

The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings

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[T]he transformation of international business law signifies more than just an incremental normative change; it signifies a quite radical revision in the very prism through which we view transnational deals and disputes.¹

I. INTRODUCTION

This Article will attempt to ferret out factors that may lead to unintended contractual liability for American business persons involved in international transactions. The focus will be on two distinct issues. First, this Article will examine the presumption of enforceability placed on certain types of business correspondence by foreign legal systems. Legal hybrids, such as comfort instruments,² are more likely to result in contractual liability in civil law systems than in the Anglo-American legal system. Comfort instruments can be found in both the private and public domains. In the private domain, they can be found in the validity agreement in asset-based financing,³ letters of understanding or intent in business purchases,⁴ and restrictive agreements used in purchase negotiations.⁵ In the public arena, governmental agencies have resorted to comfort instruments either to provide guidance to private applicants or to deal with daunting delays due to administrative manpower shortages. *Corson v. Rhuddlan Borough Council*,⁶ for example, involved the

1. Kenneth C. Randall & John E. Norris, *A New Paradigm for International Business Transactions*, 71 WASH. U. L.Q. 599, 624 (1993).

2. These instruments are generally given in letter form. They are found in almost all areas of law, business, and finance. See ROBERT A. THOMPSON, REAL ESTATE OPINION LETTER PRACTICE (1993) (discussing use of attorney comfort or attorney opinion letters); Jeffrey J. Gilbert, *Comfort Letters: A Banker's View*, 64 J. COM. BANK LENDING 48 (1982) (discussing use of comfort letters in commercial lending). Parties engaged in business and finance often use these instruments to communicate. A comfort letter is given by one party to another in a negotiation, or by a third party to the negotiations (attorney, parent company, accountant), in order to encourage or "comfort" one of the parties to enter into the prospective transaction or relationship. See René Sacasas & Don Wiesner, *Comfort Letters: The Legal and Business Implications*, 104 BANKING L.J. 313, 313 (1987) ("[C]omfort letter[s] [seek] to assure the lender [or a party to a transaction] without the writer intending to commit itself as a surety or guarantor.")

3. In order to validate a company's inventory or accounts receivable, a bank or factoring institution often requires a company officer or director to warrant that the records are accurate. See ASSET-BASED FINANCING: A TRANSACTIONAL GUIDE § 26 app. at 26-200 (Howard Ruda ed., 1992) (reproducing form indicating that this is industry practice).

4. Based on my experience, a typical letter of intent might begin: "This is in reference to our conversations with respect to the possible purchase." See generally David N. Goldsweig, *Documentation of Present Intent and Confidentiality*, in NEGOTIATING AND STRUCTURING INTERNATIONAL COMMERCIAL TRANSACTIONS 521 (Shelly P. Bantram & David N. Goldsweig eds., 1991).

5. A restrictive agreement is generally given in the form of a letter in which "a seller agrees not to negotiate with third parties for a fixed period of time, while the buyer investigates the seller's business." CHARLES SCHARF ET AL., ACQUISITIONS, MERGERS, SALES, BUYOUTS & TAKEOVERS 365 (4th ed. 1991).

6. 59 P.P. & C.R. 185 (Eng. C.A. 1990).

use of a comfort letter by a local municipality regarding its intent to renew a land lease. More recently, the European Directorate IV⁷ has used the comfort letter in the area of trade practices. Despite the lack of a legislative mandate to create such a device, the Directorate has informally used it to reassure companies contemplating a merger or an acquisition.⁸

The second issue of concern is the U.S. ratification of the Convention on Contracts for the International Sale of Goods (CISG),⁹ and whether it may result in unexpected liability for the business person with only a working knowledge of the Uniform Commercial Code (UCC). A 1995 U.S. court of appeals case noted that analogous case law interpreting the UCC "may also inform a court where the language of the relevant CISG provisions tracks that of the UCC."¹⁰ The court concluded, however, that such "case law is not per se applicable."¹¹ Article 7(1) of the CISG asserts that courts' interpretations of the Convention should be "informed by its international character and . . . the need to promote uniformity in its application."¹² Thus foreign court decisions that construe the Convention's provisions should play a greater role in its interpretation than analogous UCC case law. The continuing globalization of U.S. business interests will force the legal and business communities to focus on the legal intricacies of international business transactions.¹³ As Dennis Tallon has noted, a factor "of prime importance in our times is the internationalization of commercial law."¹⁴ These

7. For an explanation of the Directorate's responsibilities in the area of competition, see 52 HALSBURY'S LAWS OF ENGLAND para. 19.123 (4th ed. 1986).

8. See generally C. S. KERSE, *EEC ANTI-TRUST PROCEDURE* (2d ed. 1988) (indicating that companies contemplating merger or acquisition often request informal, nonbinding comfort letter from Directorate stating that it does not expect to challenge transaction under EC Competition Law).

9. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF.97/18, Annex I, reprinted in 19 I.L.M. 668 [hereinafter CISG]. The CISG was incorporated into the law of the United States in January 1988. See ALBERT H. KRITZER, *GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* app. 1 (1994) (providing list of countries adhering to CISG). As of the date of this Article, forty-six countries, including many of the United States's major trading partners, have ratified the Convention. See *id.* "Among the forty-five nations adopting the CISG are Argentina, Australia, Austria, Canada, Chile, China, France, Germany, Italy, Mexico, Spain, Sweden, and Switzerland." John E. Murray, Jr., *Different Laws Might Apply to Foreign Buys Under the United Nations Convention for the International Sale of Goods*, *PURCHASING MAG.*, Oct. 19, 1995, at 30. Russia also has adopted the Convention. See KRITZER, *supra*, at app. 1 (indicating that Russia ratified CISG on Aug. 16, 1990, and that it entered into force on Sept. 1, 1991). The United Kingdom, however, is a notable exception.

10. *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir. 1995).

11. *Id.* (quoting *Orbisphere Corp. v. United States*, 726 F. Supp. 1344, 1355 (Ct. Int'l Trade 1989)).

12. CISG, *supra* note 9, art. 7, para. 1. The drafters of the CISG hoped that it would facilitate free trade by harmonizing contract rules in the commercial sale of goods:

If everyone could agree on a single, reasonable set of rules, that is, one that strongly resembled the one with which the speaker is most familiar, then the babel of divergent national legal systems would break down, and a coherent and predictable framework for business transactions would emerge. This strategy has much to recommend it since many legal rules, and particular contract rules, are largely conventional.

Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 283 (1984).

13. The passage of the North American Free Trade Agreement and the Uruguay Round of the General Agreement on Tariffs and Trade are two important examples of the globalization of commercial transactions.

14. Dennis Tallon, *Civil Law & Commercial Law*, in 8 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW § 2-18 (Konrad Zweigert ed., 1993).

developments will require the successful international entrepreneur to familiarize herself with the CISG and with the contract law of the foreign country in which she plans to do business.

II. CONTRACTUAL LIABILITY FOR COMFORT INSTRUMENTS

No written contract is ever complete; even the most carefully drafted document rests on volumes of assumptions that cannot be explicitly expressed.¹⁵

A search of English case law from 1989 reveals twenty-seven cases dealing with liability based upon representations made in business correspondence.¹⁶ Generally considered to be nonlegal business assurances, these letters of commerce are being increasingly scrutinized for possible promissory or reliance-based liabilities.

Generally, the objective of comfort instruments is credit value or exchange enhancement. A seller or a lender wants assurance as to certain factors that she determines to be important in contemplating a transaction. A refusal of a formal guaranty or surety¹⁷ by another party may result in a termination of the negotiation. Comfort letters are therefore issued as a compromise in order to salvage the transaction. They are hypocritical instruments intended to serve two masters. While wanting to avoid liability for nonperformance, the writer hopes the receiver of the writing will enter into a legally binding transaction. Consequently, many letters of assurance are characterized by an internal repugnancy or inconsistency. They contain language that could induce reliance while they attempt to disclaim any liability as a guaranty.

The classic discussion of the doctrine of repugnancy can be found in the 1923 English case *Rose & Frank Co. v. Crompton Bros.*¹⁸ The letter at issue contained both promissorial language and the language of disclaimer. The court utilized a "dominant language" test to determine if legal liability should be ascribed to the assurance language.¹⁹ It compared the strength of the assurance language with the disclaimer language and concluded that the letter was neither intended nor should have been relied upon as a contractually enforceable document. The court focused on the clause in the letter claiming that it was not a "formal or legal agreement" and asserting that the document was rather "only a definite expression and record of the purpose and intention of the three parties concerned to which they each honourably pledge[d]

15. Rosett, *supra* note 12, at 287.

16. See Larry A. DiMatteo & René Sacasas, *Credit and Value Comfort Instruments: Crossing the Line from Assurance to Legally Significant Reliance and Toward a Theory of Enforceability*, 47 BAYLOR L. REV. 357, 358 n.2 (1995); see, e.g., *Walford v. Miles* [1992] 2 App. Cas. 128 (appeal taken from C.A.) (concerning issuance of comfort letter by parent company to bank contemplating financing commitment to parent's subsidiary).

17. Surety or suretyship encompasses an entire range of instruments of which the guaranty is but one. Other surety instruments include the letter of credit, performance bonds, and fidelity bonds. The body of law on suretyship generally holds that such instruments are legally enforceable obligations. See RESTATEMENT (THIRD) OF SURETYSHIP §§ 62-70 (1996); ARTHUR STEARNS, *THE LAW OF SURETYSHIP* § 1.2 (James L. Elder ed., 5th ed. 1951).

18. [1923] 2 K.B. 261 (Eng. C.A.).

19. See *id.* at 293.

themselves.”²⁰ The court held that “an honourable pledge”²¹ implies only a moral and not a legal obligation.²²

Ultimately, the value of the assurance depends upon its degree of detail. The use of detailed assurance language may lead a court to characterize such letters as guaranty substitutes and thereby impose liability upon the issuing party. The greater the detail of the representations and the stronger the assurance language, the greater the likelihood of reliance by the receiving party. When such a promise crosses the line from simple assurance to justifiable reliance, then a binding contract is created.²³ As more cases are brought to bar involving comfort instruments, it is increasingly likely that courts will find them legally binding.

Historically, the civil law provides an analogue for the evolution of a presumption of enforceability for previously unenforceable instruments of commerce. The centuries old *lex mercatoria* helped “codify” day-to-day uses and practices into customary law. Commentators have recognized the prevalence and binding nature of such merchant-generated law: “[The] law merchant presents a universal character thanks [in part] to the cohesiveness of the milieu in which it developed.”²⁴ The increased use and recognition of comfort instruments in the commercial world may provide the milieu for a regime of enforceability.

The next two sections of this Article explore factors that will greatly influence the development of any such regime. Section II.A analyzes the differing presumptions of enforceability found in the Anglo-American and civil law legal systems. It is followed by an analysis of common factors used in making the enforceability decision.

A. Differing Presumptions of Enforceability

An estimated ninety-five percent of all comfort letters are issued by a parent company to obtain financing for a subsidiary.²⁵ In *Chemco Leasing SpA v. Rediffusion Plc.*, Justice Staughton recalled Justice Vaisey’s sardonic definition of such letters as a “gentlemen’s agreement . . . which is not an agreement, made between two persons neither of whom is a gentleman, whereby each expects the other to be strictly bound without himself being bound at all.”²⁶

20. *Id.* at 287.

21. *Id.* at 283.

22. The American law equivalent to the “honourable pledge” has been articulated as follows: “[I]f [the parties] manifest an intention that only a moral obligation is undertaken, the agreement is not binding. . . .” JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 14 (1970).

23. See RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1979) (“A promise which the promisor should reasonably expect to induce action . . . and which does induce such action . . . is binding if injustice can be avoided only by enforcement of the promise.”). The problem of lack of consideration where the letter issuer is a third-party to the transaction may be resolved by reliance’s twin sister, promissory estoppel.

24. Tallon, *supra* note 14, § 14, at 8.

25. See John Evans, *British Court Warns Lenders Not To Rely on Letters of Comfort*, AM. BANKER, June 6, 1989, at 7.

26. *Chemco Leasing SpA v. Rediffusion Plc.* (Eng. Q.B. July 19, 1985) (LEXIS, Enggen Library, Cases File), *aff’d*, (Eng. C.A. Dec. 11, 1986) (LEXIS, Enggen Library, Cases File).

Although English and American courts have generally held these letters to be nonguarantees, the potential for liability remains. The court in *Heisler v. Anglo-Dal, Ltd.*,²⁷ for example, harkened back to the *lex mercatoria* when it described the genesis of customary law:

[O]ne has to bear in mind that commercial men do not look at these things quite from the lawyer's point of view [Although a lawyer would consider an instrument to be worthless] a commercial man would regard the guarantee, perhaps furnished in the form of [a] letter, as having some value as underlining, as it were, the promise that had been undertaken.²⁸

It is in this customary *law* of business that the law often creates new rules of contractual liability.

The potential for liability may be even greater under civil law legal systems. The civil law seems to place less weight upon the semantic labeling of instruments when determining the existence of a legally enforceable obligation.²⁹ A brief comparative review of civil law and common law jurisprudence illustrates the potential for liability for representations made in letters of assurance.

1. *Anglo-American Law*

Commercial and legal practitioners in the Anglo-American system have generally regarded comfort instruments as nonbinding instruments of commerce. The court in *K/S A/S Bani v. Korea Shipbuilding & Engineering Corp.*³⁰ confirmed this view. A bank that had taken over a financially distressed shipbuilding company sent comfort letters to the shipbuilder's customers and creditors that expressed confidence that the shipbuilder would meet its obligations in the future. Despite the letter's clear potential for inducing reliance, the court held that such letters were nonbinding. The court concluded that there was little doubt that the letters were "written in good faith [They] can be treated as a source of comfort but no more than that."³¹ This conclusion, however, suggests that bad faith may be a basis of liability. For example, what if the issuer had little intention of providing future credit to the company or was privy to important information concerning the troubled nature of the company?³²

The number of reported cases involving the enforceability of comfort

27. [1954] 2 All E.R. 770 (Eng. C.A.).

28. *Id.* at 772 (quoting *Barker v. M'Andrew*, 144 Eng. Rep. 643 (C.P. 1865)).

29. For a look at the reception and influence of Roman law upon English common law, see Thomas Weir, *Contracts in Rome and England*, 66 TUL. L. REV. 1615 (1992); John F. Winkler, *Roman Law in Anglo-Saxon England*, 13 J. LEGAL HIST. 101 (1992); see also T. Plucknett, *The Relations Between Roman Law and English Common Law Down to the Sixteenth Century*, 3 U. TORONTO L.J. 24 (1939). For a brief review of the intermingling of common and civil law, see Luigi Moccia, *English Law Attitudes to the 'Civil Law'*, 2 J. LEGAL HIST. 157, 164 (1981) ("[O]ne must still mention the long-established judicial practice of resorting to 'continental authorities' in cases of 'first impression' [E]vidence which may be gathered suggests the existence of close relations between 'English law' . . . and 'Continental law.'").

30. [1987] 2 Lloyd's Rep. 445, 455 (Eng. C.A.) (discussing comfort letter as ancillary issue to main holding of case).

31. *Id.*

32. A cause of action in tort for fraud or misrepresentation may be possible in this type of situation.

letters has been growing. Nowhere has the increase been more pronounced than in the English courts. Many of these English cases have raised new issues concerning the enforceability of comfort letters while also providing guidance on how to avoid liability. A review of the case law shows that although such instruments remain generally unenforceable, the outlines of a jurisprudence of enforceability have begun to come into focus. For example, the English case of *Compagnie Generale D'Industrie et de Participations v. Solari S.A.*³³ avoided the issue of comfort letter enforceability by holding that the unsigned comfort letter failed to satisfy the statute of frauds.³⁴ However, the case made clear that such instruments were not innately unenforceable.³⁵ The potential for contractual liability was further confirmed by the 1986 case of *Chemco Leasing SpA v. Rediffusion Plc.*³⁶ There, the court made clear that assurances made by a parent company in a letter that it would "undertake to take over the remaining liabilities" of its subsidiary were fully enforceable legal promises.³⁷

Some believed that the 1987 case of *Kleinwort Benson, Ltd. v. Malaysia Mining Corp.*³⁸ would become a watershed decision in favor of comfort letter enforceability.³⁹ That belief, however, proved short-lived when the court of appeal quickly reversed the lower court holding that the letter at issue was binding.⁴⁰ The proliferation of cases since *Kleinwort Benson*, however, indicates that it was not a deathblow to the issue of liability.

An analysis of the lower court decision, therefore, is useful in predicting a future jurisprudential basis for comfort instrument enforceability. *Kleinwort Benson* confirmed that courts will no longer treat such instruments as per se unenforceable. Instead, they will look to the specific language of each instrument when making an enforceability determination. For example, the letter in *Kleinwort Benson* confirmed the parent company's knowledge of a loan to a subsidiary and assured the lender that it was its policy "to ensure that the business of [the subsidiary was] at all times in a position to meet its liabilities."⁴¹ Justice Hirst implied a binding obligation into the comfort letter by interpreting the "policy to ensure" language as a "promise to ensure." The court of appeal reversed, reasoning that the policy to ensure was a statement of current policy; as such, it did not constitute a promise that the policy would continue into the future.⁴²

Despite its reversal, Justice Hirst's opinion renewed interest in the

33. (Eng. Q.B. June 18, 1984) (LEXIS, Enggen Library, Cases File).

34. *See id.*

35. *See id.*

36. (Eng. C.A. Dec. 11, 1986) (LEXIS, Enggen Library, Cases File).

37. *Id.*

38. [1988] 1 W.L.R. 799 (Q.B. 1987) [hereinafter *Kleinwort I*].

39. *See, e.g.*, B.J.D., Comment, *A Very Comfortable Comfort Letter*, 1988 LLOYD'S MAR. & COM. L.Q. 290, 293-94.

40. *See* [1989] 1 W.L.R. 379 (Eng. C.A.) [hereinafter *Kleinwort II*].

41. *Kleinwort I* [1988] 1 W.L.R. at 802.

42. The change of policy argument was exactly the argument that the parent company made to the lower court: "[A]lthough the policy referred to was our policy at that time and in light of the circumstances then prevailing, no assurance was given that such policy would not be reviewed in the light of changing circumstances." *Id.* at 801.

potential for comfort letter enforceability, especially because the court of appeal reversed on such narrow grounds. The court of appeal did not hold comfort letters to be per se unenforceable. Instead, it held that the specific language used in this case was not sufficient to find a legally binding obligation. The potentially limited nature of the reversal became evident in a 1990 New Zealand decision.⁴³ There, the court held that a reference to future policy raised a letter to the level of a guaranty. The court reasoned that "the wording of the present letter goes further than the mere declaration of existing policy which led the Court [in *Kleinwort Benson*] to conclude that [the issuer] was not bound by its letter of comfort."⁴⁴ In the court's view, the operative language of enforceability concerned the issuer's policy that its subsidiary would meet its obligations, and that the issuer would use its "'best endeavors' to see that [the subsidiary] continue[d] to do so."⁴⁵ The court interpreted the phrase "best endeavors" to mean a future promise of a binding nature.⁴⁶

Taken together, *Bank of New Zealand* and Justice Hirst's opinion in *Kleinwort Benson* question the soundness of the presumption that such informal letters are unenforceable. Justice Hirst argues that the "onus of proving that there [is] no such intention [to create legal relations] is on the party who asserts that no legal effect is intended, and the onus is a heavy one."⁴⁷ *Bank of New Zealand* seems to agree. Placing such a burden on the writer of a comfort letter would be tantamount to creating a presumption of enforceability.

A presumption against the drafter of an instrument has a long history in English common law. The *contra proferentem* rule holds that "in the case of ambiguity when all other rules of construction fail, the doubt is removed by construing the document adversely to the [drafter]."⁴⁸ The key element of ambiguity, however, is often found to be lacking by the courts when not enforcing a comfort instrument against its writer. Thus, an "arrangement . . . binding in honour"⁴⁹ and a "policy to ensure"⁵⁰ have been held to be unambiguous statements of intent that do not create a legal obligation.

Modern legal philosophy has provided justification for increasingly active

43. See *Bank of New Zealand v. Ginivan* [1991] 1 N.Z.L.R. 178 (C.A. 1990).

44. *Id.* at 180.

45. *Id.* at 179. *But see* *British & Commonwealth Holdings Plc. v. Quadrex Holdings, Inc.* (Eng. Q.B. May 8, 1991) (LEXIS, Enggen Library, Cases File) (holding that use of phrase "reasonable endeavors" is not sufficient to establish liability).

46. See *Bank of New Zealand* [1991] 1 N.Z.L.R. at 179.

47. *Kleinwort I* [1988] 1 W.L.R. at 803 (citing *Edwards v. Skyways, Ltd.* [1964] 1 W.L.R. 349, 355 (Eng. Q.B.)).

48. *Letters of Responsibility Reports Delivered During the Meetings of Committee E—Commercial Banking in Atlanta on 4th November 1977*, 6 INT'L BUS. LAW. 288, 295, 301-02 (1978) [hereinafter *Letters of Responsibility*] (statement of Adrian M.H. Smart). Because of this rule, Smart cautions that "it behoves a parent company to be precise and unequivocal in the obligations it assumes." *Id.* at 302. The principle of *contra proferentem* has a long history throughout English law. See, e.g., *Glynn v. Margetson* [1893] App. Cas. 351 (appeal taken from Eng.) (construing carriage of goods contract clause against drafter).

