Chapter 3
Regional and Global Unification of Contract Law

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1 Introduction

Before turning to the main subject matter of this chapter, a few words shall be said about the development of international trade: due to globalization, the overall development of international trade over the last half century is startling. Without having regard to 2009's dramatic decrease of world merchandise exports, which in any case was basically equalized in 2010, it may be useful to have a look at the demonstrated trend during the last decades. World Trade Organization (WTO) figures for 2012 indicate that world-wide merchandise export trade amounted to USD 17.850 billion and world-wide merchandise import trade to USD 18.155 billion.[1] These figures are approximately 100 times more than 50 years ago. The average annual export growth from 1992 to 2012 was more than 5 per cent world-wide.[2] No longer is the highest growth found in North America and Europe, but instead it is the transition economies from different points of the globe – particularly Brazil, China, Russia, and some African countries.[3]

These economic developments prompted legal answers in a variety of fields.[4] The focus of this chapter, however, shall be on harmonization and unification of contract law as contract law is at the very heart of international trade.

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1 World Trade Organization, 'World Trade 2012, Prospects for 2013' (Press Release, PRESS/688, 10 April 2013) 19 <www.wto.org/english/news_e/pres13_e/pr688_e.pdf>.

2 World Trade Organization (n 1) 2 <www.wto.org/english/news_e/pres13_e/pr688_e.pdf >.

3 World Trade Organization, 'International Trade Statistics 2012', 22 <www.wto.org/english/res_e/statis_e/its2012_e/its2012_e.pdf >.

4 See Ingeborg Schwenzer and Claudio Marti Whitebread, 'Legal Answers to Globalization' in Ingeborg Schwenzer, Yesim Atamer and Petra Butler (eds), *Current Issues in the CISG and Arbitration* (Eleven International Publishing, 2014), pp. 1 *et seq*.

2 The Need for a Uniform Contract Law

Contract law and especially commercial contract law has always been at the forefront of harmonization and unification of private law. The reason is that different domestic laws are perceived as an obstacle to international trade.[5] This has always been true and still holds true nowadays as has been proven by many recent field studies around the world.[6] In the nineteenth century this prompted unification at the nation state level all over Europe, in the twentieth century the Uniform Commercial Code in the United States (US) can be mentioned as a prominent example as well as endeavours especially on the European level.[7]

Let me briefly discuss who is in need of a uniform contract law and why. In general, on the international level we may roughly distinguish three different scenarios of contracting parties.

In the first group we find parties from countries where the same language is spoken. In general, these countries also belong to the same legal family with differences between the legal systems being minor if not negligible.[8] This first of all applies to parties from English speaking Common Law countries, like parties from the US and Canada, from Australia and New Zealand, or from India and the United Kingdom (UK). But it also holds true for other scenarios like those of parties from France and Cameroon, from Argentina and Mexico, or from Germany and Austria. First, it is well possible that the parties can agree on one of their respective legal systems. If this is not the case they can be expected to choose the law of a third country with the same language and belonging to the same legal tradition. In any case, the outcome of a possible dispute – be it litigated or arbitrated – will be more or less predictable. In this group which comes close to purely domestic contracts there is hardly any need for a unification of contract law as the parties would still prefer the law that is more familiar to them than any unified law.

5 Cf Ewan McKendrick, 'Harmonisation of European Contract Law: The State We Are In' in Stefan Vogenauer and Stephen Weatherill (eds), *The Harmonisation of European Contract Law, Implications for European Private Laws, Business and Legal Practice* (Hart Publishing 2006) 5, 14–15.

6 See Stefan Vogenauer and Stephen Weatherill, 'The European Community's Competence to Pursue the Harmonisation of Contract Law – An Empirical Contribution to the Debate' in Vogenauer and Weatherill (n 5) 105, 125–26.

7 See, for example, the Principles of European Contract Law (PECL) (1999) <http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm>; for more information on PECL see Ole Lando and Hugh Beale (eds), *Principles of European Contract Law, Parts I and II* (Kluwer Law International 2003) and Ole Lando and others (eds), *Principles on European Contract Law, Part III* (Kluwer Law International 2003).

8 For an overview of the legal families with regard to domestic sales law see Ingeborg Schwenzer, Pascal Hachem and Christopher Kee, *Global Sales and Contract Law* (OUP 2012) paras 2.01–2.135.

In the second group a – most probably western – company with overwhelming bargaining power contracts with an economically weaker party. The powerful company usually will be able to impose anything that it wants on its contract partner. It has sophisticated in-house lawyers who carefully draft the contract preferably with a choice of law clause designating its own domestic law. If this is combined with a forum selection clause designating the domestic courts of the economically stronger party, usually there will be no problems at least not for the powerful party and thus no need for a uniform contract law. The domestic courts apply their domestic law which in general will yield predictable and satisfactory results for the company seated in this country. The picture may immediately change, however, if the other party brings suit in the domestic courts of its own country and there the forum selection clause and/or the choice of law clause are not honoured.[9] But even if these courts accept the choice of law, it is a totally different question how the courts will apply this foreign law. By agreeing on arbitration many of the aforementioned imponderabilities may be circumvented. Still, problems of ascertaining and proving the chosen law – as will be described below – can be encountered.

