Introduction

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I. UNIFORM LAW FOR THE INTERNATIONAL SALE OF GOODS

International trade historically has been subject to numerous domestic legal systems, mainly by virtue of the rules of private international law. The disputes arising out of international sales contracts have been settled at times according to the *lex loci contractus*, or the *lex loci solutionis*, or the *lex fori*. This diversity of the various legal systems applied has hindered the evolution of a strong, distinct, and uniform modern *lex mercatoria*. Such legal diversity creates legal uncertainty and imposes additional transactional costs on the contracting parties.

The idea of a unified international trade law represents the revival of an ancient[1] trend toward unification that can be traced to the Middle Ages and that had given rise to

[1] *See* Ronald Harry Graveson, "The International Unification of Law," 16 *Am. J. Comp. L.* 4 (1968), where the author states "the international process of assimilating the diverse legal systems of various countries goes back into ancient history." The need for uniform laws has been widely acknowledged; *see* e.g., René David, "The International Unification of Private Law," in 2 *International Encyclopedia of Comparative Law* (Mogr, Tübingen 1971) [hereinafter David, *Unification of Private Law*] Ch. 5; *see* also John O. Honnold, *Uniform Law for International Sales under the United Nations Convention* 1–8 (2nd ed. 1991) [hereinafter Honnold, *Uniform Law for Int'l Sales*]. However, there has also been some criticism of this trend; *see* Graveson (1968),

the "law merchant."[2] Historically, international trade law has developed in three stages[3]: the old "law merchant,"[4] its integration into municipal[5] systems of law, and finally, the emergence of the new "law merchant."[6]

op. cit., at 5–6, stating that "it may be necessary to correct the assumption that uniform law is good in itself and that the process of unification is one to be encouraged in principle."

[2] Filip de Ly, *International Business Law and Lex Mercatoria* 15 (1992), notes that "the medieval law merchant is also referred to as *lex mercatoria, ius mercatorum, ius mercatorium, ius mercati, ius fori, ius forense, ius negotiatorum, ius negotiale, stilus mercatorum* or *ius mundinarum*."

[3] On the history of the law merchant, *see* Theodore F. T. Plucknett, *A Concise History of the Common Law* 657 (5th ed. 1956); Wyndham Anstis Bewes, *The Romance of the Law Merchant* 12–13 (1986); René A.Wormser, *The Law* 500 (1949); Harold J. Berman & Colin Kaufmann, "The Law of International Commercial Transactions (*Lex mercatoria*)," 19 *Harv. Int'l. L.J.* 221. 225 (1978); Rudolph B. Schlesinger, *Comparative Law* 185 (Found. Press 2nd ed. 1960).

[4] In the Middle Ages, commercial law appeared in the form of the "law merchant" – "a body of truly international customary rules governing the cosmopolitan community of international merchants who traveled through the civilized world, from port to port and fair to fair." Clive M. Schmitthoff, "The Unification of the Law of International Trade," *J. Bus. L.* 105 (1968). *See* also Tuula Ammala, "The International *Lex mercatoria*," in *Juhlajulkaisu Juha Tolenen: Oikeustieteen rajoja etsimässä, Kirjapaino Grafia: Turku* 295–311 (2001) [What is the *Lex mercatoria*: Choice of law; Customary law; The UNIDROIT Principles, Principles of European Contract Law, The *lex mercatoria* in arbitration]; Filip De Ly, De *Lex mercatoria*. Inleiding op de studie van het transnationaal handelsrecht [The *lex mercatoria*. Introduction to the study of transnational trade law – *in Dutch*] (1989) (Thesis, Ghent) (Antwerpen/Apeldoorn: Maklu, 1989). The discussion of the existence and precise role of a *lex mercatoria* has not reached consensus. Regarding the debate as to the very existence of a *lex mercatoria*, *see* Thomas E. Carbonneau, "A Definition and Perspective on the *Lex mercatoria* Debate," in *Lex mercatoria and Arbitration: A Discussion of the New Law Merchant* 11–21 (Thomas Carbonneau ed., The Hague, 1998). The skeptics' point of view is perhaps best encapsulated in the statements of M. J. Mustill and S. Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths 2nd ed. 1989) at p. 81 where the authors write, "Indeed we doubt whether a *lex mercatoria* even exists, in the sense of an international commercial law divorced from any State law: or, at least, that it exists in any sense useful for the solving of commercial disputes."

For a similar approach, *see* Georges R. Delaume, "Comparative Analysis as a Basis of Law in State Contracts: The Myth of the *Lex mercatoria*," 575 *Tulane Law Review* (1989). *See* also some more recent articles seeking to debunk the "myth" of a universal *lex mercatoria*: Emmanuel Caillard, "Transnational Law: A Legal System or a Method of Decision-Making?," in *The Practice of Transnational Law* 53–65 (Klaus Peter Berger ed., Kluwer Law International, 2001) [The Renewed Debate on *Lex mercatoria* (Is *Lex mercatoria* Defined by its Content or by its Sources?, Is *Lex mercatoria* a List or a Method?), The Issue of *Lex mercatoria* as a Distinct Legal System Revisited (Completeness, Structured Character, Evolving Character, Predictability)]; Albrecht Cordes, "Auf der Suche nach der Rechtswirklichkeit der mittelalterlichen *Lex mercatoria*" [In search of the legal reality of the medieval *lex mercatoria* – *in German*], Zeitschrift der Savigny-Stiftung für Rechtsgeschichte 168 (2001); Albrecht Cordes, "The Search for a Medieval *Lex mercatoria*," *Oxford University Comparative Law Forum* 5 (2003), also at <http://ouclf.iuscomp.org/articles/cordes.shtml>; Albrecht Cordes, " À la recherche d'une *Lex mercatoria* au Moyen Âge" [An inquiry into the *lex mercatoria* of the Middle Ages – *in French*], in Stadt und Recht im Mittelalter / La ville et le droit au Moyen Âge 118 (Monnet / Oexle eds., Göttingen 2003); Felix Dasser, *Lex mercatoria*: Werkzeug der Praktiker oder Spielzeug der Lehre? [*Lex mercatoria*: Practitioner's tool or theoretical game – *in German*], Schweizerische Zeitschrift für internationales und europäisches Recht 299 (1991); Georges R. Delaume, "The Myth of the *Lex mercatoria* and State Contracts," in *Lex mercatoria and Arbitration* 11 (Thomas Carbonneau ed., The Hague 2nd ed. 1998).

[5] The second stage of the development of international trade law is marked by the incorporation of the "law merchant" into municipal systems of law in the eighteenth and nineteenth centuries, as the idea of national sovereignty acquired prominence. It is interesting to note, however, that this process of incorporation differed in motives and methods of implementation. *See Clive M. Schmitthoff's Select Essays on International Trade Law* 25–26 (Chia-Jui Cheng ed., 1988) [hereinafter: *Schmitthoff's Select Essays*].

On the effect of the enactment of the first codes in Europe, *see* René David & John E. C. Brierley, *Major Legal Systems in the World Today* 66 (3rd ed. 1985), where the authors state that "codes were treated, not as new expositions of the 'common law of Europe' but as mere generalisations . . . of 'particular customs' raised to a national level . . . [T]hey were regarded as instruments of a 'nationalisation of law.'" Since the beginning of the twentieth century efforts had been made to overcome the nationality of commercial law, which originated from the emergence of national States in Europe and from the enactment of the first codes. *See* Rudolf B. Schlesinger et al., *Comparative Law* 31 (Found. Press 5th ed. 1987).

[6] *See* Clive M. Schmitthoff, "International Business Law: A New Law Merchant," *in* 2 *Current Law and Social Problems* 129 (1961). The third stage of the evolution is characterized by the increased involvement

The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG)[7] represents the most recent attempt to unify or harmonize international sales law. The Convention creates a uniform law for the international sale of goods.[8]

of the United Nations and the activities of specialized international organizations (such as UNCITRAL, UNIDROIT, and the International Chamber of Commerce), which signal a return to a universal concept of trade law that characterized the old "law merchant." The new general trend of commercial law is to move away from the restrictions of national law and toward the creation of an autonomous body of "international conception of commercial law which represents a common platform for the jurists of the East and West . . . [thus] facilitating co-operation between capitalist and socialist countries" (*Schmitthoff's Select Essays*, *supra* note 5, at 28). This development has been welcomed and hailed as "the emergence of a new *lex mercatoria* . . . a law of universal character that, though applied by authority of the national sovereign, attempts to shed the national peculiarities of municipal laws" (*Schmitthoff's Select Essays*, *supra* note v, at 22).

At the end of the 1920s, Ernst Rabel suggested to the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) that it start the work necessary for the unification of the law of international sales of goods. Ernst Rabel's involvement in the effort has been widely acknowledged: *see* Michael Joachim Bonell, "Introduction to the Convention," in *Commentary on the International Sales Law: The 1980 Vienna Convention* 3 (Cesare Massimo Bianca & Michael Joachim Bonell eds., Giuffrè, Milan 1987) [hereinafter Bonell, *Introduction*]. It has to be noted, however, that although the old "law merchant" had developed from usage and practice, the new "law merchant" is the result of careful and, at times, political deliberations and compromises by large international organizations and diplomats. The repercussions of such action are not always benign.

For conflicting views as to the existence of the new *lex mercatoria* and its essence *see* Klaus Peter Berger, "The CENTRAL-List of Principles, Rules and Standards of the *Lex mercatoria*: Developed and Maintained by the Center for Transnational Law (CENTRAL) Münster, Germany," in *Transnational Law in Commercial Legal Practice* 121–164 (Münster: Quadis, 1999).

Cf. Michael J. Mustill, "The New *Lex mercatoria*: The First Twenty-five Years," 4 *Arbitration International* 86–119 (1988). *See* also Lisa E. Bernstein, "The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study," 66 *U. Chi. L. Rev.* 710–780 (1999), Berkeley Olin Program in Law & Economics, Working Paper Series, Paper 26 (January 20, 1999) <http://repositories.cdlib.org/blewp/26>, with the following lead sentence: "The UCC, the CISG and the modern *Lex mercatoria* are based on the premise that unwritten customs and usages of trade exist and that in commercial disputes they can, and should, be discovered and applied by courts." The author proceeds to offer commentary on the "incorporation principle" expressed in UCC sections dealing with course of dealing, usage of trade, and course of performance, in which she concludes that, although some industry-wide usages of trade do exist, the pervasive existence of usages of trade and commercial standards is a legal fiction rather than a merchant reality.

[7] United Nations Conference on Contracts for the International Sale of Goods, *Official Records*, U.N. Document No. A/CONF. 97/19 (E.81.IV.3) (1980). The popular acronym of the Convention is CISG. The Convention entered into force on January 1, 1988.

[8] Adopted by a diplomatic conference on April 11, 1980, the Convention establishes a comprehensive code of legal rules governing the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract, and other aspects of the contract. The uniform rules in existence prior to the CISG were provided in the 1964 Hague Conventions, sponsored by the International Institute for the Unification of Private Law (UNIDROIT): one Convention dealing with formation of contracts for international sale (ULF) and the other one with obligations of parties to such contracts (ULIS). The CISG combines the subject matter of the two 1964 Hague Conventions that had failed to receive substantial acceptance outside Western Europe and had received widespread criticism as reflecting primarily the legal traditions and economic realities of continental Western Europe, the region that had most actively contributed to their preparation. *See* John Honnold, *Documentary History of the Uniform Law for International Sales* 5–6 (1989) [hereinafter: Honnold, *Documentary History*].

For commentary on the CISG's membership of the new "*lex mercatoria*," *see* Bernard Audit, "The Vienna Sales Convention and the *Lex mercatoria*," in 173–194 *Lex Mercatoria and Arbitration* (Thomas E. Carbonneau ed., rev. ed.) [reprint of a chapter of the 1990 edition of this text], (Juris Publishing, 1998), at 175 [hereinafter Audit, *Lex Mercatoria*], also available online at <http://cisgw3.law.pace.edu/cisg/biblio/audit.html>:

> The Convention's self-effacing character is one of its most striking features. Article 6 allows parties to stipulate out of the Convention or any of its provisions; article 9 gives superior weight to trade usages, regardless of whether the parties specifically designated an applicable law. These two provisions, perhaps the Convention's most significant, clearly demonstrate that the Convention does not compete with the *lex mercatoria*, but rather that the two bodies of law are complementary. Moreover, the Convention itself can be regarded as the expression of international mercantile customs.

This is clearly stated in the Preamble[9] that introduces the Articles of the Convention:

> THE STATES PARTIES TO THIS CONVENTION,
>
> BEARING IN MIND the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,
>
> CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,
>
> BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,
>
> HAVE DECREED as follows . . .

The Preamble to the CISG introduces the legal text that binds the signatory States of the Convention.[10] Thus, the CISG attempts to unify the law governing international commerce, seeking to substitute one sales law for the many and diverse national legal systems that exist in the field of sales.

The benefits of a uniform law for the international sale of goods are indeed many and substantial, and not merely of a pecuniary nature.[11] A uniform law would provide parties with greater certainty as to their potential rights and obligations. This is to be compared with the results brought about by the amorphous principles of private international law and the possible application of an unfamiliar system of foreign domestic law.[12]

Another advantage of a uniform law of international sales of goods is that it would serve to simplify international sales transactions and thus, as envisaged in the Preamble,

[9] The Preamble was drafted at the 1980 Conference, and it was adopted without significant debate. *See Report of the Drafting Committee*, U.N. Doc. A/CONF.97/17, reprinted in U.N. Conference on Contracts for the International Sale of Goods, *Official Records* 154 (1981); *Summary Records of the 10th Plenary Meeting*, U.N. Doc. A/CONF.97/SR.10, paras. 4–10, reprinted in U.N. *Official Records*, at 219–220.

For commentary on the CISG Preamble, *see* editorial comments by Albert H. Kritzer available at <http://cisgw3.law.pace.edu/cisg/text/cross/crosspreamble.html>.

[10] The United Nations Treaty Section <http://untreaty.un.org/English/treaty.asp> reports that sixty-seven States have adopted the Convention (December 2005). *See* also the UNCITRAL Web site, which also offers information about the status of the Convention, at <http://www.uncitral.org/uncitral/en/uncitral_texts.html>.

[11] Lord Justice Kennedy wrote extrajudicially in "The Unification of Law," 10 *J. Soc'y Comp. Legis.* 214–215 (1909):

> The certainty of enormous gain to civilised mankind from the unification of law needs no exposition. Conceive the security and the peace of mind of the ship-owner, the banker, or the merchant who knows that in regard to his transactions in a foreign country the law of contract, of movable property, and of civil wrongs is practically identical with that of his own country. . . . But I do not think that the advocate of the unification of law is obligated to rely solely upon such material considerations, important as they are. The resulting moral gain would be considerable. A common forum is an instrument for the peaceful settlement of disputes which might otherwise breed animosity and violence . . . [i]f the individuals who compose each civilised nation were by the unification of law provided, in regard to their private differences or disputes abroad with individuals of any other nation, not indeed with a common forum (for that is an impossibility), but with a common system of justice in every forum, administered upon practically identical principles, a neighbourly feeling, a sincere sentiment of human solidarity (if I may be allowed the phrase) would thereby gradually be engendered amongst us all – a step onward to the far-off fulfilment of the divine message, "On earth peace, goodwill toward men.

[12] *See* Audit, *Lex Mercatoria, supra* note 8, at 173–175; also available online at <http://cisgw3.law.pace.edu/cisg/biblio/audit.html>:

> Municipal laws are ill-adapted to the regulatory needs of international trade and, in particular, to those of international sales. These laws, by and large, are antiquated and their applicability to international transactions is determined by a choice of law process that varies from country to country. [. . .] Devising uniform rules specifically for international trade, therefore, appears to be the optimal solution.