49. See, e.g., *Rose & Frank Co. v. J.R. Crompton & Bros.* [1923] 2 K.B. 261, 273 (Eng. C.A.).

50. *Kleinwort II* [1989] 1 W.L.R. at 393.

judicial intervention in the finding of constructive agreements. In addition to the *contra proferentem* rule, limiting principles such as good faith and fair dealing may be brought to bear against the writer of letters used to persuade another party to enter into a business transaction.⁵¹ The development of the broad concepts of good faith, unconscionability, and reliance or promissory estoppel have given courts tremendous leeway to intervene in contractual and quasi-contractual situations. Professor Macneil refers to these grounds for enforceability as the “linking norms” of restitution, reliance, and expectation.⁵² If one of the linking norms is present, or if an intent to be bound can be inferred, an instrument should be held to be binding. Justice Hirst, in *Kleinwort Benson*, enlisted the help of the reliance and intent pillars of contractual enforceability. First, the lender in that case relied on the letter in granting the loan. Second, the issuer acted pursuant to a formal authorization of its board of directors, implying an intent regarding the seriousness of the assurance. Furthermore, the court found that the strength of the assurance language placed a burden on the issuer to state explicitly a disclaimer of liability.

Since the decision in *Kleinwort Benson*, English case law has continued to question the strength of the presumption of nonenforceability. For instance, the court in *Capital Landfill (Restoration), Ltd. v. William Stockler & Co.*⁵³ applied a heightened level of scrutiny that belied the existence of a presumption of nonenforceability:

The question comes down to whether this letter was intended simply as a comfort letter . . . or whether it was intended by the parties as a legal document binding the company strictly to its terms. These are questions that cry out to be clarified by oral evidence, and [cannot be] based simply on the wording of this alleged undertaking.⁵⁴

The type of language and evidence that is most likely to result in a legally binding obligation will be determined by legal evolution. The fact remains that recipients of comfort letters often believe that they are within the contractual domain. They continue to bring suit in the hope of persuading a court to find such letters to be legally enforceable.

U.S. courts have rarely shown such a propensity to push the contractual envelope to include traditional types of comfort instruments. Recent cases, however, indicate that the possibility of liability remains. Following Anglo-American common law, U.S. courts have tended to place great weight upon the use or nonuse of contractual nomenclature. If a comfort letter issuer avoids the operative words⁵⁵ of contract or guaranty, then she will probably

51. See Robert Braucher, *Interpretation and Legal Effect in the Second Restatement of Contracts*, 81 COLUM. L. REV. 13, 16 (1981) (“Limiting principles include the duty of good faith [and] construction against the draftsman.”).

52. See IAN MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* 55 (1980). The seminal American work on the linking norm of reliance is Lon Fuller & William Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 373 (1937); see also RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

53. (Eng. C.A. Sept. 5, 1991) (LEXIS, Enggen Library, Cases File)

54. *Id.*

55. Operative phrases or words are terms of art that have specific and generally accepted meanings within the law or within a trade or profession. This is especially true in some areas of the law that are

avoid contractual liability. However, the use of operative phrases such as "we agree," "we undertake," or "we promise" generally will lead U.S. courts to find contractual intent. Thus, the U.S. district court in *Mutual Export Corp. v. Westpac Banking Corp.*⁵⁶ held that the use of words of promise, although not conclusive, should be viewed as a strong indication of an intent to form a contractually binding obligation. The court explained that a letter writer's "use of the word 'undertakes' . . . while not mystically transforming [the instrument] into a contract, nevertheless reinforces [that conclusion]."⁵⁷ Aptly worded comfort instruments, therefore, avoid using the operative phraseology of law or custom. Avoiding the operative words of contract and using clear disclaimer language should insulate the issuing party from contractual liability irrespective of evidence of reliance upon the instrument.⁵⁸

A comfort letter issuer who uses overly assuring language can incur liability. For example, a U.S. district court placed little significance upon the affixation of the term "comfort letter" to the instrument in question.⁵⁹ The case involved the issuance of a letter from the purchaser of a borrower's oil products to the borrower's bank. The letter assured the bank of the issuer's intent to purchase oil from the borrower, and that it would pay the purchase amounts directly into an account at the bank. Partially based upon the letter, the bank extended credit to the seller-borrower. The court stated that "[n]o matter how the language . . . is characterized—as a 'guarantee' . . . or merely a 'comfort letter' . . . the [instrument] . . . could arguably be deemed inseparable from the [underlying] contract."⁶⁰ The letter writer could thus be liable for justifiable reliance and the resultant damages. These Anglo-American cases indicate that the trend in the United States, and especially in England, is toward a greater likelihood of enforceability. "No longer is it safe [under Anglo-American law] for difficult negotiations over the inclusion in a letter of comfort of an express statement as to its legal effect to end on the tacit understanding . . . that the letter is not of contractual effect."⁶¹ The following civil law comparison provides even greater support for the potential of comfort instrument enforceability.

2. *A Civil Law Comparison*

A number of features unique to various civil law legal systems, inside and outside the area of comfort instruments, may trap the unwary American

imbued with long traditions of using certain terms or instruments. For example, the law of real estate conveyancing "embodies *terms of art* whose meanings and effect have long since been determined by the courts." *Hillas & Co. v. Arcos*, 147 L.T.R. 503, 513 (Eng. H.L. 1932) (emphasis added).

56. 789 F. Supp. 1279 (S.D.N.Y. 1992), *rev'd on other grounds*, 983 F.2d 420 (2d Cir. 1993).

57. *Id.* at 1286.

58. See *Chromalloy Am. Corp. v. Universal Hous. Sys. of Am.*, 495 F. Supp. 544, 551 (S.D.N.Y. 1980) ("In light of all the written disclaimers of contractual liability which were made, any reliance on the existence of a[n] . . . agreement was unreasonable.").

59. See *Banque de Paris et des Pays-Bas v. Amoco Oil Co.*, 573 F. Supp. 1464 (S.D.N.Y. 1983).

60. *Id.* at 1473.

61. Christopher Bright & Susan Bright, *Beware the Letter of Comfort*, 138 NEW L.J. 365, 367 (1988).

attempting to transact business with a foreign entity.⁶² A selected review of some of these idiosyncrasies will show the daunting task that faces the American business person abroad.

The first set of idiosyncrasies encountered abroad can be found in European contract formation doctrine. Article 1590 of the French Civil Code, for example, implores the use of the doctrine of *arrhes*.⁶³ It refers to a buyer who gives money or a thing of value to a seller to evidence the making of a contract. It is akin to the earnest money deposit used in Anglo-American law to bind a contract.⁶⁴ Unlike Anglo-American contract law, the use of *arrhes* gives the buyer and the seller an option to terminate the contract. The parties are "at liberty to withdraw."⁶⁵ In the case of withdrawal, whether in good faith or in bad, the buyer forfeits her deposit while the seller must return "double the amount."⁶⁶ Thus, a comfort letter coupled with such a good faith deposit can result in an unintended loss of money.

The French Civil Code also adopts the Roman law notion of *laesio ultra dimidium vel enormis*, in which a contract is subject to attack if it is determined that the price paid is one-half or less the value of the item purchased.⁶⁷ Originating in the Middle Ages, the notion of inequality of consideration is now codified in article 1647 of the French Civil Code: "If the price of an immovable object is inadequate by more than *seven-twelfths*, the seller has the right to demand rescission of the sale."⁶⁸ This is true even if the seller had renounced her right to rescission in writing. The right of rescission gives the purchaser two options: to return the item or to pay "the balance of the *just price*."⁶⁹ Unlike the just price theories of the Middle Ages, the purchaser does not have a right of rescission if she has paid more than one and seven-twelfths the item's value. Thus, under European law, a bid or offer letter to purchase at a below-market price may be subject to rescission or reformation.

Another concept foreign to Anglo-American contract law is the civil law notion of *nachfrist* notice, which allows a buyer or seller to fix an additional time for performance beyond that which is specified in the contract.⁷⁰ This

62. For example, the granting of specific performance is more common in civil law countries than it is in common law ones. "[I]n civil law specific performance is the normal remedy as regards all obligations and damages are awarded only when specific performance is not possible." Robert B. von Mehren & P. Nicholas Kourides, *International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AM. J. INT'L L. 476, 499 (1981) (quoting BP Exploration Co. (Libya) v. Government of the Libyan Arab Republic, 53 I.L.R. 297, 349 (BP/Libya Concession Trib. 1979)).

63. See CODE CIVIL [C. CIV.] art. 1590 (Fr.).

64. See, e.g., Weidner v. Hyland, 255 N.W. 134, 135 (Wis. 1934); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 661-63 (George F. Comstock ed., Boston, Little, Brown & Co. 11th ed. 1867).

65. C. CIV. art. 1590 (Fr.).

66. *Id.*

67. See *id.* art. 1674-75.

68. *Id.* art. 1681.

69. *Id.* (emphasis added).

70. See RICHARD SCHAFFER ET AL., INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT 111 (2d ed. 1993) ("[C]ivil-law systems traditionally grant an additional period of time, *beyond the date called for* in the contract, within which the parties may perform. This is often referred to in French civil law as *mise en demeure* and in German law as *nachfrist*, meaning 'the period after.'") (emphasis added). The closest that the UCC gets to such notice requirements is its provisions for "notice of termination" and its

concept was adopted in articles 47 through 49 of the CISG. The buyer may give notice to the seller that she will accept delivery beyond the time prescribed.⁷¹ The buyer is then enjoined from taking legal action during the *nachfrist* period and must accept any proper tender of performance during that period.⁷² If the seller makes a request for a *nachfrist* extension, the buyer is obligated to respond to the request. Failure to do so results in an automatic grant of additional time.⁷³ The failure of the breaching party to perform during the extension allows the other party to declare an immediate avoidance of the contract.⁷⁴

An American business person unaware of this practice may face unintended liabilities. She may mistake a *nachfrist* notice as a meaningless, nonlegal request for more time. If she fails to respond properly, she could unintentionally grant additional time and freeze her legal options. Moreover, were she to reject the delivery of goods during the *nachfrist* period, she might incur liability for the purchase price and, possibly, for additional freight and storage costs. The existence of an express "time of the essence" clause is unlikely to provide a party with any protection from the use of *nachfrist* notice. Therefore, it is important for a business person to realize that the legal consequences of seemingly meaningless communications should be investigated fully. In this context, a comfort instrument assuring performance within the extended time period would be of greater legal significance.

Other significant differences in the use and interpretation of comfort instruments can also be found in Germany. The *Patronatserklärungen*, or letter of responsibility, is a commonly used instrument in German business and finance transactions.⁷⁵ One commentator has predicted that these informal instruments will be used increasingly in the future: "[T]hese parental letters of support in their numerous variants have been consistently on the onward march during the last 10 to 15 years and . . . they rank, in terms of numbers particularly for large corporations as issuers, on an equal footing with the 'old fashioned' guarantees."⁷⁶ This presumption of enforceability is grounded upon the fact that German contract law is less dependent upon legal literalism than much Anglo-American jurisprudence. Contracting parties are given free reign under the *Bürgerliches Gesetzbuch* (BGB), or Civil Code, in structuring their contractual relationships.⁷⁷ For example, unlike the mandates of the statute of frauds in Anglo-American law, German law

request for "adequate assurance." See U.C.C. §§ 2-309, 2-609 (1994). In the area of adequate assurance, a merchant may request security or assurance that the other party intends and is able to perform. It is not inconceivable that one party may grant additional time for performance in exchange for such an assurance.

71. See CISG, *supra* note 9, art. 47, para. 1.

72. See *id.* art. 47, para. 2.

73. See *id.* art. 48, para. 2.

74. See *id.* art. 49, para. 1(b).

75. See *Letters of Responsibility*, *supra* note 48, at 303 (statement of Hannes Schneider) ("[The] *Patronatserklärungen*, are perhaps rather frighteningly, much in use in my country.").

76. *Id.*

77. See Christoph von Teichman, *Germany, Federal Republic*, in 1 LEGAL ASPECTS OF DOING BUSINESS IN WESTERN EUROPE 205, 216 (Dennis Campbell ed., 1983) [hereinafter DOING BUSINESS IN WESTERN EUROPE] ("[T]he parties are not bound to any specific type of contract dealt with in the [Civil Code]."); see also ERNEST C. STIEFFEL, GERMAN COMMERCIAL LAW (1956).

provides that “a merchant’s guarantee is valid even if given only verbally.”⁷⁸ In fact, there are no provisions in the BGB that deal specifically with guarantee-type agreements.⁷⁹ This legal informalism provides parties with greater flexibility to structure transactions and, accordingly, with additional types of instruments to effectuate their intent: “They are at liberty to agree to variants [of accepted contract types] . . . or to develop entirely new types.”⁸⁰ Thus, the evolution and enforceability of comfort-type instruments is a likely response to this underlying informalism in German contract law.

Furthermore, the German approach to contractual liability is more consequence-based than that of the common law system. German law places less emphasis on the types of legal instruments used, the labels applied to these instruments,⁸¹ and the legal meaning of the words used within the instruments. The German approach, rather than literally interpreting the language used, attempts instead to give effect to the purpose of the instruments:

By contrast with . . . English legal doctrine, German courts favor the so-called teleological method of interpretation: rather than restricting themselves to a literal interpretation of the wording of a provision, they tend to consider the purpose of the [statute] and to interpret it in the way best suited to meet that purpose⁸²

Enforceability is therefore unlikely to be determined by formalistic labeling or by a disclaimer that an instrument is an assurance rather than a formal guaranty. Instead, the importance of context in determining actual, subjective intention is the cornerstone of German contract interpretation. Article 133 of the BGB states that “[i]n interpreting a declaration of intention the true intention shall be sought without regard to the declaration’s literal meaning.”⁸³ One commentator has construed article 133 to encourage the interpretation of contracts “in light of [their] contractual economic purposes.”⁸⁴ Thus, the full breadth of a relationship can be relied upon to find contractual intent in an instrument that, on its face, indicates otherwise. This is reflected in the fact that the European guaranty, despite being very

78. von Teichman, *supra* note 77, at 216.

79. See Wolfgang Hering, *The Commercial Laws of Germany*, in 3 DIGEST OF COMMERCIAL LAWS OF THE WORLD 62 (Lester Nelson ed., 1992) (“There are no specific provisions in the Civil or Commercial Code concerning guarantees. Yet, guarantees are as common in Germany as in any other industrialized country.”).

80. von Teichman, *supra* note 77, at 216.

81. The importance of labels and using accepted forms of agreement to ensure enforceability in Anglo-American contract law is often overstated:

Merely terming a document a letter of intent will not be conclusive as to how a court will construe the document. For example, if the document does not clearly and unequivocally indicate that no binding obligations are to arise until a definitive agreement has been reached, a court might look at the intent of the parties and find that the letter of intent constitutes a binding contract.

Harvey L. Temkin, *When Does the “Fat Lady” Sing?: An Analysis of “Agreements in Principle” in Corporate Acquisitions*, 55 FORDHAM L. REV. 125, 129 n.18 (1986) (citing JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 2-7, at 30-33 (2d ed. 1977)).

82. von Teichman, *supra* note 77, at 206.

83. § 133 BÜRGERLICHES GESETZBUCH [BGB] (F.R.G.).

84. NAGLA NASSAR, SANCTITY OF CONTRACTS REVISITED: A STUDY IN THE THEORY AND PRACTICE OF LONG-TERM INTERNATIONAL COMMERCIAL TRANSACTIONS 44 (1995).

short in length, is generally enforceable.

Informal letters of assurance or comfort, generally unenforceable in American and English courts, are more likely to be taken seriously under this purpose-oriented jurisprudence. For example, recording a comfort instrument on the company's financial statements may give it an aura of legal consequence: "[A] letter which does not have to be shown on the balance sheet is usually of questionable value to the bank."⁸⁵ In addition, one commentator on German law reasoned that if a comfort letter given by a parent company stated that it would provide its subsidiary "the financial means" to meet its obligations, then the recipient would have a direct claim against the parent.⁸⁶

In sum, a number of factors in the German legal system weigh in favor of the enforceability of certain "informal" letters used in the business world. First, German jurisprudence encourages the creation of legal hybrids. Second, there is a general belief in the business community that "parents do back their subsidiaries."⁸⁷ Third, there is a general presumption in favor of enforceability. For example, in the area of financial reporting, any uncertainty as to the binding nature of such letters is resolved in favor of reporting them as a potential liability. "[T]he parent [company] must prove that both sides have agreed only to a moral commitment if it wants to avoid" the notation of the assurance on its financial statements.⁸⁸ Given the brevity of formal guaranty instruments, the informal categorization of legal instruments in general, and the underlying teleological jurisprudence, American companies should be cautious in issuing comfort instruments in jurisdictions following the German approach.

Like the German legal system, the French legal system creates a presumption in favor of enforceability. French law approaches the efficacy of informal letters of business in a direct, common-sense way by asking: Would two sophisticated commercial entities intend to create a meaningless, unenforceable instrument? To the French, "the creation [in the commercial world] of a meaningless instrument is unthinkable."⁸⁹ Comfort instruments are more likely to be considered *obligations de faire*⁹⁰ that commit the issuer to some level of performance. In comparing English law with French law one can conclude that the "French analysis of contracts may make the courts [more likely] to enforce promises in a parent company's comfort letter about repaying its subsidiary's debts than in English law."⁹¹ This may even be the case when assurances are made orally. Unlike the common law statute of frauds requirement that guaranty instruments be in writing, the French Civil Code states that "[w]ith respect to merchants, acts of commerce may be

85. *Letters of Responsibility*, *supra* note 48, at 300 (statement of Adrian M.H. Smart).

86. *Id.* at 305 (statement of Hans Schneider).

87. *Id.*

88. *Id.* at 308 (statement of Hans Schneider).

89. *Id.* at 302 (statement of Léon Proscour). For a discussion of the importance of agreement in French jurisprudence as compared to English law, see Anne de Moor, *Contract and Agreement in English and French Law*, 6 OXFORD J. LEGAL STUD. 275, 275-81 (1986).

90. *Obligation de faire* translates as a "commitment to perform."

91. *What Comfort Letters Really Mean*, BUS. L. BRIEF, May 1989, available in LEXIS, News Library, BLB File.

proved by *all* means."⁹²

Like German and French contract law, the Belgian Civil Code reflects a purpose- or consequence-oriented jurisprudence. The language used in the instrument is but one factor influencing interpretation and enforcement decisions. Article 1156 dictates that the jurist seek "the common intention of the contracting parties rather than stop at the *mere literal sense of language*."⁹³ Courts that interpret contracts or instruments must attempt to effectuate the document's intended consequences. In ambiguous cases, the courts are to choose a meaning that "would have some effect" rather than a meaning "which . . . could not produce any [effect]."⁹⁴ Furthermore, the Belgian Civil Code requires all contracts to be executed in good faith⁹⁵ and their interpretations to be supplemented by custom and usage.⁹⁶ Article 1135 states that "[a]greements obligate not only for what is expressed therein, but also for all the consequences which equity, usage or the law gives to an obligation according to its *nature*."⁹⁷ If the essence of a letter is to induce reliance, then the possibility for enforceability exists. Moreover, the facilitating factors of equity and usage may add or subtract from the enforceability decision.

Second order rules of interpretation are also codified in the Belgian Civil Code. First, a counterpart to the English *contra proferentem* rule construes ambiguities in written instruments against the drafters.⁹⁸ Second, "customary usage" and usage found in a particular region are implied in contracts that are created in such a region.⁹⁹ Third, the integrity of the entire instrument is to be maintained. Article 1158 states that terms are to be interpreted in "the sense which is most suitable for the subject-matter of the contract."¹⁰⁰ Courts may use these factors to construe a contract instrument against its issuer and to find its representations enforceable.

Despite the discretion that it allows judges in determining the *essence* of a contract, the Belgian Civil Code also restricts the type of evidence that a court may consider—reducing the potential for contract letter liability emerging from outside of the language of the document. It combines a statute of frauds requirement with a strict parol evidence rule. All contracts for sales of more than three thousand francs must be in writing and executed before a notary or by private signature.¹⁰¹ Oral evidence is inadmissible regardless

92. C. CIV. art. 109 (Fr.) (emphasis added). The greater informality and simplicity of French commercial contracts may also be due to the fact that there are fewer lawyers to consult for legal advice. "Overall, France had fewer legal experts than any other Western countries, 1 per 2000 inhabitants, as against 1 per 1200 in former West Germany and 1 per 500 in the USA." COLLIN RANDLESOME, *BUSINESS CULTURES IN EUROPE* 109 (2d ed. 1993). Alternatively, the fewer attorneys per capita may be due to the fact that business persons are more predisposed to maintain their transactions as agreements between merchants and not between their attorneys.

93. BELGIAN CIVIL CODE [C. CIV.] art. 1156 (Belg.).

94. *Id.* art. 1157.

95. *See id.* art. 1134.

96. *See id.* art. 1135.

97. *Id.* (emphasis added).

98. *See id.* art. 1162.

99. *See id.* arts. 1159–60.

100. *Id.* art. 1158.

