

Slater, Overcome by Hardship: The Inapplicability of the UNIDROIT Principles
OVERCOME BY HARDSHIP: THE INAPPLICABILITY OF THE UNIDROIT PRINCIPLES' HARDSHIP PROVISIONS TO CISG

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I. INTRODUCTION

This article attempts to resolve the difficult question of whether one may invoke the hardship provisions of the UNIDROIT Principles of International Commercial Contracts (Principles or UNIDROIT Principles) in order to supplement the United Nations Convention on Contracts for the International Sale of Goods (CISG or Convention). The article first presents a highly plausible, albeit fictional, story demonstrating one context in which this issue could arise. It then briefly outlines the history of both instruments. Next, the article considers whether, as a practical matter, fundamental differences between civil law and common law systems will undermine the applicability of the Principles' provisions on hardship. It then contemplates whether CISG is even subject to supplementation by other international instruments. Finally, the article examines the specific issue of whether CISG is subject to supplementation by the Principles' hardship provisions.

Due to the notable lack of international case law and scholarly commentary regarding this issue, the author's analysis focuses largely on the proper implementation of CISG's gap-filling mechanism, Article 7, considering the legislative history of the Convention as part of that process. It is the author's hope that this article will stimulate greater debate on the subject, ultimately resulting in international agreement on the issue.

II. IT COULD HAPPEN TO YOU

Your high school teachers murmured behind your back, saying you would never amount to anything. Your parents wrote you off as a long-haired dreamer. They implored you to "be sensible like your older brother and go to law school." Your friends laughed when you told them you were going to open your own business. Then, your competitors laughed when you told them that you would one day be king of the industry. Your creditors have harassed you incessantly for months. Nevertheless, you were certain that you would soon silence them all. Yet now, as you stand upon the precipice of greatness, all that you have accomplished stands at risk.

As a teenager you were drawn to the sport of mountain-biking. So much so that you elected to attend college in Colorado in order to enjoy the sport in its most ideal setting. By the middle of your sophomore year you had eschewed college entirely in order to race on the national circuit. Two years later, although an injury had ended your racing days, you were more determined than ever to leave your mark on the mountain-biking world. With only a fistful of dollars as capital, you began building and selling your own hand-crafted bikes incorporating as Rockhard Mountain Bikes,

Inc.¹ Within five years, your penchant for delivering high-quality bikes at reasonable prices allowed you to carve out a small niche among serious buyers. Lately, however, the overhead associated with pushing to become a mainstream manufacturer has nearly bankrupted your enterprise. Suddenly, the break you needed seemed to materialize.

Through a former racing colleague, you recently discovered an upstart mountain-bike manufacturer in Slovenkosov, a small, rapidly westernizing former eastern-bloc nation. Then, you learned that Slovenkosov, rich in natural resources, is an ideal source of the strong and lightweight metals required to build the best mountain-bike frames, that the manufacturer, Yuri Gregaivitis, had just begun producing high-grade, hand-tubed bicycle frames for a fraction of the cost of American and Japanese equivalents. You realized that combining your industry contacts with Gregaivitis' competitive advantage could propel Rockhard Mountain Bikes into a leading position among mountain-bike manufacturers. Dreaming of an empire, you hastily concluded an output contract with Gregaivitis and, stretching your credit to the last nickel, arranged for an initial shipment of 1000 frames. Upon learning of the alliance, retailers lined up to place orders for your hand-tubed, carbon-fiber and aluminum framed Rockhards.

The shelling of Slovenkosov started at 11 P.M. U.S. Central time. By 2 A.M., our time, rebel forces had laid claim to the northern foothills and declared the region a separate, autonomous nation. Shortly thereafter, you managed to reach Gregaivitis, who happily reported that his plant, located approximately 90 miles from the northern foothills, was unaffected by the recent conflict. At 6 A.M., on the morning after the attack, you were awakened by a call from Gregaivitis who reported that although his facility had not suffered physically, as a result of the conflict, his workers were leaving in droves: some to join the northern rebels; others fleeing to the south. Gregaivitis expressed his conviction that the rebels would not attempt to extend their occupation since their goal was not further conquest, but liberation of the ethnically distinct northern region of Slovenkosov. Nonetheless, he declared that his manufacturing costs had increased by approximately seventy-five percent as a result of the rebels' invasion and that to perform under the contract would seriously injure his business. He then requested a renegotiation of the original agreement between his enterprise and yours. You grimaced and said that you would call back.

Obviously, attempting to hold Gregaivitis to his contractual obligations would destroy your promising relationship with the manufacturer. On the other hand, any renegotiation, premised upon Gregaivitis' desire to reduce

1. The name "Rockhard" was inspired by Specialized Bicycle Components' "Hardrock" line of bicycles.

or eliminate his responsibilities under the contract, would place the business that you have labored to build at tremendous risk of outright collapse. Furthermore, even if Rockhard Mountain Bikes managed to survive under a renegotiated contract, a reduction in the quantity of frames delivered would necessitate your default on some or all of your agreements with many important retailers. This alone could irreparably damage your standing in the industry. In addition, defaulting on your contractual obligations would expose Rockhard to liability. Reluctantly, you decide to call your brother, the big-shot international corporate lawyer, in order to determine your legal rights in the matter before responding to Gregaivitis.

Through your conversation with your brother, you learn that since your contract with Gregaivitis contained no provision governing choice of law, the contract is governed by CISG.² Furthermore, CISG contains no provisions expressly governing situations such as this, which involve "hardship."³ Instead, CISG only exempts from liability failure to perform due to "impediment[s]" beyond the nonperforming party's control.⁴ Your brother explains that the fact that Gregaivitis' costs have increased by seventy-five percent would not constitute an "impediment";⁵ thus, the manufacturer is bound to either perform or face damages under CISG. However, your brother's research revealed that Gregaivitis' request for renegotiations is premised upon the UNIDROIT Principles.⁶ The UNIDROIT Principles provides that those seeking to interpret international laws may use the Principles to fill "gaps" in these laws.⁷ Gregaivitis, obviously receiving advice from a lawyer in Slovenkosov, is apparently hoping that the Principles' hardship provisions will serve to effectively supplement CISG. Even more troubling than the fact that, under the Principles, you may have to renegotiate the contract with Gregaivitis, is the fact that, if you fail to reach an agreement, he is entitled to resort to a court to determine whether hardship exists.⁸ If the court finds hardship, it may either terminate the contract altogether or "adapt" it.⁹

2. See United Nations Convention on Contracts for the International Sale of Goods, arts. 1(1), U.N. A/Conf.97/18, Annex I, (April 11, 1980) in 19 I.L.M. 668 (1980) [hereinafter CISG]; but see CISG art. 6 (allowing parties to contract out of the provisions).

3. See generally CISG arts. 1-101. Hardship is not mentioned in any of these articles. See *id.*

4. See *id.* art. 79.

5. See *infra* notes 164-65 and accompanying text, noting that hardship is not considered the same as impediment.

6. See International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts, art. 6.2.3(1) (1994), available in 34 I.L.M. 1067(1995) [hereinafter UNIDROIT Principles].

7. See *infra* notes 102-03 and accompanying text.

8. See UNIDROIT Principles, *supra* note 6, art. 6.2.3(3).

9. See *id.* art. 6.2.3(4)(a)-(b).

What you need now is a straight answer: are the terms of CISG or the UNIDROIT Principles applicable? That answer will go a long way toward deciding how you respond to Gregaivitis.

III. THE COMING OF INTERNATIONAL LAW

A. Background

1. Antecedents

Today, even those who are not well-versed in economics have some understanding of the degree to which nations' economies are interdependent. Recent turmoil in the world's financial markets¹⁰ has awakened those who had dozed through the emergence of a global economy. Moreover, staggering advances in communications and transportation technology have provided instantaneous access to distant and diverse regions of the earth. Whether isolationist or internationalist, no one can dispute that the earth is shrinking rapidly. Nonetheless, the fact that calls for widespread unification of legal rules pertaining to commercial transactions were heard long before the advent of our modern information age may come as a surprise.

Domestically, the United States recognized the need for uniform rules governing interstate trade at the turn of the 20th century by enacting the Negotiable Instrument Law and the Uniform Sales Act.¹¹ It was also around this time that overtures were first made toward the harmonization of international commercial law.¹² In 1926, the International Institute for the Unification of Private Law (UNIDROIT), born out of the authority of

10. See Walter Hamilton, *Asia Rout Hurls Wall Street onto Roller-Coaster Ride Economy: Dow Plunges 269 Points, then Recovers Two-Thirds of Loss. Some Say Bear Market Has Begun*, L.A. TIMES, Dec. 20, 1997, at A1 (considering effects of Asian economic problems on U.S. stock market); Peter Koenig, *When the World's Financial Stabiliser Crumbles...*, THE INDEPENDENT (London), Jan. 11, 1998, at 2, available in 1998 WL 4735894 (predicting that Asian financial crisis poses far greater danger to global economy than Mexican financial crisis four years earlier); Mark Atkinson & Larry Elliott, *Shockwaves Hit Global Markets at Home/Britain Will Not Be Immune from the Economic Turmoil*, THE GUARDIAN, Aug. 28, 1998, at 005 (estimating that economic upheaval in Russia will affect both Britain and the United States).

11. The ever-increasing need for uniform sales laws culminated in the states' preparation and enactment of the Uniform Commercial Code. See John Honnold, *The Sales Convention: Background, Status, Application*, 8 J.L. & COM. 1 (1988).