"contribute to the removal of legal barriers in international trade and promote the development of international trade."[13] The CISG seeks to achieve such uniformity.[14] Whether or not the uniform law is successful will largely depend on two things: first, whether domestic tribunals interpret its provisions in a uniform manner, and second, whether those same tribunals adopt a uniform approach to the filling of gaps in the law.

The unification or harmonization of international commercial law is generally desirable because it can act as a "total conflict avoidance device"[15] that, from a trader's point of view, is far better than conflict solution devices, such as the choice of law clauses.[16] Textual uniformity is, however, a necessary but insufficient step toward achieving substantive legal uniformity, because the formulation and enactment of a uniform legal text provide no guarantee of its subsequent uniform application in practice. The main question regarding the success or failure of the Convention as truly uniform sales law relates to the proper interpretation and uniform application of its provisions as the international sales law of contracts governed by it. Several commentaries have evaluated the CISG from this perspective, and the authors have disagreed on how successful CISG will be in reaching this unifying goal.[17]

[13] Lower transactional costs and more speedy resolution of disputes are the main tangible benefits of a uniform international legal regime. *See* also V. Susanne Cook, "The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods," 50 *U. Pitt. L. Rev.* 197–226 (1988), also available online at <http://cisgw3.law.pace.edu/cisg/biblio/cook2.html>.

[14] *See* Francis A. Cabor, "Stepchild of the New *Lex Mercatoria*: Private International Law from the United States Perspective," 8 *NW. J. Int'l L. & Bus.* 538–560 (1988), also available online at <http://cisgw3.law.pace.edu/cisg/biblio/gabor.html>: V. Proposal for Implementation of International Uniform Laws:

> Revitalization of the ancient *lex mercatoria is* one of the major achievements of our century. The creation of a uniform substantive law applicable to the international sale of goods eliminates a major non-tariff barrier to the free flow of goods and services across national boundaries.

Cf. Willis L. M. Reese, Commentary on Professor Gabor's Stepchild of the New *Lex mercatoria* (Symposium Reflections)," 8 *Nw. J. Int'l L. & Bus.* 570–573 (1988), also available online at <http://cisgw3.law.pace.edu/cisg/biblio/reese.html>.

[15] Professor Schmitthoff long ago declared that only a uniform law could act as "total conflict avoidance device." Clive M. Schmitthoff, "Conflict Avoidance in Practice and Theory in the Preventative Law of Conflicts," 21 *Law & Contemp. Probs.* 432 (1956). However, it is arguable that no code can ever truly act as a total conflict avoidance device without a law making it a crime to interpret it in a different way. A jurisdiction with such a law is Brobdingnag, as reported by Lemuell Gulliver (Jonathan Swift, *Travels into Several Remote Nations of the World: Part II. A Voyage to Brobdingnag*, 1726):

> No Law of that Country must exceed in Words the Number of Letters in their Alphabet, which consists only of two and twenty. But, indeed, few of them extend even to that Length. They are expressed in the most plain and simple Terms, wherein those People are not mercurial enough to discover above one Interpretation: And to write a Comment upon any Law is a capital Crime. As to the Decision of civil Causes, or Proceedings against Criminals, their Precedents are so few, that they have little Reason to boast of any extraordinary Skill in either.

[16] Choice of law clauses are usually inserted in most contracts, but they can only act as a "partial conflict avoidance device." Clive M. Schmitthoff, *supra* note 15, at 454.

Cf. Andreas Kappus, "Conflict avoidance" durch *"lex mercatoria"* und UN-Kaufrecht ["Conflict avoidance" through *"lex mercatoria"* and Cisg – *in German*], 36 *Recht der Internationalen Wirtschaft, Heidelberg* 788–794 (1990); Andreas Kappus, *"Lex mercatoria"* in Europa und Wiener UN-Kaufrechtskonvention 1980 – "Conflict avoidance" in Theorie und Praxis schiedsrichterliche und ordentliche Rechtsprechung in Konkurrenz zum Einheitskaufrecht der Vereinten Nationen ["*Lex mercatoria*" in Europe and Vienna Sales Convention – "Conflict avoidance" in theory and practice of arbitral and court jurisdiction in competition to the CISG – *in German*] (1990) (Thesis Innsbruck, Frankfurt a.M); Bernardo M. Cremades & Steven L. Plehn, "The New "*Lex mercatoria*" and the Harmonization of the Laws of International Commercial Transactions," *B .U. Int'l L.J.* 317 (1984).

[17] For example, compare Arthur Rosett, "Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods," 45 *Ohio St. L. J.* 265 (1984), concluding that the *CISG* will not be successful in harmonizing the law of international trade, with Jan Hellner, "The UN Convention on International Sales of Goods – An Outsider's View," in *Ius Inter Nationes: Festschrift fur S. Riesenfeld* 71 (Erik Jayme et al. eds., 1983), concluding that even with its shortcomings, the CISG will provide a basis for unification of the law of international commerce. *See* also Peter H. Schlechtriem, "25 Years CISG – An International Lingua Franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational

II. PROBLEMS OF INTERPRETATION OF UNIFORM LAW

Uniform law, by definition, calls for its common interpretation in different legal systems that have adopted it.[18] The CISG is an important legal document, because it establishes a uniform code of legal rules governing the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract, and other aspects of the contract. As stated in its Preamble,[19] the CISG was created "to remove legal barriers in international trade and promote the development of international trade." For the Convention to accomplish its objectives, it is essential that its provisions are interpreted properly.

The CISG is uniform law binding buyers and sellers from different legal cultures to its set of rules and principles. Uniformity in the Convention's application, however, is not guaranteed by the mere adoption or ratification of the CISG. The political act of adoption of the Convention by different sovereign States is merely the necessary preliminary step toward the ultimate goal of unification of the law governing contracts for the international sale of goods. The long process of unification of international sales law can be completed only in practice – if the CISG is interpreted in a consistent manner in all legal systems

Contracts," 2 *Cile Studies. The CISG and the Business Lawyer: The UNCITRAL Digest as a Contract Drafting Tool* (forthcoming 2006), offering a strong argument in favor of the CISG as a *lingua franca* of international commercial law.

[18] *See* R. J. C. Munday, "The Uniform Interpretation of International Conventions," 27 *Int'l. & Comp. L. Q.* 450 (1978), stating "[t]he principal objective of an international convention is to achieve uniformity of legal rules within the various States party to it. However, even when outward uniformity is achieved following the adoption of a single authoritative text, uniform application of the agreed rules is by no means guaranteed, as in practice different countries almost inevitably come to put different interpretations upon the same enacted words."

[19] The importance of the wording of the CISG's Preamble and the weight to be placed on it cannot be fixed precisely. We can get some guidance from Article 31(2) of the United Nations Convention on the Law of Treaties (1969), which specifically mentions the Preamble of a treaty as being part of the context for the purpose of the interpretation of the treaty; that is, the Preamble can be relevant to the interpretation of a treaty. Academic opinions, however, differ as to the legal importance of this Preamble. Some commentators believe that the language of the Preamble, for various reasons, counts for virtually nought, whereas others argue that the Preamble "informs" other provisions of the Convention, most particularly Article 7. Support for the first view, that the Preamble may not be used for the interpretation and gap-filling of the substantive legal provisions, can be found in: Peter Schlechtriem, *The U.N. Convention on Contracts for the International Sale of Goods* (Manzsche 1986) [hereinafter: Schlechtriem, *Uniform Sales Law*], at 38 n.111; *see* also Bonell, *Introduction*, *supra* note 6, at 25, stating "[T]he scope for interpretation in the light of the Preamble may not be very wide and it will be of interest to see how far the case law may accord its provisions the status of something more than general declarations of political principle." *See* also Honnold, *Uniform Law for Int'l Sales*, *supra* note 1, at 541, where Honnold argues that the short preparation and consideration of its provisions deprive the Preamble of its "weight" as an aid to the interpretation of CISG's provisions (including Art. 7) that were discussed at length in UNCITRAL and at the Diplomatic Conference.

For the exactly opposite view, *see* Amy H. Kastely, "Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention," 8 *Nw. J. Int'l L. & Bus.* (1988) [hereinafter Kastely, *Rhetorical Analysis*], at 572; Joseph M. Lookofsky, "The 1980 United Nations Convention on Contracts for the International Sale of Goods," in *1 International Encyclopaedia of Laws* – Contracts 18, para. 4 (Blainpain ed., 1993). *See* also Fritz Enderlein & Dietrich Maskow, *International Sales Law* (Oceana 1992) [hereinafter Enderlein & Maskow, *International Sales Law*], at 19–20, who state, "It would . . . be inappropriate to dismiss the preamble from the start as insignificant from a legal point of view. The principles it contains can be referred to in interpreting terms or rules of the Convention, such as the terms of 'good faith' (Article 7(1)) or the rather frequent and vague term 'reasonable.' It could also be used to fill gaps because those principles can be counted among, or have an influence on, the basic rules underlying the Convention Article 7(2)). The spirit of the preamble should also be taken account of when agreed texts of sales contracts are to be interpreted." For a similar view, *see* Horacio A. Grigera Naón, "The UN Convention on Contracts for the International Sale of Goods," *in The Transnational Law of International Commercial Transactions: Studies in Transnational Economic Law* 92 (Horn & Schnittoff eds., 1982). Most of the above citations can be found in a thorough report on the legal importance of the CISG Preamble, *Report on different opinions as to legal importance of Preamble* in Annotated Text of the Cisg (Albert H. Kritzer, ed.) at <http://cisgw3.law.pace.edu/cisg/text/reportpre.html>.

that have adopted it. In contrast, if domestic courts and tribunals introduce divergent textual interpretations of the CISG, this uniform law will be short-lived.

The practical success of the Convention depends on whether its provisions are interpreted and applied similarly by different national courts and arbitral tribunals. Furthermore, as the uniform law must remain responsive to the contemporary needs of the community it serves in a dynamic global marketplace, despite the lack of machinery for legislative amendment in the CISG, it is vital that the CISG be interpreted in a manner that allows the uniform law to develop in a uniform fashion, consistent with its general principles, so as to continue to "promote the development of international trade" well into the future.

As has been persuasively stated elsewhere, the success of a uniform law code that intends to bind parties transacting worldwide depends on the creation of "an international community of people who perceive themselves as bound together and governed by a common legal system and who have some way to deliberate together over matters of continuing verification and development."[20] It is this achievement of establishing an "international community," a kind of international legal consensus, that is regarded by some as the true underlying purpose of CISG and as the key to its eventual triumph or demise.[21] It is also the focus of the most forceful criticism of CISG, as it has been argued that achieving international consensus on significant legal issues is impossible.[22]

III. ISSUES OF INTERPRETATION IN THE CISG

It is natural that disputes will arise as to the meaning and application of the CISG's provisions. The CISG, however, comes with its own, in-built interpretation rules, which are set forth in Article 7.[23] Article 7 is the provision that sets forth the Convention's interpretive standards. The provision in Art. 7(1) expressly prescribes the *international* character of the Convention and *uniform* direction that should be adopted in the interpretation and application of its provisions. Owing to its unique nature as an autonomous and self-contained body of law,[24] it is necessary that CISG exist on top of a legal order that can provide doctrinal support and solutions to practical problems – such as resolving issues that are *governed but not expressly settled by* the Convention, as per the gap-filling provisions in Art. 7(2). This doctrinal support guarantees CISG's functional continuity and development without offending its values of internationality and uniformity mandated in Art. 7(1).

[20] Kastely, *Rhetorical Analysis*, *supra* note 19, at 577.

[21] *See* generally Kastely, *Rhetorical Analysis, supra* note 19; *see* also Camilla Baasch Andersen, "The Uniform International Sales Law and the Global Jurisconsultorium" (2005), available online at <http://cisg-online.ch/cisg/The_Uniform_International_Sales_Law_and_the_Global_Jurisconsultorium.pdf> [hereinafter Andersen, *Global Jurisconsultarium*].

[22] *See* Arthur Rosett, *supra* note 17, at 282–286. *See* also Rosett, "Note: Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods," 97 *Harv. L. Rev.* (1984). *Cf.* It has been argued that this criticism by Rosett dismisses the possibility of genuine discourse within the international community too easily. *See* Kastely, *Rhetorical Analysis*, *supra* note 19, at 577, n. 9.

[23] Article 7 of the CISG provides the following:

(1) 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.

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

[24] For a thesis in support of the statement that the CISG is an autonomous, self-contained body of law, *see* John Felemegas, "The United Nations Convention on Contracts for the International Sale of Coods: Article 7 and Uniform Interpretation," *Pace Review of the Convention on Contracts for the International Sale of Goods (CISG)* 115–379 (Kluwer Law International, 2000–2001), also available online at <http://cisgw3.law.pace.edu/cisg/biblio/felemegas.html>[hereinafter Felemegas, *Uniform Interpretation*].

To avoid divergent interpretations of the CISG some commentators had hoped for the establishment of an international court with jurisdiction over disputes arising under the CISG. The main advantage of such a court would probably be the uniformity that a centralized judicial system can produce on disputes arising within its jurisdiction. Although the internal correlation of decisions handed down by a central judicial authority has a superficial attraction, the idea has never been a realistic possibility for the CISG.[25]

The risk that inconsistent interpretation could frustrate the goal of uniformity in the law was well understood by those working on the CISG.[26] This problem is not, however, exclusive to the present structures administering justice under the CISG. All centralized judicial systems are also prone to this danger (although there is ultimately a final appellate level to provide redress). The nature of the CISG's subject matter (i.e., trade) is in itself unsuitable to the time-consuming, delay-laden mechanism of a single judicial authority. As such, the implicit assumption is that the CISG will be applied by domestic courts and arbitral tribunals.[27]

The essence of the problem of the CISG's divergent interpretation lies with the interpreters themselves; its nature is substantive and not structural. All the attention has been focused on the necessity, for the various courts and arbiters applying the CISG, to understand and respect the commitment to uniformity and to interpret the text in light of its international character. It has been suggested that a feasible solution to the problems associated with decision making under the CISG is the "development of a jurisprudence of international trade."[28] Arguably, the success of the Convention depends on the achievement of this goal.

The dynamic for developing a jurisprudence of international trade is established in Articles 7(1) and 7(2).[29] These are arguably the most important articles in the CISG, not

[25] *See* David, *Unification of Private Law*, *supra* note 1, at 4. The enormity of the financial task and the admin-
istrative structures necessary for the establishment of such a closed-circuit judicial system are prohibitive
for the creation of an international commercial court.

A significant development took place in 2001 when the CISG Advisory Council was established as a private initiative to respond to the emerging need to address some controversial, unresolved issues relating to the CISG that would merit interpretative guidance. The Advisory Council is a private initiative that aims at *promoting a uniform interpretation* of the CISG. The Council is guided by the mandate of Article 7 of the Convention as far its interpretation and application are concerned: the paramount regard to international character of the Convention and the need to promote uniformity. In practical terms, the primary purpose of the Advisory Council is to issue opinions relating to the interpretation and application of the Convention on request or on its own initiative. Requests may be submitted to the Council, in particular, by international organizations, professional associations, and adjudication bodies. It publicizes all its opinions widely through printed and electronic media and welcomes comments from the readership. Further information on the Council's membership and work is available online at <http://cisgw3.law.pace.edu/cisg/CISG-AC.html>.

[26] *See* Michael J. Bonell, "Some Critical Reflections on the New UNCITRAL Draft Convention on International Sales," 2 *Uniform L. Rev.* 5–9 (1978); E. Allen Farnsworth, "Problems of the Unification of Sales from the Standpoint of the Common Law Countries: Problems of Unification of International Sales Law," in *7 Digest of Commercial Laws of the World* (Dobbs Ferry 1980) [hereinafter Farnsworth, *Problems of Unification*]. The effort to ensure uniform interpretation of the Sales Convention and to inspire international discourse on issues raised by it has been discussed elsewhere. *See, e.g.*, John Honnold, "Methodology to Achieve Uniformity in Applying International Agreements, Examined in the Setting of the Uniform Law for International Sales under the 1980 U.N. Convention," in *Report to the Twelfth Congress of the International Academy of Comparative Law* (Sydney/Melbourne 1986).

