United Nations Commission on International Trade Law (UNCITRAL)

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A. Introduction

1. The United Nations Commission on International Trade Law ("UNCITRAL"; "Commission") is a subsidiary body to the United Nations General Assembly (United Nations, General Assembly; United Nations Committees and Subsidiary Bodies, System IX), which mainly focuses on the unification and harmonization of international trade law (International Economic Law; Unification and Harmonization of Laws). It is the principal body within the international legal order concentrating on international trade law unification. UNCITRAL was established by UNGA Resolution 205 (XXII) of 17 December 1966.

B. History

2. Since its creation, the UN General Assembly has repeatedly recognized the significance of international trade within the mandate of the United Nations (UN) to maintain international peace and security. The inseparability and interdependence of economic relations and a stable, democratic political environment was underscored with regard to both developed and developing countries. Eventually, issues of trade and development were assigned to a separate UN institution agenda, the United Nations Conference on Trade and Development (UNCTAD), which was established by the General Assembly only two years prior to UNCITRAL (UNGA Res. 1995 [XIX] [30 December 1964]; GAOR 19th Session Supp. 15, 1). This framework was complemented by two other organizations in the area of unification of private law, the Hague Conference on Private International Law and the International Institute for the Unification of Private Law (UNIDROIT).

3. The creation of UNCITRAL must thus be seen as a response to the need to facilitate and adequately govern border crossing-commercial transactions against the background of a diversified regulatory framework, consisting of both numerous domestic and international instruments. The obstacles to building an all-encompassing legal framework resulted, on the one hand, from national politics and, on the other, from the diversity of categories of international trade, which were recognized—arguably—to defy all one-size-fits-all approaches to juridification. The multitude of trade forms and instruments along with an ever-increasing plurality of actors in norm-creation for these commercial transactions, relations, and agreements challenged not only the attempts at legal unification, but indeed the very core and identity of the field of international trade law. Against this background, UNCITRAL’s general mandate has been to promote the progressive harmonization and unification of the law of international trade.

C. Purpose

4. UNCITRAL was tailored for the promotion of commercial law reform. Given that international commercial transactions and the applicable legal instruments are shaped through national legislation, commercial practice, and conventions in the area of international trade, UNCITRAL’s law reform mandate must by necessity be interpreted within this multilevel and multipayer field of norm creation. Taking its first steps towards legal unification, UNCITRAL sought to identify and, where necessary, codify pre-existing normative structures. Striving for eventual unification of existing and emerging legal instruments, UNCITRAL has been aiming to harmonize available legal frameworks. This approach was informed by the belief that the achievement of uniform interpretation and application of rules, the negotiation of updated solutions and the promotion of international awareness enhances the legitimacy, predictability, and effectiveness of international trade law. This is further developed by the fact that UNCITRAL pursues its drafting projects with a view to contemporary law reform developments of its Member States.

D. Structure

5. UNCITRAL originally consisted of 39 States, but it increased the number of its members to 36 in 1973 and to 60 in 2004. Five regional groups are represented in the Commission, namely African States, Asian States, Eastern European States, Latin American and Caribbean
The Commission will decide between a convention, a model law, or a legislative guide, depending on the level of consensus that it anticipates as achievable in the negotiating process. Thus, there are three types of documents: conventions, model laws, and legislative guides.

F. UNCITRAL Documents and Instruments

8 UNCITRAL documents can take a number of forms. First the UN General Assembly adopts resolutions relevant to UNCITRAL work (see also → International Organizations or Institutions, Secondary Law). Each year UNCITRAL submits its annual report to the General Assembly, which appears as supplement No. 17 to the official records of each session of the General Assembly. Another form is the Commission documents, which include commentary, draft uniform rules, notes, reports, studies, and other information. The Secretariat also prepares working papers, which are given to different working groups.

9 Instruments drafted within the UNCITRAL working groups vary considerably. Their legal nature depends on the degree of consensus that is anticipated as achievable in the negotiating process. Thus, there are three types of documents: conventions, model laws, and legislative guidelines.

10 Conventions are, in essence, multilateral → treaties. Their → negotiation requires longer time, and it is more difficult to reach consensus. They are finalized through the complicated process of accession, signature, and ratification by national competent organs already familiar from general public → international law (→ Treaties, Conclusion and Entry into Force).

11 Model laws constitute the second type of document produced under UNCITRAL. Model laws are less strict than a convention and States are invited to select the model laws as they are or modify or even exclude unwanted provisions. Model laws can provide for an advanced authority for countries with less extensive legal regulation in a certain sphere of action, while constituting a benchmark for countries with a comprehensive regulatory framework.

12 The third form of legislative texts under UNCITRAL is a legislative guide. Legislative guides are a set of recommendations that provide guidelines towards legislative bodies vis-à-vis a particular area of law making in international trade. A legislative guide resembles a model law to the degree that it can provide for a set of legislative suggestions. However, it includes a guide to enactment, with an extensive commentary and background information, outlining various policy options, including statements from various interest groups. Although they constitute the softest of the three instruments, it can be argued that the thrust of legislative guides, under conditions of a highly diversified law-making arena of both national and transnational actors, producing binding, official "hard" norms as well as → soft law, comprising standards, recommendations and best practice guidelines, might effectively escape national resistance by connecting to more indirect trends of law reform (→ Best Practices).

