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Introduction

AN OVERVIEW OF THE CISG AND AN INTRODUCTION TO THE
DEBATE ABOUT THE FUTURE CONVENTION

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Ladies, Gentlemen, and Colleagues,

THE organizers of this Villanova conference have invited me to address to you a few remarks under the heading of “An Overview of the CISG and an Introduction to the Debate About the Future Convention.” It is a privilege to be asked to do this, but it is a matter of some regret that I cannot be with you. I am not sure whether I should say “Good Morning,” “Good Afternoon,” or “Good Evening,” as, while I am recording these remarks in rainy London, you will be hearing them in a rather colder Pennsylvania town where it may even be snowing. I shall at that time be in the rather warmer confines of Singapore. Let’s proceed to the introduction.

The CISG has now been in force for just over a quarter of a century, and has been adopted by nearly eighty states. Its progress has been described by some as slow, but I do not see it that way. By the standards of international uniform commercial law, that is a highly impressive achievement. It is bested only by the New York Convention on International Arbitral Awards. There is of course the case of marine carriage liability, but there you are looking at four different uniform models of liability: the Hague Rules, the Hague-Visby Rules, the Hamburg Rules, and the recent Rotterdam Rules. We of course are looking at only one uniform instrument. UNCITRAL will not rest on its laurels, I know this, and will continue to promote the adoption of the CISG and may even, in time, attract the adherence of the most intractable states, including my own country.

It is more than just a case of creating uniformity; the real challenge, I think, lies in maintaining uniformity. This is because a uniform law does not exist as inert matter on a printed page—it is, instead, a living thing in a stream of continuing legal development. One reason for the success of the CISG, apart from the commitment shown by UNCITRAL to promote it and to maintain it as a uniform instrument by means of a CLOUT system of reported cases and a digest of cited cases, has been the immense effort

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put in by the so-called “private sector” into the process of maintaining uniformity. Now, it is always invidious to set up particular cases, but obvious examples that spring to mind are the various websites dedicated to the task (of which the Pace website is perhaps the best known). Mention should also be made of the CISG Advisory Council, which seeks to give practical assistance to courts and tribunals in the form of measured and authoritative opinions on particularly important aspects of the CISG. I should here declare an interest as a member of that Council, but then go on to say that its process of monitoring developments and scrutinizing texts are exacting.

Turning now to case law and scholarship, it can hardly be doubted that the private programs of rendering national cases available in full-text form, particularly when the cases are translated into English (here I think Pace and Queen Mary University of London should take a bow), is proving to have a striking impact on the maintenance of uniformity. The cross-citation of authority, though not as fully developed as one would want it to be, is much more pronounced than in the early stages of development of the CISG. My impression is that decided cases are becoming both more predictable and more settled.

Let us contrast that with the case of legal scholarship. It is not clear to me how any tribunal can hope to deal with the deluge of material, in varying degrees of quality, that comes out and is published, often in full-text form, on websites. Article-by-article commentaries in the German tradition seem to me to have the best prospects of commending themselves to courts and tribunals. For all the rest, it seems to me, at any rate, to be as a matter of accident whether those adjudicating cases have accessed the material in law reviews and printed collections. Now, it would be pompous and ahistorical to seek a return to the Emperor Augustus’s *ius respondendi* (which of us would be Ulpian, Paulus, Papinian, and so on?), but there is an itch that prompts the thought.

We turn now to substantive law: sale and contract. In my opinion, the greatest handicap the CISG has to face as it promotes international uniformity lies in its isolation. It is not tethered to any other body of uniform private law. There is no true hinterland for international sales of the type that exists for national sales instruments. The problem is acute, because, to a very substantial extent, the separation of special sales law and general contract law is an artificial exercise. In national systems, the division only can be made in matters concerning property; this is one of the two areas, along with validity, that is actually excluded from the CISG, which otherwise deals in a plenary way with the rights and duties of seller and buyer arising out of a contract of sale. Enormous difficulties therefore arise in determining the scope within the CISG of doctrines such as mistake or misrepresentation. All this is before we even begin to survey the boundary between sale and tort law. This means that constructing a link to a body of

general contract law, as a minimum measure, is essential to the future welfare of the CISG.