[27] *See Progressive Development of the Law of International Trade: Report of the Secretary-General*, 21 U.N. GAOR Annex 3, Agenda Item 88, U.N. Doc. A/6396, reprinted in [1970] 1 *Y.B.U.N. Comm'n on Int'l Trade L.* 18, at 39–40, U.N. Doc. A/CN.9/SER.A/1970.

[28] *See, e.g.*, Kastely, *Rhetorical Analysis*, *supra* note 19, at 601. *See* also Andersen, *Global Jurisconsultarium*, *supra* note 21.

[29] *See, e.g.*, Audit. *Lex Mercatoria*, *supra* note 8, at 187 commenting on the ability of the Convention to generate new rules:

> The Convention is meant to adapt to changing circumstances. Amending it is practically impossible. A conference of the magnitude of the one held in Vienna is difficult to organize. Achieving the unanimity of the participating

only because their central location and stated purpose demand detailed treatment but also because their success or failure will determine the CISG's eventual fate as uniform law. The debate regarding the application of the CISG generally, as well as in individual cases, necessarily involves Article 7.

Article 7 expressly directs that in the interpretation of CISG "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."[30] Interpreters of the CISG are further instructed that questions concerning matters governed by the CISG that are not expressly settled in it "are to be settled in conformity with the general principles" on which the CISG is based or, in the absence of such principles, "in conformity with the law applicable by virtue of the rules of private international law."[31]

Matters *governed by the CISG which are not expressly settled in it* are issues to which CISG applies but which it does not expressly resolve; that is, gaps *praeter legem*.[32] It is only with this type of gap that Art. 7(2) CISG is concerned, as opposed to questions regarding matters that are excluded from the scope of CISG, such as the matters mentioned in CISG Arts. 2, 3, 4 and 5; that is, gaps *intra legem*.

Article 7(1) directs tribunals to discuss and interpret the detailed provisions of the text with regard to its international character and the need for uniformity in its application. If domestic courts and tribunals pay heed to the drafters' directions in Article 7 and to the spirit of equality and loyalty with which the CISG is imbued, then Article 7 will have contributed to the coherence of the precariously fragile international community. Article 7(2) provides the important mechanism for filling in any gaps *praeter legem* in the CISG and thus complements Article 7(1) by laying the course for the text's deliberation and future development. In this way, the CISG acquires the flexibility necessary for any instrument that attempts to deal with a subject matter as fluid and dynamic as international trade.

The spirit of international cooperation extends to the treatment that tribunals will afford to decisions of other national courts that are as significant as their own interpretation of the Convention.[33] Article 7(1), by directing an interpreter's attention to the CISG's international character and stressing the goal of uniformity, emphasizes the need for an international discussion among different national courts. Although the CISG, once ratified, becomes part of the domestic law of each Member State, it does not lose its international and independent character.

The recourse to rules of private international law in interpreting [Art. 7(1)] or gap-filling [Art. 7(2)] the provisions of the Convention arguably hinders and undermines the search for the elusive goal of uniformity by producing divergent interpretive

> states on proposed changes also would present substantial obstacles. The provisions of the Convention must be flexible enough to be workable without formal amendment for a long period of time. The Convention, therefore, must be regarded as an autonomous system, capable of generating new rules. This feature of the Convention is reflected in article 7, dealing with interpretation and gap-filling.

[30] CISG Art. 7(1).

[31] CISG Art. 7(2).

[32] *See* Franco Ferrari, *Interprétation uniforme de la Convention de Vienna de 1980 sur la vente internationale*, 48 *Revue internationale de droit comparé* 813, 842 (1996), as well as Ferrari, "General Principles and International Uniform Law Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions," 2 *Uniform Law Review* 451–473 (1997), at 454, where Ferrari uses the expression *lacunae praeter legem* for issues not expressly regulated by the law although governed by it and *lacunae intra legem* for issues not governed by the law.

[33] *See* Working Group on International Sale of Goods, *Report on the Work of the Second Session*, U.N. GAOR, 24th Sess., Supp. No. 18, U.N. Doc. A/7618, (1968), *reprinted in* [1971] 2 *Y.B.U.N. Comm'n on Int'l Trade L.* 50, U.N. Doc. A/CN.9/SER.A/197, *also reprinted in* Honnold, *Documentary History*, *supra* note 8, at 62: "It was also suggested that the provision would contribute to uniformity by encouraging use of foreign materials, in the form of studies and court decisions, in construing the Law." *See* also Andersen, *Global Jurisconsultarium, supra* note 21.

results.[34] An interpretive approach that has been suggested as suitable to the proper application of the CISG as truly global uniform sales law is based on the concept of internationality and on generally acknowledged principles of commercial law, such as the UNIDROIT Principles and the Principles of European Contract Law (PECL).[35]

It is arguable that the legal backdrop for CISG's existence and application can be provided by general principles of international commercial law, such as those exemplified by the *UNIDROIT Principles of International Commercial Contracts* (1994) and the *Principles of European Contract Law* (1998) would in many instances aid in rendering unnecessary the textual reference in Article 7(2) CISG to private international law, a positive step toward substantive legal uniformity.

IV. INTERPRETATION OF THE CONVENTION: ARTICLE 7(1)

Paragraph (1) of Article 7 mandates that in the interpretation of the Convention one must pay close attention to three points: (a) the "international character" of the CISG, (b) "the need to promote uniformity in its application," and (c) "the observance of good faith in international trade."

It is the opinion of many scholars that the first two of these points are not independent of each other,[36] but that, in fact, the second "is a logical consequence of the first."[37] The third point is of a rather special nature, and its placement in the main interpretation provision of the CISG has caused a lot of argument as to its precise meaning and scope.[38]

1. The International Character of the Convention

Every legislative instrument raises issues of interpretation as to the precise meaning of its provisions, even within the confines of a national legal system. Such problems are more prevalent when the subject has been drafted at an international level. In the interpretation of domestic legislation, reliance can be placed on methods of interpretation and established principles within a particular legal system – the legal culture or infrastructure upon which the particular legislation is seated. However, when dealing with a piece of legislation, such as the CISG, that has been prepared and agreed upon at the international level and has been incorporated into many diverse national legal systems, interpretation becomes far more uncertain and problematic because there is no equivalent international legal infrastructure. Does that mean that the CISG is seated on a legal vacuum? The answer is yes and no. The CISG was given an autonomous, free-standing nature by its drafters, and it is true that there are no clearly defined international foundations (equivalent to those in a domestic legal setting) upon which the CISG is placed.[39]

Principles of interpretation could be borrowed from the law of the forum or the law that according to the rules of private international law would have been applicable in

[34] *See* Audit, *Lex Mercatoria*, *supra* note 8, at 187, commenting on the ability of the Convention to generate new rules: "The express reference to national law represents a failure in an instrument meant to unify law for international transactions."

[35] *See* Felemegas, *Uniform Interpretation*, *supra* note 24, at chapter 5.

[36] *See, e.g.*, Honnold, *Uniform Law for Int'l Sales*, *supra* note i, at 135; Michael Joachim Bonell, "General Provisions: Article 7," in *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (C. M. Bianca & M. J. Bonell eds., Giuffrè 1987), at 72 [hereinafter Bonell, *General Provisions*].

[37] Bonell, *General Provisions*, *supra* note 36, at 72.

[38] For a discussion of the competing arguments, *see* Felemegas, *Uniform Interpretation*, *supra* note 24, at chapter 3.

[39] As is argued in this Introduction, there are, however, general principles of international commercial law (e.g., the UNIDROIT Principles and the PECL) that can provide a part of the platform upon which the CISG, like any other piece of domestic or international piece of legislation, must be based.

the absence of the uniform law. Either approach would result in a diverse construction and implementation of the same piece of legislation by different Contracting States. According to some commentators, the result would be not only a lack of uniformity but also the promotion of forum shopping.[40] Such a result would undermine the purpose of the uniform legislation and defeat the reasons for its existence.

On the other hand, an autonomous and uniform interpretation, if it could be achieved in practice, would go a long way toward completing the process of unification and achieving the aims of the drafters of the uniform international instrument. Article 7(1) declares that such an autonomous approach must be followed in interpretation, befitting the special character and purpose of the Convention. To have regard to the international character of the Convention means that its interpreter must understand that, although the CISG has been formally incorporated into many different national legal systems, the special nature of the CISG as a piece of legislation prepared and agreed upon at an international level helps it retain its independence from any domestic legal system.

Arguably it is essential for the long-term success of the CISG that the rules and techniques traditionally followed in interpreting ordinary domestic legislation are avoided.[41] The CISG is uniform law intended to cover the field of international contracts of sale and, in doing so, to replace all national statutes and case law previously governing matters within that field. The autonomy of this international sales law depends not only on the drafting of the respective rules into a separate body of rules but also on the emancipation of this body of rules from other branches of the law in the international and domestic legal systems.[42]

Even though the CISG is incorporated into municipal law, international sales law should not be regarded as a part of various national legal systems because doing so would inhibit its development as an autonomous branch of law and distort its interpretation and application. Instead, it is suggested that international sales law rules should be seen as part of international law in the broad sense and should be entitled to an international, rather than national, interpretation. The consequence of realizing the essence of the Convention's international character and autonomy is that there should be no reason to adopt a narrow interpretation of the CISG.[43]

[40] *See* Honnold, *Uniform Law for Int'l Sales*, *supra* note 1, at 142, stating, "The settlement of disputes would be complicated and litigants would be encouraged to engage in forum shopping if the courts of different countries persist in divergent interpretations of the Convention."

Contra Fritz Enderlein, "Uniform Law and its Application by Judges and Arbitrators," in *International Uniform Law* in *Practice: Acts and Proceedings of the 3rd Congress on Private Law*, UNIDROIT (Rome, September 7–10, 1987), at 340–341, who thinks that the lack of uniformity in the interpretation of uniform laws has no influence on the choice of forum, so the danger of forum shopping is not real in these circumstances.

[41] The tendency of national tribunals to apply law in accordance with ingrained national patterns was discussed at the Twelfth International Congress of Comparative Law (Sydney 1986).

[42] *See* Jerzy Jakubowski, "The Autonomy of International Trade Law and its Influence on the Interpretation and Application of its Rules," in *Law and International Trade, Recht und Internationaler Handel* 209 (Clive M. Schmitthoff ed., 1973). *Cf.* Bonell, *General Provisions*, *supra* note 36, at 92–93, although recognizing the necessity to interpret uniform laws "autonomously" in general, is of the opinion that an exception must be made if an insuperable divergence of interpretation of a particular provision of the CISG exists between Contracting States. Bonell offers a supporting citation of Jan Kropholler, *Internationales Einheitsrecht*, Allgemeine Lehren 204 (1975). *See* also Van der Velden, *Netherlands Reports to the Twelfth International Congress of Comparative Law* – Sydney/Melbourne 1986, (P. H. M. Gerver et al. eds., Frans J. A. Van der Velden trans., 1987).

[43] Expressing support for this point is Bonell, *General Provisions*, *supra* note 36, at 73: "Instead of sticking to its literal and grammatical meaning, courts are expected to take a much more liberal and flexible attitude and to look, wherever appropriate, to the underlying purposes and policies of individual provisions as well as of the Convention as a whole." *See* also Bruno Zeller, "The UN Convention on Contracts for the International Sale of Goods (Cisg) – A Leap Forward towards Unified International Sales Laws," 12 *Pace Int'l L. Rev.* 79, 105–106 (2000), *also* available at <http://cisgw3.law.pace.edu/cisg/biblio/zeller3.html>.

It is submitted that Article 7 represents an implied provision in the Convention for undertaking such a liberal approach to the interpretation of the body of law in question. It must be acknowledged, however, that the danger with adopting a broad view of the CISG is that it might open the way to diverse national interpretations, if "broad" and "liberal" were equated with notions of theoretical diversity and practical relaxation of the rules of the CISG's interpretation. Thus, a paradox may possibly exist: that internationalism might be better served by a narrow interpretation of the CISG. However, this is merely an aberration, or rather an illusion, because both the nature of the CISG and the intentions of its drafters point unequivocally to its broad and liberal interpretation. If its interpreters realize the true spirit of the CISG and enforce it in practice, then a liberal approach, far from diversifying the results, will achieve uniform results. This is so because the broad and liberal approach, in this case, does not mean the endorsement of many different national views, but the adoption of a single, uniform, *a-national* approach. Such an approach is broad and liberal by definition, because it operates outside and above the restrictions, limitations, and narrowness of established national approaches to interpretation. The broad global scope of the CISG requires that its interpretation be of a similar nature. For the "legal barriers in international trade" to be removed successfully, a broad and liberal approach to the interpretation of the CISG is required. Only such an approach can successfully "take into account the different social, economic, and legal systems"[44] that the CISG is aiming to unite, at least in the field of sale of goods. The proper interpretation of the CISG must be broad and liberal, but not lax or abstract.

2. Uniformity of Application

At this point, the interrelation between the first two parts of Article 7(1) becomes more apparent. The autonomous interpretation of the CISG is not simply a consequence of the "international" characterization of the CISG, but also a necessity, if "the need to promote uniformity in its application" is to be taken seriously. In the CISG, the elements of "internationality" and "uniformity" are interrelated thematically and structurally because of their position in the same Part and Article of the Convention; they are interrelated functionally because an autonomous approach to interpretation is necessary for the functioning of both, and they are interdependent because the existence of one is a necessary prerequisite for the existence of the other. The international, rather than national, interpretation is necessary for uniformity in the application of the CISG to be achieved, and uniformity of application is vital if the CISG is to maintain its international character.

The biggest danger concerning the interpretation of the CISG has been attributed to "a natural tendency to read the international text through the lenses of domestic law."[45] This reading can be the result of a conscious, or unconscious, inclination of judges to place the uniform law against the background of their own municipal law (*lex fori*) and to interpret the uniform law on the basis of principles with which they are already familiar, thus threatening the goal of international uniformity in interpretation.[46]

[44] CISG Preamble.

[45] John Honnold, "The Sales Convention in Action – Uniform International Words: Uniform Application?," 8 *J.L. & Com.* 207, 208 (1988).

[46] Among other causes that can give rise to diverging interpretations of a uniform law are problems that are "internal" to the uniform law because they have their source in the uniform law itself. Such divergences in interpretation are "normal" results of defects in the drafting of the uniform rules. These include mistakes in grammar and translation, lack of clarity, or gaps in the law. *See* Michael F. Sturley, "International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation," 27 *Va. J. Int'l. L.* 729, 731 (1986). Other reasons that can lead to divergent interpretations are "external" because they are independent from the uniform law itself. On this aspect, it has been said that some interpretative differences can result from various national interests that the different interpreters want to prevail over the national interests of other States. In relation to the CISG, it has been asserted that "the disparity of economic, political, and legal structure of the countries represented at the Vienna Conference suggests the difficulty of achieving legal uniformity." *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, 450 (1989).

It is submitted that this goal of international uniformity cannot be achieved if national principles or concepts, taken from the law of the forum or from the law that in the absence of the CISG would have been applicable according to the rules of private international law, are allowed to be used in the interpretation of the CISG. In fact, a "nationalistic" approach to the interpretation of the CISG would achieve results that are contrary to what was intended by the creation of the uniform law and would foster the emergence of divergent national interpretations.[47] The nationalization of the uniform rules deprives the instrument of its unifying effect.