12. See Alejandro M. Garro, *The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay Between the Principles and CISG*, 69 TUL. L. REV. 1149 (1995). The great French comparatist, Edouard Lambert, was already advocating the establishment of a supranational law at the beginning of the century. See MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW 1 (1994).

the League of Nations, began its quest to develop an international sales law that would bind all of the world's major trading nations.¹³ UNIDROIT's efforts came to fruition in 1964 at a diplomatic conference at the Hague.¹⁴ The two conventions on international sales that resulted from that conference took effect in a few Western European nations, but ultimately self-destructed due to their failure to assimilate concepts from common law legal systems.¹⁵ As we shall see, however, the growing need for uniform rules governing international trade quickly overcame this initial setback.¹⁶

Although those advocating harmonization have endured their share of heckling,¹⁷ the justifications for their efforts are sound. As the chairman of the Working Group for the preparation of the UNIDROIT Principles said, "[t]he present state of international trade law is far from satisfactory."¹⁸ First, international transactions remain encumbered by the existence of domestic laws that were not designed to facilitate cross-border exchanges.¹⁹ Indeed, many of these laws are rudimentary and difficult to access.²⁰ Because of the uncertainties associated with conflict of law rules, it may prove impossible for parties to an international contract to ascertain which domestic law will govern their transaction until after a dispute has arisen.²¹ In addition, standardized documents developed by the business communities of trading nations offer an unsatisfactory solution to the inadequacies of domestic laws as their content is inevitably one-sided and infused with legal concepts derived from their nations of origin.²² Even non-partisan instruments are deficient due to their limited scope and their

13. Although the organization was originally comprised of commercial law experts from Western Europe, it has grown to include, *inter alia*, the United States. See JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 150, at 872 n.1 (3d ed. 1990); E. Allan Farnsworth, *An International Restatement: The UNIDROIT Principles of International Commercial Contracts*, 26 U. BALT. L. REV. 1, 1-2 (1997).

14. See MURRAY, *supra* note 13, § 150, at 872.

15. This failure has often been blamed on the lack of participation in the formulation of the Hague Conventions by common law nations, including the United States. See *id.*

16. See *id.*

17. Among the criticisms leveled against unification are that: uniformity compromises the certainty and effectiveness that has developed over many years in the various national legal systems; since uniform conventions are, by their nature, restricted to particular subjects, they must be interpreted against the backdrop of domestic law; the onerous task of acquiring court decisions and arbitral awards from other jurisdictions is unduly burdensome; and, national unification cannot keep pace with the international unification process. See Malcolm Evans, *Uniform Law: A Bridge Too Far?*, 3 TUL. J. INT'L L. 145, 146-55 (1995) (concluding that these criticisms do not merit retreating from the goal of unifying international private law).

18. BONELL, *supra* note 12, at 9.

19. See *id.*

20. See *id.*

21. See *id.* at 9-10.

22. See *id.* at 12.

dependence upon the existence of a more general regulatory framework within which to function.²³ This general framework is necessary even when parties attempt to avoid the above problems by setting forth an exhaustive list of contractual rights and obligations in their agreement.²⁴ Moreover, language barriers and the absence of internationally uniform legal terminology create inordinate difficulties for negotiating parties.²⁵ In order to conclude a deal, one party often winds up acquiescing to the other's insistence that the contract be governed by an unfamiliar or undesirable set of legal rules.²⁶ Finally, parties cannot afford to rely on general principles of law, or "lex mercatoria" to govern their transaction as the imprecise nature of these principles risks producing even greater uncertainty and unpredictability.²⁷

2. CISG and Exemption

The United Nations Commission on International Trade (UNCITRAL) overcame the Hague Convention's fatal flaw by creating a worldwide legislative body to establish uniform international rules of sales, arbitration, negotiable instruments and transport.²⁸ In 1980, after a decade of work, UNCITRAL submitted a draft sales convention to a diplomatic conference in Vienna at which sixty-two of the world's major trading nations were represented.²⁹ Five weeks later, the United Nations Convention on Contracts for the International Sale of Goods received the unanimous endorsement of conference participants.³⁰ CISG entered into force on October 9, 1986.³¹ As of June 1997, fifty nations had ratified the Convention,³² making CISG the world's most important treaty governing commercial contracts.³³

23. The International Chamber of Commerce has drafted some of these non-partisan instruments, including the INCOTERMS and the Uniform Customs and Practices for Documentary Credits. *See id.*

24. *See id.*

25. The difficulties that can arise in international contract negotiations also depend on the extent to which the parties' legal systems vary. For example, Japanese companies abhor the notion of jury trials and punitive damages, preferring instead the secrecy and finality of arbitration to resolve disputes. Thus, a potential deal between a Japanese manufacturer and an American wholesaler can quickly if the American insists that U.S. law govern the contract. *See id.* at 13-14.

26. *See id.* at 13.

27. *See id.* at 14.

28. *See* Honnold, *supra* note 11, at 4.

29. *See id.* at 5.

30. *See id.*

31. *See id.*

32. *See Journal of Law and Commerce CISG Contracting States and Declarations Table*, Clout Abstracts, 16 J.L. & COM. 371 (1997).

33. *See* Dietrich Maskow, *Hardship and Force Majeure*, 40 AM. J. INT'L L. 657, 664 (1992).

Since CISG is an international treaty, sanctioned by a legislative body composed of delegates from around the world and ratified by participating nations, its provisions are legally binding. Article 1 of the Convention states that it “applies to contracts of sale of goods between parties whose places of business are in different States [countries]: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State.”³⁴ Sales of goods are distinguished from service contracts in the Convention.³⁵ In addition, CISG expressly excludes from coverage sales of personal goods, goods bought by auction or by authority of law, stocks and securities, ships, vessels, hovercraft, aircraft and electricity.³⁶

CISG contains no express provision governing the effects of hardship on parties to an international contract for the sale of goods.³⁷ However, Article 79 grants both buyers and sellers an exemption from performance if certain conditions are met.³⁸ Under this provision:

A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.³⁹

Article 79 also provides that a third person’s failure to perform can constitute grounds for exemption in some instances.⁴⁰ A party failing to perform is required to provide notice of the impediment to the other party.⁴¹ Finally, Article 79 does not restrict parties’ rights to claim relief other than damages under the Convention.⁴²

3. The UNIDROIT Principles and Hardship

By 1971, UNIDROIT, inspired by the American Law Institute’s Restatement of Contracts, had conceived the notion of drafting a “‘progressive codification’ of international trade law.”⁴³ In 1980,

34. CISG, *supra* note 2, art. 1

35. *See id.* art. 3(2).

36. *See id.* art. 2(a)-(f).

37. *See generally id.* arts. 1-101. None of these articles contain a hardship provision. *See id.*

38. *See id.* art. 79(1).

39. *Id.*

40. *See id.* art. 79(2).

41. *See id.* art. 79(4).

42. *See id.* art. 79(5). Other relief is available in the form of the rights to seek interest, to reduce the purchase price and to seek restitution. *See id.* arts. 50, 78, 81(2).

43. Farnsworth, *supra* note 13, at 2.

UNIDROIT's Governing Council established a Working Group composed largely of European academics, but which also included judges and civil servants.⁴⁴ Members served in their individual capacities and did not hold the license nor necessarily espouse the views of their governments.⁴⁵ This lack of diplomatic formality allowed UNIDROIT to advance what, in its opinion, represented the most suitable legal rules in particular areas of law without the need to disguise deep opposition through a compromise approach.⁴⁶ The Working Group met semiannually and circulated its drafts widely among experts within both academic and business circles.⁴⁷ The Governing Council finally approved publication of the UNIDROIT Principles of International Commercial Contracts in 1994.⁴⁸ Originally published in English and French, UNIDROIT'S principles' are now available in many other languages and preparation of additional language texts continues.⁴⁹

Because the UNIDROIT Principles, unlike CISG, does not carry the legal force of an international treaty, application of its provisions is not mandatory in any nation. Nonetheless, the Principles' drafters proposed in its Preamble scenarios in which the Principles could be invoked. Of greatest significance to this discussion is that the Principles "may be used to interpret or supplement international uniform law instruments."⁵⁰ It is this suggested application that *may* justify the use of relevant provisions of the UNIDROIT Principles to "fill gaps" in CISG.⁵¹

The Principles is intended to provide a set of legal rules so well balanced as to be applicable to all international commercial contracts,⁵² regardless of the legal, political or economic backgrounds of contracting parties.⁵³ As such, it strives to represent a sort of international restatement of contract law.⁵⁴ To this end, the Principles relies on general terminology,

44. See *id.*; Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts: Why? What? How?*, 69 TUL. L. REV. 1121, 1126 (1995).

45. See Bonell, *supra* note 44, at 1126.

46. See Garro, *supra* note 12, at 1160.

47. See Bonell, *supra* note 44, at 1126-27; Farnsworth, *supra* note 13, at 2.

48. See Farnsworth, *supra* note 13, at 2.

49. See *id.* The Principles were originally drafted in English. A sampling of the other languages in which the Principles are available includes Italian, Spanish, Arabic, Chinese and Russian. See *id.*; Bonell, *supra* note 44, at 1127.

50. UNIDROIT Principles, *supra* note 6, at 1. The Preamble also states that the Principles may apply when parties agree to have their contract governed by either its rules or those of *lex mercatoria*, when parties are not able to establish the relevant rule of law, or when legislators seek model legal rules. See *id.*

51. See *infra* Part IV.B.

52. Accordingly, the Principles are broader in scope than CISG, which governs contracts for certain sales of goods. See *supra* notes 34-36 and accompanying text.

