FLECHTNER, H. "Globalization of law as documented in the law on International Sales of Goods" in ERAUW, J.and TAELMAN, P. (eds), Nieuw Internationaal Privaatrecht: meer Europees, meer globaal, Reeks 'Gandaius PUC Willy Delva', nr. 35, Mechlin, Kluwer, 2009, 541-560. Posted with permission.

SECTION 1. INTRODUCTION: THE APPROACH TO GLOBALIZED LAW IN THE CISG

A leading scholar has stated that the United Nations Convention on Contracts for the International Sale of Goods ('CISG' or 'the Convention') 'represents the most successful attempt to unify an important part of the many and various rules of the law of international commerce'.[1] This success is evidenced by the extraordinarily broad acceptance the CISG has achieved: currently 73 states (including Belgium and the United States) have ratified[2] and new ratifications continue to be made.[3] The Contracting States represent remarkable geographical, cultural, political, linguistic and economic diversity. The CISG thus represents an excellent test case for identifying the conditions under which genuine globalization of law is possible, and an experiment that can reveal the major roadblocks to that goal.

The interest of the CISG as a test case for globalized law is enhanced by the particularly demanding form of globalization the Convention seeks. The CISG does not merely identify general non-self-executing objectives and then leave it up to individual states to devise their own means to promote those objectives within the conditions and traditions of that state. The CISG also goes further than conventions that create uniform rules of private international law, and thereby attempt to globalize the method for identifying applicable domestic law.[4] The CISG proposes a particularly 'pure' and ambitious form of globalized law: it adopts specific self-executing rules of substantive private law with the goal of creating, in the words of the Convention's Preamble, 'uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems'. The CISG, of course, is not unique in its vision of globalized law as uniform self-executing substantive rules. However, the importance and complexity of the subject matter it addresses, as well as its wide-spread acceptance by the community of nations, makes it a particularly interesting experiment with this approach.

1. Peter SCHLECHTRIEM, 'Preface' in Peter SCHLECHTRIEM and Ingeborg SCHWENZER (eds.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, at v, 2nd (English) ed., 2005. See also Peter HUBER, 'Some introductory remarks on the CISG', 6, *Internationales Handelsgericht* 2006, 228 ('It is therefore fair to say that the CISG has in fact been one of the success stories in the field of the international unification of private law').
2. See the UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ('UNCITRAL'), *Status: 1980 – United Nations Convention on Contracts for the International Sale of Goods*, available on the UNCITRAL website at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.
3. Armenia, Japan and Lebanon all ratified in 2008. *Id.*
4. In the commercial law area, see the Hague Convention on the Law Applicable to International Sales of Goods (1955). Information on this Convention, including its text, is available on the website of the Hague Conference of Private International Law at http://www.hcch.net/index_en.php?act=conventions.text&cid=31.

The purpose of the Convention's uniform rules is to remove barriers to international trade by reducing transactions costs associated with choice-of-law issues in international sales.[5] Those who created the CISG pursued that purpose *not* by assembling what they considered the 'best' sales rules, but rather by identifying a set of rules that would be widely accepted in the diverse international community. Thus the CISG can succeed even if its contents are substantively inferior to other sales law regimes, provided its rules remain uniform and widely adopted.

The goal of uniform globalized substantive sales law can be reached only if the text of the CISG is interpreted and applied in a way that maintains a workable level of uniform results. The Convention does not, however, employ many of the most obvious and powerful (albeit expensive and politically challenging) tools for achieving such uniformity. The CISG does not create a system of specialist tribunals to deal with litigation arising under it, nor does it designate any final authority on the meaning of its provisions.[6] Instead, 'regular' domestic courts and arbitration tribunals with jurisdiction over disputes involving sales transactions are charged with applying the CISG in a fashion consistent with its goal of creating uniform globalized sales law. By embracing a particularly demanding vision of globalized law without providing for the most potent means for achieving the vision, the Convention poses extraordinary challenges to those working with it.

The Convention's primary tool for achieving its daunting goal of maintaining uniform (or at least, as I characterized it above, *workably* uniform) globalized substantive sales law is the mandate in CISG Article 7(1) requiring that the Convention be interpreted with regard for, *inter alia*, 'its international character and the need to promote uniformity in its application...'. This language imposes a treaty obligation on those applying the Convention to transcend the interpretative methodologies of the domestic law in which they have been trained[7], even though those interpretive approaches form one of the most fundamental elements of what might be called the ideology of legal traditions. To meet this

5. *See* Harry M. FLECHTNER, *Outline of Lecture I on the CISG* ('Purposes, Background, History, Nature and Scope'), available in the United Nations Audiovisual Library of International Law at http://untreaty.un.org/cod/avl/pdf/ls/Flechtner_outline1.pdf.
6. Such a final interpretive authority has, however, been proposed. *See* John. E. MURRAY Jr., 'The Neglect of the CISG: A Workable Solution', 17, *J.L. & Com.* 1998, 365, 374-79; Michael Joachim BONELL, 'A Proposal for the Establishment of a "Permanent Editorial Board" for the Vienna Sales Convention', in *International Uniform Law in Practice/Le droit uniform international dans la pratique* [Acts and Proceedings of the 3rd Congress on Private Law held by the International Institute for the Unification of Private Law, UNIDROIT (Rome 7-10 September 1987)] 241 (1988).
7. *See* Franco FERRARI, 'CISG Case Law: A New Challenge for Interpreters?', 17, *J.L. & Com.* 1998, 245, 246-48 & 259; Harry M. FLECHTNER, 'The CISG in U.S. Courts: The Evolution (and Devolution) of the Methodology of Interpretation', in Franco FERRARI (ed.), *Quo Vadis CISG*, 2005, 91, 92-93.

difficult challenge, commentators have recommended that judges and arbitrators applying the Convention search for an approach that promotes uniformity by consulting CISG decisions by tribunals in 'foreign' jurisdictions.[8]

