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HARMONISATION OF CONTRACT LAW IN ASIA—HARMONISING REGIONALLY OR ADOPTING GLOBAL HARMONISATIONS—THE EXAMPLE OF THE CISG

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Asian countries increasingly see the need for uniform or harmonised law at least in commercial matters, but the adoption of international uniform laws has nonetheless often been slow in many parts of Asia. How should Asia harmonise its laws? Should there be an Asian harmonisation or should Asian nations simply adopt internationally negotiated uniform law? Do the internationally negotiated laws sufficiently take into account the legal traditions of Asia or are they simply compromises between the main Western legal traditions (civil and common law)? Using the CISG as an example, the author readily concedes that it does not take into account non-Western legal traditions but argues that Asian nations should nonetheless adopt such international instruments. First, for better or for worse, either Western civil law or Western common law is the formal law in force in commercial matters in most Asian countries and therefore any harmonisations of these formal laws would be useful in Asia. Furthermore, the adoption of these formal international instruments in Asia would allow Asians to (more informally) influence their interpretation and make sure that they are applied taking into account Asian experiences and values.

I. INTRODUCTION

There has been a lot of discussion in Asia and ASEAN about economic integration. Probably inspired by the European model, there have been calls for uniformisation of the commercial laws of Asia to facilitate this economic integration. To a large extent, the commercial laws of Asia, particularly contract law, have been greatly influenced by Western law (either the common law or the civil law). There have been many instruments of uniformisation adopted internationally to bridge the gaps between civil and common law. Should Asian countries adopt these compromises drafted mainly by Westerners or international organisations, or are there issues peculiar to Asia which should be considered in commercial matters? This paper will argue that for the most part, Asian countries should adopt the international conventions and standard laws for the uniformisation of commercial law and should get more actively involved in the interpretation of such conventions in the future. This paper will mainly look at the *United Nations Convention on Contracts for the International Sale of Goods (1980)* [CISG][1] and argue for its wider adoption in Asia.

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[1] UN Doc. A/Conf.97/19 (1980) (entered into force 1 January 1988), (the Arabic version was rectified in 1999), reproduced online: Pace Law School CISG Database <http://www.cisg.law.pace.edu/cisg/text/text.html> (text of the CISG in all its 6 official versions except Arabic, and in many other languages in translation).

II. The CISG in Asia

A. *The CISG and "Asian" Law*

The preamble of the CISG states that: "the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade."[2]

What "legal systems"[3] did the drafters of the CISG take into account, and more specifically, did they take into account the "legal systems" of Asia?

There is very little evidence that the drafters took into account any legal tradition other than the main Western legal traditions: civil law (French and German sub-traditions) and common law (English and American sub-traditions). To the extent that socialist law, also a Western tradition, was different from civil law, the drafters sometimes took it into account.[4]

There seems to be no evidence however (at least that I am aware of[5]) that the drafters of the CISG took into account any specifically Asian legal tradition. For example, Islamic law seems not to have been taken into account at all. Article 78 of the CISG provides for the payment of interest and a country is not entitled to make a reservation to that article.[6] The drafters do not seem to have taken into account Hindu law or any other tradition that has its origin in Asia.

One must say however that this is hardly surprising. In commercial matters, particularly on legal issues relating to the sale of goods, most Asian jurisdictions have been forced to abandon their Asian legal traditions and now rely mainly on Western

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2 *Ibid.*, at Preamble.

3 The concept of "legal system" might not be the most useful concept to use in this context. A legal system may include or be influenced by many legal traditions. For example, the Singapore legal system is mainly based on the common law traditions, but for family matters of Muslims residing in Singapore, that legal system includes and is mainly influenced by Islamic law as modified by, or applied in, Malay custom. I will therefore use the concept of "legal tradition" which I find more accurate and useful for our purposes, except of course when quoting the preamble of the CISG which uses the concept of "legal system".

4 See e.g. the debate over what is now art. 95 CISG which was introduced at the suggestion of Czechoslovakia (as it then was) to take into account how international sales were governed in socialist countries. Legislative History, 1980 Vienna Diplomatic Conference, Summary Records of the Plenary Meetings, 11th plenary meeting, Thursday, 10 April 1980, at 3 p.m., reproduced online: Pace Law School CISG Database <http://www.cisg.law.pace.edu/cisg/plenarycommittee/summary11.html>.