101. *See id.* art. 1341.

of whether it contradicts or simply clarifies the written agreement. Furthermore, “[n]o evidence by witnesses against and outside of the content of instruments is allowed, nor as to what is alleged to have been said before, at the time of, or after the making of the instruments.”¹⁰² As a result, the receiver of a comfort instrument is unlikely to be able to reach the evidentiary threshold for enforceability.

The jurisprudence of comfort letter enforceability is still evolving internationally. The parties’ presumption of nonenforceability no longer determines issuer liability in all cases.¹⁰³ In practice, the presumption may be in favor of enforceability. Whereas in common law countries, formality is a prerequisite to enforceability, in civil law countries, the “formal contract is not the dramatic event . . . [A]s a result, the courts in civil law [countries] are more likely to declare the parties legally bound at an earlier stage of the negotiation process than courts in common law countries.”¹⁰⁴ At those earlier stages of negotiation, comfort instruments are likely to be considered in determining precontractual liability. Commercial literature in Spain, for example, has discussed the dilemma that the presumption of nonenforceability has created: Once the legal and business communities infuse these instruments with the trappings of a contractual undertaking, it becomes difficult to avoid attendant promissorial or reliance-based liabilities.¹⁰⁵ The infusion of these trappings is growing more evident on two fronts. First, the business and legal communities are developing standards regarding the contents of such letters. Second, there is increasing incorporation of customized, detailed representations and assurances in the letters. One can argue that the greater the detail and *acceptance* of such letters, the closer they will move into the domain of legally enforceable contractual obligations. The next section analyzes the factors that a court may weigh when rendering an enforceability decision.

B. *Common Factors Affecting Enforceability*

The courts have long looked to the circumstances surrounding the issuance of a written instrument to determine whether the required intent to create legal relations exists. Lord Wilberforce restated the notion of the totality of the circumstances analysis: “In commercial contracts it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the

102. *Id.*

103. This presumption exists because such instruments do not possess the operative words and labels of suretyship. This lack of guaranty-type nomenclature is especially important for the presumption of enforceability in the common law legal system.

104. John Klein & Carla Bachechi, *Precontractual Liability and the Duty of Good Faith Negotiation in International Transactions*, 17 HOUS. J. INT’L L. 1, 17 (1994) (quoting Ralph B. Lake, *Letters of Intent: A Comparative Examination Under English, U.S., French, and West German Law*, 18 GEO. WASH. J. INT’L L. & ECON. 331, 342 (1984)). Klein and Bachechi note that “[c]ivil law jurisdictions have historically proven more receptive to claims based upon precontractual liability.” *Id.* at 4.

105. See Sacasas & Wiesner, *supra* note 2, at 330 n.50 (citing Gurrea, *La Llamada ‘Carta de Confort’ y Su Problemática Jurídica*, 16 REVISTA DE DERECHO BANCARIO Y BURSÁTIL 779 (1984)).

background, the context, the market in which the parties are operating.”¹⁰⁶ Relevant information includes oral representations, prior dealings, usage and custom, reliance, and professional standards.

1. Oral Representations and Prior Dealings

The lack of a writing requirement in the CISG and some civil law systems allows a party to submit evidence to overcome the contractual shortcomings of a comfort instrument. Prior dealings between the parties may be used to bolster the enforceability claim of the comfort letter’s receiver. Prior dealings may be regarded “as establishing a common basis of understanding for [purposes of] interpreting [the parties’] expressions and conduct”¹⁰⁷ relating to the transaction in question. Comfort instruments are generally a product of “vigorous negotiations.”¹⁰⁸ Consequently, freed from the limitations of the parol evidence rule, courts in international contract cases have a greater variety of admissible evidence to consider. Plaintiffs may attempt to use prior dealings and oral representations to show that the comfort instrument, despite its vagueness, was intended to be a legally enforceable assurance.

Other party-specific factors on which courts often focus include the sophistication of the parties¹⁰⁹ and the content of the communications or advice that each of the parties received from its attorneys. If a defendant argues that she did not intend to create a legally binding obligation, then the advice that she received from her legal counsel will be directly relevant to the issue of intent. Also, if the plaintiff argues that she had relied upon the comfort letter, then the advice she received from counsel regarding the enforceability of such a letter will bear upon the reasonableness of her reliance. A Canadian court, holding that such evidence was admissible, concluded that since the plaintiff must prove reliance, “it would be relevant to show that at the time of the loan, the plaintiff had been advised by its solicitor that it could not rely on those letters.”¹¹⁰ Thus, the scope of the comfort letter negotiations, prior dealings, and the legal advice that the parties received are important factors in determining the parties’ states of mind regarding the legality of the comfort instrument.

2. Custom and Usage

Just as domestic contracts are supported by local custom and trade

106. *Reardon Smith Line, Ltd. v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, 996 (Eng. H.L.) (appeal taken from Eng. C.A.).

107. U.C.C. § 1-205(1) (1994).

108. René Sacasas et al., *Keep-Well Letters: The Elusive Contingency*, CPA J., Nov. 1989, at 46, 46 (discussing accountants’ use of comfort letters).

109. In the area of corporate negotiations and acquisitions “some courts have specifically noted that the parties involved are sophisticated business people.” Temkin, *supra* note 81, at 141 n.68.

110. *Zidenburg v. Greenberg*, No. 70300/91Q, 1993 Ont. C.J. LEXIS 2157, at *10 (Ont. Ct. J. Aug. 24, 1993); see also *Bank of New Zealand v. Ginivan* [1991] 1 N.Z.L.R. 178, 181 (C.A. 1990) (holding that guarantee was enforceable because respondents had also received independent legal advice).

usage,¹¹¹ international transactions are formed and performed within a milieu of customary law: "Usages of trade . . . furnish the background and give particular meaning to the language used [in agreements to provide] the framework of common understanding controlling any general rules of law."¹¹² In 1961, Professor Goldstajn boldly stated that "a new law merchant is rapidly developing in the world of international trade. It is time that recognition be given to the existence of an autonomous commercial law that has grown independent of the national systems of law."¹¹³ The enforceability of a commercial instrument such as a comfort letter will be affected by these general customs of international business transactions, the usage of a particular business or trade, and the usage of the locality in which it is to be performed.¹¹⁴

The custom or usage pertaining to the enforceability of comfort instruments is likely to change as they become increasingly detailed and are used as guarantees or assurances. Until the middle of this century, U.S. courts held that once a custom was established, it became "a rule of law that supplemented the common law."¹¹⁵ Business deals have collapsed because of a bank's request that a parent company "effectively act as a guarantor by submitting a 'letter of comfort.'¹¹⁶ The more that such instruments are referred to in legal terminology, the greater the likelihood that custom and usage will evolve so as to support comfort instrument enforceability. One commentator has noted that "the term and concept has been freely adopted in . . . business transactions . . . giving substance to the generalization that such [instruments] provide some *legal* comfort."¹¹⁷ The enforceability of comfort instruments, however, varies from one trade or business to another depending upon its particular customs and usage. For example, a validity letter in asset-based financing is generally considered to be enforceable against the officer or shareholder providing the assurance.¹¹⁸ In contrast, a comfort letter given by a parent company stating that it will monitor the liabilities of a subsidiary is likely to be construed as a nonbinding, good faith

111. See *California Lettuce Growers v. Union Sugar Co.*, 289 P.2d 785, 790 (Cal. 1955) ("It is the general rule that, when there is a known usage of the trade . . . the usage forms part of the contract, and that evidence of usage is always admissible."). For a review of trade usage as applied in U.C.C. § 1-205(4), see Amy H. Kastely, *Stock Equipment for the Bargain in Fact: Trade Usage, "Express Terms," and Consistency Under Section 1-205 of the Uniform Commercial Code*, 64 N.C. L. REV. 777 (1986).

112. U.C.C. § 1-205 cmt. 4 (1994).

113. Alexander Goldstajn, *The New Law Merchant*, 1961 J. BUS. L. 12, 12.

114. See, e.g., U.C.C. § 1-205 cmt. 5 (1994) ("An applicable usage of trade in the place where any part of the performance is to occur shall be used in interpreting the agreement as to that part of the performance.").

115. Elizabeth Warren, *Trade Usage and Parties in the Trade: An Economic Rationale for an Inflexible Rule*, 42 U. PITT. L. REV. 515, 519 (1981) (citation omitted).

116. U.K.: *Investors Threaten Court Action*, SCOT. ON SUNDAY, Apr. 17, 1994, available in LEXIS, News Library, Scotsm File.

117. Sacasas & Wiesner, *supra* note 2, at 337 (emphasis added). In other situations a comfort instrument might not be legally binding but could hold the weight of moral suasion.

118. See ASSET-BASED FINANCING: A TRANSACTIONAL GUIDE, *supra* note 3, § 26 app. at 26-200; see also Peter A. Alces, *The Efficacy of Guaranty Contracts in Sophisticated Commercial Transactions*, 61 N.C. L. REV. 655 (1983) (maintaining that well-structured contracts of guaranty may be enforceable).

assurance.¹¹⁹

3. Reliance

Anglo-American contract law has often used reliance theory to fill in gaps in the enforceability determination. The concept of reliance has been used to overcome shortcomings in contractual intent, lack of consideration, and failure to satisfy statute of frauds requirements. As a result, there are several reasons for avoiding the use of a formal guaranty.¹²⁰ It can induce actual reliance on the part of the comfort instrument receiver, or it can result in a strong case for promissory estoppel.¹²¹ If the failure to use an instrument of formal guaranty was an accommodation to the letter writer for a reason other than liability avoidance, then the use of an informal comfort letter should not be conclusive as to enforceability. It may be shown, however, that the letter writer intended to be bound. Furthermore, proof of reliance would strengthen the plaintiff's case. Such reliance would be shown if the recipient would not have consummated the transaction but for the assurances given in the comfort instrument. For example, the plaintiff in *Lloyd's Bank Canada v. Canada Life Assurance Co.*¹²² argued in favor of reliance liability based upon the issuance of a comfort letter and providing certain oral assurances. "[Lloyd's Bank] alleged that [Continental Bank] made the loan in reliance on comfort letters and related oral assurances given by the defendants . . . to induce the loan. It plead[ed] that those letters and the oral assurances constituted a 'support agreement.'"¹²³ In the common law, liability may be affixed, if not through the clear expression of contractual intent, then by a finding of reasonable reliance. The quasi-contractual nature of comfort instruments makes them susceptible to the ever-expanding doctrines of promissory estoppel and detrimental reliance.¹²⁴

4. Professional Standards

Court decisions may bring greater certainty to the issue of comfort issuer liability. In order to manage such liability, particular groups of comfort issuers have begun to develop guidelines for the contents of their comfort instruments. This standardization of comfort instruments has initially come from professional groups that wish to avoid liability. One commentator has

119. See, e.g., *Kleinwort I* [1988] 1 W.L.R. at 802.

120. Examples include wanting to avoid the entry of a liability on the third party's financial statements and statutory restrictions on the ability of a governmental agency, financial institution, or insurance company to give guaranties. See, e.g., *Lloyd's Bank Can. v. Canada Life Assurance Co.*, No. 18929/87, 1991 Ont. C.J. LEXIS 1015, at *23 (Ont. Ct. J. Oct. 11, 1991) (indicating that insurance companies are prohibited by statute from guaranteeing repayment of third party debt).

121. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

122. *Lloyd's Bank Can. v. Canada Life Assurance Co.*, No. 18929/87, 1990 Ont. C.J. LEXIS 304 (Ont. Ct. J. June 5, 1990).

123. *Id.* at *3-4.

124. See Charles Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52 (1981). *But cf.* Phuong N. Pham, Note, *The Waning of Promissory Estoppel*, 77 CORNELL L. REV. 1263 (1994) (arguing that contemporary commentators overstate expansiveness of courts' use of promissory estoppel).

cited "self-regulatory rules of professional organizations" as a source of international business law.¹²⁵ Both the German Institute of Certified Public Accountants and the American Institute of Certified Public Accountants have issued guidelines and standards for comfort letters. An American Institute task force, anticipating increased liability, recommended restricting the availability of comfort letters from accountants.¹²⁶

In international banking, the Basle Committee on Banking Supervision has developed monitoring guidelines for transnational banking activities.¹²⁷ Its Revised Concordat of 1983¹²⁸ recognized concerns over the use of comfort instruments by parent banks and their subsidiaries and in banking consortiums and joint ventures: "Banks . . . cannot . . . be indifferent to the situation of their joint ventures and may have commitments to these establishments beyond the legal . . . for example through comfort letters."¹²⁹ Individual countries have also acted to regulate these instruments in international commerce. For example, partly in order to preempt the use of comfort instruments as devices to avoid formal guarantees in cross-border financing, the U.S. Congress passed § 13228(b) of the Omnibus Budget Reconciliation Act of 1993.¹³⁰ This section adopts a very broad "guarantor classification rule" that effectively includes comfort letters.¹³¹ The development of these types of professional standards and governmental regulations provides additional sources that may assist a plaintiff in reaching the evidentiary threshold for enforceability.

C. *No Per Se Rules of Enforceability*

The previous review of national laws and common factors pertaining to potential liability for assurances given in informal letters of commerce reveals that there are no per se rules of enforceability. However, as a general rule, the broader and the more vaguely drafted the letter, the lower the likelihood of enforceability. For example, in the area of international project financing, lenders frequently require a comfort letter from principal shareholders in the

125. FILIP DE LY, *INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA* 133 (1992).

126. See Vicky Stamas, *Accountants' Association Plans to Limit Assurances on Official Statements*, BOND BUYER, Oct. 4, 1991, at 1.

127. The Basle Committee is made up of banking regulators from twelve industrialized nations. See generally J.J. Norton, *The Work of the Basle Supervisors Committee on Bank Capital Adequacy and the July 1988 Report on "International Convergence of Capital Measurement and Capital Standards"*, 23 INT'L LAW. 245 (1989) (discussing Basle Committee's initial efforts and subsequent developments setting forth framework for capital adequacy measurement and minimum capital standards).

128. Committee on Banking Regulations and Supervisory Practices, *Revised Basle Concordat on Principles for the Supervision of Banks' Foreign Establishments*, reprinted in 22 I.L.M. 900 (1983).

129. *Id.* at 906; see also Duncan E. Alford, *Basle Committee Minimum Standards: International Regulatory Response to the Failure of BCCI*, 26 GEO. WASH. J. INT'L L. & ECON. 241 (1992).

130. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13228(b), 107 Stat. 312, 494 (1993) (amending 26 U.S.C. § 163(f)(6)(D)(iii) (1994)).

131. See *id.* ("[T]he term 'guarantee' includes any arrangement under which a person (directly or indirectly) through an entity or otherwise, assumes, on a conditional or unconditional basis, the payment of another person's obligation under any circumstances."). See generally Aaron A. Rubinstein & Todd Tuckner, *Financing U.S. Investments After the Revenue Reconciliation Act of 1993*, 25 TAX ADVISER 111, 113 (1994) (explaining that classification of guarantee is so broadly defined that it covers any form of credit support including comfort letters).

hope of obligating the latter to keep the project corporation in sound financial condition. The shareholders' attorneys generally draft these letters with vague assurances. One commentator concluded that "since these obligation clauses are usually very broadly worded, the enforceability of these commitments is often questionable under *any* legal system."¹³²

The initial presumption against enforceability in English and American law was probably due to the vagueness and breadth of the first generation of comfort instruments. Comfort letters were often used to mask fundamental differences between the parties involved in a transaction. The use of comfort letters or letters of assurance to mask gaps in a business deal has been documented:

Comfort letters are a species of those ambiguous declarations which negotiators often use to save a deal threatened by lack of agreement on an important point It is a lawyer's cover-up of a disagreement. The lawyer keeps his fingers crossed and prays that there may never be litigation over the meaning of his handiwork.¹³³

The more detailed a comfort letter, the greater the likelihood that a court will find contractual intent or allow reliance-based recovery. Providing greater contextual detail in a letter "offer[s an attorney] considerable factual representations and promises on which to argue detrimental reliance."¹³⁴ If, for example, the issuer agrees not to sell its ownership interest in a subsidiary or to notify the recipient of any change of ownership, then the operative words of promise and obligation are more likely to be implied. The comfort letter recipient, however, would still have the burden of proving damages related to the breach of the assurance. Would notice have allowed the party to take steps to safeguard her position? The strongest type of representation, short of a formal guaranty, would occur when the letter writer promises to take affirmative steps to ensure that its affiliate meets its obligations. Moreover, language that suggests that a present policy will remain the company's policy until an obligation is satisfied,¹³⁵ or that a parent company will use its "best endeavors"¹³⁶ to assist its subsidiary in the future, would be considered tantamount to a guaranty.

In short, the international business person should operate under the assumption that there are no *per se* rules of enforceability for comfort instruments. As a result, the business person should undertake an analysis of the common factors that courts use to affix liability. She should scrutinize the wording in comfort instruments for potentially enforceable assurances with a full understanding of the legal idiosyncrasies found in the world's different legal systems. She should also consider the impact of the enactment of the CISG because as a source of international contract, the CISG may become the

132. Kimmo Mettälä, *Governing-Law Clauses of Loan Agreements in International Project Financing*, 20 INT'L LAW. 219, 223 (1986) (emphasis added).

133. A.H. Hermann, *Real Comfort in a Comfort Letter*, FIN. TIMES, Feb. 4, 1988, at 13, available in LEXIS, News Library, Fintme File.

134. Sacasas & Wiesner, *supra* note 2, at 335 (quoting Gilbert, *Comfort Letters: A Banker's View*, 64 J. COM. BANK LENDING 48 (1982)).

135. See *What Comfort Letters Really Mean*, *supra* note 91 (arguing that statement of future intent of corporate policy should be enforceable).

136. *Bank of New Zealand v. Ginivan* [1991] 1 N.Z.L.R. 178, 179 (C.A. 1990).

vehicle for comfort instrument enforceability. With this review in mind, the remainder of this Article will explore the substance and relevance of the CISG to the future of comfort instrument enforceability.

III. THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: A POSSIBLE INTERNATIONAL RESOLUTION OF COMFORT INSTRUMENT ENFORCEABILITY

[T]he interest in general principles of law both measures the extent of convergence of legal rules and, under appropriate conditions, facilitates further convergence.¹³⁷

The issue of comfort instrument enforceability is considerably more complex within an international context than in one's own national legal system. Idiosyncrasies found in most national legal systems make the use of foreign counsel in international contract negotiations a necessity. However, the movement towards convergence among the world's different legal systems in the area of transactional law offers hope for a less complicated future.

The impetus to unify contract law stems from three sources: the increase in economic and legal unions, most noticeably in Europe; the use of "neutral" country laws; and the increased recognition of general principles of contract law. The most profound evidence of the move towards the unification of contract law is the ratification of the CISG. The development of a new contracts jurisprudence to interpret and bolster the CISG is likely to have important consequences for comfort instrument enforceability. In the long term, the movement towards the internationalization of contract law offers the hope for a more unified approach to comfort instrument enforceability. In the short term, however, the ratification of the CISG, coupled with the existing differences in national legal systems, further complicates the issue of enforceability. The following section will first review the internationalization of contract law through the enactment of the CISG and the use of general principles. The section will then conclude with a review of the informality of contract formation under the CISG and its potential impact on comfort instrument enforceability.

A. *History and Underlying Principles*

The CISG is the most recent attempt at contract law unification, which reaches back to the medieval *lex mercatoria*. "Besides retention of the principle of the freedom of contract . . . [its] essential characteristics are simplicity, practicality and clarity. It is free of legal short-hand, free of complicated legal theory and easy for businessmen to understand."¹³⁸ A quest for uniformity in international business transactions motivated states to

137. John H. Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 STAN. J. INT'L L. 357, 377 (1981).

138. Kazuaki Sono, *The Vienna Sales Convention: History and Perspective*, in INTERNATIONAL SALE OF GOODS 1, 7 (Petar Sarcevic & Paul Volken eds., 1986). Sono further notes: "That the Convention is free from dogma is important because it is, after all, businessmen who must understand the meaning of the provisions." *Id.*

adopt the CISG. Yet the CISG was forged from the world's different national legal systems. In order to promote uniformity, it had to detach itself from the idiosyncrasies of any one legal system; however, it is a product of the civil, socialist, and common law systems of contract. As such, it is a unique hybrid of all three.

The Convention is meant to be interpreted based upon its uniqueness and not its similarities to any one of the systems from which it was created. Article 7 mandates that the Convention be interpreted in a way that would "promote uniformity in its application."¹³⁹ One commentator has noted that this dictate of uniformity was meant to allow individual judges to sever their thinking from domestic law mind-sets. It was an attempt "to free judges, particularly in countries of the common law tradition, from the iron chains of precedents, thus permitting them to examine foreign cases as well in order to attain uniformity."¹⁴⁰ Thus, national *stare decisis* is to be supplanted by an informal supranational *stare decisis*.

