model law it has been used by many domestic legislatures as a basis for the reform of their domestic laws (supra at **3.2**).

Two conclusions arise from the above analysis: first, the soft or hard law character of the CISG is not dependent upon its party autonomy rule enshrined in Article 6; secondly, softness of the CISG is more often than not achieved in international arbitration because, as an environment for dispute resolution, international arbitration is naturally more prone to flexibility than state court litigation. Hence, promoting party autonomy in association with the CISG depends more on promoting its use in arbitration (**5.3.3**) than on

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[81] In international arbitration the arbitrators will most often apply the rules of law agreed by parties. Failing such agreement arbitrators will often (e.g., under Article 21 ICC Arbitration Rules) be allowed to bypass conflicts of laws rules and choose the rules of law the deem more appropriate for the resolution of the dispute.

[82] Arbitration is also consistent with leaving room for regional perspectives, as arbitrators are able to handle different cultural perspectives within the same proceeding (infra **3.2.3**).

[83] Of course, a state court could also apply the CISG as persuasive authority, and courts have done so (SPAGNOLO, 2014b).

incorporating party autonomy into its text. Article 6 intends to guarantee something that parties already enjoy in arbitration and which does not really make sense outside of it — as stakeholders such as states and domestic courts do not of themselves care for party autonomy. They would rather apply their own domestic law.

This calls into question the real purpose of the CISG as a normative hallmark: is it intended to "make peace through law" or to aid international parties in finding proper and suitable — or so to speak, neutral — rules for their sales transactions? Would it not be more effective to suppress — or at least relativize — the exclusion rule from the CISG in the event of renovation[84], while more actively promoting its use in arbitration? This could certainly make the CISG more of a regulatory instrument — and harder on its hard side — whereas it would not harm its softness as an element of the New *Lex Mercatoria*, in which capacity it is applied by nature in arbitration — which already considers all law more soft than hard. Such a possibility is likely to improve the CISG's "net regulatory content" and enable it to comprise rules which are not supposed to be optional (infra **5.6**).

3.2.3 The CISG and a Global Commercial Code

An alternative to a renovation of the CISG would be the proposal for a Global Commercial Code (hereinafter, Global Commercial Code or "Code"). The proposal for a Global Commercial Code is not new, and has been appearing on and off in the literature and international practice over the last few decades (BONELL, 2001)[85]. At first, Schmitthoff (1968, p. 211) opposed the idea:

> It will hardly be possible to develop a single global code of international trade law acceptable to all countries of the world. The pattern of this law will be multiform and complex. It will consist of an integrated scheme of

[84] Or, alternatively, providing for the selective exclusion of certain provisions while maintaining others as the expression of international *ordre public*.

[85] Besides Schmitthoff (1985), Bonell (2001) and Herman (2001), also Lando (2010) deserves attention as a particularly recent proposal for the adoption of a Global Commercial Code.

> international conventions, model laws, standard contract forms, general conditions of business and guide texts. Regional and global measures of unification may well exist side by side, and this international regulation may overlap in some respects with national codes [...].[86]

It should be to no one's surprise that these words sound so much like a fulfilled promise today. With time, however, Schmitthoff changed his mind and passed to the defense of a world code on international trade law[87]. He based his defense on the foremost benefit that "such a code would offer countries in the course of development a compact package deal" (SCHMITTHOFF, 1985, p. 249; see also SCHMITTHOFF, 1981)[88].

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[86] Schmitthoff's idea of coexistence between global and regional unification measures seems to have become deeply unpopular. For instance, the CISG AC (2012) states: "[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. There is, furthermore, 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". This statement is pretty similar to what Mateucci has defended in 1961 (p. 288): "[*p*]*artant d'un point de vue général et systématique, il paraît incontestable que les unifications régionales ou communautaires créent des interférences avec les initiatives d'unification portant sur les mêmes matières poursuivies à l'échelle universelle. Toute unification étant le résultat d'un compromis, d'une adaptation entre des philosophies et des pratiques différentes, il s'ensuit que la pluralité des unifications a pour effet de créer une pluralité, et souvent une difformité, des systèmes de droit uniforme, avec pour résultat d'accroître la confusion chez les juges et les praticiens*". It is a curious idea, to say the least, that plurality should be seen as negative. While added layers of legislation can certainly cause confusion and uncertainty, it is certainly preferable to respect the right of regional communities to pursue their own unification processes once mechanisms to avoid confusion and uncertainty are provided for. Quite differently than the CISG AC, René David (1968, p. 311) addresses the problem from the point of view of flexibility. As he contends: "[*d*]*u fait de cette souplesse il est possible d'imaginer que, concernant une matière donneé, il vienne à exister tout un réaseau de Conventions : les unes, peu exigeantes, conclues sur un plan mondial, — d'autres, de plus en plus précises, existant sur un plan régional ou entre deux ou plusieurs Etats déterminés. L'on ne doit pas, par principe, s'attacher à l'idée, souvent chimerique, d'un droit mondial.* [...] [*L*]*es relations économiques ou autres existant entre les Etats, leur tradition, le type de civilisation auquel ils adhèrent, leur situation géographique justifient qu'un Etat conçoive et organise différemment ses rapports avec tel Etat et ses rapports avec tel autre Etat*".

On the convenience of regional harmonization for less developed regions and for the protection of weaker parties see Dennis (2014, p. 133 et seq.).

[87] He attributed his change of perspective on the issue to three factors: 1) the success of UNCITRAL which entitles it to take on more eminent tasks; 2) a shift in focus of formulating agencies from specific to general topics of contract law; 3) the success of the US Uniform Commercial Code, predicated on the idea that "[i]f codification could be achieved for the United States of America, it should be possible to achieve it on a universal world-wide basis" (SCHMITTHOFF, 1985, p. 244-245). The author estimates that Schmitthoff's change of mind can be at least partially attributed to the change in the mood from the late 1960's (chaotic, state-eschewing and intent on freedom and tolerance) to the mid-1980's (law-abiding, state-centric and intimidated by the idea of nuclear war).

[88] Why developing countries would need such package deal in the form of a binding code is not explained by Schmitthoff, but any good reasons as there might exist in the past may have changed considerably or even disappeared altogether. In any event, a Global Commercial Code is not the only way to provide developing countries with technical assistance in putting together good commercial legislation, whereas it is one that does entail particular regard for their independence and political freedom — considering its pretense "globalism", it would certainly appear not as inoffensive and persuasive as would, for instance, a model law.

According to him, the possibility to codify certain general principles and questions which affect all international commercial contracts would bring additional advantages. It is the will to codify general principles that lies behind the Swiss Proposal, considering that it refers to "issues of general contract law in the context of international sales — and possibly other types of — transactions from a global perspective" (UNCITRAL, 2012a, p. 7)[89]. This uncertain, expansive scope is probably what makes some react to the Swiss Proposal the same way they would react to the idea of a Global Commercial Code (supra **2.1.1**).

When Gerold Herrmann, former UNCITRAL Secretary, decided to unbury Schmitthoff's 1985 idea, he laid out two premises that help understand why the idea on a Global Commercial Code should be set aside altogether and, hopefully, not be mistaken by a proposal to renovate the CISG.

First, he evokes the allegory of a global village in order to speak about uniformity; however, his figure of speech goes well beyond the mere allegory a global village is supposed to evoke (HERRMANN, 2001, p. 29):

> We talk about the global marketplace, the global village, but what a funny village: every house still has its own laws, sometimes different streets in the village have different traffic rules. This cannot work, certainly not on the Internet, and it cannot work well in the rest of commerce[90].

While there is no room to argue that, in a *real* village, traffic rules should not be uniform, the world with its many nations, peoples and civilizations and all its geographic

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[89] In her defense of a "future uniform contract instrument" (2013, p. 729), Professor Schwenzer explains that "[t]he scope of the envisaged instrument on general contract law should be similar to the one of the United Nations Convention on Contracts for the International Sale of Goods (CISG), except that it should apply to all kinds of contracts and not just to sales" (ibid, p. 728). Although this approach seems to merge with the idea of a Global Commercial Code, the present author does not see it that way. He regards Professor Schwenzer's approach as sitting rather well with the discussion on the CISG's renovation.

[90] "Global village" was a term most likely coined by Canadian media theorist Marshal McLuhan in a prominently fluid manner. It refers primarily to a relativization of time and distances vis-à-vis the rise of electronic communication (MCLUHAN, 1967). Analytically speaking, changes in social space and time introduced by the advance of real-time overseas communication are a valid aspect of globalization. They give rise to a kind of "transworld simultaneity and instantaneity [which] takes social relations substantially beyond territorial space" (SCHOLTE, 2002, p. 19). These changes provide substratum for what Heidegger called "distancelessness" (ibid., loc. cit.). However, from a normative perspective, there can hardly be any justification for the cultural homogenization that would come with an absolute uniformity of laws, no matter how supraterritorial the world — and Law itself — have become. "On the contrary, territorial production, territorial governance mechanisms, territorial ecology and territorial identities remain highly significant at the start of the twenty-first century, even if they do not monopolize the situation as before" (ibid., p. 25).

diversity can hardly fit the comparison Herrmann intends to draw. Yes, houses in a real as well as in the global village are allowed to have domestic rules — unless we let our ideas about uniformity fool us into creating some kind of melancholic, utopian international society where each "household" (i.e., nation) is supposed to abide by strict codes of conduct, being deprived of the freedom to govern itself with a minimum of self-determination[91]. Though there may be good reasons for regional or even world-wide unification of the law dealing with certain subjects, an "unbounded enthusiasm" for unification takes no notice that (SCHLESINGER, 1980, p. 33):

> [...] legal systems reflect the values of diverse cultures; that cultural diversity should not be turned into monotony unless there are very strong reasons for doing so; and that there is no strong reason for world-wide, across-the-board unification of all law,

even if the intended unification refers solely to contract law.

Secondly, Herrmann (2001, p. 35) states that, in order to develop a universal code of international trade law people would "unite [...] towards one big project, like in a religious order". This mention to an almost "religious" effort, though of course also metaphorical, is not misplaced here — uniformity as an idea is very much linked to religion. Many religions believe their rules should be universally adopted everywhere by everyone. Some even have "codes" that were drafted under strenuous effort, often along the course of centuries, and by many hands. Our search for universal laws permeates Physics and Philosophy. But there is no good reason why a commercial dispute between a Chinese and an Iranian party *ought to* be resolved the same way as a dispute between a French and a Colombian party, or an Angolan and a Brazilian party, or a US and a Canadian party. Uniformity can be relative or absolute; absolute uniformity — one enthusiasts of a Global Commercial Code apparently cherish — is an idea perhaps not feasible as such, and certainly not desirable as such. Relative — or useful — uniformity consists in the "lessening of legal impediments to trade" (DIMATTEO et al., 2004, p. 310) as opposed to imposing universal solutions — an approach that can hardly be dissociated from an authoritarian and colonialist outlook.

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[91] In the words of an Indian commentator, "[u]niversalism is suffocating. Pluralism allows adaptations" (BATRA, 1999-2000, p. 443).

Ole Lando is also a supporter of a Global Commercial Code. In a 2010 article (p. 95), he puts forward a justification for the idea: "[t]he acceptance of the CISG by so many countries points to a need for a Global Commercial Code, and this need will grow with the growth of communication and commerce"[92]. It is not easy to see, however, how these two facts are linked. Why would widespread acceptance of the CISG lead to the need of a Global Commercial Code? It appears that the acceptance of the CISG by many countries is merely indicative of its proneness to being accepted internationally. There is no real causal relationship between the acceptance of the CISG and the need for a Global Commercial Code. Apparently, the fact that new states are still acceding to the CISG is a sign that the CISG is still considered to be meaningful law — and the act of acceding to it a meaningful political move — even though certainly not the newest knickknack on the market, as extensively argued in the present thesis.

Professor Lando (2010, p. 95) goes on to propose that:

> "[m]odern means of communication know no frontiers. When the world comes closer to being a single market, this market will require one law, and this law must include general principles of contract law".

In the present author's opinion, this is both true and false. It is true to the extent that a "single market" needs common rules which are acknowledged and respected by the players who operate in it. It is though false in that it also stretches the analogy of the world as a single market too far. Professor Lando speaks almost as if it would be worth ignoring the world's complexity and diversity of cultural, civilizational, political and economic factors (supra **3.1**) for the sake of defending the idea of a Global Commercial Code. No matter how close globalization takes the world to being a single market, it will probably never attain the level of singleness that lies behind such justifications as those of Herrmann and Lando.

However strong a defender of a Global Commercial Code, Professor Lando (1995, p. 401-402) concedes that codes have little endurance in themselves and are likely to be replaced by informal norms such as usages and custom:

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[92] In an earlier article, Lando (2005) put forward what he thinks should be the mainstays (in terms of specific contract law principles) of a world code on contract law.

> But what will happen in Europe to the *lex mercatoria* when a European Civil Code has established a common core of the legal systems? The need of a *lex mercatoria* will not be the same as before when the commercial law has become uniform. However, in some areas there may be or emerge international usage and other elements of the *lex mercatoria* which will replace the rules of the Code or which are not provided there. Furthermore, and this may sound heretic, some time after its coming into force the Code may on some points be outdated. The writers will realise that, and audacious courts may eventually do the same. In these cases the *lex mercatoria* will be invoked to supplement or correct the Code.

Lando's use of the word "heretic" in this excerpt sits particularly well with Herrmann's idea of a religious order. Lando's concern about not being a heretic actually has to do with that which supporters of codified legislation[93] think of codes — that they are supposed to endure forever; *sed et apud omnes gentes, et omni tempore*. But of course they become outdated with time[94]. In the case of uniform law, which stems from the consensual (supra **2.1.2.1**) will of the society of states as opposed to that of a centralized authority, the updating process poses costs and difficulties which might in the case of a Global Commercial Code prove unreasonable. Private norms, on the other hand, do update themselves without state interference. Other norms such as the UPICC — which already provide a restatement of general contract law principles — have proven capable of providing a great deal of gap filling not only where the CISG is lacunose, but also in other areas of contract law.

Ideas about uniformity and permanence should not be taken so far as those who attach themselves too much to a "Victorian predilection of orderliness" (SCHMITTHOFF, 1968, p. 212) would do. The world society — and any society, for that matter — can hardly fit into stiff molds of behavior and government. International sales law needs governance in addition to government, as does any area of international affairs. One will not reach that goal by stuffing it with a modern-day Justinian *Corpus*. If anything, we live in a post-Justinian, somewhat neomedievalized society where political power is more scattered than centralized (BULL, 2002). We are much better off sticking to Schmitthoff's

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[93] I.e., those who fall prey to the "never-subsiding charm of codes" (KRONKE, 2005, p. 463).

[94] In Rosset's (1992, p. 688) words, "the drafters of [...] codifications tend to look on harmonization as an event that happens once and for all. They see their codes as monuments that will stand without change, that will be self-executing in a unified way throughout the world. This static, monumental quality is most mischievous. As times change and the law does not, codification becomes the enemy of substantive reform. In today's world, any code that does not build a process for prompt and sustained reconsideration into its structure becomes part of the problem, not part of the solution".

1968 (p. 212) idea of a New *Lex Mercatoria* which can be "unsystematic, complex and multiform, but [is] of bewildering vigour, realism and originality". The 21st century needs vigor, realism and originality, and so does international sales law in order to cruise through it.

Even though not "commercial", not "uniform" and not a "code" (BONELL, 2001)[95], a Global Commercial Code built up as "an integrated body of rules relating to the most important commercial transactions, leaving the general contract law to be supplemented by other more flexible instruments" (BONELL, 2001, p. 100) is not necessary. Judging by Professor Bonell's words the Code would be no more than a bundle of already codified law and as such, his proposal appears to advocate for a *vade mecum* rather than a code strictly speaking. While a *vade mecum* of UNCITRAL, ICC and UNIDROIT instruments could be of great help to any commercial lawyer, this is not a matter that should deserve great attention from academicians. Taken as a proposal for an innovative Code, any inspiration drawn from the UCC should be taken with a grain of salt. Taking the UCC as a model for a Global Commercial Code seems as tricky as taking the United States as a model for the world. The world is clearly way more complex, diverse and non-uniform than the United States and any analogy that takes the United States (or any other country, for that matter) as a role model for a world project has no solid basis upon which to stand.

The establishment of a Global Commercial Code in a single act capable of formalizing all international trade custom and comprise a rationally organized restatement of contract law — including its general principles — would be a piece of such intricacy and extensiveness, that it would make the whole set of WTO agreements look like a brisk haiku. We would probably have to create an international organization — or at least, a "Code Co-ordination Council" (HERRMANN, 2001, p. 35) — to look after such a Code,

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[95] Professor Bonell argues that a Global Commercial Code should not be a commercial code as opposed to a civil code; also, in his opinion, it should not be uniform because it ought to admit variation on the part of individual states when adopting it (in this sense, it would be on an equal standing with a model law — infra **4.3**); finally, he argues that the Code should not be a "code" in the strict sense that it gives the law anew, but rather "a compilation of special rules relating to the most important kinds of commercial transactions" (2001, p. 92). In a more recent article, Professor Bonell states that he subscribes to a school of thought which is also espoused by Professors Klaus Peter Berger and Roy Goode, who defend the informal approach took by UNIDROIT when designing the UPICC. Such school of thought attributes most of the success of the UPICC to their being "informal, not formalised" (i.e., not adopted by states as binding law) and even considers them to be more successful than an international convention (BONELL; LANDO, 2012, p. 21).

provide it with updates, issue interpretations and recommendations, administer its relationship with domestic and regional instruments and so forth. Since one would be creating such an organization, why not supply it with a two-tier judicial body, which would be in charge of standardizing the application and interpretation of the Code? The WTO might serve as a template. But since all this would necessarily have to be optional for the parties and ready to be contracted out of, we are talking of an expenditure that would be as immense as it would be more than difficult to justify even before the world's most commercial law-driven taxpayer.

