

# THE RELATIONSHIP BETWEEN THE UCC AND THE CISG AND THE CONSTRUCTION OF UNIFORM LAW

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## I. INTRODUCTION

It is a common understanding among legal scholars that comparative law serves other important purposes<sup>1</sup> beyond the acquisition of knowledge.<sup>2</sup> It undoubtedly aids in the preparation of legal texts.<sup>3</sup> Furthermore, comparative law both serves as a tool of construction<sup>4</sup> and helps in the unification of law.<sup>5</sup> By keeping these two functions in mind, this Essay will examine the relationship between the Uniform Commercial Code (UCC) and the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG).<sup>6</sup>

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1. For more detailed discussions of the functions of comparative law, see Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974); Eric Stein, *Uses, Misuses—and Nonuses of Comparative Law*, 72 NW. U. L. REV. 198 (1977).

2. For a similar statement, see 1 KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 15 (Tony Weir trans., 2d rev. ed. 1987).

3. For further details on this point, see Helmut Coing, *Rechtsvergleichung als Grundlage von Gesetzgebung im 19. Jahrhundert*, 7 IUS COMMUNE 160 (1978); Ulrich Drobnig & Peter Dopffel, *Die Nutzung der Rechtsvergleichung durch den deutschen Gesetzgeber*, 46 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [R.Z.P.] 253 (1982); Norman S. Marsh, *Comparative Law and Law Reform*, 41 R.Z.P. 649 (1977).

4. See, e.g., Konrad Zweigert, *Rechtsvergleichung als universale Interpretationsmethode*, 15 R.Z.P. 5 (1949/50).

5. See ZWEIGERT & KÖTZ, *supra* note 2, at 23-27.

6. For the English text, see, for example, United Nations Conference on Contracts for the International Sale of Goods, Apr. 10, 1980, 19 I.L.M. 668 [hereinafter CISG].

The other official versions—French, Spanish, Russian, Arabic, and Chinese—together with the English one, are reprinted in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 681-806 (Cesare Massimo Bianca & Michael J. Bonell eds., 1987); THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS: A HANDBOOK OF BASIC MATERIALS 29-64, 169-246 (Daniel Barstow Magraw & Reed R. Kathrein eds., 2d ed. 1990).

Since it is not possible to list all the commentaries and articles dealing with the 1980 Vienna Sales Convention, it shall suffice to indicate some bibliographies for more detailed

This Essay will not compare the aforementioned sets of rules. On the contrary, it will show that this comparison,<sup>7</sup> though interesting and stimulating, serves hardly any practical purpose. One can go even further and state that the results of similar comparisons undertaken by other scholars—for instance the assertion that the UCC's and

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information. See MICHAEL J. WILL, *INTERNATIONALE BIBLIOGRAPHIE ZUM UNKAUFRECHT* (5th ed. 1995); Walter Rodino, *Rassegna bibliografica in materia di vendita internazionale*, in *LA VENDITA INTERNAZIONALE: LA CONVENZIONE DI VIENNA DELL'11 APRILE 1980*, at 414 (1981); Peter Winship, *Bibliography: International Sale of Goods*, 18 *INT'L LAW*. 53 (1984); Peter Winship, *A Bibliography of Commentaries on the United Nations International Sales Convention*, 21 *INT'L LAW*. 585 (1987); Peter Winship, *The U.N. Sales Convention: A Bibliography of English-Language Publications*, 28 *INT'L LAW*. 401 (1994).

7. For a general comparison of the UCC and the CISG, see HENRY GABRIEL, *PRACTITIONER'S GUIDE TO THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) AND THE UNIFORM COMMERCIAL CODE (UCC)* (1994); Michael J. Bonell, *UN-Kaufrecht und das Kaufrecht des Uniform Commercial Code im Vergleich*, 58 *R.Z.P.* 20 (1994); John Honnold, *The New Uniform Law for International Sales and the UCC: A Comparison*, 18 *INT'L LAW*. 21 (1984); Paul Lansing & Nancy R. Hauserman, *A Comparison of the Uniform Commercial Code to UNCITRAL's Convention on Contracts for the International Sale of Goods*, 6 *N.C. J. INT'L L. & COM. REG.* 63 (1980); Curtis R. Reitz, *The Uniform Commercial Code and the Convention on Contracts for the International Sale of Goods*, in *A.B.A. NATIONAL INSTITUTE ON NEGOTIATING AND STRUCTURING INTERNATIONAL CONTRACTS: LEGAL ANALYSIS WITH SAMPLE AGREEMENTS* 111 (1990); Claude D. Rohwer & Jack J. Coe, Jr., *The 1980 Vienna Convention on the International Sale of Goods and the UCC—A Peaceful Coexistence?*, in *LEGAL ASPECTS OF INTERNATIONAL BUSINESS TRANSACTIONS* 225 (D. Campbell & C. Rohwer eds., 1984).