5 The legislative history of the CISG is massive and I could have missed such an occurrence. My apologies if I have.

6 A contractual provision which provides for interest to be paid could be held invalid in an Islamic country through art. 4(a) CISG, but a country could not prevent the application of art. 78 CISG (interest on damages)—it is not one of the reservations allowed under the CISG. It is therefore unlikely that the CISG will be adopted by countries that profess to base their legal system on Islamic law. For a view in favour of the enforceability of art. 78 CISG in Islamic jurisdictions, see T.S. Twibell, "Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) under Shari'a Law: Will Article 78 of the CISG Be Enforced When the Forum Is an Islamic State?" (1997) 9 International Legal Perspectives 25.

legal traditions. Of course this was imposed in most instances through colonisation (or the threat of it that led to a so-called "modernisation" i.e. Westernisation of the law) but there is no strong movement for a return to the Asian traditions in matters relating to the international sale of goods at least, with maybe the notable exception of some movements for an Islamisation of all law in some countries (Iran and Pakistan for example).[7]

For the most part, Asian law relating to the sale of goods is governed either by the civil law or the common law. Of course the law will most often be in Asian languages (though the civil code of Indonesia remains in Dutch and the Singapore common law is practiced in English, for example) but the principles behind the law will usually find their source in a Western legal tradition. In many instances, the parts of civil codes governing the sale of goods will read very much like the original French or German civil codes, and in most instances, in common law jurisdictions, there is likely to be a *Sale of Goods Act* very similar to one of the versions of the English Act of the same name.

There might be differences of course between the formal laws in Asia and the formal laws in their Western countries of origin. Asian countries are independent jurisdictions and their statutes and codes may be different from those of their former colonisers or foreign inspirations, but it remains, however, that the law will tend to be fundamentally the same—the differences will be within the same legal tradition.

We should not of course dismiss the possibility that, notwithstanding the formal adoption of Western law in Asia, Western law might in fact be applied in Asian ways or not applied at all. I will further discuss that possibility below. However, at the formal level, i.e. at the level of codification and harmonisation of rules—one should not be surprised that the CISG took into account mainly the civil and the common law—from a formal perspective these two traditions seemed to be in force almost throughout the whole world.[8]

One should mention that the CISG is in force in all six official languages of the United Nations: English, French, Spanish, Russian, Chinese and Arabic. Chinese and Arabic are Asian languages and French, English and Spanish are the languages of nations that at one point colonised significant parts of Asia. Even though I assume

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[7] I do not want to be perceived as dismissing such movements by saying that they are not very common in Asia. In some respects, I do believe that the issue of how international commercial law should take into account Islamic law is a fundamental one—Islamic banking is only the beginning of a longer struggle for the recognition of the very rich and noble legal traditions of Islam. I am in fact enthused by the resurgence of Islamic law. It remains however that as far as the international sale of goods is concerned, there has not yet been a strong Asian movement for a return to Islamic law.

[8] To be fair, there is at least one instance where the CISG has taken into account the existence of another tradition, namely Scandinavian law. The drafters do not seem to have used that tradition in drafting the CISG, but knowing of that tradition, they have allowed for the possibility that countries that share a common tradition may wish to have their international sales governed by that tradition, which is the purpose of art. 94 CISG. See e.g. art. 94(1) CISG which states: "Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations."