1. *CISG Past: Sources and Scope*

The simplicity of the Convention masks fundamental differences between the positions of its civil law and common law signatories. One commentator has noted that "divergency in the interpretations of civil law and common law judges [seems] to be inevitable."¹⁴¹ In order to avoid this divergence, common law and civil law judges must alter their approaches in a number of ways. First, the civil law judge is asked to search other cases throughout the world and follow precedent in much the same way the common law judge does within her national system. Second, the common law judge is asked to look to the *travaux préparatoires*, or legislative history, and to general principles when making a decision involving an original interpretation of the Convention. These are the techniques of interpretation in which civil law judges feel most at home:

It is common knowledge that common law judges seem traditionally less willing to take recourse to preparatory materials or to refer to the genesis of a statute [In contrast,] civil law judges are more willing to refer to the preparatory work or legal history of a text than their common law colleagues Continental European judges are far less scrupulous about taking a functional approach than their English or American counterparts.¹⁴²

The job of the American jurist has been made easier in a number of ways. First, "many rules of the Convention [are] . . . sufficiently akin [to the UCC] so that experience with one will be readily translatable for use with the other."¹⁴³ Second, the language is simple and not nation-specific, which invites original interpretation. "To prevent problems of . . . interpretation the

139. CISG, *supra* note 9, art. 7, para. 1.

140. Sono, *supra* note 138, at 8.

141. Paul Volken, *The Vienna Convention: Scope, Interpretation, and Gap-Filling*, in *INTERNATIONAL SALE OF GOODS*, *supra* note 138, at 19, 38.

142. *Id.* at 39-40.

143. Richard D. Kearney, Book Review, 78 AM. J. INT'L L. 289, 292 (1984).

Convention's language is terse and clear, and its concepts are uncomplicated."¹⁴⁴ Furthermore, the rules of the Convention are expressed in terms of the events found generally in international trade and are not tied to thematic, abstract elements of contract law.¹⁴⁵ Third, the Convention provides a cross-referenced road map for the jurist to follow in reasoning by analogy. There is a "considerable amount of cross-reference to other pertinent articles, which reduces substantially that perennial difficulty encountered [by common law judges and lawyers] in dealing with civil law."¹⁴⁶

The backdrop to the CISG was international commercial law, or the *lex mercatoria*. The *lex mercatoria* can be seen as the world's first uniform law, albeit in an uncodified form. Merchants have long developed usage and practice that have given them the ability to communicate with one another without the distractions presented by the nuances of culture, language, and national legal systems. Professor Honnold has noted that successful sales law unification entails a body of rules that are event-specific and devoid of unnecessary legalese. An international sales law "needs to cut out legal idioms, and write the rules in terms of commercial events that happen around the world. Without knowing the languages of the world you can be sure that there have to be words for these commercial events wherever there is commerce."¹⁴⁷

Professor Goldstajn has attributed the current rise of a supranational commercial law to two key factors. First, the "optional character of the law relating to the sale of goods"¹⁴⁸ has enabled merchants to transform customary law. Under international law, most rules of sales law are not immutable and can be varied by agreement. The CISG has preserved the optional nature of international sales law. The CISG allows the parties to an international sales contract to "exclude the application of [the] Convention or . . . derogate from or vary the effect of any of its provisions."¹⁴⁹

The second factor that Professor Goldstajn has identified as contributing to the development of an independent international sales law is the increased use of arbitration to settle contractual disputes. The Council of Europe, for example, "started work as early as 1959 on the preparation of a convention on arbitration."¹⁵⁰ The European arbitration convention is to "a large extent based on the various legal systems involved and on the fruit of practical experience."¹⁵¹ Commercial arbitrators are more likely to make decisions based upon proarbitration norms than on any predisposition toward a domestic

144. Sara G. Zwart, *The New International Law of Sales: A Marriage Between Socialist, Third World, Common and Civil Law Principles*, 13 N.C. J. INT'L L. & COM. REG. 109, 112 (1988).

145. See Kearney, *supra* note 143, at 291 ("[T]he statement of [a] rule is often expressed in the context of the events that trigger the rule.").

146. *Id.* at 291-92.

147. John Honnold, *Beyond the Reef: Uniform Law for International Trade*, Lecture at the University of Hawaii (May 13, 1986), *quoted in* Amy H. Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 WASH. L. REV. 607, 609 nn.11-12 (1988).

148. Goldstajn, *supra* note 113, at 12.

149. CISG, *supra* note 9, art. 6.

150. COUNCIL OF EUR., *LEGAL CO-OPERATION IN EUROPE, 1957-1982*, at 37 (1983).

151. *Id.* at 38.

law.¹⁵² In turn, this developing international law of commerce has infused domestic legal systems. Professor Schmitthoff has noted that “[t]he legal techniques of carrying on international trade are the same everywhere, irrespective of the political, ideological or economic orientation of the countries [involved].”¹⁵³ These factors, along with widely accepted supranational rules of commerce, have led to the creation of a law of business for international transactions.

The movement toward free trade areas has also directly impacted the unification of sales and contract law. Nowhere has the need for harmonization of national laws been more pronounced than in Europe.¹⁵⁴ “Typical features of the current business scene in Europe include a growing number of international commercial transactions and the expansion of trade as a result of economic interdependence At the same time, there are still broad discrepancies between legal systems”¹⁵⁵ The Council of Europe has specifically addressed the importance of uniform rules and their uniform application.¹⁵⁶

However, in spite of these sources of internationalization, the CISG has failed to adopt formal recommendations to encourage information exchanges that would have facilitated the uniform interpretation of supranational legislation.¹⁵⁷ The Council of Europe’s commitment to uniformity in interpretation would be served by adopting enhanced procedures for communications between member states. In the absence of such procedures, it will be interesting to see whether European signatories to the CISG will keep each other informed of CISG-related decisions through their existing European channels of communication.¹⁵⁸

152. Cf. Goldstajn, *supra* note 113, at 12 (discussing “peculiarities of the various national systems of law”).

153. C.M. SCHMITTOFF, *COMMERCIAL LAW IN A CHANGING ECONOMIC CLIMATE* 18–20 (2d ed. 1981).

154. See Jack J. Coe, Jr., *Western Europe: A Preface and Primer*, in *DOING BUSINESS IN WESTERN EUROPE*, *supra* note 77, at 1, 1 (“The complexity and interdependence of legal, political, monetary and economic systems which characterizes the modern business arena generally are epitomised in Europe.”).

155. COUNCIL OF EUR., *supra* note 150, at 43.

156. An example of a specific attempt at harmonization is Resolution (78)3 on Penal Clauses in Civil Law. It was adopted by the Council of Europe to harmonize discrepancies in national laws pertaining to contractual penalty clauses for untimely performance. The Resolution contains eight rules to guide member states. Under the Resolution, courts would be allowed to adjust any penalty clause to a more appropriate amount. For example, article 7 of the Resolution provides that the “sum stipulated may be reduced by the court when it is manifestly excessive.” COUNCIL OF EUR., *PENAL CLAUSES IN CIVIL LAW* 6–7 (1978). This is contrary to the laws of Belgium and England where courts are placed in an all-or-nothing situation. In those countries, if the clause is considered a legitimate liquidated damage provision, then it must be enforced. If a clause is considered to be an unfair penalty, then it must be stricken. There is no provision for a reduction or adjustment of the amount in such clauses.

157. One commentator predicts that the United Nations Commission on International Trade Law (UNCITRAL) will continue to monitor the application of and disseminate information on the CISG: “The Secretariat already has started to monitor the implementation of the Convention, and no doubt will find ways to collect and disseminate interpretations elsewhere.” Zwart, *supra* note 144, at 127.

158. Private sources may satisfy the courts’ need to stay informed of foreign legal decisions when interpreting and applying the CISG. For example, the *Journal of Law and Commerce* announced in a 1993 issue that it intended to “feature English translations of foreign court decisions interpreting the United Nations Convention on Contracts for the International Sale of Goods.” 12 J.L. & COM. 237 (1993).

2. CISG Present: Application and Motivation

The CISG is only the most recent attempt at unifying international commercial law.¹⁵⁹ The most apparent problem, however, with this attempt to unify commercial law is that it has to be applied through a nonunified court system. The Convention envisioned the use of an informal system of stare decisis to help ensure uniformity of interpretation. However, the potential for diverging interpretations by national courts has proven to be a problem of all international uniform laws.¹⁶⁰

The drafters envisioned that the national trial courts called on to interpret the Convention would act as informal international appellate courts. These courts were seen to have two primary functions. First, they would look to decisions of foreign courts for guidance. Second, they would actively unify international sales law by distinguishing seemingly inconsistent prior decisions and by harmonizing differences in foreign interpretations. The preamble to the Convention envisions national courts "contribut[ing] to the removal of legal barriers in international trade" by performing these appellate functions.¹⁶¹ In sum, the removal of legal barriers to trade is to be accomplished by interpreting the Convention with "regard . . . to its international character and to the need to promote uniformity in its application."¹⁶²

In reality, the Convention exhibits characteristics of acute legal schizophrenia. It is a product of the rules and exceptions of various national legal systems, including the civil, common law, and socialist systems.¹⁶³ In its application, however, it is intended to divorce itself from the idiosyncratic meanings of the legal systems from which it came. The rules and terms of the Convention are to be given original interpretation. A priori meanings taken from national legal systems are to be abandoned in favor of independent meanings consistent with the Convention's objectives.¹⁶⁴ These objectives include the establishment of a "New International Economic Order"¹⁶⁵ and the creation of a uniform international law of sales. Article 7(2) mandates that

159. See, e.g., FRITZ ENDERLEIN & DIETRICH MASKOW, UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS 1 (1992) ("Work on the unification of sales law started in the 1920s but not until 1972 did the laws on sale adopted at a diplomatic conference in the Hague in 1964 . . . enter into force between a few states . . ."); KRITZER, *supra* note 9, at app. B at B-1 ("The 1980 Convention resulted from work instituted in 1968 by the United Nations Commission on International Trade Law (UNCITRAL)."); see also M.J. Bonell, *Is It Feasible to Elaborate Uniform Rules Governing the Relations Between Principal and Agent?*, 1 UNIFORM L. REV. 52 (1984).

160. See ENDERLEIN & MASKOW, *supra* note 159, at 7.

161. CISG, *supra* note 9, pmb1. This would be accomplished by taking "into account the different social, economic and legal systems." *Id.*

162. *Id.* art. 7, para. 1.

163. See ENDERLEIN & MASKOW, *supra* note 159, at 14 ("[T]he character of the whole regulation as a compromise is reflected by the individual norms, by combining different principles, e.g. as rules or exceptions, from which the various legal systems proceed.").

164. See *id.* at 15. Legislative history is one device used to determine the intent of the drafters of the Convention. For the legislative history of the CISG, see *United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records*, U.N. Doc. A/CONF. 97/19 (E.81.IV.3); see also JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES (1989).

165. CISG, *supra* note 9, pmb1.

interpretation of the Convention is to be guided by its general principles and by the rules of private international law. Matters of interpretation are “to be settled in conformity with the *general principles* on which it is based”¹⁶⁶ or, failing that, with general principles of international contract law.

The unifying principles that govern the interpretation of the Convention include the unification of law,¹⁶⁷ the internationally recognized principle of good faith,¹⁶⁸ and the increase in the certainty and predictability of international transactions.¹⁶⁹ Secondary norms of interpretation include filling gaps with internal references, analogy, and the use of the international reasonable person standard. In filling gaps in the Convention, courts are to use the techniques of analogy and expansive construction in order to promote original, uniform interpretations.¹⁷⁰ Article 9(2) authorizes the courts to imply terms “which in international trade [are] widely known . . . and regularly observed.”¹⁷¹ The Convention makes clear that the customs and usage are to be international in character and shall preempt any conflicting national equivalents. The parties must submit evidence that establishes the putative custom or usage as a “rule[] governing international trade and not just domestic transactions.”¹⁷²

In interpreting the Convention the jurist should make use of both civil and common law interpretive tools. The courts should look within and outside the Convention for uniform, rational interpretations.¹⁷³ From a civil law standpoint, the courts should look to interpret each article of the Convention in order to maintain its internal integrity. In interpreting an article, the courts should look to the meaning of other articles and their relationship to the one in question.

Common law interpretation should use external principles to dress the newly crowned “emperor”¹⁷⁴ of international sales law. By way of comparison, Professor Hillman describes the UCC’s interpretive approach as

166. CISG, *supra* note 9, art. 7, para. 2 (emphasis added).

167. *See id.* art. 7, para. 2 (noting “need to promote uniformity in its application”); *id.* pmb1. (noting “adoption of uniform rules”).

168. *See* ENDERLEIN & MASKOW, *supra* note 159, at 57 (“National *measures* for a conduct based on good faith are thus only relevant insofar as they are also the recognized measure for international trade.”).

169. *See id.* at 59 (“Another criterion to be conceived as a general principle of the Convention, at least when it comes to assessing the scope of the legal consequences which are linked to non-conformance and/or failure of a party or to the overall legal consequences, can be the *predictability of effects*.”).

170. *See id.* at 58.

171. CISG, *supra* note 9, art. 9, para. 2. Quintessential examples of such universally accepted trade usages include the International Chamber of Commerce’s rules pertaining to trade terms and letters of credit. *See* INTERNATIONAL CHAMBER OF COMMERCE, UNIFORM CUSTOMS AND PRACTICES FOR DOCUMENTARY CREDITS (1994).

172. ENDERLEIN & MASKOW, *supra* note 159, at 70.

173. *See* 1 GUIDE TO THE INTERNATIONAL SALE OF GOODS CONVENTION 101.011 (William A. Hancock ed., 1996) [hereinafter GUIDE TO THE CISG] (“[R]eference [can be made] to external legal principles—the common law approach, or by internal analogy—the civil law approach.”).

174. “Emperor” is a reference to Professor Leff’s seminal work on unconscionability. *See* Arthur Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485 (1967). This reference serves two purposes: to note the potential for the ratification of the CISG as a watershed in international contract law (as was the UCC’s adoption of the doctrine of unconscionability) and to provide the doctrine of unconscionability as an example of an external principle that may be used in the interpretive process.

a combination of methods found in the common and civil laws. He advises: "Look first at the explicit language of the Code, next to the Code's purposes and policies and finally, to the common law."¹⁷⁵ This approach is adopted under articles 7(1) and 7(2) of the Convention and consists of a number of steps. First, the courts are to look to the express language of the Convention and reason by analogy among its different provisions. Second, the courts are to advance the general principles upon which the Convention was drafted when making such an interpretation.¹⁷⁶ Third, if an interpretation is not clear, the court is to make use of private international law as defined in a relevant national legal system.¹⁷⁷

The quest for uniform application of the CISG will not be a smooth one. The threat of national courts placing a "domestic gloss"¹⁷⁸ on cases of first impression is real. The ultimate impact of domestically slanted opinions will depend on the soundness of their reasoning and analysis. Ultimately, the way in which foreign courts reconcile divergent opinions will determine if uniformity of application will be achieved.

[A firm] foundation can only be built if courts interpreting the CISG provide detailed and convincing analyses. Such detailed and convincing analyses . . . will consider the pertinent provisions of [the] CISG . . . and will consider the interplay between them. They [should] also include reference to . . . [its] legislative history . . . and to scholarly articles . . . In so doing, the decisions will have a logic and rationale which will be persuasive of their own accord The very compromise that led to CISG's creation will lead to results in its application which embody these compromises.¹⁷⁹

Fortunately, courts concerned with uniform application of the CISG have a number of techniques and tools at their disposal. The first is to use the CISG as a fully integrated statute. This will allow a court to use unrelated or tangentially related articles of the Convention to interpret a given article without recourse to "domestic gloss." Second, the legislative history of both the Convention and previous attempts at contract law harmonization will provide ready-made rationales that will help bridge the divergence among

175. Robert A. Hillman, *Construction of the Uniform Commercial Code: U.C.C. Section 1-103 and 'Code' Methodology*, 18 B.C. INDUS. & COM. L. REV. 655, 678 (1977).

176. Article 7(1) states that interpretations of the Convention should pay due regard "to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." CISG, *supra* note 9, art. 7, para. 1 (emphasis added).

177. Article 7(2) states that as a final resort, interpretation is to be based upon "conformity with the law applicable by virtue of the rules of private international law." *Id.* art. 7, para. 2. Uniformity should be advanced by the fact that certain principles, such as the duty of good faith and fairness in the exchange, can be found in almost all national legal systems.

178. Paul Amato, *U.N. Convention on Contracts for the International Sale of Goods—The Open Price Term and Uniform Application: An Early Interpretation by the Hungarian Courts*, 13 J.L. & COM. 1, 26 (1993). A similar concern can be analogized from the adoption of the UCC by the fifty states. The purposes given for the UCC can be applied to the aim of uniformity envisioned by the drafters of the CISG:

Underlying purposes and policies of this Act are,

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

U.C.C. § 1-102(2) (1994).

179. Amato, *supra* note 178, at 28-29.

national legal systems. Third, a court may seek the guidance of the universalized reasonable person as a device for supranational interpretation. Employing international usage and custom in conjunction with a notion of the internationalized "reasonable person"¹⁸⁰ will help courts to avoid national legal bias. Finally, uncovering and using general principles of contract law, such as good faith and fair dealing, will help internationalize judicial interpretation of the Convention.

The path to uniformity in the application of the Convention is likely to be a rocky one, given the nuances of meaning and the differences among the national legal systems. The ultimate success of the Convention may turn on the benefits that it bestows upon commercial parties to "be able to fashion transactions under a neutral international body of law."¹⁸¹ The Convention promotes this benefit by facilitating contracts that otherwise would have been precluded because of disagreement over the choice of law. Article 7 of the Convention, for example, implies that national courts have an obligation to recognize foreign court decisions by stating that the Convention should be interpreted with regard to its "international character and to the need to promote uniformity in its application."¹⁸²

One area of contract law that the Convention needs to unify is the disparate treatment of comfort instruments. Multi-jurisdictional uniformity can be seen in American states' interpretation of the UCC and the European Union's meshing of national and supranational legal systems.¹⁸³ These examples of multi-jurisdictional uniformity are more likely to be due to other factors, such as the formal nature of *stare decisis* in the United States and the enactment of a formal legal framework in Europe. Nonetheless, the quest for multi-jurisdictional uniformity is not without hope or precedent.

The move toward uniformity is supported by several factors. First, the principle of international comity should encourage judicial deference to opinions of foreign courts. In *Hilton v. Guyot*, the U.S. Supreme Court explained the importance and meaning of comity: "Comity is neither a matter of absolute obligation, nor of mere courtesy and goodwill."¹⁸⁴ To ignore previously rendered foreign court decisions would "adversely affect the integrity of the principle of comity."¹⁸⁵ Consequently, comity may increase uniformity. Second, a related principle and a cornerstone of civil law jurisprudence is the use of scholarly writings¹⁸⁶ and legislative history. The

180. CISG, *supra* note 9, art. 8, para. 2; *see also* Amato, *supra* note 178, at 25.

181. Michael Stonberg, *Drafting Contracts Under the Convention on Contracts for the International Sale of Goods*, 3 FLA. J. INT'L L. 245, 251 (1988).

182. CISG, *supra* note 9, art. 7, para. 1.

183. *See* V. Susanne Cook, *The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 50 U. PITT. L. REV. 197, 200 (1988).

184. 159 U.S. 113, 163-64 (1895); *see also* Societe Nationale Industrielle Aerospatiale v. United States Dist. Court, 428 U.S. 522 (1987) (explaining comity and application of Hague Evidence Convention in United States).

185. Larry A. DiMatteo & Kenneth B. Furry, Note, *Reciprocity: A Workable Standard for Foreign Government Antitrust Standing?*, 15 CORNELL INT'L L.J. 355, 370 (1982).

186. *See* John Honnold, *The Sales Convention in Action—Uniform International Words: Uniform Application?*, 8 J.L. & COM. 207, 208 (1988) ("Traditional barriers to the use of scholarly writing[s] in legal development broke down long ago in [the United States] and [are] breaking down in citadels of literalism in other parts of the common-law world.").

use of such common sources should positively 'impact the convergence of national court interpretations of the Convention. Third, the language of the Convention was specifically chosen to avoid nationally based meanings. The courts are invited to develop an original meaning for the words and articles of the Convention.¹⁸⁷ Fourth, customary international law pertaining to treaty construction encourages uniformity of construction. The Vienna Convention on the Law of Treaties directs the initial interpretive inquiry to focus on the "ordinary meaning" of the Convention's terms in the "context and in the light of its object and purpose."¹⁸⁸ Furthermore, the Vienna Treaty Convention "views subsequent judicial decisions as relevant evidence"¹⁸⁹ in the subsequent application of the Convention.

Courts will ideally look to the general principles of treaty interpretation to foster a uniform application. These principles include the reading of the Convention independently of nation-specific meanings. The Convention should be read with reference to its internal "structure and [the] logical interrelationship of . . . [its words] and articles."¹⁹⁰ This approach will be more difficult for common law judges. Civil law judges are adept at reasoning by analogy within the confines of a code because they generally decide civil law cases by reference, at least tangentially, to some article of a national code. In contrast, common law judges often have looked outside of a given code to external principles and sources in order to fill in gaps. Thus, as Professor Honnold notes, the success of uniformity of application will be decided by the ability of common law judges "to resist hasty recourse to domestic rules, and instead to develop the approach . . . of gap filling by analogical application of the [Convention] in order to effectuate its purpose."¹⁹¹

Fortunately, a number of English court cases have upheld the notion that preserving the uniformity of international conventions is a paramount goal of national courts. The House of Lords in *Midland Silicones, Ltd. v. Scruttons, Ltd.* stated that in the application of an international convention by different national courts, "it is very desirable that the same conclusions should be reached in whatever jurisdiction the question arises."¹⁹² The importance of international uniformity of interpretation was reiterated by Lord Diplock in the 1980 case of *Fothergill v. Monarch Airlines, Ltd.*: "The language of an international convention is addressed to a much wider and varied judicial audience . . . [than] purely domestic law. It should be interpreted . . . unconstrained by technical rules of English law . . . on broad principles of general acceptance."¹⁹³

In the short term, the internationalization of contract law presents a

187. The drafters of the Convention intentionally attempted "to replace local legal idioms with references to *facts of commercial life.*" *Id.*

188. Vienna Convention on the Law of Treaties, May 22, 1969, art. 31 para. 1, U.N. Doc. A/CONF.39/47 (1989), reprinted in 8 I.L.M. 679 (1969).