For a comparison dealing with specific topics, see, for example, Harry M. Flechtner, *Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.*, 8 *J.L. & COM.* 53 (1988); Henry D. Gabriel, *The Battle of the Forms: A Comparison of the United Nations Convention for the International Sale of Goods and the Uniform Commercial Code: The Common Law and the Uniform Commercial Code*, 49 *BUS. LAW*. 1053 (1994); K. Goto, *Warranties: United Nations Convention on Contracts for the International Sale of Goods Compared to United States Uniform Commercial Code on Sales*, 3 *STUD. L. & ECON.* 40 (1991); Richard Hyland, *Conformity of Goods to the Contract Under the United Nations Sales Convention and the Uniform Commercial Code*, in *EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT* 305 (Peter Schlechtriem ed., 1987); Glower W. Jones, *Warranties in International Sales: UN Convention on Contracts for the International Sale of Goods Compared to the US Uniform Commercial Code on Sales*, 17 *INT'L BUS. LAW*. 497 (1989); Eric C. Schneider, *The Seller's Right to Cure Under the Uniform Commercial Code and the United Nations Convention on Contracts for the International Sale of Goods*, 7 *ARIZ. J. INT'L & COMP. L.* 69 (1989); Kenneth Schwartz, *Open Price Contracts and Specific Performance Under the UN Sales Convention and the U.C.C.*, 1 *U. MIAMI Y.B. INT'L L.* 356 (1991); Richard E. Speidel, *Buyer's Remedies of Rejection and Cancellation Under the UCC and the Convention*, 6 *J. CONTEMP. L.* 131 (1993); James Edward Joseph, Comment, *Contract Formation Under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code*, 3 *DICK. J. INT'L L.* 107 (1984).

CISG's basic concepts of good faith and trade usages<sup>8</sup> are similar in approach and content<sup>9</sup>—are misleading. Although the UCC has greatly influenced the CISG,<sup>10</sup> it is impossible and even perilous to assert that the aforementioned sets of rules are similar in content, or, even worse, that they “are sufficiently compatible to support claims of overall consistency.”<sup>11</sup> An awareness of the UCC's influence might aid in understanding the CISG, especially with respect to issues which the Convention's legislative history demonstrates this influence.<sup>12</sup> It is, however, *impermissible* and *dangerous* to assert that the concepts of the CISG and the UCC are analogous.

The comparison is *dangerous* because it makes one believe—erroneously—that the concepts of the CISG correspond to those of the UCC and can therefore be interpreted in light of the UCC. But this is *impermissible* since a similar approach conflicts with the principle, expressly laid down in Article 7(1) of the CISG,<sup>13</sup> that the

8. See, e.g., Isaak I. Dore & James E. DeFranco, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23 HARV. INT'L L.J. 49, 67 (1982) (stating that “the [United Nations] Convention incorporates both a concept of trade usages and a principle of good faith similar to those of the U.C.C.”).

9. See Michael Kabik, *Through the Looking-Glass: International Trade in the “Wonderland” of the United Nations Convention on Contracts for the International Sale of Goods*, 9 INT'L TAX & BUS. LAW. 408, 428-29 (1992) (stating not only that “[m]any of the C.I.S.G.'s provisions are similar in approach and content to those of the U.C.C.,” but also that “the C.I.S.G. is, for the most part, truly a mirror image of the U.C.C.”); see also *Proposed United Nations Convention on Contracts for the International Sale of Goods: Hearing on Treaty Doc. 98-9 Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. 2 (1982) (statement by Peter H. Pfund, Assistant Legal Advisor for Private International Law, U.S. Department of State); Lyon L. Brinsmade, *American Bar Association Report to the House of Delegates*, 18 INT'L LAW. 39, 40 (1984) (stating that “many provisions of the Convention are very similar in content and form to those of the Uniform Commercial Code”).

10. Some authors go even further, stating, for instance, that “one may view the Convention as a triumph of the Uniform Commercial Code's approach to contract law.” Robert S. Rendell, *The New U.N. Convention on International Sales Contracts: An Overview*, 15 BROOK. J. INT'L L. 23, 42 (1989).

11. Elizabeth H. Patterson, *United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination*, 22 STAN. J. INT'L L. 263, 275 (1986).

12. At this point it is sufficient to point out that the legislative history of the CISG may play an important role in its interpretation.

13. Article 7 of the CISG states:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general

CISG and its concepts must be interpreted in light of its international character and the need to promote uniformity in its application.<sup>14</sup>

## II. INTERPRETATION OF THE CISG

By providing that in the interpretation of the CISG<sup>15</sup> regard is to be had to its international character, Article 7(1) has opted for an "autonomous interpretation"<sup>16</sup> of the CISG—that is, an interpretation independent from the particular concepts of a specific legal system—even when the expressions employed are characteristic of a specific national law,<sup>17</sup> an autonomous interpretation which contrasts with a "nationalistic interpretation"<sup>18</sup> based upon the premise that once put in force, international conventions become part of the

principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

CISG, *supra* note 6, art. 7, at 673.