Therefore, notice must be taken that the proposal for a renovation of the CISG is different than any proposal on the establishment of a Global Commercial Code, being even at variance with it. Part of the explanation for the CISG's success relates to its being a piecemeal instrument of limited scope and it should continue to be that way despite its need for modernization. International trade law is a movable and colorful magic square; we should be careful not to turn it into a grey, rock-hard Hammurabi idol. As for the CISG, it is a beauty; in attempting to move on with its development, every bit of awareness is called for so as not to create a beast.

3.3 RELATIONSHIP WITH OTHER NORMS OF INTERNATIONAL COMMERCE

It is clear from Articles 4 and 7(2) of the CISG that the Convention is a compromise solution between uniform — international — rules and domestic rules whose application is governed by conflict of laws. The CISG therefore embodies an intermediate model between domestic and uniform solutions. It reflects the aim and desire to uniformize the law of international sales while allowing room for the parallel (in matters not covered by its substantive scope) or subsidiary (otherwise) application of domestic rules. This has led one commentator to state that the CISG is not a "monolithic" or self-contained system,

thereby representing an "eclectic model" of international sales law sources — and that it has "non-monopolistic pretensions" (DE LY, 2005, p. 28-30)[96]. According to Filip De Ly, this eclecticism is evidenced by the fact the CISG's methodology not only admits the application of uniform as well as domestic law rules, but also self-regulation (Article 6) and state-party reservations (Articles 92-96)[97].

Apart from self-regulation and reservations, the CISG's relationship to other norms of international commerce is governed by its "gateway" provisions of Article 7(2)[98] and 9[99]. Article 7(2) states that internal gaps in the CISG must be filled with the aid of the general principles on which it is based — or of domestic law as a second (and last) resort. One may argue that the general principles on which the CISG is based are those of international trade, however the prevalent opinion is that they must be derived from the text of the CISG itself (SCHWENZER; HACHEM, 2010b, p. 139; HUBER; MULLIS, 2007, p. 35-36).

Though often times giving rise to the application of norms not deriving from the plain text of the CISG, such as the UPICC[100], Article 7(2) is not on its face intended to open the door for the application of norms of international commerce per se — except if

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[96] See also Ferrari (2005) who warns against the "oversimplification" of considering the CISG as the only source of international sales law.

[97] De Ly's idea of an eclectic model correlates to that of Basedow (2008, p. 718) according to which commercial law is a "public-private amalgam" of norms.

[98] Article 7(2) governs the gap-filling of matters covered by the Convention "but not expressly settled in it". The CISG does not assist the adjudicator in addressing matters in a legal relationship that, in and of itself, falls within its scope of application but contains matters that are, nevertheless, not governed by the Convention. No uniformity was achieved in that regard and it falls upon the adjudicator to follow conflict or autonomy rules and for the latter to yield the substantive applicable rules.

[99] "Article 9: (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

[100] On the mixed views as to the relationship of the UPICC and Article 7(2) of the CISG cf., e.g., Huber (2007, p. 35: "the use of the UPICC for gap-filling under Article 7(2) CISG is hard to justify") and Magnus (1995: "the 'Principles' are nevertheless to be considered as additional general principles in the context of the CISG") or Basedow (2000). UNCITRAL has twice (in 2007, at its 40th session, and at its 45th session in 2012) endorsed the use of the UPICC "for their intended purposes", recognizing that the UPICC "set forth a comprehensive set of rules for international commercial contracts, complementing a number of international trade law instruments, including the United Nations Sales Convention" (2012c, p. 33). The author agrees with Huber's position on this matter. Article 7(2) CISG, though it should have been, was not intended to allow for the use of external sources for gap-filling purposes. It is true that the UPICC *complement* the CISG and, to some extent, are based on it, but they are not what CISG drafters had in mind when they decided on the drafting of Article 7(2).

one considers domestic law rules as norms of international commerce[101]. This shortcoming of the Convention also derives from its incomplete historical development — as the current wording of Article 7(2) is deeply rooted in that of Article 11 of the Draft Uniform Sales Law of 1935 (MAGNUS, 1995)[102]. It is a relic which reflects a completely outdated landscape of the sources of international trade law. CISG drafters apparently did not benefit from the contributions of either the Dijon School or Clive Schmitthoff which were already in existence when the text of the CISG was put together.

In turn, Article 9[103] governs the "reception" by the Convention of usages which may be either transaction-specific[104] or contract type- and trade-specific[105]. This second kind of usage must definitely be regarded as constituting norms of international commerce (even though they may not be formalized), since they do not depend upon agreement or the course of dealing between the parties. However, it must be recognized that the provision of Article 9(2) may give rise to "difficult problems in application", such as evidentiary problems or the definition of the "particular trade concerned" (HUBER; MULLIS, 2007, p. 17).

In view of on the plain language of Articles 7(2) and 9, the CISG governs rather precariously the coordination between its own text and external sources. The Convention does not pose itself in the position of a central and coordinating source of international sales law. Rather than non-monopolistic, the present author finds the CISG fairly self-centered as far as it abdicates from a more sophisticated interaction with other norms of

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[101] Even taken as solution in its own right, the reference to the general principles on which the Convention is based deserves severe criticism. Drafters of the CISG cannot be blamed by not specifying those principles or at least giving examples of them (ANDERSEN, 2008). Yet this does not make the solution chosen an effective one. Camilla Andersen (2008, p. 17) thusly summarizes the use of general principles in Article 7(2): "[t]hey thus remain an illusion — a merely textual nod to transnational cooperation in understanding a certain unified interpretational approach. Without being understood and applied by those who use the Convention, they serve no purpose other than to make the text of Article 7 CISG seem friendly and deceptively potentially uniform".

[102] "Art. 11. If this Statute does not expressly settle a question and does not formally provide for application of a national law, the court decides in conformity with the general principles on which this Statute is based" (MAGNUS, 1995).

[103] See also Article 8(3) CISG: "In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, *usages* and any subsequent conduct of the parties" (emphasis added).

[104] That is, agreed by or established between the parties in the case of Article 9(1) CISG.

[105] Or "widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned" — as provided by Article 9(2) CISG.

international commerce. As Erik Jayme (1995, p. 259) puts it — albeit in relation to rules on the conflict of laws:

> *Les droits de l'homme, les constitutions, les conventions internationales, les systèmes nationaux : toutes ces sources ne s'excluent pas mutuellement ; elles «parlent» l'une à l'autre. Les juges sont tenus de coordonner ces sources en écoutant ce qu'elles disent.*

In international sales law, multiple international conventions[106], soft law instruments[107], regional codifications[108], flexible principles[109], model clauses[110] and contracts, recommendations[111], guidelines[112], general conditions of sale, etc., as well as innumerable domestic laws, constitute sources of an undefined, complex and eclectic nature all of which relate to the CISG given that the latter is — whether one likes it or not — the principal source of international sales law. One of the essential steps in the process of renovation of the CISG is the strengthening of its role as an international sales law centerpiece, by improving its dialogue with other norms of the same subsystem of International Law in order to produce coherence, adaptation and complementariness (AMARAL, 2008; infra **5.2** and Chapter **6**).

What role should the CISG assume in this dialogue? Let us examine three possibilities.

First, the possibility of the CISG assuming the role of *über*-norm. As the supreme norm of international trade law with constitutional status, the CISG would defeat the application of any inferior norms on sales contracts. In this hypothesis, given its international character, the CISG would turn into an overtly monopolistic norm which by

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[106] E.g., the CISG, the 1974 Convention on the Limitation Period in the International Sale of Goods (along with its 1980 Protocol), the 1986 Convention on the Law Applicable to Contracts for the International Sale of Goods, the UNECIC, the 2004 Convention on the Assignment of Receivables in International Trade, etc.

[107] Such as, notably, the UPICC and the PECL.

[108] Such as the impending Asian (HAN, 2013), African (OHADA) and European codifications (CESL). Supra **2.1.1**.

[109] Such as the Trans-Lex Principles.

[110] E.g., the International Commercial Terms (INCOTERMS), published by the ICC since 1936.

[111] E.g., the Recommendation Regarding the Interpretation of Article II (2), and Article VII (1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

[112] Such as the Uniform Customs and Practice for Documentary Credit (UCP), published by the ICC since 1933.

design would displace any other norms that do not conform to it. It is not possible to imagine that the CISG would assume such a role; this would contradict the flexible and informal nature of international trade law and of international trade as a human fact (supra Chapter **1**).

A second possibility would be for the CISG to assume a role of *primus inter pares*. That is, it would "preside" over other norms such that its application would "gently" displace other norms at the discretion of the adjudicator. This is also not a role the CISG should assume. That is because the CISG, as part of international legislation, has a supplementary character (supra **3.2**). It must be displaced by other norms, not the other way around. Its importance does not derive from any sort of hierarchic power — as its "hardness" is illusory (supra **3.2.1** and **3.2.2**) — but from its authority as a legal source.

Therefore, the role for the CISG to assume within international trade law — and especially, in international sales law — is that of a *vital cogwheel*. It should control and coordinate — but should not reign or rule. It should assign and distribute — not prescribe or ordain. One cannot try to impose the CISG on international parties by depriving it of a party autonomy provision as the latter is not of the essence of the Convention (supra **3.2.2**). The CISG's central and coordinating role must be substantiated, in the event of renovation, by endowing the new text with a veritable gateway provision (infra **5.2**). It must also be furnished with non-optional provisions that reflect not an attempt to place the CISG on a shrine of trade law sources, but merely the necessity of incorporating the development of an international or "world"[113] public policy framework which cannot simply be ignored by future drafters (infra **5.6**)[114]. Such policy goals cannot be effected by suggestive instruments such as the UPICC, given their non-binding nature. They may only be pursued by means of binding international conventions.

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[113] While analyzing the phenomenon of legal globalization as a substitution of the law of the market (*loi du marché*) for state law, Kahn (2000, p.606) considers that a world public policy is pairing with (or even replacing) previously existing international public policy: "*l'évolution de la perception de grandes risques majeurs, la compréhension qu'il existe des patrimoines dont la conservation intéresse le monde entier et non pas tel ou tel Etat, tel ou tel individu et exige un statut juridique mondial, la création d'infractions et d'espaces judiciaires mondiaux, le fonctionnement de certaines institutions internationales telles la Cnudci, Unidroit ou l''Unesco vont dans le sens d'une unification et d'une mondialisation du droit applicable aux opérations commerciales, mais aussi à celui applicable à la protection de l'intérêt général*" (see infra at **5.6**).

[114] On the lack of success of private international law in channeling public policy objectives see Loquin and Ravillon (2000): "[*l*]*e phénomène du* jus shopping *permet alors de sélectionner la loi la plus favorable au modèle juridique contractualisé dans le cadre d'une opération juridique determinée. Les parties rechercheront alors naturellement le droit de l'ordre juridique le plus « déréglementé »*" (ibid., p. 98).

4 POSSIBLE AVENUES TO A RENOVATION OF THE CISG: THE WAY FORWARD

> Each technique to unify the law has its strengths and weaknesses. The choice of one technique or another may have to do with the extent to which the subject matter is ripe for unification. It also may have to do with the nature of the organization within which the unification activity is undertaken.
>
> **Eric Bergsten** (2009)

Assuming that stakeholders (supra **1.2**) may come to a positive consensus concerning the renovation of the CISG, the question is still open on how to carry out the effort leading to such renovation.

At least four avenues present themselves: a reform in the strict sense which would be carried out by the conclusion of an amending agreement to the CISG (hereinafter, a hypothetical "Amending Protocol", or simply "Protocol") (**4.1**); the supplementation of the CISG's text by the conclusion of ad-hoc instruments dealing with matters not covered by the CISG or which need further uniform rules or clarification (**4.2**); the enactment of a Model Law on Obligations which, though discussed in the literature, does not necessarily (nor specifically) aim at the renovation of the CISG (**4.3**); and the drafting, discussion and adoption of a new Convention on the International Sale of Goods and Services, which is presented as the main result of the present inquiry — the CISGS (**4.4**).

4.1 REFORM BY AMENDING PROTOCOL

As an international treaty, the CISG's conclusion, entry into force, observance, termination, suspension and other public international law aspects are governed by the VCLT. Also regulated by the VCLT are any possible amendments and modifications to the CISG. Specifically, Part IV of the VCLT (Articles 39 to 41) governs the amendment and modification of treaties. Hence, any "reform" of the CISG — thus considered any legislative process that would result in amendment or modification — would be governed by Articles 39 to 41 VCLT.

The CISG has no provision affecting its amendment or modification. Therefore, those would depend upon the agreement of all contracting states to the CISG[1]. An amendment proposal would have to be first of all notified to all contracting states[2]. Next, each party to the CISG would have the right to participate in deciding upon the proposal as well as negotiating and concluding an Amending Protocol[3]. An amendment should not curtail the right of any potential new party to the CISG to become a party to the CISG as amended[4]. The rights and obligations of a current party that decides not to become a party to the Amending Protocol will be governed by the unamended version of the CISG[5]. Whenever the amended CISG has to be applied between a buyer and a seller of any two CISG states only one of which has become a party to the Amending Protocol, the latter will be ignored and the unamended CISG will prevail[6]. States which accede to the Convention after the Amending Protocol enters into force will be bound by the amended CISG in relation to "protocol states" — unless they express a different intention in that regard — and by the unamended CISG in relation to "non-protocol states".

These requirements will be addressed with regard to the impact on current contracting states (**4.1.1**), future "protocol states" and "non-protocol states" (**4.1.2**) and the relationship between "post-protocol" states and "pre-protocol" states (**4.1.3**).

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[1] Article 39 VCLT.
[2] Article 40(2) VCLT.
[3] Article 40(2)(a) and (b) VCLT.
[4] Article 40(3) VCLT.
[5] Article 40(4) VCLT.
[6] Article 30(4)(b) VCLT.

4.1.1 Notification and Need of Agreement by Current Contracting Parties on an Amendment Proposal

Under Article 40(2) VCLT[7], a proposal to amend the CISG must be notified to all contracting states of the Convention. According to subparagraph (a) of the same provision, all contracting states shall have the right to take part in a decision whether or not to proceed with such proposal. This means all 81 current contracting states to the CISG would have to agree on proceeding with an amendment proposal to begin with. The difficulty convincing all such stakeholders need not be pointed out. Eighteen states have acceded to the CISG in the last 10 years[8] and most likely, some of them will not be ready to discuss a potential Amending Protocol as they should have recently concluded laborious procedures to accede to the Convention. Plus, courts located in those countries have probably barely started applying the Convention to cases falling under their competence; their law schools may have barely started teaching the Convention to students; practitioners will still be unfamiliar with the Convention's 1980 text; and so on. But this does not mean "older" contracting parties would be willing to automatically embark on one such proposal either. They may be content with the results achieved by the CISG or afraid of potentially diminishing its success. All told, one may expect that great strides must have to be taken in fulfillment of Article 40(2) VCLT to cajole either approval or indifference from all CISG parties to date in respect of an amendment proposal.

Hence, the process of amending the CISG would have to deal with a very cumbersome stumbling block which lays right at its precise outset. Prospects are hardly encouraging that it could start out as a humble initiative and gain momentum little by little. Because of the fashion the VCLT governs the amendment and modification of treaties, all CISG contracting states would become stakeholders in an amendment process and are placed immediately in a position to decide upon it before it even starts. They add to the

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[7] "Article 40. AMENDMENT OF MULTILATERAL TREATIES: [...] 2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in: (a) The decision as 10 the action to be taken in regard to such proposal; (b) The negotiation and conclusion of any agreement for the amendment of the treaty [...]."

[8] In chronological order, Republic of Korea, Gabon, Cyprus, Liberia, Paraguay, Montenegro, Macedonia, El Salvador, Japan, Lebanon, Armenia, Albania, Dominican Republic, Turkey, Benin, San Marino, Brazil, Bahrein and Congo (UNCITRAL, 2014b).

stakeholders previously identified in this thesis at **1.2** and this in turn adds to the complexity of the renovation process as defended in the present thesis — which is in the form of a new convention.

In contradistinction, decisions at UNCITRAL (such as one regarding a proposal to work on a new Convention on the International Sale of Goods and Services) are reached by consensus which according to UNCITRAL's rules of procedure and methods of work corresponds to "adoption of a decision without formal objection and vote" (UNCITRAL, 2008, p. 5). Failing consensus, majority vote may be taken (UNCITRAL, 2008). Moreover, the Commission's membership is outnumbered by the amount of CISG member states by 21 (60 against 81). UNCITRAL member states have already been factored in as stakeholders in the present thesis for the purposes of the CISG's renovation according to the list of stakeholders laid out supra at **1.2**.

4.1.2 Separation of CISG Parties into "Protocol States" and "Non-protocol States"

The conclusion of an additional protocol amending the CISG might provoke a split between CISG parties into "protocol states" and "non-protocol states". Not all CISG parties need ratify, or accede to, the Amending Protocol. In light of Article 40(4) VCLT[9], the Amending Protocol is not automatically binding on any state which is already a party to the CISG as at the moment when the Amending Protocol enters into force. Those states that are parties to the CISG upon entry into force of the Amending Protocol and decide to adopt the Protocol would then be "protocol states"; those that would refrain from doing so would turn into "non-protocol states".

[9] "Article 40. AMENDMENT OF MULTILATERAL TREATIES: [...] 4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(6), applies in relation to such State [...]"

This would cause the current split between CISG states and non-CISG states to acquire a new layer. There would be: 1) non-CISG states; 2) protocol CISG states; and 3) non-protocol CISG states. For instance, the United Kingdom is not a party to the CISG. Let us assume that China, for the sake of argument, would not adopt the Amending Protocol, and that Italy and Brazil would. Hence, an Italian seller doing business with China and the UK would have to be prepared to handle sales transactions under domestic law with UK buyers; under the unamended version of the CISG with Chinese buyers; and under the amended version of the CISG with Brazilian buyers. This would be a hindrance to uniformity and would add to the complexity of the sources of international sales law.