The third group is probably by far the biggest one. It consists of parties from countries where different languages are spoken, be they parties from a Common Law and a Civil Law country or from two Civil Law countries. If none of the parties has the economic power to impose its own law upon the other party, that is, where the parties are dealing at arm's length with one another, more often than not they will agree on a third law. This might be a law that appears to be closely related to both parties because it influenced the law of both parties' countries in one way or the other, as is true for German law for example in relation to Italian and Korean law.[10] If no such common background exists, more often than not the parties think to solve their problems by resorting to what they believe is a "neutral law" thereby often confusing political neutrality with suitability of the chosen law for international transactions.[11] In particular, this seems to be the case with Swiss law.

In such a case the first hurdle that the parties have to take, at least once it comes to litigation or arbitration, is the language problem. They have to investigate a

9 A prominent example is Brazil, where the validity of choice of law and choice of forum clauses is highly controversial. For more information see Dana Stringer, 'Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging New Way' (2005–06) 44 Columbia Journal of Transnational Law 959.

10 For German influences on Italian Civil Law see Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 104–06; for German influences in the East Asian region see Schwenzer, Hachem and Kee (n 8) paras 2.123–2.127.

11 cf Christiana Fountoulakis, 'The Parties' Choice of "Neutral Law" in International Sales Contracts' (2005) 7 European Journal of Law Reform 303, 306–07.

foreign law in a foreign language. If the language is not the one of the litigation or arbitration in question all legal materials – statutes, case law and scholarly writings – must be translated into the language of the court or of the arbitration. Legal experts are required to prove the content of the law that is chosen by the parties. In some countries the experts may be appointed by the court, in others as well as generally in arbitration each party will have to come forward with sometimes even several experts.[12] Needless to say the procedures can be very expensive and may be prohibitive for a party who does not have the necessary economic power to invest these monies in the first place. This may even be harsher under a procedural system where each party bears its own costs regardless of the outcome of the proceedings as is especially the case under the so-called "American Rule" as it applies not only in the US but also for example in Japan.[13] However, even if a party is willing to bear all these costs to prove a foreign law in court or arbitration the question as to how this law is interpreted and applied can be highly unpredictable.

Second, the parties will very often be taken by surprise when they realize the true content of the law that they have chosen. One example, that is in my view rather typical for an international contract between two small and medium enterprises (SMEs), would be a sales contract between a Chinese seller and an Italian buyer. As German law has had great influence on both Chinese and Italian law[14] the parties – although none of them speaks German – believe that they have a rough idea of German law and agree on German law to govern their contract. The Chinese seller for its standard form contract copies a form it finds on the internet including a limitation of liability clause. Whereas the clause may well live up to the standards of the United States Uniform Commercial Code (US UCC), it is totally invalid under German law that provides for substantive control of standard terms even in business-to-business (b2b) relationships.[15] This is certainly not what both parties wanted and expected in choosing German law.

Third, the outcome of the case under the law chosen may be highly unpredictable. This especially holds true if the parties choose Swiss law. As Switzerland is such a small country, many central questions of contract law have not yet been decided by the Swiss Supreme Court or if so the decision may have been rendered decades

12 cf for court proceedings Michele Taruffo, 'Evidence' (2010) 16 International Encyclopedia of Comparative Law paras 7.65–7.66; cf for arbitration proceedings Gabrielle Kaufmann-Kohler, 'Globalization of Arbitral Procedure' (2003) 36 Vanderbildt Journal of Transnational Law 1313, 1330; Siegfried H Elsing and John M Townsend, 'Bridging the Common Law–Civil Law Divide in Arbitration' (2002) 18 Arbitration International 59, 63–4; see, for example, Art 25(3) ICC Arbitration Rules (2012); Art 27(2) UNCITRAL Arbitration Rules (2010).

13 For a comparative overview as to how litigation costs and attorney fees are allocated between the parties in civil litigation see Mathias Reimann (ed), *Cost and Fee Allocation in Civil Procedure* (Springer 2012).

14 cf Schwenzer, Hachem and Kee (n 8).

15 cf §§ 305–10 BGB (German Civil Code).

ago and is disputed by scholarly writings. This makes the outcome of the case often rather unpredictable; another reason that may well prevent a party from pursuing its rights under the contract.

Furthermore, especially Swiss domestic contract law in core areas is unpredictable and not suitable to international contracts. This can be demonstrated by reference to only two examples. First, the Swiss Supreme Court distinguishes between *peius*, that is, defective goods, and *aliud*, that is, different goods;[16] the latter giving the buyer the right to demand performance for ten years after the conclusion of the contract notwithstanding whether it gave notice of non-performance or not,[17] while the former requires the buyer to give prompt notice of defect according to Art. 201 OR (Swiss Civil Code) to preserve any remedies for breach of contract. Where the line between *peius* and *aliud* will be drawn in a particular case can be extremely difficult to predict.[18] The second example is compensation of consequential losses.[19] Whether there is a claim for damages without fault depends on the number of links in the chain of causation.[20] Extremely short periods for giving notice of defects[21] furthermore militate against domestic Swiss law for the international context. Similar examples could be drawn from many domestic legal systems.