14. The interpretive guidelines laid down in Article 7(1) of the CISG now seem to be universally accepted, as evidenced by the fact that other uniform law conventions have adopted them. *See, e.g.*, Council Convention on the Law Applicable to Contractual Obligations, June 19, 1980, art. 18, 19 I.L.M. 1492, 1496; UNIDROIT Convention on International Factoring, May 28, 1988, art. 4, 27 I.L.M. 943, 945-46; UNIDROIT Convention on International Financial Leasing, May 28, 1988, art. 6, 27 I.L.M. 931, 933-34.

15. Several papers have been written on the interpretation of the CISG. *See* Michael J. Bonell, *L'interpretazione del diritto uniforme alla luce dell'art. 7 della Convenzione di Vienna sulla vendita internazionale*, RIVISTA DI DIRITTO CIVILE 221 (1986); Adame Goddard, *Reglas de interpretacion de la Convencion sobre Compraventa Internacional de Mercaderias*, DERECHO DEL COMERCIO INTERNACIONAL 103 (1990); John O. Honnold, *Interpretacion de la Convencion de 1980 sobre compraventas, uniformidad, buena fe, lagunas y derecho interno*, 10 ANUARIO JURIDICO 111 (1983); John O. Honnold, *The Sales Convention in Action—Uniform International Words: Uniform Application?*, 8 J.L. & COM. 207 (1988) [hereinafter Honnold, *The Sales Convention in Action*]; Mark N. Rosenberg, *The Vienna Convention: Uniformity in Interpretation for Gap-Filling—An Analysis and Application*, 20 AUSTL. BUS. L. REV. 442 (1992); Paul Volken, *The Vienna Convention: Scope, Interpretation and Gap-Filling*, in INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 19 (Petar Sarcevic & Paul Volken eds., 1986); Susanne Cook, Note, *The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 50 U. PITT. L. REV. 197 (1988).

16. *See, e.g.*, BERNARD AUDIT, LA VENTE INTERNATIONALE DE MARCHANDISES 47 (1990); Michael J. Bonell, *Art. 7, in CONVENZIONE DI VIENNA SUI CONTRATTI DI VENDITA INTERNAZIONALE DI BENI MOBILI* 21 (Cesare Massimo Bianca & Michael J. Bonell eds., 1991); Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183, 200 (1994) [hereinafter Ferrari, *Uniform Interpretation*].

17. For a similar assertion, see Bonell, *supra* note 16, at 74 (stating that "[e]ven in the exceptional cases where terms or concepts were employed which are peculiar to a given national law, it was never intended to use them in their traditional meaning").

18. For this expression see Michael J. Bonell, *La nouvelle Convention des Nations-Unies sur les contrats de vente internationale de marchandises*, 7 DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL 7, 14 (1981).

domestic law.<sup>19</sup> Consequently, one should not have recourse to any domestic concept in order to solve interpretive problems arising from the CISG.<sup>20</sup> The policy behind reliance upon the autonomous interpretation also precludes recourse to domestic interpretive techniques in order to solve problems,<sup>21</sup> since that would lead to results which conflict with the other premise upon which the interpretation of the CISG is to be based, namely the need to promote uniformity in its application.<sup>22</sup>

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19. See Sergio Carbone, *L'ambito di applicazione ed i criteri interpretativi della convenzione di Vienna*, in LA VENDITA INTERNAZIONALE, *supra* note 6, at 84.

20. For a similar statement, see JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALE UNDER THE 1980 UNITED NATIONS CONVENTION 136 (2d ed. 1991) (stating that "the reading of a legal text in the light of the concepts of our domestic legal system [is] an approach that would violate the requirement that the Convention be interpreted with regard to 'its international character'").

Similar statements can also be found in a recent decision of the English House of Lords. See *Fothergill v. Monarch Airlines*, 1981 App.Cas. 251 (1980) (appeal taken from Q.B.) (Eng.).

There are, however, authors who hold the opposing view. See, e.g., Frans J.A. van der Velden, *Indications of the Interpretation by Dutch Courts of the United Nations Convention on Contracts for the International Sale of Goods 1980*, in NETHERLANDS REPORTS TO THE TWELFTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW: SYDNEY-MELBOURNE 1986, at 21, 33-34 (P.H.M. Gerver et al. eds., 1987) (stating that where a source of uniform law is a specific provision of national law, recourse to its domestic interpretation is a logical aid to interpretation of the uniform law); F.A. Mann, *Uniform Statutes in English Law*, 99 L.Q. REV. 376, 383 (1983) (stating that "[i]t is simply common sense that if the Convention adopts a phrase which appears to have been taken from one legal system . . . where it is used in a specific sense, the international legislators are likely to have had that sense in mind and to intend its introduction into the Convention").