Unlike the case of an Amending Protocol, the drafters of a new convention would have the option to terminate the effects of the CISG upon entry into force of the new instrument (see infra at **4.2.3** for the use of this approach in practice). Such an alternative would push parties to the old CISG into ratifying the new convention, lest they would cease to benefit from uniformity of rules. This alternative may seem radical at first, but in the opinion of the present author it should be carefully considered.

4.1.3 Newly acceding parties in Relation to "Pre-protocol States"

As for newly acceding parties to the CISG, they would under Article 40(5) VCLT[10] have the right to express an intention not to be bound by the Amending Protocol. Failing such an expression they would be bound by the Amending Protocol. Hence, they would have the right to choose between becoming a protocol state or a non-protocol state. If they decide to enter into the CISG family by becoming a protocol state, their relationship with protocol states will be governed by the CISG as modified by the Amending Protocol,

[10] "Article 40. AMENDMENT OF MULTILATERAL TREATIES: [...] 5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State: (a) be considered as a party to the treaty as amended; and (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement [...]."

whereas their relationship with states not bound by the Amending Protocol will be governed by the unamended version of the CISG.

This may have a negative effect on the accession of new parties to the CISG. It is recognized that many states suffer from a lack of resources that potentially hinders their ability to consider accession to international treaties. In the case of the CISG due consideration is assumedly given to the acceding state's main commercial parties and their CISG status. Suppose A is state which has not acceded to the CISG. In considering accession, A will check the CISG status of its main commercial partners, say states B and C. Let us suppose that B is a protocol state and that C is a non-protocol state. This will throw A in a deadlock because the benefits of uniformity it seeks by its accession to the CISG will come either with B or C, but not both. Eventually, this may cause A to refrain from acceding at all to the CISG. This may limit the number of new CISG accessions.

However one argues that such a problem could be of reduced importance as more and more states become parties to the CISG, two additional factors must be considered. The same problem exists in relation to ratification of, or accession to, the Amending Protocol. Suppose A, B and C are relevant trade partners which are also parties to the CISG. Let us assume that C has become a protocol state by ratifying the Amending Protocol. Suppose A is considering accession to the Amending Protocol and B has declared that it will not do so[11]. Let us assume A has a more relevant trade current with B than with C. Then A will be discouraged to accede to the Amending Protocol as it will be more interested in benefitting from legal uniformity along the A-B current than along the A-C current. In the end, out of these three hypothetical states only one will become a protocol state. This may limit the number of CISG states which accede to the Amending Protocol — in other words, the number of protocol states. As a consequence, it will lessen the impact of the Amending Protocol itself[12].

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[11] This may happen regardless of the role each state has played in the negotiation of the Amending Protocol. The United Kingdom, for instance, has been an active participant in the Vienna Conference of 1980 but has never become a party to the CISG. Hence, in the example, A may have been an active participant in the negotiation and drafting of the amending protocol and still remain a non-protocol state, since its interest in becoming a protocol state or not will be driven by its commercial flow with relevant partners rather than the role it has assumed in the negotiating process.

[12] A split between protocol parties and non-protocol parties has occurred in association with the United Nations Convention on the Limitation Period in the International Sale of Goods of 1974 (hereinafter,

Of course one could argue that all the added complexity associated with the Amending Protocol could still be worth the effort. This might be argued, inter alia, on some or all of the following grounds:

1) That the Amending Protocol would provide a set of modernized and updated norms for the international sale of goods;

2) That the same process of natural accommodation that has led states to adopt the CISG will eventually lead states to accede to the Amending Protocol;

3) That no matter how many states actually become protocol states, courts and arbitral tribunals will still take the Amending Protocol into consideration either as persuasive authority or interpretive guideline.

There is nothing in the above argument, however, that could not be argued in relation to a new Convention on the International Sale of Goods and Services. If an

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"Limitation Convention") and its 1980 Protocol. A quite intricate amount of information is required in order to deal with this split. UNCITRAL's website (2014a) thus accommodates the relevant aspects of the relationship between protocol parties, non-protocol parties and newly acceding parties, in accordance with the relevant provisions of the 1980 Protocol and of the VCLT:

"**Parties (as amended by the Protocol of 11 April 1980): 22**
Parties (unamended): 29

The text of the Convention, as amended, has been established by the Secretary-General, as provided for by article XIV of the Protocol.

In accordance with its article VIII, paragraph 1, the Protocol is open for accession by all States.

In accordance with article VIII, paragraph 2, of the Protocol, accession to the Protocol by any State that is not a Contracting Party to the unamended Convention shall have the effect of accession to the amended Convention, subject to the provisions of article XI of the Protocol.

In accordance with article X of the Protocol, ratification of or accession to the unamended Convention after the entry into force of the Protocol shall also constitute a ratification of or accession to the amended Convention if the State notifies the depositary accordingly.

In accordance with article XI of the Protocol, the Contracting Parties to the amended Convention are considered to be also Contracting Parties to the unamended Convention in relation to any Contracting Party to the unamended Convention not yet a Contracting Party to the 1980 Protocol, unless the depositary is notified to the contrary".

Bergsten (2009, p. 13) is of the opinion that instead of adopting the 1980 Protocol, it would have been better if "the re-drafting of the relevant provisions [of the Limitation Convention] had taken place in the context of joining the provisions on the limitation period to the CISG as a separate Part, as the provisions on formation of the contract had been". The experience with the Limitation Convention and its 1980 Protocol should be seen as a precedent to a possible amendment of the CISG via an Amending Protocol and, as such, it points in the direction of setting aside that avenue for renovating the CISG.

Amending Protocol would be so innovative as to provide a set of new and updated rules, a new convention could be even more innovative. If the Amending Protocol would have to correct the problems discussed supra at **2.2.1** in relation to formation of the contract; and those discussed supra at **2.2.2** in relation to the obligations of the parties; or at least either of them, it would have to be so substantial that it would in actuality amount to a new convention — or at least, a partial new convention. Say the Amending Protocol would instead make cosmetic changes to the unamended CISG in order to update it in conformity with CISG jurisprudence that has held sway over the years. Then the Amending Protocol would not be justified because CISG jurisprudence is already widely accessible (e.g., by means of the UNCITRAL Digest[13] or a number of CISG databases[14]) and can already be taken as persuasive authority and interpretive guideline by parties, courts and arbitrators. From a practical point of view, the resources expended in preparing and enacting the Amending Protocol as well as the added complexity it would bring as discussed above would hardly pay off in this scenario — at least, not in the face of a possibility to draw up an entirely new convention without having to abide by the challenging amending process established by the VCLT.

4.2 SUPPLEMENTATION BY OTHER INSTRUMENTS ON AD-HOC SUBJECTS

A second avenue for the renovation of the CISG in the sense defended in the present thesis would be the adoption of additional instruments covering ad hoc subjects which would supplement the CISG. One such instrument already exists and may be studied in its effects and relationship to the CISG: the UNECIC (**4.2.1**). A comparison with framework and umbrella agreements (**4.2.2**) as well as with the Warsaw regime (**4.2.3**),

[13] The UNCITRAL Digest is an UNCITRAL publication which aims at monitoring judicial and arbitral decision on the CISG and reporting on them, thereby encouraging uniform application of the CISG (UNCITRAL, 2012b).

[14] Of which the most outstanding is the Pace "Albert H. Kritzer" Database (URL: http://cisg.law.pace.edu).

which was built around the Warsaw Convention of 1929, arises naturally from the study of the amending and supplementing approach.

4.2.1 The UNECIC as a Supplementing Text to the CISG

The UNECIC resulted from the same concerns that gave rise to the UNCITRAL Model Law on Electronic Commerce (1996) and the UNCITRAL Model Law on Electronic Signatures (2001). However, while those model laws were aimed at harmonizing domestic law in order to face the rising challenges of electronic commerce, the UNECIC aims at providing uniform rules at the international level "for legal issues emanating from the use of electronic methods of communication in international contracts" (EISELEN, 2008, p. 111).

Work on the UNECIC actually started in 2001 on the assumption that a new convention ought to be preferred to other forms such as a model law, a recommendation or the amendment of existing treaties. "It was further assumed that such a convention should not interfere with the well established regime of the CISG or with the law of contract formation in general" (EISELEN, 2008, p. 110)[15]. According to Article 20 UNECIC[16], its

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[15] According to Gabriel (2013, p. 665), though originally intended to amend the CISG, the UNECIC "quickly morphed into a free-standing instrument because of the fear of reopening the CISG" due to the possibility of "two competing instruments instruments—an original and a revised CISG". See infra at **4.5.5**.

Notably, the UNCITRAL Model Law on International Commercial Arbitration also resulted from a proposal by the Asian-African Legal Consultative Committee (AALCC) to amend the New York Convention. Upon refusing to give effect to such proposal, UNCITRAL pointed out that the problems identified (such as the fact that the New York Convention does not regulate certain issues such as the law governing the validity of an arbitration agreement) were not of such magnitude as to warrant revision of the text. Moreover (UNCITRAL, 1979, p. 108): "[i]n the light of the more than 100 reported decisions on the 1958 Convention, one cannot but conclude that this Convention has satisfactorily met the general purpose for which it was adopted and that, for that reason, it would, at least at this juncture, be inadvisable to amend its provisions. Notwithstanding this, other steps designed to eliminate certain problem areas could well be taken which, if successful, would facilitate the application of the Convention".

[16] "Article 20. Communications exchanged under other international conventions: 1. The provisions of this Convention apply to the use of electronic communications in connection with the formation or performance of a contract to which any of the following international conventions, to which a Contracting State to this Convention is or may become a Contracting State, apply:

provisions do not apply to the international sale of goods alone. They also apply to other kinds of international contracts which are formed or whose performance is carried out with the aid of electronic communications (although all those contracts are, in principle, related to the international sale of goods[17]).

Hence, the UNECIC is not intended to supplement *only* the CISG. However, it is debatable whether it would have gathered the same consideration and interest were it not for the fact that it is closely related to the CISG's provisions on contract formation. One may safely assume that the formation of international sales contracts was one of the main issues — if not *the* main issue — UNECIC drafters had in mind[18]. For purposes of the present analysis it will be assumed that the UNECIC is designed essentially as a

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Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958);

Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) and Protocol thereto (Vienna, 11 April 1980);

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980);

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 19 April 1991);

United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 11 December 1995);

United Nations Convention on the Assignment of Receivables in International Trade (New York, 12 December 2001).

2. The provisions of this Convention apply further to electronic communications in connection with the formation or performance of a contract to which another international convention, treaty or agreement not specifically referred to in paragraph 1 of this article, and to which a Contracting State to this Convention is or may become a Contracting State, applies, unless the State has declared, in accordance with article 21, that it will not be bound by this paragraph. 3. A State that makes a declaration pursuant to paragraph 2 of this article may also declare that it will nevertheless apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of any contract to which a specified international convention, treaty or agreement applies to which the State is or may become a Contracting State. 4. Any State may declare that it will not apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of a contract to which any international convention, treaty or agreement specified in that State's declaration, to which the State is or may become a Contracting State, applies, including any of the conventions referred to in paragraph 1 of this article, even if such State has not excluded the application of paragraph 2 of this article by a declaration made in accordance with article 21."

[17] Notably, in the case of an arbitration agreement (UNECIC, Article 20, mention to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards) the relationship to a sales contract is not necessarily implied.

[18] See, inter alia, UNCITRAL (2000, p. 2): "[a]t its thirty-third session, the Commission held a preliminary exchange of views regarding future work in the field of electronic commerce. Three topics were suggested as indicating possible areas where work by the Commission would be desirable and feasible. The first dealt with electronic contracting, considered from the perspective of the United Nations Sales Convention [i.e., the CISG], which was generally felt to constitute a readily acceptable framework for in-line contracts dealing with the sale of goods."

supplemental instrument to the CISG, with potential ancillary benefits for other kinds of contracts.

As the treaty of treaties, the VCLT governs the relationship between the CISG and the UNECIC as well as any conflicts between the two. Specifically, under Article 30 VCLT[19], insofar as two treaties relating to the same subject-matter are in conflict, one of two situations may arise: 1) the provisions of the earlier treaty (i.e., the CISG) prevail if the later treaty (i.e., the UNECIC) provides that it is either "subject to" or "not to be considered as incompatible with" the earlier treaty; 2) the provisions of the later treaty (i.e., the UNECIC) prevail and those of the earlier treaty (i.e., the CISG) only apply to the extent they are compatible with those of the later treaty. The UNECIC has no provision stating that it is subject to or not to be considered incompatible with the CISG. Article 20 UNECIC refers to the CISG only with the aim of defining the UNECIC's scope of application. Therefore, as both conventions deal with the same subject-matter — namely, the formation of contracts —, the UNECIC derogates the CISG as between states which are parties to both conventions whenever their texts come to be in conflict[20].

As an example, under the VCLT, Article 8(1) UNECIC[21] derogates Article 4(1) CISG in relation to the validity of a contract of sale. Article 8(1) UNECIC deals with the validity of a contract concluded by means of electronic communication, by providing that a contract "shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication". The assumption of Article 4(1) CISG that the CISG

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[19] "Article 30. APPLICATION OF SUCCESSIVE TREATIES RELATING TO THE SAME SUBJECT-MATTER: 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs. 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. 4. When the parties to the later treaty do not include all the parties to the earlier one: (a) As between States parties to both treaties the same rule applies as in paragraph 3; (b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations. 5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty."

[20] Article 30(4)(a) VCLT.

[21] "Article 8. Legal recognition of electronic communications: 1. A communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication [...]."

"is not concerned" with the validity of the contract is thus incompatible with Article 8(1) UNECIC. Therefore, an argument that a provision of a sales contract is subject to domestic restrictions on validity because the CISG excludes validity from its scope of application[22] may be affected or even fall apart wherever the sale involves parties from states in regard to which both the CISG and the UNECIC are in force.

4.2.2 Comparison with Framework and Umbrella Agreements

Such kind of enmeshing between instruments dealing with the same subject-matter requires careful and logical coordination. If there is no intention that a later treaty derogates an earlier one (under Article 30(3) VCLT), then the earlier treaty must be unequivocally confirmed as a framework or umbrella agreement. Framework and umbrella agreements[23] lay down a basic set of rules for continued cooperation on specific topics and are deliberately intended to be supplemented by sub-agreements (such as protocols or complementary agreements) dealing with topical issues falling under the remit of the main agreement. They form part of a process of international cooperation on sensitive matters such as the conservation of biodiversity[24], climate change[25] or the law of the sea[26]. This

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[22] E.g., a clause on the limitation of the seller's liability, whose validity as a disclaimer from the implied obligations of Article 35(2) "is an issue which lies outside the CISG; and since the Convention is simply 'not concerned with' the validity of the contract or of any of its provisions, the validity of a disclaimer must be settled in accordance with the applicable *domestic* law" (LOOKOFSKY, 2000, p. 97).

[23] While framework agreements are intended as the starting point of a new regime, umbrella agreements aim at absorbing or superseding an existing regime. "While both umbrella and framework conventions lay the ground for future agreements (proactive), only the former has a legal impact on previous agreements (retroactive)" (MCGRAW, 2002, p. 19).

[24] The United Nations Convention on Biological Diversity (hereinafter, "CBD") is a framework agreement as it creates an institutional structure for cooperation and implementation, while providing for its own development through the negotiation of ancillary instruments (annexes and protocols) and building on previously existing treaties without absorbing them (MCGRAW, 2002).

[25] The United Nations Framework Convention on Climate Change (hereinafter, "FCCC") and the Kyoto Protocol are the two core treaties of the international climate change regime. Both the CBD and the FCCC provide for their own flexibility and adaptability. They establish a body known as the Conference of the Parties (COP) which has broad discretion to adopt protocols, annexes and amendments to the original texts (Article 23 CBD; Articles 15-17 FCCC). Several other international agreements, such as the Convention for the Protection of Literary and Artistic Works of 1886 (Articles 26 and 27) and the Antarctic Treaty of 1959 (Article XII) also provide for their amendment and periodic revision. See David (1987, p. 92

kind of process begins with broad declarations of principles[27] and gradually develops into the conclusion of binding international agreements. As Alexandre Kiss explains (1976, p. 27):

> [...] once the fundamental principles of a new field are proclaimed, even in a non-binding form, the evolution can take different directions, either to the drafting of a general Convention which transforms all, or a great many, of the principles into mandatory norms, or to the conclusion of treaties which develop and implement single principles, or, lastly, to the drafting of regional treaties dealing with either general or special matters. [...] The most logical pattern of evolution would be the conclusion, first of a general Convention, then of regional treaties and, finally, of agreements concerning specific problems either in a universal or in a regional framework.

As it is plain to see, this is not the case of the CISG. First, there is no sensitive matter at play for states so far as the international sale of goods is concerned — at least, not as sensitive as in other areas. States do not commit themselves either hardly or softly vis-à-vis other states by means of an agreement such as the CISG[28]. They do not undertake to invest resources[29] or refrain from the pursuit of certain goals or activities. They are not stopped from approaching certain territorial areas or exploiting certain resources or reshaping their monetary policies so may they wish. They are at most interested in avoiding overprotection of either buyer or seller in international trade — depending upon the fact that they are mainly exporters or importers of goods. They may be interested in seeing to the fact that their jurists are being heard and that the instrument will be optional for their internationally active enterprises, but there is little more to it than this. Even if objectives of the international community such as sustainable development come to be incorporated into the CISG in the event of its renovation (infra **5.6**), those will be treated as ready-made and will not be innovations of the international sales law regime capable of affecting other areas of International Law.

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et seq.) for comments on the revision of instruments adopted by the International Labor Organization as well as other organizations.

