Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, an Inter-American Application

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I. INTRODUCTION

"Translation is the art of failure,"[1] yet it is necessary. In international law, translation refers not only to language, but also to legal concepts and legal cultures. This article describes the failure to escape the necessity of translation by the imposition of a uniform set of laws. Intensifying global communications and expanding businesses render accessibility to the legal standards and laws of different countries a reality for international commercial actors.[2]

The Inter-American region is particularly significant in its need for accessible international sales law. Inter-American trade accounted for over thirty percent of total U.S. trade in goods for 2005[3] and U.S. trade in goods with Mexico and Canada alone totaled over $800 billion in 2005.[4] Canada and Mexico are the two largest trading partners of the United States.[5] Consequently, great inefficiencies will result in the absence of an easily ascertainable set of laws governing the sale of goods.

The Convention on the International Sale of Goods ("CISG") attempts to facilitate trade by creating one common legal standard.[6] The CISG seeks to unify varying legal concepts of contract law and create one coherent body of law for the contracting states.[7] Problems with translation, however, including differing methods of interpretation, language and varying legal cultures, complicate the goal of unification.

In examining the different sources of impediments to unification, this article focuses on Article 7 of the CISG as utilized by Argentinean, Colombian, Mexican and U.S. courts. Article 7 of the CISG purports to direct the interpretation of the Convention.[8] Article 7(1) addresses interpretation of the Convention's three major goals: regard for the international character of the Conven-

1. Quotation of Umberto Eco, Thinkexist.com, http://en.thinkexist.com/quotes/umberto_eco (last visited Nov. 10, 2006).

2. *See* Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187 (1998).

3. U.S. CENSUS BUREAU, FOREIGN TRADE STATISTICS, TOP TRADING PARTNERS – TOTAL TRADE, EXPORTS, AND IMPORTS (Dec. 2005), www.census.gov/foreign-trade/statistics/highlights/top/top0512.html.

4. *Id.*

5. *See id.*

6. *See* United Nations Convention on Contracts for the Sale of Goods art. 7(2), Apr. 11, 1980, 19 I.L.M. 673 (1980) [hereinafter CISG].

7. *See id.* at pmbl.

8. *See id.* at art. 7.

tion, promoting uniformity and good faith in international trade.[9] Article 7(2) is a gap-filler for concepts intended to be governed by the CISG but not expressly stated within.[10] The Article 7(2) method provides a hierarchy: applying general principles upon which the Convention is based before resorting to private international law in resolving an ambiguity.[11]

The problems of interpretation of the CISG are a function of judges interpreting the Convention through lenses cut by their own legal culture and experiences. Consequently, interpretation impedes the goals of unification and international character of the Convention.

Reviewing the rationale of court opinions provides the strongest indication of the process by which domestic laws are imputed. I suggest revisiting the creation of a common adjudicative body to review contested cases beyond the initial country of litigation. A final court should be instituted to ensure uniform results of the interpretation of the CISG. Additionally, a final court can give definitions to the enigmatic "general principles" in Article 7(2).[12] The absence of such a supranational structure also leads to an over-reliance on domestic laws. Consequently, using a court to provide comprehensive contours to the "general principles" will embody and promote the international character of the Convention.

II. GLOBALIZATION AS THE IMPETUS FOR ASPIRING TOWARDS UNIFORMITY

In many respects globalization has dissolved the significance of nation states.[13] National boundaries are determined by "geographic arbitrariness"[14] while international commerce transcends national borders. Although economic boundaries are blurred, cul-

9. *See id.*

10. *See id.*

11. *See* Larry A. DiMatteo et al., *The Interpretive Turn in the International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence,* 24 NW. J. INT'L L. & BUS. 299, 313-314 (2004).

12. CISG at art. 7(2).

13. *See* Sandeep Gopalan, *New Trends in the Making of International Commercial Law,* 23 J.L. & COM. 117 (2004) ("Increasingly, nation states are becoming less important in the creation of international commercial law with the growth of regional organizations, non-state actors, and international arbitration. This is spurred on by the march of globalization and the need for international commercial law.").

14. Russell Menyhart, *Changing Identities and Changing Law: Possibilities for a Global Legal Culture,* 10 IND. J. GLOBAL LEGAL STUD. 157, 160 (2003).

tural, legal and linguistic borders remain.[15] Consequently, the commercial expansion brought on by globalization requires a compatible legal structure.[16] That is not to say that current national legal structures are completely ineffective in dealing with international commerce. However, different legal cultures (with competing national interests), various languages, and confusion amongst foreign law, render individual, independent national legal systems highly inefficient in dealing with the growing needs of international commerce.[17] The result is that "international commerce needs uniform rules that do [not] dissolve with diverging national interpretations."[18]

The era of globalization has had a significant effect on the progression and transformation of international commerce. In the Americas there are six different regional arrangements[19] that seek to promote common markets and about twenty five bilateral accords that focus on economic integration and free trade.[20] The North American Free Trade Agreement ("NAFTA") is the most powerful instrument put in place in North America regarding, among other things, trade, business and investments.[21] Additionally, on July 1, 2004, seven Latin American countries joined an "Economic Complementation Agreement for the formation of a

15. *See id.*

16. *See* Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria*, *in* LEX MERCATORIA AND ARBITRATION, 139-40 (Thomas E. Carbonneau ed., 1990).

17. *See Suggestions for Future Unification Techniques, Progressive Codification of the Law of International Trade: Note by the Secretariat of the International Institute for the Unification of Private Law (UNIDROIT)*, 1970 U.N. Comm'n on Int'l Trade Law Y.B., U.N. Sales No. E.71.v.1. ("[I]nternational trade also needs its own ordinary law with its own particular role and full range of functions . . . . legal relationships of international trade are international in character [which] puts them outside the jurisdiction of municipal law and makes them governable by a law removed from any national contingency. . .which alone can provide the legal framework which international trade needs in order to develop.").

18. CLAUDE SAMSON, *Analyse des Dispositions de la C.V.I.M. du Point de Vue du Droit Civil Québecoise* [Analysis of the CISG from the Point of View of the Civil Law of Quebec] *in* REPORT TO THE UNIFORM LAW CONFERENCE OF CANADA ON CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, 168-305 Toronto (1981), *available at* http://www.yorku.ca/osgoode/cisg/writings/samson.htm (translation by author).

19. *See* David A. Pawlak, *International Trade in the Americas: The Inter-American Lawyer's Guide to Origin Determinations*, 5 TUL. J. INT'L. & COMP. L. 317, 319 (1997) (citing Peter Smith, *The Politics of Integration: Concepts and Themes*, *in* THE CHALLENGE OF INTEGRATION: EUROPE AND THE AMERICAS 1, 13 n.4 (Peter Smith ed., 1993)).