21. See, e.g., Bonell, *supra* note 16, at 72 (affirming that "[t]o have regard to the 'international character' of the Convention means first of all to avoid relying on the rules and techniques traditionally followed in interpreting ordinary domestic legislation"); 1 FRANCO FERRARI, VENDITA INTERNAZIONALE. AMBITO DI APPLICAZIONE. DISPOSIZIONI GENERALI 134 (1994) [hereinafter FERRARI, VENDITA].

22. The negative impact of the application of domestic interpretive techniques on uniformity becomes apparent if one considers that in most common-law countries statutes are generally interpreted restrictively. For a similar affirmation, see, for example, AUDIT, *supra* note 16, at 47 n.2. Consequently, "by doing so, the provisions of the statutory law [and of the Conventions] become framed within the principles of the judge made law." Francesco Galgano, *Civil law e common law Generalita*, in ATLANTE DI DIRITTO PRIVATO COMPARATO 1, 1 (Francesco Galgano & Franco Ferrari eds., 2d ed. 1993). By contrast, civil-law countries do not adopt as narrow an approach in interpreting statutes or conventions; for a more detailed discussion of this issue, see, most recently, 1 FERRARI, VENDITA, *supra* note 21, at 134-35, and also Ulrich Magnus, *Währungsfragen im Einheitlichen Kaufrecht. Zugleich ein Beitrag zu seiner Lückenfüllung und Auslegung*, 53 R.Z.P. 116, 122 (1989) (briefly examining the interpretive techniques of different countries).

Thus, Article 7(1) demands that the Convention not be read through the lenses of national law<sup>23</sup> but by projecting the interpretive problems against an international background.<sup>24</sup> Ultimately, this is one of the reasons why U.S. practitioners are barred from having recourse to UCC concepts when asked to solve interpretive problems arising out of the CISG, even where the expressions employed are identical—such as “good faith,” “trade usages,” and so on.<sup>25</sup>

As mentioned above,<sup>26</sup> Article 7(1) demands not only that the domestic background be set aside: By stating the need to promote uniformity in the interpretation of the CISG, but it also sets forth the goal<sup>27</sup> with which any interpretive activity has to comply<sup>28</sup>—a goal<sup>29</sup> to which the rule of autonomous interpretation is closely linked.<sup>30</sup> Indeed, an autonomous interpretation promotes uniformity

23. See Honnold, *The Sales Convention in Action*, *supra* note 15, at 208 (stating that “[o]ne threat to international uniformity in interpretation is a natural tendency to read the international text through the lenses of domestic law”).

For similar conclusions, see 11 ROLF HERBER & BEATE CZERWENKA, *INTERNATIONALES KAUFRECHT. KOMMENTAR ZU DEM UEBEREINKOMMENDER VEREINTEN NATIONEN VOM 11. APRIL 1980 ÜBER DEN INTERNATIONALEN WARENKAUF* 47 (1991); BURGHARD PILTZ, *INTERNATIONALES KAUFRECHT. DAS UN-KAUFRECHT (WIENER UEBEREINKOMMEN VON 1980) IN PRAXISORIENTIERTER DARSTELLUNG* 66 (1993).

24. For this affirmation, see HONNOLD, *supra* note 20, at 136 (“To read the words of the Convention with regard for their ‘international character’ requires that they be projected against an international background.”); see also Ferrari, *Uniform Interpretation*, *supra* note 16, at 200-01 (stating the same).

25. For this line of reasoning, see 1 FERRARI, *VENDITA*, *supra* note 21, at 131.

26. See *supra* notes 15-22 and accompanying text.

27. For this conclusion, see Ferrari, *Uniform Interpretation*, *supra* note 16, at 200, and also Gyula Eörsi, *General Provisions*, in *INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* § 2.03, at 2-5 (Nina M. Galston & Hans Smit eds., 1984) (stating that “a considerable merit of the paragraph [Article 7(1)] lies in the fact that it proclaims an up-to-date legal *policy* in harmony with the exigencies of world trade which postulates that ‘no recourse to national law should be admitted’ ”) (emphasis added) (footnote omitted).

28. For this conclusion, see 1 FERRARI, *VENDITA*, *supra* note 21, at 131-32, with further references.

29. Some authors consider the achievement of the broadest degree of uniformity in the application of the CISG as being the Convention’s “supreme goal.” See, e.g., Cook, *supra* note 15, at 216.