[26] The United Nations Convention on the Law of the Sea (UNCLOS) is the example of an umbrella convention as it has legal ramifications for pre-existing agreements (MCGRAW, 2002).

[27] Such as, e.g., the Declarations of Stockholm (1972), Rio (1992) and Rio+20 (2012).

[28] Except, of course, as far as the application of the CISG by state courts is concerned.

[29] *Au contraire*, "[o]ne of the advantages of UNCITRAL texts is that they do not have direct financial implications for contracting states" (SORIEUL; HATCHER; EMERY, 2013, p. 506).

Secondly, international sales is not a complex issue-area as others subject to progressive codification and continued cooperation. Stakeholder typology is rather straightforward (supra **1.2**) and there is no major appeal regarding the outcome of the cooperation process — which exerts no pull on the media or the general public. Sales are not exactly an eye-catcher for the headlines. It is hardly as appealing a theme for media coverage as climate change. The negotiation of a convention like the CISG does not place states in a fragile position within their own territory in dealing with internal pressures either in favor or against this or that solution. The present author himself[30] had to deal with media professionals in order to explain how Brazil's accession to the CISG could affect Brazil's industrial outcome. They not only had a hard time understanding the matter despite any efforts to simplify it or make it attractive or economically meaningful, they also did not think it much relevant. Long interviews have often resulted in insipid, brief notes in specialized media. Major news vehicles never showed any interest in it.

Thirdly, the difficulties securing agreement on the law of international sales do not accrue from state hypersensitivity to the issue but from the fact that it comes across as a rather specialized topic and is likely to be seen by many states as an overly technical issue. As there is no way of determining the impact of the uniform law on the economic performance of international trade (WAGNER, 2011; supra **2.1.1**), states will not decide on such matters based on objective, tenable data, but on the opinion of the scholarly community and commercial parties under its jurisdiction. As states rely upon experts to conduct the negotiation, difficulties are ultimately not due to irreconcilability of state interest but of expert opinion.

Fourthly, while not as stable as some may imagine, international sales law is not as unstable and chaotic as environmental law. Environmental instruments such as the CBD and the FCCC require consistent monitoring and evaluation. A myriad of bodies and people are engaged both in their national and international implementation. Such instruments require constant review and updating and need to keep up with data from the real world about the state of the environment. The CISG needs nothing of the sort. Let alone the proposal for the creation of a Global Commercial Code subject to a Code

[30] As the Editor-in-Chief of the CISG Brazil website, the author had the opportunity to personally participate in the efforts that led to Brazil's accession to the CISG.

Coordination Council (supra **3.2.3**), international sales law will subsist as a complex array of norms of undefined and eclectic nature not subject to the rigors of hierarchy and umbrella coordination that characterize other areas of International Law. It is an essentially spontaneous field as far as norm-generation is concerned, though in need of better coordination of sources by means of improved mechanisms that go beyond Articles 7(2) and 9 CISG (supra **3.3**).

4.2.3 Comparison with the Warsaw Regime

The case of the CISG may nevertheless be compared to that of the Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929 (hereinafter, the "Warsaw Convention") and its system of amending and supplementing agreements (hereinafter, taken in conjunction with the Warsaw Convention, the "Warsaw system"). The Warsaw Convention was amended or supplemented on at least four occasions: 1) with the Hague Protocol of 1955; 2) with the Guadalajara Supplementary Convention of 1961; 3) with the Guatemala City Protocol of 1971 and 4) with the Montreal Protocols (1 to 4) of 1975. Because several parallel agreements and court decisions emerged which were at odds with the Warsaw system[31], the Warsaw system eventually failed to meet the standards of the air industry despite the decades-long effort of updating and supplementing the Warsaw Convention.

The weakening of the Warsaw system due to the emergence of parallel agreements entered into by Warsaw parties led the International Civil Aviation Organization (hereinafter, the "ICAO") to consider alternatives to the reform, including the substitution, of the Warsaw system. Alternatives considered by the ICAO comprised: 1) the coexistence of the Warsaw system with parallel agreements forming a "patchwork" of normative

[31] Such parallel agreements purported to deviate from the provisions of the Warsaw system by varying the limits for air carrier liability or the conditions for air carrier license in relation to the provisions of the Warsaw system (DE LEON; EYSKENS, 2000-2001).

arrangements; 2) a limited reform of the Warsaw system by yet another additional protocol; 3) the deregulation of the aviation industry at the international level leaving such a mandate for domestic law and private arrangements (DE LEON; EYSKENS, 2000-2001).

Based on the modifications required in order to acceptably modernize the Warsaw system, an ICAO Study Group concluded in 1997 that drafting a new convention altogether would be preferable to the adoption of further amending agreements and called for action to be commenced without delay. A draft new convention was prepared following which a diplomatic conference was convened by ICAO to take place in 1999 in Montreal. The diplomatic conference adopted the Convention for the Unification of Certain Rules for International Carriage by Air (1999; hereinafter, the "Montreal Convention"). The Montreal Convention "preserves the structure of the Warsaw Convention while consolidating the provisions of existing legal instruments" (BATRA, 1999-2000, p. 437). Its Article 55[32] governs its relationship with the Warsaw system and essentially derogates the latter entirely. The Montreal Convention entered into force on 4 November 2003 and has been adopted by 107 states as at the time of writing.

The history of the Warsaw system and its superseding by the Montreal Convention demonstrates that amending or supplementing an international convention which deals with rather a specific topic of private law (in this case, air carrier liability) may lead to its being "developed haphazardly" (IATA, 2014). Between 1929 and 1999, states tried to

[32] "Article 55 — Relationship with other Warsaw Convention instruments: This Convention shall prevail over any rules which apply to international carriage by air: 1. between States Parties to this Convention by virtue of those States commonly being Party to (a) the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 (hereinafter called the Warsaw Convention); (b) the Protocol to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929, done at The Hague on 28 September 1955 (hereinafter called The Hague Protocol); (c) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, signed at Guadalajara on 18 September 1961 (hereinafter called the Guadalajara Convention); (d) the Protocol to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955, signed at Guatemala City on 8 March 1971 (hereinafter called the Guatemala City Protocol); (e) Additional Protocol Nos. 1 to 3 and Montreal Protocol No. 4 to amend the Warsaw Convention as amended by The Hague Protocol or the Warsaw Convention as amended by both The Hague Protocol and the Guatemala City Protocol, signed at Montreal on 25 September 1975 (hereinafter called the Montreal Protocols); or 2. within the territory of any single State Party to this Convention by virtue of that State being Party to one or more of the instruments referred to in sub-paragraphs (a) to (e) above."

reform the Warsaw Convention by creating a system of additional instruments which gave rise to a patchwork of rules and provoked fragmentation. This proved ineffective as a means to update the Warsaw Convention as states — as well as air carriers — deviated from such patchwork by entering into parallel arrangements. The Montreal Convention is the "eagerly anticipated single convention" (DE LEON; EYSKENS, 2000-2001, p. 1159) that eventually replaced the fragmented Warsaw system and re-established its unity. One wonders whether it would not have been wiser for stakeholders of the air carrier liability regime to face the challenge of enacting a new convention in lieu of even starting to produce amendments and supplementing instruments.

An analogy with the international sales regime inevitably arises. Updating the CISG by means of amending agreements or supplementary instruments is likely to raise the same challenges that have affected the Warsaw regime. The Warsaw Convention, much like the CISG, was intended to be a standalone convention at the center of a system involving other public and private norms dealing with air carrier liability. One such central and coordinating norm must be a solid instrument with a flexible content. It must be able to stand on its own and have invulnerable unity and logical consistency. Amending agreements and supplemental instruments will unavoidably undermine the unity and solidness of the CISG. Such an approach to updating ineluctably introduces fragmentation and uncertainty, and is more likely than not to drive both state and commercial parties away from the Convention.

Eventually, amendments and supplementations will give rise to disruption and a situation where a new single convention will be "eagerly anticipated" to replace the muddle of fragmented pieces into which the CISG would turn. If that is so, then why not start right away with a new single convention? The CISG is not (nor was the Warsaw regime) anything like environmental regimes (supra **4.2.2**) that demand an intricate lattice of publicly-created rules and institutions to put up with the challenges raised by their complex governance structure. One can only imagine what would have happened (and what resources could have been wasted) if instead of drafting a new convention (which eventually yielded the text of the CISG), UNCITRAL had decided to amend the Hague Laws in an attempt to revert their hopeless fate (supra at **2.1.2**).

4.3 MODEL LAW ON OBLIGATIONS

Squeezed between the proposal for a Global Commercial Code (LANDO, 2010) and the similar proposal for an International Convention on International Commercial Contracts (RAMBERG, 2013) lies the proposal for a Model Law on Obligations.

As analyzed supra at **3.2.3**, Lando's (2010, p. 94) proposal concerns "an instrument binding on the courts, like the CISG". He enumerates the issues such a Code would cover, in respect of all international contracts: 1) fundamental principles; 2) pre-contractual negotiations; 3) formation of the contract, conclusion and form; 4) invalidity and illegality; 5) interpretation of contracts and terms implied in fact or in law; 5) non-performance (breach) and remedies and 6) effects of supervening events[33]. Not surprisingly[34], it is a program much like that of the UPICC or of the PECL. In fact, his proposal predicates on the assumption that the UPICC "can hardly remain soft law" and must be lifted "from their present status [i.e., of soft law] to rules of law that are binding upon the courts", thereby becoming a part of the Global Commercial Code (2010, p. 95).

Professor Jan Ramberg's (2013, p. 690) proposal advocates an international convention which is able "to unify and consolidate at least the fundamental principles on a global level"[35]. He does not explain with exactness what would be the scope of such a convention. It could be that his proposal overlaps with that of Professor Lando, for one might as well include all items in Professor Lando's enumeration under the label of

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[33] In another article, Professor Lando (BONELL; LANDO, 2012, p. 28) offers his view as to the subject-matters falling under the Code: "[t]he Code should provide rules on contracts in general and on specific contracts such as the sale of goods, leasing, factoring, commercial agency, distributorship, franchising, and services. Services have a growing role in international trade and should be a important part of the Code". He considers the Code as "only a further development of the existing CISG" (ibid., loc. cit.) and thinks the Swiss Proposal to be "less ambitious than the plan for a World Code" (ibid., p. 30). He believes however the Swiss Proposal "shows that the idea of a World Code is not so far from reality as many may think". Based on the range of issues and contractual types which Professor Lando feels as falling under the scope of the Code, the author believes his proposal — apart from unnecessary as discussed supra at **3.2.3** — is unfeasible and hence, quite far from reality.

[34] As Professor Lando not only had a prominent role in the drafting of the UPICC but was also the *spiritus rector* of the PECL, which in his honor are also known as the Lando Principles (BONELL; LANDO, 2012).

[35] His approach is very similar to that of Schwenzer (2013a, p. 728), who pleads for an international convention much like the CISG, "except that it should apply to all kinds of contracts and not just to sales". In Professor Schwenzer's view, such an instrument would restrict itself to B2C contracts and should start by addressing the gaps left by the CISG (ibid.).

"fundamental principles". Professor Ramberg bases his proposal on advances brought about by the CISG to the field of international contract law. By taking into consideration the divergent approaches of the CISG and the UPICC to a range of issues, he ultimately defends that the International Convention on International Commercial Contracts should be based on the UPICC (RAMBERG, 2013)[36].

The proposal for a Model Law on Obligations stems from a 2007 article by Professor Michael Joachim Bonell. He proposed a multi-tiered process for the promotion of the UPICC as an effective choice of law for parties in international trade: 1) formal endorsement of the UPICC by UNCITRAL and 2) recommendation by UNCITRAL that the UPICC be used as a means to interpret and supplement the CISG (supra at **3.3.**); 3) formal recognition of the parties' right to choose the UPICC as governing law of the contract[37] and finally, 4) adoption of the UPICC as a model law.

Professor Bonell (2007, p. 244) bases his proposal on the assumption that "the conversion of the UNIDROIT Principles into a binding instrument in the form of an international convention is not a realistic and perhaps not even a desirable objective"[38]. He considers that the involvement of states in preparing a model law that corresponds to the

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[36] As such, it would also govern the sale of goods and therefore, supersede the CISG. Given the number and scope of compromises that would have to be reached in order to put such an international convention in place, its feasibility and distance from reality seem pretty much similar to those of the Global Commercial Code. Gabriel nevertheless believes "that the benefits of a binding convention justify the new project" (2013, p. 679). He himself acknowledges however that many subject-matters involved would not lend themselves to easy agreement and that UNCITRAL working methods may not suit the broader scope of the convention proposed.

[37] In this connection, Professor Bonell (2007, p. 241) himself recognizes that domestic law (among which certainly Brazilian law) plays an important part in limiting parties' ability to freely choose the UPICC as governing law: "[o]nly in the context of international commercial arbitration are parties nowadays permitted to choose a soft law instrument such as the UNIDROIT Principles as the law governing their contract in lieu of a particular domestic law". Solving this issue would require further improving the norms on choice of law at the international level. The Draft Hague Principles on Choice of Law in International Commercial Contracts, a non-binding set of principles which may roughly be considered as a counterpart to the UPICC, address this issue in its Article 3, which reads (HCCH, 2014, p. x):

> "Article 3 – Rules of law
> The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise."

[38] Gabriel (2013, p. 666) lays down a similar opinion: "[...] both the working methods of UNIDROIT, as well as the differences between the soft law nature of the UNIDROIT Principles and the binding nature of the CISG as a convention, do not allow for an easy adaptation in convention form of all of the areas covered in the UNIDROIT Principles".

UPICC would enhance the authority of the UPICC as a non-binding instrument. He also believes that the Global Commercial Code ought to be enacted in the form of a model law and that the UPICC should constitute the general part (i.e., the part dealing with fundamental principles of contract law as opposed to specific contract types) of such a model law. He suggests that the Code should do this by referring to the UPICC as governing the general theory of contract (BONELL, 2007).

While favoring the adoption of an International Convention on International Commercial Contracts[39], Pilar Perales Viscasillas (2013, p. 737) is of the opinion that the need for converting the UPICC into a Model Law on Obligations is "unconvincing". She points out that the UPICC already are a "'model law' available for the states" and additionally that a model law would suffer from a high degree of uncertainty in its application (VISCASILLAS, 2013, p. 737). Professor Viscasillas' stance may be the same behind expressed concerns on the implementation of the Swiss Proposal "regarding possible duplication of effort with respect to the work of Unidroit"[40] (UNCITRAL, 2012c, p. 32). [41]

Such a Model Law would be nothing more than the endorsement already given by UNCITRAL to the UPICC, except in a more formal outfit. It could even amount to the nullification of UNIDROIT's efforts in building the UPICC as UNIDROIT would lose every authority it currently has on them[42] upon "assigning" them to the custody of UNCITRAL. It is hereby suggested that UNIDROIT itself drafts and adopts a Model Law on Obligations by taking the UPICC as a starting point.

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[39] Professor Viscasillas (2013, p. 738) also suggests a "Plan B", which according to her would be the adoption of an international convention on international distribution contracts.

[40] Thus: "[t]hat the convention would be binding where the UNIDROIT Principles are not does not suggest a need for the project. Moreover, even with a binding convention, there is the question of whether parties would routinely opt out of its application, or whether countries would even see the need to ratify the convention in the first place" (GABRIEL, 2013, p. 666).

[41] In addition to the above proposals, Professor Jan Smits (2011, p. 52) has suggested the "drafting [of] an optional contract code that parties can choose if they find this code suits their interests best. Such an optional code would allow harmonization to take place from the bottom-up. Unlike the CISG, it could contain rules about different types of commercial contracts and even allow a choice between different sets of rules for these contracts". On the adoption of an optional code for intra-European trade (the CESL), see supra at **2.1.1**.

[42] Which entitles UNIDROIT, inter alia, to reform the UPICC whenever it finds it suitable, by using its working methods which diverge from those of UNCITRAL. See Gabriel (2013) for a comparison between UNIDROIT and UNCITRAL working methods.

As for the relationship between the proposed Model Law on Obligations and the renovation of the CISG, it must be said that they are not mutually exclusive[43]. First, because the scope of the Model Law on Obligations is considerably different than that of the CISG. The CISG is an instrument dealing exclusively with international sales contracts which contains a few provisions that can be extended to other contract types. It only touches upon the general theory of obligations to the unavoidable extent. Of course, it would be necessary to coordinate both processes — that of renovation of the CISG and that of drafting a Model Law on Obligations — such as to avoid inconsistency and contradictions as to matters where they would overlap.

Secondly, because the timing and resources needed for both projects should be considerably different. While a renovation of the CISG may take years in the making, a Model Law on Obligations is not likely to take as long[44]. That is because compromises can be more easily achieved and there is no need for a diplomatic conference. Furthermore, a very up-to-date text already exists that ought to serve as a template, which is that of the UPICC 2010. Yet while the Model Law on Obligations does not preclude the renovation of the CISG, it also does not do justice to the CISG's need of renovation. First, because it is intended to be a model law and cannot per se replace an international convention. Secondly, because the subject-matter of the CISG deserves a special place in international trade law[45] and merging it into a more comprehensive instrument might not be a smart move — while it is certainly not one that honors the historical development of international trade law.

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[43] They embody different harmonization methods; supra **2.1.2.1.**

[44] A Model Law on Obligations might also be accordant with the established trend in the United Nations for a "codification light" approach. "The United Nations, in other words, is hesitating to pursue the codification effort through hard law instruments, and there is an increased interest in codification techniques of a different kind, which are more flexible both to address the needs of international society and to reflect the complexity of the topics involved" (VILLALPANDO, 2013, p. 119). If that trend is to be taken seriously, an International Convention on International Commercial Contracts has a very limited prospect of becoming a reality. The case for a new Convention on the International Sale of Goods and Services is more compelling due to the success of the CISG (in terms of its number of ratifications and accessions) which it could be expected to replicate.