In response, a wealth of resources to provide access to such decisions from jurisdictions around the world has developed; they are generally available *gratis* on the internet. Such resources include, for example, the Digest of CISG decisions assembled by the Convention's sponsor, the United Nations Commission on International Trade Law (UNCITRAL), available in the six official U.N. languages.[9] Anglophones have access to particularly extensive resources through the UNILEX database[10] (which also provides information on the UNIDROIT Principles of International Commercial Contracts, including decisions that have applied the Principles) and the quite extraordinary CISG website maintained by the Institute of International Commercial Law at Pace University School of Law.[11] There is also a Belgian CISG website maintained by the Institute for International Trade Law at the Katholieke Universiteit Leuven[12] – part of a coordinated group of CISG websites maintained in various states and in various languages known as 'the Autonomous Network of CISG websites'.[13] These resources represent perhaps the most remarkable by-product of the CISG: an entirely new information infrastructure allowing unprecedented access to legal information from around the world, creating a new method of conducting legal research – indeed, a new way of practicing law[14] – and a model for what must be developed in order to make global uniformity in other subject areas possible.

8. See, *e.g.*, Peter SCHLECHTRIEM, 'Art. 7 § 14', in SCHLECHTRIEM and SCHWENZER, *CISG Commentary*, 2nd (English) ed., 2005; Franco FERRARI, 'CISG Case Law: A New Challenge for Interpreters', 17, *Journal of Law & Commerce* 1998, 245, 246-48 & 259; Antonio BOGGIANO, 'The Experience of Latin American States', in *International Uniform Law in Practice/Le droit uniform international dans la pratique* [Acts and Proceedings of the 3rd Congress on Private Law held by the International Institute for the Unification of Private Law, UNIDROIT (Rome 7-10 September 1987)] 47 (1988); Harry M. FLECHTNER, 'Recovering Attorneys' Fees as Damages under the U.N. Sales Convention (CISG): The Role of Case Law in the New International Commercial Practice, with Comments on Zapata Hermanos v. Hearthside Baking', 22, *Northwestern Journal of International Law & Business* 2002, 121, 122-23; V. Susanne COOK, 'The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity', 16, *Journal of Law & Commerce* 1997, 257, 263.
9. The Digest is available, *gratis*, in the six official U.N. languages through the 'Case Law (CLOUT)' section of the UNCITRAL website (http://www.uncitral.org/uncitral/en/index.html). The English-language version is also available on the CISG website maintained by the Institute of International Commercial Law at Pace University School of Law, available at http://www.cisg.law.pace.edu.
10. Available free-of-charge at http://www.unilex.info.
11. Available free-of-charge at http://www.cisg.law.pace.edu.
12. Available free-of-charge at http://www.law.kuleuven.ac.be/ipr/eng/cisg/index.php?language=en.
13. For information on the network, see http://www.cisg.law.pace.edu/network.html.
14. *See* Harry M. FLECHTNER, 'Recovering Attorneys' Fees as Damages under the U.N. Sales Convention (CISG): The Role of Case Law in the New International Commercial Practice, with Comments on Zapata Hermanos v. Hearthside Baking', 22, *Northwestern Journal of International Law & Business* 2002, 121, 122-23.

The question is whether these remarkable developments have in fact produced uniformity in the interpretation of the CISG. That is an extremely broad question that I could not hope to answer definitively here, or in any other setting. What I can do, however, is offer several specific examples that illustrate both successes and failures in following the uniformity mandate of CISG Article 7(1).

SECTION 2. ASSESSING UNIFORMITY IN ADDRESSING PARTICULAR ISSUES

§ 1. Interpretation of Choice of Law Clauses Designating the Law of a Contracting State

My first test of uniformity under the CISG involves a simple but frequently-arising issue. Suppose the following choice of law clause appears in a contract for the sale of goods between parties located in two different states: '**The parties agree that this transaction is governed by the laws of [a specified Contracting State – e.g.,] Belgium'.** What is the proper interpretation of the clause?

The clause is (or, at least, could be viewed) as ambiguous. Belgian law for international sales transactions is the CISG, so the clause could be interpreted as designating the Convention. On the other hand, if the parties actually intended the CISG to govern their transaction they chose an oddly-phrased clause: while certainly a part of Belgian law, the CISG is (as discussed above) genuinely international sales law, so that designating it by reference to 'Belgian law' seems a strange approach.[15] This might suggest that the parties' likely intention was to make domestic Belgian sales law applicable to the transaction.

There is another argument for interpreting the clause as designating Belgian domestic sales law: if each of the parties to the sale is located in a Contracting State to the CISG, or if the rules of Private International Law would lead to the application of the law of a Contracting State (such as Belgium), the CISG would apply to the transaction even without a choice of law clause (see CISG Article 1(1)(a) & (b))[16]; thus interpreting the clause as designating the CISG, it can be

15. This argument is even stronger for choice of law provisions that designate, in a general fashion, the law of one of the constituent states of the United States (*e.g.*, 'the law of Pennsylvania'). Under the Supremacy Clause of the U.S. Constitution, each state's law incorporates federal (national) law, including the CISG and other treaties to which the U.S. is a party; thus the choice of law clause could be interpreted as referring to the CISG. If the parties intended their transaction to be governed by the Convention, however, referring to the law of a particular U.S. state seems a particularly awkward way to express that intention.

16. There are some particularly interesting issues that would arise if at least one of the parties was located in a non-contracting state to the CISG and the choice of law clause had designated the law of a State that has ratified the

→

argued, renders it meaningless. The answer to this last argument – a convincing one – is that interpreting the clause as referring to the CISG does not render it meaningless because the clause would still designate domestic Belgian law as the law 'supplementing' the CISG for issues not governed by the Convention.[17] Thus the clause would still operate to make Belgian domestic law applicable, *e.g.*, to issues going to the 'validity' of the contract or of particular contractual provisions (see CISG Article 4(a)), and to questions concerning the effect of the contract of sale on the property in (title to) the goods sold (see CISG Article 4(b)).