30. See Ferrari, *Uniform Interpretation*, *supra* note 16, at 203.

of the CISG's application,<sup>31</sup> which choosing the nationalistic approach would have seriously been endangered.<sup>32</sup>

However, to achieve uniform application of the CISG—as is true for other uniform law conventions—it is not enough to consider the Convention an autonomous body of rules,<sup>33</sup> since it still can be interpreted differently in different countries,<sup>34</sup> such as where the Convention itself gives rise to differing autonomous interpretations.<sup>35</sup> In order to achieve uniformity, it is therefore necessary to consider the practices of other contracting states.<sup>36</sup> One must consider “what others have already done,”<sup>37</sup>—that is, one must take CISG decisions rendered by judicial bodies of other contracting states into account.<sup>38</sup>

31. Note, however, that if it is true that “autonomous” interpretation promotes to a certain extent uniformity in the application of the Convention, it is also true that the exigency of promoting its uniform application had some influence on the choice of an autonomous rather than “nationalistic” approach. *Id.*

32. See Bonell, *supra* note 16, at 74-75 (stating that “[a]nother and more important reason for the autonomous interpretation of the Convention relates to the Convention's ultimate aim, which is to achieve worldwide uniformity in the law of international sale contracts. To this end it is not sufficient to have the Convention adopted by the single states. It is equally important that its provisions will be interpreted in the same way in various countries. This result would be seriously jeopardized if those called on to apply the Convention would resort, in case of ambiguities or obscurities in the text, to principles and criteria taken from a particular domestic law.”).

33. See FRITZ ENDERLEIN & DIETRICH MASKOW, *INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS* 56 (1992).

34. For similar affirmations, see R.J.C. Munday, Comment, *The Uniform Interpretation of International Conventions*, 27 *INT'L & COMP. L.Q.* 450, 450 (1978), where it is stated that

“[t]he principal objective of an international convention is to achieve uniformity of legal rules within the various states party to it. However, even when outward uniformity is achieved following the adoption of a single authoritative text, uniform application of the agreed rules is by no means guaranteed, as in practice different countries almost inevitably come to put different interpretations upon the same enacted words.”

35. For a more detailed analysis of this problem, see, most recently, 1 FERRARI, *VENDITA*, *supra* note 21, at 136-37.

36. In this sense, see Rolf Herber, *Art. 7*, in *KOMMENTAR ZUM EINHEITLICHEN UNKAUFRECHT* 94 (Peter Schlechtriem ed., 2d ed. 1995); 11 GERT REINHART, *UNKAUFRECHT. KOMMENTAR ZUM UEBEREINKOMMEN DER VEREINTEN NATIONEN VOM 11. APRIL 1980 ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF* 30 (1991).

37. Dietrich Maskow, *The Convention on the International Sale of Goods from the Perspective of the Socialist Countries*, in *LA VENDITA INTERNAZIONALE*, *supra* note 6, at 54.

38. See, e.g., HERBER & CZERWENKA, *supra* note 23, at 48; VINCENT HEUZÉ, *LA VENTE INTERNATIONALE DE MARCHANDISES. DROIT UNIFORME* 30 (1992); ALBERT H. KRITZER, *GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION*

Recourse to the *travaux préparatoires*<sup>39</sup> and scholarly writings,<sup>40</sup> as long as their underlying purposes do not conflict with the rules set forth in Article 7(1), might also help promote uniform application.

### III. THE UCC AND ITS RELATIONSHIP TO THE CISG

From what has been said thus far, two conclusions can be drawn: On the one hand, the CISG's international character prohibits recourse to domestic concepts in view of the solution of interpretive problems arising from the CISG. On the other hand, the need to promote uniformity in its application imposes upon the interpreter the duty not to disregard foreign interpretations of CISG concepts. Ultimately, these considerations are why CISG concepts cannot be analogized to UCC concepts. Even if the CISG's text were identical to that of UCC Article 2, CISG and UCC concepts could not be considered the same—unless interpreters from the other contracting states would reciprocate. One should not see similarities where there are *necessarily* significant differences.

It might be helpful to illustrate the issue with a practical example. Various legal writers<sup>41</sup> have argued that the CISG concept of trade usages<sup>42</sup> corresponds to—or at least resembles<sup>43</sup>—the UCC's.<sup>44</sup>

ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 68 (Supp. 10 1994); PILTZ, *supra* note 23, at 66; Patterson, *supra* note 11, at 283; Cook, *supra* note 15, at 199.

39. It appears common teaching, at least among civil lawyers, that in interpreting the CISG one must also take into account the *travaux préparatoires*. See, e.g., FRITZ ENDERLEIN ET AL., INTERNATIONALES KAUFRECHT 61 (1991); MARTIN KAROLLUS, UNKAUFRECHT 11 (1991).

40. See Edgar Bodenheimer, *Doctrine as a Source of the International Unification of Law*, 34 AM. J. COMP. L. 67 (Supp. 1986). The author examines from a comparative lawyer's point of view "whether doctrinal writings may be considered primary authorities of law on par with legislation and (in some legal systems) court decisions, or whether they must be relegated to the status of secondary sources." *Id.* at 67.