[45] As demonstrated by the historical preference for international sales as a subject for unification and harmonization; supra **2.1.2.1**.

4.4 OTHER APPROACHES: UNCITRAL RECOMMENDATIONS AND NATIONAL CENTERS OF EXPERTISE

It has been suggested (SORIEUL; HATCHER; EMERY, 2013, p. 504-505) that UNCITRAL might develop an interpretive guide[46] to the CISG or issue recommendations on its preferred interpretation —in the same way as it has issued, for example, the Recommendation Regarding the Interpretation of Article II (2), and Article VII (1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (UNCITRAL, 2006; hereinafter, the "Recommendation on the New York Convention")[47].

Mr. Renaud Sorieul himself admits that this could raise legitimacy[48] issues[49]. First of all, an interpretive guide would not be seen as binding and would leave every room for adjudicators to depart from it[50]. Secondly, in order to draft such an interpretive guide

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[46] The Secretariat Commentary to the 1978 Draft of the CISG (UNCITRAL, 1991, p. 14-66) has been considered to be the "most authoritative source on can cite" and the "closest counterpart to an Official Commentary on the CISG" (PACE UNIVERSITY SCHOOL OF LAW, 2014). However, for obvious reasons, it does not incorporate any case law on the CISG nor any developments arising thereof.

[47] The Recommendations to Assist Arbitral Institutions and Other Interested Bodies with Regard to Arbitrations under the UNCITRAL Arbitration Rules Adopted at the Fifteenth Session of the Commission (UNCITRAL, 1982) bear a different nature than the Recommendation on the New York Convention. The Recommendation on the New York Convention is a soft law instrument (i.e., one accepted as persuasive and suggestive) which purports to provide guidance on the interpretation of a hard law instrument — one which was adopted reciprocally by states as binding law. The Recommendations on the UNCITRAL Arbitration Rules are a soft law instrument which intends to assist in the interpretation of rules which are a suggestive and persuasive authority in and of themselves (i.e., the UNCITRAL Arbitration Rules).

[48] The CISG's own legitimacy has already been questioned. According to a commentator, under Franck's theory of legitimacy the CISG would lack determinacy (i.e., textual clarity), symbolic validation (i.e., perceived authenticity), coherence (i.e., harmony with previously existing rules) as well as adherence (compliance by the relevant affected community). According to such commentator, such difficulties are in part due to the CISG's lack of amendment mechanisms. Quite similarly to the conclusions of the present thesis (in spite of the completely different grounds), suggested improvements made by that commentator include less emphasis on uniform interpretation, friendlier stance toward incorporating non-Convention law and the creation of workable amendment processes (WINER, 1998-1999).

[49] Legitimacy concerns were expressed in regard to the Recommendation on the New York Convention. Moss (2007, p. 58) questions the Recommendation's lack of binding power over governments and national judges and also points out that UNCITRAL cannot be considered the "issuing or enacting body [of the New York Convention]" (since UNCITRAL did not exist in 1958 when the New York Convention was enacted). While conceding that the Recommendation has nevertheless the authority of reflecting the United Nations' official view, she argues that "it remains to be seen whether a Recommendation is a sufficient instrument on which to base an interpretation of Article II(2) that might differ considerably from the interpretation currently made in some countries" (ibid., loc. cit.).

[50] Kronke (2002, p. 300) defines such guides as "truly educational exercises, the authors being the teachers and the users — even government officials and parliamentarians — the pupils". He argues guides are "[v]ery useful for attracting the public's attention, but no real contribution to developing and harmonising the law" (ibid., p. 302).

UNCITRAL would naturally have to analyze and evaluate court (as well as arbitral) decisions and criticize them, which should be a delicate matter given that UNCITRAL is a body of the United Nations (BAZINAS, 2005). Thirdly, in putting together recommendations or even an interpretive guide, UNCITRAL would duplicate efforts with the CISG AC — which parenthetically is in a better position to issue recommendations on the CISG and actually does that[51]. The CISG AC is not under any embarrassment or constraint to appraise court decisions from any country as it is an independent, private organization made up of academicians. CISG AC Opinions and Declarations have effective persuasive power due to the professional standing of Council members and provide valuable interpretive guidance on the CISG[52].

Let us assume, however, that UNCITRAL decides to issue recommendations on the interpretation of the CISG. Let us assume that it decides to tackle the interpretation issues of Article 35(2)(a) and (b) (supra at **2.3.2**). It could, for instance, recommend that, wherever applicable, the word "purpose" in the above provisions be interpreted as referring to the "reasonable quality" standard of the goods sold, according to the theory developed in the Rijn Blend case. If it does so UNCITRAL would still not solve the problem explored above at **2.3** concerning the servitization of goods and the way it affects the Convention. But it would certainly help adjudicators in interpreting Article 35 as far as traditional (non-servitized) goods are concerned. However, by doing so UNCITRAL would substantially be modifying the text of the Convention. This should certainly be seen as a very delicate move. UNCITRAL could face complaints of overstepping its mandate by purporting to unilaterally modify the text of an international convention which was agreed upon by states in a diplomatic conference.

An alternative strategy was also suggested: the establishment of National Centers of Expertise (hereinafter, "NCE"s) in international trade law by states. The strategy was proposed in the context of the High-Level Meeting on the Rule of Law held by the UNGA (SORIEUL; HATCHER; EMERY, 2013, p. 505-506). Such proposal draws on the fact that

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[51] In the form of CISG AC Opinions and Declarations.

[52] CISG AC Opinions have been cited in court decisions in a few instances. It is not known how many times they have been used by arbitrators as arbitral awards remain unpublished in most cases. In general, there remains the sensation that "[t]he academic community has in fact taken greater notice of the CISG-AC than have the courts" (KARTON; DE GERMINY, 2009, p. 478), but this is by no means to be taken at face value.

UNCITRAL has limited resources and is not properly physically located to assist national courts in implementing the application of texts such as the CISG. This proposal entails costs; these costs are nevertheless warranted since lower-cost initiatives "have not entirely succeeded" (SORIEUL; HATCHER; EMERY, 2013, p. 506). One implies that such lower-cost initiatives relate to the CLOUT Program[53] and miscellaneous educational and training strategies endorsed by UNCITRAL such as the Willem C. Vis Moot[54] and the collection (via national representatives) as well as the dissemination of information and bibliography about the application of the CISG.

NCEs would mediate between UNCITRAL and national courts in implementing a more uniform application of the CISG. They "could serve as a direct resource for judges and practitioners" and could function "even as a kind of domestic CISG advisory body, even endorsing CISG Advisory Council opinions if desired" (SORIEUL; HATCHER; EMERY, 2013, p. 505). The risk of homeward bias in national centers of expertise would be addressed by making sure they would be "staffed by experts in the international trade law field and mandated explicitly to promote uniform implementation of texts such as the CISG" (SORIEUL; HATCHER; EMERY, 2013, p. 505). UNCITRAL would coordinate between NCEs.

The proposal for the creation of NCEs is not exactly aimed at further harmonizing international contract law. If and to the extent it is considered in relation to a potential renovation of the CISG, it is not at all effective. In performing a mandate for the national implementation of the CISG, NCEs would not have the authority to amend the Convention or to supplement it by any means. Even the adoption, at the national level, of CISG AC Opinions would not add to the content of the CISG as an instrument (though it could render the work of the CISG AC still more authoritative). However, the creation of NCEs, as local implementation hubs, deserves further discussion. They would provide states with technical capacity to assist courts and practitioners to better understand UNCITRAL texts in general and the CISG in particular. If properly equipped and well run, they would certainly add to the likelihood of uniform application of the Convention by state courts. In

[53] On the Case Law on UNCITRAL Texts (CLOUT) Program see Bazinas (2005).

[54] Among the miscellaneous initiatives endorsed by UNCITRAL is the realization of the "Professor Albert H. Kritzer" Essay Competition on the CISG. The Competition is organized by the CISG Brazil Website on an annual basis, and is currently entering its fourth edition.

addition, they would be an important gateway for states to improve their UNCITRAL outreach and potentially contribute to an increased success of the CISG and new texts and initiatives to be developed by UNCITRAL in the future.

4.5 NEW CONVENTION ON THE INTERNATIONAL SALE OF GOODS AND SERVICES

Among the alternatives to a renovation of the CISG, the possible creation of a new Convention on Contracts for the International Sale of Goods and Services (hereinafter, the "CISGS"[55]) stands out as the most compelling one. The difficulties involved in reaching such a result, though, are known to be challenging. But as the United Nations has been successful in pursuing very difficult and unlikely tasks in the area of codification and the progressive development of International Law[56], it would be but one more step in the long history of the Organization's international treaties. The difficulty involved in a task is no excuse for not pursuing it as long as one is certain that it must be taken forward.

Paving the way to the CISGS begins with a project. How to bring such a new convention to life? It is — and it must be — a long way until it is done. A rushed process will yield no good results. A patient construction is in order. UNCITRAL would have to start by undertaking consultations and supporting the preparation of a preliminary report (DAVID, 1987). Then, first, a Joint Working Group between UNCITRAL and UNIDROIT must be created to lay out the main lines of the renovation process and prepare a comprehensive report (**4.5.1**). Secondly, the Joint Working Group must prepare a Draft text for the CISGS (hereinafter, the "Draft") (**4.5.2**). Thirdly, states, non-governmental organizations and the public should be invited to comment on the Draft (**4.5.3**). Fourthly,

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[55] The name of the proposed convention — Convention on the International Sale of Goods and Services — as well as its acronym — CISGS — are of course mere suggestions. There is a need to name the entity one is dealing with. The names hereby invented are a response to that need and not by any means the ones that should be preferred if and when an actual renovation process is commenced. The same proviso applies to the Joint Working Group and any other aspect of the current proposal.

[56] E.g., the recent enactment of the Arms Trading Treaty (ATT) in 2013.

UNCITRAL must consolidate all relevant inputs on the Draft (**4.5.4**). Fifthly and finally, the Draft must be submitted to a diplomatic conference to be convened in due course (**4.5.5**).

4.5.1 The Creation of a Joint Working Group

It is hereby suggested that a Joint Working Group on the International Sale of Goods and Services is created by UNCITRAL and UNIDROIT[57]. It is intended as an enterprise intended to bridge the competencies of UNCITRAL and UNIDROIT and gear the best from each of them[58]. The composition of the Joint Working Group must reflect the differences in the working methods[59] of UNCITRAL and UNIDROIT[60]. That is to say, its membership must be a mix of state-appointed and academically-chosen participants. Above all it must be work under interdisciplinary methods allowing for the participation of jurists, diplomats, businesspeople, trade experts and other specialists. It must be possible for the Joint Working Group to address both the legal and business, public and private, contractual and regulatory aspects involved in a revision of the CISG.

It is suggested that the Joint Working Group prepares a comprehensive report on the need to renovate the CISG by introducing a new international Convention on the International Sale of Goods and Services. In preparing such a report, the Joint Working Group might be interested in reviewing the issues arising from the changing circumstances of international trade (supra **1.1**); investigate the existence of a consensual opinion on the need to renovate the CISG (supra **2.1**); assess the criticisms levied against the CISG's 1980 text, especially regarding the formation of the contract and the obligations of the parties

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[57] As it is the enacting body of the CISG, UNCITRAL should act as a steward organization and primary custodian of the renovation work.

[58] Joint involvement of UNCITRAL and UNIDROIT in the preparatory stage of new conventions (e.g., by the exchange of draft texts) has been suggested, inter alia, by Bergsten (1995) — in the context of UNCITRAL's mandate to coordinate between formulating agencies — and Kronke (2005).

[59] On the distinctive features of the UPICC Working Group methods see Kronke (2002, p. 298).

[60] The agreement between the United Nations and UNIDROIT for the creation of the Joint Working Group might be substantiated in the form of a Memorandum of Understanding (MOU).

(supra **2.2**) as well as the consequences for international sales law of the servitization of goods and the productization of services (supra **2.3**).

In pursuing the objective of examining the issues submitted to its consideration, the Joint Working Group must do every effort to spare time and resources and keep its cost of operation to a minimum. In particular, it is suggested that the Joint Working Group resorts to online communication to the greatest possible extent[61], and meets with limited frequency on its own budget. It is also suggested that it endorses meetings to be sponsored and organized by local, regional or global organizations such as trade federations and associations, chambers of commerce, corporations, education institutions, law firms and so on. In the meetings, topics which are of interest to the Joint Working Group would be discussed by practitioners, businesspeople, business experts and other specialists. Realization of meetings should be pursued on as wide a geographical, cultural and civilizational basis as possible. Publications arising from such meetings would be prepared by sponsors to the avail of the Joint Working Group. In such a way the Joint Working Group would be able to transfer part of the cost of its work to private sector actors — which would not only be interested, but also pleased to contribute to the successful conclusion of the Joint Working Group's work.

It is estimated that this step of the process should consume 3 to 4 years of work.

4.5.2 Preparation of a Draft Text for the CISGS

Once the Joint Working Group prepares a comprehensive report laying out the main lines of the renovation process for the CISG, such report should be the object of consultations and commentary by specialists and UNCITRAL delegates. After the report is handed in, all notes and commentaries presented by delegates and specialists should be

[61] One of the main differences between the current time and the time of preparation of the CISG is the existence and widespread use of the Internet. This is to be considered as an advantage not only for the production of a better text, but of a lower cost one.

consolidated and the report should be published along with notes and commentaries received. Once again the Joint Working Group should be convened, this time in order to prepare a Draft for the CISGS drawing on its own report as well as relevant submissions thereon conceivably received by UNCITRAL.

In putting together the Draft, the Joint Working Group must take into consideration the expectations of all stakeholders (supra **1.2**) as well as the inputs from academia, practitioners and the business sector. It should also abide by the best interests of the international community. The Draft is expected to reflect 1) the changed circumstances of international trade since the time of the CISG; 2) the appearance of new technologies and business arrangements affecting goods (i.e., their "servitization") as well as services (i.e., their productization); 3) the need to reconcile different concepts and cultures, as well as to provide the necessary flexibility of the resulting text (transcivilizational approach); 4) the need to accommodate stakeholders' concerns in order to make the prospects for the work of the diplomatic conference as smooth and streamlined as possible.

It is estimated that this step of the process should take up to 4 or 5 years of work.

4.5.3 Invitation to Governments and the Public to Comment on the Draft

Once the Joint Working Group hands in the Draft, UNCITRAL as well as UNIDROIT should take what is likely to prove the most important step in the process, which is that of inviting governments and the public to comment on the Draft. While inviting governments to comment on the Draft is hardly anything new and was done during the preparation of the CISG, inviting citizens, NGOs, companies and other organizations on a worldwide basis to submit comments in their private and personal capacity is certainly a new and bold initiative. It comes across, however, as a window to a new horizon of legitimacy for the future text of the CISGS — a window that was certainly not open at the time of the CISG. This sort of inclusion of new stakeholders (not as such accounted for in the enumeration of **1.2** above) — by allowing them to *formally* participate in the process — is likely to be a groundbreaking case (at least) in international trade law. It matches the

evolution of government activities known as Government 2.0, a phenomenon that "encourages the public engagement by increasing opportunities [...] to provide the government with the collective knowledge, ideas, and expertise of the population " (CHUN et al., 2010, p. 2)[62].

This approach to public participation in the building process of the new CISGS is the source of legitimacy never before attained in international trade law[63]. It is capable of overcoming or significantly reducing the problem of underrepresentation of businesspeople in the creation of international trade law instruments (supra **2.1.2.2**). It could be the first time the public is consulted in the process of creation of an international trade law instrument. It would provide opportunities for both UNCITRAL and UNIDROIT to build new constituencies by liaising with the general public or, at least, to strengthen its bonds with the specialized public (law students, teachers, practicing professionals, businesspeople and so on). Both entities would acquire greater visibility and be able to build closer ties to civil society at the global level. It may appear that visibility is not to be desired by a technical body of the United Nations or by a strongly academic institute such as UNIDROIT. However, according to Carmodi (1999-2000, p. 1326):

> "[...] in this intensely popular age, an age when so much international activity appears to be increasingly democratized, we must become more concerned with broadening participation and with rededicating the institutions of international economic law to openness, transparency, and fairness."

From a technological point of view this is certainly feasible; it may however be quite demanding on the resources of UNCITRAL, UNIDROIT and the Joint Working Group to browse through and weigh all inputs received, picking the ones which deserve attention, as well as discussing and evaluating them for possible incorporation into the Draft. A practical way of limiting the number of inputs and possibly also the quality

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[62] Government 2.0 is boosted by the appearance of the Social Web, or Web 2.0, a collection of technologies which allows for "large scale distributed collaboration, information sharing and creation of collective intelligence in government areas at all levels [...]" (CHUN et al., 2010, p. 4-5).

[63] With the advent of Government 2.0 and the Social Web, consulting the public in the framework of such a major project as that of renovation of the CISG is no longer optional. "[T]o retain democratic legitimacy and reduce costs, political actors at all levels must consult citizens" (NOVECK, 2003). International organizations fit into the definition of "political actors at all levels" such as employed by Noveck.

thereof is to establish a narrow timeframe for the submission of inputs, provided that it is conveyed to the public with appropriate advance notice.

It is estimated that this step of the process uses up about 1 to 2 years of work.

4.5.4 Consolidation of Inputs and Preparation of a Final Draft

As the steering body, UNCITRAL should be primarily responsible for consolidating all the reports, submissions from stakeholders as well as those collected through informal and formal participation of broader constituencies with a view to preparing a final version of the Draft for submission to the diplomatic conference.

A critical aspect of the preparation of the final Draft is the reliability of the drafting party insofar as the consolidation of all relevant information is concerned. With the preparation of the final Draft, the convening of a diplomatic conference is the only remaining step in the process.

It is estimated that the consolidation takes about a year to complete.