The clause, of course, could have avoided the problem by referring to specific Belgian law – *e.g.*, the CISG, or domestic sales rules contained in the Belgian Civil Code – but it has not done so. Thus the issue remains: does the clause exclude the CISG in favor of domestic Belgian sales law? Or is the transaction governed by the CISG?[18]

At least nine decisions reported in the Pace University CISG website or the UNILEX service have interpreted choice of law clauses similar to the one described above as referring to the domestic sales law of the designated jurisdiction. On the other hand, at least 65 decisions reported in these services – including most of the more recent cases, and representing a wide variety of jurisdictions – interpret such clauses as designating the CISG as the applicable law.[19]

The case law record on this issue reflects what I would characterize as 'workable uniformity' – *i.e.*, a growing consensus on a genuinely disputable question shared by a group of tribunals impressively diverse in their location, legal and political traditions, and economic context. On the other hand, the consensus appears to result, in large part, from a convergence of independent analyses of

→ Convention with the reservation permitted by CISG Article 95. That reservation renders the rule of CISG Article 1(1)(b) (under which the Convention applies to an international sale if PIL rules lead to the application of the law of a Contracting State) not binding on the reserving State. China, the Czech Republic, Singapore the Slovak Republic, St. Vincent and the Grenadines, and the United States have all made the Article 95 reservation (Belgium has not), but the issues raised by that reservation are beyond the scope of this paper.

17. *See* UNCITRAL, *Digest of case law on the United Nations Convention on the International Sale of Goods Art. 6 § 8*, available at http://daccessdds.un.org/doc/UNDOC/GEN/V04/547/50/PDF/V0454750.pdf?OpenElement; Franco FERRARI, 'CISG rules on exclusion and derogation: Article 6' in Franco FERRARI, Harry FLECHTNER and Ronald A. BRAND (eds.), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention*, 2004, 114, 124-27.

18. Contrast a choice of law clauses designating specific domestic sales law of a Contracting State – *e.g.*, 'This transaction is governed by Article 2 of the Uniform Commercial Code as enacted in Pennsylvania': See, *e.g.*, Oberster Gerichtshof, Austria, 4 July 2007, English translation available at http://cisgw3.law.pace.edu (interpreting specific reference to a domestic sales code as implicitly excluding the CISG in favor of domestic sales law).

19. Citations to many of the decisions on this issue are given in the Appendix to this paper.

the issue rather than from tribunals complying with the treaty obligation created by CISG Article 7(1) to have 'regard' for 'the need to promote uniformity in its application'. There is little in these opinions to suggest that the tribunals consciously sought an international perspective on the issue by, *e.g.*, consulting decisions from foreign tribunals, although there is some citation (particularly in the U.S. cases) of decisions from the tribunal's own jurisdiction and, occasionally, consultation of scholarly commentary (inevitably from scholars in the tribunal's own jurisdiction). Thus my first example does not give strong support to the proposition that regard for uniform interpretation is guiding the decisions of tribunals applying the CISG, although (clearly) it also does not demonstrate that tribunals are ignoring the uniformity mandate.

§ 2. Domestic Regulations of the Buyer's State and the Seller's Obligations Under CISG Article 35(2)(a) & (b)

The case law record on another issue, however, does offer an example of tribunals recognizing the authority of foreign case law, and thus consciously complying with the Article 7(1) mandate to regard the need for uniform application of the CISG. This example involves one of the best-known CISG decisions, the so-called New Zealand Mussels case decided by the German Bundesgerichtshof in 1995.[20] The decision addressed the following question: if a seller delivers goods that fail to comply with regulations in the buyer's jurisdiction, does the seller violate its obligation under CISG Article 35(2)(a) to deliver goods fit for their ordinary purposes, or its obligation under CISG Article 35(2)(b) to deliver goods fit for particular purposes conveyed to the seller by the time the contract was concluded? The Bundesgerichtshof concluded that a seller is not generally required to comply with regulations of the buyer's jurisdiction, but described a set of important exceptions to that rule.

The case has become well-known, and been highly influential. For example, two tribunals in the United States cited and followed the decision in deciding a dispute over a U.S. buyer's purchase of medical equipment that failed to meet U.S. safety regulations.[21] The litigation began in arbitration, where the panel applied the approach in the New Zealand Mussels decision; the tribunal concluded that the seller violated its obligations because the situation fell into one of the exceptions stated by the Bundesgerichtshof to the usual rule of seller non-

20. Bundesgerichtshof, Germany, 8 March 1995, CLOUT case No 123, English translation available at http://cisgw3.law.pace.edu/cases/950308g3.html, subsequently confirmed by, *e.g.*, Bundesgerichtshof, Germany, 2 March 2005, English translation available at http://cisgw3.law.pace.edu/cases/050302g1.html.
21. See Federal District Court for the Eastern District of Louisiana, United States, 17 May 1999, available at http://cisgw3.law.pace.edu/cases/990517u1.html.

liability. The seller challenged the award in a U.S. federal court, arguing that the arbitral panel had misapplied the New Zealand Mussels decision, but the court confirmed the arbitration ruling. 'It is clear from the arbitrators' written findings', the court wrote, 'that they carefully considered [the Mussels] decision and found that this case fit the exception and not the rule as articulated in that decision'.[22] Thus both the arbitration panel and the U.S. court followed the approach adopted in Bundesgerichtshof decision. They did so, furthermore, to deal with an extremely important and complex issue. This is an encouraging example of fora in the United States, which have not always led the way in complying with the mandate of Article 7(1),[23] taking effective steps to maintain an international perspective on the CISG, and working to achieve uniform application of the Convention by consulting a CISG decision from outside the U.S.