53. See UNIDROIT Principles, *supra* note 6, introduction.

54. See *id.*

specifically seeking to avoid language particular to any given legal system and preferring, above all, parlance common to international trade.⁵⁵ In order to effectuate its goal, the Principles incorporates legal rules common to many nations, yet it goes further by enunciating certain rules that some countries would deem innovative.⁵⁶

As a universally applied international treaty, CISG served as an obligatory point of reference in the Working Group's deliberations.⁵⁷ Indeed, the members did not hesitate to incorporate CISG provisions into the Principles.⁵⁸ Nonetheless, the Working Group was also aware of the limitations inherent in international conventions.⁵⁹ Thus, UNIDROIT derogated from or expanded upon CISG where it thought appropriate.⁶⁰ Where such choices were made, they were premised upon UNIDROIT's desire to set forth the "best solutions, even if still not yet generally adopted."⁶¹

In contrast to CISG's express failure to address hardship,⁶² the Principles devotes three articles to the issue.⁶³ The first, Article 6.2.1, merely reaffirms the familiar contract principle of *pacta sunt servanda*⁶⁴ by requiring a party for whom performance has become more onerous to perform nonetheless.⁶⁵ Article 6.2.2 defines hardship under the Principles by saying that:

[t]here is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or

55. See Bonell, *supra* note 44, at 1128.

56. See *id.* at 1129-31.

57. See *id.* at 1129-30.

58. See Garro, *supra* note 12, at 1160.

59. These limitations have traditionally included the fragmentary character of international instruments, the likelihood that they will face differing interpretations between nations and the difficulty of amending outdated provisions. See Bonell, *supra* note 44, at 1123-24.

60. See *id.* at 1130-31. Compare UNIDROIT Principles, *supra* note 6, art. 2.1, with CISG, *supra* note 2, art. 14 (governing contract formation); UNIDROIT Principles, *supra* note 6, art. 1.7, with CISG, *supra* note 2, art. 7(1) (concerning the obligation of good faith in international trade); UNIDROIT Principles, *supra* note 6, art. 2.22, with CISG, *supra* note 2, art. 19 (dealing with the "battle of the forms").

61. UNIDROIT Principles, *supra* note 6, introduction.

62. See *supra* note 37 and accompanying text.

63. The Principles deal with force majeure in another provision, Article 7.1.7. The language employed in this article closely tracks that of Article 79 of CISG. Compare UNIDROIT Principles, *supra* note 6, art. 7.1.7, with CISG, *supra* note 2, art. 79.

64. This principle holds that "agreements are to be observed." Farnsworth, *supra* note 13, at n.4. This classic concept binds a person to their promises. In so doing, it is a fundamental element of both economics and contract law as attempts to engage in meaningful economic activity would be futile without reliable promises. See Maskow, *supra* note 33, at 658.

65. See UNIDROIT Principles, *supra* note 6, art. 6.2.1.

because the value of the performance a party receives has diminished, and the events occur or become known to the disadvantaged party after the conclusion of the contract; the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; the events are beyond the control of the disadvantaged party; and the risk of the events was not assumed by the disadvantaged party.⁶⁶

According to the Comment following Article 6.2.2 in the official text, an event that “fundamentally alters the equilibrium of the contract” may occur in two distinct ways.⁶⁷ First, a substantial increase in the cost of performance may qualify under the rule.⁶⁸ Second, a substantial decrease in the value of performance may trigger the hardship provisions.⁶⁹ Significantly, the Comment further defines both of these concepts by saying that a monetary alteration of “50% or more of the cost or the value of performance is likely to amount to a ‘fundamental’ alteration.”⁷⁰

Finally, Article 6.2.3 governs the effects of hardship.⁷¹ Under this provision, a party facing hardship is entitled to request renegotiations.⁷² To do so, the requesting party must, without undue delay, inform the other party of the basis of the hardship.⁷³ However, the disadvantaged party is not automatically relieved of the duty to perform simply based on its request.⁷⁴ If, during the course of their renegotiations, the parties cannot reach an agreement within a reasonable period of time, Article 6.2.3 provides that either may resort to the court for a determination of the controversy.⁷⁵ The court may, if it finds hardship: “(a) terminate the contract at a date and on terms to be fixed; or⁷⁶ (b) adapt the contract with a view to restoring its equilibrium.”⁷⁷

66. *Id.* art. 6.2.2.

67. *See id.* art. 6.2.2, cmt. 2.

68. *See id.*

69. *See id.*

70. *Id.*

71. *See id.* art. 6.2.3.

72. *See id.* art. 6.2.3(1).

73. *See id.*

74. *See id.* art. 6.2.3(2).

75. *See id.* art. 6.2.3(3).

76. *Id.* art. 6.2.3(4)(a).

77. *Id.* art. 6.2.3(4)(b).

IV. MUDDY WATERS: THE INTERPLAY BETWEEN THE PRINCIPLES AND CISG

A. *Of Fundamental Differences*

As an initial matter, one practical fact threatens to undermine decision-makers' ability to apply the UNIDROIT Principles' hardship provisions to contracts governed by CISG, especially those involving a party from a common law legal system. The Working Group's inspiration for the hardship provisions in the Principles is deeply rooted in civil law.⁷⁸ Indeed, Article 6.2.3(4)(b), which allows courts to "adapt the contract," is of purely civilian origin.⁷⁹ In contrast, when it comes to business matters, common law courts are often hesitant to substitute their judgment for that of commercial parties.⁸⁰ In a well-known opinion, Judge Winter, of the

78. See Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 *FORDHAM L. REV.* 281, 298 (1994); Maskow, *supra* note 33, at 661. Civil law dominates most of Western Europe and is typified by the French and German systems, while common law originated in England. See ARTHUR TAYLOR VON MEHREN, *THE CIVIL LAW SYSTEM* 3 (1957); Konrad Zweigert & Hans-Jurgen Puttfarcken, *Statutory Interpretation-Civilian Style*, 44 *TUL. L. REV.* 704, 705-06 (1970). There are a number of distinctions between the two legal systems. First, civil law relies heavily on codification whereas common law traditionally does not. See VON MEHREN, *supra* note 78, at 3. Next, common law courts often consider social and political issues beyond those strictly required to render judgment, aggressively balance parties' respective rights and interests and actively engage in shaping the law. Civilian courts tend to refrain from these activities. In addition, common law traditions incorporate the concept of trial by jury — a notion mostly foreign to civil law nations. See Takeshi Kojima, *Japanese Civil Procedure in Comparative Law Perspective*, 46 *U. KAN. L. REV.* 687, 689, 720 (1998) (noting that Japan also adheres to civil law). Finally, civil law nations favor specific performance while common law nations favor money damages. See Thomas S. Ulen, *Firmly Grounded: Economics in the Future of Law*, 1997 *WIS. L. REV.* 433, 455.

79. See Robert A. Riegert, *The West German Civil Code, Its Origin and Its Contract Provisions*, 45 *TUL. L. REV.* 48, 86 (1970). The notion of hardship was formally adopted in Germany in 1920 when the German Supreme Court considered a case in which a lessor had contracted to supply steam to his lessee. As the price of steam spiraled, its cost was soon more than the lessee's rent. See *id.* Instead of requiring performance, the Court relied on the principle of good faith and concluded that since the burden imposed on the lessor was now beyond his sacrifice, the lessee's insistence on performance was a breach of good faith. See *id.* The Court then took it upon itself to revise rather than terminate the contract. See *id.* The German legislature's enactment of "contract help" or "judicial-contract-help" laws began during World War II. See *id.* at 87. These laws specifically authorize judges to modify contracts affected by changed circumstances. Although not every scholar in Germany agrees with the nation's liberal view towards adaptation, at least one, Robert Riegert, believes that Germany's strong economic history is a testament to the policy's success. See *id.* at 88. Furthermore, he suggests that judicial adaptation of contracts may act as an economic stimulus by preventing the destruction of numerous businesses. See *id.*

80. See *e.g.*, *Joy v. North*, 692 F.2d 880, 886 (2d Cir. 1982) (concerning the "business judgment rule"); *Zapata Corp. v. Maldonado*, 430 A.2d 779, 782 (Del. 1980) (discussing Delaware's business judgment rule).

Second Circuit, recognized that “[t]he circumstances surrounding a corporate decision are not easily reconstructed in a courtroom years later, since business imperatives often call for quick decisions, inevitably based on less than perfect information.”⁸¹ Thus, one may wonder whether common law courts will simply spurn attempts to effectuate the Principles’ civilian-style hardship provisions, which authorize courts to “adapt” contracts by adjusting existing terms and constructing new ones.⁸²

Despite common law courts’ animosity toward the concept of judicial contract revision, a number of factors suggest that those faced with the choice of whether to implement the Principles’ hardship provisions are less likely to disregard these provisions than one might expect. First, notwithstanding the differences between common law and civil law, both systems share a common tradition in that they are each products of western civilization and, as such, share common values.⁸³ Moreover, the systems are strikingly similar in terms of functional details. For example, the process of legal reasoning engaged in by civilian attorneys mirrors that of their common law colleagues.⁸⁴ Civilians must distinguish cases, determine holdings, ascertain rationales and distill relevant rules of law, much as any common law attorney would.⁸⁵ In addition, despite civil law systems’ traditional reliance on codification, judicially made law occupies a position of prime importance in modern civilian states.⁸⁶ What’s more, common law courts interpreting CISG may recognize that both the Convention and the UNIDROIT Principles share a common policy that encourages performance of contracts where feasible.⁸⁷

Perhaps the most important reason why common law courts are unlikely to reject the Principles’ hardship provisions outright, however, turns on the notion of judicial comity and the desire of common law courts to keep in step with prevailing international views. Common law courts are not ignorant of the rapid growth in international commerce.⁸⁸ Furthermore, even prior to the Convention’s ratification, the English House of Lords determined that, when engaged in the interpretation of international

81. *Joy*, 692 F.2d at 886.

82. See UNIDROIT Principles, *supra* note 6, art. 6.2.3(4)(b).

83. See VON MEHREN, *supra* note 78, at 3.

84. See Zweigert & Kötz, *supra* note 78, at 709.

85. See *id.*

86. See *id.* at 706.

87. See Garro, *supra* note 12, at 1185 (stating that “[t]his common goal is reflected by offering the breaching party the possibility to cure, requiring the nonbreaching party to provide an additional period for performance, and, most importantly, by allowing the termination of the contract only when the breach or nonperformance qualifies as ‘fundamental’”).