13 In fulfilling its mandate, the Commission thus has to seek out which instrument is most likely to be successful in the drafting process. The Commission will decide between a convention, a model law, or a legislative guide, depending on the level of consensus that it anticipates in a certain area of international commercial law.

G. Technical Assistance

14 → Technical assistance provided under UNCITRAL can take on various forms. UNCITRAL organizes briefing missions, seminars, and conferences; it performs law reform assessments; it assists governments in drafting national legislation; it assists international development agencies; it advises and assists international and other organizations, and professional associations (organizations of attorneys, chambers of commerce, arbitration centres); it holds group-training activities; and it prepares technical materials. It has also created a database for practitioners, which facilitates access to existing case-law involving UNCITRAL Texts (Case Law on UNCITRAL Texts ["CLOUD"]). CLOUD is a system for collecting and disseminating information on court decisions and arbitral awards relating to the
conventions and model laws that resulted from the work of the Commission. It relies on a network of national correspondents, designated by the countries that have ratified a convention or adopted a model law. The purpose of CLOUT is to promote international awareness and facilitate uniform application and interpretation of UNCITRAL instruments.

H. Overview of UNCITRAL Instruments

15 Instruments carried out so far include numerous instruments of all three types of UNCITRAL texts. The most important ones are the following: in the area of International commercial arbitration, there is the UNCITRAL Model Law on International Commercial Arbitration, which addresses national legislators when drafting legislation regarding commercial arbitration. In addition, the UNCITRAL Arbitration Rules 2015 are the major rules of procedure in international arbitration in UNCITRAL arbitrations. In the area of international sales of goods, the Uniform Law on the International Sale of Goods (CISG) of the United Nations Convention on Contracts for the International Sale of Goods (CISG) is a widely adopted law. The CISG addresses numerous sales contract law issues, such as the formation of contract and rights and obligations of seller and buyer, as well as remedies in the case of breach of contract. At the time of its drafting in Vienna in 1980, 62 States signed it, and CISG entered into force on 1 January 1985. Since that time, 59 States have acceded to it, but it is open to accession to States that are not signatory States and since then it has become a much referenced legal framework in commercial contracts. In the area of insolvency, the most recent text is the 2004 UNCITRAL Legislative Guide on Insolvency Law, which can be perceived as a remarkable example of UNCITRAL’s global law-making capacity, capturing many recent trends in insolvency law and relying on the drafting participation of a large number of States and organizations. It has been endorsed, inter alia, by the International Bar Association (IBA). In the area of international payments, an important convention is the United Nations Convention on the Assignment of Receivables in International Trade, which facilitates access to lower-cost credit. In the area of international transport of goods, UNCITRAL members signed, inter alia, the United Nations Convention on the Carriage of Goods by Sea. In the area of electronic commerce, with the exception of the United Nations Convention on the Use of Electronic Communications in International Contracts—which was adopted by UNGA Resolution 60/21 of 53 November 2005—there have been only model laws and recommendations. In the area of procurement and infrastructure development there are only model laws and legislative guides.

I. Evaluation

16 Representation and participation in UNCITRAL is very broad. UNCITRAL is composed of 60 members but in addition to these, it invites any other member of the UN General Assembly to participate in its drafting and negotiation activities. Other UN agencies (→ United Nations, Specialized Agencies), international organizations, NGOs and professional groups are encouraged to participate. Thus UNCITRAL has evolved into an extraordinary UN agency. It can be seen to be incorporating elements of a civil society forum, as the wider participation and representation under UNCITRAL no doubt enhances the legitimacy of the UNCITRAL texts. Wide participation also results in the representation of diverse interests in UNCITRAL. However, the price for the diversification of the representative basis of UNCITRAL is that achieving consensus has been rendered more difficult. Moreover, diversity in representation of various interests could be more effectively achieved through a system of participation of the business community within national missions. Within the current UNCITRAL system, national business associations and the business community as such do not have a right to influence and be seen as part of the overall national agendas, but they participate independently. The composition of national missions is based on political criteria together with a focus on geographical representation and not the representation of functional interests, as is the case in other international organizations such as the → International Labour Organization (ILO).

