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Uniformity and Politics: Interpreting and Filling Gaps in the CISG

Harry M. Flechtner

Professor Dr. Ulrich Magnus stands as one of the great promoters of cross-border legal understanding. His writings on uniform international commercial law – a field of particular interest for me – have been my guides when I seek insights that transcend the ideology of particular legal systems. I have also had the opportunity to work with him on important projects aimed at promoting understanding of uniform international commercial law; these opportunities have been among the most rewarding experiences of my career.

It is my work on the United Nations Convention on Contracts for the International Sale of Goods (the "CISG") that has most benefitted from Professor Magnus' scholarly insights, and it is in studying the CISG that I have had the honor to collaborate with him. Thus the most appropriate contribution I can make to a volume honoring his extraordinary career and accomplishments is to attempt, yet again, to tap into the deep reservoirs of significance that this seminal legal text holds.

Specifically, I will build on some earlier observations concerning the Convention's overarching themes – the goals of uniform international law, the importance of uniform interpretation, and the special approach mandated by the "international character" of the Convention – to put forward a thesis some may find startling: that some current approaches to interpreting and filling gaps in the CISG (approaches that I believe reflect the characteristically more aggressive and expansive interpretational methods of the Civil Law) overemphasize the goal of uniformity. I believe the single-minded pursuit of uniformity in connection with the Convention has produced a distorted reading of the CISG, and is, ironically, a long-term threat to the project to create an effective system of uniform international commercial law.

I. Uniformity and the CISG – the prevailing view

The CISG has been lauded as the most successful substantive commercial law treaty in history.[1] At the time this is written it has attracted 79 Contracting states, [2] and is the presumptive governing law for a significant percentage of world trade in goods.[3] Its purpose is to reduce

[1] *See* Peter Schlechtriem, *Preface*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALES OF GOODS i, v (Peter Schlechtriem & Ingeborg Schwenzer, eds.) (Oxford, Oxford University Press, 2nd (English) ed., 2005).

[2] UNCITRAL, *Status – 1980 United Nations Convention on Contracts for the International Sale of Goods*, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (visited 30 May 2013).

[3] *See* Ulrich Magnus, *Introduction*, in CISG vs. REGIONAL SALES LAW UNIFICATION 1, 3 (Ulrich Magnus, ed.) (Munich, sellier european law publishers, 2012) (estimating that 75% of current world trade in goods is potentially governed by the CISG); Peter Schlechtriem and Ingeborg

choice-of-law-related transactions costs in international sales by supplying shared uniform international substantive law to govern such transactions, in lieu of the application of a particular state's (non-uniform) domestic law.[4] As I have noted elsewhere, the CISG attempts "a particularly 'pure' and ambitious form of globalized sales law" – a set of self-executing substantive sales rules directly applicable to the parties involved in international sales transactions.[5]

Thus the provision of *uniform* international substantive sales rules is a principle at the heart of the CISG project. Indeed, the importance of *uniform* international rules is a prominent theme of the Convention's preamble, which declares 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." The drafters of the Convention recognized, however, that real uniformity required not only a shared legal text, but also an internationally-uniform interpretation of and approach to that text. Divergent interpretations of the CISG in different tribunals would mean that choice of forum would, in effect, be choice of (non-uniform) law, and this would reintroduce the transactions costs the CISG was designed to avoid. This danger is increased by the fact that the Convention is applied not by specialist CISG tribunals headed by a single, final authority on the meaning of the Convention (i.e., a "Supreme Court of the CISG"), but by "regular" domestic courts and arbitral tribunals with jurisdiction over sales disputes. As a counter to the tendency of such a system to create divergent interpretations of the CISG, the drafters included a mandate in Article 7(1) that, in interpreting the Convention, "regard is to be had ... to the need to promote uniformity in its application. (...)"

The uniformity mandate in Article 7(1) has been linked to – indeed, sometimes almost equated with – another interpretative principle enunciated in Article 7(1): the requirement that the Convention also be interpreted with regard for "its international character."[6] It has

Schwenzer, *Introduction*, in Schlechtriem & Schwenzer, commentary on the UN Convention on the International Sales of Goods 1, 1 (Ingeborg Schwenzer, ed.) (Oxford, Oxford University Press, 3rd ed, 2010) (estimating that 80% of current world trade in goods is potentially governed by the CISG). I refer to the CISG as "presumptive" or "potentially" governing law because the parties to an international sale can (and frequently do) opt out of the CISG as the law applicable to their transaction. See CISG Art. 6.

4 Harry M. Flechtner, *Globalization of Law as Documented in the Law on International Sales of Goods*, in Nieuw Internationaal Privaatrecht: Meer Europees, Meer Globaal 541 (XXXVe Postuniversitaire Cyclus Willy Delva 2008-09) 544 (J. Erauw & P. Taelman, eds.) (Mechelen, Wolters Kluwer Belgium, 2009); Harry M. Flechtner, *The Future of the Sales Convention: In Defense of Diversity in Interpreting the CISG,* in 1 Private Law: national – global – comparative (Festschrift für Ingeborg Schwenzer zum 60, Geburtstag) 493, 496 & 502 (Andrea Büchler & Markus Müller-Chen, eds.) (Bern, Stämpfli Verlag, 2011). *But see* John Coyle, *Rethinking the Commercial Law Treaty*, available in the Social Sciences Research Network ("SSRN"), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1582898 (questioning whether the approach of the CISG is well-adapted to reducing transactions costs).