88. “The portion of the American economy attributable to international trade nearly tripled between 1950 and 1980, and more than 70 percent of American-made goods now compete with imports.” *United States v. Lopez*, 514 U.S. 549, 621 (1995) (5-4 decision) (Breyer, J., dissenting).

conventions, one should consider judicial decisions of other contracting nations for the "persuasive force of their reasoning."⁸⁹ The House of Lords reasoned that, where a large body of consistent case law exists, courts should accord this body great weight.⁹⁰ In addition, CISG itself requires that those interpreting the Convention pay heed to the document's international character and the goal of transnational uniformity of law.⁹¹ In the United States, this fact was not lost on the Eleventh Circuit, which recently recognized the importance of uniformity in the interpretation of CISG.⁹² Accordingly, common law courts are probably bound to consider relevant judicial decisions of other contracting states when seeking to resolve questions involving international commercial contracts under CISG.⁹³

At present, no court in the United States has considered the UNIDROIT Principles' applicability. However, a review of international case law suggests that it is only a matter of time before American courts, drawing on foreign case law to interpret CISG, will encounter the question of whether the Principles are an appropriate tool by which to supplement the Convention. A small number of international tribunals have determined that it is indeed appropriate to use the Principles to resolve questions not expressly settled in CISG.⁹⁴ American courts interpreting CISG will eventually need to reckon with these opinions when seeking to untangle

89. JOHN O. HONNOLD, SALES UNDER THE 1980 UNITED NATIONS CONVENTION 143 (2d ed. 1991) (citing *Fothergill v. Monarch Airlines*, [1981] App. Cas. 251 (1980), which involved a British Act of Parliament that effectuated a provision of the Warsaw Convention).

90. *See id.* Furthermore, reliance upon foreign decisions is, as a general matter, quite common among courts seeking to resolve issues involving international conventions. *See id.* at 142-43.

91. *See* CISG, *supra* note 2, art. 7(1).

92. *See* MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.P.A., 144 F.3d 1384, 1390-91 (1998).

93. Will this fact commence an international judicial race to render decisions in important areas of law in order for nations to establish theirs as the prevailing view on a particular issue under CISG? Unlikely. Although CISG's mandate regarding uniformity may require common law courts to defer to international case law before rendering a decision, these courts are not compelled to follow foreign case law as the common law doctrine of *stare decisis* is inapplicable to authority beyond the relevant nation's borders. *See* David J. Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035 (1991) (containing a thought-provoking discussion of traditionalism and the role of *stare decisis* in common law legal systems). *See generally* James C. Rehnquist, Note, *The Power That Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U.L. REV. 345 (1986) (considering the United State Supreme Court's adherence to precedent in constitutional controversies). Hopefully, courts electing to reject the reasoning of other nations' courts on similar questions of interpretation will provide a sufficiently detailed analysis of their position. In this fashion, the international community may eventually have the tools by which to arrive at uniform interpretations of unsettled issues under CISG through broad consensus regarding which is the best among well-reasoned decisions.

94. *See* ICC Court of Arbitration — Paris, UNILEX, No. 8128/1995 (1995); *infra* notes 159-61 and accompanying text.

issues that arise in areas such as hardship where the Convention appears to contain a gap.⁹⁵ While it is impossible to know at this point whether U.S. courts will align themselves with these international opinions, it seems likely that at least some American courts will follow their foreign counterparts' lead by using the UNIDROIT Principles to settle questions not expressly resolved in CISG.

However, American courts could justifiably refuse to apply the Principles as a gap-filling aid simply because, unlike CISG, the Principles do not constitute law.⁹⁶ Furthermore, American courts could refuse to apply the Principles based on the fact that it is pervaded by concepts common to civil law systems⁹⁷ and that this very flaw doomed CISG's predecessors, the Hague Convention Treaties.⁹⁸ Nonetheless, the notion that the Principles represents an international restatement of law is powerful.⁹⁹ This notion alone may prompt less critical American courts, or those unaccustomed to operating in the international arena, to adopt the Principles as a means by which to fill gaps in the Convention. After all, this route does offer convenient solutions to complex problems, and U.S. courts routinely refer to what they may view as the Principles' domestic equivalent—the American Restatement of Contracts—for guidance in resolving national issues.¹⁰⁰ In addition, the Eleventh Circuit's recent decision recognizing the need for uniformity in the interpretation of CISG, although not considering the Principles' applicability as a method of supplementation,¹⁰¹ may persuade American courts that recourse to the Principles is appropriate where questions are not resolved in the Convention. Therefore, if civil law courts eventually rule that the Principles' hardship provisions are a proper means by which to supplement CISG, it is likely that at least some American courts will arrive at the same conclusion.

95. See discussion *infra* Part V.A.

96. See *supra* notes 31-33, 45 and accompanying text; *supra* note 46, at 1163.

97. See *supra* notes 78-79 and accompanying text.

98. See *supra* note 15 and accompanying text.

99. See *supra* notes 52-54 and accompanying text. For a discussion of why this notion is flawed, at least in respect to some articles of the UNIDROIT Principles, see *infra* notes 135-42 and accompanying text.

100. See, e.g., *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 52 (1st Cir. 1979); *Western Alliance Ins. Co. v. Wells Fargo Alarm Servs., Inc.*, 965 F.Supp. 271, 279 (D. Conn. 1997).

101. See *MCC*, 144 F.3d at 1390-91 (1998). Unfortunately, the court did not detail how Article 7, the gap-filling provision of CISG, actually works. See *id.* Had the court done so, it could have provided clear guidance as to whether courts may use the UNIDROIT Principles to supplement CISG. For a model of how CISG's Article 7 should operate see discussion *infra* Part IV.B.2.

B. *Whether CISG Provides for Supplementation of Its Provisions*

Much has been made of the UNIDROIT Principles' usefulness as a tool with which decision-makers may fill "gaps" in international law.¹⁰² Indeed, the Principles' Preamble clearly offers its rules as a means by which "to interpret or supplement international uniform law instruments."¹⁰³ Moreover, reliance upon universally accepted principles of law to aid in contract interpretation is hardly a novel theory.¹⁰⁴ For example, in the United States, the Uniform Commercial Code anticipates supplementation of its provisions by "the principles of law and equity, including the law merchant"¹⁰⁵ Likewise, many other nations sanction recourse to general principles of law as a supplement to their frameworks of laws.¹⁰⁶

While it is one thing to agree that the UNIDROIT Principles can serve as a gap-filling device, it is quite another to automatically invoke its provisions as a supplement to CISG. The differences between the two instruments are, after all, monumental in that the former is a nonbinding "restatement" of international legal principles¹⁰⁷ while the latter, as an international treaty, occupies the gilded position of "law" in the nations in which it has been enacted.¹⁰⁸ Therefore, regardless of the Principles' purpose, it is of utmost importance to ask whether CISG itself provides for supplementation of its provisions.

Article 7(2) answers the question affirmatively by stating that

[q]uestions concerning matters governed by [CISG] . . . 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.¹⁰⁹

102. See, e.g., Garro, *supra* note 12, at 1152-59.

103. UNIDROIT Principles, *supra* note 6, at 1.

104. See generally Barton S. Seldon, *Lex Mercatoria in European and U.S. Trade Practice: Time to Take a Closer Look*, 2 ANN. SURV. INT'L & COMP. L. 111, 124-26 (1995) (discussing the application of *lex mercatoria* by judges and arbitrators in the absence of the parties' designation of their choice of law).

105. U.C.C. § 1-103 (1995).

106. See Seldon, *supra* note 104, at 124-25. These include: Germany, Belgium, France, Italy, the Netherlands, the United Kingdom, Korea, the Philippines, Spain and Panama.

107. See Bonell, *supra* note 44, at 1126; Garro, *supra* note 12, at 1160; CISG, *supra* note 2, art. 1, 3(2), 2(a)-(f); see also UNIDROIT Principles, *supra* note 6, introduction.

108. See Honnold, *supra* note 11, at 5; *Journal of Law and Commerce CISG Contracting States and Declarations Table, Clout Abstracts*, 16 J.L. & Com. 371 (1997); Dietrich Mascow, *Hardship and Force Majeure*, 40 AM. J. COMP. L. 657, 664 (1992).

109. CISG, *supra* note 2, art. 7(2).

Article 7 also requires those interpreting CISG to heed the instrument's international character as well as the need for both uniformity in its application and good faith in international trade.¹¹⁰ Thus, on its face, Article 7 acknowledges CISG's potential deficiencies and sets forth a means by which to resolve issues not expressly addressed within the Convention.¹¹¹

John Honnold, whose authority regarding CISG stems from his former positions as secretary of UNCITRAL and Chief of the United Nations International Trade Law Branch,¹¹² has concluded that Article 7 requires courts seeking to answer questions not expressly settled in CISG to first attempt to resolve those questions by ascertaining relevant general principles upon which the Convention is based.¹¹³ According to Honnold, this approach allows courts to minimize the confusion surrounding the application of conflict of laws rules and to avoid referring to domestic laws that are ill-suited for international transactions.¹¹⁴ When this approach is of no avail, however, Honnold notes that courts should proceed to consider the issue under the relevant domestic law.¹¹⁵

1. The Civil Law Model

Prominent scholars from civil law nations, some of whom have invested a great deal of time in seeing the UNIDROIT Principles come to fruition, have adopted Honnold's approach—but have taken it a step too far. Under the civil law model of Article 7, because courts seeking to fill gaps in CISG must, under Article 7(2), first look to “general principles” on which the Convention is based, reliance upon domestic law is only tenable as a “last resort.”¹¹⁶ Civilian commentators further contend that since Article 7(1) calls for recognition of CISG's “international character” and “the need to promote uniformity in its application,”¹¹⁷ it is appropriate to refer to the UNIDROIT Principles as general principles on which the Convention is based.¹¹⁸ These commentators feel that using the Principles

110. *See id.* art. 7(1).