20. *See id.* (citing *Special Report: Trade Outlook for 1995*, INT'L TRADE RPTR., Jan. 18, 1995).

21. *See* Jorge A. Vargas, *An Introductory Lesson to Mexican Law: From Constitutions and Codes to Legal Culture and NAFTA*, 41 SAN DIEGO L. REV. 1337, 1368 (2004).

Free Trade Area."[22]

Uniform laws reduce restrictions and barriers to international trade, increasing efficiency in international commerce. By contrast, local laws are protectionist, seeking to protect their local industries.[23] Local laws create inefficient barriers and impediments that constrict commerce.[24] Additionally, the Colombian Constitutional Court remarked that unification would increase commercialization of goods, resulting in a better quality of life for the inhabitants in those countries.[25] The CISG proposes to unify these regional efforts on a global scale to maximize the efficiency of the economic integration through the use of uniform laws.[26]

On April 11, 1980, the CISG was adopted by diplomatic conference.[27] It was then ratified by the United States in 1988.[28] As of July 17, 2006, there were sixty-eight member countries to the CISG.[29] Thirteen of the sixty-eight are Inter-American countries.[30] They include: Argentina, Canada, Chile, Colombia, Cuba, Ecuador, Honduras, Mexico, Paraguay, Peru, Saint Vincent and Grenadines, the United States and Uruguay.[31] Accordingly, the use of the CISG encompasses a significant portion of commerce in the Americas.

Developed from several failed attempts to unify contract law, the CISG has successfully received a reputation for being the "first sales law treaty to win acceptance on a worldwide scale."[32]

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22. John R. Pate, Ramón A. Azpúrua-Nuñez, and Patrizia F. Papaianni (Meaghan McGrath Beaumont & Jonathan M. Miller Regional eds.), *Inter-American Law*, 38 INT'L LAW. 665, 690 (2004) (participating in this free trade agreement are: Venezuela, Colombia, Ecuador, Argentina, Brazil, Uruguay, and Paraguay).

23. *See* James J. Callaghan, *U.N. Convention on Contracts for the International Sale of Goods: Examining the Gap-Filling Role of CISG In Two French Decisions*, 14 J.L. & COM. 183 (1995).

24. *See id.*

25. *See* Corte Constitucional [Constitutional Court], Sentencia C-529/00, Referencia: expediente, LAT-154, May 10, 2000 (Colom.) (Pablo A. Santos Jiménez trans., Jorge Oviedo Albán ed.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000510c7.html; *see also* discussion *infra*.

26. *See* Callagan, *supra* note 23, at 184-85.

27. *See* CISG at art. 101.

28. *See* Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443, 481 (1989) [hereinafter Garro, *Reconciliation*].

29. *See* Pace Law School, Legal Resources and Centers, CISG Database: *CISG: Table of Contracting States*, http://www.cisg.law.pace.edu/cisg/countries/cntries.html (last visited Nov. 10, 2006).

30. *See id.*

31. *See id.*

32. JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN THE USA: A COMPACT GUIDE

As a tool for unifying contract law for the sake of international commerce, the scope of the CISG is rather modest. That is, the CISG only covers the law for the formation of the contract and the obligations and duties stemming from the contract.[33] Although recourse to domestic law is necessary for various accompanying issues,[34] the CISG does provide the opportunity to avoid questions of conflicts of law and answer questions of substantive law directly.[35]

The first part of this article looks at the sources of the obstacles to the goals of Article 7(1): promoting uniformity in the interpretation of the CISG. Article 7(1) states: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."[36]

III. METHODS OF INTERPRETATION

Even on the most basic level of translation, interpretive methods are constrained. The obstacle: "all texts subject to human communication . . . must inherently have a certain degree of indeterminacy concerning their meaning."[37] Moreover, linguists argue, words do not have "an objective meaning existing independently of human agents."[38] Accordingly, judges are constrained in interpretation of the text of the CISG simply because it is a function of interpretation. The significance of recognizing this constraint calls for implementing a structure that responds directly to it. Various responses have been attempted but none of the methods sufficiently focus on the inherently subjective interpretative problem. Consequently, as discussed below, there is an intrinsic need for supranational judicial authority for interpretive guidance.

A. "Autonomous" Interpretation

Many scholars have interpreted Article 7(1) to indicate that

TO THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1 (2d ed. 2004).

33. *See* CISG.

34. *Id.* at art. 4.

35. *Id.* at art. 1.

36. *Id.* at art. 7(1).

37. Jan Engberg, *Statutory Texts as Instances of Languages(s): Consequences and Limitations on Interpretation*, 25 BROOK. J. INT'L L. 1135, 1139 (2004).

38. *Id.* at 1142.

judges must interpret the CISG autonomously.[39] Autonomous interpretation divorces domestic law as an influence on questions of interpretation that arise when deciding a case based on a provision in the Convention.[40] Instead of domestic case law, scholars advocate creating an international jurisprudence so that courts will look to decisions made by other foreign courts to determine the outcome of a given case.[41] The method promotes uniformity in accordance with Article 7(1). However, United States courts are reluctant to use anything but a restrictive approach to interpretation of the text.[42] The restrictive approach permits the "natural bias for familiar domestic legal norms" to be the method of interpretation.[43] However, this approach is in direct opposition to the goals of the Convention, namely that "[t]he interpretive standards of the CISG article 7. . .. establish[ ] a means for interpreters to develop the law under an international convention in a manner entirely free from the influence of domestic legal norms."[44] By contrast, the restrictive method encourages courts to refer to their own legal systems and concepts to define legal terms. Commentators refer to this problem as the "homeward trend."[45] In practice it has been found that U.S. courts rely on the "homeward trend" more often than other judges in interpreting the CISG: "United States judges will tend to seek authoritative guidance from the texts of prior judicial or arbitral decisions, whereas European judges will be inclined to rely far more on academic commentary."[46] Uniformity cannot be achieved when judiciaries rely on their own "domestic legal norms" in interpreting ambiguities in the CISG.[47] The "homeward trend" as a method of interpretation in the United States remains one of the greatest obstacles to the

39. *See* Franco Ferrari, *Applying the CISG in a Truly Uniform Manner: Tribunale di Vigevano (Italy), 12 July 2000*, NS Vol. 6, UNIFORM LAW REVIEW / REVUE DE DROIT UNIFORME, 203, 204 (2001).

40. *See id.* at 205.

41. *See id.* at 206.

42. *See* Michael P. Van Alstine, *Dynamic Treaty Interpretation,* 146 U. PA. L. REV. 687, 691-92 (1998).

43. *Id.* at 693.

44. *Id.* at 733.