There are, in fact a number of other U.S. CISG decisions that have demonstrated a willingness to seek guidance from beyond U.S. borders as to the proper interpretation of the Convention. A substantial number of decisions have invoked non-U.S. case law on the CISG.[24] Other U.S. decisions have cited the UNCITRAL Case Law Digest on the CISG[25], and still others have consulted

22. *Id.*
23. *See*, *e.g.*, Joseph LOOKOFSKY and Harry FLECHTNER, 'Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?', 9, *Vindobona J. Int'al Comm. L. & Arb*. 2005, 199; Harry M. FLECHTNER, 'The CISG in American Courts: The Evolution (and Devolution) of the Methodology of Interpretation' in Franco FERRARI (ed.), *Quo Vadis CISG: Celebrating the 25th Anniversary of the United Nations Convention on Contracts for the International Sale of Goods*, 2005.
24. See Federal District Court, United States, 21 May 2004, available at http://cisgw3.law.pace.edu/cases/040521u1.html (Chicago Prime Packers, Inc. v. Northam Food Trading Co., 320 F. Supp. 2d 702 (N.D. Ill. 2004)) (citing Dutch, German & Italian decisions); Federal District Court, United States, 29 March 2004, CLOUT case No. 695, available at http://cisgw3.law.pace.edu/cases/040329u1.html (Amco Ukrservice v. American Meter Co., 312 F. Supp. 2d 681 (E.D. Pa. 2004)) (citing German decisions); Federal District Court, United States, 28 March 2002, CLOUT case No. 613, available at http://cisgw3.law.pace.edu/cases/020328u1.html (Usinor Industeel v. Leeco Steel Products, Inc., 209 F. Supp. 2d 880 (N.D. Ill. 2002)) (citing Australian decision); Federal District Court, United States, 26 March 2002, CLOUT case No. 447, available at http://cisgw3.law.pace.edu/cases/020326u1.html (St. Paul Guardian Ins. Co. v. Neuromed Medical Syst. & Support, GmbH, 2002 WL 465312 (U.S.D.C.S.D.N.Y. 2002)) (citing German decisions); Federal District Court, United States, 17 May 1999, CLOUT case No. 418, available at http://cisgw3.law.pace.edu/cases/990517u1.html (Medical Marketing Int'l, Inc. v. Internazionale Medico Scientifica, S.r.I., 1999 WL 311945 (U.S.D.C.E.D. La. 1999)) (citing German decision). See also Federal Court of Appeals for the 11th Circuit, United States, 29 June 1998, CLOUT case No. 222, available at http://cisgw3.law.pace.edu/cases/980629u1.html (MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova d'Agostino, S.p.A., 144 F.3d 1384 (11th Cir. 1998)) (describing unsuccessful attempt to locate relevant foreign decisions on Pace website).
25. See Federal Court of Appeals for the 3rd Circuit, United States, 19 July 2007, available at http://cisgw3.law.pace.edu/cases/070719u2.html (Valero Marketing & Supply Co. v. Greeni Trading Oy, 2007 WL 2064219 at **4 (3rd Cir. 2007)); Federal District Court, United States, 1 June 2006, available at http://cisgw3.law.pace.edu/cases/060601u1.html (Multi-Juice, S.A. v. Snapple Beverage Corp., 2006 WL 1519981 at *7 (U.S.D.C.S.D.N.Y. 2006)).

opinions of the CISG Advisory Council[26] (see http://www.cisg.law.pace.edu/cisg/CISG-AC-op.html), a group that carefully consults international case law in forming its opinions. Thus the case law record includes heartening examples of U.S. tribunals accepting the mandate to promote uniform application of the CISG and transcending the interpretational methodologies familiar from domestic law. Examples of non-U.S. tribunals that have attempted to comply with the uniformity mandate of CISG Article 7(1) by consulting foreign case law – sometimes on a far more extensive basis than anything found in U.S. decisions – are also not hard to find.[27]

§ 3. Incorporation of Standard Terms: The U.S. 'Rolling Contract' Theory and the Convention

Identifying the circumstances in which a party has effectively incorporated its standard terms into a contract is a fundamental (and often contentious) issue for any body of modern sales law. The handling of this issue under the CISG offers a less hopeful example for uniform interpretation of the Convention.

The text of the CISG does not specifically address the issue of incorporation of standard terms. One could view this as a 'gap' in the Convention, to be filled according to the methodology described in CISG Article 7(2) – *i.e.*, resolve the issue by reference to the general principles on which the Convention is based (such as, in the view of some, good faith[28]), unless no adequate general principles exist, in which case refer to the (domestic) law applicable under principles of private international law. Those who believe the UNIDROIT Principles of International Commercial Contracts can supplement the Convention[29] – primarily those from Civil Law jurisdictions – might refer to Articles 2.1.19

26. See Federal District Court, United States, 23 August 2006, available at http://cisgw3.law.pace.edu/cases/060823u1.html (Tee Vee Tunes, Inc. v. Gerhard Schubert GmbH, 2006 WL 2463537 at *7 & *8 (U.S.D.C.S.D.N.Y. 2006)); see also *Plaintiff's Reply to Columbia's Response to Plaintiff's Motion for Partial Summary Judgment Re Unmerchantable Wine* in La Delizia Friulani la DELIZIA, S.C.A.R.L. v. Columbia Distr. Co., available at 2004 WL 2975203.
27. In particular, certain Italian decisions include astonishingly extensive citation to foreign case law. See, *e.g.*, Tribunale di Forli, Italy, 16 February 2009, English translation available at http://cisgw3.law.pace.edu/cases/090216i3.html; Tribunale di Forli, Italy, 11 December 2008, English translation available at http://cisgw3.-law.pace.edu/cases/081211i3.html; Tribunale di Padova, Italy, 31 March 2004, English translation available at http://cisgw3.law.pace.edu/cases/040331i3.html; Tribunale di Padova, Italy, 25 February 2004, English translation available at http://cisgw3.law.pace.edu/cases/040225i3.html; Tribunale di Rimini, Italy, 26 November 2002, English translation available at http://cisgw3.law.pace.edu/cases/021126i3.html; Tribunale di Vigevano, Italy, 12 July 2000, English translation available at http://cisgw3.law.pace.edu/cases/000712i3.html.
28. For the position that the general principles of the CISG include an obligation on the parties to behave according to the norms off good faith, *see*, *e.g.*, Peter SCHLECHTRIEM, 'Article 7 § 30 at 104' in Peter SCHLECHTRIEM and Ingeborg SCHWENZER (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd (English) ed., 2005.
29. See, *e.g.*, Alejandro M. GARRO, 'The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG', 69, *Tulane L. Rev.* 1995, 1149.

through 2.1.22 of that document for rules to deal with the issue. Approaches based on CISG general principles or on the UNIDROIT Principles would tend to impose significant obstacles to the mechanical incorporation of either party's standard terms. The same result would often flow from reference to domestic law, particularly domestic law of Western European jurisdictions, on the issue of incorporation of standard terms.