5 Flechtner, *Globalization of Law*, *supra* note 4, at 543.

6 See John Felemegas, *Introduction*, in An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law 12 (John Felemegas, ed.) (Cambridge University Press, 2007) ("In

Electronic copy available at: http://ssrn.com/abstract=2426565

also been argued that these two interpretative principles require that the Convention be interpreted broadly and liberally.[7] The idea is that a broad reading of the CISG will tend to bring more matters within its provisions, thus furthering its purpose of replacing divergent national sales law with uniform international sales law. For those of us who understand and believe in the value of uniform international rules, the logic of this would appear to be unassailable.

The value of maximizing the reach of uniform sales law has also been cited in support of a certain approach to "gap-filling" under the CISG. According to the Convention's gap-filling rule in Article 7(2):

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

In order to promote the fullest possible reach of uniform law, it has been suggested that, whenever possible, gaps in the Convention's provisions should be filled by employing the first of the two steps described in this provision – i.e., finding a solution based on the Convention's general principles – rather than resorting to the non-uniform domestic law designated by PIL (the second or "fall back" step described in Article 7(2)).[8] Once again, looking to the substantive purpose of the CISG to reduce transaction costs by replacing divergent national law with uniform international law, and without consideration of any other circumstances, the logic of this position is certainly appealing.

The push for a uniformity-centered gap-filling methodology, and the resulting liberal and expansive approach to "the general principles on which [the CISG] is based" is reflected in the large number of CISG general principles that have been put forward.[9] Indeed, in a rather circular (almost incestuous) move, several general principles have been identified that

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the CISG, the elements of 'internationality" and 'uniformity' [in Article 7(1)] are interrelated thematically and structurally because of their position in the same Part and Article of the Convention; they are interrelated functionally because an autonomous approach to interpretation [as dictated by the Convention's 'international character'] is necessary for the functioning of both, and they are interdependent because the existence of one is a necessary prerequisite for the existence of the other.").

7 *E.g., Id*. at 11-12; Michael Joachim Bonell, *General Provisions: Article 7*, in Commentary on the International Sales Law: The 1980 Vienna Sales Convention 73 (C.M. Biana & M.J. Bonell, eds.) (Guiffrè 1987).

8 *See* Felemegas, *supra* note 6, at 23 ('[U]niformity in the CISG's application is the ultimate goal. It follows that for the interpretation of the CISG in general – not only in the case of ambiguities or obscurities in the text but also in the case of gaps *praeter legem* – "courts should to the largest possible extent refrain from resorting to the different domestic laws and try to find a solution with the Convention itself."' (quoting Bonell, *surpa* note 7, at 75)).

9 *See*, *e.g.*, Ingeborg Schwenzer and Pascal Hachem, *Article 7* ¶ 31, in Schlechtriem & Schwenzer Commentary (3rd ed.), *supra* note 3, at 135 ("Commentators recite long lists of general principles and their sources, and these lists can be embellished by many decisions of State courts and arbitration tribunals referring to general principles either in general or in the context of specific issues." (citations omitted)).

support the liberal "discovery" of further general principles, turning the general principles into a kind of gap-filling "black hole" that, in the name of uniformity, draws in all issues and allows none to escape.[10]

In the apotheosis of CISG interpretation and gap-filling methodology designed to minimize resort to non-uniform domestic law, it is argued that both the interpretation of the Convention and the process of filling gaps in the treaty's rules should incorporate certain compilations of international contract principles – general ones (in particular the UNIDROIT Principles of International Commercial Contracts) and even regional ones (such as the Principles of European Contract Law (PECL)).[11] Because of the comprehensive scope of these compilations, this final step in the uniformity-oriented methodology for interpretation and gap-filling would minimize – indeed, it might essentially eliminate – any need to resort to non-uniform law for transactions governed by the CISG. I will return to discuss this methodology after going in for a closer look at what the Convention actually provides concerning uniformity.

II. Uniformity reexamined

The drafters of the CISG and the text they produced did not embrace the uniformity-before-all-else approach reflected in the foregoing. For one thing, the CISG is a treaty with a limited scope and sphere of application, expressly relegating a number of international sales matters to non-uniform law. For example, the CISG does not apply to various international sales transactions (such as consumer transactions, Article 2(a)); it excludes coverage of various issues in transactions to which it does apply (such as the "validity" of the sales contract and the contract's effect on ownership interests in the goods, Article 4); and it does not attempt to create a uniform procedural system for enforcing the rights and obligations it creates. For various reasons, furthermore, the Convention itself intentionally incorporates non-uniformity within its text. For example, the CISG permits Contracting States to make declarations that

[10] *See* Pilar Perales Viscasillas, *Article 7* ¶ 59, in UN Convention on Contracts for the International Sale of Goods (CISG) 138 (Stefan Kröll, Loukas Mistelis & Pilar Perales Viscasillas, eds.) (München, Verlag C.H. Beck, 2011) (discussing the posited Article 7(2) gap-filling general principle of "*pro-Conventione*" (which "dictates an interpretation of favour of applicability of the CISG") and "*dubio pro Conventione*" (which considers "the preference in the applicability of the CISG before domestic law and the applicability of the CISG over the purely domestic or national public order")). *But see*, *e.g.*, Joseph Lookofsky, *In Dubio Pro Conventione? Some Thoughts about Opt-Outs, Computer Programs and Pre-Emption under the 1980 Vienna Sales Convention (CISG)*, 13 Duke Journal of Comparative and International Law 263, 265 (suggesting a cautious approach to applying the "*dubio pro Conventione* principle).

