CISG Advisory Council Declaration No. 1
The CISG and Regional Harmonization

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DECLARATION

1. The United Nations Convention on the International Sale of Goods has proved to be a highly successful piece of harmonization. It has been adopted by nearly 80 Contracting States, including most to the world's major trading nations. Its success was not born overnight. Efforts to create a uniform law date from the 1920s and the current Convention was created in the aftermath of a previous, unsuccessful attempt at uniformity.

2. The uniformity achieved by the CISG is especially impressive in view of its relatively few reservations. As regards regional harmonization efforts, one of them, Article 94, permits two or more States with the same or closely related rules on matters governed by the CISG, and a Contracting State in the same position regarding one or more Non-Contracting States, to declare that the CISG shall not apply to contracts between parties resident in those States. The only reservation States are Denmark, Finland, Iceland, Sweden and Norway. If the practice developed of more States entering Article 94 reservations, the considerable measure of uniformity that exists, which is the very reason for the existence of the CISG and for the amount of time and human energy that went into it, would largely be undermined.

3. The draft Common European Sales Law (CESL) would not as such call for any Article 94 reservations to be entered by Member States of the European Union. This is because contracting parties may opt out of the CISG under Article 6 and would be subject to CESL only if they opted into it (Art 8(1) of the draft Regulation). CESL would, however, trench upon the area occupied by the CISG to the extent that it

were to apply to commercial sales where one of the parties was an SME (small-to-medium enterprise), and even to all commercial sales if a Member State so wished (Art 13(b) of the draft Regulation). A substantial part of CESL is devoted to matters of contractual validity, excluded from the CISG by Article 4(a), but CESL on its own terms would not allow contracting parties to adopt only those provisions of CESL that dealt with validity and would not allow them to combine CESL and the CISG (Art 11 of the draft Regulation).

4. An argument that is sometimes used to oppose adoption of the CISG is that it would impose a greater burden on those giving legal advice and increase transaction costs. However that may be, the existence of a global and a regional sales law, in addition to the two national laws of the contracting parties, would certainly have a complicating impact on the pre-contractual process. A key attribute of uniformity and harmonization is also simplicity. Increasing legal plurality detracts from that virtue and introduces fragmentation, which is the very thing that uniformity and harmonization seek to avoid. There is, furthermore, the likelihood that regional initiatives would not produce better solutions and, moreover, that those solutions would not have been subject to the same searching inquiry, from delegates drawn from many different countries, as occurred in the case of the CISG. The effort that goes into initiatives such as CESL, PACL (Principles of Asian Contract Law) and the OHADA (Organization for the Harmonization of Business Law in Africa) Uniform Act on General Commercial Law is a valuable contribution to the harmonization of commercial law, not least for the boost it give to comparative legal scholarship. So far as it varies work already done in the area of sales law covered by the CISG, however, it does not promote the cause of harmonization. Where these regional initiatives embrace general contract law, they may however make a very useful contribution towards the achievement of global solutions to contract law, but there is a danger of which proponents of regional harmonization should be aware. It is that States may become entrenched behind regional instruments at the expense of participating in the work of increasing harmonization of global contract law that has yet to be done to carry forward the achievements of the CISG.

5. In the course of its drafting and adoption, the CISG was subject to vigorous debate involving States in widely different parts of the world and with very different economies, both as to the balance between resource and manufacturing in their economies and as to the nature of the State's political system. If energy in the area of sales law were drained away from the CISG by competing regional initiatives, there would be the risk that the influence of certain States in the continuing development of the CISG through judicial interpretation would be lessened. The attractions of the CISG to States that are not yet Contracting States would also be lessened to the extent that its universality were compromised. Existing membership of a regional initiative might also lessen the incentive to adopt the CISG (only three States that are parties to the OHADA law are also CISG Contracting States).

6. The coverage of the CISG is extensive, already reaching deeply into areas that would in national law be seen as pertaining to the general law of contract The paramount need now is to continue the work of harmonisation in the area of global contract law falling outside the CISG. The CISG Advisory Council believes that the time has come to support a proposal from the Government of Switzerland (A/CN.9/758) that, in the first instance, consideration should be given to the question whether further work in the area of harmonizing international commercial contract is desirable and feasible.