4.5.5 The Diplomatic Conference

The final version of the Draft would be thereupon submitted to a diplomatic conference for discussion and enactment. The success of the diplomatic conference depends on all earlier steps, on the quality of the final Draft, its simplicity, the legitimacy that may be attached to it, the fact that it effectively reconciles different traditions or represents a middle ground between them, and the fact that it accommodates submissions that represent different points of view on the subject-matter involved.

All told (supra **4.5.1** to **4.5.4**), it is estimated that 9 to 12 years of work are necessary before the diplomatic conference takes place. This means that, in the event that a renovation process is commenced, and considering that it should not commence before 2015[64], the CISGS is not to be expected to become an international treaty anytime before 2024. Considering the natural hesitation, ordinary necessity for debate, budget discussion and approval, etc., it is pretty likely that the CISG will turn 50 in 2030 without the CISGS having entered into force or maybe, even without its being enacted by a diplomatic conference. It is to be hoped, on the other hand, that by way of immediate action a target is set to take advantage of the CISG's 50-year landmark of 2030 as a limit for carrying out the diplomatic conference to discuss the Draft CISGS.

Before proceeding to this thesis' submissions on what would be the salient features of the CISGS, a brief comment is in order about the fear that the renovation of the CISG would give rise to competing instruments or inflict a "chilling effect" (GABRIEL, 2013, p. 664; LOKEN, 2013, p. 513; DENNIS, 2014, p. 142-146) on the adoption of the CISG by new contracting parties. Those fears may not in fact sound unsubstantiated. However, the very precedent of the CISG should be enough to disprove them. The kickoff to the "reopening" of the Hague Laws (which eventually transmuted into the drafting of the CISG) took place in 1968 (supra **2.1.2**). However, the Hague Laws had only collected three ratifications until 1968[65], out of the eleven they would eventually reach. They have entered into force in 1972 and were last ratified by Luxembourg in 1979, about the time the draft text of the CISG had already been finalized at UNCITRAL. There is also no indication that the discussion or even the enactment of the CISG has jeopardized the application of the Hague Laws or to what extent it would have done so[66]. Therefore, the concerns expressed by the above authors are belied by facts relating to the very history of the CISG.

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[64] UNCITRAL is preparing a Congress in commemoration of the CISG's 35th anniversary to take place in 2015. At the occasion, it is speculated that further discussions on the Swiss Proposal should take place.

[65] Those of Belgium, San Marino and the United Kingdom (UNIDROIT, 2014a and 2014b).

[66] The Hague Laws were still producing meaningful case law as late as 1982 (SCHLECHTRIEM, 1984), i.e., two years after the CISG was enacted.

5 SALIENT FEATURES OF A NEW CONVENTION ON INTERNATIONAL SALES

> There are enough disadvantages in connection with the Convention form to keep the many supporters of looser regulatory nets happy. Yet there are also sufficient grounds for not abandoning the Convention but to improve it drawing on past experience.
>
> **Herbert Kronke** (2000)

It is suggested that a new Convention on the International Sale of Goods and Services be enacted by UNCITRAL (supra Chapter **4**). In order to be able to solve the issues related to the aging of the CISG (supra Chapter **2**) and do justice to the central and coordinating role (supra Chapter **3**) the CISG is supposed to occupy within international sales law, the new CISGS must bear a few salient features. This thesis does not intend to cover all the ground related to those salient features; that would be premature, and most likely impossible given the scope of the present work. There is no pretension by the present author to surrogate himself in the position of, or replace work that has to and can only be done by, the Joint Working Group. It is the aim of the present thesis to point out a few guidelines that might be considered persuasive by the Joint Working Group if it is ever created and if it ever decides to use such guidelines to encourage debate or in the preparation of a report.

First, one must ensure the usefulness of the resulting text (**5.1**). Secondly, the CISGS must respond to the need of a core instrument which coordinates between international sales law sources by laying out general rules and principles for the their interplay (**5.2**). Thirdly, it is essential that new approaches are pursued for the uniform, or indeed proper, interpretation of the CISGS (**5.3**). Fourthly, the CISGS is supposed to overcome the inadequacies of the CISG's approach to contract formation and the

obligations of the parties (**5.4**). Fifthly, the CISGS must provide a unified approach to goods and services, reflecting the changes in the economy of international sales in the 21st century (**5.5**). Finally, the CISGS must incorporate fundamental concerns of the international community that came to prominence only after the CISG was enacted, notably sustainable development (**5.6**).

5.1 ENSURING THE USEFULNESS OF THE RESULTING TEXT

When UNCITRAL first faced the challenge of further developing the international sales law regime it sent out requests to states for observations on the Hague Laws. Criticisms on the Hague Laws were levied even by states which had had active participation in their drafting process (SCHLECHTRIEM, 1987). In particular, it is worth remembering Austria's comment on the Hague Laws, expressed by the Austrian delegation at the first session of the Working Group on the international sale of goods in 1970 (UNCITRAL, 1971, p. 162):

> Austria expressed the opinion that the Uniform Law on Sales is too voluminous, too detailed and not always well arranged and feared that its complexity would have an adverse effect on its application.

One wonders what the Austrian representatives who drafted this response would make of the CISG. The CISG has 101 articles as opposed to 126 of the combined Hague Laws. Is 101 less "voluminous" than 126? The CISG is certainly less detailed and complex than the Hague Laws, but is the simplification achieved by the CISG what the Austrians meant when they argued that the Hague Laws were too detailed and complex? A new CISGS must attempt at even further simplicity. This will not necessarily reflect on the number of provisions as the subject-matter should become more complex (goods and services instead of goods). However, it would be a good thing to target the 100-article benchmark while augmenting the coverage of issues. The CISGS will be of no use to the international community if drafters do not exercise restraint in terms of the length of the resulting text.

Therefore, focus should be only on rules and principles of sales law and which may be considered *omni tempore*, that is, those which makes sense to regard as reasonably stable and are not particularly "international" as opposed to "domestic" (ROSSET, 1992). This will render the norms contained in the CISGS less prone to becoming outdated, and therefore either useless or an obstacle to the efficient operation of the Convention. Also, by focusing on few, well assorted rules, the temptation is avoided to "harmonise the unharmonisable" or to "harmonise for harmonisation's sake" (KRONKE, 2000)[1].

Furthermore, all endeavors must concentrate on the search for common ground and shared rules and institutions between legal systems, as opposed to novel uniform solutions. Newly created uniform law suits a political environment where there a central authority is present to both enact and enforce legal solutions. It is plausible for the Brazilian federation, for instance, to have a single Code of Civil Procedure, as it is enacted by a federal legislature and subject to uniform application ensured by a (federal) Superior Court of Justice. It is plausible for the United States to have a Uniform Commercial Code in order to harmonize rules on commercial contracts across all states, so as to avoid increased transactions costs for domestic parties. It may even make sense for Europe to have an European Civil Code[2], as it makes sense in the case of norms dealing with jurisdiction and conflicts of laws, such as the Rome and Brussels Regulations. But so far, one is talking about moderately to highly centralized political environments. The world at large is not politically centralized.

Therefore, newly invented uniformity — that is, rules that do not stem from any legal system and have no solid foundations, or at least similar counterparts in national, comparative or transnational law —, if ever present at the enactment of an international convention, will hardly be ensured as far as its application is concerned. This is evidently a hindrance to uniform application and therefore, to the usefulness of the resulting text of the CISGS. Smart, clean and straightforward innovation must be reserved to implementation mechanisms and the approach to the interplay of rules within and outside the convention. If no rules can be found in national, comparative or transnational law to suit the future needs of the sale of goods, new rules can only be drawn from analogy and the search for least

[1] Or likewise codify for codification's sake (SCHMITTHOFF, 1985, p. 246).

[2] This is not conclusive opinion nor an assessment of legal feasibility or political convenience; it is a merely argumentative contention.

common denominators among systems of law — or, at the very least, as a logical consequence of rules pertaining to those systems[3]. The imaginative power of scholars must be exercised with discretion during the renovation process and be left as much as possible to the realm of commentary.

The CISGS must be even more readily and easily acceptable to states and parties of different cultures and civilizations than the CISG. Therefore, it should seize the opportunity to build a veritable transcivilizational bond among states as far as international sales law is concerned, leaving room for non-uniform, diverse perspectives in its supplementation by private norms, as well as, to a limited extent, also regional and domestic legislation. Excessive interference in local, regional and civilizational perspectives must be avoided even under the pretext of uniformity and at the cost of non-uniformity[4]. That the world is not uniform is a fact of life and needs no proof or demonstration[5]. The world is essentially diverse. As Rosset (1992, p. 687) puts it:

> It may well be possible to create a situation in which the text that expresses the rules of international commercial law will be identical everywhere. But to suggest this would unify the law ignores the extent to which legal rules operate in a very particular social and political setting. If one focuses too hard on the unity of the text, one is quite likely to lose sight of the disparity of result that is produced when that text is applied in different systems.

The Joint Working Group must seize every opportunity to learn in earnest from unusual, local perspectives on the law of sales. Attention should be paid not only to those dominant players in international trade as if others were not important and their traditions could be solemnly ignored just because their trade balance numbers are negligible. It is

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[3] E.g., by adopting innovative wording while keeping functional results.

[4] Accepting diversity and procuring ways to interact with regional and local perspectives is of the essence of the work on the CISGS: "[i]t is a paradox of the harmonisation process that it aims at removing differences, but derives its acceptability from diversity. The quality of international negotiations on private law questions, and the very authority of formulating agencies, would be greatly diminished if their constituencies lost the benefit of the current wealth of time-tested solutions of legal families sharing their experiences in international negotiations. Formulating agencies should take an interest in contributing to the development of ways in which regional harmonisation might best be combined with global efforts" (ESTRELLA FARIA, 2009).

[5] Hence, "[*u*]*n cosmopolitisme qui prétendrait nier les différences entre les Etats serait le pire ennemi des progrés de l'unification du droit*" (DAVID, 1968, p. 311). Cultural uniformity will never replace diversity; attempts at uniformity such as those made by the EU have often aggravated differences as the centralization of decisions encourages citizens to unite in pursuance of more representativeness and power (BAPTISTA, 2013).

hoped that the process of drafting the CISGS does not embody any ethnocentricity as the CISG itself comes with a built-in mandate to abandon it (COOK, 1997). In addition, a text which does not impose too many unknown and unfamiliar solutions to familiar problems should thus be preferred to one which pursues logical consistency all too eagerly at the cost of ignoring the needs of businesses and the expectations of political stakeholders. Easier said than done of course, but it is believed that throughout the years of drafting the CISGS it will be possible to strike a balance between tradition and innovation in the law of international sales — thereby improving the acceptability and usefulness of the resulting text to the international community.

5.2 ARTICULATION OF MULTIPLE SOURCES

It is also worth taking note of the opinion on the Hague Laws expressed by Sweden at the first session of UNCITRAL's Working Group on the international sale of goods (UNCITRAL, 1971, p. 163):

> Sweden, drawing attention to the relation between the Uniform Laws and standard contracts, expressed the view that it would be expected that the main legal issues of the greater part of international contracts of sale would be governed by standard contracts and that it would be the role of the Uniform Laws to supplement these contracts on points on which they did not contain provisions.

The CISGs should in a straightforward manner assume its supplementary character (SCHMITTHOFF, 1961; supra **3.2**) to other public and private norms of international trade law. Professor Onuma's (2009, p. 100) narrative of the establishment and role of International Law seems to bear a clear correspondence to this idea:

> Based on their experiences in earlier societies, humanity created law in international society, and has managed affairs in international society through the institution of law. International law is the law of international society [footnote:] In addition to public international law, private international law, domestic laws, laws of international organizations, EU law, and other kinds of law have been functioning in international society as well. However, (public) international law co-ordinates and controls these various laws, and provides a certain degree of harmony to these

> laws. Thus in international society, it is (public) international law that is most conspicuous and important among all laws.

The CISGS should thus assume a *central and coordinating* role among the sources of international sales law. Its drafters should have in mind that, as part of public international law, it falls upon the CISGS to provide consistency and concord to the realm of international sales law sources. Unlike the current wording of Article 7(2) which focuses on issues governed by the Convention, but not expressly settled in it, the CISGS counterpart of Article 7(1) and (2) must be a veritable gateway provision. It should make clear that the CISGS does not stand in a vacuum, it coexists and interacts with other sources of international trade law[6] (and even sources that go beyond international sales law[7]). Hence, CISGS drafters should see to the fact that CISGS provisions lead to the conclusion that: 1) CISGS rules apply in coordination with those of other regional and global, private and public, formal and informal instruments, falling upon party autonomy and the adjudicator — especially, international arbitrators — to reach the optimal "collage" thereof; 2) whenever applicable, established rules and principles of international trade should be used to interpret and supplement the CISGS; 3) whenever applicable, CISGS rules may provide guidance for other kinds of international contracts as well as be used to interpret and supplement other international instruments dealing with international contract law; 4) domestic legal rules should be applied to the extent that no rule can be found either in the CISGS or elsewhere in international trade law that would settle the issue without recourse to conflicts rules and thereby, domestic law; 5) the CISGS is subject to concerted application with other norms of International Law as long as the subject-matter of these norms is supposed to reflect on the field of application of the CISGS (infra **5.6**).

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[6] Progress in this particular depends "chiefly on drafting those references [such as Article 7(2) CISG] to outside sources in a broader and more liberal fashion" (KRONKE, 2002, p. 292).

[7] E.g., those norms of domestic or international law which govern issues that may on occasion be involved in an international sales transaction, such as tax, corruption, human rights, competition and so on (supra Chapter **3**).

5.3 UNIFORMITY AND PROPER APPLICATION

The CISG's approach towards uniformity is merely declaratory — Article 7(1) CISG dictates a mandate "to promote uniformity in its application". The CISGS should be more daring — by encompassing built-in mechanisms for the pursuit of uniform interpretation (**5.3.1**). Also, it should recognize that uniformity is not an absolute goal and must not be obsessively pursued (**5.3.2**). As the forum matters in regard to uniformity, the CISGS should promote the use of arbitration and mediation by parties (**5.3.3**).

5.3.1 Institutional Framework

Although some initiatives for promoting uniformity of application have been implemented[8] and others suggested[9] such as: 1) the issuance of UNCITRAL recommendations or an interpretive guide on the CISG[10]; 2) the creation of National Centers of Expertise (NCEs)[11]; 3) the improvement of law school curricula and textbooks to promote the study of the CISG (FERRARI, 2009); 4) the creation of an international commercial court by UNCITRAL with supervisory jurisdiction over the application of the CISG (SIM, 2001); 5) the creation of an official interpretive council on the CISG (KARTON; DE GERMINY, 2009), etc., one must recognize that the institutional

[8] By way of notable example, the preparation of the UNCITRAL Digest (UNCITRAL, 2012) and the establishment of the CISG AC. It is worth noticing that the drafters of the UNCITRAL Digest, while providing an overview of judicial interpretation of the Convention by national courts, are not allowed to refer to scholarly writing which is considered "taboo" in the context of the Digest (LOOKOFSKY, 2004, p. 191-192). For this reason, and due to the fact that Digest drafters cannot express their preference for certain judicial solutions over others (op. cit., p. 191), the Digest does not amount to an interpretive guide in the sense envisaged by Sorieul, Hatcher and Emery (2013).

[9] In general, no initiative that has so far been suggested escapes in one way or the other from the two categories devised by René David in 1987 (p. 86 et seq.), namely, 1) "[*i*]*information de l'interpréte*" and 2) "[*c*]*ontrôle international*".

[10] Supra **4.4.**

[11] Ibid.

framework dedicated to pursuing the uniform application of the CISG is still rather sketchy and clearly insufficient.

As far as the text of the Convention is concerned, it is difficult to expect that mere words calling for uniform application will actually result in it. Hence, with the CISGS, it is not by putting new wine into old wineskins that uniform application of uniform law will become a reality. There is the need to take institutional steps, that is, to draw up an institutional framework to supervise the application of the CISG, provide assistance to national governments and courts, and actually point to preferred interpretations and the correct filling of gaps.

For instance, if UNCITRAL is reluctant to assign value to judicial decisions of national courts (BAZINAS, 2005; SORIEUL; HATCHER; EMERY, 2013), maybe UNIDROIT is not. A combined institutional framework may be put in place by means of a Memorandum of Understanding between the UN and UNIDROIT which would empower UNIDROIT with the authority to issue official commentary on the CISGS. Such an institutional framework would thus combine the advantages of UNCITRAL and UNIDROIT with the latter providing the substantive content and the former providing the political authority as the issuing body of the CISGS. If the drafting process of the CISGS is based on a joint effort of UNCITRAL and UNIDROIT (supra **4.5.1**), then the possibility that the CISGS' interpretation and gap-filling be supervised by a common institutional framework established by mutual cooperation between the two institutions is clearly enhanced.

5.3.2 Kernel Uniformity

No matter how highly one values uniformity of application, it is known that it will never be fully attained. This raises the question whether it is time to start speaking more of

"proper" than uniform application. Proper application of uniform law is application consistent with the principles of international trade[12]. Although rigorously well-defined gauges for proper application are impossible to attain, it is known that a pretense application of uniform sales law which in actuality corresponds to camouflaged application of domestic law and concepts can never be considered as proper. Nonetheless, given the experience accruing from the application of the CISG, the idea of absolute uniformity must be abandoned once and for all.

Though relative or useful uniformity (supra **3.2.3**) is still a valid idea, why would it be so important to the promotion of international trade that the period for inspection and notice of non-conformity (Articles 38 and 39 CISG, which are notable examples of the use of the reasonableness standard)[13] is precisely the same in North America and Polynesia[14]? Each state's application of uniform sales law will inevitably bring about the expression of local concerns, judicial tradition and custom as well as a peculiar legal outlook. As long as a core of uniform rules is ensured uniform application, details may be diversely dealt with. This approach might be called *kernel uniformity* and represents the idea that uniformity should be enforced at the core, while diversity is free to mushroom on the outskirts.