[11] *See* Felemegas, *supra* note 6, at 10 ("An interpretative approach that has been suggested as suitable to the proper application of the CISG as truly global uniform sales law is based on the concept of internationality and on generally acknowledged principles of commercial law, such as the UNIDROIT Principles and the Principles of European Contract Law (PECL). (...) [Looking to these such compilations] would in many instances aid in rendering unnecessary the textual reference in Article 7(2) CISG to private international law, a positive step toward substantive legal uniformity."). For an extended argument in favor of using the UNIDROIT Principles and the PECL for interpreting and gap-filling the CISG, see *id*. at 31-38.

certain provisions or aspects of the Convention do not bind the state (see Articles 92-97), although the drafters also attempted to limit states' power to make reservations in Article 98.[12] The text of the CISG also expressly incorporates non-uniform national law, as in the references to "private international law" in Articles 1(1)(b) and 7(2) and the reference in Article 28 to a court's "own law in respect of similar contracts of sale not governed by the Convention."[13]

Even CISG Article 7(1) – the source of the authority behind calls for broad and expansive interpretation of the Convention and gap-filling with minimal recourse to non-uniform law – evidences a more cautious approach to the value of uniformity than is suggested by the aggressive approach to uniformity described earlier. Article 7(1) does *not* mandate that the CISG be interpreted uniformly: it instructs that, in interpreting the Convention, "regard is to be had to ... the need to promote uniformity in its application." This is quite a different and "softer" proposition than mandating uniform interpretation. As I have noted elsewhere, the mandate here is *not* for the interpreter to achieve a result (uniform interpretation) but to go through an analytical process in which the importance of uniform interpretation is merely a factor to consider. [14] And not the exclusive factor. The "need to promote uniformity in its application" is just one of three interpretational considerations expressly specified in Article 7(1); there is no indication that the other two (the "international character" of the Convention and "the need to promote ... the observance of good faith in international trade") are of lesser importance. Of course, as noted earlier,[15] the aggressive approach to uniformity tends to reduce the international character of the Convention to a consideration that merely reinforces the goal of uniform interpretation – a kind of subsidiary uniformity principle. Certainly the two considerations are not disconnected, but (as I will argue below) the aggressive approach does not do justice to the "international character" consideration, which has a vital role to play independent of the uniformity consideration: it requires the interpreter to treat the Convention not merely as a source of substantive private law like a domestic civil code, but as a treaty consented to by sovereign states.

Indeed (although some may disagree), I believe that the three interpretational considerations identified in Article 7(1) can conflict. An example I have discussed elsewhere involves the strict interpretation, adopted in a considerable number of decisions, of the timing and content obligations imposed by Article 39 for a buyer's notice to the seller that delivered goods were non-conforming.[16] The goal of uniformity might suggest that a tribunal faced with an issue concerning the adequacy of a buyer's Article 39 notice should adopt the strict approach, which is well-entrenched in certain jurisdictions and has a substantial body of case law behind it. In my view, however, the strict approach may not promote good faith in international trade because it creates an opportunity for a seller to escape the consequences of breaching basic contractual obligations even where the seller has suffered no prejudice from the timing or content of the buyer's notice.[17] On the question of the adequacy of a buyer's

12 See Flechtner, *The Future of the Sales Convention*, *supra* note 4, at 510-11; Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & Com. 193-197 & 206 (1998).

13 Flechtner, *The Several Texts of the CISG*, *supra* note 12, at 198-200 & 206.

14 Flechtner, *The Future of the Sales Convention*, *supra* note 4, at 503-04.

15 See note 6 *supra* and the accompanying text.

16 Flechtner, *The Future of the Sales Convention*, *supra* note 4, at 503.

17 The strict approach to Article 39 notice may also run counter to the Article 7(2) mandate for the interpreter to have regard for the international character of the CISG because it may to a degree

Article 39 notice, it seems to me, the criteria that Article 7 identifies pull the interpreter in different directions. Another example of this phenomenon arises out of the vastly different legal-cultural attitudes towards incorporation of standard contract terms – differences that threaten significant non-uniformity on a critical issue.[18] Given that threat, should one reject the "knock-out rule" approach that has been adopted by the German Bundesgerichtshof[19] (despite an argument that this approach reflects and fosters good faith in international sales), and in the name of uniformity seek refuge in a literal application of what is, in practical effect, the "last shot" principle resulting from a literal application of CISG Article 19?[20]

Given the "soft" (or at least softer-than-often-asserted) uniformity mandate in Article 7(1) – under which the "need to promote uniformity in [the CISG's] application" is merely one of three non-prioritized (and not always congruent) factors that an interpreter is required to have "regard" for (i.e., an *obligation de moyens* rather than an *obligation de résultat)* – it is not surprising that the gap-filling provision that follows in Article 7(2) also displays a commitment to uniformity that has limits. Even where an open issue falls within the sphere of application of the CISG (i.e., it is "governed by this Convention" but "not expressly settled in it"), Article 7(2) contemplates that the issue *may* end up being referred to non-uniform national law (i.e., it will be resolved "in conformity with the law applicable by virtue of the rules of private international law"). Of course this is to occur only if the first step in Article 7(2)'s two step process – settling the issue "in conformity with the general principles on which it [i.e., the CISG] is based" – fails.