3 Global Instruments on Contract Law

UNCITRAL Endeavours

It was exactly against this background that UNCITRAL started working on the unification of sales law in 1968, culminating in the Convention on Contracts for the International Sale of Goods (CISG) which entered into force on 1 January 1988. The CISG proved to be the most successful international private law convention world-wide. Today there are 79 contracting states with the number continuously increasing.[22] According to WTO trade statistics, nine of the ten largest export

16 BGer, 5 December 1995, BGE 121 III 453 (Switzerland).

17 cf Art 127 OR (Swiss Civil Code).

18 See Fountoulakis (n 11) 308–09; for more information on the differentiation between *peius* and *aliud* see Heinrich Honsell in Heinrich Honsell, Nedim Peter Vogt and Wolfgang Wiegand (eds), *Basler Kommentar, Obligationenrecht I* (5th edn, Helbing Lichtenhahn Verlag 2011) Art 206 paras 2–3.

19 Art 208(2) OR (Swiss Civil Code).

20 See BGer, 28 November 2006, BGE 133 III 257, 271 (Switzerland); Honsell (n 18) Art 208 paras 7–8.

21 cf Art 201(1) OR (Swiss Civil Code), according to which the notice must be made immediately ('sofort'); see also BGer, 27 June 1950, BGE 76 II 221, 225 (Switzerland) (notice within four days in time as these included a Sunday).

22 A list of all current contracting states to the CISG is provided by UNCITRAL <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>. Recently, Brazil has deposited its instrument of ratification of the CISG. The Convention will come into force

and import nations are contracting states, with the UK being the only exception.[23] It can be assumed that approximately 80 per cent of international sales contracts are potentially governed by the CISG.[24]

Moreover, a truly great success is the strong influence the CISG has exerted at both the domestic and international level. The Uniform Act on General Commercial Law by the Organization for the Harmonization of Business Law in Africa (OHADA) in its sales part is in many respects practically a transcript of the CISG.[25] The UNIDROIT Principles of International Commercial Contracts,[26] the Principles of European Contract Law,[27] the Draft Common Frame of Reference[28] and now the Draft Common European Sales Law[29] are all modelled on the CISG. Furthermore, the EC Consumer Sales Directive heavily draws on the CISG.[30] Similarly, the Sale of Goods Act in the Nordic Countries,[31]

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on 1 April 2014, making Brazil its 79th contracting state. In Bahrain and Madagascar ratification processes have started. See also Ingeborg Schwenzer and Pascal Hachem, 'The CISG – A Story of Worldwide Success' in Jan Kleineman (ed), *CISG Part II Conference* (Iustus 2009) 119.

23 cf World Trade Organization, 'International Trade Statistics 2011' (n 3) 24.

24 See Peter Schlechtriem and Ingeborg Schwenzer in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer, Commentary on the Convention on the International Sale of Goods (CISG)* (3rd edn, OUP 2010) Introduction I.

25 Acte uniforme portant sur le Droit commercial general (AUDCG) (1998, amended 2011) <www.ohada.org/presentation-generale-de-lacte-uniforme/telechargements1.html>; cf Ingeborg Schwenzer, 'Regional and Global Unification of Sales Law' (2011) 13 European Journal of Law Reform 370, 373–76; Ulrich G Schroeter, 'Das einheitliche Kaufrecht der afrikanischen OHADA-Staaten im Vergleich zum UN-Kaufrecht' (2001) Recht in Afrika 163, 166.

26 UNIDROIT Principles of International Commercial Contracts (PICC) (2010) <www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>; cf Michael Joachim Bonell, 'The CISG, European Contract Law and the Development of a World Contract Law' (2008) 56 American Journal of Comparative Law 1, 16–18.

27 See for more information on PECL n 7; cf Ole Lando, 'CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law' (2005) 53 American Journal of Comparative Law 379, 381.

28 Christian von Bar and Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)* (Sellier 2009).

29 See Ingeborg Schwenzer, 'The Proposed Common European Sales Law and the Convention on the International Sale of Goods' (2012) 44 Uniform Commercial Code Law Journal 457. The draft forms Annex I of the 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law' COM (2011) 635 final (11 October 2012) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:EN:PDF>.

30 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:171:0012:0016:EN:PDF>.

31 cf Kjelland, *Das neue Kaufrecht der nordischen Länder im Vergleich mit dem Wiener Kaufrecht (CISG) und dem deutschen Kaufrecht* (Shaker Verlag 2000).

the modernized German Law of Obligations,[32] the Contract Law of the People's Republic of China and other East Asian codifications,[33] and the majority of the recent post-Soviet codifications in Eastern Europe,[34] Central Asia,[35] and in two of the Baltic States[36] build on the CISG. Likewise, the draft for a new Civil Code in Japan follows the CISG.[37] It is reported that in developing countries the CISG is used to teach traders the structures of contract law so as to improve their level of sophistication.[38]

Despite this notable world-wide success, the CISG is merely a sales law convention that nevertheless covers core areas of General Contract Law. In addition to the obligations of the parties and typical sales law issues such as conformity of the goods and passing of risk, it contains provisions on the formation of contracts and remedies for breach of contract.[39]

