Chapter 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

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? “If it ain'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 forsake 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 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 among 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

---

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 all or most of Gabriel's concerns in the course of the present work.
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 for either reform or replacement at some point. 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 for international trade?

This Chapter questions whether there is an appeal to renovate the CISG which could strike a balance in the stakeholder equation and drive stakeholders (supra 1.2) to commence working on a project for renovation (2.1). It will then address the shortcomings of the Convention which better demonstrate it must not be regarded as a permanent work done by the international legislator (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

---

2 The author will provide a definition for each of these terms in order that the author’s understanding be 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.).