189. Cook, *supra* note 183, at 210.

190. *Id.* at 203.

191. Honnold, *supra* note 186, at 211.

192. [1962] 1 App. Cas. 446, 471 (1961) (appeal taken from Eng. C.A.) (applying Hague Rules).

193. [1981] 1 App. Cas. 251, 282 (1980) (appeal taken from Eng. C.A.).

complicated duality.¹⁹⁴ In the hope of simplification and uniformity in the long term, there is a likelihood of increased complexity in the short term. Until the jurisprudence surrounding the CISG is universally accepted with uniform interpretation and application of its provisions, the international business person will have to confront a number of contract law regimes. The international lawyer will be “called upon to synthesize diverse and sometimes conflicting national and supranational policies and supporting legal rules.”¹⁹⁵ For example, a practitioner in Europe will need to be familiar with domestic laws, the law of the European Union, and the CISG. This is the state of the current legal milieu in which issuers of international comfort instruments are to be judged. On the positive side, courts will have another opportunity to reexamine the degree of clarity and intent needed to make these instruments enforceable. The use of the CISG’s notion of *original interpretation* may unify the diverging national opinions regarding comfort letter enforceability.

3. CISG Future: Prospects and Expansion

All legal systems look to commercial practice, trade usage, and custom to breathe meaning into contracts. The objective theory of contract describes the reasonable person as possessing the knowledge and sophistication of the average business person in a given trade or profession. This knowledge includes the meanings, trade usage, and practices generally known and accepted in that business or profession. This knowledge is the merchant’s tool to communicate and to effectuate commerce. In the Middle Ages, usage and practice became a portable law that merchants carried with them from town to town. “The merchants carried their law, as it were, in the same consignment as their goods, and both law and goods remained in the places where they traded and became part of the general stock of the country.”¹⁹⁶ This base of knowledge is implied into merchants’ contracts to imbue express terms with their technical or trade meanings and to imply usage and custom to fill in gaps. The importance of trade usage in contractual interpretation was adopted by the CISG. Article 8 states that in determining the knowledge of the reasonable person “due consideration is to be given to all relevant circumstances including . . . usages and any subsequent conduct of the parties.”¹⁹⁷ Article 9 solidifies the binding nature of trade usage in

194. For an exploration of the notion of an “international law of contracts” in the setting of a nation-private party contract, see A. A. Fatouros, *International Law and the Internationalized Contract*, 74 AM. J. INT’L L. 134, 137 (1980).

195. Coe, *supra* note 154, at 1.

196. WYNDHAM A. BEWES, *THE ROMANCE OF THE LAW MERCHANT* at vi (1923). The view of the new *lex mercatoria* as a modern day descendant of the Roman *ius gentium* and the medieval law merchant is not without opposition. “Roman law *ius gentium* and medieval law may not be invoked as historical precedents of an autonomous system of international business law.” DE LY, *supra* note 125, at 54. The common law has long seen custom and usage as an independent source of law. “Once the custom was proven . . . it became an independent source of obligation: a rule of law that supplemented the common law.” Elizabeth Warren, *Trade Usage and Parties in the Trade: An Economic Rationale for an Inflexible Rule*, 42 U. PRTT. L. REV. 515, 519 (1981); see, e.g., *Walls v. Bailey*, 49 N.Y. 464 (1872).

197. CISG, *supra* note 9, art. 8, para. 2. The conduct of the parties and their statements are to be interpreted as a reasonable person would have interpreted them in that trade. “[S]tatements made by and other conduct of a party are to be interpreted according to the understanding that a *reasonable person* of

international contracts:

The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or *ought to have known* and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the *particular trade* concerned.¹⁹³

An International Chamber of Commerce (ICC) arbitration tribunal posed an interesting question regarding trade usage in relation to the CISG: Can the CISG itself be considered a usage of trade and be applied outside the scope of its direct jurisdiction? Can it be used within domestic law as evidence of trade usage in the area of international transactions? The tribunal reasoned that "there is no better source to determine the prevailing trade usages than the terms of the [CISG]."¹⁹⁹ As such, the Convention can be implied into international contracts not only as substantive law but also "as the best available evidence of international usage of trade."²⁰⁰ The issue in this ICC arbitration case was the type of notice required regarding the non-conformity of certain goods. Instead of looking for guidance in the domestic law, the arbitrators looked to the CISG as a convenient tool to determine customary notice practice.²⁰¹ The two-year statute of limitations provision for giving notice on nonconformity in the CISG is generally longer than those found in most domestic laws.²⁰² For example, the Danish Sales Act of 1906 provides for a one-year limit to raise claims of defects.²⁰³ The statutory period under the German Civil Code time-bars claims "after only six months."²⁰⁴ An arbitrator or judge may be tempted to choose between the different notice provisions found in the CISG and domestic law in order to achieve a certain result. "[T]he Convention may be applied virtually anytime an arbitrator [or judge] believes that it produces the proper result."²⁰⁵ The ICC Arbitration Tribunal adopted just such a position.

The Tribunal finds that there is no better source to determine the prevailing trade usages than the terms of the [CISG]. . . . This is so even though neither [the buyer nor seller are from signatory countries]. If they were, the Convention might be applicable to this case as a matter of law and not only as reflecting trade usages.²⁰⁶

the same kind as the other party would have had in the same circumstances." *Id.* (emphasis added).

198. *Id.* art. 9, para. 2 (emphasis added).

199. Seller v. Buyer, Int'l Comm. Arb. No. 5713 (1989), reprinted in 15 Y.B. COM. ARB. 70 (1990).

200. Ronald A. Brand & Harry M. Flechner, *Arbitration and Contract Formation in International Trade: First Interpretations of the UN Sales Convention*, 12 J.L. & COM. 239, 258 (1993).

201. The application of the CISG as trade usage in the area of notice on non-conformity was criticized by Richard Hyland as an improper representation of usage: "[T]he source of CISG's conformity provisions was not a uniform commercial practice, as found . . . in standard terms frequently employed in international commercial contracts." Richard Hyland, *ICC Arbitration Case No. 5713 of 1989*, in KRITZER, *supra* note 9, at 3 (Supp. 9 Apr. 1994) (Case Commentary: France).

202. See CISG, *supra* note 9, art. 39, para. 2.

203. See Erling Borchert, *Denmark*, in 1 DOING BUSINESS IN WESTERN EUROPE, *supra* note 77, at 77, 86; see also *id.* at 47 (Supp. 1987).

204. von Teichman, *supra* note 77, at 218.

205. Hyland, *supra* note 201, at 7.

206. Seller v. Buyer, Int'l Comm. Arb. No. 5713 (1989), reprinted in 15 Y.B. COM. ARB. 70, 72 (1990).

One commentator asks whether the Convention can provide “para-legal norms” in contract negotiations and dispute resolution. He concludes that “general conditions embodied in treaties are regarded as evidence of trade usage.”²⁰⁷

The seeds for evading domestic laws when it is convenient to do so can be found in the Danish Sales Act. The rules of the Sales Act are not immutable and “may be modified by way of agreement or by commercial usage.”²⁰⁸ The recognition of the CISG notice provision as representative of commercial usage would allow a court to extend the limitations period from one to two years and thereby prolong the buyer’s ability to bring suit. Thus, the CISG may be seen as a vehicle for a new international law merchant.²⁰⁹ Like the medieval *lex mercatoria*, it can be seen as “a collection of usage . . . a sort of international custom”²¹⁰ that international merchants may use in their transactions. In the framework of a new international law merchant, the treatment of comfort instruments under the CISG could lead to their recognition as enforceable instruments of international custom or usage. This could result in two regimes of enforceability: one under the decisional law of a given national system and a second under the CISG.

The Convention may act not only as a source of customary international law or usage, but also as a vehicle to transform substantive national law. For example, Norway has enacted the Convention as its domestic law. The Convention’s grounding in generally accepted principles of contract law makes a reconciliation between the CISG and most national laws a much less daunting prospect. Jan Hellner sees such a possibility for a convergence of German law and the CISG: “Since the Convention . . . to a large extent applies general principles of contract to sales, the Convention’s substantive contents can fairly easily be reconciled with the previous principles of German law, which in the main are also general and abstract.”²¹¹ Finland and Sweden have also revised their domestic sales laws in light of the Convention.²¹² Developing countries still struggling to formalize their substantive laws may look to the Convention as an international “model” statute.²¹³ “It provides these countries with a ready-made legal framework

207. NASSAR, *supra* note 84, at 101.

208. Borchers, *supra* note 203, at 86.

209. The CISG can be seen as two distinct sources of international law. First, it is formal domestic law when ratified as an international convention or statute. Second, the CISG can be viewed as evidence of international customary law. The importance of the latter should not be underrated. “[T]here are [those] who . . . regard custom as the prior source of international law, if not indeed the sole source.” TEKLEWOLD GEBREHANA, *DUTY TO NEGOTIATE: AN ELEMENT OF INTERNATIONAL LAW* 18 (1978).

210. HENRI PIRENNE, *ECONOMIC AND SOCIAL HISTORY OF MEDIEVAL EUROPE* 53 (1936).

211. Jan Hellner, *The UN Convention on the International Sale of Goods: Its Influence on National Sales and Contract Law*, in *COMMERCIAL AND CONSUMER LAW: NATIONAL AND INTERNATIONAL DIMENSIONS* 41, 47 (Ross Cranston & Roy Goode eds., 1993).

212. *See id.* at 48 (“The Norwegian [Sale of Goods Act] conforms closely to the Convention . . . The Finnish and Swedish statutes are almost identical . . .”); Peter Winship, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 *LOY. L. REV.* 43, 46 (1991).

213. The interrelationship between the New International Economic Order and the CISG has been duly noted. “[O]ne may ask whether the ambitions of developing countries to build a *New International Economic Order* . . . should not be taken into account in the process of defining the territorial scope of international business law.” DE LY, *supra* note 125, at 49–50.

for contracts, which otherwise would take too long to develop."²¹⁴ In the United States, article 2 of the UCC is being revised. It will be interesting to see how the revising committee elects to recognize and incorporate the Convention into the Code. Revising article 2 to eliminate differences between it and the Convention would help unify U.S. domestic and international sale of goods laws. The ultimate beneficiary would be the American business person whose legal transaction costs would be reduced in the current era of free trade.²¹⁵

The CISG, like most codes, reflects a recognition of generalized principles of law. Professor Schmittoff, in making reference to the development of an international trade law code, notes that it should possess "principles which should apply to all international trade transactions."²¹⁶ One can argue that it is the evolution of general principles of law that makes an international code possible. It is unlikely, however, that a code can create new principles that will be universally accepted and applied. A code is most likely to be successful if it recognizes and harmonizes existing general principles of contract law. For example, despite the Convention's failure to incorporate a full-fledged good faith requirement, as is found in the UCC,²¹⁷ such a requirement is likely to be read into the Convention due to its prevalence in most legal systems. "It has been predicted that the good faith requirement will mean, at a minimum, that the parties have an affirmative obligation 'to communicate during performance and to cooperate in the cure of defects and the modification of obligations in unforeseen circumstances.'"²¹⁸

B. *General Principles of Contract Law Recognized by the CISG*

The International Court of Justice recognizes general principles of law found in the legal systems of all civilized societies as a source of international law.²¹⁹ This can also be said of contract law, whether referring to civil or common law. There are universalized principles or norms of contract law that are found in some form in most national legal systems.²²⁰ "Despite the

214. Zwart, *supra* note 144, at 115.

215. *See id.* at 92.

216. Clive Schmittoff, *The Codification of the Law of International Trade*, 1985 J. BUS. L. 34, 42.

217. *See* U.C.C. § 2-103(1)(b) (1989 & Supp. 1996).

218. GUIDE TO THE CISG, *supra* note 173, at 101.007 (quoting Rosett, *supra* note 12, at 290).

219. Article 38(1)(c) of the Statute of the International Court of Justice states that international law includes "the general principles of law recognized by civilized nations." STATUTE OF THE ICJ art. 38, para. 1(c). One commentator lists the following as sources of international business law: (1) standard forms; (2) customs and trade usage; (3) rules of professional organizations; (4) general principles of law; (5) codes of conduct; (6) arbitral awards; and (7) international conventions. *See* DE LY, *supra* note 125, at 133.

220. Lord McNair analyzes the concept of general principles of law as it applies to contracts between companies and governments for the development of natural resources. He concludes that where a nation's laws are not "sufficiently modernized," choice of law should lead courts to seek out generalized principles of contract law and not a particular national law. "[T]he system of law most likely to be suitable for the regulation of [such] contracts . . . and the adjudication of disputes arising upon them is 'the general principles of law recognized by civilized nations.'" Lord McNair, *The Generalized Principles of Law Recognized by Civilized Nations*, 33 BRIT. Y.B. INT'L L. 1, 19 (1957). Lord McNair notes two possible candidates for recognition as general principles: unjust enrichment and the principle of acquired rights.

variety of ways in which the conclusions are reached and articulated, concrete commercial issues tend to have similar resolutions in [both civil law and common law] Western systems."²²¹ The arbitration panel in *Libyan American Oil Co. v. Libyan Arab Republic* offered a definition of generally recognized principles: "These general principles are usually embodied in most recognized legal systems They thus form a compendium of legal precepts and maxims, universally accepted in theory and practice. Instances of such precepts [include] . . . the principle of sanctity of property and contracts."²²²

The notion of universal rules or norms of contract has been formulated in many ways. For example, principles of contract law may be motivated by "the goal of full compensation, the moral convention of promising, a community's sense of justice, relational and cooperational norms, or the goal of unification and certainty in international sales contracts."²²³ The meta-principles of good faith, fairness in the exchange, and the duty to inform are implied by most legal regimes of contract. Viewed expansively, good faith "imports affirmative obligations on the parties to communicate during performance and to cooperate in the cure of defects and the modification of obligations in unforeseen circumstances."²²⁴ I now turn to these meta-principles or norms of contract law.

1. *The International Duty of Good Faith*

"[G]ood faith is a legal principle that forms an integral part of the rule *pacta sunt servanda*. . . . Manner of performance . . . is one of the oldest and most clearly established of the major elements of the principle in international law."²²⁵ The CISG surprisingly did not adopt a specific implied duty of good faith provision for sale of goods transactions.²²⁶ It does, however, state that the CISG is to be interpreted to promote "the observance of good faith in international trade."²²⁷ Other provisions of the Convention may also be read to imply a good faith obligation. The statements and conduct of the

See id. at 15–16. Professor Goldstajn argues for the "universal recognition and confirmation of the two fundamental principles of freedom of contract and *pacta sunt servanda*." Goldstajn, *supra* note 113, at 17.

221. Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and Review*, 63 *FORDHAM L. REV.* 281, 282 (1994); *see also* Fatouros, *supra* note 194, at 136 ("Any law of contracts, national or international, is bound to start with this principle [of *pacta sunt servanda*].").

222. 6 *Y.B. COM. ARB.* 89, 94 (ad hoc arb. 1981).

223. Amy H. Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 *WASH. L. REV.* 607, 632 (1988).

224. Rosett, *supra* note 12, at 290.

225. J.F. O'CONNOR, *GOOD FAITH IN INTERNATIONAL LAW* 37 (1991). The preamble to the Vienna Convention on the Law of Treaties states that "the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized." Vienna Convention on the Law of Treaties, *supra* note 188, pmb1.

226. The legislative history of the CISG indicates that its drafters recognized good faith as a "universally recognized" principle and as a "norm of conduct" in international trade. *See* Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat, U.N. Doc. A/CONF.97/5, reprinted in *OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS*, U.N. Doc. A/CONF. 97/19 (1981).

227. CISG, *supra* note 9, art. 7, para. 1.

parties to a contract are to be “interpreted according to the understanding [of] a reasonable person.”²²⁸ A reasonable person is generally taken to act and react in a good faith manner. In addition, article 9(2) implies trade usage and custom into every contract of sale.²²⁹ A strong argument may be made that good faith is a universal trade usage or custom. From the medieval *lex mercatoria* to the present, most specific rules of business can be traced to the norm of good faith and fair dealing. The duty of good faith is consistent with the goals of the Convention and may be implied through purposive reading of its express articles. For example, article 77’s express adoption of the duty to mitigate is consistent with a finding of an implied duty of good faith.²³⁰ The nonbreaching party’s duty to mitigate is the counterpart to the breaching party’s duty of good faith performance.

2. Nationally Recognized Duties of Good Faith

The long-standing obligations of good faith found in national legal systems²³¹ can also be used in the interpretation and enforcement of contracts under the CISG. The principle of good faith performance has a lineage that can be traced to Roman times. The principle was reembraced by the mercantile community during the eleventh and twelfth centuries.²³² The notion of good faith performance stemming from Roman law and the *lex mercatoria* has been brought forward to the present-day civil codes. The German Commercial Code, or BGB, voids any agreements or contractual terms that are considered *contra bonos mores*, or contrary to the public policy of good faith.²³³ The German Law on General Business Conditions, or *AGB-Gesetz* (AGBG) generally holds that a contract provision is void if it “work[s] to the disadvantage of [a party] in a way irreconcilable with good faith.”²³⁴

228. *Id.* art. 8, para. 2.

229. *See id.* art. 9, para. 2 (“The parties are considered . . . to have impliedly made applicable . . . a usage . . . regularly observed by parties to contracts of the type involved in the particular trade.”).

230. *See id.* art. 77 (stating that nonbreaching party “must take such measures as are reasonable in the circumstances to mitigate the loss”); *see also* Kastely, *supra* note 223, at 621.

231. One commentator has remarked:

[C]ommon and civil law jurisdictions recognize a principle of good faith requiring “fair dealing, affirmative disclosure of material facts and assistance to others in achieving the free benefit of contractual relationships. [The good faith concept] is in accordance with the code of fair play of everyday ethics, is written into the civil codes in almost all civil-law systems and is thoroughly established in Anglo-American equity. [Furthermore, it can be found as] an equitable element in the Jewish, Roman, English medieval, Muslim, English modern, Scottish, American, French, German, Swiss, Belgian, Dutch, Italian, . . . Soviet, Polish, Swedish, Japanese, and Greek legal systems.

1 GUIDE TO THE CISG, *supra* note 173, at 101.010 (quoting R. Newman, *The General Principles of Equity, in EQUITY in the WORLD’S LEGAL SYSTEMS* 589, 600–08 (R. Newman ed., 1978)).

232. *See* Jill Pride Anderson, *Lender Liability for Breach of the Obligation of Good Faith Performance*, 36 EMORY L.J. 917, 920 (1987).

233. *See* von Teichman, *supra* note 77, at 217. For an excellent examination of the German duty to negotiate in good faith or the doctrine of *culpa in contrahendo*, see Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964).

234. von Teichman, *supra* note 77, at 217.

The AGBG also provides a number of techniques that can be used in making a good faith determination. First, if a contract provision “fundamentally deviates” from the default rules of the BGB, then it may be considered to have been made in bad faith. Thus, although provisions that are contrary to the optional rules of the BGB are not directly invalid, they may be stricken indirectly if they violate the general principle of good faith. Second, a court will make a “literal and restrictive interpretation” of a contract clause that was not freely negotiated.²³⁵ This interpretation accords with the long recognized duty in the civil law to negotiate in good faith, known as *culpa in contrahendo*.²³⁶ Third, a court can overcome the presumptive power of a written agreement by considering parol evidence that leads to a more equitable reading of a harsh contract term. Finally, section 242 of the BGB uses the good faith concept of “basis of the bargain,” or *Geschäftsgrundlage*, to excuse a party from performing a contract that has been frustrated.²³⁷ In German law, then, there are a number of ways in which the existence of a good faith excuse for nonperformance may result in an equitable reformation or a rescission of the contract. “[T]he courts will in the first place try to adapt the contract to the new circumstances by re-writing it in accordance with what they perceive as the parties’ intentions and interests. Only if this fails will the entire contract be declared void.”²³⁸

In the United States, the concepts of good faith and fair dealing can be found in the *Restatement (Second) of Contracts* and the UCC. Section 1-203 of the UCC states that “every contract or duty within this act imposes an obligation of good faith in its performance or enforcement.”²³⁹ The “macro” nature of good faith as an overriding principle of contract law has been duly acknowledged.²⁴⁰ Expansive interpretations of contractual good faith include good faith in negotiations,²⁴¹ the duty to cooperate,²⁴² the duty to adjust from the express terms of the contract,²⁴³ and good faith in the termination

235. See generally Kessler & Fine, *supra* note 233 (comparing duty to negotiate in good faith in German and American contract law).

