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Non-Governmental initiatives towards the harmonization of international trade law*

> *"Great reuerence is due vnto Lawes at all times, and hath beene in all ages. … greater reuerence then is due to the Law-Merchant which hath proued alwaies firme and inuiolable." (Malynes Gerhard Consuetodo vel Lex Mercatoria or the Ancient Law Merchant (1622) Adam Islip London Epistle from the Epistle Dedicatorie.)*

1. Introduction

What do I mean by non-governmental initiatives? International trade can be facilitated, broadly speaking, in two different manners. Governments can in negotiation with the governments of their trading partners try to remove trade barriers. This is what I would term governmental initiatives to facilitate trade. However, trade can also be facilitated by the harmonization of the law regulating trade. There are various harmonization techniques, some of which require no participation from government, whilst others require government participation only in the form of legislation.

With regard to the harmonization of international trade law non-governmental initiatives have been important. By non-governmental initiatives I mean, essentially, the initiatives of various agencies throughout the world that work towards harmonizing international trade law. These agencies may have arisen without any governmental intervention or participation,[1] or with some[2] (for example UNIDROIT) or even significant[3] governmental participation, but once in place, they work totally or largely independently of any government. From the above it should be clear that the term "non-governmental initiatives" in this context is somewhat of a misnomer: Government may still be involved, for example in the founding or funding of an agency working towards harmonization, or as legislature. The point is that government's role can be regarded as secondary or supportive to initiatives of other institutions or agencies. These initiatives form the subject matter of this paper.

Many of the agencies working towards unification in the field of international trade or business (law) have their own very specific areas of interest. Examples are:

* The financial assistance of the National Research Fund (NRF) towards this research is hereby acknowledged. Comments and findings are those of the authors and should not be attributed to the NRF.

1 For example the ICC (on which see par 4 below).

2 For example UNIDROIT (on which see par 5 below).

3 For example UNCITRAL (on which see par 3 below).

C Hugo, University of Stellenbosch, Stellenbosch.

(i) The International Air Transport Association (IATA): IATA is the trade organization for the world's airlines. It has played and important role in standardizing air transport documentation such as air waybills.[4]

(ii) The International Federation of Freight Forwarders' Associations (FIATA): FIATA is an organization that promotes standards and quality in international freight forwarding. It has been responsible for a number of standard documents of which the FIATA Bill of Lading is perhaps the best known.[5]

(iii) The International Maritime Committee (CMI[6]): The CMI was founded in 1897 with the purpose of promoting the unification of maritime law. Its work has led to a number of maritime protocols and conventions on maritime law, including the international regulation of bills of lading known as the Hague-Visby Rules.[7]

(iv) The International Road Transport Union (IRU): The ITU represents commercial operators of road transport vehicles. It administers the TIR customs system that allows containers sealed by customs officials to cross intervening national borders without undergoing full customs formalities.[8]

(v) The World Customs Organization (WCO): The WCO us a global union of customs organizations that endeavours to advance the efficiency of the customs process.[9]

The objectives of agencies such as these are clear. Their respective impact has understandably been restricted to their specific spheres of interest. Their work has been important, and will continue to be so, but for the purposes of this paper I will not devote any further attention to them. Three other agencies, however, have a more general interest, and deserve closer scrutiny. They are the United Nations Commission for International Trade Law (UNCITRAL), the International Chamber of Commerce (ICC), and the Institute for the Unification of Private Law (UNIDROIT).

These organisations are very important in the context of harmonization of international trade law in general. Much of this paper is devoted to their work. Before turning to them specifically, however, it is useful to deal briefly with the different harmonization techniques.

4 Jiménez 1997:30.
5 Jiménez 1997:30.
6 The acronym reflects the French Comité Maritime International.
7 Jiménez 1997:31.
8 Jiménez 1997:31.
9 Jiménez 1997:30.