Alternatively, one might view the incorporation of standard terms as a matter addressed by the contract formation rules in CISG Part II (Articles 14-24). Under this view, the CISG has no 'gap' on the question of incorporation of standard terms. A straightforward application of the Convention's contract formation provisions, particularly its rules on a purported acceptance that includes terms not matching those in the offer (Article 19) and its approval of acceptance by 'conduct of an offeree indicating assent to an offer' (Article 18(1)), would tend to reproduce the results of the so-called last-shot principle. In other words, whichever standard terms were last transmitted to the other side before the contract was formed would be incorporated into the agreement, on the theory that those terms were part of a counter-offer that was accepted. However, other provisions of the Convention, such as the 'reasonable person' standard of contract interpretation in CISG Article 8(2), offer opportunities to divert from the mechanical incorporation of standard terms resulting from Article 19 and the last-shot principle.

With so many possible interpretations of how the Convention applies to the critical question of incorporation of standard terms, the issue is particularly susceptible to what has been called by Professor John HONNOLD, the leading U.S. commentator on the Convention, the 'homeward trend' – the tendency of an interpreter to project the domestic law with which he or she is familiar onto the international text of the Convention.[30]

In both Germany and Austria, the highest courts with jurisdiction over CISG issues – the German Bundesgerichtshof and the Austrian Oberster Gerichtshof – have held that incorporation of a party's standard terms into a contract is governed by the express provisions of the Convention; both courts, however, invoked Article 8 (and, in the case of the Oberster Gerichtshof, CISG Article 14, which defines what constitutes an 'offer') to avoid mechanical incorporation of

30. *See Documentary History of the Uniform Law for International Sales 1* (John HONNOLD (ed.), 1989). At a symposium on the CISG sponsored by the University of Pittsburgh's *Journal of Law and Commerce*, Professor HONNOLD described the phenomenon as follows: 'Years of professional training and practice cut deep grooves. How can we avoid the tendency to think that the words we see are merely trying, in their awkward way, to state the domestic rule we know so well'. John HONNOLD, 'The Sales Convention in Action-Uniform International Words: Uniform Application?', 8, *J.L. & Com.* 1988, 207, 208.

one party's terms under the last shot principle. The Bundesgerichtshof held that standard terms must be attached to the offer (or, presumably, a counter-offer that is accepted) in order to become part of the contract.[31] The Oberster Gerichtshof held, according to the English-language CLOUT abstract of the decision, that standard terms are valid and operative to the extent that the parties realize that they apply to the contract and that they have a reasonable possibility to understand their content. The Court added that this is the case when such terms are not too long and are written in a language widely spoken, as German, so that they may be translated easily.[32]

Both of these decisions adopt what I think are reasonable approaches to the standard terms issue. I also strongly suspect, however, that these decisions reflect domestic legal traditions disfavoring wholesale incorporation of one party's standard terms on the basis of a mechanical rule like the last shot principle.

Under U.S. domestic sales law there is an emerging approach that generally results in the automatic contractual incorporation of a seller's standard terms. Denominated the 'rolling contract' theory, it posits that a contract for sale is not necessarily formed when the seller agrees to sell the goods to the buyer, or even when the seller ships the goods in response to the buyer's order after the buyer has paid (*e.g.*, by credit card). Instead, under the rolling contract theory the seller is deemed to make an offer to sell by delivering the goods to the buyer (in response to the buyer's order) accompanied by the seller's standard terms (*e.g.*, in a document shipped with the goods, or as text displayed upon starting a computer) along with a statement that the buyer accepts those terms if it keeps the goods. The buyer is deemed to accept the seller's offer, including all the seller's standard terms[33], by failing to return the goods within the period specified by the seller.[34] The rolling contract approach does not derive from particular provisions of U.S. sales law; indeed, it is not limited to sales of goods, but is a theory of general contract law projected onto the offer/acceptance paradigm of U.S. contract formation rules. It is by no means a universal view in our courts, but it is an increasingly popular one.

31. Bundesgerichtshof, Germany, 31 October 2001, CLOUT case No. 445, English translation available at http://cisgw3.law.pace.edu/cases/011031g1.html.
32. Oberster Gerichtshof, Austria, 17 December 2003, CLOUT case No. 534, English translation available at http://cisgw3.law.pace.edu/cases/031217a3.html.
33. If, however, any of the seller's terms are deemed 'unconscionable' (see § 2-302 of the Uniform Commercial Code, adopted in 49 of the 50 U.S. states to govern sales of goods), they will not bind the buyer. *See* M.A. Mortenson Co. v. Timberline Software Corp., 970 P.2d 803 (Wash. App. 1999).
34. Hill v. Gateway 2000, Inc., 105 F. 3rd 1137 (7th Cir. 1997). *See also ProCD v. Zeidenberg*, 86 F. 3rd 1447 (7th Cir.1996).

It is hard to believe that other CISG Contracting States (particularly those in Western Europe) would find the rolling contract theory, with its mechanical incorporation of one party's (invariably, the seller's) standard terms, an attractive, convincing or even tolerable approach. Certainly the decisions of the Bundesgerichtshof and the Oberster Gerichtshof described above appear at odds with that theory.