45. *Id.* at 704 (citing Michael F. Sturley, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?*, 21 TEX. INT'L L. J. 540, 542 (1986)).

46. Vivian Grosswald Curran, *The Interpretive Challenge to Uniformity,* 15 J.L. & COM. 175, 176 (1995) (reviewing CLAUDE WITZ, PARIS: LIBRAIRIE GÉNÉRALE DE DROIT ET DE JURISPRUDENCE (1995)).

47. Van Alstine, *supra* note 42, at 693-94.

creation of a foreign law based jurisprudence for the CISG.[48]

B. *The U.C.C. and the Use of Analogous Domestic Legal Concepts*

Autonomous interpretation also means abandoning domestic techniques used to resolve interpretive problems. Professor Ferrari has discredited the use of analogizing the Uniform Commercial Code ("UCC") as an interpretive method for understanding the CISG.[49] He writes: "Article 7(1) demands that the Convention not be read through the lenses of domestic law."[50] These "lenses" do not simply highlight the absence of the use of foreign jurisprudential decisions concerning the CISG. Rather, he argues, although the UCC greatly influenced the CISG drafters, "it is impossible . . . to assert that the . . . sets of rules [of the UCC and CISG] are similar in content, or, even worse, that they 'are sufficiently compatible to support claims of overall consistency.'"[51] According to this view, the UCC and the CISG are simply not analogous.[52] For instance, the concept of good faith in CISG Article 7(1) indicates that good faith is a "mere instrument of interpretation," while the UCC refers to good faith as, among other things, the direct obligation on the parties to a contract.[53]

Nonetheless, a methodological approach that discounts the use of analogies to domestic legal concepts seems impractical if not impossible. In particular, a judge looking to interpret a provision needs some frame of reference to assist in understanding that provision. Moreover, the provisions of the CISG are "the result of a compromise rather than a consensus."[54] That is, the basis of a particular foundation makes an implicit reference to various legal

48. Curran, *supra* note 46, at 176.

49. *See* Franco Ferrari, *The Relationship Between the UCC and the CISG and the Construction of Uniform Law*, 29 LOY. L.A. L. REV. 1021, 1022 (1996) [hereinafter Ferrari, *Relationship*].

50. *Id.* at 1026 (citing John O. Honnold, *The Sales Convention in Action – Uniform International Words: Uniform Application?*, 8 J.L. & COM. 207 (1988)).

51. *Id.* at 1023 (quoting Elizabeth H. Patterson, *United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination*, 22 STAN. J. INT'L L. 263, 275 (1986)).

52. *See id.* at 1033.

53. *See* CISG at art. 7(1); Uniform Commercial Code (UCC) § 1-203 (2004). *But see* Van Alstine, *supra* note 42, at 779-82 (indicating that good faith has a more expansive role in the CISG and should be regarded as a "general principle" referred to in Article 7(2)); Harry Flechtner, *Comparing the General Good Faith Provisions of the PECL and the UCC: Appearance and Reality*, 13 PACE INT'L L. REV. 295, 299-300 (2001).

54. Garro, *Reconciliation*, *supra* note 28, at 481.

traditions including the UCC. Although simple analogies to the UCC would violate the uniformity principle, it is impossible for judges to interpret the provisions in the absence of a clear indication of what the legal concept actually represents. Additionally, many American judges interpreting the provisions are not specialized in international law and, therefore, the burden of interpreting legal concepts in the abstract with deference to "uniformity" and "international character of the Convention" is too great. Judges, if discouraged from looking to domestic concepts, should have guidelines and other available standards for comparison. Consequently, a completely autonomous interpretation devoid of a supranational organization to provide guidance is an ideal that is impractical and without meaning beyond theoretical conceptions of what is required to achieve a theoretical absolute uniformity.

IV. The Meaning of the Uniformity Principle

Before detailing further obstacles to uniformity and the international character of the CISG, it is important to look at the meaning of uniformity. The text of Article 7(1) supports the argument that the drafters did not intend to create absolute uniformity of application of the provisions. Article 7(1) states, "*regard* is to be had to . . .the need to *promote* uniformity in its application."[55] Both the words "regard" and "promote" lack the definitive force of absolute uniformity. Of course, "uniformity" remains a goal of the Convention, but it should be read in light of the other goals of the Convention.

V. Obstacles to Uniformity

A. *Language, Translation and the Text*

"The rules were meant to be simple, accessible, and effective."[56] The CISG is a short collection of 101 articles with seemingly simple and straightforward language.[57] However, the simplicity and brevity of the CISG is bound to fall short of completeness.[58] Moreover, the "technicalities and idiosyncrasies"[59] that are particular to a certain legal culture have been eliminated.[60] Adding to the complexities of the 'simple' language, the

55. CISG at art. 7(1) (emphasis added).
56. Audit, *supra* note 16, at 143.
57. *See* CISG.
58. *See id.* at art. 7(2).
59. Audit, *supra* note 16, at 143.
60. *See id.*

articles have also been referred to as compromises.[61] That is, many of the embodied rules are compromises between scholars from different legal cultures. Consequently, the legal significance of a particular word or phrase is in part a function of a given compromise.[62] Given the structure and composition of the CISG, various ambiguities in the text of the CISG exist.

Although many Latin American countries that are members to the CISG share a common language, the application of the CISG in the Inter-American perspective maintains the obstacle of varying languages. For instance, "[e]ach national legal system uses terminology that does not necessarily correspond with the legal languages of other countries. . . the English expression[ ] *contract*. . . comprise[s] of different legal concepts [than]. . . *contrato*."[63] Additionally, where the "CISG covers certain types of contracts which in some domestic laws do not correspond to the traditional notions of 'sales' contracts, it is not always easy to ascertain which contracts fall within the sphere of application."[64]

One method the drafters used to generate uniformity was to promulgate the CISG in six official languages.[65] A consequence of this method was an unintended non-uniformity.[66] For example, there exist discrepancies between two versions of the official languages of the Convention that were unintended, because "the nature of language and translation makes such an ideal impossible to achieve."[67] For example, when looking at Article 7(1) in English, French and Spanish, it is clear that lexical choices play a role in creating these ambiguities:

> [English]: In the interpretation of this Convention, regard is to be had. . . to the need to PROMOTE uniformity in its application and the observance of good faith in interna-

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61. Garro, *Reconciliation, supra* note 28, at 459-60.

62. *See* Garro, *Reconciliation*, *supra* note 28.

63. Ana M. López-Rodríguez, *Towards a European Civil Code without a Common European Legal Culture? The Link Between Law, Language and Culture*, 29 BROOK. J. INT'L L. 1195, 1200 (2004) (emphasis added).