Therefore, despite the need for a bold, innovative approach towards uniform application to be developed throughout the creation process of the CISGS, one should from the very beginning admit a flexible mindset towards uniformity. Uniformity should not be pursued as an obsession nor foisted as an imposition; lest the CISG, and the new CISGS in the years to come, become a platform for the invasion of markets by the most powerful and better informed.

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[12] A different viewpoint on the definition of "proper application" is that of Felemegas (2000-2001): "[t]he necessary legal backdrop for the CISG's existence and proper application should be provided by general principles of the new legal order to which the CISG also belongs. The UNIDROIT Principles and the CISG both belong to the 'New International Economic Order' that the United Nations has envisaged, and working in tandem, they best reflect the objectives of that body to remove 'legal barriers in international trade and promote the development of international trade' in the spirit of equality and friendly co-operation among its member States". Considering that the New International Economic Order is today of only historical interest, the present author prefers to characterize the backdrop for the proper application of the CISG as that of international trade *tout court*.

[13] On the (non-)uniform application of Article 39(1) see generally Andersen (1999).

[14] As an example, unlike Articles 38 and 39 CISG, the CESL takes a clear-cut approach by providing a fixed rule of fourteen days for inspection. This however is likely to prove unreasonable in practice as, "depending on the type of goods, buyer's access to the goods and the means of inspection the fourteen-day period may be unreasonably short. Inspection times are highly context dependent, and thus setting a fixed time for inspection risks causing injustice in given cases" (DIMATTEO, 2012, p. 49).

The new CISGS might speak of proper instead of uniform application. Proper application of the CISGS should entail: 1) consistency with the principles of international trade; 2) uniformity of legal rules and of the application thereof regarding core aspects (kernel uniformity) and 3) diversity in the detail, that is to say, uniformity is waived in relation to minor aspects of application (such as a deadline for inspection, just to mention one example). Proper application and kernel uniformity, instead of "die-hard uniformity" should frame the discussion on the drafting and application of the CISGS and must be reflected in the CISGS counterpart of Article 7 CISG.

5.3.3 Forum Matters

Another important aspect of proper application is that forum matters. Not, as Andersen (2007, p. 47) correctly points out, because judges would be "leopards" who cannot get rid of their spots, but because party expectations must definitely adjust to the method they choose for the resolution of their disputes. If court litigation is preferred of instead of arbitration or mediation, a less international interpretation and application ought to be anticipated. At the risk of making a sweeping assumption, a state court is a deep-seated institution whereas arbitrators and mediators act under the authority conferred upon them by the parties (and accordingly, are privately funded). Courts stick to sovereign rules of procedure by which counsel are also obliged to abide whereas in arbitration, "the only certainty is that the parties' counsel should not bring the rule books from their home courts with them" (BLACKABY et al., p. 363). Because arbitration and mediation are so flexible and allow for the appointment of arbitrators and mediators of remarkable expertise in a given subject, they are much more like-minded to informal, practical rules than formal,

abstract ones. Arbitrators are less likely to abide only by strictly state-given rules unless the parties mandate that they so proceed.[15]

Uniformity in arbitration and mediation is also not as important as proper application. Proper application of the CISGS — understood as application that is congruous with principles of international trade — in arbitration and mediation may be more likely than in state courts[16]. Arbitration and mediation are normally chosen in an attempt to avoid the jurisdiction of national courts not only because of neutrality — as "[t]he national court of one party will be a foreign court to the other party" — but also because courts "have been developed to deal with domestic matters and not for international commercial or investment disputes" (BLACKABY et al., p. 32). Arbitration and mediation on the other hand are specialized fora where the principles of international trade are truly overarching principles.

As the forum matters the new CISGS might in the context of proper application promote the use of arbitration and mediation for the resolution of CISGS disputes. How this is supposed be effected is far from obvious; the text cannot commend parties to dodge the jurisdiction of state courts on the ground that the latter are not likely to properly resolve their disputes (which is absolutely not true, to start with). It is hoped that in the course of the development of the Draft CISGS the Joint Working Group will consider suitable alternatives. What is not an alternative, however, is to ignore that the application of international trade norms in arbitration and mediation is more international than that which is carried out in state courts. While such a statement may admit qualifications, it should be valid as a rule.

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[15] As the CISGS must pose itself at the core of a complex array of formal and informal rules (supra **5.2**), it will be even more manageable as a legal source in arbitration and mediation — in comparison to the state court environment — than the CISG.

[16] Kahn (1982, p. 106) understands that the CISG is aimed at organizing international economic arbitration at the substantive level.

5.4 NEW APPROACH TO CONTRACT FORMATION AND THE OBLIGATIONS OF THE PARTIES

Given that the current text of the CISG takes on an outdated approach towards the formation of the contract (supra **2.2.1**) and the obligations of the parties (supra **2.2.2**), it is also suggested that the CISGS embodies a renovation of such approaches.

As to the formation of the contract, it is expected that the CISGS abdicates from the approach of formation by correspondence which for historical reasons is that which the CISG adopts. As discussed supra at **2.2.1**, this approach fails to adapt to other forms of contract formation that predominate in today's international trade. The CISGS must, in contradistinction to the CISG, seek to capture the essence of contract formation — the exchange of consent — instead of providing for a tight scheme into which the interpreter is obliged to shove the facts.

In regard to the obligations of the parties, the CISGS must consider that sales transactions in international trade no longer involve uniquely the seller and buyer, but also third parties as discussed supra at **2.2.2**. Unlike the CISG, it should not consider that a sales transaction is effected only by two parties as if they were in segregation from the rest of the business world. It ought to treat them as part of value networks and consider them and their sales contracts (as well as their business relationship) in the context of the broad interplay between business actors which may be involved in or with the same transaction. Only from the perspective of their being enmeshed in a web of business actors should their relationship be meaningfully treated with a view to rebuilding the rules on the obligations of the parties in the CISGS.

5.5 UNIFIED APPROACH TOWARDS GOODS AND SERVICES

The relevant change of circumstances that took place since the time of the CISG and will continue to take place in the following years in the structure of the economy of trade in goods must reflect in a particularly important way in the development process of

the CISGS. The emergence of the servitization of goods (and accordingly, the productization of services; supra **2.3**) and the inaptitude of the text of the CISG to deal with it are the main reasons why this thesis proposes the drafting of a new Convention on the International Sale of Goods and Services (supra **4.5**). There are basically three options at the disposal of the Special Working Group to begin with: first, the drafting of two separate conventions, one on the sale of goods, and one on the sale of services (**5.5.1**); second, the drafting of a convention on the international sale of goods and certain services attached thereto (**5.5.2**); and third, the drafting of a Convention on the International Sale of Goods and Services (**5.5.3**).

5.5.1 The Drafting of Two Separate Conventions or of Two Independent Parts in a Single Convention

The advantages of drafting two separate conventions are clear. On the one hand, it would be possible to maintain the basic structure of the CISG in the goods convention, with new provisions drawing on old provisions or resulting from adaptations of wording and meaning. This is precisely putting new wine into old wineskins. The services convention, on the other hand, might imitate or replicate the structure of the CISG with its provisions being largely based on those of the goods convention. This would certainly be a safe and rather painless approach. It would not disrupt the familiarity that many have acquired with the CISG and would induce the same familiarity in relation to the services convention. It would allow states to pick-and-choose between both conventions and adopt only one of them instead of both if so they wish.

On the other hand, it would not necessarily consume less resources than other approaches. The approach of drafting the new based on the old was that adopted in the drafting process of the CISG. It was slow and there is no indication that it was

inexpensive[17]. But above all it would not be effective in addressing the problems discussed supra at **2.3**. It would still adopt a "water and oil" approach to goods and services which is not consistent with the goods-services continuum into which both categories have developed (supra **2.3.1**). This approach would treat separately, albeit in parallel, the issues concerning the sale of goods and the sale of services. It would in all likelihood not be effective in dealing with the emergence of PSSs and of the third generation of complex goods (supra **2.3.2.1**). Hence, it is not to be preferred as an approach to that of drafting a single convention.

An alternative approach to the drafting of two conventions would be the drafting of two independent parts within the same convention (much in the way Part II and Part III of the CISG are independent[18], which resulted from a request by Scandinavian states[19]). One of the parts would be the goods part and the other would be the services part. However, this approach would not be any more effective in tacking the abovementioned issues. In addition, allowing states to choose to ratify only one convention or one of the parts of a single convention would generate the same problems Article 92 of the CISG[20] has given rise to: uncertainty and fragmentation. If kernel uniformity is to be pursued (supra **5.3.2**), it must be ensured that a certain — minimally consistent — core of rules is acceded to by as many states as possible. Many states have recently abandoned their CISG reservations, including those made under Article 92, and the CISG AC (2013) has recommended that

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[17] Anecdotal evidence suggests that the cost of drafting the CISG amounted to US$ 6 million dollars at the time. While not unreasonably costly given the magnitude of the undertaking, such process could certainly not be considered a low-cost initiative.

[18] See Article 92 CISG. The transition from two conventions dealing with separate matters (the Hague Laws) to one convention which merges contract formation and sales obligations into a single text (CISG) was a move CISG drafters have made. Formation of contracts and the obligations of the parties were dealt with separately by the Hague Laws and were merged into one convention (the CISG) with two independent parts, one on formation (Part II) and the other on the obligations of the parties (Part III) (HONNOLD, 2009, p. 10).

[19] Scandinavian states (Denmark, Norway and Sweden, but not Iceland) considered that the formation of contracts was "a matter of general contract law which should not require any particular rules for contracts of sale" (RAMBERG, 2009, p. 258). Scandinavia has once been recognized as a prime example of regional unification (SCHLESINGER, 1980, p. 33).

[20] "Article 92: (1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention. (2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies."

newly acceding states do so without any reservations. Therefore, the reservation approach to ensuring ratifications must not be considered as a paramount alternative.

5.5.2 The Drafting of a Convention on the International Sale of Goods and Certain Services Attached Thereto

Another approach would be the drafting of a CISGS "light". A CISGS light, that is, a convention on the international sale of goods and certain services attached thereto, could in principles do justice to the existence of PSSs. But still, its scope of application would have to stop somewhere in the continuum that stretches from "pure" goods to "pure" services. It would still be necessary to draw the line much in the fashion of Article 3(1) CISG.

Therefore, while not a bad "plan B" to a full Convention on the International Sale of Goods and Services, a convention on the international sale of goods and certain services attached thereto would not cover all the ground there is to cover in adapting uniform sales law to the needs of 21st international trade. Plus, it could be hard to draft the new text's counterpart of Article 3(1). What standard would be used? That of economic proportion is not easy to apply and often overlooked by adjudicators (supra **3.2.1**). It also tends to become even more blurred with the rise of IoT and nanotechnology. Furthermore, the sale of services which are not attached to any good is becoming increasingly rare. The field of application of such a convention might not only be hard to ascertain, it may become a contradiction in terms in light of the fact that goods and services are now mere aspects of the same economic transaction (supra **2.3.1**).

5.5.3 The Drafting of a Convention on the International Sale of Goods and Services

The only way to pursue comprehensive coverage of all the issues that will be relevant for the sale of goods in the 21st century is to abandon altogether every distinction, for the purpose of a norm-generation process at the international level, between the sale of goods and the sale of services. Not by treating them separately in two distinct conventions; nor by treating them separately in two parts of the same convention; nor, in addition, by dealing with the sale of services only as far as they are "attached" to a sale of goods[21].

If the phenomenon of the servitization of products and the emergence of a product-service continuum are to be taken seriously, then uniform sales law must not shy away from facing them up front. It is not by evading the challenges presented by commercial reality that one will make sure a useful text is produced (supra **5.1**). Only by addressing all aspects of the new economy as discussed supra at Chapter **2** drafters are likely to come up with a text which may endure the vicissitudes of time — hopefully, even better than the CISG has endured.

A true convention containing rules applicable to contracts for the sale of goods and services must encompass not only the sale of "pure" goods, but also of "pure" services, since severing them has become not only difficult from the point of view of the adjudicator, it has become rarer and rarer in commercial life. If the CISGS, so much as the CISG, is to be based on references to "*facts* of commercial life" (HONNOLD, 1988, p. 208) it must sow its seeds in the impermanent soil of commercial reality. And the reality of commercial facts in the 21st century is one which allows for lesser and lesser differentiation between services and goods. It will be hard for the drafters of the new sales regime to insist in a differentiation that has become nearly impossible, and is likely to become impossible in the years to come.

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[21] This is the approach taken by the CESL (ORTIZ; VISCASILLAS, 2012).

5.6 INCORPORATION OF SUSTAINABLE DEVELOPMENT

In a world in need of governance (supra **3.1.1.2**) privity of contract[22] can no longer be absolute, as no contract is an island unto itself. Each contract represents an economic transaction and therefore, it can impact on other contracts and on the whole of economy even though it only represents a single transaction. This is demonstrated by the fact that financial variables may be both deterministically as well as stochastically chaotic[23] (HOLYST; ZEBROWSKA; URBANOWICZ, 2001). Hence, not only concerns of traders and the commercial interest of states, but also the general interest of mankind should be taken into consideration in the drafting process of the CISGS. International sales law cannot ignore the existence of surrounding norms of International Law. It too is not an island unto itself.

Notably, as concerns the surrounding norms of International Law, drafters must recall that the World Commission on Environment and Development[24] (1987) has established the groundwork for the dissemination of the idea of sustainable development. The idea of sustainable development must also inform the drafting process of the CISGS. CISGS drafters must not overlook the fact that international trade has played its part in "the short-sighted way in which we have often pursued prosperity" (WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, 1987[25]). International sales law must not shrug its shoulders to the efforts being made to "deal simultaneously with economic and ecological aspects in ways that allow the world economy to stimulate the growth of developing countries while giving greater weight to environmental concerns" (WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, 1987).

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[22] The principle of privity of contract is as old as Roman law and derives from the famous statement *res inter alios acta aliis nec nocet, nec prodest*. This is commonly translated into English — quite meaningfully — as "any matter between others is none of our business", despite its plain meaning as "that which is said and done between them does not either harm or benefit others" (a true proclamation of the sanctity of privity in business).

[23] I.e., they vary greatly depending on a small variation in initial conditions, partly according to pre-established laws and partly at random. E. Lorentz has famously tied chaotic processes to butterflies (in a meteorological context) by titling an address as "Predictability: does the flap of a butterfly's wings in Brazil set off a tornado in Texas?" (LORENZ, 1972). It is suggested that any contract between two international parties may be the flap of a butterfly's wings that can lead the economy to depart greatly from where it would sit had the same contract not been made.

[24] Widely known as the Brundtland Commission.

[25] Also known as the Brundtland Report.

One must bear in mind that what the World Commission on Environment and Development refers to as "ecological aspects" does not limit itself to concerns about natural resources and environmental degradation. The discourse on sustainable development has certainly been inspired by the environmentalist movement and the imminent irruption of a "tragedy" of the commons (HARDIN, 1968). However, it has far-reaching consequences on such themes as development, poverty, labor relations and foreign investment. For instance, the OECD Guidelines for Multinational Enterprises (hereinafter, "OECD Guidelines" or simply "Guidelines")[26] have been instrumental in assisting corporations to abide by ethical business practices and have due regard for human rights and the environment. The Guidelines open with the following statement (OECD, 2011, p. 13):

> The Guidelines aim to ensure that the operations of these enterprises [i.e., multinational enterprises] are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises.

Therefore, sustainable development can and must be closely associated with transnational entrepreneurial activity and, by way of consequence, with international sales transactions. A recent (and important) UN document has laid out recommendations for multinational corporations including that these corporations promote their human rights policies throughout value chains where they participate. According to the Guiding Principles on Business and Human Rights (HUMAN RIGHTS COUNCIL, 2011, p. 15), multinational corporations should spread their protective policies across business networks:

> The statement of commitment should be publicly available. It should be communicated actively to entities with which the enterprise has contractual relationships; others directly linked to its operations, which may include State security forces; investors; and, in the case of operations with significant human rights risks, to the potentially affected stakeholders.

[26] The OECD Guidelines for Multinational Enterprises first appeared in 1976 before the advent of the Brundtland Report.

However being a primary concern of public international law, the multifaceted idea of sustainable development is ready to invade international trade law. In international sales, buyers and sellers worry about the way products purchased were manufactured and fear possible unethical business practices of their counterparts[27]. Inter-firm governance of value networks is geared to address "the vulnerability and exposure to risks for lead firms within the chains, especially brand recognized corporations, to non-compliance within their supply chains" (NADVI, 2008, p. 16). Although parties are free to incorporate express terms into their contracts so as to hedge themselves against ethics violations, this will often not be the case. Parties will then have to rely upon contract interpretation and supplementation in order to avoid damage accruing from unsustainable practices of their business partners (SCHWENZER; LEISINGER, 2007). Here again, the concept of purpose embraced by Article 35(2) CISG (supra **2.3.2**) is likely not to suffice in order that ethical standards be incorporated into the contract — or at least the need that one stretches interpretation of Article 35 still farther becomes even greater.

Accordingly, the CISGS must be drafted in such a way that sustainable practices of buyers and sellers in international trade may effectively be enforced. This will be reached inter alia by tackling: 1) the conformity provisions in the text in order that they reflect the need for sustainable business practices and 2) the articulation between the CISGS and sources of sustainable development law (supra **5.2**). As to the first aspect, the conformity provisions of the CISGS (i.e., its counterparts for Articles 35-39 CISG) must deal with the issue of unsustainable practices from the viewpoint of contractual obligations. Effective remedies must be triggered by the inobservance by one of the parties of reasonable ethical and sustainability standards that the other party was entitled to expect (provided, of course, that the aggrieved party actually complies with such standards[28]). As to the second aspect, the determination of "reasonable" sustainable practices (regarding their incorporation into the contract) cannot but rely upon the existence of an already established set of norms endorsed and promoted by states (such as, e.g., the OECD Guidelines[29]) which deal with them in detail. The challenge CISGS drafters will face is that of reconciling the norms on

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[27] Of course, such concern is motivated primarily by fear of damage to the company's own reputation as well as that of its brand (in other words, the company's "goodwill").