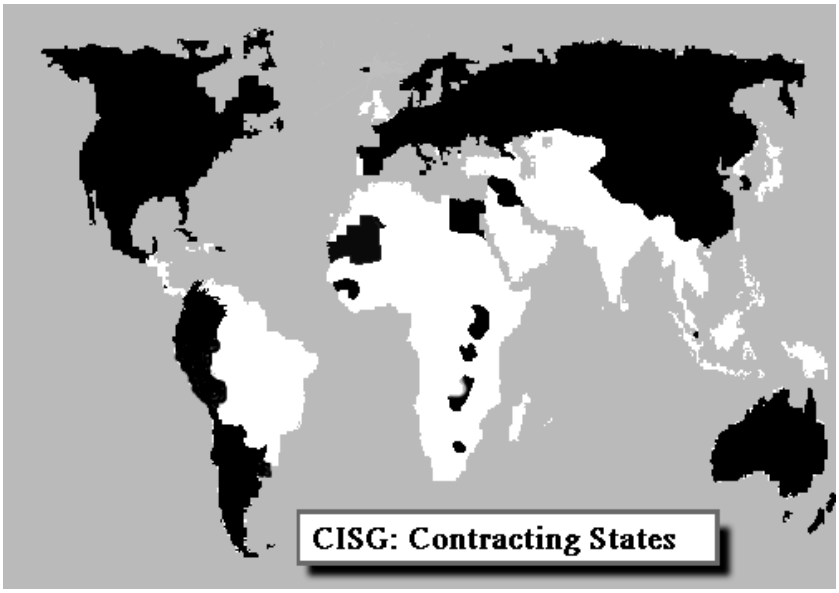

Image 1. CISG Contracting states on 13 April 2005, as collated at the Pace Law School CISG database, online <http://www.cisg.law.pace.edu/cisg/cisgintro.html>

that in Asia the most used official versions will be the ones in Chinese, English, Arabic and Russian (for countries from the Commonwealth of Independent States[9]) we should remember that all six versions are officially binding.

B. *Where is the CISG in Force in Asia?*

As the map above shows quite well, the CISG has been widely adopted in Europe (the main exceptions being the United Kingdom, Ireland and Portugal) as well as in all of North America (USA, Mexico and Canada). It has also been adopted in many South American countries with the notable exception of Brazil. The continents where the adoption of the CISG is patchier are Africa and Asia.

The main and most important country in Asia to have adopted the CISG is China which leads Asia by example—not only has it adopted the CISG,[10] but it has also inspired itself of the CISG when came time to reform its domestic contract law so much so that some provisions of Chinese contract law are very close to provisions

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[9] The CIS or Commonwealth of Independent States is made up of countries that were formerly part of the USSR.

[10] There seems to be an exception for Hong Kong where the CISG did not apply before Hong Kong returned to Chinese rule. To my knowledge, the government of the People's Republic of China has not filed a notification with the Secretary General of the UN and therefore one would assume that the CISG does not apply in Hong Kong. See Pace Law School Institute of International Commercial Law, "China (PRC)", online: Pace Law School CISG Database <http://www.cisg.law.pace.edu/cisg/countries/cntries-China.html>.

of the CISG. The CISG is chosen by the parties[11] as the law of the contract so often in China that there are more than 60 Chinese decisions on the CISG reported at the Pace University Database, most of those from CIETAC arbitral tribunals.[12] China is therefore the most important Asian contributor to the interpretation of the CISG through cases, with no other Asian country making a significant contribution.[13]

The only other East Asian country to have adopted the CISG is South Korea and only recently on 1 March 2005. Japan, a significant trader in Asia, is still not a party to the CISG. In Southeast Asia, only Singapore is a party. In South Asia, no one is a party. In Central Asia, Kyrgyzstan, Mongolia and Uzbekistan are parties. Siberia being part of North Asia, we should note that Russia is also a party. In West Asia, Georgia, Iraq, Syria and Israel are also parties. Although one may argue that Australia and New Zealand are a continent on their own, a lot of their trade is with Asia and therefore it is useful to note that these two common law countries are also parties to the CISG.[14]

As must be clear by now, the vast majority of Asian countries have not adopted the CISG. This of course does not mean that the CISG may not apply to transactions involving parties having their place of business in non-contracting states. Through the application of article 1(1)(b),[15] the CISG may apply if the parties chose the law of a country which is a contracting state to the CISG. Therefore, for example, the CISG would apply to a transaction between an Indian and a German party provided German law is the law of the contract—the German law includes the CISG.[16] Unfortunately, this would not be the case between an Indian party and a Chinese or Singaporean party as the latter two countries have made a reservation to the CISG which effectively allows the CISG to apply only if both parties are from contracting states.[17]

The main question for most Asian countries remains whether to become a party to the CISG. I will first consider whether Asian countries should attempt their own harmonisation of their laws of sale and, concluding that they should not, I will give the reasons why I think all Asian countries should become parties to the CISG.

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[11] Art. 6 CISG states that "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." Therefore, even if a country adopts the CISG, there is no guarantee that the parties to contract will chose the CISG to govern their contract.

[12] See list of cases online: Pace Law School CISG Database <http://www.cisg.law.pace.edu/cisg/text/casecit.html>.

[13] According to the Pace Law School CISG Database, only a few Asian cases are not from the People's Republic of China—a case or two each from Japan, Vietnam and Chinese Taipei for example, i.e. countries or regions that are not parties to the CISG.