64. Michael Joachim Bonell & Fabio Liguori, *The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law - 1997 (Part 1)*, NS Vol. 2, UNIFORM LAW REVIEW/ REVUE DE DROIT UNIFORME, 385, 385-95 (1997).

65. *See* CISG at art. 101. *Cf.,* Flechtner, *supra* note 2, at 192-193 (stating that there are six official languages but the various other translations in contracting states will be primary sources for courts and practitioners in countries that lack an official version).

66. *See* Flechtner, *supra* note 2, at 207.

67. *Id.* at 206.

> tional trade.[68]
>
> [Spanish]: En la interpretación de la presente Convención se tendrán en cuenta. . .la necesidad de PROMOVER la uniformidad en su aplicación y de ASEGURAR la observancia de la buena fe en el comercio internacional.[69]
>
> [French]: Pour l'interprétation de la présente Convention, il sera tenu compte de. . .la nécessité de PROMOUVOIR l'uniformité de son application ainsi que D'ASSURER le respect de la bonne foi dans le commerce international.[70]

The English use of the verb "promote" qualifies both the goals of uniformity and the observance of good faith in international trade.[71] However the Spanish and French versions of the texts utilize different verbs in regards to uniformity and the observance of good faith. "To promote" ("promover"/"promouvoir") is the choice in the Spanish and French texts in reference to the uniformity principle while "to assure" ("asegurar"/"assurer") is the lexical choice qualifying the goal of the observance of good faith. The courts will ultimately be responsible for determining the significance of these differences. However, the focus here is on the existence of such lexical choices and their potential impact for disparities in interpretations. Put another way, the different linguistic choices creating such ambiguities have an impact on the legal predictability of a given provision.[72]

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68. CISG at art. 7(1).

69. *Universidad Carlos III de Madrid, Convencion de Las Naciones Unidas Sobre Los Contratos de Compraventa Internacional de Mercaderias* (CNUCCIM-CISG), http://www.uc3m.es/cisg/textoc.htm (last visited Oct. 9, 2006).

70. Pace Law School CISG Database, *Convention des Nations Unies sur les contrats de vente internationale de merchandises,* http://cisgw3.law.pace.edu/cisg/text/salecf.html (last visited Oct. 9, 2006).

71. *See* Harry M. Flechtner, *Another CISG Case in the U.S. Courts: Pitfalls For the Practitioner and the Potential For Regionalized Interpretations*, 15 J.L. & COM. 127, 136 (1995).

72. *See also* Flechtner, *supra* note 2, at 190-192. An example of textual non-uniformity can be seen in Articles 71 and 72 regarding anticipatory breach. Fletchner argues that 71 requires only the appearance of non-performance of a *substantial* part of the obligations, whereas avoidance of the contract requires clarity that a *fundamental* breach will occur. The English version of the text distinguishes between the looking out for a *substantial* breach, as opposed to a *fundamental* breach. However, the French text uses the word *essentielle* in both Articles 71 and 72 (looking out for a breach of an essential part of the contract). The Spanish version of the text supports Professor Fletchner's argument because it follows the same linguistic structure as the English version. *Universidad Carlos III de Madrid, Convencion de Las Naciones Unidas Sobre Los Contratos de Compraventa Internacional de Mercaderias* (CNUCCIM-CISG), Art. 71, 72, http://www.uc3m.es/cisg/textoc.htm (last visited Oct. 9, 2006). That is Article 71 in the Spanish version uses the word *sustancial*, while Article 72 uses, *esencial*. *Id.* Moreover, *esencial* is the same word

B. Legal Culture

1. Absence of a Common Legal Culture

The absence of a common legal culture is another obstacle to uniformity of international sales law. A common legal culture refers to a common socioeconomic and political structure, combined with a common general legal framework, which plays a significant role in how legal rules are understood and applied.[73] As described above, a common language facilitates the common framework of legal principles.[74]

Legal culture provides "national glasses" for the application and understanding of the laws and general principles of the laws.[75] The common general legal framework develops through common legal culture and shared legal discourse.[76] For example, in the United States, education and accessibility to common legal literature promotes a common legal culture.[77] The absence of a basic authority and a common legal thinking constitutes a significant hurdle for the Inter-American landscape.[78] The problem is further intensified because of the lack of access to international legal sources.[79] Comprehensive research websites such as those generated by Uncitral and Pace Law School have removed some of the barriers creating greater availability.[80] However, language still plays a large role in the accessibility of these sources because adequate translations of caselaw and research are simply nonexistent. Moreover, Professor Garro writes:

> Basic research tools such as updated and comprehensive legislative and case-law reports of other Latin American countries are out of reach of most Latin American law libraries. Even if adequate sources were available, a noto-

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used in the Spanish version in Article 25 when describing the breach that permits avoidance (In English, *fundamental* breach). *Id.* at art. 25.

73. *See* López-Rodríguez, *supra* note 63, at 1206; Alejandro M. *Garro, Unification and Harmonization of Private Law in Latin America*, 40 AM. J. COMP. L. 587, 597 (1992) [hereinafter Garro, *Unification*].

74. *See* López-Rodríguez, *supra* note 63, at 1208.

75. *Id.* at 1206.

76. *See id.* at 1208-1209, 1214.

77. *See id.* at 1207-1208.

78. *Cf. id.* at 1208-1209 (indicating that lack of common legal thinking and common language make achieving legal uniformity in the European Union difficult).

79. *See* Garro, *Unification, supra* note 73, at 611.

80. *See* Pace Law School, CISG Database, http://www.cisg.law.pace.edu (last visited Nov. 12, 2006); UNCITRAL, International Sale of Goods (CISG) and Related Transactions, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods.html (last visited Nov. 12, 2006).

riously underpaid academic community and an understaffed and overworked judiciary is unlikely to be able to process, digest and think over the many intricate issues posed by legal unification.[81]

2. Common Law and Civil Law Traditions

The obstacle of a common legal culture is amplified by the differences between the common law and civil law systems.[82] These differences demonstrate how the civil law and common law systems lead to divergences in application and understanding of the laws. Specifically, the civil law system focuses on the legal rule while the common law tradition gives priority to practical experience.[83] Thus, the varying role of precedent influences the differences in interpretation. In common law countries the judiciary emphasizes the binding nature of its own precedent and is reluctant to look beyond it. In contrast, civil law countries tend to stick very closely to the text itself, and rely less on precedent. The common law system places judges and the judiciary in the center of the legal system with a focus on *stare decisis* and a strong conception of judicial review.[84] In contrast, the traditional civil law system makes the legislature the center of law making and law modification.[85] Judges are the caretakers of the law who must apply the law as it was given to them by the legislature.[86] In more contemporary civil law countries (primarily in Latin American countries) the executive branch has a significant influence on the powers of the Supreme Court.[87] For example, an Argentinean Supreme Court Justice nominee may assert during nomination hearings that he is qualified because he is "a friend of the President."[88] Differing conceptions of rules, principles, precedent and the role of the judiciary highlight some of the impediments that exist in interpretation of the CISG.