111. Note that CISG expressly excludes certain questions from its scope of coverage. *See* CISG, *supra* note 2, art. 2(a)-(f). These questions are not subject to interpretation by the Principles. Instead, the “Principles may supplement those questions that deserve further examination.” Garro, *supra* note 12, at 1158.

112. *See* HONNOLD, *supra* note 89, cover page.

113. *See id.* at 156-57.

114. *See id.* at 157.

115. *See id.*

116. *See, e.g.,* Garro, *supra* note 12, at 1159.

117. CISG, *supra* note 2, art. 7(1).

118. *See* BONELL, *supra* note 12, at 113; Garro, *supra* note 12, at 159. Although some civilian scholars disagree with the proposition that the UNIDROIT Principles represent general principles on which CISG is based, these commentators, nonetheless, favor applying the Principles when no

to supplement CISG provides the greatest level of fairness to contracting parties, some of whom may encounter prejudice if courts refer to opposing parties' domestic law to resolve international disputes.¹¹⁹ Moreover, they assert that this course is consistent with the Convention's goal of unifying international laws.¹²⁰

The civilians' characterization of Article 7(2) as providing for recourse to domestic law only as a last resort may not be entirely out of synch with Honnold's interpretation of this provision. However, the civilian view that "CISG Article 7 is entrusted with avoiding national laws when an issue is not sufficiently covered by the Convention"¹²¹ is overbroad and is not supported by the Convention's text. Civilian commentators seem to anchor their theory that the UNIDROIT Principles are available as a supplement to CISG on this reading of Article 7(2). Yet, their premise runs counter to the plain language of the Convention, which expressly sanctions gap-filling via recourse to national law after attempts to determine relevant general principles on which the Convention is based have failed.¹²²

In fact, Article 7 of CISG represents a hard-fought compromise between the civil law and common law perspectives on gap-filling.¹²³ During the drafting of CISG, delegates from civil law nations feared that domestic courts would eagerly turn to their own national law when seeking to resolve issues under the Convention, thereby circumventing the goal of uniformity.¹²⁴ In contrast, common law delegates were reluctant to place too much faith in difficult to ascertain general principles as a means by which to supplement the Convention.¹²⁵ The resulting compromise is embodied in Article 7(2), which provides for both methods of supplementation.¹²⁶ The civilians' interpretation of Article 7(2) abrogates the delicate balance struck by delegates to the Convention.

Despite civilians' efforts to skew the effect of Article 7(2), the UNIDROIT Principles does not, in its entirety, represent general principles on which CISG is based. Such an approach is intellectually disingenuous

resolution is possible, either by analogy or through the application of general principles. See Dr. Maria del Pilar Perales Viscasillas, *UNIDROIT Principles of International Commercial Contracts: Sphere of Application and General Provisions*, 13 ARIZ. J. INT'L & COMP. L. 381, 404 (1996). This solution still calls for resort to the Principles prior to reliance on domestic law to resolve issues not expressly settled in CISG. See *id.* at 405-13.

119. See Garro, *supra* note 12, at 1159.

120. See *id.*

121. Perales Viscasillas, *supra* note 118, at 404; see also Garro, *supra* note 12, at 1152-53.

122. See CISG, *supra* note 2, art. 7(2).

123. See HONNOLD, *supra* note 89, at 150; see also JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 19-21, 237, 327-28, 659 (1989).

124. See HONNOLD, *supra* note 89, at 150.

125. See *id.*

126. See CISG, *supra* note 2, art. 7(2).

given the number of flaws in the civilians' theory. Some civil law commentators do recognize that the task of determining general principles on which the Convention is based is an arduous one since CISG fails to specify any other than those delineated in Article 7: internationality, uniformity and good faith.¹²⁷ To their credit, some of these commentators also warn those seeking to ascertain general principles to first parse the Convention itself to determine these principles.¹²⁸ Yet, even those striving to first discover relevant general principles within CISG must cautiously undertake any subsequent attempt to place reliance on the UNIDROIT Principles as general principles on which the Convention is based. After all, the text of Article 7(2) does not specifically provide for supplementation by international instruments beyond CISG itself.¹²⁹ And, although Article 7(2) does not preclude reliance upon these tools,¹³⁰ the civilians' approach seems more heavily grounded in the language and purpose of the Principles' than on the text of CISG.¹³¹

By declaring that the UNIDROIT Principles represent general principles on which CISG is based, civil law commentators ensure that resolution of many controversies not settled by the Convention itself will occur in accordance with the Principles. This largely obviates the need for Article 7(2)'s provision sanctioning the use of domestic law as a means by which to supplement CISG.¹³² Since the Principles were published well after Convention delegates had finished their work on CISG,¹³³ common law nations that struggled to include a meaningful gap-filling provision based on domestic law will surely view the supplementation of CISG by the Principles as a subversion of their diplomatic agreement.¹³⁴

Civilian commentators emphasize the notion that the UNIDROIT Principles constitute an international restatement of law.¹³⁵ This is not altogether surprising considering that the introduction to the official text

127. See Perales Viscasillas, *supra* note 118, at 404

128. *See id.*

129. *See* CISG, *supra* note 2, art. 7(2).

130. *See id.*

131. *See* BONELL, *supra* note 12, at 10-15.

132. *See* CISG, *supra* note 2, art. 7(2).

133. *See supra* notes 48, 29-30 and accompanying text.

134. This fact is significant considering that CISG represents an internationally negotiated treaty, shaped largely by the need to reach compromise agreements to secure the imprimatur of officially represented governments. *See supra* notes 28-30 and accompanying text. In contrast, the idea that the Principles are, in their entirety, applicable as general provisions of CISG is dubious given that the instrument has no force of law, was produced by international scholars and others beholden to no governments and that it seeks no compromises regarding international commercial issues. *See supra* notes 45-46 and accompanying text.

135. *See* BONELL, *supra* note 12, at 7-15.

of the Principles represents the instrument as such.¹³⁶ This characterization is not accurate in all cases, however. To the extent that the Principles mirror CISG or follow legal traditions of a majority of jurisdictions, it may indeed represent an international restatement. At various points, however, the Principles intentionally deviate from existing traditions in order to arrive at the “best solutions, even if still not yet generally adopted.”¹³⁷ For example, in regard to remedies provisions dealing with stipulated damages and specific relief, the Principles’ approach neither mirrors CISG nor follows that of common law.¹³⁸ More significantly, the Principles’ hardship provisions serve as an example of a concept extending well beyond both common law¹³⁹ and CISG.¹⁴⁰ Accordingly, scholars from both civil and common law systems have recognized that at least some of the Principles’ provisions “break fresh ground” inasmuch as they deviate from certain legal systems’ norms.¹⁴¹ How, then, can the UNIDROIT Principles as a whole constitute a general principle on which CISG is based? Rather, in instances where the Principles’ provisions differ in substance from both the Convention and globally accepted legal maxims, it is inappropriate to rely upon the Principles before turning to domestic law to resolve a question not expressly settled in CISG.¹⁴²

Notwithstanding the flaws inherent in the notion that the UNIDROIT Principles reflect general principles on which CISG is based, one prominent court in a civil law nation has recently adopted this position.¹⁴³ This evidences some likelihood that the view of civilian commentators will eventually reach widespread acceptance and that courts will, over time, drastically curtail the role of domestic law under Article 7(2). At present,

136. See UNIDROIT Principles, *supra* note 6, at Introduction (stating that “[o]thers go even further and advocate the elaboration of an international restatement of general principles of contract law. UNIDROIT’s initiative for the elaboration of ‘Principles of International Commercial Contracts’ goes in that direction.”).

137. *Id.*

138. See Farnsworth, *supra* note 13, at 5.

139. See Perillo, *supra* note 78, at 297.

140. See Garro, *supra* note 12, at 1155.

141. Farnsworth, *supra* note 13, at 4-5; see also Bonell, *supra* note 44, at 1131 (“There are, however, rules that are clearly innovative . . .”); E. Allan Farnsworth, *The American Provenance of the Unidroit Principles*, 72 TUL. L. REV. 1985, 1985-86 (1998) (noting that even where particular provisions of the Principles follow CISG, they sometimes differ from the text of the Convention); Garro, *supra* note 12, at 1160-64 (pointing out some differences between the Principles and CISG).

142. Of course, to the extent that the Principles mirror CISG, they really offer nothing beyond the Convention itself to those interpreting it. To the extent that the Principles reflect globally accepted legal maxims, however, they may have some usefulness as additional evidence of already established general principles on which the Convention is based.

143. See ICC Court of Arbitration – Paris, UNILEX, No. 8128/1995 (1995) (finding that both the UNIDROIT Principles and the Principles of European Contract Law are general principles on which CISG is based).

however, this possibility seems unlikely. The bulk of international case law indicates that the civilians' position is incorrect as courts continue to look to domestic law rather than the Principles to resolve questions unsettled in the Convention when no pertinent general principles are apparent.¹⁴⁴ Furthermore, most of the cases which fail to recognize the UNIDROIT Principles as general principles on which CISG is based were rendered in courts of civil law nations.¹⁴⁵ Thus, considering the faults inherent in the civilian scholars' interpretation of Article 7(2), and the fact that international courts continue to acknowledge the validity of domestic law as a means by which to supplement the Convention, a more plausible model of Article 7 must exist.