2. Harmonization techniques

2.1 Legislative techniques

If the harmonization-ideal is pursued by legislative technique, the text will be either a convention or a model law. Both are legislative texts. Both must be legislated into force by any state wishing to do so.[10] A convention is multilateral: it only becomes law when a specified number of states have ratified it, and then only for those states who have ratified it. Further states wishing to make the convention part of their law can accede to the convention after it is in force. Conventions lead to the highest degree of uniformity. States ratifying or later adhering to a convention have the identical statutory law with the sole exception of specifically permitted reservations.[11] The main disadvantage of this method is its inflexibility. States that cannot live with specific aspects of the convention will simply decline from ratifying it or adhering to it and thereby compromise the harmonization ideal. Experience has also shown that governments tend to give a low priority to the implementations.[12]

A model law, on the other hand, allows for unilateral introduction. Any state wishing to do so can introduce legislation based on the model law unilaterally. The model-law technique is likely to lead to a lesser degree of uniformity than in the case of a convention, but has the advantage of being more flexible. States can model legislation on the model law and simply change or leave out those portions that it regards as undesirable.[13] To achieve the highest degree of harmonization possible states may be requested, for example by resolution of the General Assembly, to depart as little as possible form the model law itself.[14]

2.2 Contractual technique

An international transaction can be simplified to a great degree by the incorporation of standard terms drafted at an international level. These terms are incorporated (normally simply by reference) into the contract of the parties, and, insofar as such terms are universal, harmonization of the

10 Schmitthoff 1981:22-23 uses the term "international legislation" to embrace conventions and model laws, but acknowledges that the term is a misnomer as "the power to create legal rules in a particular territory is restricted can only be exercised by, or by authority of, a national sovereign."

11 The United Nations Convention on Contracts for the International Sale of Goods provides good examples. For a detailed overview of the reservations see Hugo 1999:10-11. The Scandinavian countries, for example, have a different approach to formation of contract than that of the rest of continental Europe. When they acceded to the convention it was with the reservation that those articles dealing with formation of contract would not apply to them.

12 See "Factors determining choice of instrument to be prepared" <http://www.unidroit.org/english/presentation/pres.htm>.

13 "Factors determining choice of instrument to be prepared" <http://www.unidroit.org/english/presentation/pres.htm>.

14 UNCITRAL Secretariat 1991:paragraph 25.

issues dealt with in the standard terms is achieved. This technique has the advantage of being totally independent of legislative activity. It simply rests upon that general rule of legal systems that contracts must be honoured. As such, it is also relatively simple to amend such standard terms to keep pace with developments in international business.

2.3 Explanatory Technique

It is sometimes useful for an agency to draft a legal guide dealing with a particular area.[15] The purpose of such a guide is basically educational. The underlying idea is that it can stimulate the modernization and harmonization of that particular area of law.[16] International contracts can be very complex. A legal guide discussing various issues relating to that particular contract, indicating the implications, advantages and disadvantages of certain possible solutions can be of great assistance to parties,[17] especially where they do not always have access to the best legal advice.

3. United Nations Commission on International Trade Law (UNCITRAL)

3.1 Founding, mandate and composition

UNCITRAL was founded in 1966 by resolution of the General Assembly of the United Nations.[18] The Resolution was the culmination of work prompted by an item placed on the agenda of the 20th Session of the General Assembly of the United Nations in 1965 by Hungary entitled "Consideration of steps to be taken for progressive development in the field of private international law with a particular view to promoting international trade".[19] The Secretariat of the General Assembly commissioned Professor Clive M Schmitthoff to prepare a preliminary study. His report concluded that significant progress had been made towards harmonization but disclosed the following shortcomings: (i) the progress had been slow in relation to the time and effort spent; (ii) the new independent developing countries had had very little opportunity to participate and contribute; (iii) none of the agencies working in this field represented all major geographic regions or principal economic systems in the world; and (iv) the different agencies working in the field did not interact sufficiently. The report proposed the creation of a new UN organ to "systemize and accelerate the process of harmonization and unification of international trade".[20] Resolution 2205 (XXI) of the General Assembly, giving