236. See *id.*

237. See von Teichman, *supra* note 77, at 218.

238. *Id.*

239. U.C.C. § 1-203(1)(b) (1989 & Supp. 1996).

240. One commentator, for example, has noted: “The general concept of ‘good faith’ appears in the U.C.C. as an ‘overriding and super-eminent principle.’” Anderson, *supra* note 232, at 923 (quoting E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 666 (1963)); see also Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980) (defining bad faith as contracting party’s attempt to recapture forgone opportunities); Robert S. Summers, “Good Faith” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

241. See, e.g., Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70 (1993).

242. See Anderson, *supra* note 232, at 924 (“[C]ooperation among contracting parties to insure that all parties receive the benefit of their bargain is at the very foundation of the good faith performance obligation.”).

243. Cf. Clayton P. Gillette, *Commercial Rationality and the Duty to Adjust Long-Term Contracts*, 69 MINN. L. REV. 521 (1985) (examining arguments for requiring adjustment of contractual duties following unforeseeable event). See generally Richard E. Spiedel, *The New Spirit of Contract*, 2 J.L. & COM. 193 (1982) (discussing changes in contract theory); Robert W. Reeder III, *Comment Court-Imposed Modifications: Supplementing the All-or-Nothing Approach to Discharge Cases*, 44 OHIO ST. L.J. 1079

of contractual relations.²⁴⁴

The universality of good faith in contract formation and performance is evident when reviewing the legal regimes of planned or socialist economies. Private contract law is generally not associated with countries characterized by state ownership of property and centralized planning, such as the countries of the former Soviet Union and Eastern Europe prior to the fall of communism. Contracts of sale, however, were used in those countries to facilitate transactions between state-owned agencies.²⁴⁵ Implicit in the notion of such contractual interchange was the duty of an enterprise to cooperate in concluding contracts and to "perform its obligations with due care."²⁴⁶ These duties to cooperate and to act in good faith were required because all agencies were obligated to work toward goals stated in national economic plans.²⁴⁷ Thus, failure to act in good faith was viewed as harming not only the other contracting party but also the state itself. Failure to perform or to provide defective goods therefore resulted in the assessment of penalties not necessarily related to actual damages. The penalties were intended to be punitive and not primarily compensatory.²⁴⁸ A party acting in bad faith was subject to damage claims in excess of those granted under the *Hadley* foreseeability principle found in the common law.²⁴⁹ Thus, the concept of good faith played an important role in the contract law of Eastern Europe and the Soviet Union.

This review of national laws demonstrates that good faith in the performance and enforcement of contracts is recognized by a broad range of national legal systems.²⁵⁰ These national good faith requirements can be brought to bear on CISG-governed contracts in two ways. First, the Convention specifically excludes from its scope governance over "the validity of contracts."²⁵¹ However, we have seen that in most national legal systems bad faith negotiation or performance will void a provision in a contract that was produced by the bad faith act. Thus, national law may continue to

(1983) (discussing court-imposed contract modifications).

244. See generally Robert A. Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 CORNELL L. REV. 617 (1983).

245. See Goldstajn, *supra* note 113, at 16 ("Although more or less restricted by state planning, individual problems of commodity production and marketing exist in Eastern Europe. The private law of contract . . . applies.").

246. LAW AND ECONOMIC REFORM IN SOCIALIST COUNTRIES 154 (Gyula Eörise & Attila Harmathy eds., 1971). "[S]ocialist enterprises have the obligation to co-operate in concluding contracts and in their performance, taking into account the tasks resulting from national economic plans." *Id.* at 158.

247. See Zwart, *supra* note 144, at 114 ("The main function of contracts in socialist countries is to help the state fulfill its national plans. Contract law . . . is therefore characterized by general principles . . . [such as] the principle of 'socialist cooperation.'").

248. See LAW AND ECONOMIC REFORM IN SOCIALIST COUNTRIES, *supra* note 246, at 157 ("Conventional penalties in socialist trade are conceived as sanctions against the party obliged who is not performing its obligations properly.").

249. See *Hadley v. Baxendale*, 9 Ex. 341 (Eng. 1854) (holding that contract damages must be reasonably foreseeable).

250. Professor Schmittoff suggests that the obligation of good faith should be codified into international law. See Schmittoff, *supra* note 216, at 41-42 ("[C]ertain principles . . . should apply to all international trade transactions . . . e.g., the obligation of good faith in the performance and enforcement of an international contract.").

251. CISG, *supra* note 9, art. 4(a).

determine the impact of bad faith upon the validity of a contract. Second, as discussed above, article 9 of the CISG allows for the consideration of international trade usage. In sum, it is likely that national principles of good faith will be applied to CISG contracts.²⁵²

3. Fairness in the Exchange

In *Contract and Fair Exchange*,²⁵³ Professor Atiyah examines the common law's shift from the undaunting allegiance to freedom of contract in classical contracts theory to the "modern growth of statutory interventions in contract law . . . designed to ensure substantive fairness in the exchange."²⁵⁴ Fairness in the exchange has also increasingly been accepted as a major norm or principle of contract law at the supranational level. One commentator on international commercial contracts predicts a continuing shift from the principle of sanctity of contract to fairness in the exchange:

Though the principle of sanctity remains strong, relational elements are on the rise. . . . [There has been] a major shift towards relationalism and a recognition of equitable considerations. Principles of equity have been fully recognized with respect to the duties of good faith, renegotiation, and gap-filling. . . . The doctrines of good faith and fair dealing are integral parts of contract law. It, therefore, can be concluded that, though *fairness* might not be the sole aim of contract law, it is certainly its underlying basis and one of its major objectives.²⁵⁵

The notion of fairness in the exchange has been traced to the natural law philosophy of Hugo Grotius²⁵⁶ and Samuel Pufendorf.²⁵⁷ This philosophy recognized contractual fairness as a relevant factor in the enforceability of contract.²⁵⁸ The norm of fairness provides an umbrella for a number of doctrines that revolve around the substantive fairness of the exchange. The civil law's notion of just contract²⁵⁹ and the common law doctrine of unconscionability²⁶⁰ come within the fairness penumbra. The divergence between the common law and the civil law in the area of substantive fairness may be merely one of semantics. For example, under article 1674 of the

252. Professor Kastely concludes that "although the principle of good faith is not clearly defined and its placement in the Convention is problematic, it is appropriate to interpret the rights to performance . . . consistently with a general obligation of good faith." Kastely, *supra* note 223, at 619-20.

253. P.S. Atiyah, *Contract and Fair Exchange*, 35 U. TORONTO L.J. 1 (1985).

254. *Id.* at 3.

255. NASSAR, *supra* note 84, at 234 (emphasis added).

256. See, e.g., HUGO GROTIUS, *THE LAW OF WAR AND PEACE* (F.W. Kelsey trans., 1925).

257. See, e.g., 2 SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM* [THE LAW OF NATURE AND NATIONS] (C.H. Oldfather & W.A. Oldfather trans., 1934).

258. See NASSAR, *supra* note 84, at 7 ("[T]he arguments of fairness, good faith, and change of circumstances were generally recognized by natural [law] lawyer[s].").

259. See generally John W. Baldwin, *The Medieval Theories of the Just Price*, 49 AM. PHIL. SOC'Y 2 (1959); Raymond de Roover, *The Concept of the Just Price: Theory and Economic Policy*, 18 J. ECON. HIST. 418 (1958). Just price evolved from the Roman law notion of *justum pretium*. See James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587 (1981) (noting "the ancient idea that in an exchange the value of what each party gives should be equal to the value of what he receives").

260. See RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); U.C.C. § 2-302 (1994); see also Andrew Burgess, *Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and a Suggestion*, ANGLO-AM. L. REV. 255 (1986); Leff, *supra* note 174.

French Civil Code, an agreed price that is inadequate by more than seven-twelfths of the value of a good may be rescinded by the seller. The purchaser then has the option of "paying the balance of the just price"²⁶¹ or returning the goods.

In contrast, inequality of exchange is not a ground for rescission under the common law.²⁶² A common law contract need only be supported by some mutuality of consideration. It need not be characterized by an equality or adequacy of consideration. "[A] contract does not lack mutuality merely because its terms are harsh or its obligations unequal."²⁶³ The common law premise is that value is to be determined by the parties and is not the proper subject for judicial reformation on grounds of inadequacy of consideration.²⁶⁴ However, it should be noted that in the area of equitable relief, the common law is closer to the civil law's notion of just contract. While a court faced with a contract of unequal exchange is required to enforce it and assess damages accordingly, that same court faced with the same contract is free to deny a claim for specific performance because of the inequality of the exchange.²⁶⁵ Section 364 of the *Second Restatement* expressly states that specific performance should be denied if "the exchange is grossly inadequate or the terms of the contract are otherwise unfair."²⁶⁶

Furthermore, despite the general common law principle that courts shall not set aside a contract due to inequality or inadequacy of consideration, there has been a long-standing exception when the inequality is deemed significant. The 1882 case of *Wolford v. Powers* states the common law exception: "Where the [consideration] is so grossly inadequate as to shock the conscience, courts will interfere."²⁶⁷ This notion of substantive fairness is the cornerstone of fairness in the exchange inquiries. Under the civil law's notion of just price, this analysis should theoretically be applied before any contract is enforced. In contrast, the voiding or reformation of a contract in the common law on grounds of unfairness is considered an extraordinary remedy. Yet, the enlargement of notions of substantive unfairness or

261. C. CIV. art. 1681 (Fr.). The buyer may reduce the just price by ten percent. *Id.* Evidently, the purchaser is entitled to a good bargain but not too good a bargain. *See id.*

262. *See, e.g.,* *Batsakis v. Demotsis*, 226 S.W.2d 673, 675 (Tex. 1949) ("Mere inadequacy of consideration will not void a contract."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981) (concerning adequacy of consideration and mutuality of obligation).

263. *Meurer Steel Barrel Co. v. Martin*, 1 F.2d 687, 688 (3d Cir. 1924). Professor Newman noted that the common law's historical indifference to inequality in the exchange is an aberration: "[T]he conclusion is unavoidable that the Anglo-American legal system is the only important system other than Islamic law incorporating the doctrine that contracts unfairly obtained or unfairly pressed for performance will be enforced in damages" and not be given specific performance. Ralph A. Newman, *The Renaissance of Good Faith in Contracting in Anglo-American Law*, 54 CORNELL L. REV. 553, 554 (1969).

264. *See Wolford v. Powers*, 85 Ind. 294, 303 (1882) ("If . . . there is any consideration for a promise, it must be sufficient for the one made; for, if this be not so, then the result is that the court substitutes its own judgment for that of the promisor, and, in doing this, makes a new contract.").

265. *See* RESTATEMENT (SECOND) OF CONTRACTS § 358 (1982).

266. *Id.* § 364(1)(c).

267. *Wolford*, 85 Ind. at 301. The seminal American case on unconscionability is *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). It states the traditional test for unconscionability. An unconscionable contract is one that "no man in his senses and not under delusion would make on the one hand, and no honest or fair man would accept, on the other." *Id.* at 450 n.12 (quoting *Greer v. Tweed*, 13 Abb. Pr. (n.s.) 427, 429 (N.Y.C.P. 1872)).

unconscionability has helped narrow the gap between the civil and common law and between legal and equitable remedies.²⁶⁸ For example, the court in *Girard Trust Bank v. Castile Apartments, Inc.*²⁶⁹ seemed to adopt the litmus test of the medieval just price theorist: “[I]f [the] value is more than twice the sale price, there is such gross inadequacy as will shock the conscience of the Court and justify setting the sale aside.”²⁷⁰

Often the substantive unfairness of a contract is a result of a weakness in the bargaining process.²⁷¹ In *Vockner v. Erickson*²⁷² an elderly woman entered into a contract for the sale of her apartment building. The contract provided for a purchase money mortgage with a monthly payment that was so low that it failed to cover the interest owing on the deed of trust. She would have had to wait until the age of 103 for a thirty-year balloon payment to mature in order to receive the bulk of the money. The court held that the payment terms were unconscionable but elected to reform them instead of striking them entirely. It held that the “aim of reformation in these circumstances is to bring the contract in conformity with *minimum standards of conscionability*.”²⁷³

In order to strike a contract, an American court is likely to focus on factors that indicate that the stronger party exploited the “gross inequality of bargaining power.”²⁷⁴ The simple fact of disparity in bargaining positions, however, is insufficient to render a contract unconscionable: “Superior bargaining power alone without the element of unreasonableness does not permit a finding of unconscionability or unfairness.”²⁷⁵ The court in *Tuzlowitzki v. Atlantic Richfield Co.* considered the usage and customs of the particular trade in order to determine if a contract term was unreasonable. “The *business practices-of-the-community test* asks whether the terms are so extreme as to appear unconscionable according to the mores and business practices of the time and place.”²⁷⁶ The court held on the basis of this test that a termination provision in a gas station dealership agreement was “not atypical in the local business community”²⁷⁷ and therefore was not

268. The *Second Restatement* provides:

[Types of unfairness] involve elements of substantive unfairness in the exchange itself or in its terms that fall short of . . . unconscionability The gradual expansion of these doctrines to afford relief in an increasing number of cases has resulted in a contraction of the area in which this traditional distinction is made between the availability of equitable and legal relief.

RESTATEMENT (SECOND) OF CONTRACTS § 364 cmt. a (1981).

269. 379 A.2d 1144 (Del. Super. Ct. 1977).

270. *Id.* at 1145 (quoting *Central Nat’l Bank v. Industrial Trust Co.*, 51 A.2d 854 (Del. Super. Ct. 1947)).

271. See Newman, *supra* note 263, at 558 (“If . . . the disparity between purchase price and market value is great . . . the inadequacy of the consideration might raise a presumption of fraud which would preclude relief in either specific performance or damages.”).

272. 712 P.2d 379 (Alaska 1986).

273. *Id.* at 384 (emphasis added).

274. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981).

275. *Tuzlowitzki v. Atlantic Richfield Co.*, 396 A.2d 956 (Del. 1978); see also *J.A. Jones Constr. Co. v. City of Dover*, 372 A.2d 540 (Del. 1977).

276. *Tuzlowitzki*, 396 A.2d at 960 (emphasis added); see also *Gordon v. Crown Cent. Petroleum Corp.*, 423 F. Supp. 58 (N.D. Ga. 1976), *aff’d*, 564 F.2d 413 (5th Cir. 1977).

277. *Tuzlowitzki*, 396 A.2d at 960.

unconscionable despite the disparity in bargaining positions. It is still unresolved whether less than a "gross disparity in the values exchanged"²⁷⁸ will be sufficient for a common law court to interfere under the rubric of fairness in the exchange. It is clear, however, that an unfair contract in which one party does not take unreasonable advantage of the other is less likely to be reformed. To provide reformation in such a case would be "[Anglo-American] contract theory pushing beyond current substantive unconscionability [and] beyond medieval just-price doctrine."²⁷⁹ Nevertheless, some level of fairness in the exchange "constitutes a principle of current international practice [and] is regarded as an underlying principle of international commitments and arbitral awards."²⁸⁰

4. *Duty To Notify*

The duty to notify the other party under various situations can also be seen as a generally accepted contract principle found in domestic laws. Notice obligations surface in a number of places along the transactional time line, including anticipatory nonperformance, request for additional time, notice of nonconformity, and notice of contract avoidance. Under Swiss law, the buyer must inspect the goods purchased "as soon as it is feasible."²⁸¹ If defects are found, the buyer must "immediately" notify the seller of the defects. "If the buyer fails to so notify recognizable defects, the goods purchased are deemed to have been accepted."²⁸² The German Civil Code imposes a similar duty of prompt inspection and notification.²⁸³ Failure to fulfill these obligations results in the waiver of the buyer's right of rejection based upon deficiencies in the goods.

Given the relatively short statute of limitation periods found in some national laws, the requirement of prompt notification is very important. For example, the statutory period under the German Civil Code is only six months.²⁸⁴ Under the Danish Sales Act of 1906, or *Købeloven*, the buyer must advise the seller of defects within a twelve-month period from the delivery of the goods.²⁸⁵ The Belgian and French Civil Code's title provisions are particularly idiosyncratic. Generally, ownership passes upon the signing of the contract; however, an exception is made for wine and other goods in "which it is customary to taste before purchasing."²⁸⁶ There is no sale or duty to notify until the buyer has had an opportunity to taste the goods. Third World countries have generally been concerned that strict notice

278. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. c (1981).

279. Amy H. Kastely, *Cogs or Cyborgs?: Blasphemy and Irony in Contract Theories*, 90 NW. U. L. REV. 132, 176 (1995).

280. NASSAR, *supra* note 84, at 170.

281. Claus Schellenberg & Karl Arnold, *Switzerland*, in 1 DOING BUSINESS IN WESTERN EUROPE, *supra* note 77, at 387, 397.

282. *Id.*

283. *See, e.g.*, § 496 BGB (F.R.G.).

284. *See id.* § 477(1).

285. *See* Henri-Robert Depret, *Belgium*, in DOING BUSINESS IN WESTERN EUROPE, *supra* note 77, at 41, 47 (Supp. 1987).

286. C. CIV. art. 1587 (Belg.); C. CIV. art. 1587 (Fr.).

requirements could be used by more sophisticated business persons to avoid liability for defects in their products.²⁸⁷ Thus, the good faith nature implicit in the duty to notify was adopted in the notification requirements of the CISG. In order to placate opponents, the maximum time limit of two years to notify is longer than what is found in most national laws of sale.²⁸⁸

C. *New Contractual Informalities Recognized by the CISG*

In comparing the CISG with the common law and the UCC, the most obvious difference is the degree of informality found in the CISG. This informality will be analyzed from three perspectives: writing requirements, the battle of the forms, and oral modifications of contracts. The importance of choice of law clauses will be analyzed as an aside.

1. *Writing Requirements*

The UCC requires that any sale of goods for a price of \$500 or more must be evidenced by "some writing sufficient to indicate that a contract for sale has been made between the parties."²⁸⁹ Furthermore, the writing must be "signed by the party against whom enforcement is sought."²⁹⁰ The sanctity of the written contract is protected by the common law and the UCC's parol evidence rule. This rule provides that a written agreement cannot be "contradicted by evidence of any prior agreement or of a contemporaneous oral agreement."²⁹¹

In contrast, the CISG adopts the view of many of the civil law countries that a writing is not a required formality to the finding of a contract. Article 11 states that a "contract need not be . . . evidenced by writing."²⁹² The lack of a writing requirement is coupled with the admissibility of any evidence that may bear on the issue of formation. Proof of a contract or of the terms within a contract may be given "by any means, including witnesses."²⁹³

The lack of a writing requirement creates a much greater potential under the CISG than under the UCC for liability for representations made during the negotiation phase. "Under [the] CISG . . . any relevant statement made in negotiations prior to the signing of the contract [is] admissible into evidence."²⁹⁴ In contrast, the UCC's parol evidence rule integrates prior statements, written or oral, into the final written contract. A seller could avoid warranty liability for representations made during the precontract phase by not memorializing them in the written form. Under the CISG, however, prior oral

287. See Zwart, *supra* note 144, at 118-20.

288. See CISG, *supra* note 9, art. 39.

289. U.C.C. § 2-201(1) (1994). As between merchants, a written confirmation subsequent to an oral agreement is sufficient to satisfy the writing requirements. *Id.* § 2-201(2). There is a specific exception for specially manufactured goods. *Id.* § 2-201(3)(a).

290. *Id.* § 2-201(1).

291. *Id.* § 2-202.

292. CISG, *supra* note 9, art. 11.

293. *Id.* (emphasis added).

294. John E. Murray, Jr., *Different Laws Might Apply to Foreign Buys Under the United Nations Convention for the International Sale of Goods*, PURCHASING, Oct. 19, 1995, at 30.

representations regarding quality and performance would be enforceable. This raises the potential for unwanted liability for comfort instruments. The unsophisticated business person could be trapped if she believed that any oral or informal *comfort* would only create a binding obligation if confirmed in writing.

The requirements to form a contract are further complicated by the fact that articles 12 and 96 of the Convention allow a contracting state to opt out of the oral agreement provision. Furthermore, countries whose domestic law requires a sales contract to be in writing may opt out of article 11. As a result, a party contracting internationally must inquire not only whether the other party is a resident of a CISG country, but also whether that country has opted out of article 11.²⁹⁵

2. *The Battle of the Forms*

An American party familiar with the UCC can be exposed to unexpected liability due to the battle of the forms. Article 19 of the CISG resolves the battle of the forms dilemma differently than section 2-207 of the UCC.²⁹⁶ A hypothetical involving the addition of a term in an offeree's response will illustrate the comparative complexities. Suppose that a seller responds to a purchase order (offer) with a confirming invoice. The confirming invoice, however, includes an additional term that limits the ability of the buyer to notify the seller of product defects. What is the legal effect of the additional notice term? The term's legal effect will turn on whether such a modification of the CISG notice provision would materially alter the contract offer. If it were construed as a nonmaterial modification, the CISG and the UCC both would acknowledge a contract that incorporated the offeree's modification. However, if the additional term were considered to be material, the two laws would dictate different conclusions. The CISG would not recognize a contract in this case because the modification would be construed as converting the would-be acceptance into a counteroffer. The UCC, in contrast, would have found a contract under the material terms presented in the original offer. The modification of the notice provision would be stricken.