2. A Better Model

Ideally, those interpreting CISG Article 7 should honor its call for internationality and uniformity while paying heed to its provision for gap-filling via domestic law. It is important to recognize that Article 7(1), which contains the often trumpeted language of internationality and uniformity, is devoid of specifics relating to methods of supplementation.¹⁴⁶ The language of the provision is general in nature,¹⁴⁷ and one must guard against the tendency to read Article 7(1) too broadly. Courts can comply with its mandate in a variety of ways without crediting the fallacy that the UNIDROIT Principles constitute a general principle on which the Convention is based. For example, a tribunal interpreting CISG can point to Article 7(1) to justify the important need to rely on the

144. Four of these decisions were published well after the UNIDROIT Principles' publication. See CA Chambre Commerciale, UNILEX, No. 48992 (Sept. 13, 1995); Amtsgericht Alsfeld, UNILEX, No. 31 C 534/94 (May 12, 1995); Federal Court, South Australia District Adelaide, UNILEX, No. 57 FCR 216 (Apr. 28, 1995); LG Landshut, UNILEX, No. 54 0 64/94 (Apr. 5, 1995). A number of similar decisions were issued in the same year as or subsequent to the Principles' publication. See Jdgmt. of December 20, 1994, Tribunal Cantonal Valais, UNILEX (Switzerland); Rb. Amsterdam, UNILEX, No. H 92.3572 (June 15, 1994); ICC Court of Arbitration – Paris, UNILEX, No. 7565/1994 (1994); ICC Court of Arbitration – Paris, UNILEX, No. 6653/1993 (1993); ICC Court of Arbitration – Paris, UNILEX, No. 7197/1992 (1992); 1a Inst. en lo Comercial No. 7, UNILEX, No. 50272 (May 20, 1991).

145. See CA Chambre Commerciale, UNILEX, No. 48992 (Sept. 13, 1995); Amtsgericht Alsfeld, UNILEX, No. 31 C 534/94 (May 12, 1995); LG Landshut, UNILEX, No. 54 0 64/94 (Apr. 5, 1995); Jdgmt. of December 20, 1994, Tribunal Cantonal Valais, UNILEX (Switzerland); Rb. Amsterdam, UNILEX, No. H 92.3572 (June 15, 1994); ICC Court of Arbitration – Paris, UNILEX, No. 7565/1994 (1994); ICC Court of Arbitration – Paris, UNILEX, No. 6653/1993 (1993); ICC Court of Arbitration – Paris, UNILEX, No. 7197/1992 (1992); 1a Inst. en lo Comercial No. 7, UNILEX, No. 50272 (May 20, 1991). In fairness, however, it does seem as though the ICC Court of Arbitration in Paris has changed its mind on this issue. See ICC Court of Arbitration – Paris, UNILEX, No. 8128/1995 (1995).

146. See CISG, *supra* note 2, art. 7(1).

147. See *id.*

persuasive value of cases decided in foreign jurisdictions to resolve issues arising under the Convention.¹⁴⁸

In contrast to the broad language contained in Article 7(1), Article 7(2) provides a detailed guide for resolving questions not expressly settled in the Convention. First, the article requires decision-makers to attempt to decide these issues according to the general principles on which CISG is based.¹⁴⁹ Undertaking to provide a conclusive list of general principles underlying the Convention is both beyond the scope of this discussion and probably an impossible endeavor at this point in the brief history of CISG. Nonetheless, courts and commentators have begun to identify some of these principles.¹⁵⁰ When so doing, decision-makers seem to agree that general principles on which CISG is based should be distilled from the text of the Convention itself.¹⁵¹ Therefore, although various articles of the UNIDROIT Principles may indeed reflect general principles underlying the Convention, those interpreting CISG should refrain from the temptation to use the Principles as a handbook of CISG general principles.¹⁵²

When no relevant general principle is available to resolve a question left unsettled in CISG, Article 7(2) instructs decision-makers to defer to the rules of private international law.¹⁵³ However, there are widely recognized problems associated with the application of domestic law to interpret

148. See *MCC-Marble*, 144 F. 3d at 1390-91; CISG, *supra* note 2, art. 7(1); HONNOLD, *supra* note 89, at 142-43; Lubon, *supra* note 93, at 1035.

149. See CISG, *supra* note 2, art. 7(2), available in 19 I.L.M. at 673.

150. BONELL, *supra* note 12, at 114; HONNOLD, *supra* note 89 at 152-55; see *supra* Garro note 12 at 1185-88; Jdgmt. of Oct. 10, 1996, CA, UNILEX, (France); Internationales Schiedsgericht der Bundes – kammer der gewerb, UNILEX, No. SCH-4366 (June 15, 1994).

151. The principle favoring performance of contracts where feasible stems from CISG Articles 37 and 48, Articles 47 and 63, and Article 25. See GARRO *supra* note 12 at 1177-84. The principle of estoppel is written into Articles 16(2)(b), and 29(2). See HONNOLD, *supra* note 89, at 153-54; Internationales Schiedsgericht der Bundes – kammer der gewerb, UNILEX, No. SCH-4318 (June 15, 1994). Articles 19(2), 21(2), 26, 39(1), 48(2), 68, 71(3), 72(2), 79(4) and 88(1) establish a general principle in the form of a duty to communicate information needed by other parties. See HONNOLD, *supra* note 89, at 154-55. The principle of mitigation stems from Articles 77, 85 and 86(1). See *id.* at 155; Internationales Schiedsgericht der Bundes – kammer der gewerb, UNILEX, No. SCH-4366 (June 15, 1994). Article 57 gives effect to a principle that obligations to pay are to be performed at the creditor's place of business. See Jdgmt. of Oct. 23, 1996, CA, UNILEX, (France); OLG Dusseldorf, UNILEX, No. 17 U 73/93 (July 2, 1993). The general principle providing for full compensation to an aggrieved party is implicit in Articles 74 and 78. See Internationales Schiedsgericht der Bundes – kammer der gewerb, UNILEX, No. SCH-4366 (June 15, 1994). Finally, Articles 38 and 39 reflect a general principle requiring that the buyer must satisfy the burden of proof. See Handelsgericht Zurich, UNILEX, No. HG930138 U/H93 (Sept. 9, 1993).

152. Some civilian scholars have even recognized this fact. See del Pilar Perales Viscasillas, *supra* note 118, at 404.

153. See CISG, *supra* note 2, art. 7(2) 19 I.L.M. at 673.

international agreements.¹⁵⁴ By resorting to domestic law, decision-makers must deal with the uncertainties associated with conflict of laws rules, the task of determining outcomes under foreign laws and the chance that significant incongruities may exist between the pertinent international instrument and the national legislation employed to decide the issue.¹⁵⁵ Therefore, when a question is left unsettled in CISG, and when it proves exceedingly difficult or impossible to decide the relevant controversy under domestic law, decision-makers are again faced with a dilemma. At this point, perhaps it is appropriate to reconsider Article 7(1)'s requirement that decision-makers pay heed to the international character of CISG.¹⁵⁶ Only in these situations does Article 7(1) justify limited recourse to the UNIDROIT Principles.

However, in using the Principles to supplement CISG, a problem familiar in the application of domestic law arises: significant incongruities may exist between the relevant provision of the Principles and the Convention itself. In these instances, by comparing CISG's position as legal authority to that of the Principles,¹⁵⁷ it would still seem inappropriate to apply the Principles. Since the sole reason to employ the Principles to supplement CISG is to decide controversies left unresolved by the text of the Convention, reliance upon the Convention's text to ascertain incongruities between CISG and the Principles is futile where CISG is textually ambiguous. Nonetheless, a method of determining incongruities between the two instruments is available. According to the 1969 United Nations Convention on the Law of Treaties, those seeking to discover the meaning of an international treaty may resort to supplementary means of interpretation, including analysis of the preparatory work of the treaty.¹⁵⁸ Therefore, the appropriate means by which to ascertain whether a significant incongruity exists between the relevant UNIDROIT Principles' provision and CISG is to search the legislative history of the Convention.

The foregoing model represents a more cautious approach to filling gaps in CISG through application of the Principles than that advocated by civil law commentators. Yet, there is evidence that this method is

154. See HONNOLD, *supra* note 89, at 153.

155. See *id.*

156. See CISG, *supra* note 2, art. 7(1) 19 I.L.M. at 673. The UNIDROIT Principles' Preamble invites this type of application. See *supra* note 50.

157. See HONNOLD, *supra* note 11, at 6.

158. See SIR IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 71 (1973); see also DOCUMENTARY HISTORY, *supra* note 123, at vii (noting that a "plain meaning" theory of interpretation becomes absurd when applied to international legislation); John Honnold, *Uniform Laws for International Law*, INT'L TRADE & BUS. L.J. 5 (1995), available at <<http://www.cisg.law.pace.edu/cisg/linkd.html>> (concluding that, "Where important and difficult issues of interpretation are at stake, diligent counsel and courts will need to consult the [Convention's] legislative history. In some cases this can be decisive.").

workable. In a recent case, reported in a large American law firm's summary of developments in international dispute resolution, a controversy arose between a Middle Eastern manufacturer and an American supplier.¹⁵⁹ The arbitrators in that case were unable to ascertain which of the five relevant jurisdictions' laws to apply to the controversy.¹⁶⁰ In order to overcome their inability to properly rely on domestic law, the arbitrators decided to employ the law of New York together with the UNIDROIT Principles to resolve the dispute.¹⁶¹

V. PUTTING THE PIECES TOGETHER

A. *Whether CISG Contains a "Gap" Concerning Hardship*

Academics have, through considerable discussion, attempted to ascertain the scope of CISG's Article 79,¹⁶² which grants exemption from performance of a party's obligations in cases where the party faces an "impediment beyond his control."¹⁶³ Although there is no consensus on the issue, many courts and scholars believe that the term "impediment" as contained in Article 79 does not extend so far as to encompass hardship.¹⁶⁴ That the legislative history of CISG implies that Article 79 is limited to cases involving an greater obstacle to performance than that which traditionally constitutes hardship seems to support their position.¹⁶⁵ Thus, there is authority for the proposition that the concept of hardship is not

159. See Farnsworth, *supra* note 13, at 3.

160. See *id.*

161. See *id.* The tribunal justified its reliance on the Principles by stating that that instrument may serve as a useful tool in the interpretation of international commercial contracts and that arbitrators may rely on the rules contained therein. See *id.*

162. See HONNOLD, *supra* note 89, at 542-44; Sarah Howard Jenkins, *Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles — A Comparative Assessment*, 72 TUL. L. REV. 2015, 2024-25 (1998); Jennifer M. Bund, Comment, *Force Majeure Clauses: Drafting Advice for the CISG Practitioner*, 17 J.L. & COM. 381, 386-89 (1998).