15 "Factors determining choice of instrument to be prepared" <http://www.unidroit.org/english/presentation/pres.htm>.
16 UNCITRAL Secretariat 1991:paragraph 32.
17 UNCITRAL Secretariat 1991:paragraph 33.
18 Resolution 2205 (XXI).
19 UNCITRAL Secretariat 1991:paragraph 1.
20 UNCITRAL Secretariat 1991:paragraph 3. See also Schmitthoff 1981:24.

birth to UNCITRAL, was formulated and adopted. Since then it has become probably "the leading international agency for the harmonization of private commercial law".[21]

The mandate given to UNCITRAL in the resolution is detailed and too voluminous to reproduce here. Essentially, however, it is designed to address the problems raised in the Schmitthoff-report. The composition of the Commission is significant. The 36 member countries[22] are elected by the General Assembly as follows: 9 African States, 7 Asian States, 5 East European States, 6 Latin American States, 9 West European and other States. This composition ensures that all major geographic regions and economic systems are represented on the Commission. The members are selected for a term of 6 years, the terms of half the members expiring every three years.[23] Due to its politics of the past, South Africa, prior to 1994, could not become a member of UNCITRAL. Sadly, however, even after our re-emergence into the international community, no, or very little tangible, attention appears to have been given towards securing our membership to this important Commission.[24]

The International Trade Law Branch of the United Nations Office of Legal Affairs serves as substantive and administrative Secretariat of UNCITRAL.[25] The professional members are trained lawyers from different parts of the world. They conduct research within the programme of work of UNCITRAL and prepare reports, preliminary draft texts and commentaries on draft texts for the annual Sessions of UNCITRAL and for working groups and expert groups. The Chief of the International Trade Law Branch is also the chief executive officer of UNCITRAL (the Secretary). The Secretaries of the past have included a number of persons whose names are familiar to international trade lawyers.[26] The current Secretary is Jernej Sekolec. The Secretariat has an excellent devoted library that can be visited by prior arrangement.

3.2 Method of work

The Commission carries out its work at its annual Sessions conducted alternately in Vienna and New York. The UNCITRAL Sessions typically take the form of discussing and analysing draft texts and reports prepared by the legal officers of the Secretariat in conjunction with specialized working

21 Goode 1995:18 n 64.

22 The founding resolution made provision for 29 members, but this was amended to 36 by the General Assembly Resolution 3108 IXXVIII) in 1973.

23 UNCITRAL Secretariat 1991:paragraph 6.

24 The current African member states and the years when their membership expires, are Benin (2007), Burkina Faso (2004), Cameroon (2007), Kenya (2004), Morocco (2007), Rwanda (2007), Sierra Leone (2007), Sudan (2004), Uganda (2004). See "C. Composition" <http://www.uncitral.org/english/commiss/geninfo.htm>.

25 UNCITRAL Secretariat 1991:paragraph 6.

26 They have been: Paolo Contini (1968-9), John Honnold (1969-74), Willem Vis (1974-1980), Kazuaki Sono (1980-85), Eric Bergsten (1985-91), Gerold Herrmann (1991-2001).

groups and groups of experts. The role of the legal officers is a very important one. At its 11th Session UNCITRAL adopted the following general policy:

> As a general rule, the Commission should not refer subject-matters to a working group until after preparatory studies had been made by the Secretariat and the consideration of these studies by the Commission had indicated not only that the subject matter was a suitable one in the context of the unification and harmonization of a law, but that the preparatory work was sufficiently advanced for a working group to commence work in a profitable manner.[27]

The Commission reports to the General Assembly on the work done at each of its annual sessions. These reports are also submitted to the United Nations Conference on Trade and Development (UNCTAD) for comments.[28]

The texts eventually adopted by UNCITRAL can take any of the forms mentioned above in the context of harmonization techniques namely conventions, model laws, uniform rules and legal guides.

UNCITRAL conducts national and regional seminars and briefing missions promoting knowledge of their work and instruments. Two such conferences have already been held in South Africa[29] and there is a good possibility of another in 2003.[30]

UNCITRAL has been responsible for the following Conventions already in force (African countries that have ratified or acceded to the Conventions are listed):[31]

(i) Convention on the Limitation Period in the International Sale of Goods (New York, 1974) as amended by the Protocol of 11 April 1980. [Entered into force on 1 August 1988.] Egypt, Uganda, Zambia.