[28] In light of the principle *in pari causa turpitudinis cessat repetitio* (ENONCHONG, 1995).

[29] For a broad account of issues involved in, as well as norms and initiatives dealing with corporate social responsibility see Scherer and Palazzo (2011).

sustainable and ethical practices of corporate social responsibility and the standards of contract law on which the CISGS should be based.

Of course, any such norms as deal with sustainable development in the context of the CISGS will not be optional for the parties. Sustainable development is part of an emerging world public policy (supra **3.3**) and is obviously not an optional concern. Hence, such provisions will derogate from the dispositive character of the CISG by adopting a mandatory approach. They will be an exception to the sacred recognition of party autonomy by the Convention, which is not at any rate of the essence of the CISG (supra **3.2.2**). This approach is not strange to UNCITRAL texts as it is adopted, at the very least, by the Limitation Convention (SONO, 2003).

6 CONCLUSION

> Parties already are permitted to displace positive law and to chose the rules that govern their dealings. Those who seek to shape those rules must be prepared to compete with alternative norms. Instead of imposing grand formulations as mandatory substitutes for local and industry specific practices, we would do better emphasizing choices that parties are likely to select because the solutions offered. provide a superior answer to the concrete problems they face. Revision projects that consciously seek to compete will place more emphasis on explanation and less on the elegance of the text or its crystalline theoretical coherence. The prospects are exciting. I look forward to the prospect of scholars from around the world working together.
>
> **Arthur Rosset** (1992)

The widespread acceptance of the CISG paves the way to new compromises by states in the realm of its ambit of application. Uniform sales law must adapt to the new economic realities of the 21st century. Renovation of the CISG is in order. It will be better achieved by the enactment of a new Convention on the International Sale of Goods and Services — the CISGS. The CISG has infused great innovation into the regime of sales rules both domestically and internationally. The CISGS has the potential to bring about even greater innovation, provided that their drafters do not lose sight of the fact that global sales rules must be based on local raw material and on fundamental, time-tested concepts and principles. Not unlike the CISG, the drafting and enacting process of the CISGS tends to be "a search for compromises in order to reach workable rules" (GARRO, 1989, p. 481).

Such search for compromises and workable rules is not without solid foundations. The landscape of international trade norms and principles was greatly enhanced by the work of distinguished scholars from Rabel to Schmitthoff and from Goldman to the present day. In particular, apart from the rich material provided by the CISG, by the UPICC and by

commentary and case law thereon[1], three sources of material should be of particular interest to CISGS drafters.

Though quite different in methodology and scope, all of them provide helpful guidance for the formulation of modern international trade norms. First, the *Global Sales and Contract Law* (SCHWENZER; HACHEM; KEE, 2012) commentary (supra **1.2**) is the most comprehensive work on comparative sales and contract law since Rabel. It provides a functional comparative analysis of "all traditional components of contract law" (except for rights of third parties, assignment and plurality of debtors and creditors) based on the neutral language introduced by the CISG and covering 60 jurisdictions[2] (SCHWENZER; HACHEM; KEE, 2012, p. 1-2).

Secondly, the Trans-Lex Principles, a compilation of transnational legal principles provided by the Centre for Transnational Law of the University of Cologne under the direction of Prof. Klaus Peter Berger (TRANS-LEX, 2014) constitute a successful "free research and knowledge platform on transnational law". The database offers a systematic collection of materials on the transnational law of international trade while its highlight and core is certainly its compilation of transnational principles of law, which amount to over 100 rules and principles covering from general provisions of contract law to the law of corporations, arbitration and private international law. The theoretical underpinning of the Trans-Lex project is the gradual or "creeping" codification of the New *Lex Mercatoria* (BERGER, 2010).

Thirdly, the Lexical initiative for Global Commerce, a proposal by Vikki Rogers and Albert H. Kritzer (ROGERS; KRITZER, 2003) launched in 2006 under the leadership of Prof. Albert H. Kritzer aims at fostering "the common understanding and application of language forming the basis of a bargain" (ROGERS, 2008, p. 405). It targets at the creation of a "controlled vocabulary" for international sales and is thus the antithesis of negotiating

[1] Commentary and case law on both the CISG and the UPICC are largely available on line. For instance, at the Pace "Albert H. Kritzer" CISG Database, URL: http://www.cisg.law.pace.edu and at UNILEX, URL: http://www.unilex.info. The theoretical underpinning of the Albert H. Kritzer CISG Database is the *global jurisconsultorium*, i.e., the idea that courts applying uniform law should pay attention to commentary and jurisprudence stemming from other countries which apply the same international instruments (ROGERS; KRITZER, 2003).

[2] In addition to such numerous instances of municipal law, the book also covers a vast array of international agreements relating to its subject-matter.

in silence for the lack of commonly understood language (supra **1.1**). By means of the construction of a thesaurus — which purports to be a "living document" —, the Lexical Initiative for Global Commerce "educates the user to the nuances of meaning of terms between international texts and provides for the recall of more relevant documents" (ROGERS, 2008, p. 411-413).

This thesis maintains that the CISGS must play a central role within the complex array of norms that make up international sales law. This can be translated as a coordinating role of an interpretive and relational nature among norms of different origins by serving as a gateway to diverse normative influences and paradigms. The CISGS must function as a conduit for other formal and informal norms which by operation of the adjudicator will add up to the most well-adjusted blend or "collage" (supra **5.2**) to the end in question. It will provide an opportunity for states to sanction that which is already part of the reality of international trade — informal norms —, thereby furthering the dialogue between sources of state and non-state origin. The CISGS must handle diversity. Diversity comes with conflict, but should end up in coherence. Diversity is a *fact*; coherence is a *necessity*.

The CISGS will be paramount in introducing a paradigm shift in international trade law which entails the overcoming of the *hard/soft dualism* of private international norms. *Hard* and *soft* are no longer essential categories of International Law. On the one hand, "hard" norms encompass ever more open concepts and standards, leaving room for the appearance of "soft" criteria of application and interpretation. As arbitrators usually have the power to apply the rules of law they deem appropriate (and judges under certain circumstances will also avoid the *lex non conveniens*), the "hardness" of a legal source is undermined by the possibility that it be set aside in favor of a more appropriate source, thus "softening" what would otherwise be a hard, secure choice of law. Non-uniform application of uniform law is another "softener" of norms intended to be as hard as a traditional legal code. The transient character of legal norms — a characteristic of legal post-modernity — is a softener that acts as time passes on by stretching the meaning and scope of purportedly hard and stable legal provisions.

It is hoped that the CISGS, so much as the CISG, becomes a beacon for the development of contract law. The CISG has brought contract law to the forefront of legal development; the CISGS should follow in its steps. So long as the Hague Laws have

constituted the expression of a generation of international contract lawyers and the CISG of another, the CISGS is expected to result from the work of yet a third generation of international lawyers and scholars who devote themselves to the study of international trade law. In light of the complexification of international trade, states alone without the influx of scholarship do not have what it takes to frame a workable yet scientifically accurate text for the CISGS. This is where inter-organizational cooperation between UNCITRAL and UNIDROIT rises to prominence. Whenever international sales law is concerned, traders — not states — have the greatest vested interests. Traders have a general capacity to legislate for themselves without state interference. Hence, state cooperation must set the frame for international trade legislation, yet it cannot furnish it with a picture. Unlike other areas of International Law, in international trade law states do not legislate for themselves, they legislate for other actors. The fact that they retain the power to do so (supra **3.1**) is not an excuse for the overlooking of such fact, but should rather serve as an inspiration for the work to be developed.

Renovation of the CISG — with or without the emergence of the CISGS — will be a rather steep slope to climb. We will benefit from starting as early as possible, and the CISG's 35th anniversary in 2015 provides a landmark as well as a kickoff opportunity. As stated by Andersen (2007, p. 27):

> It seems defeatist to abandon the pursuit of a goal because there are stumbling blocks to its achievement in terms of lawmaking [...] [T]hose who advocate we abandon the pursuit of unification because of these — admittedly serious — difficulties of legal divergence in lawmaking do not comment on the objectives of uniform law, but on the strength of the promulgators who seem to have managed in the face of such difficulties.

The lack of — at least — comprehensive reform incorporating the leading jurisprudence that has developed in connection with the CISG can nullify the benefits which the CISG was intended to introduce, as it allows judicial and arbitral decisions to come further and further apart. Inertia will also open the flood gates for regional uniform regimes that, though legitimate, might eventually become dominant and hegemonic in international sales law. Only by taking on a project for the most radical renovation of the CISG will it be possible to stand by its success which is otherwise likely to wither away.

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ANNEX A

UNIFYING THE LAW (EÖRSI, 1977)

(A Play In One Act, With A Song)

*Gyula Eorsi**

Chairman: Bang! The discussion is open on art. 1. The distinguished delegate from Knowhowland has asked for the floor.

The Delegate from Knowhowland: Thank you Mr. Chairman. delegation proposes that art. 1 should read as follows: "The dog shall bark." Thank you Mr. Chairman.

The Delegate from Oraculum: With greatest respect Mr. Chairman, this proposition runs against all experience. My delegation proposes the following wording: "The cat shall mewl." Thank you.

The Delegate from Knowhowland: My delegation is terribly sorry to disagree with my friend from Oraculum, Mr. Chairman, but have to remind you that my proposal stating that "The Dog Shall Bark" is backed by a 700 year old, uninterrupted line of court decisions in my country. Thank you Mr. Chairman.

The Delegate from Oraculum: Without underestimating, Mr. Chairman, the erudition, frugality and creative force of the courts and the importance of judge-made law, may I call your attention to the fact that the proposal tabled by the delegation of the Republic of Oraculum stating that "The Cat Shall Mewl" is warranted not only by our Civil Code but also by our greatest brains in legal thinking from the early 18th century up to the present days and is sociologically correct. Thank you Mr. Chairman.

The Delegate from Lombrosia [a newcomer in the unification business, meekly]: With due respect, Mr. Chairman, you will correct me if I am wrong, but I have the impression that the two distinguished delegates are both right, but perhaps they are not speaking about the same thing when one keeps speaking about dogs and the other about cats. Thank you.

The Delegate from Knowhowland [startled]: Of course we are not speaking about the same thing.. . **[p. 658]**

The Delegate from Oraculum: . . .but we are here to unify!

The Delegate from Lombrosia [ashamed]: Well. . . sure. . . I apologize. . . [Everyone is silent]

Chairman: Nobody wants to take the floor? May I announce that the discussion on this matter is closed?

The Delegate from Lowland: Mr. Chairman, Mr Chairman, no, please, don't conclude the discussion yet! This is a highly important matter, Sir! And it should be decided in a way which promotes genuine unification and not only unification in words! Comparative law teaches us that genuine unification can be attained only if the different legal systems are mixed! Thereby they will sooner or later be merged! A World Law will emerge, Sir! For these reasons, Mr. Chairman, my delegation suggests that we insert two equally valid and official texts into our Draft Uniform Law, that is: "The dog shall mewl" and "The cat shall bark"! This might satisfy everybody! Thank you Mr. Chairman.

The Delegate from Frogistan: While I fully appreciate the excellent idea, Mr Chairman, I still have some hesitations. Which of the two should come first, Sir? The dog or the cat? Should the dogs yield to the cats or *vice versa?* I see a difficult diplomatic problem involved in this proposal! With great respect, Mr. Chairman, my delegation is strongly against creating a new reason for a feud between dogs and cats, Sir! Thank you Sir. [Silence].

The Delegate from Nomansland: Mr. Chairman, perhaps we might put the proposed words into square crickets!

The Chairman: Does the distinguished delegate from Nomansland mean crickets or brackets?

The Delegate from Nomansland: Mr. Chairman, this is purely a drafting matter. I don't care. Thank you.

The Delegate from Balcony: Mr. Chairman, I am strongly opposed to any square animal or symbol in a Draft Uniform Law. But, with your permission Sir, I have a tentative proposal which I put forward in the spirit of compromise. We could say: "An animal shall make a noise." This would cover both proposals and would also satisfy our business circles. Thank you Mr. Chairman.

The Delegate from Transcendentia: This proposal, Mr. Chairman, has a certain appeal to my delegation. May I remark, however, that not all kinds of animals are capable of making a noise. I have particularly fish in mind, Sir.

The Delegate from Balcony: Well Sir, this depends on how the words "shall make a noise" are construed. This is a question of causation and is beyond the scope of our Draft Uniform Law. Besides if it were true that certain animals do not make any noise whatsoever, well, then our Uniform Law would simply not be applicable to such animals. Thank you Mr. Chairman.

The Delegate from Lapidaria: Mr. Chairman, my delegation asked for the floor to welcome the excellent proposal made by the most **[p. 659**] honorable delegate from Balcony with greatest enthusiasm. It is a modern proposal. It makes use of the functional approach to comparative law instead of the out-of-date conceptual one. The differences in means are unimportant. It is the result, the legal effect, which must be uniform. The proposal now under discussion concentrates not on barking or mewling, that is, not on the means but on the effect, that is, on the noise! Thank you Chairman.

The Delegate from Culinaria: This may be so Mr. Chairman, never the less I have the impression that the wording of the proposal tabled by our colleague Dr. Gegenbauch from Balcony is somewhat broad. It might not give sufficient direction to the courts. Perhaps some specification could be added. Something

on these lines: "The animal shall make a non-human noise." Thank you Mr. Chairman.

The Delegate from Linguaria: Me asking floor Chairman. . to proposing language bettering. . . in spite of "non-human" we can say "ahuman." This better English language I believing. Thank you so well Chairman.

The Delegate from Transcendentia: Both the suggestion made by the distinguished Delegate from Culinaria and that of the equally, distinguished Delegate from Linguaria sound better, Mr. Chairman, but my delegation still has some doubts. It is a common experience to all civilized countries that animals—and not ex fir: elusively parrots—frequently make noises which sound like noises emitted by species of the human race. And vice *versa*. Thank you Mr. Chairman.

The Delegate from Balcony: This is, in fact, a fact, Mr. Chairman, but with due respect Sir, does it amount to the same if we say that "a human noise" shall be made or if we say that "a noise sounding human" shall be effected? Thank you.

Chairman: I thank you so much Dr. Gegenbauch for your excellent remark. Perhaps we might refer this important question of detail to the Drafting Party, which will, as always, pay great attention to it. Does anybody else want to take the floor on this matter? Or we can take our refreshments now? We have already been working twelve minutes. . . .

The Delegate from Knowhowland: I am so sorry, Mr. Chairman, for causing a delay, but my delegation shares the strong belief that, the proposal of the distinguished delegate from Balcony—an excellent proposal indeed—needs some specification. But instead of inserting "non-human noise" which is not too specific either, we might say: "The animal shall bark." This is a compromise and I hope it will satisfy our commission. Thank you Mr. Chairman.

The Delegate from Oraculum: Mr. Chairman, I listened with greatest attention to the very interesting discussion. My delegation fully agrees with what has been said

by all the distinguished delegates.I have only a very modest proposal, not so much as to substance. **[p. 660]**

It is rather a matter of drafting. The article should read as follows: "The animal shall *mewl*". Thank you Mr. Chairman.

/Song/

The Delegate from Knowhowland: It's terribly nize
To find a compromize,
Whereby without awe
All countries ratify!

The Delegate from Oraculum: A drafting proposer
Will bring us much closer
To a Uniform Law
Which all states ratify!

Duet: No one make a fuss,
Excepting only us!

Chairman: Well gentlemen, time is late by now and I think you have sufficiently clarified the matter. It is referred to the Drafting Party for drafting. The Drafting Party will, as usual, meet at 2 a.m. tomorrow in the waiting room on the 4th floor and is kindly requested to present its draft at the plenary session tomorrow morning. And now we adjourn for ten minutes which should not last longer than half an hour. You are invited to take your refreshments. [Bang!]

Proposal of the Drafting Party

Article 1.

1.A noise [sound] shall be made [emitted] by any kind of a nonhuman [ahuman] being capable of [and fit for] making noise remitting a sound], including dogs and cats [cats and dogs].

A noise [sound] under paragraph 1 may be made [emitted] expressly or impliedly. It shall be of such a nature as can in the given circumstances reasonably be expected to be made [emitted] by the non-human [ahuman] being actually making the noise [emitting the sound], the proper imitation of noises usually made [sounds usually emitted] by non-human [ahuman] beings of a different kind from the one which has actually made the noise [emitted the

sound] as well as noises made [sounds emitted] by human beings, provided that such noises [sounds] sound non-human [ahuman], included, and subject to usages widely known to and regularly observed by [any particular branch of] [the branch involved of] the non-human [ahuman] community capable of [and fit for] making noises [emitting sounds]. Such imitation shall, subject to fraud, be deemed proper, if a reasonable non-human [ahuman] being could under the circumstances reasonably be deceived by the said imitation. 3. Any noise [sound not in conformity with the provisions of paragraph 2 shall for the purposes of paragraph 1 be deemed as **[p. 661]** silence, unless the party obliged under paragraph 1 to make a noise [emit a sound] can prove that it was prevented from making [emitting] the proper noise [sound] by circumstances beyond its control and the other party foresaw or ought have foreseen the impediment at the time of the silence following the making [emission] of the noise[sound] under this paragraph.

4. For the purposes of this Article a noise [sound] amounts to a noise [sound] even if it remains totally unheard, unless it is proved that there was no noise [sound] at all.'

Sequel

This proposal was, after the insertion of the word "promptly" following "silence" at the end of paragraph 3, unanimously adopted. The square brackets, however, were left to the next meeting.

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1. A compromise in respect of the delimitation of noise [sound] and silence. **[p. 662]**

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