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81. Garro, *Unification*, *supra* note 73, at 611.

82. *Cf.* López-Rodríguez, *supra* note 63, at 1209 (indicating disparities between common law and civil law make common legal culture difficult to achieve in the European Union).

83. *See id.*

84. *See* Vargas, *supra* note 21, at 1353.

85. *See* Richard J. Wilson, *Reflections on Judicial Review in Latin America*, SW. J. L. & TRADE AM. 435, 441 (2000).

86. *See id.*

87. *See id.*

88. *Id.* at 442 (citing Jonathan M. Miller, *Evaluating the Argentine Supreme Court Under Presidents Alfonsin and Menem (1983-1999)*, 7 SW. J. L. & TRADE AM. 2 (2000)).

The Mexican legal system illustrates the focus of a civil law system. In Mexico, unlike the United States, there is no doctrine of *stare decisis*, meaning that the Mexican decisions "carry no legally binding force in deciding subsequent judicial cases."[89] However, the Supreme Court decisions do gain precedential value by function of certain formalities in the Mexican legal system.[90] First, judicial decisions are called *Ejecutorias* which are published in the Federal Judicial Weekly and are meant to inform lower courts of the Supreme Court's reasoning.[91] These *Ejecutorias* influence the decisions of the lower courts, legislators and public officials.[92] Second, legally binding decisions or, *Jurisprudencias,* develop when there are five uninterrupted and consecutive judicial resolutions by the Supreme Court of Justice or the Circuit Collegiate Tribunal with the same legal holding.[93] These must be decided by the eight Justices in the Supreme Court en banc or by four Justices in the Supreme Court Chamber.[94] Accordingly, the process of developing binding precedent is significantly slower in the Mexican civil law system than under the U.S. common law system.

CISG Article 79 also illustrates another interpretive problem resulting from diverging legal traditions. This article refers to the concept of anticipatory repudiation and permits an avoidance of the contract when one of the parties is facing an impediment that is out of their control.[95] However, what determines an impediment seems to differ between civil law and common law countries. The meaning of *impediment* relates to its definition within the common legal culture in which the article is interpreted.[96]

However, it has been argued that divergence in the common and civil law traditions has less of an effect on the promotion of uniformity than would be expected. For instance, with the varying degrees of differences in legal culture, the Mexican legal culture has "borrowed" and incorporated many values from the U.S. system.[97] The differences in legal cultures become minimized as countries incorporate different ideas and values into their own

89. Vargas, *supra* note 21, at 1353.
90. *See id.*
91. *See id.* at 1353-1354.
92. *See id.* at 1354.
93. *See id.* at 1353.
94. *See id.*
95. *See* CISG at art. 79.
96. *See generally* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 480-85 (3rd ed. 1999).
97. *See* Vargas, *supra* note 21, at 1365-66.

legal culture. This exchange is often a byproduct of "aggressive marketing and commercial strategies of transnational corporations to penetrate the Mexican market."[98]

Problems of interpretation remain as the greatest impediments to uniformity. The sources of those impediments lie with complexities of varying languages, the inadequacy of translated materials and diverging legal cultures. One possible solution is an organized tribunal dealing with questions of interpretation that give definitive interpretations when discrepancies and difficulties arise. Such a tribunal could consist of scholars, CISG commentators and judges that frequently adjudicate CISG cases. The goal of uniformity (even if not absolute uniformity) in commercial law cannot be achieved without regard to a supranational organization that has the power to decide complex interpretive matters and to provide standards and guidelines. The possibility of referencing one adjudicative body on particular matters of interpretation will also ease the impediments to accessing resources that exist primarily in Latin American countries. Additionally, in promoting uniformity, a decision from a supranational body should have greater weight than any one particular decision in a foreign country.

VI. ARTICLE 7(2) AS A TOOL OF INTERPRETATION

The tool of interpretation laid out in Article 7(2) is a gap filler meant to assist judges in interpreting matters governed by the Convention but that are not expressly settled in the Convention.[99] The text of Article 7(2) reflects a hierarchy in the methods of interpretation to be used when courts are filling in the gaps.[100] First, the court is required to refer to the general principles upon which the Convention is based.[101] Second, recourse to the laws applicable by private international law is appropriate.[102]

The second part of this article analyzes the meaning of Article 7(2), then reviews how the courts in the Americas have interpreted the term "general principles" in their decisions.

98. *Id.* at 1362.

99. *See* CISG at art. 7(2).

100. *See id.*

101. *See id.*

102. *See id.*

A. *"[M]atters governed by this Convention which are not expressly settled"*

Article 7(2) states:

> Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.[103]

When courts determine which issues fall under Article 7(2) as "matters governed by this Convention which are not expressly settled," courts should refer to issues expressly excluded from the CISG.[104] For instance, Article 4 expressly excludes all matters regarding validity and property rights.[105] Therefore, where matters of the validity of the contract and the property rights related to the issue are before the court, it is appropriate to review the matters under rules applicable by virtue of private international law and not under "general principles of law."[106] Additionally, Article 5 excludes matters regarding liability of the seller for death or personal injury.[107] Article 6 permits the parties to exclude any article of the Convention.[108] Therefore, if the parties derogate from an article, reference to domestic law would be the appropriate method of interpretation. Moreover, countries have the right to make reservations in reference to certain articles that render those articles inapplicable to reserving states.[109] Matters that are included in the CISG and that fall within the scope of the Convention should be resolved in accordance with hierarchy of methodological interpretation described in Article 7(2). Consequently, matters expressly excluded from the CISG are not governed by the CISG and, as such, Article 7(2) would be inapplicable.

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103. *Id.*
104. *Id.*
105. *See* CISG at art. 4.
106. *See* CISG at art. 7(2).
107. *See* CISG at art. 5.
108. *See* CISG at art. 6.
109. *See* CISG at art. 92.