The shortcomings of the CISG firstly relate to the areas not at all covered by the Convention, which approximately amounts to 50 per cent of the entire area of General Contract Law. Especially, the CISG does not deal with agency, validity questions such as mistake, fraud, duress, gross disparity, illegality, and control of unfair terms, third party rights, conditions, set-off, assignment of rights, transfer of obligations, assignments of contracts, and plurality of obligors and obligees. Furthermore, many issues that were still highly debated in the 1970s had to be left open in the CISG such as the problem of battle of the forms, specific performance as well as the applicable interest rate.[40] Some areas that are covered by the CISG have in the meantime proven to need more detailed attention, such as the rules on unwinding of contracts. Finally, conventions meant to supplement the CISG, such as the 1974 United Nations Convention on the Limitation Period in the International

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32 Peter Schlechtriem, 'International Einheitliches Kaufrecht und neues Schuldrecht' in Barbara Dauner-Lieb, Horst Konzen and Karsten Schmidt (eds), *Das neue Schuldrecht in der Praxis* (Heymanns 2003) 71.

33 cf Gary F Bell, 'Harmonisation of Contract Law in Asia – Harmonising Regionally or Adopting Global Harmonisations – The Example of the CISG' (2005) Singapore Journal of Legal Studies 362, 365–6.

34 Rolf Knieper, 'Celebrating Success by Accession to CISG' (2005) 25 Journal of Law and Commerce 477, 478.

35 ibid.

36 cf Martin Käerdi, 'Die Neukodifikation des Privatrechts der baltischen Staaten in vergleichender Sicht' in Helmut Heiss (ed), *Zivilrechtsreform im Baltikum* (Mohr Siebeck 2006) 19.

37 See for the English version of the Draft Proposal <www.shojihomu.or.jp/saikenhou/English/index_e.html>.

38 Schwenzer, Hachem and Kee (n 8) para 3.21.

39 The formation of contracts is dealt with in Arts 14–24 CISG. The buyer's remedies for breach of contract are to be found in Arts 45–52, the seller's remedies in Arts 61–5.

40 On the battle of forms see Ulrich G Schroeter in Schwenzer, *Commentary* (n 24) Art 19 paras 31–51; on the applicable rate of interest see Klaus Bacher in Schwenzer, *Commentary* (n 24) Art 78 paras 26-43.

Sale of Goods[41] and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts,[42] have at least not attracted as many members as the CISG, thereby also diminishing their unifying effect.

In addition to the CISG, UNCITRAL has embarked upon the unification of many other areas of international trade. Some of these instruments again touch upon various questions of General Contract Law,[43] especially the 1974 Convention on the Limitation Period in the International Sale of Goods, the 1983 Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance, the 1992 UNCITRAL Legal Guide on International Countertrade Transactions, and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts. However, this still leaves important areas to domestic law.

UNIDROIT Principles

On a global scale, UNIDROIT has engaged in elaborating Principles of International Commercial Contracts (PICC).[44] Whereas the 1994 version of the UNIDROIT Principles mostly covered the areas already dealt with under the CISG, and in addition validity issues, the 2004 version also addressed authority of agents, contracts for the benefit of third parties, set-off, limitation periods,

41 See for text and status <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_limitation_period.html>.

42 See for text and status <www.uncitral.org/uncitral/uncitral_texts/electronic_commerce/2005Convention.html>.

43 1974 Convention on the Limitation Period in the International Sale of Goods; 1978 United Nations Convention on the Carriage of Goods by Sea – the 'Hamburg Rules'; 1980 United Nations Convention on International Multimodal Transport of Goods; 1983 Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance; 1988 United Nations Convention on International Bills of Exchange and International Promissory Notes; 1991 United Nations Convention on the Liability of Operators of Transport Terminals in International Trade; 1992 UNCITRAL Legal Guide on International Countertrade Transactions; 1992 UNCITRAL Model Law on International Credit Transfers; 1995 United Nations Convention on Independent Guarantees and Stand-by Letters of Credit; 1996 UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, with additional article 5 bis as adopted in 1998; 2001 UNCITRAL Model Law on Electronic Signatures with Guide to Enactment; 2001 United Nations Convention on the Assignment of Receivables in International Trade; 2005 United Nations Convention on the Use of Electronic Communications in International Contracts; 2007 UNCITRAL Legislative Guide on Secured Transactions; 2007 Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods; 2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea – the 'Rotterdam Rules'; 2010 UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property.