Despite the drafters' clear indication that there will be open issues that cannot be resolved using the general principles of the uniform law, and that such issues should be referred to the (non-uniform) law designated by PIL, those who promote uniformity at all costs favor an approach that would virtually block that possibility:

> It is arguable that the use of the rules of private international law to resolve questions concerning matters governed but unresolved by the CISG will harm the Convention's uniform application by producing divergent results. An alternative approach to gap-filling – one based on the concept of internationality and on generally acknowledged principles upon which the CISG is based – would serve and promote the purpose of the new law (i.e., uniformity in its application), rather than hinder it.

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be a product of the "homeward trend," reflecting non-internationally-accepted approaches in certain domestic laws.

18 Compare the increasingly-accepted "rolling contract" theory in U.S. law, which generally results in the incorporation of the seller's standard terms even if those terms are not revealed until after the buyer has paid for and taken possession of the goods, with the approach to the incorporation of standard terms taken in decisions by the German courts. See Bundesgerichtshof, Germany, 31 October 2001, CLOUT case No. 445 (Machinery Case), English translation available online at http://cisgw3.law.pace.edu/cases/011031g1.html (holding that a seller's written order confirmation that referenced, but did not attach the actual text of, the seller's standard terms was insufficient to incorporate those terms into the parties' contract). For discussion of this issue, see Flechtner, *Globalization of Law*, *supra* note 4, at 550-55.

19 Bundesgerichtshof, Germany, 9 January 2002, (Powdered Milk Case), English translation available online at http://cisgw3.law.pace.edu/cases/020109g1.html.

20 I have in fact advocated this position, so I have at least some credentials as a supporter of the uniformity principle. *See* Flechtner, *Globalization of Law*, *supra* note 4, at 555.

> In accordance with the basic criteria established in Article 7(1) ... uniformity in the CISG's application is the ultimate goal. It follows that for the interpretation of the CISG in general – not only in the case of ambiguities or obscurities in the text but also in the case of gaps praeter legem – "courts should to the largest possible extent refrain from resorting to the different domestic laws and try to find a solution within the Convention itself."
>
> (...) [T]he recourse to rules of private international law represents regression into doctrinal fragmentation and practical uncertainty. The relevant reference to such a method in Article 7(2) is unfortunate, as it does not assist the goal of uniformity ...
> On the other hand, minimizing the need to invoke the rules of private international law in the context of Article 7(2) goes a long way towards strengthening the unification effort. This approach requires reliance upon and an aggressive search for general principles that underlie the Convention.[21]

These ideas are used to justify an approach to the "first step" in Article 7(2) that would fill gaps not only by taking an aggressive approach to locating general principles within the Convention, but also by treating the rules found in general, non-binding compilations of international contract principles – specifically the UNIDROIT Principles and the PECL – as sources for gap-filling rules.[22] There is nothing in Article 7(2) suggesting that open issues should be referred to these compilations: Article 7(2) is clear that gap-filling must be based on general principles found *in the Convention*, which, unlike these compilations, is the document to which the Contracting States consented. Indeed, nothing about these compilations suggests they can properly be used to fill CISG gaps under the methodology of Article 7(2): the compilations were not produced by bodies with any law-making authority; both post-date the CISG; both derive their rules from sources unconnected to the CISG (including domestic contract law and the compilers' assessment of what rule is best). Indeed, some of the rules in the compilations contradict the CISG, as where the UNIDROIT Principles posit a right to specific performance (indeed, a non-derogable right) that (as the Principles' Official Comments admit) flies in the face of CISG Article 28.[23] Because the UNIDROIT Principles and PECL contain a comprehensive (and, in the case of the UNIDROIT Principles, ever-expanding) body of rules, there are few if any possible open CISG issues that they do not address – another example of the "black hole" effect of the uniformity-at-all-costs ideology (all issues irresistibly drawn in and none can escape). Use of these compilations as gap-filling sources would, in the name of uniformity, obviate any need to go to Article 7(2)'s "second step" and refer an issue to non-uniform law via PIL. That, indeed, is the avowed purpose of this approach.

Of course this approach violates a fundamental canon of statutory construction by rendering the second part of Article 7(2) meaningless. It also violates what must have been the understanding of the states who originally signed the Convention text and the Contracting States who thought Article 7(2) meant what it said. And it is an approach that, in my view, creates a homeward trend problem because the gap-filling rules it produces tend to favor the approaches and principles of the Civil Law as opposed to the Common Law or other non-

21 Felemegas, *supra* note 6, at 23 (quoting Bonell, *surpa* note 7, at 75) and 35.

22 Felemegas, *supra* note 6, at 30 & 35.

23 See Article 7.2.2 of the UNIDROIT Principles (2010) and Official Comment 2 thereto.

Civilian traditions.[24] These last two points are strikingly illustrated by the 2009 decision of the Belgian Court of Cassation in *Scafom International BV v. Lorraine Tubes S.A.S.* – a decision that represents the most aggressive and far-reaching use of this gap-filling methodology by a court to date.