A German court, in fact, held that such a modification was nonmaterial.²⁹⁷ This is a surprising decision given that most commentators have interpreted article 19 of the CISG as a rejection of the UCC approach

295. As of this writing, at least eight countries have formally opted out: Argentina, Chile, People's Republic of China, Russia, Belorussia, Estonia, Hungary, and Ukraine. See KRITZER, *supra* note 9 (Supps. 7-10 Sept. 1993, Apr. 1994 & July 1994). Interestingly, most of the countries opting out have had socialist legal regimes. The United States has elected not to opt out in favor of the writing requirements of the UCC. Thus, lack of formality, such as nonadherence to the statute of frauds, would not protect an American company from unexpected liability. "[F]or companies doing business in the United States under the CISG, there is no statute of frauds writing requirement." 1 GUIDE TO THE CISG, *supra* note 173, at 101.002.

296. See HENRY GABRIEL, PRACTITIONER'S GUIDE TO THE CISG AND THE UCC 59-63 (1994) (stating that CISG effectively requires "mirror image," whereas UCC allows "battle of forms").

297. See *Journal of Law and Commerce Case II*, 12 J.L. & COM. 277, 277 (1993) (summarizing facts and holding and translating text of German case *Landgericht, Baden-Baden*, 1991-40 113/90 (Aug. 14, 1991)).

in favor of a mirror image rule.²⁹⁸ This interpretation of article 19 rests on the assumption that the CISG's definition of materiality would be broadly construed. Unlike the UCC, which restricts materiality to a few fundamental terms, the Convention provides an expansive list of contract terms that are to be construed as being material. It states that terms "relating, *among other things*, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other, or the settlement of disputes are considered to alter the terms of the offer materially."²⁹⁹ The modification of the notice term would thus seem to come within the umbrella of events that impact the "extent of one party's liability to the other."³⁰⁰ The German court decision is evidence that until the jurisprudence surrounding the CISG is solidified, contracting parties are likely to be surprised by some of the results produced by national courts interpreting the Convention. In the area of comfort instruments, the materiality of the assurance to the underlying transaction is likely to be a pivotal factor in the enforceability determination.

3. Oral Modifications

This clear difference between common law formalities and the CISG is further complicated by article 29 of the Convention, which enforces an agreement that all modifications to a contract must be in writing. What if the parties orally agree that any future modifications must be in writing? The spirit of article 11 of the CISG would indicate that such an oral agreement would be as provable and enforceable as any other contractual term.³⁰¹ Although article 29(2) may be interpreted to require that such an agreement be in writing,³⁰² one could argue that an oral agreement with respect to the requirements for modification is equally binding and in conformity with the spirit of the informality that article 11 represents.

The Convention's article on modification and its interpretation may have an impact upon the enforceability of comfort instruments made subsequent to the formation of a contract. Two issues could arise in conjunction with the use of such instruments to clarify conflicting positions or to assure a party of continuing performance. First, does the use of a comfort instrument to clarify or to assure constitute a contractual modification? Second, if such a modification is intended, does it need to be in writing? The second issue has already been addressed above. The first issue was addressed outside the context of the CISG in the American case of *Chelsea Industries v. Accuracy*

298. See, e.g., GABRIEL, *supra* note 296, at 59 ("The CISG adopts the traditional common law rule that the acceptance be a 'mirror image' of an offer.").

299. CISG, *supra* note 9, art. 19, para. 3 (emphasis added). One commentator's response to the broad phraseology of this paragraph is that "almost any alteration is material." GABRIEL, *supra* note 296, at 60.

300. CISG, *supra* note 9, art. 19, para. 3.

301. Article 29(1) illustrates another difference between Anglo-American law and the Convention. It states that a contract may be modified "by the mere agreement of the parties." *Id.* art. 29, para. 1. Thus, a modification of a contract under the CISG need not be supported by new consideration.

302. *Id.* art. 29, para. 2 ("A contract in writing which contains a provision requiring any modification or termination by agreement may not be otherwise modified.").

*Leasing Corp.*³⁰³ A lessee under an equipment leasing agreement asked the lessor about a purchase option. In response, the leasing company wrote a letter stating that it was its "policy . . . to convert on stated terms"³⁰⁴ the lease to a purchase contract. The leasing company argued that the policy letter was only a statement of current policy and was intended to be a nonbinding comfort letter. The court disagreed and held that the letter became a part of the total agreement and was a contractually binding promise. The CISG's modification provisions thus contribute to decisions regarding comfort letter enforceability.

4. *Choice of Law*

The United States has two laws of contracts: a state law of contracts, represented by the UCC, and a "federal" law of contracts, the CISG. It has long been the rule in the United States that there is no general federal common law.³⁰⁵ The common law remains the domain of the states under a Constitution that restricts the authority of the federal government to enumerated powers. However, when the federal government preempts state law by way of statute or treaty, it effectively rewrites that portion of state law. The Supreme Court affirmed this principle in *Hauenstein v. Lynham*:³⁰⁶ "[L]aws and treaties of the United States are as much a part of the law of every state as its own local laws."³⁰⁷ This becomes important when a U.S. citizen attempts to opt out of the Convention through, for example, a choice of law clause. Once again the unwary business person may become trapped in the quagmire of conflicts of law. Suppose a choice of law clause states that the "law of the State of New York" shall apply to any disputes arising out of a contract. What law shall apply: New York's version of the UCC or the CISG? The CISG appears to be the better answer because it is the law of the State of New York in cases in which the contracting parties are from different countries that are both signatories to the Convention. Alternatively, if the court's conflict of law rules refer it to the law of New York, a strong argument arises once again that the CISG preempts the UCC. This will be the case whether the contract is signed in New York or abroad. It will also be the case in contracts involving a foreign company doing business in New York, even if the contract is to be performed within the state. All that is needed is for the parties to have their primary places of business in two countries that are signatories to the Convention.³⁰⁸

An ancillary issue is whether a court should admit evidence to rebut the presumption that favors federal law. The parol evidence rule of the UCC would probably preclude such oral admissions in favor of the court's own

303. 699 F.2d 58 (1st Cir. 1983).

304. *Id.* at 61.

305. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

306. 100 U.S. 483 (1880).

307. *Id.* at 490.

308. *See* CISG, *supra* note 9, art. 1, para. 1(a). It should be noted that the United States opted out of article 1(1)(b), which would mandate the application of the CISG in certain situations where only one of the parties is from a signatory country. *See* U.N. Doc. A/CN/9/294 (1987).

interpretation of the words of the contract. In contrast, a court applying the rules of evidence suggested by the CISG would admit evidence showing the parties intended that the UCC govern the case. To avoid this uncertainty in the choice of law, the contracting parties should choose their words carefully when opting out of the Convention. In our hypothetical, the correct phraseology would be that the law to be applied is the "Uniform Commercial Code as adopted by the State of New York as of the date of the contract or as subsequently amended." The choice of law determination is especially important with respect to comfort instrument enforceability. Under current U.S. law, the informality of such instruments, coupled with their inherently ambiguous language, is likely to result in a finding of nonenforceability. A choice of law rule, however, that directs a court to a foreign national law or to the CISG may result in a different holding.

As parties become more knowledgeable and comfortable with the provisions, they may expand the CISG's jurisdiction by private agreement. The law applicable to a given international contract is often determined by an express choice of law clause. Commercial parties have often compromised in choice of law negotiations and forum selection clauses by choosing venues and national laws that are considered fair and advanced. For example, the London Court of International Trade and the International Chamber of Commerce's Paris-based Arbitration Panel are popular compromises for contracting parties from divergent legal systems. This has also been the case regarding Swiss commercial law: "Swiss commercial law appears to be acceptable to parties from different legal backgrounds."³⁰⁹ The straightforward and uncomplicated nature of Swiss law has made it an appealing compromise for choice of law in contract negotiations.³¹⁰ Other popular choices of law in international contract dispute resolution include English, U.S., French, German, and Swedish laws.³¹¹ It will be interesting to see if the CISG becomes an alternative choice of law. Parties may see it as a compromise law to govern contracts not within their jurisdiction.

The remainder of this Article will more carefully analyze the potential impact of the CISG on comfort letter enforceability. Part IV will examine the underlying principles of the CISG and foreign cases that apply the CISG to understand how such courts may deal with comfort instrument enforceability. It concludes with a prediction that it is likely to impact the common law presumption of nonenforceability. Part V will look to the future relevance of the CISG to the internationalization of contract law and to the creation of a uniform jurisprudence for comfort instrument enforceability. It concludes with some advice to American business persons for avoiding unintended contractual liability.

309. Schellenberg & Arnold, *supra* note 281, at 397.

310. *See id.*

311. *See* NASSAR, *supra* note 84, at 35 ("London, New York, Paris, Geneva, and Zurich are the most popular arbitration centers. Their respective laws, in addition to German law, are also the most frequently applied in dispute resolution."); B. Blair Crawford, *Drafting Considerations Under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 187, 189 (1988) ("The usual compromise is the law of (and often a forum in) some 'neutral' third country such as Sweden or Switzerland . . .").

IV. THE CISG AND COMFORT LETTER ENFORCEABILITY

How comfort instruments are *originally* interpreted under the CISG by a court of first impression will play a key role in determining their enforceability. That court will face the daunting task of harmonizing the divergence in the world's different legal systems regarding comfort instrument enforceability. Moreover, how foreign courts recognize such an opinion will determine whether the original interpretation will gain universal precedential value. The courts are likely to look to general principles of contract law for guidance in determining the enforceability of these business instruments. As we have seen, the principles of good faith and fairness in the exchange are widely accepted norms of contract law. Ancillary norms include compensation for justifiable reliance, the belief that one should keep her promises, and the justice-promoting concept of equalizing the exchange. If a party agrees to a seemingly one-sided agreement based on its reliance on a third party assurance, then a court may feel inclined to enforce the assurance as a way of equalizing the underlying agreement. The hard use of comfort instruments to motivate a party to enter into an agreement, followed by refusal to provide such comfort, could be construed under the German AGBG, for example, as something that "works to the disadvantage of a party in a way irreconcilable with good faith."³¹² Clearly, the bad faith use of comfort instruments by hard bargainers should subject them to a claim for foreseeable reliance damages. Finally, the great stock that international business persons place on the duty to notify can be applied, by analogy, to comfort instruments. If a comfort issuer's defense is that there has been a policy change subsequent to the issuance of the comfort letter, then at the very least she should be required to notify the other party of that policy change. This would allow the receivers of comfort instruments to seek other assurances in order to protect themselves.

A. *General Principles and Enforceability*

The enforceability of quasi-contractual and preliminary instruments has long been debated. The line between contract and pre-contract or noncontract has never been precisely fixed.³¹³ Courts have at times rescued those who relied upon noncontractual instruments by using flexible concepts such as promissory estoppel and good faith to give recourse to those whose claims would have been precluded by one of contract law's formalities. The uncertainty of liability is compounded in the area of international contracts because of variations in contractual formalities among different legal systems. For example, an American business person can rely on the statute of frauds to avoid incurring liability when giving an oral assurance or representation. In contrast, a verbal guaranty or assurance is more likely to be enforced under

312. §§ 157, 242 HGB (F.R.G.).

313. See, e.g., E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987); Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673, 673-76 (1969); G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 VAND. L. REV. 221, 232-34 (1991).

the CISG and in some legal systems, such as Germany's. The party seeking enforcement of a comfort letter or an oral assurance would need to show that the parties' actions would indicate to a reasonable person that an agreement had been made or that an intent to be bound had been given.

It should be noted, however, that the importance of the statute of frauds in Anglo-American jurisprudence is often overstated. The lack of a writing or the lack of a final, integrated expression of agreement has rarely prevented a court from admitting evidence in order to fill in gaps in a contract.

[The finding of an] agreement should not be frustrated where it is possible to reach a reasonable and fair result. In the final analysis, a contract becomes enforceable against the objection of apparent uncertainty . . . by resorting to objective external standards, or commercial practice, or other usage or custom fairly shown to be within the contemplation of the parties.³¹⁴

Thus, when the parties contemplate a final written agreement, the court may find a contract prior to its final integration: "[T]he mere fact that the parties contemplate memorializing their agreement in a formal document does not prevent their informal agreement from taking effect prior to that event."³¹⁵

Letters of intent and agreements in principle have long tested the ability of American courts to differentiate between contract and mere negotiation. "The 'agreement in principle' may be based on a handshake understanding or memorialized in a preliminary letter of intent."³¹⁶ Parties may take three views toward preliminary agreements, letters of intent, comfort instruments, and other inchoate agreements.³¹⁷ First, a party may believe that she is not legally bound until a formal writing is signed, despite an oral agreement or assurance. Second, a party may believe that a more formal writing is a mere formality and that the informal instruments or oral assurances are legally binding. If these oral assurances offered in the "precontractual" negotiation constitute misrepresentation, they can result in both moral and legal recrimination.³¹⁸ Often the morality of enforcement is equivalent to the legality of enforcement. Indeed, unethical conduct or promises have created legal causes of action.³¹⁹ Third, the party may think that the preliminary agreement formalizes the parties' intent to enter into a final agreement pending successful negotiations by their attorneys and other representatives. The party may believe, however, that failure by these representatives to finalize the terms of the agreement releases the principals from their good faith intentions to enter into a formal, binding agreement.

314. *Mid-Continent Tel. Corp. v. Home Tel. Co.*, 319 F. Supp. 1176, 1192 (N.D. Miss. 1970).

315. *V'Soske v. Barwick*, 404 F.2d 495, 499 (2d Cir. 1968).

316. *Temkin*, *supra* note 81, at 125 (citation omitted). *Temkin* categorizes exchanges in the area of corporate acquisitions into three types: preliminary negotiations, definitive agreement, and agreement in principle. *See id.* at 127.

317. *See id.* at 129 n.15.

318. For an examination of the ethics of negotiations, see Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219 (1990).

319. The moral basis of promissorial enforcement was stated by Professor Linzer: "The origins of enforcement may be religious, or religion may have been used to achieve utility, but I think that today most people believe that one should stand by one's word." Peter Linzer, *On the Amoralism of Contract Remedies—Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111, 138 (1981) (citations omitted).

These various views have found expression in American court decisions. A number of courts have ruled that any negotiation not resulting in a formal agreement allows each of the parties to withdraw—whether in good or bad faith.³²⁰ Other “courts have held the withdrawing party liable as if a fully negotiated contract to consummate the transaction already existed.”³²¹ The enforceability of preliminary agreements and correspondences therefore remains unclear. It is clear, however, that reliance theory has been used to expand the contractual liability net into areas of precontract or quasi-contractual instruments in ways not previously seen.³²² This expansion of contractual liability is likely to include international contract negotiations and the use of comfort instruments.

Recent changes in modern international transactions have led to an increased reliance on precontractual instruments. Commercial transactions are increasingly consummated between parties of diverse cultural and legal traditions. Parties are often unfamiliar with the ethical and legal ramifications of the negotiating process in other countries, which may lead the parties to write out their goals at a relatively early stage of the negotiation.³²³

Given this tendency to use precontractual agreements, “the primary question becomes whether the relevant community would accord binding force to the [instrument].”³²⁴ Ultimately, the potential for liability in the area of precontract or in the area of comfort instruments will be determined by commercial practice. It is recognized that “[s]imilarities of contract practice and contract law are due to common commercial needs shared by all who participate in international trade transactions.”³²⁵ The more such instruments are a product of hard bargaining and the more contracting parties rely on them, the greater the likelihood of contractual liability.

B. *A Case Study: The Italian Shoe Cases*

The enforceability of comfort instruments under the Convention is not likely to be determined in the near future. The lack of clarity regarding the enforceability of these instruments under national legal systems provides little guidance as to the likelihood of enforceability under the Convention. Nonetheless, the aids of interpretation used under the civil law system may be applied in order to predict a possible judicial response. The Italian Civil Code of 1942 provides the means of interpretation that analogously applies to the Convention’s dictate that its articles are to be interpreted *originally*:

In interpreting the [Convention], no other meaning can be attributed to it than that made clear by the actual significance of the words according to the connection between them, and

320. See, e.g., *Belcher v. Import Cars, Ltd.*, 246 So. 2d 584, 586 (Fla. 1971).

321. Temkin, *supra* note 81, at 130.

322. The unleashing of promissorial and reliance-based liability from the confines of *assumpsit* during the eighteenth and nineteenth centuries is based upon a simple philosophy that it is right for one to receive the performance that was promised.

323. Klein & Bachechi, *supra* note 104, at 8 (citations omitted).

324. *Id.* at 11.

325. Harold J. Berman, *The Law of International Commercial Transactions* (Lex Mercatoria), 2 EMORY J. INT’L DISP. RESOL. 235, 235–36 (1988).

by the intention of the [drafters]. If a controversy cannot be decided by a precise provision, consideration is given to provisions that regulate similar cases or analogous matters; if the case still remains in doubt, it is decided according to the general principles [on which the Convention is based].³²⁶

There is no article within the Convention that specifically deals with precontractual liability or with liability stemming from informal instruments of business such as comfort letters. Instead, liability will have to be premised on a composite of relevant articles of the Convention. The creation of the composite should be guided by the founding principles of the Convention and general principles of contract law previously discussed.

A number of German cases dealing with contracts for the importation of Italian products offer a preview of the CISG in action. These German cases dealt with the issues of implying contract terms and satisfying the notice of nonconformity requirement.

1. *Implication of Terms*

A German court of appeals held a misuse of specifications by an Italian shoe manufacturer to be a fundamental breach.³²⁷ The German purchaser became aware of the misuse when shoes built to its specifications and bearing its trademark appeared at a trade show. The court implied the notions of exclusivity and confidentiality into the contract and thereby permitted the German company to void its purchase contract with the Italian manufacturer. The court held that the use of the purchaser's specifications was a misappropriation that constituted a breach under article 25 of the CISG.³²⁸ This case illustrates the informality of most sale of goods transactions. Despite the paramount importance of trademark and confidentiality, the parties failed to formalize specific contract language to protect the buyer. Nevertheless, the German court implied the existence of such protections into the agreement. Professors Beale and Dugdale examined the importance of implied assumptions in the types of informal contracts consummated "by telephone or simple exchange of letters."³²⁹ They characterized such agreements as ones in which "only the primary obligations would be planned expressly but the parties to such contracts held unexpressed assumptions about the way in which obligations would be adjusted or enforced, relying either upon custom or a 'gentlemen's agreement' with the other contracting party."³³⁰ Although the

326. CODICE CIVILE [C.CIV.] art. 12 (Italy 1942).

327. See *Journal of Law and Commerce Case I*, 12 J.L. & COM. 261, 261 (1993) (summarizing facts and holding and translating text of German appellate case *Oberlandesgericht, Frankfurt am Main*, 1991-SU 164/90 (Sept. 17, 1991)); see also Volker Behr, *Commentary to Journal of Law & Commerce Case I: Oberlandesgericht, Frankfurt am Main*, 12 J.L. & COM. 271 (1993).

328. The CISG defines a fundamental breach as one that "substantially" deprives a party of her expectations under the contract. See CISG, *supra* note 9, art. 25. The party is excused if: (1) she did not foresee the detrimental result and (2) a reasonable person would not have foreseen the result. See *id.* The nonbreaching party may then avoid the contract under articles 49 and 64. See *id.* arts. 49, 64.

329. Hugh Beale & Tony Dugdale, *Contracts Between Businessmen: Planning and the Use of Contractual Remedies*, 2 BRIT. J.L. & SOC'Y 45, 48 (1975).

330. *Id.* It can be argued that a "gentlemen's agreement" is merely a different form of a comfort instrument.

German court enforced this type of unexpressed assumption, enforceability would have been better supported through an explicit assurance of confidentiality.

Similarly, the Municipal Court of Holstein used both the CISG and German domestic law to fill in a gap in a contract between an Italian clothing manufacturer and a German retailer.³³¹ The contract provided for a schedule of delivery dates, stating that the clothes were "autumn goods, to be delivered July, August, September, plus or minus."³³² The first delivery of the goods was made on September 26th. The retailer rejected the delivery of the goods as untimely. In its decision, "[t]he court applied the CISG as the law of the seller's country but also took into account German domestic law for filling gaps on questions of performance."³³³ The court held for the seller, reasoning that the delivery was made during the agreed period, although the delivery may not have been made according to the specifications of the contract. Such misunderstandings are common due to the problems of linguistic and cultural differences and the tendency of business persons to prefer brevity in their business communiqués.³³⁴ The danger of such misunderstandings is compounded in the area of international contract instruments. Differences in language, culture, and legal systems are coupled with the intentional use of vague language. As a result, the risk of unintended legal liability is great in these types of transnational communications.

The German importer should have done several things differently to avoid such a misunderstanding. First, it should have defined the term "autumn goods" more carefully to ensure timely and qualitatively effective delivery of the goods. Second, as the German court suggested, the importer should have made use of the *nachfrist* notice provision in the CISG,³³⁵ which is found in article 47 of the CISG.³³⁶ This additional time to perform is normally given in conjunction with a fixed and known delivery date. The German court held that "the buyer did not effectively avoid the contract by refusing acceptance of the goods *without having fixed an additional period* in the

331. U.N. COMM'N ON INT'L TRADE LAW, CASE LAW ON UNICTRAL TEXTS (CLOUT), 1993, at 3, U.N. Doc. A/CN.9/SER.C/ABSTRACTS/1 [hereinafter CLOUT Case #7] (discussing case in Amtsgericht Oldenburg in Holstein 5 C 73/89 (Apr. 24, 1990)).