Now, let us take a look at the UNIDROIT Principles of International Commercial Contracts. These, in my opinion, amount to a highly impressive achievement in promoting international uniform contract law. They nevertheless have their limitations. They suffer from the fact that they are avowedly not a contract code as such, though how this status is compatible with mandatory standards of good faith and cooperation in the Principles, as well as rules concerning contract formation and vitiated consent, is not something I have ever been able to determine. What is clear to me is that they cannot be shoehorned into the CISG as a supplementary source under Article 7(2), or as a usage under Article 9. They do not constitute the basis on which the CISG was devised (though they are somewhat compatible with CISG), and they do not proclaim themselves to be established usage, though some provisions, such as those dealing with payments, might individually in fact prove to be usage.

So there is further work that UNCITRAL can carry out. The case for taking up the reins and promoting a uniform contract law instrument is a compelling one. The Swiss Proposal seems to be timely. I do realize that there are political forces at work in this area, and that in a world of limited financial resources the decision to take this matter forward would represent a hard choice at the expense of other initiatives. If such an initiative were nevertheless to be taken, the gains arising out of its success would be very great. A venture into general contract law is the next logical step in the development of a uniform private commercial law. UNCITRAL would not and should not start with a clean slate; it does have the UNIDROIT Principles themselves, just as earlier it had the two Uniform Sales Laws of 1964. Moreover, and I cannot speak to the political feasibility of this proposal, a measure of joint action on the part of UNCITRAL and UNIDROIT might yield very impressive results.

The full measure of this initiative needs to be considered. There are various formats that might be used. The most modest possibility would be to have a legislative guide, akin to the one developed by UNCITRAL for secured transactions. Modest and quick, nevertheless, might not amount to the same thing. If an agreement could be reached on the general principles of contract law at a level of detail that was not merely bland, such as "let there be freedom of contract," it would be better to take the extra step by moving either to a model law or a uniform law convention. In my view, the latter approach, the uniform law convention, would have the greater chance of producing tangible results at the national level. The internal political will in a nation state to work on a model law would in many cases be rather weak, especially in the case of contract, whose familiar contents might not give many nation states an incentive to take action. As for the formulation of the UNIDROIT Principles themselves, with rule, comment,

and case illustration, this would not lie well with the current shape of the CISG and would probably not be suited to the treaty-making process.

There is a danger in delaying any such movement forward. The obvious danger comes from various and varying regional initiatives which may or will not be suited for integration with the CISG, and may even (as is the case with the Common European Sales Law) entail a departure from the basic rules of the CISG. This process is likely to continue, and to undermine the present uniformity achieved in sales law unless UNCITRAL intervenes. The Common European Sales Law seems to me to have acquired traction, or at least some traction, for two reasons. First, because it avoids the awkward exclusion of validity that at present has happened with the CISG. This is a good reason for intervening, but it does not justify rewriting the rules for some commercial sales as though these were quasi-consumer transactions. Second, the Common European Sales Law is presented as modern while the CISG is described as showing its age. Now, I do not agree with the second reason at all. The whole point of a convention treated as a living instrument is that it is more than just the words written on a diplomatic page. It develops and adapts. The process of arriving at international agreement is painful and arduous, and cannot be regarded as something to be done at quite regular intervals. This process gives rise to a new instrument that must go through the pains of clarification in litigation. A succession of new uniform sales laws attracting different groupings of adopting states, as is now the case for marine carriage liability, is plainly undesirable.

Let us finally turn to other possibilities. To start with, the New Year is a time for optimism, but calls for an international commercial code do seem to me to be premature, unless they are to be furthered by means of an instrument that is incremental and part of a long-sighted road map, coming in, as it were, in installments over a lengthy period. That apart, there is much to be said for beginning with issues concerning the transfer of ownership from seller to buyer. Property issues are frequently represented to be issues where securing international uniformity is profoundly difficult. As true as this might be in cases dealing with land and succession, it is in my belief far from true about the passing of property rights under a sale of goods transaction. Intention-based national systems move in the direction of exceptions based upon delivery. Delivery-based national systems move in the direction of exceptions based upon intention. In this area above all, we can draw considerable comfort from the comparative law adage that "profound difficulties of national approach are heavily outnumbered by the numbers of identical national solutions."

Now I think that is a proper point with which to conclude these remarks. May I wish you the best for the coming conference and the series of discussions that will be carried out in the next day or so. Thank you.