44 See for further information on the PICC n 26.

assignment of rights and contracts, and transfer of obligations. Finally, the 2010 version contains a chapter on illegality and a section on conditions as well as detailed rules on the plurality of obligors and obligees and on the unwinding of contracts. Thus, the PICC 2010 now cover all areas that are perceived as contract law in most legal systems. Still, the practical importance of the PICC is rather limited, as they are an opt-in instrument being applicable by the parties' choice of law only.[45] Surveys suggest that in international commercial contracts the PICC are chosen in only 0.6 per cent of all cases.[46] Furthermore, the PICC being soft law, many domestic courts will not even accept such a choice of law.[47]

Furthermore, there are some shortcomings concerning the content of the PICC. The terminology used by the PICC is not always in line with the one used by CISG. For example, where the CISG uses the word avoidance for breach of contract the PICC instead uses the word termination[48] whereas avoidance is used in relation to defects of intent,[49] which would otherwise also be called rescission. This certainly gives rise to misunderstanding and confusion.[50] As the circle of representatives at UNIDROIT is not as inclusive as at UNCITRAL, the PICC display a certain tendency towards Civil Law concepts. The frequent use of good faith[51] is hardly acceptable to many Common Law lawyers. Likewise, there are too many provisions known to French legal systems only but unknown to both Common Law as well as Germanic systems, such as the rules on *astreinte*, a private penalty,[52] or those on conditions.[53]

4 Regional Instruments on Contract Law

On a regional level, a number of initiatives can be discerned. Several approaches can be found in Europe which all aimed at a European Civil Code or at least a European Contract Law. First and foremost, the Principles of European Contract Law (PECL) shall be mentioned here.[54] Starting with preparatory work in the 1980s, the PECL were published in three parts (1995, 1999, 2003),

45 cf the Preamble of the PICC.

46 See Simon Greenberg, Christopher Kee and J Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2011) para 3.140.

47 Ralf Michaels in Stefan Vogenauer and Jan Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (OUP 2009) Preamble I para 7.

48 See Chapter 7, Section 3 PICC, titled 'Termination'.

49 See Chapter 3, Section 2 PICC, titled 'Grounds for Avoidance'.

50 See also Schwenzer, Hachem and Kee (n 8) para 47.09.

51 See Arts 1.7, 4.8, 5.1.2, 5.3.3, 5.3.4 PICC.

52 Art 7.2.4 PICC; see also Schwenzer, Hachem and Kee (n 8) para 43.67–43.68.

53 See Chapter 5, Section 3 PICC.

54 For further information on PECL see n 7.

Part I covering performance, non-performance and remedies, Part II covering formation, agency, validity, interpretation, content and effects of contracts, and Part III covering plurality of parties, assignment of claims, substitution of the debtor, set-off, limitation, illegality, conditions, and capitalization of interest. The PECL have a clear European focus, but also take into account the US–American Uniform Commercial Code as well as the Restatements on Contracts and Restitution.[55] Like the PICC, the PECL are so-called soft law. Although the parties at least in arbitration may choose the PECL, there are no reported cases where this has happened.

More recently, the Study Group on a European Civil Code and the Research Group on European Private Law published the Draft Common Frame of Reference (DCFR) in 2009.[56] In contrast to the PICC and the PECL, the DCFR not only addresses General Contract Law but virtually all matters typically addressed in civil codes except family law and the law of inheritance. The DCFR was, however, met with severe criticism not only with regard to the general idea of the project[57] but especially with regard to drafting and style[58] as well as specific solutions in the area of general contract and sales law.[59]

Building on the DCFR, the European Commission published a proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (CESL) in October 2011.[60] Thus, the idea of a General Contract Law on the European level was not pursued anymore but rather narrowed down to sales law. The content of the CESL is almost identical to that of the CISG and the United Nations (UN) Limitation Convention with additional provisions on defects of consent, unfair contract terms, pre-contractual information duties, and contracts to be concluded by electronic means. Most notably, in contrast to the CISG, the CESL not only applies to b2b contracts but is in fact primarily aimed at contracts with consumers. The CESL, too, is an opt-in instrument. Throughout the European Union this proposal has been met with utmost criticism from academia as well as from practice. The future of this instrument is yet to be seen.[61]

In Europe, a few more private initiatives undertook similar projects, among them the Academy of European Private Lawyers (Pavia Group) that issued

55 Lando and Beale (n 7) xxvi.

56 For further information on DCFR see n 28.

57 Schwenzer, Hachem and Kee (n 8) para 3.63.

58 Horst Eidenmüller and others, 'Der Gemeinsame Referenzrahmen für das Europäische Privatrecht: Wertungsfragen und Kodifikationsprobleme' (2008) Juristenzeitung 529, 549; Ulrich Huber, 'Modellregeln für ein Europäisches Kaufrecht' (2008)16 Zeitschrift für Europäisches Privatrecht 708, 742.

59 Huber (n 58) 744; Ingeborg Schwenzer and Pascal Hachem, 'Drafting New Model Rules on Sales: CFR as an Alternative to the CISG?' (2009) 11 European Journal of Law Reform 459.

60 For further information on CESL see n 29.

61 See on the whole Schwenzer, 'The Proposed European Sales Law' (n 29).

the Preliminary Draft for a European Code (2001)[62] and the Trento Common Core Project.[63]

In Africa, first regard is to be given to the OHADA's Uniform Act on General Commercial Law (1998, amended 2011).[64] As mentioned above, the sales part of this act strongly relies on the CISG, although it contains certain modifications. Unfortunately, the 2011 amendments have implemented additional concepts stemming from French law and thus blurring the clear concepts achieved by the CISG.[65] In addition to this act, OHADA initiated works on a Uniform Act on Contract Law. A draft was prepared in cooperation with UNIDROIT and published in 2004, heavily drawing on the PICC.[66] At the time being, the future of this project is uncertain. Considerations for the harmonization of contract law based on the current international experience are also voiced in the framework of the East African Community.