41. See, e.g., Dore & DeFranco, *supra* note 8, at 67.

42. For a detailed analysis of the concept of "trade usages" under the UCC, see MICHAEL J. BONELL, DIE BEDEUTUNG DER HANDELSBRÄUCHE IM WIENER KAUFRECHT-SÜBEREINKOMMEN, ÖSTERREICHISCHE JURISTISCHE BLÄTTER 385 (1985); Franco Ferrari, *La rilevanza degli usi nella convenzione di Vienna sulla vendita internazionale di beni mobili*, 10 CONTRATTO E IMPRESA 239 (1994) [hereinafter Ferrari, *La rilevanza*]; Stephen Bainbridge, Note, *Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions*, 24 VA. J. INT'L L. 619 (1984).

43. Jim C. Chen, *Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant*, 27 TEX. INT'L L.J. 91, 103 (1992).

44. Several papers have been written on the concept of trade usages under the UCC. See, e.g., E. Allan Farnsworth, *Unification of Sales Law: Usage and Course of Dealing*, in UNIFICATION AND COMPARATIVE LAW IN THEORY AND PRACTICE 81 (1984); Roger W. Kirst, *Usage of Trade and Course of Dealing: Subversion of the UCC Theory*, 1977 U. ILL.



This view might gain support from the fact that both the CISG and the UCC (a) depart from the requirement that in order to be relevant the usage be obligatory;<sup>45</sup> (b) require a subjective standard to be met;<sup>46</sup> (c) consider only usages of the particular trade the parties are involved in;<sup>47</sup> and (d) set forth the rule, either expressly<sup>48</sup> or implicitly,<sup>49</sup> that express terms control contrary trade usages.<sup>50</sup>

Nevertheless, the concepts cannot be analogized to each other for several reasons. First, the CISG considers relevant only those usages of trade which "in international trade [are] widely known" to the parties. This precludes the applicability of all domestic as well as

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L.F. 811; Joseph H. Levie, *Trade Usage and Custom Under the Common Law and the Uniform Commercial Code*, 40 N.Y.U. L. REV. 1101 (1965).

45. Harold J. Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 2 EMORY J. INT'L DISPUTE RESOL. 235, 296-97 (1988) (stating that the *opinion necessitatis* is not required under CISG); Chen, *supra* note 43, at 103 (affirming that both the UCC's and the CISG's "definition of usage as regular observation rejects the requirement that custom be 'obligatory'").

46. According to the UCC, those trade usages may be relevant if the parties "are or should be aware" of their meaning. U.C.C. § 1-205(3) (1990). The CISG uses a different wording. According to Article 9(2), the parties are considered bound by the usages which they "knew or ought to have known." CISG, *supra* note 6, art. 9(2), at 674.

47. Farnsworth, *supra* note 44, at 83 (discussing the UCC); Ferrari, *La rilevanza*, *supra* note 42, at 253 (discussing the CISG).

48. According to the UCC,  
[t]he express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.  
U.C.C. § 1-205(4).

49. According to the CISG,  
[t]he parties are considered, *unless otherwise agreed*, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

CISG, *supra* note 6, art. 9(2), at 674 (emphasis added).

50. For this conclusion, with reference to the CISG, see Eric Bergsten, *Basic Concepts of the UN Convention on the International Sale of Goods*, in *DAS UNCITRAL KAUFRECHT IM VERGLEICH ZUM ÖSTERREICHISCHEN RECHT* (Peter Doralt ed., 1985) (stating that the Sales Convention contains a hierarchy of norms: "The highest level is the contract itself, to the extent it covers the matter. Next come usages which are applicable to the contract. In third place comes the law, in this case the Convention. The hierarchy may seem familiar. Contract breaks usages; Usages break Convention.")

According to Chen, *supra* note 43, at 104, however, "unlike the UCC, the CISG does not command that express contractual terms control contrary course of performance, course of dealing, and trade usages." This is not tenable, since this would mean ignoring the text of Article 9(2). See *supra* note 49 (quoting Article 9(2)).

local usages,<sup>51</sup> except those which are known as rules also governing international trade.<sup>52</sup> Second, unlike the UCC concept of "relevant" trade usages, the CISG concept is not limited by the *parol evidence rule* which, as many legal writers<sup>53</sup> and a recent court decision<sup>54</sup> have pointed out, has been rejected by the CISG. Third—and for purposes of this Essay most importantly—the views on trade usages and their importance differ from system to system. This is a fact which the U.S. interpreter<sup>55</sup> must, because of Article 7(1), take into account when construing the CISG concept of trade usages, and which ultimately makes it impossible for the CISG's concept to correspond to the UCC's.