3. The Observance of Good Faith in International Trade

According to the third element of Article 7(1), in interpreting the provisions of the Convention one must have regard to the need to promote the "observance of good faith in international trade." The legislative history of this provision shows that the final inclnsion of the good faith principle represented a compromise. This solution was worked out between those delegates to the Vienna Convention who supported its inclusion, stating that, at least in the formation of the contract, the parties should observe the principles of "fair dealing" and act in "good faith," and those who were opposed to any explicit reference to the principle in the Convention, on the ground that it had no fixed meaning and would lead to uncertainty and nonconformity.[48]

a. Good Faith as a Mere Instrument of Interpretation

The placement of the good faith principle in the context of an operative provision dealing with the interpretation of the CISG creates uncertainties as to the principle's exact nature, scope, and function within the CISG.[49] Scholarly opinion on the issue is divided. Some commentators insist on the literal meaning of the provision and conclude that the principle of good faith is nothing more than an additional criterion to be used by judges and arbitrators in the interpretation of the CISG.[50] Under this approach, good faith is merely a tool of interpretation at the disposal of the judges to neutralize the danger of reaching inequitable results.

However, even if included in the CISG as a mere instrument of interpretation, the good faith principle can pose problems in achieving the ultimate goal of the CISG – that is, uniformity in its application – because the concept of good faith has not only different meanings among different legal systems but also multiple connotations within legal systems.

[47] The negative consequences of a "nationalistic" interpretation have also been pointed out by courts. The House of Lords, in *Scruttons Ltd. v. Midland Silicones Ltd.* 1962 A.C. 446, at 471, stated that "it would be deplorable if the nations, after protracted negotiations, reach agreement . . . and that their several courts should then disagree as to the meaning of what they appeared to agree upon."

[48] *See* Honnold, *Uniform Law for Int'l Sales, supra* note 1, at 146. *See* also Bonell, *General Provisions, supra* note 36, at 83–84.

[49] *See* Gyula Eörsi, "A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods," 31 *Am. J. Comp. L.* 333, 349 (1983), who is of the opinion that the provision as it now stands represents "a strange compromise, in fact burying the principle of good faith."

[50] *See* E. Allen Farnsworth, "The Convention on the International Sale of Goods from the Perspective of the Common Law Countries," in La *Vendita Internazionale, La Convenzione di Vienna dell' 11 Aprile 1980* 5 (Dott. A. Giuffrè ed., 1981), at 18, where the author speaks of "seemingly harmless words." *See also* Peter Winship, "International Sales Contracts Under the 1980 Vienna Convention," 17 *UCC L. J.* (1984) 55, 67 n. 40. *Cf.* Bruno Zeller, *Good Faith – The Scarlet Pimpernel of the Cisg* (2000), available *online* at the Pace Web site: <http://cisgw3.law.pace.edu/cisg/biblio/zeller2.html>.

b. Good Faith in the Relations between the Parties

However, there is academic opinion favoring a broader interpretation of the reference to good faith as contained in Article 7(1), pointing out that the duty to observe "good faith in international trade is also necessarily directed to the parties to each individual contract of sale."[51]

The main theoretical difficulty with the above suggestion is that, in effect, it implies that the interpreters of the CISG are not only the judges or arbitrators but the contracting parties as well.[52] This point is controversial, and there are practical and theoretical objections to it. If Article 7 is addressed to the parties, then that provision might be excluded by them under Article 6. This would be an unwelcome result because, in practice, it would hinder the uniformity of interpretation. The theoretical objection is that the statement seems to obliterate the distinction between interpretation by the court and performance of the contract by the parties. One of the main practical objections to the inclusion in the CISG of a provision imposing on the parties a general obligation to act in good faith was that this concept was too vague and would inevitably lead to divergent interpretations of the CISG by national courts.

The possibility of imposing additional obligations on the parties is clearly not supported by the legislative history of the CISG. Article 7(1), as it now stands in the CISG's text, is the result of a drafting compromise between two diverging views; it reflects the political and diplomatic maneuvering necessary for the creation of an international Convention. It cannot now be given the meaning originally suggested by those advocating the imposition of a positive duty of good faith on the parties, as doing so would reverse the intent of the compromise. On the other hand, this does not mean that the opposite view (i.e., that good faith represents merely an instrument of interpretation) should be adopted instead. That interpretation would unnecessarily deny the value of good faith and its potential function within the CISG.

It is submitted that "good faith," like all the other terms in the CISG, must be approached afresh and be given a new definition that will describe its scope and meaning within the CISG, separate from the peculiar loads that it carries in different, and often within, legal systems. It may take some time for the principle of good faith to develop naturally and to crystallize in the case law, in the spirit of continuing deliberation and discourse that characterizes the community of the CISG members.

V. REMEDIES AGAINST DIVERGENT INTERPRETATIONS

It has been eloquently – and accurately – stated elsewhere that international trade law is subject to the tension between two forces: "the divisive impact of nationalism and our

[51] Bonell, *General Provisions*, *supra* note 36, at 84. *See also* Gyula Eörsi, "General Provisions," in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* 8–9 (Nina M. Galston & Hans Smit eds., 1984) [hereinafter: Eörsi, *General Provisions in International Sales*], stating, "[i]t might be argued that [in cases in which interpretation of the Convention leads to application of the good faith clause] it was not the Convention which was interpreted but the contract. . . . [H]owever, interpretation of the two cannot be separated since the Convention is necessarily interpreted by the parties also; after all, the Convention constitutes the law of the parties insofar as they do not make use of Article 6 on freedom of contract." For similar statements, *see* Schlechtriem, *Uniform Sales Law*, at 39; Fritz Enderlein & Dietrich Maskow, *supra* note 19, at 55; Dietrich Maskow, "The Convention on the International Sale of Goods from the Perspective of the Socialist Countries," in *La Vendita Internazionale, La Convenzione di Vienna dell' 11 Aprile 1980* 45–47 (1981). *Cf.* the opinion offered in Arthur Rosett, "Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods," 45 *Ohio St. L.J.* 265, 290 (1984).

[52] *See* Enderlein & Maskow, *International Sales Law*, *supra* note 19, at 55.

unwillingness to confine our activities within national borders."[53] The CISG attempts to establish uniform international rules for the international sale of goods to minimize the uncertainties and misunderstandings in commercial relationships that result from the uncertainty over the correct identification – and the subsequent proper application – of the relevant applicable law in case of a dispute.

Uniformity does not result automatically from an agreement on the wording of the uniform rules. The objectives of that agreement can be undermined by different domestic approaches to interpreting and applying the uniform international rules in practice. For a uniform application of the CISG to be attained, it does not suffice that the CISG be considered as an autonomous body of law, because it could still be interpreted in different autonomous ways in various States. If such an unfortunate scenario were to develop, uniformity would be attained only as a "very unlikely coincidence."[54] In theory there exists a wide range of remedies against such a risk,[55] but in practice it will be up to the national judges and arbitrators interpreting the CISG to attain, and then maintain, its uniform application to the highest degree possible.

There are some interpretative aids at the disposal of the interpreters of the CISG that may facilitate its uniform application and may act as a hindrance to the development of divergent interpretations. For example, in cases of ambiguities or obscurities in language, the existence of several equally authentic language versions of the Convention permits the interpreter to consult another official version of the CISG for assistance.[56] What follows is an examination of different means that can be used in the battle against divergent interpretations of the CISG.

1. Jurisprudenee (Case Law)

Arguably the most effective means of achieving uniformity in the application of the CISG is to have regard to the way it is interpreted in other countries. The development of a body of case law based on the provisions of the CISG and the careful consideration of this jurisprudence by later courts are very important steps in the process of interpretation of the CISG. A judge, or arbitrator, faced with a particular question of interpretation of the CISG's provisions, which may have already been brought to the attention of a court in another Contracting State, should take into consideration the solutions so far elaborated in the foreign courts.[57] Given also the lack of machinery for legislative amendment in the CISG, the importance of case law in understanding international sales law will be

[53] John Honnold, "Uniform Words and Uniform Application. The 1980 Sales Convention and International Juridical Practice," in *Einheitliches Kaufrecht und Nationales Obligationrecht* 119 (Peter Schlechtriem ed., 1987) [hereinafter Honnold, *Uniform Words and Application*].

[54] *See* Franco Ferrari, "Uniform Interpretation of the 1980 Uniform Sales Law," 24 *Ga. J. Int'l & Comp. L.* 183 (1994) [hereinafter: Ferrari, *Uniform Interpretation*], at 204, where the author uses the following numerical example to illustrate this point: Supposing that there are three equally plausible autonomous interpretations of the same provision, the chance that two interpreters construing the same provision independently will arrive at a uniform result amounts only to 33 percent, whereas the probability of diverging interpretations is 67 percent.

[55] *See* David, *Unification of Private Law*, *supra* note 1, at 107–122.

[56] *See* Bonell, *General Provisions*, *supra* note 36, at 90, who is of the opinion that such comparison "becomes obligatory, if the text actually applied is only a translation into a national language which is not one of the official languages of the United Nations."

[57] *See* Audit, *Lex Mercatoria*, *supra* note 8, at 188–189:

> The Convention must be interpreted with a view to maintaining its uniformity. Divergent interpretations by national courts should not be allowed to undermine the uniform law. A lack of harmony in interpretation would have the unfortunate consequence of reintroducing the conflicts methodology that the Convention was meant to eliminate.
>
> Courts, therefore, should consider foreign decisional law and scholarly commentary on the Convention in reaching their determinations [references omitted].

all the greater. Thus, it is arguable that, as a matter of principle and common sense, courts should at least consider the jurisprudence developed by foreign courts applying the CISG.[58] The difficulty lies in the importance (e.g., binding force or merely persuasive value) that a court should place on a decision of a foreign court and the reasoning behind that decision, as well as the degree to which any such "precedent" may be followed and adopted by other foreign courts.

In terms of how the evaluation of existing case law should affect interpretation of the CISG's provisions, the basic question that needs answering concerns the reaction of a judge or arbitrator, who, when faced with an issue of interpretation in the CISG, discovers that divergent solutions have been adopted in regard to that same issue by different national courts. The prevailing view is that, as long as the divergences are rather isolated and rendered by lower courts or are to be found even within the same jurisdiction, "it is still possible either to choose the most appropriate solution among the different ones so far proposed or to disregard them altogether and attempt to find a new solution."[59]

Even though no mention is made in Article 7 of the authority of decided cases, the exhortation in Article 7(1) to treat the CISG as an international text and to promote *uniformity* in its interpretation will require deference to judicial opinions from other countries. This body of opinions may not quite develop as a system of precedent, in the common law sense, but in a new and unique jurisprudential system like the CISG's, in which case law will be at a premium, courts have an obligation to expand their reasoning process if they are to transmit relevant persuasion to courts of other legal systems.[60]

[58] For the necessity of having regard to other countries' decisions, *see* Albert H. Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* 108–109 (1989) [hereinafter Kritzer, *Guide to Practical Applications*]. The domestic legislative instruments in most common law countries are traditionally interpreted narrowly so as to limit their interference with the law developed by the courts. *See* generally Cook, "The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods," 50 *U. Pitt. L. Rev.* 197–226 (1988). Progress on this issue – that is, the development of a body of case law citing rulings of courts of foreign jurisdictions – is slower than desired but nonetheless evident. *See*, *e.g.*, the following case law:

- Italy January 31, 1996 District Court Cuneo (*Sport d'Hiver di Genevieve Culet v. Ets. Louys et Fils*), case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/960131i3.html>
- France October 23, 1996 Appellate Court Grenoble (*Caec des Beauches v. Teso Ten Elsen*), case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/961023f1.html>
- Switzerland January 8, 1997 Appellate Court Luzern, case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/970108s1.html>
- United States June 29,1998 Federal Appellate Court [11th Circuit] (*MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino*), case presentation available at <http://cisgw3.law.pace.edu/cases/980629u1.html> (a case that, although not citing foreign precedents, as there was none on the issue considered, did point out the need to consider such precedents
- United States May 17, 1999 Federal District Court [Louisiana] (*Medical Marketing v. Internazionale Medico Scientifica*), case presentation available at <http://cisgw3.law.pace.edu/cases/990517u1.html> (a case citing the ruling of a court of a foreign jurisdiction)
- Italy December 29, 1999 District Court Pavia (*Tessile v. Ixela*), case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/991229i3.html> (a case that cites the ruling of a court of a foreign jurisdiction)
- Italy July 12, 2000 District Court Vigevano (*Rheinland Versicherungen v. Atlarex*), case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/000712i3.html> (a case that cites and comments on forty rulings of courts of foreign jurisdictions)
- United States May 21, 2004 Federal District Court [Illinois] (*Chicago Prime Packers v. Northam Food Trading Co.*), case presentation available at <http://cisgw3.law.pace.edu/cases/040521u1.html> (citing rulings by courts of Germany, Italy, and Netherlands)

[59] Bonell, *General Provisions*, *supra* note 36, at 92.

[60] *See* Philip T. Hackney, "Is the United Nations Convention on the International Sale of Goods Achieving Uniformity," 61 *LA. L. Rev.* 473–486 (2001) at 479, available online at <http://cisgw3.law.pace.edu/cisg/biblio/hackney.html>:

> It cannot be argued that the Convention itself requires the courts to apply the principle of *stare decisis* and make prior case law binding. [...] Therefore, a reasonable reading of this Convention directive would be that it requires a principle similar to *jurisprudence constante*, a principle from Civil-Law legal systems. This principle holds that case law is not a binding source of law, but a persuasive source of law. This would mean that when interpreting the Convention, a court should look to other court's interpretations of the Convention, including the interpretations of courts from other countries. These interpretations, however, would not be binding, but only persuasive.

Interpretations of an international Convention by sister signatories should be taken into account in a comparative manner and with the "integrative force of a judgment... based on the persuasive reasoning which the decisions of the Court bring to bear on the problem at hand."[61] A judge ought to be "obliged to search for and to take into consideration foreign judgments... at least the judgments from other Contracting States, when he is faced with a problem of interpretation of an international convention."[62]

Access to foreign decisions has become a lot easier than it used to be. UNCITRAL has taken many steps to ameliorate any practical difficulties relating to access, including the establishment of CLOUT, through which the original texts of decisions and other materials may be obtained from the UNCITRAL Secretariat.[63]

In recognition of the importance of foreign decisions to the uniform interpretation of the CISG, many international organizations and law schools have made efforts to collect, translate, and provide commentary to relevant decisions.[64] An updated and growing collection of CISG jurisprudence, including English translation and relevant commentary, can be found on the CISG database maintained by the Pace Law School.[65]

2. Doctrine (Scholarly Writings; Commentaries)

Another "antidote"[66] to the danger of divergent interpretations of the CISG is the use of doctrine (i.e., academic writings). The literature on the CISG is voluminous and still growing. The value of scholarly writings and international commentaries in the promotion

[61] Jürgen Schwarze, "The Role of the European Court of Justice (ECJ) in the Interpretation of Uniform Law among the Member States of the European Communities (EC)," in *International Uniform Law in Practice: Acts and Proceedings of the 3rd Congress on Private Law* 221 (UNIDROIT, Rome, September 7–10, 1987) (1988). *See* also Harry M. Flechtner, "Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges in the Uniformity Principle in Article 7(1)," *17 J. L. & Com.* 187–217 (1998), also available online at <http://cisgw3.law.pace.edu/cisg/biblio/flecht1.html> (where the author explores the theme of uniformity in the Convention arguing that the uniformity principle "requires a process or methodology involving awareness of and respect for, but not necessarily blind obedience to, interpretations of the CISG from outside one's own legal culture – an approach not unlike the treatment U.S. courts accord decisions of other jurisdictions when applying our Uniform Commercial Code"). *See* also Philip T. Hackney, *supra* note 60, at 479, available online at <http://cisgw3.law.pace.edu/cisg/biblio/hackney.html> (also suggesting that U.S. Uniform Commercial Code case law could be used as a model for tribunals to interpret the Convention by evaluating relevant international case law).