163. CISG, *supra* note 2, art. 79(1), 19 I.L.M. 689.

164. See HONNOLD, *supra* note 89, at 542-44 (concluding that the grounds for exemption under Article 79 are strict and should be limited to situations in which an impediment "prevents performance"); Jenkins, *supra* note 162, at 2025 (finding that the term impediment is limited to instances of "impossibility of performance but not impracticability, frustration, or imprevision"); Bund, *supra* note 162, at 387 (opining that although Article 79 encompasses impossibility, it probably does not extend to the American doctrine of frustration and certainly does not include the American doctrine of commercial impracticability); Jdgm. of May 2, 1995, *Rechtbank van koophandel Hasselt (Belgium) available in CISG Database* (visited Oct. 20, 1998) <<http://www.cisgw3.law.pace.edu/cases/950502bl.html>> (concluding that a significant drop in the market price of goods after contract formation does not constitute an impediment). *But see* LG Aachen, UNILEX, No. 43 0 136/92 (May 14, 1993) (holding that Article 79 covers "Wegfall der Geschäftsgrundlage," the German equivalent of hardship).

165. See *infra* note 210 and accompanying text.

within Article 79's definition of impediment. Moreover, a glance at the article's text reveals that the term "hardship" is not expressly included in its language.¹⁶⁶ Nor is hardship explicitly excluded from CISG's coverage.¹⁶⁷ It is, therefore, plausible to contend that the Convention has a marked gap concerning hardship—a gap easily filled by the detailed hardship provisions of the UNIDROIT Principles.

B. *Whether the UNIDROIT Principles Can Fill CISG's Gap on Hardship*

1. International Case Law

An exhaustive review of international case law unearthed only two cases worth considering in attempting to resolve this issue.¹⁶⁸ The first, *Nuova Fucinati S.p.a. v. Fondmetall International A.B.*, decided by an Italian tribunal in 1993, involved an Italian seller's attempt to invoke the domestic law of Italy to avoid its contractual obligation to a Swedish buyer.¹⁶⁹ The seller in the controversy, Nuova Fucinati, failed to deliver 1000 tons of metal that Fondmetall had contracted to purchase.¹⁷⁰ Nuova Fucinati objected to a court-imposed injunctive order and sued Fondmetall, seeking a release from its contractual duties.¹⁷¹ The seller argued that delivery was impossible due to Fondmetall's failure to take delivery of another load of goods ordered at the same time.¹⁷² Furthermore, Nuova Fucinati alleged that prior to delivery of the goods, the price on the international market had risen so swiftly and unexpectedly that the balance between the parties' corresponding performances was significantly altered, thereby justifying repeal of the injunction and dissolution of the contract.¹⁷³

Unfortunately, the *Nuova Fucinati* court's discussion of Article 79 is pure dicta.¹⁷⁴ The court resolved the case by deciding that CISG was inapplicable under Article 1.¹⁷⁵ In addition, in its discussion of the issue of

166. See CISG, *supra* note 2, art. 79, 19 I.L.M. at 689-90.

167. See CISG, *supra* note 2, art. 2(a)-(f) 19 I.L.M. 672.

168. This research encompassed American case law, the Internet and the UNILEX international law database.

169. See Alessandra Michelini, *Tribunale di Monza, Sentenza 14 Gennaio 1993, Laudisio Presidente, Lapertosa Estensore, Nuova Fucinati S.p.a. (Avv. Bassi, Santamaria) C. Fondmetall International A.B. (Avv. Bianchi, Ginelli, Rossi)*, 15 J.L. & COM. 153 (1995) (translating the original Italian decision).

170. See *id.* at 154.

171. See *id.*

172. See *id.*

173. See *id.*

174. See *id.* at 156-57.

175. See *id.* at 157. For a commentary concluding that the court's refusal to apply CISG to the

supplementation, the court never contemplated whether, in keeping with the international character of the Convention, a domestic court could rely upon provisions of an international instrument such as the UNIDROIT Principles. As *Nuova Fucinati* was decided in January of 1993,¹⁷⁶ a full year before publication of the Principles,¹⁷⁷ it is hardly surprising that the court never considered whether the Principles' hardship provisions could serve to supplement CISG.

The court did, however, comment on the seller's desire to supplement CISG Article 79 with the domestic law of Italy, which provides for dissolution of contracts in instances of "supervening excessive onerousness."¹⁷⁸ In its discussion, the court stated that since hardship is not expressly excluded from the scope of the Convention by Article 4, a domestic court could not integrate domestic hardship provisions into CISG.¹⁷⁹ The court's reasoning on this point is clearly flawed given Article 7(2) of the Convention. The fact that hardship is not expressly excluded from CISG, coupled with the fact that it is neither explicitly nor implicitly included,¹⁸⁰ means that this is an issue left unsettled in CISG. Under Article 7(2), questions not expressly settled in the Convention are to be determined under domestic law provided the decision-maker cannot first ascertain a relevant general principle of the Convention capable of resolving the issue.¹⁸¹ Therefore, even if one appreciates that the Italian court's analysis regarding the application of hardship principles is merely dicta, one must also guard against the temptation to rely upon its reasoning as this is undercut by the court's failure to take into account Article 7(2).

Five months after *Nuova Fucinati* was decided, a German court, Landgericht Aachen, considered the application of Article 79.¹⁸² The case at issue pitted a German seller of acoustic prosthetics against an Italian buyer who refused to take delivery of the goods under contract.¹⁸³ The court applied CISG as the governing law since both parties were located in contracting states at the time the contract was concluded.¹⁸⁴ In rendering

parties' contract was erroneous see Franco Ferrari, *Uniform Law Of International Sales: Issues of Applicability and Private International Law*, 15 J.L. & COM. 159, 161 (1995).

176. See Micheline *supra* note 169, at 153.

177. See UNIDROIT Principles *supra* note 6.

178. Micheline, *supra* note 169, at 154-55.

179. See *id.* at 156. Although not made explicit, the mere fact that the court was considering the issue in this manner establishes that the court recognized that none of CISG's articles expressly cover hardship.

180. See generally CISG, *supra* note 2, arts. 1-101. None of these articles provides for "hardship." See *id.*

181. See CISG, *supra* note 2, art. 7(2).

182. See LG Aachen, UNILEX, No. 43 0 136/92 (May 14, 1993).

183. See *id.*

184. See *id.*

its decision, the court held that “Wegfall der Geschäftsgrundlage,” the German equivalent of hardship,¹⁸⁵ was covered by Article 79 of the Convention.¹⁸⁶ Therefore, since the court determined that hardship was covered by Article 79, the issue was, in its opinion, settled in the Convention. Accordingly, the court had no reason to look beyond the text of CISG to either domestic law or the Principles.¹⁸⁷

The German court’s opinion contrasts with that of the Italian court, which apparently found no provision for hardship in CISG.¹⁸⁸ Nonetheless, the outcome reached by the German court was the same as that in *Nuova Fucinati* in that recourse to domestic law was precluded.¹⁸⁹ This interpretation of Article 79 is noteworthy. If, as the German court believes, Article 79’s reference to “impediments” does encompass the concept of hardship, then our inquiry is at its end. Under this theory, one could not invoke the UNIDROIT Principles’ hardship provisions to supplement the Convention due to CISG’s concurrent coverage of that issue. However, the volume of contrary authority suggests that the German court’s reading of Article 79 to include hardship is too broad.¹⁹⁰ Therefore, neither the Italian nor German decisions touching on the issue are conclusive.

2. Resolution Under CISG Article 7

Since CISG apparently contains a gap regarding the concept of hardship,¹⁹¹ we must rely on Article 7 to fill this gap.¹⁹² As rehearsed, our first obligation under Article 7 is to parse the Convention itself, seeking to distill a general principle sufficient to resolve the controversy.¹⁹³ One principle does seem applicable to cases involving hardship: that favoring performance of contracts where feasible.¹⁹⁴ An exemption from performance based on hardship seems at odds with CISG’s general principle favoring performance of contracts where feasible since, although rendered more difficult, performance is, nonetheless, feasible in cases of hardship.¹⁹⁵ This general principle suggests, therefore, that no exemption from performance is available under CISG to a party facing an increased

185. See Maskow, *supra* note 33, at 661.

186. See generally LG Aachen, UNILEX, No. 43 0 136/92 (May 14, 1993).

187. See *id.*

188. See *supra* note 169 at 158.

189. See LG Aachen, UNILEX, No. 43 0 136/92 (May 14, 1993).

190. See *supra* text accompanying note 164.

191. See discussion *supra* Part V.A.

192. See CISG, *supra* note 2, art. 7; see also *supra* text accompanying note 111.

193. See CISG, *supra* note 2, art. 7 (2); see also *supra* text accompanying note 111.

194. See *supra* note 12; see also *supra* text accompanying note 151.

195. See generally UNIDROIT Principles, *supra* note 6, art. 6.2.2; Maskow, *supra* note 33, at 661-63.

burden of performance stemming from hardship. Furthermore, as the issue is capable of resolution under Article 7 of the Convention, invocation of the UNIDROIT Principles' hardship provisions to supplement CISG is both unnecessary and inappropriate.¹⁹⁶

Although the general principle favoring performance of contracts where feasible may suffice as a means by which to settle the question, some courts may fail to ascertain this general principle. Courts may also consider this general principle an insufficient justification for denying relief to a party faced with hardship. In these instances, courts are required by Article 7(2) of the Convention to resort to the domestic law applicable under conflict of laws rules to determine whether a party facing hardship is exempt from performance.¹⁹⁷