Another recent private initiative aiming at the elaboration of Principles of Asian Contract Law (PACL) can be found in Asia since 2009. Among others, participants come from Cambodia, Vietnam, Singapore, PRC, Japan, and South Korea. Until today, the chapters on formation, validity, interpretation, performance and non-performance of the contract have been finalized.[67]

Likewise, in Latin America, general contract principles are being developed since 2009 within the framework of the Proyecto sobre Principios Latinoamericanos de Derecho de los Contratos hosted by a Chilean university. The countries covered up to now are Argentina, Uruguay, Chile, Colombia and Venezuela. However, the European approach seems to be considered as well.[68] In 2011 the biannual Conference of Private Law teachers in Latin America recommended working towards a uniform Civil Code for the Latin American region and to take the work of the above mentioned Pavia Group as a starting point.[69]

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62 For further information on the so-called Pavia Draft of a European Contract Code see Giuseppe Gandolfi, 'The Academy of European Private Lawyers and the Pavia Draft of a "European Contract Code"', <http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/stakeholders/5-20.pdf>.

63 For further information on the Trento Common Core Project see <www.common-core.org/>.

64 For further information on the AUDCG see n 25.

65 cf Schwenzer, Hachem and Kee (n 8) para 3.40.

66 OHADA Uniform Act on Contract Law, Preliminary Draft (2004) <www.unidroit.org/english/legalcooperation/OHADA%20act-e.pdf>.

67 For further information on the PACL see <www.fondation-droitcontinental.org/jcms/c_7718/projet-commun-de-droit-des-contrats-en-asie-du-sud-est>.

68 For further information on this project see <www.fundacionfueyo.udp.cl/archivos/Proyecto%20sobre%20Principios%20latinoamericanos%20de%20derecho%20de%20los%20contratos.pdf>.

69 See Luis FP Leiva Fernandez, 'Autour d'un "Code des contrats": Le Congrès des civilistes latino-américains à Tucuman' (2012) 64 Revue internationale de droit comparé 334 <http://www.unisob.na.it/universita/facolta/giurisprudenza/age/leiva.pdf>.

Along these initiatives, a trend aiming at building common regional law by using global texts also exists, for instance in the framework of the North American Free Trade Agreement (NAFTA), and now also in the framework of the Dominican Republic – Central America Free Trade Agreement (DR-CAFTA).[70]

Regional endeavours to harmonize and unify General Contract Law, however, cannot fulfill the needs of international trade.[71] Rather, different legal regimes in different regions lead to fragmentation. Instead of saving transaction costs and thus facilitating cross-border trade, international contracting may become even more complicated. Regional unification adds one more layer in addition to domestic rules and the well-established instrument of the CISG. Additionally, in many instances, not only does the terminology used in the General Contract Law instruments differ from that of the CISG, which in itself leads to confusion, but frequently, there will also be contradicting solutions to one and the same legal problem. Finally, regionalization of legal systems reduces the number of cases decided on a truly international level and hence has a negative impact on the predictability of the outcomes.

5 International Chamber of Commerce

For decades, important contributions to the harmonization of international trade law have emanated from the International Chamber of Commerce (ICC). As far back as 1936, the ICC published the International Commercial Terms (Incoterms®). Their latest version, the eighth edition, dates from 2010.[72] Although in many sales contracts they are agreed upon and thus are of significant practical importance, Incoterms® cover only a small fraction of the parties' obligations in an international sales contract. With the Uniform Customs and Practice for Documentary Credits (UCP), the ICC has created another important instrument to facilitate international trade.[73] Finally, the ICC provides innumerable model contracts and clauses for use in various types of international commercial transactions.[74]

70 cf Stephen Zamora, 'NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade' (1995) 12 Arizona Journal of International and Comparative Law 401; see also Craig L Jackson, 'The Free Trade Agreement of the Americas and Legal Harmonization' ASIL Insights June 1996 <www.asil.org/insight3.cfm>.

71 See also McKendrick (n 5) 29.

72 See on the Incoterms® 2010 Jan Ramberg, *ICC Guide to Incoterms 2010* (ICC 2011).

73 See on the latest version of the UCP, UCP 600, International Chamber of Commerce, *Commentary on UCP 600* (ICC 2007).

74 See, for example, International Chamber of Commerce, *The ICC Model International Sale Contract* (ICC 2013) and International Chamber of Commerce, *ICC Force Majeure Clause 2003, ICC Hardship Clause 2003* (ICC Publishing S.A. 2003), free download of the English and French versions at <www.iccbooks.com/Product/ProductInfo.aspx?id=233>.

6 Possible Future Work on Global Contract Law

All the endeavours described above clearly demonstrate the urgent need to further harmonize if not unify General Contract Law.