B. *"General Principles": "[M]oored to the premises that underlie specific provisions of the Convention"*[110]

The definition of "general principles upon which the Convention is based" falls short of receiving any clear interpretation in the scholarly works. Reference is made to these principles in Article 7(2) without further explanation.[111] Jeffrey Hartwig writes that the "[g]eneral principles are to be derived from the Convention's own provisions."[112] Moreover, Professor Honnold writes that a "particular general principle must be moored to premises that underlie specific provisions of the Convention."[113] Specifically, some of the "general principles" originating from the Convention itself include: good faith;[114] the reasonableness principle;[115] the principle that each party should communicate information needed by the other party;[116] the estoppel principle that a party cannot effectively contradict its own statement on which the other party has relied;[117] the principle disfavoring premature contract termination;[118] the principle requiring parties to mitigate losses from the other party's breach;[119] freedom of contract and party autonomy;[120] the principle that international sales contracts should not be subject to formal writing requirements;[121] and the general presumption that parties have formed a binding contract.[122]

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110. Van Alstine, *supra* note 42, at 778 (A "particular general principle must be moored to premises that underlie specific provisions of the Convention." (citing HONNOLD, *supra* note 96, at 155)).

111. *See* CISG at art. 7(2).

112. Jeffrey R. Hartwig, *Schmitz-Werke GMBH & Co. v. Rockland Industries Inc. and the United Nations Convention on Contracts for the International Sale of Goods (CISG): Diffidence and Developing International Legal Norms*, 22 J. L. & COM. 77, 84 (2003); *see also* Van Alstine, *supra* note 42, at 692.

113. *See* Van Alstine, *supra* note 42, at 778 (citing HONNOLD, *supra* note 96, at 155).

114. *See* Henry Mather, *Choice of Law for International Sales Issues Not Resolved by the CISG*, 20 J.L. & COM. 155, 157 (2001) (citing M.J. Bonell, *Article 7, in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 80, 84-85 (C.M. Bianca & M.J. Bonell eds., 1987)).

115. *See id.* (citing Rolf Herber, *Article 7, in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 59, 67 (Peter Schlechtriem ed., Geoffrey Thomas trans., 2d ed. 1998)).

116. *See id.* (citing Herber, *supra* note 115, at 67).

117. *See id.* (citing Bonell, *supra* note 114, at 81).

118. *See id.* (citing Bonell, *supra* note 114, at 81).

119. *See id.* (citing Bonell, *supra* note 114, at 81).

120. *See id.* at 158 (citing Bonell, *supra* note 114, at 80).

121. *See id.* (citing Bonell, *supra* note 114, at 80).

122. *See id.* (citing Bonell, *supra* note 114, at 81).

C. *Broader Purposes of the Convention*

Interpreting "general principles" as only those derived from the Convention is too narrow of a construction.[123] The clause "on which [the Convention] is based"[124] does not preclude principles that are not expressly or even implicitly stated in the text of the Convention. Moreover, the rule does not even explicitly reference to drafters' intent.[125] Therefore, there is no constricting rule that the interpretation must be bound to the specific intent of the drafters.[126] The interpretation of Article 7(2) should not be too rooted in formalism but should look to the Convention's broader purposes as espoused in Article 7(1).[127]

D. *Fluid and Evolving Principles*

Additionally, courts should take an expansive view of "general principles" because "[a]n international convention. . .is a living thing, [a] maturing body of law, founded on certain fundamental values but capable of adapting new interpretations for changed environments."[128] The "general principles" should be interpreted as evolving with and following the changes and transitions in international commerce. The goal of "international character"[129] by its nature is one of constant movement and evolution, thereby requiring the Convention to follow. Moreover, this perspective of Article 7(2) is consistent with the purpose of the Article, to resolve matters "not expressly settled," those issues that will arise in the future.[130] Furthermore, many of the rules are open-ended, such that they "derive their content from post-hoc application to real world cases."[131] As a result, the untreated or unanticipated matters governed by the CISG require interpretations that are "fluid" and evolving.[132]

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123. *See* Van Alstine, *supra* note 42, at 778 (arguing that the general principles do not have to be "embedded" in the Convention).

124. CISG at art. 7(2).

125. *See id.*

126. *See* Van Alstine, *supra* note 42, at 778.

127. *See id.* at 774 (rejecting a restrictive textual approach to treaty interpretation for a more equitable interpretation of the general principles).

128. *Id.* at 783.

129. CISG at art. 7(1).

130. *See generally id.* at 776 (detailing why interpretation should consider changes in societal values and legal context after a statute's adoption).

131. DiMatteo et al., *supra* note 11, at 317-318.

132. Van Alstine, *supra* note 42, at 776-77 (arguing that the code like structure of the Convention requires the flexibility in interpretation to "adapt to circumstances unforeseen at the time of their adoption").

E. "Restatements" of International Contract Law: UNIDROIT and PECL

Professor Guillemard advocates the use of principles of the International Institute for the Unification of Private Law ("UNIDROIT") and the Principles of European Contract Law ("PECL") as a source of "general principles" in Article 7(2), yet another reason why this article should receive a more expansive interpretation.[133] The UNIDROIT principles are intended to apply in commercial contracts and are meant to be used worldwide.[134] PECL can be applied in commercial transactions but was originally drafted to create unified contract law for Europe.[135] However, both treatises were drafted as general principles of law and share the common goals of the CISG in promoting uniformity in contract law.[136] PECL even cites the CISG as one of its sources.[137] Although the UNIDROIT principles and PECL cover more matters than the CISG (for example, issues of validity of the contract are not covered by the CISG),[138] these principles can and should be used by courts, instead of their domestic legal systems, as a tool of interpretation for Article 7(2) when defining "general principles."

VII. "GENERAL PRINCIPLES" INTERPRETED BY INTER-AMERICAN COURTS

Interestingly, courts lacking in a comprehensive understanding of "general principles" have varying methods of interpretation ranging from avoiding the interpretation, to analogizing to their own legal systems a particular provision, to providing a suggestion of what the general principles should be. The following is a case study of how courts in the Americas are dealing with the question of "general principles."

A. Argentina

In *Elastar Sacifia v. Bettcher Industries Inc.,* the Buyer was an Argentinean firm in the process of bankruptcy proceedings and

133. *See* Sylvette Guillemard, *A Comparative Study of the UNIDROIT Principles of European Contracts and Some Dispositions of the CISG Applicable to the Formation of International Contracts from the Perspective of Harmonisation of Law*, Laval University, May 23, 1999, http://www.yorku.ca/osgoode/cisg/writings/guille.htm.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

the Seller was an American creditor.[139] The Seller claimed a credit based on the international sale of goods.[140] The Seller filed a claim for $3,249.55 and was awarded $3,065.61.[141] The Seller appealed the dismissal of the $183.94 representing the interest portion of the Seller's claim.[142] In interpreting the Convention, the court found that there was no express provision providing for the amount of interest that should be paid.[143] In resolving the question of amount of interest, the court relied on Article 9(2) of the Convention, which looks to the widely accepted practices in international commerce.[144] First, the court disclaimed the lower court opinion for relying on the Argentinean Code, which was inapplicable because the CISG applied.[145] Second, the court stated that only matters that could not be resolved by the Convention should be solved by the rules of private international law.[146] The court correctly referred to the hierarchy of interpretation principles as it proceeded to general principles.[147]

By contrast, in *Cervecería y Malteria Paysandú S.A. v. Cervecería Argentina S.A.*, the court failed to identify any general principles under Article 7(2) and quickly referred to rules of private international law for a resolution.[148] Here, a Seller from Uruguay sued an Argentinean Buyer for the price of malted barley

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139. *See* Juzgado Nacional de Primera Instancia en lo Comercial No. 7 [1a Inst.] [State Lower Court of Ordinary Jurisdiction] (Buenos Aires), 20 May 1991, "Elastar Sacifia v. Bettcher Industries Inc. / commercial," (Arg.), Alejandra Truscello, trans., *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/910520a1.html (last visited Nov. 13, 2006) [hereinafter *Elastar Sacifia*].