[14] This information about the parties to the CISG is valid as of 13 April 2005 and based on Pace Law School Institute of International Commercial Law, "CISG: Table of Contracting States", online: Pace Law School CISG Database <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>.

[15] "1(1): This Convention applies to contracts of sale of goods between parties whose places of business are in different States:…
(b) when the rules of private international law lead to the application of the law of a Contracting State."

[16] Unless the parties exclude the CISG which they can do under art. 6 CISG.

[17] The United States, Saint Vincent and the Grenadines and the then Czechoslovakia have made a similar reservation which is authorised by art. 95 CISG.

III. For the Laws of Sale, Should We Adopt CISG Or Build Our Own Asian Harmonisation?

To decide whether Asian countries should attempt their own regional harmonisation of laws of sale or should adopt the CISG, one must first decide whether there is anything particularly Asian about the laws of sale we have, or whether there would be any strategic advantage at harmonising regionally rather than globally. If there is no difference in the formal laws themselves, are there cultural differences and differences in values that affect how the laws of sale are applied in the region which could justify a regional harmonisation?

A. *Is there Something Particularly Asian About the Problem?*

As mentioned above, with respect to the sale of goods, most Asian countries are part of the civil and common law traditions and therefore the problems of harmonisation that were faced by the drafters of the CISG are the very problems we face in Asia.

For example, when a contract is formed by mail, in most civil law jurisdictions (in Asia or elsewhere), the contract is formed when the acceptance of the offer is received by the offeror; whereas, in most common law jurisdictions, the contract is often formed when the acceptance is mailed. This is a problem addressed by article 16 of the CISG which states that the contract is formed only when the acceptance is received (the solution of the civil law) but (following the common law to a limited extent) that the offer cannot be revoked once an acceptance has been sent.[18]

We could of course try to come up with our own Asian solution but it is hard to see how we could come to a better compromise and what would be achieved by rejecting the compromise reached in other parts of the world between legal systems very similar to ours.

It should be pointed out at this point that many Asian countries have participated in the diplomatic conferences that led to the CISG[19] and that, to my knowledge, no reticence based on Asian specificity were ever raised at the diplomatic conferences.

B. *Would there be any Advantage to Harmonising Regionally?*

In some instances, there could be advantages in regional harmonisation rather than global harmonisation. In some cases it makes sense—customs and tariffs harmonisations within ASEAN or Asia might attract investors which may look at Asia as one investment region in competition with other regional blocs (EU or NAFTA). A regional harmonisation may give us a competitive advantage in some cases. I submit however that it is not the case with the laws of sale.

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[18] Art. 16(1) CISG: "Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance."

[19] See e.g. the Final Act of the 1980 Vienna Diplomatic Conference which was signed by the following Asian countries: Burma, China, India, Iraq, Japan, Pakistan, the Philippines, Republic of Korea, Singapore, Thailand, Turkey and the USSR (the latter two being mainly or partly in Asia). Legislative History, 1980 Vienna Diplomatic Conference, Summary Records of the Plenary Meetings, 12th plenary meeting, Friday, 11 April 1980, at 2.25 p.m., reproduced online: Pace Law School CISG Database <http://www.cisg.law.pace.edu/cisg/plenarycommittee/summary12.html>.

What we have in the case of the international sale of goods is a harmonisation of private law—merchants in Asia will enter into contracts with each other and with merchants in the rest of the world. Does it make sense to have a set of harmonised laws governing contracts between Asian merchants (a new Asian harmonised law of sale) and a potentially different harmonised law (the CISG) for contracts between Asian and non-Asian merchants? I think that most merchants would prefer to use only one harmonised law, not two. Since a lot of the Asian goods are sold outside Asia, it would seem easier to simply adopt for our intra-Asian transactions the most international of such harmonisation, the CISG.

C. *Are there Asian Values that the CISG does not Reflect?*

It has often been said that Asian values and cultures are different from Western ones and that the same Western law when adopted in Asia does not necessarily lead to a similar result. It has been said that because of the concept of "face", some Asian societies were less litigious, less likely to have recourse to the courts (which might be true of Japan but certainly not of India). It has been sometimes said that older traditions (Confucianism in some societies, adat laws in others, for example) influenced the interpretation and application of Western law.