III. Uniformity gone wild (and wrong): the Scafom decision

Important background to the *Scafom* decision is a debate about whether a "hardship" provision would be included in the CISG.[25] Hardship, which is a doctrine recognized in the contract law of many (but not all) civil law jurisdictions,[26] provides relief where the "equilibrium" (i.e., the economic balance) that existed between the parties when a contract was formed is seriously and unexpectedly disrupted by events that occur or become known after the contract was concluded. Unlike traditional force majeure doctrine, "hardship" does not limit relief to situations where events have rendered performance impossible; "hardship" relief is triggered (to use the definition of "hardship" in Article 6.2.2 of the UNIDROIT Principles) where the occurrence of unanticipated events whose risk was not assumed by the disadvantaged party "fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished." More significant than the standard of what constitutes "hardship" (at least to this U.S.-trained lawyer) is the relief provided by hardship doctrine as reflected in the UNIDROIT Principles: the party disadvantaged by the hardship event has a right to "request" renegotiation of the contract terms (the "request" appears to trigger an obligation by the other party to renegotiate); if the renegotiations fail to produce an agreement to modify, courts are given the power to terminate the agreement or to "adapt the contract with a view to restoring its equilibrium."[27] In other words, a court can modify the terms of the contract without the consent of the parties.

The Convention, of course, contains a provision – Article 79 – that provides relief if events create an "impediment" that causes a party to fail to perform its obligations, provided the impediment is beyond the affected party's control, the party could not reasonably have taken the impediment into account when the contract was concluded, and the party could not avoid or overcome the impediment or its consequences. I (like most tribunals and other commentators) believe that Article 79 (unlike traditional force majeure doctrine) does not require the impediment to have rendered performance impossible; the standard is something

[24] This effect is most overt in the reference of open issues to PECL, which of course was designed to identify common principles found in the overwhelmingly Civil Law-oriented body of European national contract laws.

[25] The following discussion of hardship doctrine and the *Scafom* decision is a condensed version of my earlier discussion in Harry M. Flechtner, *The Exemption Provisions of the Sales Convention, including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court*, 59 Annals of the Faculty of Law in Belgrade – Belgrade Law Review 84, 88-101 (2011).

[26] The doctrine, of course, goes by different names in different national laws – *imprévision*, *eccessica onerosita sopravvenuta*, *Wegfall der Geschäftsgrundlage,* etc.

[27] Article 6.2.3 of the UNIDROIT Principles (2010).

more akin to very-extremely-more-difficult/expensive,[28] although whether the Article 79 standard for relief is as lenient as the standard for "hardship" (a "fundamental" alteration of the "equilibrium of the contract") is not clear. In indisputable contrast to "hardship" doctrine, however, Article 79 does not authorize judges or arbitrators to modify the terms of a contract as a response to a qualifying "impediment": Article 79(1) specifies that, when its requirements for relief are met, the party facing the impediment is "exempt from liability," and Article 79(5) makes clear that this means the party is not liable in damages for failing to perform its duties. Nothing in Article 79 permits judicial imposition of "adjusted" (modified) contract terms.

Recognizing that Article 79 was not the equivalent of hardship doctrine, at least in terms of the relief provided, some involved in drafting the CISG proposed that a true hardship provision – one that would have expressly authorized tribunals to adjust contract terms in the event of hardship in order to reestablish contractual equilibrium – be included in the Convention; the proposal was rejected.[29] That it encountered opposition is not surprising. The idea of judges imposing modified contract terms without party consent is contrary to a long-held attitude in U.S. contract law (and I believe the U.S. is not out of step with other common law jurisdictions on this) that judges should not "make a contract" for the parties. Under U.S. contract law, if unexpected events make performance extremely more difficult or expensive for one of the parties, or if they cause what a party will receive under the contract to lose almost all its value, the relief available is discharge of the disadvantaged party's duty to perform under the "impracticability" doctrine or the "frustration of purpose" doctrine.[30] Prevailing U.S. contract law[31] does not authorize court-imposed contract modifications to account for the effects of unexpected events. There are suggestions in a comment to the main U.S. sales legislation (Article 2 of the Uniform Commercial Code ("U.C.C.")) that in such situations courts can and should "adjust" contract terms to salvage the transaction,[32] but these suggestions appear not to have taken root in decisions applying the U.C.C.

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28 *See*, *e.g.*, Ingeborg Schwenzer, *Article 79* ¶ 30, *in* Schlechtriem & Schwenzer Commentary (3rd ed.), *supra* note 3; John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention § 432.2 (Harry M. Flechtner ed.) (Alphen aan den Rijn, Wolters Kluwer, 4th ed. 2009); Niklas Lindström, *Changed Circumstances and Hardship in the International Sale of Goods*, 2006/1 Nordic J. Comm. L. 2 (2006), available online at http://www.cisg.law.pace.edu/cisg/biblio/lindstrom.html.

29 For accounts of the history of proposals to incorporate hardship doctrine into the CISG, see Lindström, *Changed Circumstances and Hardship*, *supra* note 28; Joern Rimke, *Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts*, *in* Pace Review of the Convention on Contracts for the International Sale of Goods 197, 218-19 (1999-2000).

30 See American Law Institute, Restatement 2d Contracts §§ 261 & 265 (1981).

31 I say "prevailing U.S. contract law" to designate the laws in U.S. states other than Louisiana, which has a Civil Law tradition.