Nevertheless, a recent decision by a U.S. federal trial court applied the rolling contract theory in a transaction governed by the CISG, holding that the buyer was bound by the seller's standard terms.[35] It applied the theory on two alternative bases: first, the court argued that incorporation of standard terms was a question of validity beyond the scope of the Convention (a conclusion that is demonstrably incorrect[36]), and thus was governed by U.S. domestic law which (in the court's view) incorporated the rolling contract approach; alternatively, the court held that, if the incorporation of the seller's standard terms was governed by the Convention, the rolling contract theory applied under the CISG and the result would be the same. In reaching these conclusions, unsurprisingly, the court gave no indication that it consulted, or even considered consulting, decisions by non-U.S. tribunals on the standard terms issue, or that it was even aware of its treaty obligation to adopt an international perspective on and promote uniform application of the Convention. On appeal, fortunately, the decision was overturned, although the appeals court did not clearly repudiate the lower court's rolling contract approach.[37]

The rolling contract approach is an über-theory, laid over the offer-acceptance model of contract formation – a model that is adopted in Part II of the CISG. Given its highly general and adaptable nature, and its increasing popularity in U.S. courts as a matter of U.S. domestic law, the theory almost certainly will reappear in U.S. CISG jurisprudence. Indeed, to its proponents the theory probably represents the most plausible and natural explanation of contract formation where the seller's standard terms accompany delivered goods. The theory appears to be a response to a particular vision, held at a deep (perhaps subconscious) level, of the purposes and proper operation of contract law – a vision that sees a buyer's primary protection in the operation of market forces rather than in legal rights, and that therefore identifies the primary role of

35. Federal District Court, United States, 13 April 2006, available at http://cisgw3.law.pace.edu/cases/060413u1.html (Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc., 2006 WL 1009299 (U.S.D.C.W.D. Wash. 2006)).
36. *See* VED P. NANDA and DAVID K. PANSIUS, 2, *Litigation of International Disputes in U.S. Courts § 12:9 (2005-2007)*, available at http://cisgw3.law.pace.edu/cases/060413u1.html.
37. Federal Court of Appeals for the 9th Circuit, United States, 8 November 2007, available at http://cisgw3.law.pace.edu/cases/071108u1.html (Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc., 2007 WL 4039341 (9th Cir. 2007)).

contract law as facilitating the incorporation of the seller's terms so that those market forces can operate efficiently.

This vision, I strongly suspect, is not shared by many in other Contracting States; indeed, I suspect much of the rest of the CISG world holds a vastly different view of the goals and appropriate construction of contract law. Certainly the decisions of the Bundesgerichtshof and the Oberster Gerichtshof on the standard terms question evidence a quite different perspective. Indeed, the decision of the Bundesgerichtshof stating that a party's standard terms are excluded unless they are attached to the offer would appear incompatible with the rolling contract theory, which allows incorporation of standard terms that are not conveyed until the goods are delivered.[38]

There can hardly be a more important sales law issue, both conceptually and practically, than the question of incorporation of standard terms. It goes to the single most fundamental question of any regime of contract law – how does one determine the contents of the parties' agreement? – and the issue will frequently dictate the outcome of disputes between contracting parties. If U.S. courts begin applying the rolling contract theory under the Convention and tribunals in other jurisdictions continue with approaches like those promulgated by the Bundesgerichtshof and the Oberster Gerichtshof, this would represent a gaping tear in the Convention's fabric of uniformity. Indeed, what I called above 'workable uniformity' might well be rendered impossible if such a basic question as whether a party's standard terms were incorporated wholesale into the contract depended on the jurisdiction in which the dispute was being heard. The choice of law questions that the Convention was designed to ameliorate would simply be transformed into choice of forum issues, and the vision of globally uniform substantive sales law might well fail completely.

Because both the rolling contract theory and the alternative analyses of incorporation of standard terms under the CISG derive from different underlying conceptions of contract law, and operate almost at a subconscious level, they are particularly susceptible to the 'homeward trend'. It is extremely easy to project familiar domestic approaches onto the international text of the Convention when the domestic approach seems to reflect a 'natural' and obvious analysis, particularly if one is not even aware of alternatives. That certainly appears true of the case described above in which the U.S. court adopted the rolling contract

38. It is a testament to the generality and adaptability of the rolling contract theory that its proponents could attempt to reconcile it with the Bundesgerichtshof's approach by arguing that, even though the buyer may have submitted an order that the seller agreed to fill (and even if the buyer has already paid for the goods), the offer is not really made until the goods are delivered along with the seller's terms. I doubt, however, that the Bundesgerichtshof would accept this strained analysis of the time when a sales contract is formed.

approach under the Convention. Although I personally find the approaches of the Bundesgerichtshof and the Oberster Gerichtshof far preferable, those decisions also seem to reflect underlying assumptions derived from domestic law governing the standard terms question.

How can different approaches reflecting such fundamentally irreconcilable conceptions of contract law be harmonized? This is not a case (as in the first example discussed above involving interpretation of choice of law clauses designating the law of a Contracting State) where courts are likely to reach a common position through independent analysis. The only hope is for tribunals to become aware of their own background assumptions by consulting decisions – and commentators – from other jurisdictions, and to make a conscious and concerted effort to meet the Article 7(1) obligation to adopt an international perspective on the CISG while promoting its uniform interpretation. The example discussed above involving the New Zealand Mussels case both illustrates that approach, and demonstrates its feasibility.