In former socialist countries, for instance, even though trade usages play a certain role,<sup>56</sup> they have only limited application.<sup>57</sup> Indeed, they are considered the source of unforeseeable court decisions<sup>58</sup> and uncertainty in law,<sup>59</sup> consequences which contrast with

51. For a similar conclusion, see Chen, *supra* note 43, at 105.

52. For a similar statement, see ENDERLEIN & MASKOW, *supra* note 33, at 57.

53. See, e.g., HONNOLD, *supra* note 20, at 170-71 (affirming that even though the CISG does not expressly address the *parol evidence rule*, "the language of Article 8(3) . . . seems adequate to override any domestic rule that would bar a tribunal from considering the relevance of other agreements"); Joseph M. Lookofsky, *Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules*, 39 AM. J. COMP. L. 403, 408-09 (1991).

54. *Filanto, S.P.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1238 n.7 (S.D.N.Y. 1992) (stating that "the [Sales] Convention essentially rejects . . . the *parol evidence rule*"). For a comment on this decision, see CLAUDE WITZ, *LES PREMIÈRES APPLICATIONS JURISPRUDENTIELLES DU DROIT UNIFORME DE LA VENTE INTERNATIONALE (CONVENTION DES NATIONS UNIES DU 11 AVRIL 1980)* 54 (1995); Ronald A. Brand & Harry M. Flechtner, *Arbitration and Contract Formation in International Trade: First Interpretations of the U.S. Sales Convention*, 12 J.L. & COM. 239 (1993).

55. At this point it might be useful to point out that interpreters are not only judges but the contracting parties as well. For a similar affirmation, see ENDERLEIN & MASKOW, *supra* note 33, at 55, stating that the rules on interpretation set forth in Article 7 "not only refer to judges but also to the parties which in settling their differences of opinion first and foremost have to interpret the applicable rules."

56. See Ginsburg, *International Trade Customs*, J. INT'L L. & POL. 325 (1975).

57. See Ferrari, *La rilevanza*, *supra* note 42, at 250; Bainbridge, *supra* note 42, at 641.

58. For a similar view, see Bainbridge, *supra* note 42, at 642.

59. For a somewhat similar statement, see E. Allan Farnsworth, *Developing International Trade Law*, 9 CAL. W. INT'L L.J. 461, 465-66 (1979), stating that usages are looked upon with suspicion by Eastern European countries, since

the Eastern Europeans, being even more bureaucratic in their outlook than our multinationals, like to have everything in their files. There is nothing more distressing to a bureaucrat than the thought that some Englishman or Ghanian is going to appear and claim that there is a usage that he does not have in his files.

the requirements of a planned economy.<sup>60</sup> Trade usages do not play an important role in developing countries either,<sup>61</sup> at least in terms of international relations, due to the conviction that they originated mainly in the industrialized world and therefore reflect mainly the interests of developed countries.<sup>62</sup>

Under Article 7(1)<sup>63</sup> and in interpreting the CISG concept of trade usages—as any other concept—Americans must acknowledge these diverging views which consistently differ from their own. Therefore, it is simply wrong to state that the concepts of trade usages under the CISG and the UCC are similar in content.<sup>64</sup>

The same is true concerning the concept of good faith. Despite some opinions to the contrary,<sup>65</sup> good faith under the CISG cannot correspond to the UCC definition. In the CISG good faith is mentioned only in Article 7(1)—the Article setting forth the rules for the interpretation of the Convention.<sup>66</sup> As a result, several authors re-

See also the affirmation of the Czechoslovakian delegate to UNCITRAL. *Comments by Governments and International Organizations on the Draft Convention on the International Sale of Goods*, [1977] 8 UNCITRAL Y.B. 109, 112-14, A/CN.9/125, A/CN.9/125/Add. 2.

60. For this justification, see Gyula Eörsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L. 333-42 (1983).

The socialist approach reflects the requirements of a planned economy. The fact that not all socialist countries supported each view can be accounted for by the fact that some were content if their own principles were applied in their domestic trade; so far as their Western trade was concerned they were ready to adjust to Western practice.

*Id.* at 342.

61. See Horacio A. Grigera Naón, *The UN Convention on Contracts for the International Sale of Goods*, in 2 THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 89, 101 (Norbert Horn & Clive M. Schmitthoff eds., 1982).

62. See S.K. Date-Bah, *The Convention on the International Sale of Goods from the Perspective of the Developing Countries*, in LA VENDITA INTERNAZIONALE, *supra* note 6, at 27.

Developing countries have tended to be suspicious of settled usages and customs in the international sphere. For instance, it has been observed that many new nations consider traditional customary public international law as Eurocentric and accordingly have been reluctant to submit to certain aspects of it, particularly the areas of dealing with economic relations. . . . The basis of this suspicion . . . is the feeling that such usages and customs usually crystallise from practice dominated by actors from the developed countries, particularly those in the West. Such usages are therefore likely to reflect the interest of such developed countries.

*Id.* at 27.