32 See Official Comment 6 to U.C.C. § 2-615 ("In situations in which neither sense nor justice is served by either answer when the issue is posed in flat terms of 'excuse' or 'no excuse,' adjustment under the various provisions of [U.C.C. Article 2] is necessary, especially the sections on good faith, on security and assurance and on the reading of all provisions in the light of their purposes, and the general policy of [the U.C.C.] to use equitable principles in furtherance of commercial standards and good faith."). It probably is no coincidence that Karl Llewellyn, the person mainly

It is against this background – the CISG drafters rejected attempts to incorporate into the Convention hardship rules of a type absent from, and even contrary to, the national contract law traditions of some states – that the Belgian Cassation Court's decision in *Scafom International BV v. Lorraine Tubes S.A.S.*[33] must be viewed. The case involved sales of steel tubing governed by the CISG. After the contracts for the tubing had been concluded, the cost of the steel that the seller needed to make the tubing unexpectedly rose by 70%. The seller and buyer negotiated over an increase in the price that the buyer would pay for the finished tubing, but the negotiations failed. The seller then refused to make further deliveries unless the buyer agreed to pay a higher price specified by the seller. The buyer petitioned a Belgian court to order the seller to resume deliveries at the original agreed-upon price. The court of first instance rejected the seller's argument that the court should adjust the price under hardship doctrine (*imprévision*), holding that the doctrine was inconsistent with the CISG and noting that Belgian courts had rejected the doctrine as a matter of Belgian domestic law.[34] On appeal, the Hof van Beroep Antwerp overturned the court of first instance.[35] The appeals court held that the question whether the terms of a contract governed by the CISG could be judicially "adjusted" if a hardship event occurred was a matter governed by but not expressly settled in the Convention, and thus was subject to the gap-filling procedure in Article 7(2). Apparently finding no general CISG principles that would resolve the issue, the court went to the "second step" in Article 7(2): it held that PIL led to the application of French rather than Belgian law, and that French law, although it formally rejected the theory of *imprévision*, provided for judicial adaptation of contract terms pursuant to the doctrine of good faith. The appeals court then ordered the buyer to pay the seller € 450,000 more than the parties had agreed.

On further appeal, the Belgian Court of Cassation affirmed the result reached by the appeals court, but changed the reasoning.[36] Instead of relying on French domestic law to

responsible for Article 2 of the U.C.C. in which these comments appear, was strongly influenced by German law. This influence is shown in U.C.C. § 1-304, which provides that parties to contracts governed by the U.C.C. are subject to an implied and non-derogable obligation of good faith. Given that German law includes a hardship doctrine (*Wegfall der Geschäftsgrundlage*), therefore, the appearance of the ideas expressed in Comment 6 to U.C.C. § 2-615 may not be that surprising.

33 Cour de Cassation/Hof van Cassatie, Belgium, 19 June 2009, English translation available at http://cisgw3.law.pace.edu/cases/090619b1.html.

34 Rechtbank van Koophandel Tongeren, Belgium, 25 January 2005, English translation available at http://cisgw3.law.pace.edu/cases/050125b1.html. The court also rejected the seller's argument that CISG Article 79 exempted it from liability for refusing to deliver; the court held that the seller should reasonably have taken the possibility of a steep rise in steel prices into account at the time the contract was concluded. On the other hand, the court invoked a general principal of equity and ruled that the buyer would have to pay half of the price increase demanded by the seller.

35 Hof van Beroep Antwerp, Belgium, 29 June 2006 and 15 February 2007. Information concerning the interim appeals court opinion in this case is taken from the English translation of the decision of the Court of Cassation and the comments thereon by Professor Siegfried Eiselen: see Cour de Cassation/Hof van Cassatie, Belgium, 19 June 2009, English translation and Editorial Comments by Professor Eiselen available at http://cisgw3.law.pace.edu/cases/090619b1.html.

36 Cour de Cassation/Hof van Cassatie, Belgium, 19 June 2009, English translation available at http://cisgw3.law.pace.edu/cases/090619b1.html.

justify a judicially-imposed adjustment to the contract price, the Cassation court invoked the "first step" in Article 7(2) and declared that there were general principles that would fill the hardship "gap" in the CISG, so that resort to applicable national law was unnecessary. The principles invoked by the court, however, came not from the CISG itself, but from the UNIDROIT Principles – specifically the hardship provisions in Articles 6.2.2 and 6.2.3 described previously. As the Cassation Court explained:

> Thus, to fill the gaps in a uniform manner, adhesion should be sought with the general principles which govern the law of international trade. Under these principles, as incorporated *inter alia* in the Unidroit Principles of International Commercial Contracts, the party who invokes changed circumstances that fundamentally disturb the contractual balance, as mentioned in paragraph 1, is also entitled to claim the renegotiation of the contract.

Having incorporated the UNIDROIT Principles' hardship provisions into the CISG in the name of uniform gap-filling, the court found that they led to the same result reached by the appeals court – the buyer was required to pay an additional € 450,000 beyond what it had agreed to.