Studying the decisions of the Bundesgerichtshof and the Oberster Gerichtshof might have led the U.S. court to question whether the rolling contract analysis fits a regime of international sales law. Perhaps such study would have revealed the extraordinary threat the rolling contract approach represents to uniform application of the Convention. Consulting U.S. decisions and commentary, on the other hand, might lead tribunals in Germany and Austria to question whether there is global consensus on the assumptions of the Bundesgerichtshof and the Oberster Gerichtshof about special limitations on the incorporation of standard terms. But what would result from this mutual awareness? Can the differing approaches be reconciled and a uniform approach devised? Perhaps the best result would be retreat to the most straightforward view of the application of the Convention's contract formation rules to incorporation of standard terms – the last shot principle that seems to emerge from the simplest reading of Articles 18 and 19. I am not enamored of that result, but the alternative – extreme non-uniformity on a basic and vital issue – appears worse.

In short, the international methodology required by Article 7(1) of the Convention – in particular, consultation of CISG decisions from other jurisdictions as part of a conscious effort to promote uniform application – is particularly vital if issues like incorporation of standard terms are to be prevented from sabotaging the fundamental purposes of the Convention.

SECTION 3. CONCLUDING REMARKS

Professor Michael BRIDGE has eloquently stated: 'The challenge facing the CISG is no less than the manufacture of a legal culture to envelope it before the centrifugal forces of nationalist tendency take over'.[39] Such a culture, emphasizing the importance of maintaining uniform interpretation of the CISG, has in fact developed, as evidenced by the unique CISG research infrastructure described above[40], an extraordinarily rich body of scholarship focusing on the CISG[41], and broad consensus among scholars concerning the importance of and means to achieve uniform interpretation of the Convention. However, as illustrated by the examples analyzed above (particularly the issue of incorporating standard terms), that culture has not yet 'enveloped' the Convention: it flourishes in legal academia, but it has not been widely recognized and accepted on the front lines of those who must work with the CISG – judges and arbitrators, as well as the advocates who present the disputes they must resolve.

It is not particularly surprising, at this point, that the CISG's special legal culture has not penetrated deeply into the world of practice. As noted above, the judges who apply the Convention sit in regular courts, often courts of general jurisdiction. For most of them, the CISG is just one of a wide range of legal subjects with which they must deal on a daily basis. Arbitrators and advocates generally share the same wide-ranging demands on their attention. An academic like me, in contrast, has the luxury of concentrating on the specialized approaches required by the CISG, and then of criticizing those who do not achieve the same appreciation for those particular demands. There are, of course, legitimate criticisms of some aspects of the CISG case law record – particularly the obviously improper assertion by some U.S. courts that U.S. domestic sales law should guide the interpretation of the Convention.[42] It is hardly surprising, however, that decision-makers and practitioners have not immediately achieved proficiency in what I myself have characterized as a new (and specialized) way of practicing law.

Interestingly, the exercise of writing this paper and meditating on uniform application of the Convention has, despite some disturbing findings, left me

39. Michael R. BRIDGE, 'The Bifocal World of International Sales: Vienna and Non-Vienna' in Ross CRANSTON (ed.), *Making Commercial Law: Essays in Honour of Roy Goode*, 1997, 227, 288.
40. See the text accompanying notes 9-14 *supra*.
41. The bibliography of CISG-related scholarship on the Pace University CISG website contains over 8,000 entries. See http://www.cisg.law.pace.edu/cisg/biblio/biblio.html.
42. *See* Joseph LOOKOFSKY and Harry FLECHTNER, 'Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?', 9, *Vindobona J. Int'l Comm. L. & Arb*. 2005, 199; Harry M. FLECHTNER, 'The CISG in U.S. Courts: The Evolution (and Devolution) of the Methodology of Interpretation' in Franco FERRARI (ed.), *Quo Vadis CISG: Celebrating the 25th Anniversary of the United Nations Convention on Contracts for the International Sale of Goods* 2005, 91, 103-07.

more optimistic than when I began. The legal culture of the CISG may not yet have advanced deeply into the practicing world – but genuine culture is not learned: it is absorbed during the formation of an outlook. An educational infrastructure for the CISG has now developed and been put into practice that is imprinting the CISG legal culture on many entering the profession. Several years ago, an exchange on the listserv maintained by the American Association of Law Schools for teachers of commercial law suggested that most courses on sales law in the United States incorporate some coverage of the CISG, and that a not-insubstantial number of general contracts courses in U.S. law schools (traditionally taught during the first year of legal training) include at least mention of the Convention. Coverage of the CISG as part of standard training for law students is certainly not confined to the U.S. To take one example, Denmark's largest Law Faculty at the University of Copenhagen requires all its B.A. candidates to complete a course which includes extensive coverage of the Convention.[43] Furthermore, the extraordinary success of the Willem Vis International Arbitration Moot, which each year focuses on a dispute governed by the CISG and which this last year attracted teams from 233 law schools in 59 different countries, has contributed significantly to the creation of a global pedagogy focused on the CISG. The point of this organically-developing educational program is a somewhat special form of comparative law – one in which the understanding of the way one's own legal culture departs from others (always an aspect of comparative studies) becomes a primary focus, in order to create heightened sensitivity to areas where the 'homeward trend' is a particular threat.

The first generation of lawyers, judges and arbitrators who may have been exposed to the CISG in law school has now entered into practice; members of the next generation are even more likely to have encountered the CISG as part of their legal training. If the CISG can survive in reasonably uniform fashion until its legal culture is established in the world of practice – and its widespread acceptance by the community of nations strongly suggests it can – its future, despite the challenges of its current situation, looks bright.

Of course the CISG could fail before its legal culture takes root in practice. If radically different approaches to critical issues (like the treatment of standard terms) become established in different Contracting States, the Convention could become a dead letter, shunned by those aware of it, and a trap for the unaware – subjecting the latter to contradictory legal regimes depending on the outcome of a race to the courthouse. Even should that happen, however, the CISG may

43. The course, entitled 'European and International Commercial Law', is administered by Professor Joseph LOOKOFSKY, a prominent CISG scholar. For a course description, see http://sis.ku.dk/kurser/viskursus.aspx?knr=102270. The course is available in expanded form to guest M.A. students (see http://sis.ku.dk/kurser/viskursus.aspx?knr=99568&sprog=2&forrige=48380).

not properly be judged a failure. At the least, this experiment in a pure form of globalized law aimed at a critically important type of commercial transaction will have taught vital lessons about what it takes to succeed in such an endeavor, and could thus pave the way to future (more successful, one hopes) attempts. The earlier UNIDROIT-sponsored sales conventions – the Uniform Law on Formation and the Uniform Law on International Sales – performed much the same trail-blazing function for the CISG; I would not rate those earlier conventions failures, even though they did not achieve their immediate purpose of creating global law for international sales transactions. This optimistic view may be the delusion of one who has devoted much of his professional career to studying (and, I hope, advancing) globalized law for international sales – but it is, at the least, a sincerely held delusion.