(ii) United Nations Convention on the Carriage of Goods by Sea, 1978 (The "Hamburg Rules"). [Entered into force on 1 November 1992.] Botswana, Burkina Faso, Burundi, Egypt, Gambia, Ghana, Kenya, Lesotho, Madagascar, Malawi, Morocco, Nigeria, Senegal, Sierra Leone, Tunisia, Uganda, Tanzania, Zambia.

(iii) United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). [Entered into force on 1 January 1988.] Burundi, Egypt, Lesotho, Mauritania, Uganda, Zambia.

(iv) United Nations Convention on Independent Guarantees and Standby Letters of Credit (1995). [Entered into force on 1 January 2000.] Tunisia.

South Africa is party to none.

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27 UNCITRAL Secretariat 1991:paragraph 16.
28 UNCITRAL Secretariat 1991:paragraph 14.
29 In 1997 (Stellenbosch) and 1999 (RAU).
30 Arrangements for such a conference for the entire region to be held in December 2003 or January 2004 are progressing favourably.
31 <http://www.uncitral.org/english/status/status-e.htm>.

UNCITRAL has been responsible for the following model laws (African countries who have produced legislation based on the Model Law in question are listed.):[32]

(i) UNCITRAL Model Law on International Commercial Arbitration (1985). Bahrain, Egypt, Kenya, Madagascar, Nigeria, Tunisia, Zimbabwe.

(ii) UNCITRAL Model Law on International Credit Transfers (1992).

(iii) UNCITRAL Model Law on Cross-Border Insolvency (1997). South Africa.

(iv) UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994). Mauritius, Tanzania, Uganda.

(v) UNCITRAL Model Law on Electronic Commerce (1996).

(vi) UNCITRAL Model Law on Electronic Signatures (2001).

In South Africa the Law Commission has recommended legislation based on the UNCITRAL Model Law on International Commercial Arbitration.[33] Similar legislation has also been recommended for Mozambique.

UNCITRAL has been responsible for the following standard contract rules:[34]

(i) UNCITRAL Arbitration Rules (1976).

(ii) UNCITRAL Conciliation Rules (1980).

UNCITRAL has been responsible for the following legal guides:[35]

(i) UNCITRAL Legal Guide on International Countertrade Transactions (1992).

(ii) Recommendations to Assist Arbitral Tribunals and Other Interested Bodies with regard to Arbitrations under the UNCITRAL Arbitrations Rules (1982).

(iii) UNCITRAL Notes on Organizing Arbitral Proceedings (1996).

(iv) UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2001).

(v) UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works (1988).

(vi) Recommendation on the Legal Value of Computer Records (1985).

32 <http://www.uncitral.org/english/status/status-e.htm>.
33 South African Law Commission Project 94 Arbitration: An International Arbitration Act for South Africa Report July 1998.
34 <http://www.uncitral.org/english/status/status-e.htm>.
35 *Ibid*.

4. The International Chamber of Commerce (ICC)

4.1 Founding, nature and objectives

The ICC was founded in 1919. It is based in Paris. The ICC is essentially a world business organisation with diverse activities. Its main objectives are to serve world business by promoting trade, investment and open markets for goods and services, and the free flow of capital, as well as to encourage the system of private enterprise and self-regulation by business.[36] It is a non-governmental organisation of some 7000 companies and business associations from some 130 countries throughout the world. Its views are presented in most major countries by national committees (in South Africa by SACOB). The ICC is financed by membership fees, fees for the use of the ICC Court of International Arbitration[37] and the marketing of their good but expensive publications and electronic data bases. It is an important body with top-level consultative status with the United Nations. It is represented in most inter-governmental and non-governmental agencies associated with international business, including UNCITRAL.[38]

4.2 Method of working

The ICC has a number of specialist ICC Commissions that meet regularly to review issues affecting their special area of world business. One of the most prolific is the banking commission. It has been responsible for drafting (or codifying[39]) standard contract terms for documentary credits,[40] demand guarantees,[41] and contract guarantees.[42] In addition the Banking Commission of the ICC issues bankers' opinions on documentary-credit problems posed to them.[43] There are similar commissions for a wide range of sectors including insurance, competition, intellectual property and transportation.