Without denying that there is some truth in such affirmations of cultural differences in some, if not all, Asian countries, one must however realise that such cultural arguments are, by their very nature, not pan-Asian. Asia has many different cultural traditions and it is therefore likely that what is true about the under-use of courts in Japan will not be true in India, what is true about adat principles in Indonesia will not be true in China, and what might be true about Confucian attitudes in Singapore will not be true in Christian Philippines.

It remains therefore that for the international sale of goods within Asia, we should probably try to harmonise, not our different and diverse cultural values, but our formal, Western-based laws of sale. The CISG does just that.

In any event, the CISG shows some limited flexibility in allowing for cultural and religious diversity. It does so, for example, through the recognition that the "*ordre public*" (public order) or public policy will be defined locally and therefore the moral validity of a contract is not governed by the CISG but by local law. If, based on religious grounds, trading in alcohol is prohibited in a certain country, then a contract for the sale of alcohol will be invalid even if the CISG applies.[20]

Could it be that because of differences in traditions and cultures, the CISG when adopted by most Asian countries could be implemented differently in some Asian countries? Certainly—and this may come to influence the interpretation of the CISG around the world, thus giving a voice to Asian traditions and cultures.

IV. The Advantages of Adopting the CISG

There is therefore, in my view, no good reason to try to harmonise our laws of sale regionally but many good reasons why the CISG should be adopted.

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[20] Art. 4 CISG: "… this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage;"

A. *For a Pan-Asian Law and Practice*

Our Asian lawyers, even our courts and law faculties, have until recently seen law, and in many cases continue to see law, as an essentially national endeavour practiced in local languages. We therefore have very few Asian lawyers who practice regionally or internationally and our law schools have not traditionally prepared our jurists for the trans-national practice of law in foreign languages.

This was the case in Europe until a few decades ago. Nowadays, however, with the increased Europeanization of law, law schools throughout Europe spend a lot of time teaching non-national laws applicable beyond national boundaries throughout Europe, and sometimes throughout the world. European law often bridges the gap between civil and common law and therefore the law schools increasingly take a comparative approach to law teaching.[21] When the law schools fail to do so, the law students vote with their feet—scores of law students spend a year studying law in another European country, thus perfecting their comparative law instincts and abilities, their language skills and consequently their ability to practice law internationally.

The best American law schools have taken a similar approach and increasingly teach "global law" in which comparative law plays a very important role. They try to prepare their students for an increasingly globalized and internationalized practice of the law.[22]

These American and European lawyers are increasingly establishing their practice in Asia and I am afraid that the restrictions our laws impose on the practice of local law will not stop the increasingly global nature of international commercial law practice. Rather than try to contain foreign law firms by trying to regulate them out of local practice, we should strive to do what they do—take an increasingly international and trans-national approach to the practice of law.

By creating a common law of sale through the adoption of the CISG, we in Asia will slowly send the message to our bars, our courts and our law schools that the future of commercial law indeed seems to be increasingly international and we will build the basis for a pan-Asian practice of the law. One day a Thai lawyer will be arguing against a Filipino lawyer about the CISG in front of arbitrators from China, Indonesia and India sitting in Singapore. On that day we will have achieved the same level of internationalisation as our European and American counterparts and I very much look forward to the day when this will be normal practice in Asia.

B. *Building a Comparative Law Expertise*

As mentioned above, comparative law has become an important part of law teaching in Europe and there are many law professors and practitioners trained and fluent in comparative law. To know both civil and common law well is no longer seen as an exceptional achievement in Europe. It has become quite common in large part because law has become trans-national.

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[21] See e.g. Walter Van Gerven, ed., "Ius Commune Casebooks for the Common Law of Europe", online: <http://www.law.kuleuven.ac.be/casebook/>.

[22] See e.g. Hauser Global Law School Program at New York University (NYU), online: <http://www.nyulawglobal.org/>.

Unfortunately in that respect, Asia lags behind. If law schools in this region offer an introductory course in comparative law, they usually do not go much further than this, and it is not the case that comparative law has become a major concern in every course offered in law school. Law remains for the most part, in most law schools, a national discipline.

By adopting the CISG as our law of sale, we will force Asian law schools to adopt a comparative approach to the teaching of contract law and of the law of sale. One cannot understand the compromise that is the CISG without a comparative analysis of the common and civil law traditions. In the same way the harmonisation of law in Europe led to increased expertise in comparative law, the adoption of the CISG by more Asian nations will increase the knowledge of comparative law in Asia.