SECTION 4. APPENDIX

§ 1. Decisions holding that a choice of law clause that refers generally to the law of a contracting state designates the domestic sales law of that state

1) Federal District Court, United States, 30 January 2006, available at http://cisgw3.law.pace.edu/cases/060130u1.html; **2)** Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 12 March 2005, English translation available at http://cisgw3.law.pace.edu/cases/050316r1.html; **3)** Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 11 October 2002, English translation available at http://cisgw3.law.pace.edu; **4)** Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 6 September 2002, English translation available at http://cisgw3.law.pace.edu; **5)** Arrondissementsrechtbank Alkmaar, Netherlands, 29 June 2000, English editorial remarks available at http://cisgw3.law.pace.edu; **6)** Cour d'Appel Colmar, France, 26 September 1995; **7)** Kantonsgericht Zug, Switzerland, 16 March 1995, CLOUT case No. 326; **8)** *Ad hoc* arbitral tribunal Florence, Italy, 19 April 1994, CLOUT case No. 92, English translation available at http://cisgw3.law.pace.edu; **9)** Tribunale Monza 14 January 1993, CLOUT case No. 54, English translation available at http://cisgw3.law.pace.edu.[44]

44. See also Court of Appeals of California, United States, 27 June 2007, available at http://cisgw3.law.pace.edu (COL clause designated 'California law'; special facts indicated the parties intended to exclude the CISG in favor of domestic law).

§ 2. Decisions holding that a choice of law clause that refers generally to the law of a contracting state designates the CISG

1) Oberlandesgericht Stuttgart, Germany, 31 March 2008, English translation available at http://cisgw3.law.pace.edu; **2)** Federal District Court, United States, 28 September 2007, available at http://cisgw3.law.pace.edu; **3)** Federal District Court, United States, 31 January 2007, available at http://cisgw3.law.pace.edu; **4)** Hof 's-Hertogenbosch, Netherlands, 2 January 2007, CLOUT abstract No. 828; **5)** Oberlandesgericht München, Germany, 19 October 2006, CLOUT case No. 826, English translation available at http://cisgw3.law.pace.edu; **6)** Hof van Beroep, Belgium, 24 April 2006, English translation available at http://cisgw3.-law.pace.edu; **7)** Rechtbank van Koophandel Hasselt, Belgium, 15 February 2006, English translation available at http://cisgw3.law.pace.edu; **8)** Federal District Court, United States, 7 February 2006, available at http://cisgw3.law.-pace.edu; **9)** Federal District Court, United States, 6 January 2006, available at http://cisgw3.law.pace.edu; **10)** Supreme Court, Canada, 22 July 2005, available at http://cisgw3.law.pace.edu; **11)** Federal District Court, United States, 15 June 2005, available at http://cisgw3.law.pace.edu; **12)** Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade, the Ukraine, 2005, English translation available at http://cisgw3.law.pace.edu; **13)** Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade, the Ukraine, 18 November 2004, English translation available at http://cisgw3.law.pace.edu; **14)** Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 5 November 2004, English translation available at http://cisgw3.law.pace.edu; **15)** Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 22 October 2004, English translation available at http://cisgw3.law.pace.e-du; **16)** Hof van Beroep Gent, Belgium, 20 October 2004, English translation available at http://cisgw3.law.pace.edu; **17)** Oberster Gerichtshof, Austria, 21 April 2004, English translation available at http://cisgw3.law.pace.edu; **18)** Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 20 April 2004, English translation available at http://cisgw3.law.pace.edu; **19)** Oberlandesgericht Zweibrücken, Germany, 2 February 2004, CLOUT case No. 596, English translation available at http://cisgw3.law.pace.edu; **20)** Oberster Gerichtshof, Austria, 17 December 2003, CLOUT case No. 534, English translation available at http://cisgw3.law.pace.edu; **21)** Kantonsgericht des Kantons Zug, Switzerland, 11 December 2003, English abstract available at http://cisgw3.law.pace.e-du; **22)** Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 17 September 2003, English translation available at http://cisgw3.law.pace.edu; **23)**

Appellationsgericht Basel-Stadt, Switzerland, 22 August 2003, English translation available at http://cisgw3.law.pace.edu; **24)** Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 15 August 2003, English translation available at http://cisgw3.law.pace.edu; **25)** Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 June 2003, English translation available at http://cisgw3.law.pace.edu; **26)** Federal Court of Appeals for the 5th Circuit, United States, 11 June 2003, CLOUT case No. 575, available at http://cisgw3.law.pace.edu; **27)** Federal District Court, United States, 29 January 2003, CLOUT case No. 574, available at http://cisgw3.law.pace.edu; **28)** Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 2 December 2002, English translation available at http://cisgw3.-law.pace.edu; **29)** Handelsgericht Zürich, Switzerland, 9 July 2002, English translation available at http://cisgw3.law.pace.edu; **30)** Hof van Beroep Gent, Belgium, 15 May 2002, English translation available at http://cisgw3.law.pace.edu; **and at least 35 additional decisions, including those cited in the** UNCITRAL, *Digest of case law on the United Nations Convention on the International Sale of Goods Art. 6 § 8*, available at http://daccessdds.un.org/doc/UNDOC/GEN/V04/547/50/PDF/V0454750.pdf?OpenElement.