UNCITRAL would be the most appropriate place for such a project which falls squarely within UNCITRAL's mandate. According to General Assembly Resolution 2205 (XXI), para. 8: "[t]he Commission shall further the progressive harmonization and unification of the law of international trade by: (a) Co-ordinating the work of organizations active in this field and encouraging co-operation among them".[75] Whereas any regional endeavour might mainly focus on the laws of the respective countries involved, UNCITRAL has the chance to embark upon a more truly global reflection. Indeed, UNCITRAL is the only forum with universal participation, that is, all the regions of the world have a chance to contribute on equal footing.[76] This is the reason why in 2012 Switzerland made a proposal for the 45th session of UNCITRAL on possible future work by UNCITRAL in the area of international contract law.[77] However, this proposal did not suggest how the possible future work should be conducted; especially what kind of instrument should be aimed at if one were to come to the conclusion that such future work is desirable and feasible. Let me give some thoughts on this question, emphasizing that I am speaking entirely for myself and in no way voicing the official Swiss opinion.

In principle, there is the choice between a convention and a model law. A convention is designed to unify law by establishing binding legal obligations.[78] Its aim is to achieve a very high level of harmonization.[79] Although there may be the possibility of having some reservations allowing State Parties a certain but very limited degree of choice, such reservations are easily discernible without the need to have recourse to the respective domestic law. Thus, a convention provides the highest level of predictability for private parties. In contrast, a model

75 General Assembly Resolution 2205 (XXI), 17 December 1966 <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2205%28XXI%29&Lang=E&Area=RESOLUTION>.

76 UNCITRAL's membership comprises states from Africa, Asia, Eastern Europe, Western Europe, Latin America and the Caribbean, thereby ensuring that the main economic and legal systems of the world are represented. For an overview of the today 60 member states see United Nations Commission on International Trade Law, *A Guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law* (2013), 37–41 (Annex II) <www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>.

77 United Nations Commission on International Trade Law, 'Possible future work in the area of international contract law: Proposal by Switzerland on possible future work by UNCITRAL in the area of international contract law', 45th session, New York, 25 June – 6 July 2012, A/CN.9/758 (8 May 2012) <www.uncitral.org/uncitral/commission/sessions/45th.html>.

78 UNCITRAL, *A Guide to UNCITRAL* (n 76) 13.

79 ibid 14.

law only provides for a legislative text that is recommended to State Parties.[80] It is used where State Parties want to retain flexibility in implementing or where strict uniformity is not desirable or necessary.[81] Furthermore, a model law may be finalized and approved by UNCITRAL at its annual session whereas a convention still, in principle, necessitates a diplomatic conference.[82] Although, at the political level it may be certainly easier to convince state governments to agree to a model law allowing them more leeway, the needs of international commerce clearly militate in favour of a convention. Even if states were to implement a model law, they could deviate from the text of such a model law which would make it difficult to ascertain the content of the applicable law in a specific case. Moreover, there is no obligation for courts of a state that has implemented a model law to regard its international character and the need to promote uniformity in its interpretation, as it is nowadays provided for in any international convention.[83] Thus, a statute implementing a model law *is* purely domestic law and is legitimately interpreted against the respective domestic background. If a model law may bring about some harmonization at the beginning this will soon be lost after some time. This can especially be expected in a traditional field such as contract law where firm dogmatic conceptions and convictions prevail that have been shaped over centuries and that every lawyer has internalized from the very first day in law school.

The scope of the envisaged instrument on General Contract Law should be similar to that of the CISG. That means in the first place that the instrument should only be concerned with international contracts but not with purely domestic ones. There is no reason and it is not the mandate of UNCITRAL to interfere with domestic relationships.[84] If a state feels the need to simplify the situation for its citizens by having the same law applied to domestic as well as to international contracts it is free to do so and implement correspondent domestic legislation as some states already have chosen in the relation to the CISG.[85]

Like the CISG, the instrument on General Contract Law should be confined to b2b contracts without touching business-to-consumer (b2c) relationships. Except for internet transactions that become more and more international, b2c contracts remain mostly domestic contracts. Consumer protection asks for mandatory rules which stands in sharp contrast to the need for freedom of contract in b2b contracts. It is not possible to juggle the needs of both – consumers and businesses – in one single instrument. The futility of such an endeavour has been demonstrated lately by the draft of a CESL.[86] Furthermore, the level of consumer protection still differs considerably around the world; an international *consensus* in this field probably

80 ibid.
81 ibid.
82 ibid 15.
83 See only Art 7(1) CISG.
84 cf for UNCITRAL's mandate UNCITRAL, *A Guide to UNCITRAL* (n 76) 1–2.
85 cf nn 31–37.
86 See Schwenzer (n 29).

cannot be achieved during the decades to come. Finally, consumer protection is better served by procedural tools such as class action and online dispute resolution than by mandatory substantive law rules.

Having regard to the areas already covered by the CISG – especially contract formation, interpretation and remedies for breach of contract – it can be expected that the CISG rules are also well suited for other contracts. Even long-term contracts can be accommodated by the existing CISG rules on contracts for delivery of goods by installments.[87] If the need were to be felt to exclude certain contracts from the instrument, such as maybe labour contracts or insurance contracts, this could be achieved on the one hand on a general level by a rule similar to Art. 2 CISG, excluding certain contracts from the scope of application of the instrument; and on the other hand, by providing for reservations allowing individual states to exclude certain contracts. Finally, the contract law instrument like the CISG[88] would be an opt-out instrument enabling the parties themselves to decide if they do not want these rules to apply to their contract.