I disagree with both the appeals court and the Court of Cassation that a gap exists in the CISG concerning hardship.[37] These courts appear to have determined that there was such a gap using the following test: "If we cannot find in the CISG domestic contract doctrines with which we are familiar, there must be a gap." That reasoning, of course, is simply a path to re-imposing national law doctrines – i.e., what has been called the homeward trend. I believe the record demonstrates that CISG Article 79 was intended to deal comprehensively with hardship situations through Article 79, and to pre-empt national law on the issue. The Convention's failure to include a provision permitting judicial adjustment of contract terms when hardship events occur did not, in my view, create a gap; it was an intentional rejection of the doctrine for transactions governed by the CISG. My view would, of course, create uniformity under the CISG: because it posits no "hardship gap" in the Convention, there would be no recourse to national law under Article 7(2) to fill the gap, and the uniform position would be that, in transactions governed by the CISG, there are no judicially-imposed "adjusted" contract terms in hardship situations. Thus those who believe in uniformity at all costs should be supportive on this point.

The Belgian courts' "hallucination" of a "hardship gap" where one does not exist is bad enough, but the Cassation Court compounded the problem by claiming that the rejected hardship doctrine is somehow actually incorporated into the CISG through the UNIDROIT Principles; this would mean that every court in a Contracting State has a *treaty obligation* to impose non-consensual "adjusted" contract terms, determined by judges, in order to restore the "contractual equilibrium." That includes courts in the United States and other jurisdictions with no tradition of doing this, and no expertise in the process. The Cassation Court opinion accomplishes this by completely ignoring not just the travaux préparatoires of the Convention, but also the express rule of Article 7(2) – which specifies that CISG gaps can be filled by reference to general principles *of the CISG* (i.e., the text the Contracting States actually agreed to), not by reference to a non-binding restatement of contract principles drawn from non-CISG sources by a group without any law-making authority whatsoever.

[37] See Flechtner, *The Exemption Provisions of the Sales Convention*, *supra* note 25, at 88-101.

This use of the UNIDROIT Principles to supplement the CISG in the name of uniformity distorts the meaning of the Convention in a way that, ironically, may well increase non-uniformity in the application of the CISG. For example, I cannot imagine a U.S. court following a holding so completely unsupported – indeed, that is contradicted by – the text and the *travaux* of the Convention, especially when the result would offend rather deeply-held traditions and views of the proper role of judges. Courts must be prepared to transcend their domestic views and traditions – indeed, they have an international legal obligation to do so – when the CISG, fairly interpreted, provides for a different approach; they have no such obligation when the alleged CISG rule is incorporated from a non-binding source in a process that itself (in my view) violates the treaty obligations imposed by Article 7. The combination of conjuring up a non-existent CISG "hardship gap" and then filling it by incorporating the hardship provisions of the UNIDROIT Principles results in the abandonment of a uniform position supported by the Convention and its drafting history – i.e., that there is no gap and the CISG pre-empts domestic hardship rules – and replaces it with a uniform rule invalidly incorporated and highly unlikely to be followed in at least some (perhaps many) Contracting States. Even for those who advocate uniformity-at-all-costs, such a result cannot seem desirable.

IV. Improving the approach to interpretation and gap-filling

The argument against using the UNIDROIT Principles and other such compilations (e.g., the PECL) as a source to fill gaps in the CISG is straightforward: such an approach is simply contrary to the express rule in Article 7(2), which permits "first step" gap-filling only on the basis of general principles on which *the CISG* is based; it does not authorize gap-filling on the basis of other legal texts or compilations of legal principles. That point is particularly obvious in the case of the UNIDROIT Principles and the PECL, because those texts are avowedly based on legal sources other than the Convention, and in some cases their rules even contradict Convention provisions. The response to this point by those who favor an expansion of uniform law at all costs reveals another problem in the position of the uniformity fundamentalists. Consider the following rationale for using the UNIDROIT Principles and the PECL to fill gaps in the CISG:

> The relevant textual reference in Article 7(2) to domestic law leaves the CISG prone to divergent gap-filling; that is, in the absence of general principles, the solution is to be provided in conformity with the relevant law applicable according to the rules of private international law – a development that endangers the uniformity of the Convention's interpretation and application. The Convention's fundamental general principle of "reasonableness" has a strong bearing on the proper interpretation of all provisions of the CISG, as per Article 7(2). (...) [I]t is submitted that the proper interpretation of the Convention must be based on general principles, rather than on the rules of private international law, where it is reasonable to do so. Because it is also reasonable to read into Article 7(2) the good faith and uniform law mandates recited in Article 7(1), it would also be reasonable ... to rely on general principles, rather than on the rules of private international laws in the operation of Article 7(2) when these mandates (the promotion of uniformity in the Convention's application and the observance of good faith in international trade) are at stake.[38]

[38] Felemegas, *supra* note 6, at 36 (citation omitted).

In other words, the gap-filling methodology of Article 7(2) is to be read "reasonably," and "reasonableness" is measured by whether a particular application of that methodology would promote uniformity. Because any use of the "second step" specified in Article 7(2) (filling a gap by referring to applicable national law) will by definition harm rather than promote uniformity, *abracadabra*, we have magically "interpreted" Article 7(2)'s second step right out of existence. The final step in this train of logic is that, because we need to fill CISG gaps even when we can't find adequate general principles within the CISG, we should go to the UNDROIT Principles and the PECL: after all, if the sole purpose of interpreting and gap-filling the CISG is to expand uniform substantive sales law (at any cost), then an interpretation of Article 7(2) that does so and avoids any use of Article 7(2)'s second step must be correct.