Many nations—especially industrialized nations with well-developed bodies of commercial law—have established laws governing hardship.¹⁹⁸ Thus, in most situations, those applying domestic law to determine whether the Convention provides a party facing hardship with an exemption from performance will encounter no gap in CISG's coverage due to the existence of a solution under domestic law. Therefore, in nearly every instance where a court fails to distill a pertinent general principle under Article 7(2), the court should settle the question based on the domestic law applicable via conflict rules. There are, however, some instances in which it proves impossible or inordinately difficult to apply domestic law to international transactions.¹⁹⁹

196. Even if the civilians are correct in their assertion that the UNIDROIT Principles constitute general principles on which CISG is based, they must recognize that application of the Principles' hardship provisions achieves a different outcome than application of the general principle favoring performance of contracts where feasible. See BONELL, *supra* note 12, at 113, Garro, *supra* note 12, at 1159; see also *supra* text accompanying note 118. In cases where two general principles conflict—one stemming from an instrument beyond CISG and the other stemming from CISG itself—the course truest to the Convention is to rely on the general principle stemming from the Convention itself. Under this approach, the principle of performance trumps the hardship provisions of the UNIDROIT Principles, again resulting in the unavailability of a hardship exemption for performance obligations under CISG. What's more, civilians seeking to dispute the existence of a general principle favoring performance of contracts where feasible should note that a leading civilian scholar, Alejandro Garro, has recognized this principle. See *supra* note 12, at 1185. Ironically, Garro is also a leading proponent of the view that tribunals may look to the UNIDROIT Principles as a general principle underlying CISG. See BONELL, *supra* note 12, at 113, Garro, *supra* note 12, at 1159; see also *supra* text accompanying note 118.

197. See CISG *supra* note 2, art. 7 (2).

198. For instance, practitioners in the United States are familiar with the concept of "impracticability" as set forth in the Uniform Commercial Code. See U.C.C. § 2-615 (1998). In Germany, the well-established concept of hardship is known as "wegfall der geschäftsgrundlage." See Maskow, *supra* note 33, at 661 text accompanying. The French use the term *imprévision* to refer to hardship. See *id.*

199. See HONNOLD, *supra* note 89, at 153.

In those limited instances in which domestic law is incapable of determining the availability of an exemption based on hardship, one may conclude that Article 7(1)'s call for internationality and uniformity in the interpretation of CISG²⁰⁰ justifies recourse to the UNIDROIT Principles' hardship provisions. Such a conclusion is, however, incorrect. Following a failure to resolve an issue left unsettled in the Convention under domestic law, Article 7(1) may indeed provide a proper rationale for turning to a relevant provision in the Principles.²⁰¹ Notwithstanding the Principles' potential availability as a gap-filling device, its use is inappropriate when the relevant provision is incongruous with CISG as evidenced by the Convention's legislative history.²⁰²

The legislative history of CISG is replete with evidence showing that the Principles' hardship provisions are contrary to the spirit of the Convention. In considering potential exemptions from performance, delegates to the Convention were especially wary of granting too much relief to a nonperforming party.²⁰³ Their concern is evidenced by the Working Group's decision to narrow the grounds for excuse under Article 74 of ULIS,²⁰⁴ the unsuccessful precursor to CISG.²⁰⁵ One factor motivating their decision was the likelihood that, under Article 74, an unforeseen price increase could trigger an exemption.²⁰⁶ That the UNIDROIT Principles' hardship remedy extends to situations involving unforeseen price hikes is even more evident than was the case with ULIS.²⁰⁷ Moreover, although the exemption provision of CISG, Article 79, does not define the term "impediment,"²⁰⁸ the legislative history of the Convention associates this term with "wars, storms, fires, government embargoes and the closing of international waterways."²⁰⁹ There is no evidence that the delegates intended to exempt performance complicated by unforeseen inflation. Thus, the Working Group's efforts to narrow the scope of Article 74, and the likely scope of the term impediment, provide an initial basis upon which to conclude that the Principles' hardship

200. See CISG, *supra* note 2, art. 7(1).

201. HONNOLD, *supra* note 89, at 153; CISG, *supra* note 2, art. 7(1).

202. See discussion *supra* Part IV.B.2.

203. See HONNOLD, *supra* note 123, at 185, 252.

204. See *id.* at 185; see also Matchup of CISG Article 79 with ULIS/ULF (visited Oct. 20, 1998), available in <<http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-u-79.html>> (comparing the text of CISG Article 79 to the text of ULIS Article 74).

205. See *supra* note 15 and accompanying text.

206. See HONNOLD, *supra* note 123, at 185.

207. See UNIDROIT Principles, *supra* note 6, art. 6.2.2, cmt. 2..

208. See CISG, *supra* note 2, art. 79.

209. HONNOLD, *supra* note 123, at 445; see also *id.* at 600 (German delegate pointing out that article 65(1), enacted as article 79(1), "impose[s] a heavy responsibility on the seller, and permit[s] only a very limited exemption.").

provisions are incongruous with the legislative history of CISG. There is, however, even more compelling evidence towards this end.

During its 1977 review of the Working Group's draft of CISG, UNCITRAL considered whether to incorporate into the Convention a proposed article on hardship.²¹⁰ This article would have allowed a party faced with "excessive difficulties" to "claim an adequate amendment of the contract or its termination."²¹¹ Consequently, it would have provided a means by which parties facing hardship could effectively secure a modification of the parties' contract in a manner similar to that prescribed by the Principles' hardship provisions.²¹² This proposal, however, was explicitly rejected.²¹³ Furthermore, the legislative history of CISG reveals that delegates to the Convention were cognizant of the concept of adaptation of contract as provided for by the Principles' provisions on hardship.²¹⁴ In fact, at one point during the lengthy debate surrounding Article 79, a representative of Argentina objected to a proffered proposal concerning the grounds for exemption, suggesting that rather than exemption the appropriate remedy should focus on "equitable revision of the contract."²¹⁵ His conclusion was premised on the fact that, in his opinion, the circumstances envisaged by the proposal at issue amounted to a fundamental alteration of the basis of the contract.²¹⁶ This "fundamental alteration" standard is the threshold element for a finding of hardship under the UNIDROIT Principles.²¹⁷ Despite the delegate's commentary, he received no support from other representatives and the text of CISG contains no provisions sanctioning the equitable revision of contracts.²¹⁸ Hence, even if domestic law proves incapable of settling the question of whether hardship justifies a party's exemption from performance under CISG, it is not appropriate to supplement the Convention with the UNIDROIT Principles' hardship provisions due to incongruities between the two instruments. Instead, in these instances, decision-makers must conclude that no remedy based on hardship is available and that the nonperforming party is not excused from performing his or her contractual obligations.²¹⁹

210. *See id.* at 350.

211. *Id.*

212. *See id.*; *see also* UNIDROIT Principles, *supra* note 6, arts. 6.2.1-6.2.3.

213. *See id.*

214. *See* UNIDROIT Principles, *supra* note 6, art. 6.2.3 (4)(b).

215. HONNOLD, *supra* note 123, at 602-03.

216. *See id.*

217. *See* UNIDROIT Principles, *supra* note 6, art. 6.2.2.

218. *See* CISG, *supra* note 2.

219. *See id.* Parties seeking to provide for exemption based on hardship should agree to derogate from the Convention by either specifying acceptable terms governing hardship, or by indicating that their contract incorporates either one nation's domestic law on hardship or the

VI. CONCLUSION

It is critical that you learn whether Gregaivitis, the eastern European mountain bike manufacturer with whom you contracted, can call upon the UNIDROIT Principles' hardship provisions to supplement CISG. Faced with hardship stemming from a dramatic, unexpected increase in manufacturing costs, Gregaivitis hopes to seriously curtail his obligations under the contract by invoking the Principles despite the fact that your contract is governed by CISG. You, on the other hand, cannot afford to default on any of your corresponding domestic contracts—many of which are your first—with important retailers. Therefore, you desperately want to hold Gregaivitis to his obligation to deliver the full complement of bicycle frames for which you contracted.

Against your better judgment, you contacted your brother, a high-priced international trade lawyer for assistance. Having received an inconclusive answer and a surprisingly hefty bill from your brother's law firm, you fired your brother and enlisted the services of a young attorney who claimed to specialize in legal matters relating to CISG. As you waited for her report, your frustration mounted and your ability to hold Gregaivitis' requests for a renegotiation of the contract under the Principles at bay diminished. Finally, however, the young attorney felt that she had the answer to your question.

Article 7 of CISG provides that in order to resolve questions left unsettled in the Convention one must look first to the general principles on which CISG is based. Despite some wishful thinking on the part of commentators in civil law nations, the UNIDROIT Principles are not general principles on which CISG is based. Yet, the question of whether CISG allows for a remedy based on hardship is, apparently, unsettled in the Convention. The general principle favoring performance of contracts where feasible suggests that no hardship remedy is available for contracts governed by CISG as performance is feasible in these instances. If, however, a tribunal considering the issue fails to ascertain this general principle, it must, under Article 7, look to the domestic law applicable via conflict of laws rules. This course presents a much greater likelihood of relief for a party facing hardship since many nations provide some remedy for this predicament.

As a general matter, invocation of the UNIDROIT Principles as a mechanism by which to fill gaps in CISG is, perhaps, appropriate when a controversy proves incapable of resolution under Article 7's domestic law provision. Nonetheless, this approach is unacceptable when the legislative

UNIDROIT Principles' hardship provisions. *See id.* art. 6. The parties should set forth the terms of their agreement with unmistakable clarity in the contract.

history of CISG reveals incongruities between the Convention and the Principles. Regarding the notion of hardship, the legislative history of CISG is rife with evidence of incongruities between the two instruments. Therefore, even if recourse first to the general principles on which CISG is based, and then to domestic law, fails to settle the question, one may not use the UNIDROIT Principles' hardship provisions to supplement the Convention. Rather, in these instances, a party facing hardship is required to either perform or face the penalties prescribed by CISG.