[62] Schwarze, *id. See* also Andersen, *Global Jurisconsultarium, supra* note 21.

[63] The system for reporting and distributing decisions is described in the *UNCITRAL* document, *Case Law on UNCITRAL Texts (CLOUT)*, U.N. Doc. A/CN.9/SER.C/CUIDE/1 (May 19, 1993).

[64] *E.g.*, the Centre for Comparative and Foreign Law Studies in Rome maintains the Unilex database, which provides a collection of case law and an international bibliography on the CISG. For a comment on Unilex as a tool to promote the CISG's uniform application, *see* Fabio Liguori, "'Unilex': A Means to Promote Uniformity in the Application of CISG," in *Zeitschrift für Europäisches Privatrecht* 600 (1996).

[65] The Pace Law School Institute of International Commercial Law <http://cisgw3.law.pace.edu/cisg/text/institute.html> offers an Electronic Library on Uniform International Commercial Law <http://cisgw3.law.pace.edu>, which provides case annotations for each Article of the CISG; as of December 2005, there were 1,700 cases and 5,000 case annotations reported. For a description on how this, as well as other Internet sites dealing with the CISG, are to be used, *see* Claire M. Germain, "The United Nations Convention on Contracts for the International Sale of Goods: Guide to Research and Literature," in *Review of the Convention on Contracts for the International Sale of Goods* 117 (*Cornell Int'l L. J.* eds., 1995) [hereinafter *Cornell Review*]; *see* also Albert H. Kritzer, "The Convention on Contracts for the International Sale of Goods: Scope, Interpretation and Resources," in *Cornell Rev.*, at 147.

[66] This expression is used by Honnold, "The Sales Convention in Action – Uniform International Words: Uniform Application?," 8 *J.L. & Com.* 207, 208 (1988).

of an autonomous, international interpretation of the CISG and its uniform application cannot be overstated.[67]

The role played by doctrine in the interpretation of legislation varies in different legal systems. In civil law countries, recourse to doctrine as an instrument of interpretation for domestic and foreign law has never been doubted. On the other hand, common law jurisdictions have traditionally given little effect to scholarly writings. But even in common law countries, such as England, where judges traditionally have been reluctant to have recourse to scholarly writing, the need for uniformity in interpreting international Conventions has led to a more liberal approach and the use of doctrine has become increasingly common.[68]

In considering the interpretation given to the CISG by foreign courts, all national courts should consider the doctrinal writings that influenced such interpretation in those foreign courts. This practice gains its legitimacy by the recognition of the vital role that doctrine can play in avoiding interpretative diversity in the CISG. It is achieved by the introduction, through the use of doctrine, of international, rather than domestic lenses to view the CISG.

3. *Travaux Préparatoires* (Legislative History)

Another useful guide for resolving doubts about the exact meaning, scope, and effect of the CISG's provisions is the legislative history of the CISG (i.e., the study of the *travaux préparatoires*, which include not only the acts and proceedings of the Vienna Conference but also the summary records of the previous deliberations within UNCITRAL).

The CISG directs interpreters to have regard to the "international character" of its provisions and requires, in addition to the international experience that will be developed through jurisprudence and doctrine, that the Convention be placed in the proper international setting of its legislative history.[69]

During the formative stages of the Convention, numerous difficulties arose and were resolved through debate and compromise among the diplomatic delegates to the Vienna

[67] *See* Edgar Bodenheimer, "Doctrine as a Source of the International Unification of Law," 34 *Am. J. Comp. L.* 67 (1986 Supplement), at 71, where the author examines from a comparative point of view and in detail the question of "whether doctrinal writings may be considered primary authorities of law on par with legislation and (in some legal systems) court decisions, or whether they must be relegated to the status of secondary sources."

[68] In the United States, academic writing is cited freely in judicial opinions, and there was similar reliance in England, in *Fothergill v. Monarch Airlines Ltd.*, 1981 A.C. 251 (House of Lords).The sharpest divergence from traditional common law practice is reported in Canada, where courts long ago shed their reluctance to use scholarly writing and regularly cite textbooks, law reviews, and other scholarly literature. According to one commentator, this development is explained "by the wide geographical dispersal of Canadian courts, a less cohesive bar, less specialization among judges and the greater influence exercised by Canadian law schools." *See* Honnold, *Uniform Words and Application*, *supra* note 53, at 126. It is interesting to note that some of the factors responsible for the Canadian development could also be true, structurally at least, in the context of the CISG and its worldwide application.

[69] *See* Honnold, *Uniform Law for Int'l Sales*, *supra* note 1, at 136–137. *See* also Audit, *Lex Mercatoria*, *supra* note 8, at 187–188:

> The international character of the Convention should encourage courts to refer to the Convention's legislative history and prior instruments (*i.e.*, the ULIS and ULF) in order to ascertain the most likely intent underlying the wording of a given provision. Reference should also be made to the various official texts of the Convention to resolve ambiguities in one of the texts. For example, article 39 states that the buyer must notify the seller of a lack of conformity within a reasonable time after discovery. On this score, the English text refers to the "[lack of] conformity *of the goods.*" Does this restriction mean that article 39 is inapplicable if the non-conformity appears in the documents instead of in the goods – although delivery of documents is closely associated in the Convention with delivery of the goods themselves? The French text is not as restrictive and speaks of *défaut de conformité* in general terms.

Convention.[70] The adoption of the CISG being essentially a political act by the governments of member States made it inevitable that the final version of CISG contains several textual compromises, which, in fact, are unresolved substantive difficulties. The most significant of these difficulties relates to the CISG's gap-filling procedures and its use of Western legal concepts.

The legislative history of the CISG is of great importance, not merely as the starting point of reference to the law it promotes but also as a crucial tool of understanding the meaning of that law.[71] In determining the meaning of an international treaty, one of the rules of the *U.N. Convention on the Law of Treaties* 1969 is that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty.[72] The principal commentator of the CISG has correctly observed that "[w]hen important and difficult issues of interpretation are at stake, diligent counsel and courts will need to consult the [CISG's] legislative history. In some cases this can be decisive."[73]

Reference to the legislative history of the Convention is generally advocated by most commentators.[74] The relationship between the old and the new law can often be found in the "*travaux préparatoires.*" The same commentators have, however, also stressed that the value of the legislative history should not be overestimated.[75] There are a few reasons for this caution. First, it should not be forgotten that the CISG, once adopted by the Contracting States, acquires a "life of its own,"[76] and its meaning can change with time and use. It becomes apparent that the original intention of the drafters, documented in the *travaux préparatoires*, is only one of the elements to be taken into account for the purpose of the CISG's current interpretation. Another reason for a cautious treatment of the legislative history of the CISG is that the *travaux préparatoires* sometimes reveal a difference of opinion among the drafters themselves. Also, even when the arguments put forward in favor of the adoption of a given provision were not controversial, they are not always, or necessarily, decisive for the final product. In other instances, the difference in opinion documented is of a political rather than legal nature. It should always be kept in mind that the provisions of the CISG were adopted in a diplomatic conference, in what is a political act by representatives of different sovereign States.

[70] Honnold has stressed the importance of discussion to the work of UNCITRAL, leading to consensus without the need for formal votes. *See* Honnold, "The United Nations Commission on International Trade Law: Mission and Methods," 27 *Am. J. Comp. L.* 201, 210–211 (1979). For general comments on UNCITRAL's history, structure, mission, and methods, *see* E. Allen Farnsworth, "UNCITRAL – Why? What? How? When?," 20 *Am. J. Comp. L.* 314 (1972); for one participant's wry view of this process, *see* Gyula Eörsi, "Unifying the Law (A Play in One Act, with a Song)," 25 *Am. J. Comp. L.* 658 (1977).

[71] The material found in the CISG's legislative history adds depth to the international understanding that underlies the Convention's text. Honnold's *Documentary History of the Uniform Law for International Sales* (Kluwer, 1989) reproduces the relevant documents and provides references, thereby making it easier to trace the legislative history and development of the CISG's provisions.

[72] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. Art. 32, at 331 (entered into force January 27, 1988).

[73] John Honnold, "Uniform Laws for International Trade," *Int'l Trade & Bus. L. J.* 5 (1995).

[74] *See* Honnold, *Uniform Law for Int'l Sales*, *supra* note 1, at 136; Bonell, *General Provisions*, *supra* note 36, at 90. Among civil law commentators, it is widely accepted that the legislative history of the uniform law must be taken into account when interpreting the uniform law. *See, e.g.*, Bernard Audit, *La Vente Internationale de Marchandises: Convention des Nations Unies du 11 Avril 1980* [The International Sales of Goods, UN Convention of 11 April 1980 – *in French*] (Paris: Librairie Générale de Droit et de Jurisprudence, 1990), at 48 [hereinafter Audit, *International Sales*]; Fritz Enderlein et al., Internationales Kaufrecht [International Sales Law – *in German*] 61 (1991).

[75] Honnold, *Uniform Law for Int'l Sales*, *supra* note 1, at 141–142; Bonell, *General Provisions*, *supra* note 36, at 90.

[76] Bonell, *General Provisions*, *supra* note 36, at 90.

4. Neutral Language – A New *Lingua Franca*[77]

The quality of the international character attributed to the CISG has yet a further dimension. Such a characterization denotes that the terms and concepts of the CISG must be interpreted autonomously of meanings that might traditionally be attached to them within national legal systems. To have regard to CISG's international character must mean that the interpreter should not apply domestic law to solve the interpretative problems raised in the CISG. The reading of the CISG in light of the concepts of the interpreter's domestic legal system would be a violation of the requirement that it be interpreted with regard to its international character.[78] The terms of the CISG must be interpreted "in the context of the Convention itself."[79] Such a conclusion becomes necessary when one looks at the background of the CISG.

The CISG is a code that contains a defined set of topics (formation of contract, rights and obligations of parties, remedies), and its provisions regulate issues relating to those topics using rules that are underpinned by a coherent set of general principles on which the Convention is based. The Convention has adopted a new common language to express those rules and general principles that operate throughout the CISG, frequently using plain words that refer to specific events that are typical of international commercial transactions. The rules on risk of loss provide good examples of the use of event-oriented words. CISG Art. 67(1) provides that "the risk passes to the buyer when the goods are *handed over* to the first carrier for transmission to the buyer in accordance with the contract of sale." In a similar tone, Art. 69(1) states that in contracts that do not involve carriage, "... the risk passes to the buyer when he *takes over* the goods." The drafters of the Convention opted for the use of plain language when referring to things and events for which there are words of neutral content devoid of domestic legal nuances. Such words as "delivery" and such concepts as "property" and "title," which are loaded with peculiar domestic importance, have been intentionally avoided.

The form and content of the CISG are the outcome of prolonged deliberations among lawyers representing a multitude of diverse legal and social systems and cultural backgrounds. The provisions of the CISG had to be formulated in sufficiently neutral language to reach a consensus that would not be vitiated by misunderstanding among its drafters. An important decision that the drafters of the CISG had to make regarding this issue was whether to include in the CISG detailed definitions of significant terms.[80] The eventual choice was to include some definitions as needed within the text of particular provisions,[81] but not to have definitions of key terms as a separate part of the CISG.[82] This decision

[77] *See* Peter H. Schlechtriem, "25 Years CISG – An International Lingua Franca for Drafting Uniform Law, Legal Principles, Domestic Legislation and Transnational Contracts," 2 *CILE Studies. The* CISG *and the Business Lawyer: The UNCITRAL Digest as a Contract Drafting Tool* (forthcoming 2006), offering a strong argument in favor of the CISG as a *lingua franca* of international commercial law.

[78] *See* Honnold, *Uniform Law for Int'l Sales*, *supra* note 1, at 136, where the author also states, "[t]o read the words of the Convention with regard for their 'international character' requires that they be projected against an international background."

[79] *Id.*

[80] *See* generally Farnsworth, *Problems of Unification*, *supra* note 26.

[81] *See* CISG Art. 14, stating "[a] proposal for concluding a contract addressed to one or more specific persons constitutes an offer..."; CISG Art. 18, stating "[a] statement made by or other conduct of the offeree indicating assent to an offer is an acceptance"; CISG Art. 25, stating "[a] breach of contract committed by one of the parties is fundamental..."

[82] This style is more reflective of civil code drafting style than common law statutory practice. *See* generally Farnsworth, *Problems of Unification*, *supra* note 26. This style contrasts with the detailed definitional system in the American Uniform Commercial Code.

on drafting style is a further indication of the wishes of the drafters to produce a law that promotes international cooperation in its application.[83]

It has to be conceded that, despite the diverse composition of the drafting team and the attention given to all official language versions of the CISG, the drafting debate tended to focus on legal concepts drawn from either the civil law or common law traditions.[84] As a result, most of the words and concepts used in the CISG are Anglo-American or Western European in origin, but the ramifications of this origin must not be overestimated. It may be that, in creating this modern uniform legal regime for the international sale of goods, certain concepts[85] or words were borrowed from developed legal systems, but such words or concepts do not (and should not) bring with them to the CISG the special depth of meaning that they have in their original context. The choice of one word rather than another represents the process of a compromise, rather than the acceptance of a concept peculiar to a specific domestic legal system. The drafters attempted to avoid terms that have been endorsed and shaped by diverse historical, social, economic, and cultural structures in the various legal systems. They employed neutral, "a-national" language to avoid such distortions. The neutrality of the words chosen for the CISG promotes the CISG's autonomy and advances UNCITRAL's objectives of internationality and uniformity of interpretation and application.

Any interpretation of the CISG's terms that relies on specific national connotations will be calamitous because what is required is an interpretation of the CISG that is not only uniform but truly international as well. Interpreters of the text must not violate the spirit of the law that is embodied in the Preamble and the interpretation provisions of the Convention. The meaning of any words imported from domestic legal systems must be circumscribed by their new legal context.

The Preamble expressly acknowledges the cultural, social, and legal diversity that characterizes its member States. The remedial provisions of the CISG are also structured to reflect the commitment to equality in the formal parallelism between buyer and seller.[86] The commitment to equal treatment and respect for the different cultural, social, and legal backgrounds of its international members is consistent with other important values underlying the CISG, such as commitment to keeping the contract alive, forthright communication between parties, reasonableness, etc. The interpretation of the text of the Convention must be guided by these enunciated principles.

[83] Kastely argues that this choice of drafting style has rhetorical significance because detailed definitional sections "... encourage the reader to understand the words in a technical and limited way, and to perceive the text as self-contained. The reader is led to interpret such a text as limited to its specifically defined terms and to disregard its broader implications or implicit significance." On the other hand, Kastely notes that "informal, contextual definitions... encourage a broad and conversational interpretation of the words of the text, leading to greater depth and complexity in the interpretation of individual provisions." Kastely, *Rhetorical Analysis*, *supra* note 19, at 593–594.

[84] *See* Gyula Eörsi, "Problems of Unifying the Law on Formation of Contracts for the International Sale of Goods," 27 *Am. J. Comp. L.* 315–323 (1979).

[85] For example, a party may, by notice fixing an additional final period for performance of the other party's obligations, make time of the essence, where it is not clear from the contract itself or from the surrounding circumstances whether failure to make timely performance amounts to a fundamental breach; *see* CISG Art. 47(1) and Art. 63(1). It has been commented that "Art. 47(1) is based on the German concept of '*Nachfrist*' but it has a well-known counterpart in equity in contracts for the sale of land [references omitted]." Jacob S. Ziegel, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods* (July 1981), University of Toronto, excerpt available at <http://cisgw3.law.pace.edu/cisg/text/ziegel47.html>.

[86] Hellner has observed that "the symmetry in the rules on the remedies for the seller's and the buyer's breach of contract is probably prompted by a desire of being impartial to the seller's and the buyer's sides." Jan Hellner, "The UN Convention on International Sales of Goods – An Outsider's View," in *Ius Inter Nationes: Festschrift fur S. Riesenfeld* 85 (Erik Jayme et al. eds., 1983).