Whenever a Commission deems it necessary to embark on some project it typically creates a sub-committee of experts as a Working Party. The drafts of the Working Party are then circulated widely, by means of *inter alia* the different National Committees of the ICC. The Working Party collates and

36 Jiménez 1997:28. See also <http://www.iccwbo.org/home/intro_icc/introducing_icc.asp>. Schmitthoff 1981:27 terms it "the most important and most successful" of the non-governmental formulating agencies.

37 See on the ICC International Court of Arbitration <http://www.iccwbo.org/court/english/intro_court/introduction.asp>.

38 Jiménez 1997:28; Schmitthoff 1981:27-8. See also <http://www.iccwbo.org/home/intro_icc/introducing_icc.asp>.

39 Goode 1995:14-15 uses the term "codified custom and usage" and Schmitthoff 1981:22-23 the term "international commercial custom" in this regard.

40 Uniform Customs and Practice for Documentary Credits (1993) ICC Publication 500.

41 ICC Rules for Demand Guarantees (1991) ICC Publication 458.

42 ICC Rules for Contract Guarantees (1978) ICC Publication 325.

43 See for example Collyer 1998-1999: 613.

considers any responses, and when it is satisfied, presents its final product to the relevant ICC Commission which, if it is satisfied, it passes on to the ICC Executive Board for adoption.[44]

4.3 Most successful instruments

The ICC has been responsible for a vast array of instruments assisting parties in international business transactions. Its most important contribution to the harmonization of international trade law is connected, however, to two instruments namely the Uniform Customs and Practice for Documentary Credits (UCP) and the International Commercial Terms (INCOTERMS). Both these instruments, in order to regulate the relationships between parties to international business transactions must, in principle,[45] be incorporated into the contracts. They apply, therefore as part of the contract, and not because they constitute law in themselves.

The UCP, introduced in 1933, and revised in 1951, 1962, 1974, 1983 and 1994,[46] regulates the relationships between the applicant for the credit (typically the buyer) and the bank issuing the credit, as well as the relationship between the bank and the beneficiary of the credit (typically the seller). The UCP is incorporated by reference in both the application for the credit and in the credit itself as advised to the beneficiary.[47] This is standard procedure amongst banks throughout the world. A commercial documentary credit[48] which does not incorporate the UCP is very rare indeed. This means that the relationships between the different parties to this important payment instrument are effectively harmonized,[49] at least as regards those aspects which are regulated in the UCP.

INCOTERMS, first published in 1936 and subsequently revised in 1953, 1967, 1976, 1980, 1990 and 2000, are internationally standardised trade terms which enable exporters to determine prices accurately by taking account of the risks and costs of transport to the buyer, insurance and customs

44 Jiménez 1997:29. See also <http://www.iccwbo.org/home/intro_icc/introducing_icc.asp>.

45 But see also the remarks on the potential application of the UNIDROIT Principles of International Commercial Contracts below despite an absence of contractual incorporation, which are equally applicable to the UCP and INCOTERMS.

46 The UCP has been revised 6 times since 1933. The latest revision came into operation on 1 January 1994. On the development and nature of the UCP see my trilogy of articles published in the *SA Merc LJ* (1993) 5 44 *et seq*, (1994) 6 143 *et seq*, and (1996) 8 151 *et seq*. It has just been augmented (2002) by an additional regulatory framework designed to absorb developments in e-commerce.

47 For example: "This credit is issued subject to 1993 the revision of the Uniform Customs and Practice for Documentary Credits ICC Publication 500 (1993)".

48 As opposed to a standby documentary credit for which the UCP is ill-suited, and for which more suitable regulatory frameworks have since been devised.