63. For the text of this provision, see *supra* note 13.

64. *But see supra* note 9.

65. See, e.g., Dore & DeFranco, *supra* note 8, at 67.

66. For a discussion of the issue of interpretation of the CISG, see, apart from the sources cited *supra* note 15, John O. Honnold, *Uniform Words and Uniform Application:*

gard the concept *de quo* as a "mere instrument of interpretation."<sup>67</sup> However, even believing the contrasting view<sup>68</sup> that the good faith provision is "also necessarily directed to the parties to each individual contract of sale,"<sup>69</sup> it is still misleading to state that the UCC and the CISG concepts are the same.<sup>70</sup> An interpreter would—once again—have to take into account the constructions of the concept *de quo* to be found in other countries, the CISG and UCC concepts cannot be analogized given the different interpretations in various countries.<sup>71</sup> In the United States, for example, where the good faith principle has not only been adopted by the UCC<sup>72</sup> but by the *Restatement (Second) of Contracts* as well,<sup>73</sup> its area of operation is limited to the

*The 1980 Sales Convention and International Juridical Practice*, in EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT 115, 120 (Peter Schlechtriem ed., 1987).

67. For a more detailed discussion and further references, see Ferrari, *Uniform Interpretation*, *supra* note 16, at 210-13.

68. See, e.g., PETER SCHLECHTRIEM, EINHEITLICHES UN-KAUFRECHT 25 (1981); PETER SCHLECHTRIEM, UNIFORM SALES LAW: THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 39 (1986); Ulrich Huber, *Der UNCITRAL-Entwurf eines Übereinkommens über Internationale Warenkaufverträge*, 43 R.Z.P. 413, 432 (1979).

69. Bonell, *supra* note 15, at 84.

70. At this point it must be emphasized that there appears to be no unitary concept of good faith in the United States either. In the United States, for instance, the concept *de quo* has been employed by the courts in order to prevent one party from exercising discretion in a way incompatible with the purpose of the contract. See, e.g., *R.A. Weaver & Assocs. v. Asphalt Constr., Inc.*, 587 F.2d 1315 (D.C. Cir. 1978); *Homestake Mining Co. v. Washington Pub. Power Supply Sys.*, 476 F. Supp. 1162 (N.D. Cal. 1979); *Neumiller Farms, Inc. v. Cornett*, 368 So. 2d 272 (Ala. 1979). However, good faith has also been employed to "avoid inequitable results caused by an overly literal application of a statute or contract provision. Moreover, courts have used the provision to prevent a party from taking advantage of his own actions taken in bad faith." *Dore & DeFranco*, *supra* note 8, at 62 (footnotes omitted).

71. See, e.g., E. Allan Farnsworth, *The Convention on the International Sale of Goods from the Perspective of the Common Law Countries*, in LA VENDITA INTERNAZIONALE, *supra* note 6, at 18 (stating that the concept of good faith is so "vague that [its] meaning cannot help but vary widely from one legal system to another").

72. See U.C.C. § 1-203 (1990) ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."). For a detailed discussion of the good faith provision in the UCC, see Steven J. Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1 (1981); E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963); Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

73. RESTATEMENT (SECOND) OF CONTRACTS § 205 ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

performance of the contract.<sup>74</sup> In other countries there is not only a common-law duty to perform in good faith,<sup>75</sup> but good faith plays an important role during the bargaining process as well.<sup>76</sup>

#### IV. CONCLUSION

It is shortsighted<sup>77</sup> and misleading to say that the concepts of the CISG correspond to those of the UCC and that the UCC lawyer can find comfort in the CISG's similarities to the UCC.<sup>78</sup> Allowing these assumptions to remain uncorrected will defeat the purposes of the CISG.<sup>79</sup> To avoid this it is sufficient to comply with the guidelines set forth in Article 7 mandating the independent construction of the CISG, ignoring apparently similar domestic concepts, and taking the interpretations and applications of other countries into account. Even though this might create some difficulties, because it necessarily results in departure from one's own—comfortable and familiar—background, it is the only way to achieve the uniformity the CISG stands for.

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74. See, e.g., Farnsworth, *supra* note 71, at 18.

75. For this expression, see Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980).

76. See Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 290 (1984).

In continental and socialist systems the concept [of "good faith"] may have broader connotations. In particular, the notion of good faith is not limited to the performance of completed agreements, but extends to the process of formation. It operates as a limit on the right of a party to terminate the formation process.

77. For this conclusion, see Timothy N. Tuggey, Note, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?*, 21 TEX. INT'L L.J. 540, 550 (1986) (stating that the "favorable responses to the CISG, however, especially those based upon the U.C.C. similarities, may be shortsighted").

78. For a similar statement, see, with reference to the rules on formation of contracts, Berman, *supra* note 45, at 295.

79. For this conclusion, see Tuggey, *supra* note 77, at 554.