Individual terms or problematic provisions can and must be construed with regard to the CISG's underlying values if the overall linguistic and thematic structure is to be reinforced and enriched. This is the mandate expressed in Articles 7(1) and 7(2) of the CISG. The direction taken on this issue will determine whether the members of the CISG's community form a true community of entities that abide by a uniform law or simply a collective of independent entities that, at times, cooperate with each other via a harmonization of sorts on specific topics. Simply put, uniformity in international sales law cannot be achieved merely by the universal adoption of uniform rules, but only by the establishment of a uniform interpretation of these rules universally.

VI. GAP-FILLING IN THE CONVENTION: ARTICLE 7(2)

The CISG does not constitute an exhaustive body of rules and thus does not provide solutions for all the problems that can originate from an international sale transaction.

Indeed, the issues governed by the Convention are limited to the formation of the contract and the rights and obligations of the parties resulting from such a contract.[87] This limitation gives rise to problems relating to the need to fill gaps that exist in any type of incomplete body of rules.[88]

It is to comply with such a need that Article 7(2), designating the rules for filling any gaps in the CISG, was drafted. The justification for such a provision lies in the fact that "it is hardly possible for an international group to draft a voluminous and complicated piece of legislation without leaving gaps behind,"[89] especially in the field of contract, as contracts have infinite variety.

The legislative history of this provision is informative because it reveals the drafting compromise that is Art. 7(2)[90]:

> 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.

[87] *See* CISG Art. 4, stating "[t]his Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold."
For further exclusions to the applicability of CISG, *see* CISG, *supra* note 1, art. 2 (sale of certain goods), art. 3 (supply and manufacture contracts and labor contracts), and art. 5 (liability for death or personal injury). In addition, the Convention does not govern rights based on fraud or agency law; *see* Honnold, *Uniform Law for Int'l Sales*, *supra* note 1, at 114–116.

[88] Note that for the purposes of this text, any reference to "gaps" is a reference to gaps *praeter legem* (i.e., matters "governed by the CISG which are not expressly settled in it"): in other words, issues to which CISG applies but which it does not expressly resolve. Matters that are excluded from the scope of CISG (such as the matters discussed in CISG Arts. 2, 3, 4 and 5) are gaps *intra legem* and do not concern Art. 7(2).

[89] Eörsi, *General Provisions in International Sales*, *supra* note 51, at 2–11. *See* also Audit, *Lex Mercatoria*, *supra* note 8, at 190, commenting on issues of gap-filling in the CISG:

> Although the Convention is intended to be an all-encompassing framework, unprovided-for circumstances perforce will surface. Article 7(2) deals with these circumstances. Where a gap is found in the Convention, it is not to be filled immediately by reference to an applicable domestic law; the reference to such a domestic law is only subsidiary. Initial reference must be made to the Convention's "general principles." The Convention constitutes an autonomous system; it is not to be regarded as one statute among others.

[90] There were arguments in favor of a gap-filling provision excluding the use of the rules of private international law (i.e., in terms similar to those in Article 17 ULIS). The opposing view was that the uniform law could not be considered as totally separated from the various national laws – as the uniform law did not deal with a number of important questions related to contracts of sale – and that it would be unrealistic and impractical to construe many undefined terms contained in the Cisg without having recourse to national law. *See* "Legislative History of Art. 7(2)" in Felemegas, *Uniform Interpretation*, *supra* note 24, ch. 4.

In the manner that Article 7(2) is drafted, the risk of diversity in the Convention's gap-filling from one jurisdiction to another is minimized, because recourse to domestic laws is to be had only when it is not possible to fill a gap by applying the general principles on which the Convention is based.[91]

The aim of this provision is not very different from that of the interpretation rules found in Article 7(1); that is, uniformity in the CISG's interpretation and application. Article 7(2) and gap-filling are directly connected to Article 7(1) and interpretation, not only due to the proximity of their location in the text but, more importantly, because of their substantive relationship with each other.[92] Gaps in the law constitute a danger to the uniformity and autonomy of the CISG's interpretation, because "one way to follow the homeward trend is to find gaps in the law."[93] Further, interpretation must be the means whereby gaps in the CISG are filled, because when a gap *praeter legem* is detected the problem arising thereby should be solved through interpretation of the CISG.

However, the relevant textual reference in Article 7(2) leaves the CISG prone to divergent gap-filling (i.e., in conformity with the relevant law applicable according to the rules of private international law). It is arguable that the use of the rules of private international law to resolve questions concerning matters governed but unresolved by the CISG will harm the Convention's uniform application by producing divergent results. An alternative approach to gap-filling – one based on the concept of internationality and on generally acknowledged principles upon which the CISG is based – would serve and promote the purpose of the new law (i.e., uniformity in its application), rather than hinder it.

In accordance with the basic criteria established in Article 7(1) and discussed earlier, uniformity in the CISG's application is the ultimate goal. It follows that for the interpretation of the CISG in general – not only in the case of ambiguities or obscurities in the text but also in the case of gaps *praeter legem* – "courts should to the largest possible extent refrain from resorting to the different domestic laws and try to find a solution within the Convention itself."[94]

[91] *See, e.g.*, Audit, *Lex Mercatoria*, *supra* note 8, at 193–94, where the author writes, "The relationship between the Convention and the *lex mercatoria* can be summarized by outlining the hierarchy of norms that may apply to an international sales contract under the Convention:

(1) The "mandatory norms" of domestic law, which prevail over the rules of the Convention (art. 4[a]);
(2) Trade usages, either expressly referred to by the parties (art. 9[1]) or found applicable by a court or arbitrator (art. 9[2]);
(3) Contract provisions (art. 6);
(4) The rules of the Convention;
(5) The "general principles" on which the Convention is based (art. 7[1]);
(6) If no such principles are identified, the non-mandatory norms of the law applicable under the conflict rules of the forum (art. 7[2]).

Although domestic laws appear at the top of the hierarchy, their application should be the exception. Under the Convention, the *lex mercatoria* is the chief source of the applicable law for international transactions either directly as trade usages (the second heading) or indirectly through the application of the principle of party autonomy in contract (the third heading). The Convention elaborates the common law and practices of international sales and the common core of domestic commercial rules. The Convention itself purports to formulate the most common practice and therefore qualifies as an expression of *lex mercatoria*. But, as its place in the hierarchy indicates, the Convention is above all a recognition by states of the paramount importance of existing and more specific commercial practices, to which the Convention gives the force of law.

[92] The line between implied terms and interpretation is a difficult one to draw – indeed it is not clearly drawn in some jurisdictions – which supports my view of the connection between Cisg Article 7(1) and 7(2). *See C Itoh & Co. Ltd. v. Companhia de Navegacao Lloyd Brasilieiro*, 1 Lloyd's Rep. 201 (Eng. Comm. Ct. 1998, Clarke J), affirmed by the English Court of Appeal at 1 Lloyd's Rep 115 (Eng. C.A. 1999) (use of the officious bystander test when interpreting a contract).

[93] Eörsi, *General Provisions in International Sales*, *supra* note 51, at 2–9.

[94] Bonell, *General Provisions*, *supra* note 36, at 75.

1. Gaps *Praeter Legem*

Before the gap-filling rule in Article 7(2) can be put into operation, the matters to which the rule applies must first be identified. The starting point of the gap-filling analysis is the observation that the gaps to which the rule refers are not gaps *"intra legem"* (i.e., matters that are excluded from the scope or the application of the Convention – such as the matters discussed in CISG Articles 2,[95] 3,[96] 4[97] and 5[98]); rather, they must be gaps *"praeter legem"* [99](i.e., matters that are governed but are not expressly resolved by the CISG). The absence of a uniform law provision dealing with such issues cannot be regarded as a lacuna.

2. Gap-Filling Methodology

Three different approaches exist to fill gaps *praeter legem*. The first approach is based on the application of the general principles of the statute and is known as the "true Code" approach.[100] The drafters of the 1964 Hague Conventions chose that approach.[101] ULIS's pursuit of absolute independence from domestic law failed the test of acceptance.

[95] CISG Art. 2, states that CISG does not apply to consumer sales, to auctions, or to sales of shares, vessels, and electricity.

[96] CISG Art. 3 excludes the application of the Convention in cases of "supply and manufacture" contracts and labor contracts.

[97] CISG Art. 4 sets out the scope of the Convention and, except as otherwise expressly provided in the Convention, excludes from it the issue of validity of the contract and the effect of the contract on the property in the goods.

[98] CISG Art. 5 excludes from the scope of the Convention the issue of the liability of the seller for death or personal injury caused by the goods to any person.

[99] The terms *"intra legem"* and *"praeter legem"* are discussed in Ferrari, *Uniform Interpretation*, *supra* note 54, at 217. For the distinction between gaps *"intra legem"* and gaps *"praeter legem,"* *see* Ferrari, *Uniform Interpretation*, *id.* at n. 186, referring to H. Deschenaux, *Der Einleitungstitel*, in 2 *Schweizerisches Privatrecht* 95 (Max Gutzwiller et al. eds., 1967).

[100] *See* William D. Hawkland, "Uniform Commercial 'Code' Methodology," *U. Ill. L. Rev.* 291. 292 (1962). *See* also, Ferrari, *Uniform Interpretation*, *supra* note 54, at 218, fn.189, stating that the "true code" approach corresponds to what Kritzer calls the "internal analogy approach," in Kritzer, *Guide to Practical Applications*, *supra* note 58, at 117. According to the "true Code" approach, a court, when faced with a gap in a Code, should only look at the Code itself, including the purposes of the Code and the policies underlying the Code, but no further. It follows that, for the solution of questions governed by a Code, the answer can be found within the framework of that Code. The justification of this approach lies in the belief that a "true Code" is comprehensive, and as such, "it is sufficiently inclusive and independent to enable it to be administered in accordance with its own basic policies." Hawkland, *op. cit.*, at 292.

This approach had been discussed during the 1951 Hague Conference (January 1–10). For a discussion of the 1951 Conference, *see* Ernst Rabel, "The Hague Conference on the Unification of Sales Law," 1 *Am. J. Comp. L.* 88 (1952). Rabel said this about this gap-filling approach: "... within its concerns ... the text must be self-sufficient. Where a case is not expressly covered the text is not to be supplemented by the national laws – which would at once destroy unity – but be construed according to principles consonant with its spirit". *Id.* In effect, the Code is approached as a source of law itself.

[101] *See, e.g.*, E.Wahl, "Article 17," in *Kommentar Zum Einheitlichen Kaufrecht* 126b (Hans Dölle ed., 1976), where the commentator, after having listed the three different approaches to filling gaps *praeter legem*, states that "ULIS has adopted the first method. The text of Article 17, its legislative history as well as the provision contemplated in Article 2 show that the application of the rules of international private law had to be limited." See Convention Relating to a Uniform Law on the International Sale of Goods [ULIS], July 1, 1964, 834 U.N.T.S. 107, reprinted in 13 *Am. J. Comp. L.* 453 (1964).

ULIS Art. 2 excludes the application of rules of private international law, except in a few instances; *see, e.g.*, Harold J. Berman, "The Uniform Law on International Sale of Goods: A Constructive Critique", 30 *L. & Cont. Probs.* 354, 359 (1965).

ULIS Art. 17 provides that the general principles underlying the 1964 Uniform Law are to be used to fill any gaps. It has been correctly concluded that "[t]his has the intended negative implication that courts may not refer to the domestic law of the country whose law would otherwise apply under the rules of private international law." Peter Winship, "Private International Law and the U.N. Sales Convention," 21 *Cornell Int'l L. J.* 487, 492 (1988).

The solution adopted in ULIS has been criticized and has been considered by some commentators as one of the reasons for its failure to win wide acceptance.[102]

The second approach relies on the use of external legal principles to fill gaps found in the Code and is known as the "meta-Code approach."[103]

The third approach to gap-filling is a combination of the foregoing approaches.[104] According to this approach, one is supposed to first apply the general principles of the Code. In the absence of any such principles, however, one should resort to the rules of private international law. It is this approach that was adopted by the drafters of the CISG. Therefore, in practice, when a matter is governed by the CISG but is not expressly settled in it, Article 7(2) offers a solution by (i) internal analogy, when the CISG's other provisions contain an applicable general principle or (ii) reference to external legal principles (the rules of private international law) when the CISG does not contain an applicable general principle.[105]

Pursuant to Art. 7(2) any gaps must be filled, whenever possible, within the Convention itself; a solution that complies with the aim of Article 7(1); that is, the promotion of the Convention's uniform application.[106] As has been noted above, there are various types of logical reasoning that can be employed to find a solution to a gap within the CISG itself, and recourse to the CISG's general principles constitutes only one method of gap-filling. This observation leads to a further interpretation issue, the interpretation of Article 7(2) itself. One must determine whether Article 7(2) should be interpreted broadly; that is, whether it includes other methods of legal reasoning as well, such as analogical application,[107] or whether it is to be interpreted restrictively.

It is submitted that Art. 7(2) must be interpreted broadly and that there are two complementary methods of gap-filling allowed under this provision: (a) an analogical application of specific provisions of the CISG and (b) a consideration of the general

[102] *See, e.g.*, Isaak I. Dore & James E. DeFranco, "A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code," 23 *Harv. Int'l. L.J.* 49, 63 (1982).

[103] For the expression "meta-Code," *see* Steve H. Nickles, "Problems of Sources of Law Relationships under the Uniform Commercial Code – Part I: The Methodological Problem and the Civil Law Approach," 31 *Ark. L. Rev.* 1 (1977). This approach is based on the idea that external legal principles should supplement the provisions of a Code, unless this is expressly disallowed by that Code. *See, e.g.*, U.C.C. §1–103, which states "that unless displaced by the particular provisions of the Act, the principles of law and equity ... shall supplement its provisions." *Id.* This approach seems to be favored in common law, *see* Dore & DeFranco, *op. cit.* In regards with the U.C.C., however, note the tension that is created within the U.C.C. due to the wording of §1–102(1), which states that "this Act shall be liberally construed and applied to promote its underlying purposes and policies". *Id.* at §1–201(1). For an approach more closely associated with civil law, *see* Mitchell Franklin, "On the Legal Method of the Uniform Commercial Code," 16 *L. & Contemp. Probs.* 330, 333 (1951).

[104] For further references to the three approaches, *see* generally Kritzer, *Guide to Practical Applications*, *supra* note 58.

[105] For a similar appraisal of the Convention's gap-filling measures, *see* Kritzer, *Guide to Practical Applications*, *supra* note 58, at 117.

[106] *See* Enderlein & Maskow, *International Sales Law*, *supra* note 19, at 58, where the authors state that Article 7(2) indicates that gaps must be "closed ... from within the Convention. This is in line with the aspiration to unify the law which ... is established in the Convention itself."

[107] The difference between the two gap-filling methods is explained well by Bonell, *General Provisions*, *supra* note 36, at 80 as follows:

> Recourse to "general principles" as a means of gap-filling differs from reasoning by analogy insofar as it constitutes an attempt to find a solution for the case at hand not by mere extension of specific provisions dealing with analogous cases, but on the basis of principles and rules which because of their general character may be applied on a much wider scale.

For further discussion of the distinction between analogical application and the recourse to general principles in the context of a uniform law, *see* Jan Kropholler, *Internationales Einheitsrecht, Allgemeine Lehren* 292 (1975).

principles underlying the CISG as a whole, when the gap cannot be filled by analogical application of specific provisions.