49 Schmitthoff 1981:28 describes the UCP as having been "very successful" (at 23) and as having become "world law". Goode 1995:15 describes it as the "most successful of the various ICC formulations".

formalities.[50] They are incorporated into the contract of sale by reference.[51] There are 13 INCOTERMS that represent "a stepladder of increasing responsibility"[52] (which implies an increasing price) for the seller. Thus the term EXW (ex works), which means delivery at the seller's factory, represents the minimum responsibility for the seller, and the term DDP (deliver duty paid), which means to deliver at the buyer's premises, the maximum responsibility.

It stands to reason that INCOTERMS contribute immensely to certainty in international contracts.[53]

5. International Institute for the Unification of Private Law (UNIDROIT)

UNIDROIT is an independent intergovernmental organisation with its seat in Rome. Its main objective is the study of needs and methods for modernising, harmonising and co-ordinating private law and, in particular, commercial law as between States and groups of States.[54] It was founded as an auxiliary member of the League of Nations, and after the demise of that body, re-established in 1940 on the basis of a multi-lateral agreement, the UNIDROIT Statute. To become a member a State must accede to the Statute. There are 59 member States. The African Member States are: Egypt, Nigeria, South Africa and Tunisia.[55]

UNIDROIT focuses its activities on substantive private law. As such its activities overlap to a large degree with those of UNCITRAL. Its independent status enables it to pursue methods that have made it particularly suitable for dealing with more technical (as opposed to political) issues.[56] As in the case of UNCITRAL its work may culminate lead to international conventions, model laws,[57] general conditions of contract or legal guides. Its library can be regarded as the leading documentation centre in this field. UNIDROIT publishes the *Uniform Law Review* twice a year,[58] and maintains a most impressive data base on uniform law (UNILAW)[59] for which correspondents are appointed in many countries.[60]

50 Jiménez 1997:74.
51 For example "$1000/ton FOB New York INCOTERMS 2000".
52 Jiménez 1997:74.
53 A misunderstanding of simple trade terms can lead to expensive, drawn out and unnecessary litigation. For an example of such a misunderstanding in South Africa see *Ex Parte Sapan Trading (Pty) Ltd* 1995 1 SA 218 W.
54 See "Purpose" <http://www.unidroit.org/english/presentation/pres.htm>; Jiménez 1997:30; Goode 1995:18 n 65.
55 <http://www.unidroit.org/english/presentation/pres.htm>.
56 See "Legislative policy" <http://www.unidroit.org/english/presentation/pres.htm>.
57 Despite specifically mentioning the advantages of model laws as opposed to conventions (see above) in its webpages UNIDROIT has not as yet given rise to a model law. See "Factors determining choice of instrument to be prepared" <http://www.unidroit.org/english/presentation/pres.htm>.
58 Schmitthoff 1981:26.
59 See "Subsidiary activities" <http://www.unidroit.org/english/presentation/pres.htm>.
60 The South African correspondent is Prof Johan van Niekerk of UNISA.

UNIDROIT has been responsible for the following Conventions relating to international trade or business:[61]

(i) 1964 Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (The Hague) [ULF].

(ii) 1964 Convention relating to a Uniform Law on the International Sale of Goods (The Hague) [ULIS].

The ULF and ULIS (or Hague Conventions as commonly known) received support from Western European countries and very little further support. They were subsequently replaced in most countries by its successor, the CISG (prepared under UNCITRAL guidance), which was considerably more successful.[62]

(iii) 1970 International Convention on the Travel Contract (Brussels).

(iv) 1983 Convention on Agency in the International Sale of Goods (Geneva). (Not yet in force.) South Africa.

(v) 1988 UNIDROIT Convention on International Financial Leasing (Ottowa). Nigeria.

(vi) 1988 UNIDROIT Convention on International Factoring (Ottowa). Nigeria.

(vii) 2001 Convention on International Interests in Mobile Equipment (Cape Town). Signed but not yet ratified by: Burundi, Congo, Ethiopia, Ghana, Kenya, Lesotho, Nigeria, South Africa, Sudan, Tanzania, Senegal.