As regards further areas of contract law that should be addressed it is clear that the future uniform contract instrument should cover as many areas as possible. However, there are some fields where unification is more urgent than in others. The most important area where the gaps left by the CISG are most unfortunate because they endanger uniformity already reached is questions of validity. Although it is now unanimously held that the CISG itself defines what is a question of validity left to domestic law and what is not,[89] many day-to-day contract problems are issues of validity. To name but a few; questions of consent, such as mistake, undue influence or fraud; and validity of individual clauses and standard terms, such as gross disparity, burdensome obligations, exclusion and limitation of liability clauses as well as fixed sums, that is, penalty and liquidated damages clauses.[90] It is extremely burdensome to have these questions answered by domestic law which might well lead to frictions with unified law. Also very important are issues of consequences of unwinding of contracts[91] and set-off.[92] Other areas of contract law, such as third party rights, assignment and delegation, or joint and several obligors and obligees might not be at the forefront of desirability for unification.

If one considers working on further unification of contract law, the route to be followed seems to be pretty clear. The starting point must be the CISG. It has

87 Art 73 CISG.

88 Art 6 CISG.

89 Ingeborg Schwenzer and Pascal Hachem in Schwenzer, *Commentary* (n 24) Art 4 para 31 with references.

90 For an overview on how the issues of formation and validity of sales contracts are dealt with in different legal systems see Schwenzer, Hachem and Kee (n 8) paras 9.01–22.25.

91 For an overview on how the unwinding of contracts is dealt with in the different legal systems see ibid paras 50.01–50.36.

92 For a comparative discussion on set-off see Christiana Fountoulakis, *Set-off Defences in International Arbitration: A Comparative Analysis* (Hart Publishing 2011).

received such tremendous acceptance that anything that might interfere with it must be refrained from. Other UNCITRAL instruments, such as the 1974 Limitation Convention or the 1983 Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance, should be taken in due consideration and it should be discussed whether they should be amended. Certainly, of utmost importance are the PICC. Most valuable work has been completed by UNIDROIT and any duplication of efforts must be prevented. In essence, we face a similar situation as in 1968 when UNCITRAL started working on the CISG, drawing heavily on the previous work done by UNIDROIT that had led to the Hague Conventions on the sale of goods, the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) and the Uniform Law on the International Sale of Goods (ULIS) respectively.[93] However, as has been mentioned before, there are certain contradictions between the CISG and the PICC that need to be eliminated;[94] in other areas the possible acceptance of the PICC rules at a global level must be carefully scrutinized and discussed.

Having regard to what already has been achieved at the international level, a global contract law appears to be feasible within a reasonable amount of time and without consuming too many resources needed elsewhere.

7 Improvements by a Global Contract Law

How would the global picture for internationally contracting parties change if we had an UNCITRAL instrument on General Contract Law?

First, this instrument – just like the CISG – could be expected to represent a good compromise between Common and Civil Law.[95] It would be acceptable to any party regardless of its own legal background. It would be a truly neutral law.

Second, it would be drawn up in the six UN languages and would be translated into the languages of the states adopting this instrument and thus be readily available in court and arbitral proceedings rendering costly translations and expert testimony superfluous. Like the CISG, it could serve as a model for further harmonization of contract law on a domestic level. And it could be used to teach traders that cannot afford in-house counsel or legal advice the basics of contract law.

Third, it would lead to much more predictability in international contracts. It can be expected that the same mechanisms that now support and enhance the uniform application and interpretation of the CISG will also play a decisive role

93 For more information on the drafting history of the CISG see Peter Schlechtriem, *Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods* (Manzsche Verlags- und Universitätsbuchhandlung 1986) 17–21.

94 cf nn 48–53.

95 cf for the CISG Ulrich Magnus, 'The Vienna Sales Convention (CISG) between Civil and Common Law – Best of all Worlds?' (2010) 3 Journal of Civil Legal Studies 67–98.

for such an instrument. It must be recalled that by now we have about 3,000 published cases on the CISG,[96] we count about 4,000 publications freely accessible on the internet,[97] we have CLOUT – Case Law on UNCITRAL texts,[98] we have the UNCITRAL Digest[99] and further institutions world-wide such as the CISG Advisory Council[100] that strive to guard uniformity. Commentaries with article-by-article comments will be published in different languages. Uniform standard forms that facilitate contracting will soon emerge on the basis of such an instrument and further add to predictability.

All in all it can be expected that an UNCITRAL instrument on General Contract Law may considerably save transaction costs. It may help companies with lesser funds to be able to pursue their legal rights under an international contract and thus further promote international trade. Finally, it can support the rule of law world-wide.

96 See for cases on the CISG, for example, the online case database CISG-online <www.cisg-online.ch> and the Pace Law School CISG database <www.cisg.law.pace.edu>.

97 See for publications freely accessible on the internet, for example, the online collection of scholarly writings at the Pace Law School CISG database <www.cisg.law.pace.edu>.

98 See for CLOUT <www.uncitral.org/uncitral/en/case_law.html>.

99 See for the UNCITRAL Digest <www.uncitral.org/uncitral/en/case_law/digests.html>.

100 For further information on the CISG Advisory Council and for the CISG Advisory Council Opinions see <www.cisgac.com>.