A Critique of the Swiss Proposal to Study a More Comprehensive Regime of International Contract Law
Recognizing the Advantages of an Ever-More-Comprehensive Regime of International Commercial Law

- The basic theory of uniform international commercial law initiatives: Reducing transaction costs (including uncertainty and unfairness) associated with the choice of law issue in international transactions.
My Dilemma

- If one believes (as I do) that the CISG is good, a **fortiori** more comprehensive uniform international contract law must be better.

  - Certainly at least studying the feasibility of creating more comprehensive uniform law must make sense, right?

- How can I support (indeed, found a career on) the advantages represented by the CISG and still have reservations about the Swiss proposal?
The Timing Question: Is the Time Right for a New and More Comprehensive Initiative?

- My reservations about the timing of the Swiss proposal arise from two sources:
  - 1) Reservations based on domestic U.S. political concerns.
  - 2) Reservations based on abiding methodological and ideological differences in interpreting and applying international commercial legal texts.
Reservations Based on Domestic U.S. Political Concerns

- Developing concerns in the U.S. about preserving state law prerogatives in those areas traditionally governed by it.
- The battle over implementation of the as-yet-un-ratified Hague Choice of Court Convention.
  - The push for a method of implementation (labeled “cooperative federalism”) that require implementing legislation by all 50 states (plus the territories?).
  - Failure of the attempt at “cooperative federalism” seems likely to produce a proposal to implement through federal (national) legislation – a proposal that those protective of state law prerogatives may not support (despite support for the Convention itself) and may (one hopes not) actively oppose.
Contract law (including sales law) is one of the most important traditional bailiwicks of state law in the U.S.

U.S. ratification of the CISG in 1986, apparently, was not on the radar of those solicitous to preserve the traditional role of state law in specified areas such as sales law – for the first time, it created “federal” U.S. sales law.

I strongly suspect that those forces would make U.S. ratification of the CISG far more difficult today because it “federalizes” a vital area (sales law) traditionally governed by state law.
A proposal to study the feasibility of uniform international law for an even broader area traditionally governed in the U.S. by state law (general contract law) with an even broader sphere of application (e.g., validity rules) would at this moment provoke an even stronger sense of threat to state law prerogatives.

Such a project would likely produce more insistent demands for a “federalist” method of implementation that I believe would be impractical, potentially establishing a terrible precedent.
Reservations Based on Domestic U.S. Political Concerns (cont’d)

- The result could be de facto inability of the U.S. to participate in the project – and perhaps in any future project for uniform law in areas traditionally governed by state law in the U.S.
  - I believe (hope) that U.S. participation in the movement for uniform international commercial law is desirable and important.
  - I believe (hope) that efforts to create uniform international law are improved by U.S. participation.
- The timing of the Swiss proposal represents a threat to that participation.
Deep methodological and ideological differences between the conception of and approach to “Law” in the Civil Law and the Common Law traditions has produced real stress and serious non-uniformity in even the limited CISG system.

Until the deeper purposes of the CISG have been more fully achieved – until it has manufactured (in the words of Michael Bridge) “a legal culture to envelope it before the centrifugal forces of nationalist tendency take over” – its work remains radically incomplete, and efforts to go beyond it are premature and hence dangerous.
Reservations Based on Different Approaches in the Civil and Common Law Traditions (cont’d)

• The sins of U.S. courts and commentators re the homeward trend are many, as we all know.
• But the Civil Law world is also, in my view, guilty of a particularly insidious form of the homeward trend – one that cloaks itself in the garb of greater uniformity.
  • Civilians are adept indeed at finding things in a legal text that are not apparent to a common lawyer (or, I suspect, to those who drafted the text).
  • E.g., the Bundesgerichtshof decision discovering the Beweissnahe principle in the CISG, or (much more disturbing) the Scafom decision discovering the Civil Law hardship doctrine is a general principle applicable under the CISG.
A common theme in these decisions is use of civil law interpretational approaches to discover “internationally-accepted” uniform law principles that turn out to be principles accepted by the Civil Law.

My Pitt colleague Professor Ron Brand has (in another context) described the “European magnet” and the “U.S. centrifuge”*-- an apt description of the unifying and centralizing tendencies of Civil Law interpretational approaches vs. the diversifying (and more flexible) common law interpretation techniques.

In these early stages of the development of a common uniform commercial law, involving minimal surrender of national autonomy, I would defend the more modest non-Civil Law interpretational approach as better suited to the development of a stable political base for the movement.

- States who find themselves bound by significantly-more expansive legal principles than they understood they were signing up for may well become alienated from the process.
- Economically less-advantaged States, whose perspective has not been well-represented in current applications of the Convention, may be particularly susceptible to this alienation.
Until there has been more progress towards uniformity in the areas just described, I fear that efforts to significantly expand the scope of the uniform commercial law movement are premature and could lead to a failure that would significantly harm the movement.

The CISG needs more time to succeed in the absolutely critical task that I believe was its true significance from the beginning: the development of common global values and approaches to uniform international commercial law.
A Proposal for an Affirmative Approach to Prepare for More Comprehensive Uniform International Commercial Law Initiatives in the Future

- If I actually believe in the ultimate goal of the Swiss Proposal (and I do), it is incumbent on me not just to argue that the time is not right, but to do something to change conditions and make the time right.
- I pledge to try actually to do something – to take action on this front even if it means sacrificing something else.
I am making arrangements with the American Society of International Law to try rooting out U.S. courts’ “horrible dictum” (or more than dictum) that, in interpreting the CISG, U.S. courts can be guided by the interpretation of equivalent provisions of the UCC.

- Providing lectures for low cost online CILE programs sponsored by ASIL aimed at the working bar.
- Working with ASIL’s judicial education initiatives, such as participation in the conference for new federal judges and the release of ASIL’s Bench Book on international law.
A Proposal for an Affirmative Approach to Prepare for More Comprehensive Uniform International Commercial Law Initiatives in the Future (cont’d)

- I believe a concerted effort to remove such clearly identifiable, consensus targets that undermine the CISG (and I admit the fact that the “horrible dictum” is an easy target gives an American an unfair “advantage” in this project) is the preferable action at this point.
- This is something that can be done whether or not you support the Swiss initiative – and I hope we will all try.