This is an approach to interpreting legal texts that is strange to one trained in the Common Law – but not necessarily to those trained in the Civil Law tradition. I suspect it results from the combination of two characteristics of the Civil Law that are well-described in a recent article by Professor Hein Kötz. The first characteristic is a strong impulse toward unification of law under a centralized authority:

> [L]egal diversity is seen as basically unacceptable not only in civil law countries but also in the European Union, which may be described as a civil law jurisdiction with Britain as a major retarding factor. Accordingly, the unification of law through the top-down approach of an exercise of central government power is given a high ranking.[39]

The second is a tradition of liberal interpretational approaches, born of the Civil Law concept of a code:

> Another characteristic feature of civil law systems is the idea of codifying essential fields of private law and the associated technique of using the code as a source of rules and general principles which pre-empt the field and are assumed to carry within them the answers to all possible questions.[40]

The limited commitment to uniformity in the Convention – as evidenced by its circumscribed scope of application (e.g., the exclusion of validity issues), the inclusion in Article 7(1) of other interpretative factors with authority and priority apparently equal to the uniformity consideration, and the fact that Article 7(2) expressly contemplates that interpreters may have to look to non-uniform national law to fill gaps in the Convention – no doubt frustrates the first impulse described above. This is exacerbated by the decentralized approach adopted for applying the Convention (i.e., no Supreme Court of the CISG). The response, understandably, is an instinct to war against, ignore, or attempt to eliminate the elements in the Convention that are obstacles to unification of the law. Tools to give effect to that instinct are ready-at-hand, in the creative Civil Law interpretative techniques developed in response to the obligation to extract answers to all legal questions from a code, the conception of which forbids gap-filling in line with the "second step" in CISG Article 7(2).

Of course indulging the impulse toward legal unification by employing broad Civil Law interpretative techniques is a clear example of the homeward trend. That is particularly obvi-

[39] Hein Kötz, *Contract Law in Europe and the United States: Legal Unification in the Civil Law and Common Law*, 27 The Tulane European and Civil Law Forum 1, 12 (2012).

[40] *Id*. at 14.

ous when the result is the "discovery" in the CISG of characteristically Civil Law doctrines not suggested by the Convention's actual text (e.g., judicial adjustment of contract terms in the face of hardship), and even more strikingly so when those doctrines were rejected during the drafting of the CISG. This approach violates the obligation under Article 7(2) to have regard for the international character of the Convention. All agree that the "international character" consideration requires approaching the CISG as "autonomous" law independent of national law and legal traditions, not to be interpreted in the manner of domestic legislation.[41] The uniformity-at-all-costs approach clearly does not comply with this obligation.

In my view, however, the duty to recognize the international character of the Convention requires more than merely treating the Convention as an autonomous legal text: it requires those interpreting the CISG to remember they are not dealing with a piece of domestic legislation, but rather with a treaty in which sovereign states took the serious step of limiting their sovereign legal powers. The creative interpretative techniques characteristic of the Civil Law may be quite proper when applied to a domestic Civil Law code, but when applied to a treaty ratified by sovereign states (especially states that do not themselves employ such approaches) such techniques can seriously distort the meaning of the treaty and the extent of the commitment made by Contracting States. The CISG, simply put, is *not* a Civil Law code, and should not be interpreted as such.

The distorting effect of the uniformity-at-all-costs approach, ironically, will tend to interfere in the long term with the goal of bringing uniformity to international commercial law. I earlier pointed out this effect in discussing the *Scafom* decision that purported to incorporate into the CISG the Civil Law approach to hardship found in the UNIDROIT Principles. The limits on the Convention's commitment to uniformity as expressed in both parts of Article 7, in the limited scope and sphere of its coverage, in the declarations it sanctions, and in the "decentralized, non-hierarchical system"[42] of tribunals through which it is applied, have a vital political dimension that must be recognized and respected if the long-term goal of unifying international commercial law is to be achieved. As I have said elsewhere, the Convention's limited and sometimes even cautious approach to unification of law "ensures that uniformity will not be imposed in a fashion incompatible with a voluntary association of sovereign states, but (if the interpretative process mandated by Article 7(1) is followed) will develop organically, though recognition by the international legal community, in all its diversity, of the superiority of one position among competing interpretations." Attempts to manufacture expanded uniformity beyond that actually contemplated by the Convention are a severe threat to this community-building process.[43]

V. Conclusion

The fundamental error of what I have called the uniformity fundamentalists is that they have confused promoting uniform application of the Convention with expansion of uniform law beyond the intended bounds of that treaty. The former is a goal sanctioned by the CISG (although, as we have seen, not its only goal); the latter is an improper attempt to bind sovereign states to obligations they did not undertake. Over the long (and even medium) term, uni-

41 *See*, *e.g.*, Felemegas, *supra* note 6, at 10-11.

42 Flechtner, *The Future of the Sales Convention*, *supra* note 4, at 505.

43 *Id*. at 505-06.

formity-at-any-cost does not promote the cause of unification of international commercial law. Indeed, it undermines that process by alienating those states who carefully considered the actual text of the CISG before ratifying, only to find that the meaning of the text is being distorted by improperly broad interpretational methods grounded in particular domestic law traditions, along with gap-filling that incorporates rules from sources to which the state never consented. This is an obstacle that must be removed if the movement toward uniform international commercial law is to succeed.