(viii) 2001 Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment (Cape Town). Signed but not yet ratified by: Burundi, Congo, Ethiopia, Ghana, Kenya, Lesotho, Nigeria, South Africa, Sudan, Tanzania, Senegal.

Moreover, UNIDROIT's work has served a basis for a number of Conventions adopted under the auspices of other international organisations.[63] Those most relevant to international business are:

(i) 1956 Convention on the Contract for the International Carriage of Goods by Road (CMR).

(ii) 1980 United Nations Convention on Contracts for the International Sale of Goods (Vienna).

Two further instruments that have emanated from UNIDROIT are:[64]

(i) UNIDROIT Principles of International Commercial Contracts (1994); and

(ii) UNIDROIT Guide to International Master Franchise Arrangements (1998).

61 See "Achievements" <http://www.unidroit.org/english/presentation/pres.htm>.
62 On the history of the Hague Conventions and the CISG see Hugo 1999:1-3.
63 <http://www.unidroit.org/english/presentation/pres.htm>; Goode 1995:18 n 65.
64 See "Achievements" <http://www.unidroit.org/english/presentation/pres.htm>.

The UNIDROIT Principles of International Commercial Contracts deserves closer attention. The UNIDROIT Principles are the result of many years work by a special working group composed of representatives of all the major legal systems of the world. There are 7 chapters namely: General Provisions; Formation; Validity; Interpretation; Content; Performance; and Non-Performance. The UNIDROIT Principles were augmented in 1999 by the addition of a model clause for use by parties who choose that their contract should be governed by the UNIDROIT Principles instead of some national legal system.[65]

The UNIDROIT Principles can play an important role in 5 different contexts:[66]

(i) They may be a source of inspiration for legislators drafting contract legislation.

(ii) They may provide courts and arbitrators with useful rules and criteria for interpreting and supplementing existing international instruments.

(iii) Parties may use the principles as a guide in drafting their contract.

(iv) Parties may go further and choose the principles as the proper law of their contract.

(v) Arbitrators may in certain circumstances base their findings on the UNIDROIT Principles even in the absence of the principles being chosen as the proper law of the contract. This is the case especially when the arbitrators are called upon to decide as *amiables compositeurs* or according to undefined "usages and customs of international trade" or to the "l*ex mercatoria*".

6. Conclusions

(i) There is a vast a growing body of "law" attempting with varying degrees of success to break the fetters of national law in the context of international business transactions. This "creeping codification"[67] of the law of international trade is to be welcomed as its logical culmination is the considerable simplification of the law of international business transactions.

(ii) This "codification" is made up of conventions, model laws, standard contract terms and explanatory guides. The most successful has probably been the standard contract terms. The widespread use of the UCP and INCOTERMS support this conclusion. The relative success of standard contract terms (as opposed to conventions and model laws) can probably be ascribed to the fact that government action is generally not necessary for such terms to govern a particular relationship.

65 See <http://www.unidroit.org/english/principles/pr-pres.htm>.
66 *Ibid*.
67 To employ the term of Berger Klaus Peter *The Creeping Codification of the Lex Mercatoria* (1999).

(iii) Conventions and model laws are nevertheless important. Unfortunately the SADC in general, and South Africa in particular, have not played much of a role in this regard as yet. There are signs that this may be changing. UNCITRAL Instruments have received more attention in South Africa during the last 5 years than before. (Note the South African reaction to the Model Laws on Cross-Border Insolvency and International Commercial Arbitration.) Perhaps the most pleasing aspect in this regard is the overwhelming support for the UNIDROIT Convention and Protocol relating to Mobile Equipment. [The fact that the diplomatic conference was held in Cape Town may have contributed to the favourable African response.]

(iv) It would appear that UNIDROIT Conventions have attracted a more favourable response from South Africa than UNCITRAL Conventions. This can perhaps be ascribed to the fact that South Africa is a member state of UNIDROIT but not of UNCITRAL. The leading stature of UNCITRAL as formulating agency, and of South Africa in the SADC, I believe, place a burden on our Government to attempt to secure Membership status with UNCITRAL in 2004.

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