17 The difficulties of an organization such as UNCITRAL result also from the embeddedness of the relevant commercial law rules in different, historically grown and politically entrenched national practices. Perhaps taking its cue from the available research in the areas of corporate and labour law (→ Labour Law, International), trade might well become a new field of study of the ‘Varieties of Capitalism’, relating to the different, historically grown, culturally, politically and legally embedded institutional regulation frameworks existing among capitalist States. As already suggested, a large part of UNCITRAL’s struggle over the determination and development of adequate solutions is directly related to the contested nature of international trade law. The regulatory framework of international commercial transactions consists of a fragmentation of legal regimes (→ Fragmentation of International Law), adopted and sometimes ratified international, multilateral treaties, bilateral agreements, national policies, recommendations and rules issued by professional standardization associations, as well as privately enacted self-binding instruments developed among commercial actors. The legal framework of international trade law encompasses abstract principles, customs and modern forms of law (→ Customs Law, International → Lex mercatoria), concrete national laws and international conventions. While this broad and layered basis of norm-creation can be seen to enhance the regulatory density in the area of international trade law, the broadness of ranges of actors and instruments can at the same time be seen as among the causes of cumbersome law-making processes. The latter require additional efforts to reach effective communication among all parties involved in the process. Given UNCITRAL’s embeddedness in a complex regulatory environment of hard and soft laws, its ability as always fulfilling its function as a valid forum of negotiation is not beyond contestation. Sometimes countries will start using a text even before it is concretized, while some professional associations will be simultaneously engaged in producing their own sets of norms, thus setting further obstacles to an effective unification and harmonization.

18 The importance of UNCITRAL has traditionally been assessed both in light of its political legitimacy and its economic efficiency. The correlation between both aspects can be explained with reference to a strongly State-centred understanding of legal norm-making. Central to this understanding has been a strict separation of a political State from an economic—arguably non- or less political—sphere, governed by norms of individual—sometimes collective—profit-seeking. Under this view, economic market actors are seen to rely on predictable enforcement mechanisms, which themselves are regularly seen as forming part of the State’s framework provision for economic activity. New Institutional Economics (NIE) has been arguing for a strong, yet confined role of the State in safeguarding predictability and stability of agreements among market actors. Yet, while this view has been influential both in international trade law and in law reform projects in developing nations, the continuing contestation of the policies and the laws governing international trade suggest that the political role of legal regulation of market activity has been underestimated by proponents of NIE. Shifting, thus, the emphasis back to the emerging, multilevel law-making framework of UNCITRAL, its effectiveness must be assessed retrospectively with regard to its creation by the General Assembly and, with a view to the future, with regard to the invitation of all interested parties, both State and non-State actors, to participate as observers. These not only receive all necessary documents, but their status is considered equal to that of UNCITRAL members. In time, it
might be possible to observe that UNCITRAL became a part of the emerging forms of global civil society, and that could be achieved more practically if members of the national business communities were a mandatory percentage of State representatives (→ Representatives of States in International Relations). Thus, UNCITRAL can be seen as having great potential to become a veritable global law-making body. Whether it can, in the long run, satisfy the expectations of market constituencies and other parties, will depend on the degree to which the UNCITRAL agenda continues to address issues arising from developing countries and their integration in world markets. UNCITRAL could then play a pivotal role in the on-going struggle over the promotion of international stability through laws of international trade on the one hand, while not being entirely decoupled from the development agenda.

J. Conclusion

19 The ever-present tension that exists in the area of public international law between the principle of sovereignty equality of Art. 2 → United Nations Charter and the real power inequalities persisting among States is particularly visible in the area of international trade law (→ States, Sovereign Equality). Comparable tensions appear within UNCTAD and the → World Trade Organization (WTO), which occupy the area of public international trade law and UNCITRAL in the area of private international trade law. International trade law largely reflects such asymmetries, especially with the distinction between developed and developing States. The law of international trade could be likened to the regulation of contract law and its legacies in developed nations around the world. This alignment could show to what degree redistributive considerations cannot be excluded from the international trade agenda, just as they became recognized in the core of contract law regulation. When discussing the merits of legal harmonization to address and overcome market inefficiencies, one is urged to complement this functionalist view with an appreciation of the reasons for these inefficiencies. UNCITRAL can thus be regarded as a legislative framework, which forms part of a larger agenda to explore economic and legal instruments and principles of international trade. With economic inequality lying at the basis of many of these commercial transactions, it is time to recognize that international trade law is inevitably implicated in the shaping, consolidating, and the overcoming of such inequalities.

20 However, the continued attempts at an overall unification and harmonization of international economic law do seem to suggest otherwise (see also → Codification and Progressive Development of International Law). As in other areas such as European company law, where failed attempts at legal harmonization have eventually given way to a turn to functionalism and the facilitation of experiments in regulatory competition and multilevel law-making between public and private actors that are often believed to lead to rules of merely technical nature— the “laws of the market”—international trade law reflects a similar tension between unifying and diversifying law-making dynamics. Resorting to regulatory competition, decentralized law-making or “learning through benchmarking” cannot merely be seen as replacing one formal approach with another. Both harmonization and regulatory competition constitute substantive approaches to law-making with concrete direct and indirect effects on social reality and market relations on the ground. UNCITRAL occupies an important place within this sensitive law-making environment, one that cannot adequately be captured through an efficiency analysis of harmonization versus regulatory competition.

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**International Sale of Goods (CISG) and Related Transactions:**


**Insolvency:**


**International Payments:**


**International Transport of Goods:**


**Electronic Commerce:**


**Procurement and Infrastructure Development:**