140. *See id.*

141. *See id.*

142. *See id.*

143. *See id.*

144. *See id.*

145. *See id.*; *see also* Franco Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing*, 15 J. L. & COM. 1, 116-126 (1995) (indicating that some scholars agree that interest rates are governed by the CISG but make reference to Article 78 and not commercial practice as the rationale) [hereinafter Ferrari, *Specific Topics of the CISG*].

146. *See Elastar Sacifia*, *supra* note 139.

147. *See id. But see* Ferrari, *Specific Topics of the CISG*, *supra* note 145, at 120 (arguing that there are many scholars that believe that interest rates are a matter not governed by the Convention and therefore should be determined by rules of private international law by virtue of Article 7(2)).

148. *See* Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires [CNCom.] [Court of Appeals in Comercial Matters for Buenos Aires], Nov. 7, 2002, "Cervecería y Malteria Paysandú S.A. v. Cervecería Argentina S.A.," La Ley [L.L.] (2003-D-416) (Arg.), Jorge Oviedo Albán trans., *available at* http://cisgw3.law.pace.edu/cases/020721a1.html [hereinafter *Cervecería y Malteria*].

delivered to and accepted by the Buyer.[149] The Buyer objected on the ground that the goods delivered were defective.[150] The Appellate court affirmed the lower court decision in favor of the Seller because the Buyer failed to prove the defectiveness of quality.[151] The court based its decision on the Argentinean Commercial Code reasoning that the procedure of determining evidence required the Buyer to prove that the non-conformity was a matter not expressly determined in the CISG.[152] Rather, the court stated that the provisions regarding warranty in the CISG "coincide in essence with those contained in [the Argentinean] Civil Code and Commercial Code."[153] Moreover, the court swiftly dismissed the idea of general principles that could resolve the matter, simply stating that "the CISG does not contain any rule—or general principle—concerning the procedure to follow to determine the quality of goods."[154] The court made no reference to foreign case law, scholarly commentary or any other source that gives depth to the meaning of "general principles."[155]

It is problematic that the court ignores the relevance of Article 35 that clearly identifies warranties and the nature of conforming goods as being governed by the CISG. The court should have resolved this issue by looking at Article 35(2)(a): ". . . the goods do not conform with the contract unless they are fit for the purpose for which the goods of the same description[156] would ordinarily be used."[157] The court should have referenced "general principles" because matters surrounding warranties are clearly governed by the CISG, although they are not expressly settled within.[158] The court's gloss-over of the general principle exemplifies its over-reliance on domestic law in violation of the uniformity principle.

Alternatively, the court found that the Buyer failed to give timely notice of the non-conformity under the requirements of

149. *See id.*
150. *See id.*
151. *See id.*
152. *See id.*
153. *Id.*
154. *Id.*
155. *See generally id.*
156. "Description" in Article 35(2)(a) should be understood as "description required by the contract" from Article 35(1): "The seller must deliver goods which are of the . . .description required by the contract." CISG at art. 35(1).
157. CISG at art. 35(2).
158. *See* CISG at art. 35.

Argentinean law.[159] The court could have relied, however, on Article 39(1) of the CISG which states that the buyer "loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller. . .within a reasonable time after he has discovered it."[160] Nevertheless, the court erroneously interpreted the Convention to conclude that a matter concerning the conformity of goods cannot be resolved by general principles.[161]

B. Canada

The Canadian courts have not yet directly applied Article 7(2).

C. Colombia

The Colombian Constitutional Court approved the constitutionality of the CISG on May 10, 2000, making the CISG applicable in Colombia from that date forward.[162] However, the only case law generated from Colombia referencing the CISG is the Constitutional Court decision.[163] The Court uses Article 7 in its analysis.[164] It looks at good faith as a general principle that is to be observed in contractual negotiations and also between the relationships of individuals and the State in procedural performances.[165] Therefore, "good faith" is a greater obligation embodied under "general principles" in Article 7(2) and not simply a tool of interpretation. However, in reasoning that good faith is a general principle, the court cites a Colombian Court decision that looks to good faith as it conforms to the Magna Carta.[166] The court fails to

159. *See Cervecería y Malteria*, *supra* note 148.

160. CISG at art. 39(1).

161. *See Cervecería y Malteria*, *supra* note 148.

162. *See* Corte Constitucional, [Juris. C. Con.] [Constitucional Court], Sentencia C-529/00; Referencia: expediente LAT-154, 10 May 2000 (Col.), Pablo A. Santos Jiménez, trans., *available at* www.cisg.law.pace.edu/cisg/wais/db/cases2/000510c7.html [hereinafter *Colombian Constitutional Court*]; *see also* Patricia Rincón Martín, *Editorial Remarks*, *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000510c7.html. In Colombia, the President has the power to initiate the approval of international treaties. The bill is first sent to Congress and approved as a regular law by the House of Representatives and the Senate and then it is sent to the Constitutional Court to ensure that the law conforms with the Colombian Constitution.

163. *See* Pace University School of Law, CISG Database, Country Case Schedule, Colombia, http://www.cisg.law.pace.edu/cisg/text/casecit.html#colommbia (last visited Nov. 12, 2006).

164. *See Colombian Constitutional Court*, *supra* note 162.

165. *See id.*

166. *See id.*

interpret the CISG and the determination of general principles autonomously.

Nevertheless, some deference should be given to the fact that the purpose of the Constitutional Court is to determine whether the international treaty is Constitutional under Colombian law, necessarily requiring domestic lenses of these international concepts. Additionally, since this is the only Colombian decision available, it is unclear if the Colombian Courts will be faulted with the "homeward trend."