Analogical application has also been accepted as a method of gap-filling by many other scholars in this area.[108] An explanation of this method is provided by Enderlein and Maskow, who, in endorsing a broad interpretation of Article 7(2), state that "gap-filling can be done, as we believe, by applying such interpretation methods as extensive interpretation and analogy. The admissibility of analogy is directly addressed in the wording contained in the CISG because it is aimed at obtaining, from several comparable rules, one rule for a not expressly covered fact and/or a general rule under which the fact can be subsumed."[109]

3. Gap-Filling by Analogy

The method of analogical application requires examination of the provisions of the CISG, because the rule laid down in an analogous provision may be restricted to its particular context, and thus, its extension to other situations would be arbitrary and contrary to the intention of the drafters or the purpose of the rule itself.[110]

There is some diversity in academic opinion on the exact test to be applied in such cases. Ferrari,[111] using a criterion similar to that offered by Bonell,[112] states that when the matters expressly settled in the Convention and the matters in question are related so closely that it would be "unjustified to adopt a different solution," one can fill the gap by analogy. Honnold offers a different test, placing the focus of the inquiry on whether the cases were so analogous that the drafters "would not have deliberately chosen discordant results." Only in such circumstances, according to Honnold, would it be reasonable to conclude that the rule embracing the analogous situation is authorized by Article 7(2) CISG.[113]

It is important to note that gap-filling by analogy is concerned with the application of certain rules, or solutions, taken from specific CISG provisions to be applied in analogous cases to resolve legislative gaps. This method should not be confused with the application of general principles that are expressed in the CISG or upon which the CISG is founded. It is my contention that gap-filling by analogy is *primary* gap-filling. Only when no analogous solutions can be found in the CISG's provisions should the interpreter resort to the application of the CISG's general principles – internal and external – which is *secondary* gap-filling. This is a fine, but clear, distinction. It deserves to be maintained, although there may ultimately not be a lot of practical importance attached to maintaining it because of the tendency of commentators to blur the distinction by focusing on the use of general principles in gap-filling and the potential of general principles to dominate the CISG's gap-filling function. However, the value of recognizing its existence lies in the

[108] There is strong academic opinion in favor of the view that not only does the CISG permit both methods of gap-filling but also that, in the case of a gap in the CISG, "the first attempt to be made is to settle the unsolved question by means of an analogical application of specific provisions." Bonell, *General Provisions*, *supra* note 36, at 78.

[109] Enderlein & Maskow, *International Sales Law*, *supra* note 19, at 58.

[110] Bonell, *General Provisions*, *supra* note 36, at 78.

[111] *See* Ferrari, *Uniform Interpretation*, *supra* note 54, at 222.

[112] Bonell opines that where there are no special reasons for limiting the analogical application of a specific rule to another CISG provision, the interpreter must consider whether the case regulated by this rule and the gap at hand are so analogous "that it would be inherently unjust not to adopt the same solution." Bonell, *General Provisions*, *supra* note 36, at 79.

[113] *See* Honnold, *Uniform Law for Int'l Sales*, *supra* note 1, at 156. *See* also Siegfried Eiselen, *Electronic Commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980*, 6 EDI L. Rev. 21–46 (1999) (fax, e-mail and EDI communications also encompassed by the definition of "writing" in CISG Article 13).

theoretical clarity and legitimacy that this distinction adds to the consistent and systematic examination of the interpretative structure embedded in the CISG.

4. General Principles and the CISG

When the solution to a gap-filling problem cannot be achieved by analogical application of a rule that might be found in a specific CISG provision dealing with issues similar to those present in the gap, gap-filling can be performed by the application of the "general principles" on which the CISG is based.[114]

As explained above, this procedure differs from the analogical application method, in that it does not solve the case in question solely by extending specific provisions dealing with analogous cases; rather it solves the case on the basis of rules that, because of their general character, may be applied on a much wider scale. At this point it is appropriate to note another fine but valid distinction in the types of general principles that concern the CISG and its interpretation. The distinction must be drawn between principles extrapolated from specific CISG provisions and general principles of comparative law – namely, those rules of private law that command broad adherence throughout various countries, or general principles of law of civilized nations – on which the CISG is generally based.

a. Principles in CISG's Provisions

Despite the clear provision for the use of the CISG principles in gap-filling by Article 7(2), there is no other textual reference to the identification of such principles and the manner of their application, once identified, to fill a gap in the CISG.

General principles that are capable of being applied to matters governed by, but not expressly regulated by the CISG, may be inferred from specific rules established by specific CISG provisions dealing with specific issues.[115] A general principle stands at a higher level of abstraction than a rule or might be said to underpin more than one such rule.

Some general principles can be identified easily because they are expressly stated in the provisions of the CISG itself. One such principle is the principle of good faith.[116] The principle of autonomy[117] is another general principle expressly outlined in the CISG. Most

[114] CISG Art. 7(2).

[115] For academic support on this point, *see* Schlechtriem, *Uniform Sales Law*, *supra* note 19, at 38, stating "[t]he authoritative principles can be inferred from the individual rules themselves and their systematic context"; Honnold, *Uniform Law for Int'l Sales*, *supra* note 1, at 155, stating "[g]eneral principles [must] be moored to premises that underlie specific provisions of the Convention"; Bonell, *General Provisions*, *supra* note 36, at 80.

[116] CISG Art. 7(1). The good faith principle has been recognized as one of the general principles expressly laid down by the Convention. *See*, *e.g.*, Audit, *International Sales*, *supra* note 74, at 51, where the author states that good faith is one of the general principles, even though it must be considered a mere instrument of interpretation; Enderlein & Maskow, *International Sales Law*, *supra* note 19, at 59, where the authors list the good faith principle among those principles "which do not necessarily have to be reflected in individual rules"; Rolf Herber & Beate Czerwenka, *Internationales Kaufrecht. Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11 April 1980 über Vertrage über den Internationalen Warenkauf* [International Sales Law, Commentary on the United Nations Convention on Contracts for the International Sale of Goods] 49 (1991), where it is stated that the good faith principle is the only general principle expressly provided for by the Convention.

[117] CISG Art. 6. *See*, *e.g.*, Honnold, *Uniform Law For Int'l Sales*, *supra* note 1, at 47, who in his introduction of the Convention states that "[t]he dominant theme of the Convention is the role of the contract construed in the light of commercial practice and usage – a theme of deeper significance than may be evident at first glance." Party autonomy has been described as the most important principle of the CISG; *see* Kritzer, *Guide to Practical Applications*, *supra* note 58, at 114. Some commentators have inferred from this principle that the CISG plays solely a subsidiary role as it provides only for those cases that the parties neither contemplated, nor foresaw. For this thesis, *see* Honnold, *Uniform Law for Int'l Sales*, *supra* note 1, at 48, stating that "the Convention's rules play a supporting role, supplying answers to problems that the parties have failed to solve by contract." *Id.* For a similar conclusion, *see* K. Sono, "The Vienna Sales Convention: History and

general principles, however, have not been expressly provided by the CISG. Therefore, they must be deduced from its specific provisions by analyzing the contents of such provisions. If it can be concluded that they express a more general principle, capable of being applied also to cases different from those specifically regulated, then they could also be used for the purposes of Article 7(2).

There is a notable divergence of opinion as to the exact nature of such an analysis of specific CISG provisions. Bonell states that

> just as in interpreting specific terms and concepts adopted in the text of the Convention, also in specifying "general principles" courts should, in accordance with the basic criteria of Article 7(1), avoid resorting to standards developed under their own domestic law and try to find the particular solution "autonomously", *i.e.*, within the Convention itself, or, should this not be possible, by using standards which are generally accepted at a comparative level.[118]

Bonell's argument relies on the premise that, although there are principles, such as that of party autonomy and the dispatch rule, which can be applied directly, others, such as the principle of "good faith" and the concept of "reasonableness," need further specification to offer a solution for a particular case. The question that arises here relates to the standards to be used to identify the principles that belong to the latter category. For example, how could a judge of a highly industrialized country apply the "reasonableness" test to determine which party in a particular circumstance has been acting with due diligence? Arguably, the judge should not automatically refer to the standards of care and professional skill normally required from his country's business people when conducting domestic affairs. Bonell is of the opinion that the answer should be found "either in the Convention itself or at least on the basis of standards which are currently adopted in other legal systems."[119]

On the other hand, there is strong academic opinion that comparative law should not be used to identify such general principles. Enderlein and Maskow are of the opinion that it is

> not possible to obtain the Convention's general principles from an *analysis prepared by comparison of the laws* of the most important legal systems of the Contracting States ... as it was supported, in some cases, in regard to Article 17 [of] ULIS.... The wording of the Convention does in no way support the application of this method.[120]

In addressing this issue, interpreters of the CISG must be conscious of the mandate in Art. 7(1) to have regard to the Convention's international character and to promote uniformity in its application. Although Bonell's model is not the same as resorting to rules of private international law, the temptation to adopt a domestic law analysis of the problem should be resisted. Tribunals must recognize the uniquely international

Perspective," in *International Sale of Goods: Dubrovnik Lectures* 14 (P. Sarcevic & P. Volken eds., 1986), affirming that "the rules contained in the Convention are only supplementary for those cases where parties did not provide otherwise in their contracts." *Id.*

According to this premise, it is logical to conclude that in case of conflict between the parties' autonomy and any other general principle of the CISG, the former always prevails. *See* E. Allen Farnsworth, "Rights and Obligations of the Seller," in *Wiener Ubereinkommen von 1980 über den Internationalen Warenkauf* (Lausanner Kolloquium 1984) (Schweizerisches Institut für Rechtsvergleichung ed., 1985) at 83, 84 where the author draws the same conclusion: "in case of a conflict between the contract and the Convention, it is the contract – not the Convention – that controls." *Id.* Note that this result is "contrary to the Uniform Commercial Code where principles of 'good faith, diligence, reasonableness and care' prevail over party autonomy". U.C.C. §1-102(3). *See* also Kritzer, *Guide to Practical Applications*, *supra* note 58, at 115.

[118] Bonell, *General Provisions*, *supra* note 36, at 81.

[119] *Id.*, at 82.

[120] Enderlein & Maskow, *International Sales Law*, *supra* note 19, at 60. *See also See* Ferrari, *Uniform Interpretation*, *supra* note 54, at 224.

nature of the CISG and its proper function as uniform law. Bearing in mind what has already been written about the potential threats to the autonomy and uniformity of the CISG's interpretation and application posed by the use of different domestic concepts and laws, it seems that the latter, rather than the former, opinion is better. It is hoped that the difficulties that can arise, let us say, in a dispute between a German seller and a Zambian buyer relating to a notice of nonconformity "within a reasonable time" under CISG Art. 39, can be solved in a way that respects the CISG's (international) character and (uniformity) objective – bearing in mind the different perceptions that may exist in these two countries as to time.[121]

Irrespective of the result in the debate as to the theoretical justification of the method of extracting general principles by analyzing the contents of specific provisions of the CISG, in practice, several general principles can be deduced by this method and then applied to cases not specifically regulated by any of the CISG's provisions.[122] For instance, it is commonly understood[123] that the concept of "reasonableness" constitutes a general principle of the Convention.[124]

[121] My suggestion regarding this hypothetical dispute is that the concept of *reasonableness* might be allied with the Art. 8(2) reference to "the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances" or even with the provision on usage (under CISG Art. 9) to permit regional variation of due diligence.

[122] The following is a list of such general principles of the Convention, although one should not be dogmatic in such classifications as sometimes it is not sufficiently clear whether something is a "general principle" underpinning certain rules or merely a rule:

- the principle of mitigation, which provides that the parties relying on a breach of contract must take reasonable measures to limit damages resulting from the breach of the contract; *see* CISG Arts. 77, 85–88
- the principle of cooperation, according to which the parties must cooperate "in carrying out the interlocking steps of an international sales transaction": Kritzer, *Guide to Practical Applications*, *supra* note 58, at 115. This duty is closely related to the duty to communicate "information that is obviously needed by a trading partner": Honnold, *Uniform Law for Int'l Sales*, *supra* note 1, at 155; *see* CISG Arts. 32(3), 48(2), 60(a), 65
- the principle that a party cannot contradict a representation on which the other party has reasonably relied (i.e., that the parties must not act *venire contra factum proprium*); *see* CISG Arts. 16(2)(b), 29(2)
- the principle of *favor contractus*, which means that "whenever possible, a solution should be adopted in favor of the valid existence of the contract and against its premature termination on the initiative of one of the parties": Bonell *General Provisions*, *supra* note 36, at 81; *see* CISG Arts. 19(2), 25, 26, 34, 37, 48, 49, 59, 51(1), 64, 71 and 72.

[123] *See, e.g.*, Audit, *International Sales*, *supra* note 74, at 51; Rolf Herber, "Article 7," in *Commentary on the UN Convention on the International Sale of Goods* 94 (Peter Schlechtriem ed., 1998).

[124] Citing the numerous references to reasonableness in the CISG, Schlechtriem states that "the rule that the parties must conduct themselves according to the standard of the 'reasonable person' ... must be regarded as a general principle of the Convention": Schlechtriem, *Uniform Sales Law*, at 39 and 22 n.41. For confirming citations, *see* views of several commentators on references to *reasonableness* in the CISG available online at <http://cisgw3.law.pace.edu/cisg/text/reason.html#view>. *See* also Albert H. Kritzer, "Overview Comments on 'Reasonableness' – A General Principle of the CISG," available online at <http://cisgw3.law.pace.edu/cisg/text/reason.html#over>:

> Although not specifically defined in the CISG, reasonableness is so defined in the Principles of European Contract Law. Moreover, the PECL definition of reasonableness also fits the manner in which this concept is used in the CISG. This definition can help researchers apply reasonableness to the CISG provisions in which it is specifically mentioned and as a general principle of the CISG. As a general principle of the CISG, reasonableness has a strong bearing on the proper interpretation of all provisions of the CISG. No provision of any law can purport to expressly settle all questions concerning matters governed by it. The CISG recognizes this and provides in its Article 7(2):
>
> *Part One*: Such matters are to be settled in conformity with the general principles on which the CISG is based. *Part Two*: In the absence of general principles on which the CISG is based, such matters are to be settled in conformity with the law applicable by virtue of the rules of private international law. There is much doctrine in support of the good-faith and uniform-law logic of seeking to apply Part One of Article 7(2) in lieu of its Part Two, wherever it is reasonable to do so [...] We submit that regarding reasonableness as a fundamental principle of the CISG and reading reasonableness into every article of the CISG; whether specifically mentioned in the article or not, helps tilt the scales in favor of Part One rather than Part Two applications of Article 7(2) – a tilting of scales that we submit is required by virtue of the good-faith and uniform-law mandate recited in Article 7(1) of the CISG [citations omitted]. *Id.*

b. General Principles of Comparative Law on Which the CISG Is Based

As was noted earlier, an important distinction must be drawn between those principles extrapolated from within specific CISG provisions and the general principles of comparative law on which the CISG as a whole is founded. This distinction provides the theoretical framework for the introduction of elements of the *UNIDROIT Principles of International Commercial Contracts* and the *Principles of European Contract Law* – as part of the "general principles" on which the CISG is based – into the gap-filling function of Article 7(2).

The CISG is the world's uniform international sales law. Two more recent documents can be regarded as companions to the CISG: the *UNIDROIT Principles of International Commercial Contracts* (promulgated in 1994)[125] and the *Principles of European Contract Law* (PECL) (revised version 1998).[126]

Unlike the CISG, which is a uniform sales law the PECL are a set of principles whose objective is to provide general rules of contract law in the European Union that will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them.[127] Similarly to the PECL, a stated purpose of the UNIDROIT Principles is that "[t]hey may be used to interpret or supplement international uniform law instruments."[128]

What follows is a discussion of the nature of the UNIDROIT Principles and the PECL as general principles of comparative law on which the CISG is based, and the proposed important function those Principles (both UNIDROIT and PECL) have as aids in the proper interpretation of the CISG as uniform sales law.[129]

[125] *UNIDROIT Principles of International Commercial Contracts* (UNIDROIT ed., 1994).