Knowing comparative law also allows lawyers to recommend the most appropriate law for the contracts their clients want to enter into, rather than recommend their own domestic law with no other good reason than the fact that they know no other law. This is the kind of internationally savvy lawyers international firms want and the kind we should strive to train in Asia.

C. *Building an International Law Expertise*

At the same time, the CISG is an international convention. To understand it (including its application, the reservations that a country may make, its interpretation and its international character), lawyers need a good grounding in public international law. The increasing application of the CISG will ensure that lawyers in private commercial practice remain familiar with the basic principles of public international law. This familiarity will be extremely useful to them as more and more commercial matters are now governed by international treaties.

D. *Better Solution than Our Civil and Common Law—It Might Even Lead to Domestic Reform*

The knowledge of comparative law can be useful in reforming one's own domestic law in order to make it more efficient. In particular, in matters not governed by the CISG, national legislators might wish to inspire themselves of the principles of the CISG for law reform as China did in reforming its own law of contract.

E. *Influencing the Interpretation of the CISG*

As mentioned above, China is making a significant contribution to the interpretation of the CISG through court and arbitral tribunal decisions—more than 60 cases reported so far. This contribution is, however, small compared to the European contribution—even small countries like Belgium, the Netherlands and Switzerland each have many more cases reported on the CISG than China has. If we add larger European countries such as Russia, Germany and France, each of them has contributed many times more cases. In fact, there are some 1400 cases reported on the

CISG, and well below 100 of them are from Asia as a whole. The vast majority of cases are European.[23]

It is therefore clear that the CISG is being interpreted mainly in Europe by Europeans mainly in civil law countries (England not being a party). There are a few cases from common law jurisdictions (USA, Australia, New Zealand, English Canada etc.) but there are very few. There are no contributions to the interpretation of the CISG by any Asian common law jurisdictions (outside Australia and New Zealand), not even from Singapore which is a party to the CISG and a significant commercial centre. One must note that the most important common law jurisdiction in Asia, India, is not a party to the CISG, which is in fact the case for most Asian common law jurisdictions (with the notable exception of Singapore).

The law relating to the international sale of goods is taking shape through the interpretations given to the CISG mainly by continental European courts and tribunals. If Asia wants to contribute to the interpretation and therefore the shaping of that law, Asian countries better become parties to the CISG as soon as possible and start applying it the way China has.

F. *Promoting Our Law and Our Courts and Tribunals—Decreasing the Use of Foreign, Non-Asian Legal Systems and Fora*

Because of the lack of expertise of our courts and of Asian arbitrators on the CISG, it is likely that most cases governed by the CISG[24] will be decided either outside Asia or by arbitrators from outside Asia. At this point, only China seems to have developed the expertise. Until more Asian countries adopt the CISG, the expertise on the CISG will continue to be lacking and people will chose non-Asian jurisdictions to adjudicate CISG matters.

G. *Promoting Arbitration in Asia*

The CISG is an ideal law for international arbitration—as it is international in nature, it is therefore supra-national; it does not require an expertise in any specific national law; and it is practiced by lawyers from different jurisdictions. If an American company sells to a Singapore company and the CISG applies, the American lawyers of the American company and the Singapore lawyers of the Singapore company can both argue the CISG in arbitration without the need to hire foreign lawyers. It would not be so if, for example, New York law without the CISG applies (the Singaporean lawyers would have to hire American lawyers or would be at a disadvantage), or if Singapore law without the CISG applies (the American lawyers would have to hire Singaporean lawyers or would be at a disadvantage). The CISG therefore creates a level playing field.

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[23] See list of cases online: Pace Law School CISG Database <http://www.cisg.law.pace.edu/cisg/text/casecit.html> (number of cases as of June 2005).

[24] As mentioned above, through art. 1(1)(b), the CISG may be applicable even if one of the parties to the contract is from an Asian country that is not a party to the CISG.

If most Asian countries become parties to the CISG, there will be more and more arbitration cases on the CISG, and the CISG arbitration business would increase in Asia as the expertise by arbitrators and litigants increases.

V. Conclusion

There is no good reason to consider a regional harmonisation of the laws of sale of Asia but many good reasons why the CISG should be adopted more widely in Asia. My main hope is that through the adoption of the CISG and of other international commercial law treaties, an international practice of commercial law will be developed in Asia by Asian lawyers and that lawyers here will soon acquire the international and comparative law expertise that will allow us to compete better with American and European practitioners of international commercial law.