332. *Id.*

333. *Id.*

334. A U.S. district court confronted a similar lack of clarity in the infamous "chicken case." *Frigalment Importing Co. v. B.N.C. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960). At issue was the meaning of chicken. The English-speaking exporter made a number of deliveries of stewing chickens to a German-speaking Swiss importer. The importer claimed that the meaning of chicken suggested delivery of a variety of types, including young broiling chickens. The court rejected the importer's contention, and absent any relevant trade usage, held in favor of the seller.

335. Of course, the formal notice option provided in the CISG was not available in the 1960 *Frigalment* case. The civil law countries, however, have a long history of *nachfrist* notice (Germany) or *mise en demeure* (France).

336. Article 47(1) states that the "buyer may fix an additional period of time of reasonable length for performance by the seller." CISG, *supra* note 9, art. 47, para. 1. Article 48(2) allows a seller to "request" additional time for performance. *See id.* art. 48, para. 2. The request places an affirmative obligation on the buyer to respond. If the buyer fails to respond to the request, then the additional time is deemed to have been granted. The buyer thus loses her right to void the contract during that additional period of time.

previous cases of non-delivery."³³⁷ This decision could support a number of interpretations. First, the use of *nachfrist* notice in this situation would have been evidence that the parties had indeed intended multiple delivery dates throughout the autumn months. Second, the decision suggests the possibility that *nachfrist* notice may be used to fix an unspecified delivery date. At a minimum, it would place a burden upon the exporter to respond to the request for delivery. The failure of the exporter to respond would have allowed the German importer to declare the contract void and to seek substitute goods elsewhere.³³⁸ If an American business person mistakenly regards the *nachfrist* letter as an unenforceable comfort instrument, then she may suffer unexpected liability.

2. The Duty To Inspect and To Notify

A purchaser of goods may reject delivered goods if she gives timely and effective notice of nonconformity. According to the CISG, the buyer has three duties that relate to the notice requirement. First, article 38(1) requires the buyer to inspect the goods "within as short a period as is practicable."³³⁹ Second, the buyer must inform the seller of the lack of conformity "within a reasonable time after he has discovered it or ought to have discovered it."³⁴⁰ Specifically, a claim for nonconformity is time-barred if not reported within two years of delivery to the buyer unless this time limit is inconsistent with a contractual period of guarantee.³⁴¹ Third, the notice to the seller must specify the nature of the nonconformity.³⁴²

A German court recently addressed one aspect of the CISG's notice requirements. Pursuant to an installment contract, a German clothing retailer gave notice to an Italian seller of fashion goods eight and twelve days, respectively, after delivery of two shipments.³⁴³ The buyer stated that the goods failed to conform because of poor workmanship and improper fitting of the goods.³⁴⁴ The German court bypassed the issue of timeliness and held the notice ineffective due to its lack of specificity.

Section 2-605 of the UCC contains a notice provision analogous to the

337. CLOUT Case #7, *supra* note 331 (emphasis added).

338. CISG, *supra* note 9, art. 49, para. 1(b) (providing that buyer may declare contract avoided "in the case of non-delivery, if the seller does not deliver goods within the additional period [or fails to respond to a *nachfrist* notice] of time fixed by the buyer").

339. *Id.* art. 38, para. 1. This period is extended if the goods are redirected in transit by the buyer unless the "seller knew or ought to have known of the possibility of such a redirection." *Id.* art. 38, para. 3. The UCC similarly provides: "Rejection of goods must be within a reasonable time after their delivery. It is ineffective unless the buyer *seasonably notifies* the seller." U.C.C. § 2-602(1) (1994) (emphasis added).

340. CISG, *supra* note 9, art. 39, para. 1.

341. *See id.* art. 39, para. 2.

342. *See id.* art. 39, para. 1. The period of reasonableness for giving notice and the two year limitation may be extended if the seller knew or "could not have been unaware" of the nonconformity and thus failed to disclose the nonconformity to the buyer. *See id.* art. 40.

343. U.N. COMM'N ON INT'L TRADE LAW, CASE LAW ON UNICTRAL TEXTS (CLOUT), 1993, at 3, U.N. Doc. A/CN.9/SER.C/ABSTRACTS/1 (May 19, 1993) [hereinafter CLOUT Case #3] (discussing case in Landgericht München I, 17 HKO 3726/89 (July 3, 1984)), reviewed by KRITZER, *supra* note 201, at 4 (Case Commentary: Germany).

344. *See* CLOUT Case #3, *supra* note 343.

one found in the CISG. The specificity required under the Code, however, seems to be less demanding than that required under the Convention. Under the Code, the rejecting party at first only needs to state in general terms the reason for the rejection.³⁴⁵ A comment to the Code explains that under this section, the buyer is permitted to give a "quick and informal notice of defects in a tender without penalizing him for omissions in his statement."³⁴⁶ There is at least one exception, however, to the general character of the notice requirement: "Where the defect in a tender is one which could have been cured by the seller, a buyer who merely rejects the delivery without stating his objections to it is probably acting in commercial bad faith"³⁴⁷ This clarification indicates that a general notice, rather than a particularized one, is sufficient to satisfy the dictates of the Code. Under the Code, the seller may, however, make a formal request in writing for a more particularized listing of the defects on which the buyer proposes to rely in making her rejection.³⁴⁸ The German court's determination that "poor workmanship and improper fit"³⁴⁹ was not specific enough may lead to the conclusion that the degree of specificity required under the Convention is greater than that required under the UCC. This ambiguous language of notice can be analogized to the type of language found in most comfort instruments. The writer of a comfort letter protects herself from liability through the vagueness of her letter. However, the writer's vagueness in a notification of nonconformity prevents her from exercising her right of rejection and associated warranty claims.

C. *The Presumption of Enforceability*

Both the general principles supporting comfort instrument enforceability and recent case law indicate that a clear presumption of nonenforceability no longer exists. This is especially true in light of the fact that the Anglo-American presumption of nonenforceability has no direct application under the CISG. The CISG itself places comfort instrument enforceability issues at ground zero. The enforceability of comfort instruments is still to be determined by future courts interpreting the CISG.

Two factors lead to the conclusion that, through the evolution of CISG jurisprudence, comfort instruments may extend contractual liability. First, recent court cases, especially in England, have challenged the monolithic notion of per se nonenforceability. The lower court in *Kleinwort Benson*,³⁵⁰ along with the subsequent decision in *Bank of New Zealand v. Ginivan*,³⁵¹ have provided glimpses into the potential enforceability of these instruments

345. See U.C.C. § 2-605 (1996).

346. *Id.* § 2-605 cmt. 1.

347. *Id.* § 2-605 cmt. 2.

348. See *id.* § 2-605(1)(b).

349. See CLOUT Case #3, *supra* note 343.

350. [1988] 1 W.L.R. 799 (Q.B. 1987). For a discussion of the *Kleinwort Benson* case, see *supra* text accompanying notes 38-42.

351. [1991] 1 N.Z.L.R. 178, 180 (C.A. 1990). For an examination of this case, see *supra* text accompanying notes 43-47.

on the basis of the twin pillars of contract—promissorial and reliance-based theories. A more accurate rendition of Anglo-American jurisprudence would hold that such instruments may be enforceable given the appropriate fact pattern. An instrument detailed in its assurances and resulting in reasonable reliance will result in contractual liability.

Second, the Italian shoe cases and civil law jurisprudence in general show that a greater degree of informality will be permitted under the CISG as interpreted by civil law courts. The fewer the legal requirements for contractual formality, the greater the possibility for unintended liability in the issuance of a comfort instrument. Although the enforceability of comfort instruments has not been authoritatively determined within any of the world's legal systems, the civil law countries' teleological and purpose-oriented jurisprudence weighs against any formalistic *per se* rule of nonenforceability. The French notion of *obligations de faire*³⁵² and Germany's *Patronatserklärungen*³⁵³ indicate that the presumption is generally in favor of the enforceability of such instruments.

V. THE EVOLVING JURISPRUDENCE OF THE CISG AND COMFORT INSTRUMENT ENFORCEABILITY

A. CISG Treatment of Comfort Letters

The CISG does not deal directly with the issue of comfort instrument enforceability. Whether comfort instruments are enforceable will be determined by the CISG's general articles defining what is and is not a contract. The CISG's lack of both a writing requirement and a parol evidence rule gives the receiver of a comfort instrument a strategic advantage in proving enforceability. Contemporaneous oral assurances as to the legality of the instrument may be admitted into evidence to prove the issuer's intent to be bound. Moreover, evidence of the depth of negotiations over the wording of the instrument and the importance attached to it by the parties will help support a claim of justifiable reliance. Ultimately, the vagueness and breadth of the CISG's contract formation and remedial provisions will leave the determination of enforceability to future court cases. Because of the different approaches of the common and civil law, the future enforceability of comfort instruments is likely to depend on which courts are called upon to render a decision in a case of first impression.

It is likely that civil law courts will hold a party contractually liable for issuing a comfort instrument. Assuming that the case is a strong one for enforceability,³⁵⁴ national jurisprudence and the CISG may lead other courts down the path to finding contractual liability. The civil law countries' less formal requirements for finding contractual liability,³⁵⁵ coupled with the

352. See *supra* note 90 and accompanying text.

353. See *supra* notes 75-76 and accompanying text.

354. A strong case would be one involving a letter containing detailed assurances and inducing reliance.

355. See *supra* Subsection II.A.2.

CISG's liberal evidentiary requirements, may predispose civil law courts to enforce such instruments. Once such a precedent for enforceability is in place, it will be difficult for U.S. courts to avoid similar decisions.

A number of factors militate in favor of such uniform decisionmaking. A comparison of the CISG with the history of the UCC illustrates similar elements favoring uniformity of application. These factors include "a common substantive law, a codified mandate of uniformity, and case law that will be readily accessible."³⁵⁶

B. *The Future Relevance of the CISG to International Contract Law and Comfort Instruments*

The CISG provides a greater likelihood of comfort instrument enforceability than does U.S. case law alone. The liberal evidentiary requirements of the CISG, along with foreign national laws that do not support per se nonenforceability, create fertile ground for a finding of enforceability in a foreign court applying the CISG. For the sake of uniformity, U.S. courts will be compelled to give great deference to these foreign precedents. These two factors—the CISG evidentiary requirements and the importance of foreign precedents—bode well for the future enforceability of comfort instruments.

1. *Evidentiary Requirements*

For the American business person, the level of evidence needed to meet the threshold of agreement under the CISG has made international contracting a riskier endeavor. The writing requirement of the UCC eliminates liability for oral agreements and "informal" letter agreements. The writing must be "sufficient to indicate that a contract for sale has been made . . . and [must be] signed by the party against whom enforcement is sought."³⁵⁷ There are exceptions, however, in the UCC to the rigid application of its statute of frauds and parol evidence provisions. Under the written confirmation rule, for example, the writing may be a one-sided instrument.³⁵⁸ A merchant may legally confirm an oral agreement in writing. If the receiving party fails to respond with a written notice of objection, then she is taken to have waived her statute of frauds defense. It should be noted that this forced waiver does not shift the burden of proof as to whether there was in fact a legal contract of sale. The confirming party still has the "burden of persuading the trier of fact that a contract was in fact made orally prior to the written confirmation."³⁵⁹ Other exceptions to the writing requirement can be found in cases involving specially manufactured goods³⁶⁰ and where one party has partially performed.³⁶¹ The former situation estops a purchaser from

356. Cook, *supra* note 183, at 233.

357. U.C.C. § 2-201(1) (1989).

358. *See id.* § 2-201(2).

359. *Id.* § 2-201 cmt. 3.

360. *See id.* § 2-201(3)(a).

361. *See id.* § 2-201(3)(c).

canceling an order for specialty goods if her notice of repudiation fails to reach the seller before “a substantial beginning of their manufacture or commitments for their procurement”³⁶² have been made. In the case of an installment contract, receipt and acceptance of delivery “constitutes an unambiguous overt admission by both parties that a contract actually exists.”³⁶³

In contrast, the CISG’s evidentiary threshold is easier to meet for two reasons. First, a purely oral agreement or one evidenced by informal correspondence or comfort instruments is sufficient to evidence the formation of a contract. Second, contractual obligations “may be proved by any means,”³⁶⁴ which would include a prior agreement or a contemporaneous oral agreement. A decision rendered by the Mexican Commission for the Protection of Foreign Trade, for example, cited article 11 of the CISG in holding that a number of commercial invoices and evidence of the delivery of the goods were sufficient to support a finding of a contract of sale.³⁶⁵ The informality, both in form and substance, of most comfort instruments is not as meaningful under the CISG as it is under U.S. jurisprudence.

2. *Uniformity of Decision*

The overall success of the CISG depends on the creation of a uniform interpretive jurisprudence. The uniformity of decision mandated by the CISG requires U.S. courts to apply foreign decisions over conflicting domestic decisions regarding the enforceability of comfort instruments: “[T]he Convention, by its language and history, directs United States courts to achieve uniformity in interpretation by granting considerable weight to foreign decisions interpreting its terms.”³⁶⁶ The ability to determine comfort instrument enforceability will thus depend on which courts decide cases of first impression pertaining to comfort instruments and the CISG. The need for uniformity in the interpretation and application of the CISG will be a compelling factor in most future CISG cases.

The experience of U.S. courts with the creation of a relatively uniform jurisprudence around the UCC should strengthen their resolve to create a similar jurisprudence for the CISG. The need for predictability and uniformity may place comfort instrument enforceability on two tracks. One track involves domestic cases that currently recognize the nonenforceability of most comfort instruments. The other involves the *importation* of foreign case law through the CISG. The needs of commercial predictability and certainty will best be served by a convergence of the two tracks over time. For the short term, the American business person will have to maneuver within a more complicated contractual landscape. The next section will make recommendations based on some of the major differences between the UCC and the CISG. These recommendations will help the American business person avoid unintended

362. *Id.* § 2-201(3)(a).

363. *Id.* § 2-201 cmt. 2.

364. CISG, *supra* note 9, art. 11.

365. *See* KRITZER, *supra* note 9, at 3.

366. Cook, *supra* note 183, at 199.

contractual liability.

C. *Recommendations for the American Business Person*

This Article has touched upon a number of the philosophical and practical differences in the law of contracts among the world's different legal systems and the CISG. The American business person and her attorney should be cognizant of several of these differences when negotiating and drafting international sales contracts and comfort instruments.³⁶⁷ First, they should be aware that the CISG's definition of materiality is unusually broad. The CISG's agreement-finding language is a facade for the strict compliance dictates of the early common law's mirror image rule. An American business person's skill at formulating contracts out of loosely and sparsely worded correspondence is likely to result in uncertainty of obligation under the CISG. In such situations, the CISG rejects the battle of the forms resolution found in U.S. law in favor of a finding of noncontract. The acceptance must be the mirror image of the offer in all material terms. Second, the ability to "agree to agree" on a price is expressly abrogated under the CISG.³⁶⁸ A contract can only be formed if there is a mutual agreement on price or a means of calculating the price at the time of formation. Third, the implication of trade usage is sanctioned under both the UCC and the CISG, but there are notable differences. The UCC simply recognizes that all "applicable usage[s] of trade in the place where any part of [the] performance is to occur shall be used [as aids] in interpreting the agreement."³⁶⁹ The implication of trade usage under the CISG has a higher evidentiary threshold. It requires a further finding that the party to be charged had actual or imputed knowledge of the particular trade usage.³⁷⁰

The fourth aspect of the CISG that American business persons should be aware of is its disregard for the writing requirement found in the common law. Whether a letter is a fully or partially integrated instrument will not play as meaningful a role under the CISG.³⁷¹ The common law makes a distinction between fully and partially integrated instruments. Those that are construed to be partial would admit the types of evidence that are allowed under the Convention. When an instrument is considered to be fully integrated, however, there is a pronounced divergence between the CISG and the common law. The CISG's lack of a writing requirement allows all relevant information into evidence even if it contradicts the written

367. See generally Burte A. Leete, *Contract Formation Under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code: Pitfalls for the Unwary*, 6 TEMP. INT'L & COMP. L.J. 193 (1992) (discussing creation of Uniform Law on the Formation of Contracts for the International Sale of Goods and Uniform Law on the International Sale of Goods to Establish Uniformity in International Business Transactions).

368. In contrast, the UCC expressly condones the notion of an open price term: "The parties if they so intend can conclude a contract for sale even though the price is not settled." U.C.C. § 2-305(1) (1981).

369. *Id.* § 1-205(5).

370. See CISG, *supra* note 9, art. 9.

371. Cf. RESTATEMENT (SECOND) OF CONTRACTS §§ 212, 214 (1981) (discussing American legal treatment of integrated instruments). For a general discussion of the notion of integration, see NASSAR, *supra* note 84, at 41.

documentation. In contrast, the common law parol evidence rule would prohibit the introduction of evidence that would contradict the terms of the writing.³⁷² This would be a paramount factor in the area of comfort instrument enforceability.³⁷³

The fifth aspect of the CISG that merits attention is that, under it, the American business person will find it more difficult to be the master of her offers. Except for the firm offer rule,³⁷⁴ the UCC presumes that all offers are revocable. Article 16 of the Convention, in contrast, precludes revocation if "it was reasonable for the offeree to rely on the offer."³⁷⁵ "Thus, an offer stating that acceptance must be made 'within thirty days' would be considered irrevocable for that period."³⁷⁶ The other material difference is that a *firm offer* under the UCC must be in written form. The lack of a statute of frauds requirement under the CISG, however, allows an oral assurance to be irrevocable. Thus, a comfort letter pertaining to an offer is more likely to be enforced under the CISG than under the UCC.

VI. CONCLUSION

The enforceability of informal instruments of commerce, or comfort instruments, is quite possible in international contracts law. Generally accepted principles of contract law may be applied to determine "what is fair and equitable . . . in terms of what best serves the business efficiency of the relationship."³⁷⁷ Many general principles are articulated in the CISG, which has been described as "a giant step forward from the eras of conflicts [of law] and the law of merchants."³⁷⁸ The Convention, however, has added another area of legal concern for practitioners of private international transactional law and their clients. Along with knowledge of the UCC, foreign national laws, and international trade usage, the Convention and its reach are important considerations for anyone involved in the international sale of goods. From

372. See, e.g., *I.M.A., Inc. v. Rocky Mountain Airways, Inc.*, 713 P.2d 882, 888 n.6 (Colo. 1986); see also *Buckley Bros. Motors, Inc. v. Gran Prix Imports, Inc.*, 633 P.2d 1081, 1083 (Colo. 1981).

373. The court in *Beijing Metals & Minerals v. American Business Center, Inc.* held that the parol evidence rule would still apply in U.S. courts under the CISG when there is a written instrument. The court made only passing reference to the CISG, stating that "there is as yet virtually no case law interpreting the Sales of Goods Convention." 993 F.2d 1178, 1182-83 n.9 (5th Cir. 1993) (quoting *Filanto S.p.A. v. Chlewich Int'l Corp.*, 789 F. Supp. 1129, 1237 (S.D.N.Y. 1992)). The court assumed that the parol evidence rule goes to the validity of the contract, which requires the application of internal law. "We need not resolve this choice of law rule, because our discussion is limited to application of the parol evidence rule which applies regardless." *Id.* (emphasis added). Based upon this determination, the court disregarded two oral agreements made contemporaneously with a written payment agreement. It concluded that the written agreement "[was] unambiguous . . . and that nothing in its four corners, or in the surrounding circumstances, indicates the existence of collateral contingent agreements [T]he parol evidence rule bars enforcement of prior or contemporaneous agreements to vary . . . terms of a fully integrated written instrument." *Id.* at 1182.

374. Section 2-205 allows for the irrevocability of an offer if it is "in a signed writing" and limits the period of irrevocability to no more than three months.

375. CISG, *supra* note 9, art. 16, para. 3(b). This provision also requires actual reliance on the part of the offeree.

376. 1 GUIDE TO THE CISG, *supra* note 173, at 101.021.

377. NASSAR, *supra* note 84, at 191.

378. Randall & Norris, *supra* note 1, at 619.

a practical point of view, "prudent drafters [of international sales contracts and comfort instruments] ought to re-examine language to protect the special needs of their clients."³⁷⁹

The interrelationship between the potential enforceability of comfort instruments and the application of the CISG may ultimately be secondary to the general advance of contractual liability into this area. The commonality of contract rules among the world's different legal systems attests to the fact that there has been a process of convergence taking place over the centuries. The conduit for this convergence has been the expansion of international business transactions and trade. As comfort instruments become more detailed and contractual in nature, the likelihood of enforceability increases. The Convention's flexible terminology is unlikely to present an obstacle to the enforcement of these instruments within the context of international business transactions.

379. E. Allan Farnsworth, *Review of Standard Forms or Terms Under the Vienna Convention*, 21 CORNELL INT'L L.J. 439, 447 (1988). Professor Farnsworth recognized a tripartite hierarchy in international contract law. At the top is domestic law as regards the inherent validity of the contract, followed by the contract itself, and at the bottom, the Convention.