D. Mexico

In *Dulces Luisi v. Seoul International*, a Mexican Seller brought suit against a Korean Buyer for failure to pay the price for goods received and also for false representations regarding their intention to pay for the goods.[167] In analyzing the Buyer's breach, the court referred to Article 7's good faith principle and determined that it is a general principle that binds the parties to act in good faith throughout their contractual relations.[168] In reference to the general principle of good faith, the court relied on the duty of good faith as one being fundamental in international trade, thereby complying with the goals of the Convention laid out in Article 7(1).[169]

However, the court's rationale is not absent of reliance on domestic rules. In its discussion of this general principle, the court stated: "To limit or exclude it would be equal to a failure to acknowledge the axis that regulates international trade, as understood in international trade, unbound from the meaning given to it in Mexican law."[170] The court's reference to the principle of good faith under the CISG as a principle bound by Mexican law, is on its face in contrast to the concept of autonomous interpretation. Nevertheless, as discussed above, an absolute autonomous interpretation is impractical. Moreover, the court conforms and looks to the general principles of international law in order to arrive at

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167. *See DICTAMEN relativo a la queja promovida por Dulces Luisa, S.A. de C.V., en contra de. Seoul Inernational Co. Ltd., y Seoulia Confectionary Co.*, Comisión para la Protección del Comercio Exterior de México [Mexican Comission for the Protection of Foreign Trade] [Compromex], Diario Oficial de la Federacion [D.O.], Tomo DXLIV No. 20, 29 de enero de 1999, Página 69 (Mex.), Alejandro Osuna González, trans., *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/981130m1.html.

168. *Id.* ¶ 9.

169. *Id.* ¶ 10 & n.3.

170. *Id.* ¶ 10.

its conclusion.[171] It thereby promoting the goals of the Convention set out in Article 7(1) and (2).

E. United States

In the United States there is a strong tendency to rely on domestic analogies, methods of interpretation and domestic case law in interpreting matters that fall within the scope of the CISG.[172] This tendency is exemplified in the most recent published U.S. case citing Article 7(2), *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*[173] In *Chicago Prime Packers*, the Seller contracted to sell the Buyer 40,500 pounds of pork back ribs.[174] After the goods were delivered, Buyer refused to pay the price claiming the goods were in an "off condition."[175] The issue in this case surrounds who should bear the burden of proving at what point the goods were in the "off condition" once the risk of loss passed.[176] The court first states that the CISG is to be interpreted according to the "general principles" upon which the CISG is based.[177] However, in its next sentence the court states, "[c]ase law interpreting analogous provisions of Article 2 of the [UCC] may . . . inform the court where the language of the relevant CISG provisions tracks that of the UCC."[178] The court cites cases that interpret "similar" UCC provisions.[179] The court determines that because the UCC and the warranty provision of the CISG (Article 35) have the same "structure," the proper resolution should follow that found in the UCC.[180] The Buyer has the burden of proof once

171. *See id.* at Third Recommendation (Dictamen Tercero).

172. *See* Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., 313 F.3d 385, 388 (7th Cir. 2002) (indicating that attorneys fees are not "expressly settled" in the Convention and no principles can be drawn out from the Convention to determine who bears burden of paying attorneys fees and therefore court must look to rules of private international law to resolve the matter); *cf.* Schmitz-Werke GMBH & Co. v. Rockland Indus., Inc., 37 F. App'x 687, 692 (4th Cir. 2002) (finding that the CISG governs matters of warranties but is silent on who bears the burden of proving the item was defective).

173. *See* Chicago Prime Packers, Inc. v. Northam Food Trading Co., 408 F.3d 894 (7th Cir. 2005).

174. *See id.* at 895.

175. *Id.*

176. *See id.* at 897.

177. *See id.* at 898.

178. *Id.* at 898 (citing Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1027-28 (2nd Cir. 1995)).

179. *See id.* (citing Comark v. Merch, Inc. v. Highland Group, Inc., 932 F.2d 1196 (7th Cir. 1991); Alberts Bonnie Brad, Inc. v. Ferral, 544 N.E.2d 422, 423 (Ill. App. 4th 1989)).

180. *See id.*

the Seller's risk of loss passes.[181] Many scholars agree with the resolution, the comparison of the UCC to the CISG is troubling as a "general principle" upon which the Convention is based. The court disregards the importance of autonomous interpretation, the use of foreign case law and interpretive methods such as references to "Restatements" like PECL and UNIDROIT to attempt to interpret the provisions in the CISG.[182] This decision, by failing to give any deference to other courts who have decided similar issues, contravenes Article 7(1)'s goal of promoting uniformity in international trade. Endless U.S. cases following erroneous methods of interpretation continue the legacy of a "U.S. centric view of commercial contract law [that] is no longer tolerated. . .by [its] foreign trading partners."[183]

These cases demonstrate that the uniformity principle is far from being upheld. On the contrary, courts constantly and prematurely refer to their domestic laws and use their domestic lenses to generate resolutions under an international treaty. Much of the paradigm is generated from the lack of a uniform understanding of the "general principles." On the one hand, the general principles are meant to be fluid and evolving and therefore no single interpretation could be complete. However, the current goals of the supporters and drafters of the CISG should favor generation of a methodology for incorporating relevant definitions of the "general principles" that are generated by consensus among the courts and scholars. Specifically, a guide of general principles needs to be created as a reference tool that deepens the meaning of "general principles" under Article 7(2), while still permitting the constant change and fluidity that the principle embodies. By providing judges with better defined tools, the courts will encounter less of a need for over-reliance on domestic laws and will succeed in "promot[ing] uniformity in [the CISG's] application."[184]

VIII. CONCLUSION

Given the tremendous trade that occurs between and amongst the Inter-American countries and efforts to continue this trade through regional agreements, the relevance and importance of the CISG and uniform contract law is unquestionable. However, there are practical impediments encountered in the applica-

181. *See id.*
182. *See id.*
183. *See* Callaghan, *supra* note 23, at 183.
184. CISG at art. 7(1).

tion of the CISG. Language barriers and the need for translated materials make the accessibility of information an enormous obstacle. Additionally, lack of adequate translations also creates unintended complexities in interpretation. To a lesser extent, the absence of a common legal culture and the diverging legal concepts in civil and common law traditions also play a role in the impediments to uniformity.

There are considerable shortcomings in the text of Article 7(2) itself in the absence of a common and comprehensive understanding of the meaning of "general principles." This, coupled with the paradigm of the court's reliance on the "homeward trend," further intensifies the obstacles facing a uniform application of the CISG.

However, several institutional additions to the application of the CISG can assist in creating an ease in interpretation and accessibility of information. A supranational tribunal dealing with questions of interpretation along with a structured, but evolving, guideline of what courts should consider "general principles" will help in overcoming the problems of over-reliance on domestic laws. The solution should also increase the availability of information that so hinders many countries from proper application of the CISG.