[126] *Principles of European Contract Law*, Parts I and II (Ole Lando and Hugh Beale eds., 2000).

[127] PECL Art. 1:101(1)(2).

[128] Preamble to the UNIDROIT Principles.

[129] The weight of academic opinion is that the UNIDROIT Principles form part of the new *lex mercatoria*, *see*: Michael Joachim Bonell, "The UNIDROIT Principles in Transnational Law," in *The Practice of Transnational Law* 23–41(Klaus Peter Berger ed., Kluwer Law International, 2001) [The Parties' Express Choice of the UNIDROIT Principles as the Law Governing Their Contract (Application of the UNIDROIT Principles by Domestic Courts, Application of the UNIDROIT Principles by Arbital Tribunals), Application of the UNIDROIT Principles in the Absence of an Express Reference by the Parties (The UNIDROIT Principles as a Source of "General Principles of Law," "*Lex mercatoria*" or the Like, The UNIDROIT Principles as a Means of Interpreting and Supplementing International Uniform Law, The UNIDROIT Principles as a Means of Interpreting and Supplementing Domestic Law)]; Philippe Kahn, "Vers l'institutionnalisation de la *lex mercatoria*: a propos des principes d'UNIDROIT relatifs aux contrats du commerce international" [Towards Institutionalization of the *Lex mercatoria*: The UNIDROIT Principles on International Commercial Contracts – *in French*], in *Liber amicorum commission droit et vie des affaires* 125 (1988) 125; Klaus Peter Berger, *The Creeping Codification of the Lex mercatoria*, (Kluwer Law International, 1999) [includes discussion on UNIDROIT Principles and PECL, at 143–206 and elsewhere; contains annotated "List of Principles, Rules and Standards of the *Lex mercatoria*," 278–311]; Klaus Peter Berger, "The Relationship between the UNIDROIT Principles of International Commercial Contracts and the new *lex mercatoria*" [*International Uniform Law Conventions, Lex mercatoria and UNIDROIT Principles*: Symposium held at Verona University (Italy), Faculty of Law, November 4–6,1999] in *Unif. L. Rev.* 152–170 (2000); Klaus Peter Berger, "The New Law Merchant and the Global Market Place – A 21st Century View of Transnational Law," in *The Practice of Transnational Law* 1–22 (Klaus Peter Berger ed., Kluwer Law International, 2001) [The "Milestones" of the *Lex mercatoria* Doctrine (Malynes and Blackstone: "From the Ancient Law Merchant to the Codification Wave," Zitelmann: "The Vision of a "World Law," Goldman, Fouchard and Kahn: "The Rebirth of the *Lex mercatoria* by the French School," Clive Schmitthoff: "The Power of International Arbitrators and International Formulating Agencies," UNIDROIT: "The Report on the 'Progressive' Codification of the Law of International Trade," Dezalay, Garth and Teubner: "The Sociological Approach," UNIDROIT, Lando-Commission, Central: "The New Phenomenon of the 'Creeping Codification' of Transnational Law"), "The Present State of the Doctrine of Transnational Law" ("The Evolution of a 'Global Market Place' and a 'Global Civil Society,'" "The Decreasing Significance of State Sovereignty in the Traditional Theory of Legal Sources," "The Modern Law Merchant in the Global Market Place")]; Fabrizio Marrella, "*Lex mercatoria* e Principi UNIDROIT. Per una recostruzione sistematica del diritto del commercio internazionale" [*Lex mercatoria* and UNIDROIT Principles: Toward a Systematic Rebuilding of International Commercial Law – *in*

VII. UNIDROIT PRINCIPLES AND PECL

The UNIDROIT Principles and the PECL were drafted by legal experts, many of whom had been associated with the drafting of the CISG. Although both Principles are broader than the CISG in scope, each in different ways, these are "Restatements" that include provisions derived from the CISG (as well as other sources). Both "Restatements" take cognizance of insights derived from the text of the CISG, from scholarly commentaries on the CISG, from cases that have interpreted the CISG, and from other sources.[130]

Italian], Contratto e Impresa / Europa, 5 (2000) 29–79; Jorge Oviedo Alban, "Transformaciones de la Contratación mercantil: la conformación de la *lex mercatoria* a partir de los Principios de UNIDROIT para los contratos mercantiles imternacionales y la Convención de Viena para la Compraventa internacional de mercaderias" [Changes in commercial contracting: The formation of the *lex mercatoria* after the UNIDROIT Principles of International Commercial Contracts and the Vienna Convention on Contracts for the International Sale of Goods – *in Spanish*], Conferencia presentada en el seminario "Código de comercio: 30 años", Facultad de Derecho de la Universidad de La Sabana, Forum Legis (Octubre 1 de 2001). Publicación en CD ROM, Legis: Bogatá, Colombia.

See also Gesa Baron, "Do the UNIDROIT *Principles of International Commercial Contracts* Form a New *Lex mercatoria*?," 15 *Arbitration Int'l.* 115–130 (1999), also available online at <http://cisgw3.law.pace.edu/cisg/biblio/baron.html>, where the author pursues the question of whether the UNIDROIT Principles can really be considered as a new *lex mercatoria* [Starting with a historical description of the ancient *lex mercatoria*, the commentary turns to the theory of a modern *lex mercatoria* and outlines the debate concerning the *lex mercatoria* as being an autonomous body of law. The commentary then examines the UNIDROIT Principles in light of the specific characteristics of a *lex mercatoria* and the criticism put forward against it. The commentary concludes that the Principles with their autonomous and yet nonbinding character meet not only the substantive requirements of a true law merchant but that they also counter some of the main points of criticism against the modern *lex mercatoria*: "As such, the Principles constitute a cornerstone in the *lex mercatoria* debate and may become the heart of the new *lex mercatoria*"]. *Id.*

See also Institute of International Business Law and Practice ed., *UNIDROIT Principles for International Commercial Contracts: A New Lex mercatoria*, Paris: ICC Publication No. 490/1 (1995); Jürgen Basedow, "National Report: Germany," in *A New Approach to International Commercial Contracts: The UNIDROIT Principles of International Commercial Contracts*, XVth International Congress of Comparative Law, Bristol, 26 July–1 August 1998 125–150 (Kluwer Law International, 1999) [General characterization of the UNIDROIT Principles; The UNIDROIT Principles and German contract law compared; The use of the UNIDROIT Principles and German law (Survey; The Principles as "General principles of law" or *lex mercatoria*: Filling the gaps of the applicable national law; Interpretation and supplementation of international conventions on uniform private law)]; Mª del Pilar Perales Viscasillas, "UNIDROIT Principles of International Commercial Contracts: Sphere of Application and General Provisions," 13 *Ariz. J. Int'l & Comp. L.* 380–441 (1996) [Primary issues analyzed: whether or not the Principles may be applied as *lex mercatoria*, whether or not they are part of the general principles referred to in CISG Article 7; the mutual relationship of the UNIDROIT Principles and the CISG is discussed throughout this work, especially in the discussion of the general provisions of the Principles, which show the strong influence of the general provisions of the CISG].

Cf. A. Leduc, "L'emergence d'une nouvelle *lex mercatoria* à l'enseigne des principles d'UNIDROIT relatives aux contracts du commerce international: thèse et antithèse" [The emergence of a new *lex mercatoria* under the standard of the UNIDROIT Principles of International Commercial Contracts: pros and cons – *in French*], *Revue Juridique Thèmis* 429–451 (2001); Ulrich Drobnig, "The Use of the UNIDROIT Principles by National and Supra-national courts," in *UNIDROIT Principles for International Commercial Contracts: A New Lex mercatoria?*, ICC Publication No. 490/1 223–232 (1995).

[130] *See* Michael Joachim Bonell, "The UNIDROIT Principles of International Contracts and CISG: Alternative or Complementary Instruments?," *Uniform Law Review* (1996) at 26–39, also available online at <http://cisgw3.law.pace.edu/cisg/biblio/ulr96.html> [hereinafter: Bonell, *Alternative or Complementary Instruments*]: "In view of its intrinsic merits and world-wide acceptance, CISG was of course an obligatory point of reference in the preparation of the UNIDROIT Principles. To the extent that the two instruments address the same issues, the rules laid down in the UNIDROIT Principles are normally taken either literally or at least in substance from the corresponding provisions of CISG; cases where the former depart from the latter are exceptional."

See also Pilar Perales Viscasillas, "UNIDROIT Principles of International Commercial Contracts: Sphere of Application and General Provisions," 13 *Ariz. J. Int'l. & Comp. L.* 385 (1996): "[T]he Principles have been deeply influenced by the Convention." *See* also Ulrich Magnus, "Die allgemeinen Grundsätze im UN-Kaufrecht," 59 *Rabels Zeitschrift* 492–493 (1995). Magnus points out that the harmony between the Convention and the UNIDROIT Principles comes as no surprise, because the Convention could be considered the "godfather" of the UNIDROIT Principles.

The main issue here is whether – and to what degree – the UNIDROIT Principles and the PECL can aid in the interpretation of the CISG's provisions.[131] There are instances where Restatements can be regarded as "fleshing out bones already present in the skeletal structure of the uniform law,"[132] and where the Restatements have bones and accompanying flesh that cannot be readily affixed to the uniform law they accompany. For example, a recent survey of the PECL has revealed the following[133]:

(1) PECL provisions that are *identical* to counterpart CISG provisions and either (a) go no further than their CISG counterparts or (b) embellish, add to, or make more explicit that which is implicit in the CISG provisions. Just as one regards the UCC as more detailed than the CISG, the latter categories of PECL material are more detailed than their CISG analogs.
(2) PECL provisions that are *substantially the same* as or similar to the CISG provisions
(3) PECL provisions that are *somewhat similar* to the CISG provisions
(4) PECL provisions that are *substantively different* from the CISG counterparts

Where provisions of the CISG are skeletal and those of the PECL more full-bodied, for the CISG researcher the utility of PECL comparatives ranges from most relevant to least relevant. It is arguable that where either set of the Principles (UNIDROIT or PECL) can be regarded as *fleshing out bones* already present in the skeletal structure of the uniform law, they can be utilized in interpreting problematic CISG provisions. It is doubtful whether the same can happen where the Restatements have "bones and accompanying flesh" that cannot be readily affixed to the uniform law they accompany. Where, as is often the case, the PECL dovetails with or approximates the CISG, PECL comparatives can be helpful to the CISG researchers and interpreters. For example, the PECL offers enlightenment (a) with comments that explain provisions and illustrations

See also Peter Schlechtriem, "25 Years CISG – An International Lingua Franca for Drafting Uniform Law, Legal Principles, Domestic Legislation and Transnational Contracts," 2 *CILE Studies. The CISG and the Business Lawyer: The UNCITRAL Digest as a Contract Drafting Tool* (forthcoming 2006): "[B]oth the UNIDROIT Principles and the Uniform Sales Law came from the same well, and there was also some identity of drafters, for a number of experts who had worked on the CISG later joined UNIDROIT's working teams. Thus, it is small wonder that key solutions and central concepts of the CISG and the UNIDROIT Principles are closely related . . ." In his footnote to the above, Schlechtriem states, "It could well be assumed that the founding fathers of the UNIDROIT Principles were . . . motivated by the desire to preserve the great treasure of comparative law solutions that went into the Sales project."

[131] Restatements can help interpret a law. For instance, the Uniform Commercial Code is the U.S. uniform domestic law and a Restatement has served as its companion. The U.S. Restatement of Contracts (Second) has a broader scope than the U.C.C.; it takes cognizance of insights derived from the text of the U.C.C., from scholarly commentaries on the U.C.C., from cases that have interpreted the U.C.C., and from other sources. In the United States, when a tribunal is ruling on sales provisions of the U.S. Uniform Commercial Code, references to the Restatement of Contracts are frequently encountered. Its examples and explanations of the meaning of terms and concepts are useful. In U.C.C. proceedings, courts and arbitrators refer to the Restatement of Contracts as it helps them reason through the applicable law. *See Observations on the use of the PECL as an aid to CISG research*, on the Pace Law Web site, *at* <http://cisgw3.law.pace.edu/cisg/text/peclcomp.html>.

Similar observations can be made on the use of the UNIDROIT Principles as an aid to CISG comparative research: <http://cisgw3.law.pace.edu/cisg/text/matchup/general-observations.html>. For a commentary on similarities and differences between the UNIDROIT Principles and the CISG, *see* A. S. Hartkamp, "The UNIDROIT Principles for International Commercial Contracts and the United Nations Convention on Contracts for the International Sale of Approval," in *Essays on Comparative Law, Private International Law and International Commercial Arbitration in honour of Dimitra Kokkina-Intridou* 85–98 (Boeli-Woelki/Grosheide/Hondius/Steenhof eds., Martinus Nijhoff 1994). *See also* Joseph M. Perillo, "UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review," 63 *Fordham L. Rev.* 281–316 (1994).

[132] This metaphor, along with the "skeletal" theory that is used here, belongs to Albert H. Kritzer.

[133] *See Observations on the use of the PECL as an aid to CISG research*, on the Pace Law Web site at <http://cisgw3.law.pace.edu/cisg/text/peclcomp.html>.

that apply them to case law environments and (b) with notes that identify domestic antecedents and analogs that match provisions with continental and common law doctrine and jurisprudence.

Several examples of cases exist in which tribunals have referred to the UNIDROIT Principles as it helped them reason through the CISG.[134] One can anticipate many such references to the UNIDROIT Principles in the CISG proceedings. The general affinity of the CISG to its companion Restatements demands such a comparative approach, especially where it can be shown that their respective provisions share a common intent.[135] Thus, the UNIDROIT Principles and the PECL could and should help reduce the need to resort to rules of private international law for gap-filling, thus helping maintain the integrity of the CISG's uniform and international application and interpretation.

Although the CISG chronologically preceded the PECL and the UNIDROIT Principles, it is arguable that there is significant affinity between the three instruments as the latter two also form part of the new international legal order to which the CISG belongs. The temporal discordance of the instruments should not be used to hide their similarities in origin and substance or to impede their common purpose, which is the unification or harmonization of international commercial law. In essence, it is arguable the word "based," in Article 7(2), should be given a substantive and thematic nuance, which is broader than the one merely signifying a strict temporal correlation. Where it can be shown that a relevant Restatement provision shares a common intent with a CISG provision under examination, then the former can help interpret the latter by being utilized as an expression of the "general principles" upon which the CISG is based.[136] This

[134] *See* relevant case law and arbitral awards:

- Austria June 15, 1994 Vienna Arbitration proceeding SCH-4318; case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/940615a4.html>
- Austria June 15, 1994 Vienna Arbitration proceeding SCH-4366; case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/940615a3.html>
- ICC Arbitration Case No. 8128 of 1995; case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/958128i1.html>
- France October 23, 1996 Appellate Court Grenoble (*Gacc des Beauches v. Teso Ten Elsen*) case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/961023f1.html>
- Belarus May 20, 2003 Supreme Economic Court (*Holzimpex Inc. v. State Farm-Combine Sozh*), cases 7–5/2003 and 8–5/2003, case presentations available at <http://cisgw3.law.pace.edu/cases/030520b5.html> and <http://cisgw3.law.pace.edu/cases/o30520b6.html>
- Russian Federation Jnne 6,2003 Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Proceeding No. 97/2002; case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/030606r1.html>

For further remarks on this subject, *see generally* Michael Joachim Bonell, "The UNIDROIT Principles in Practice – The Experience of the First Two Years," *Unif. L. Rev.* (1997) at 34–45, also available online at <http://cisgw3.law.pace.edu/cisg/biblio/pr-exper.html>. *See* also Bonell, *Alternative or Complementary Instruments, supra* note 130; Bonell, "The UNIDROIT Principles of European Contract Law: Similar Rules for Same Purposes?," *Unif. L. Rev.*(1996) at 229–246, also available online at <http://cisgw3.law.pace.edu/cisg/biblio/bonell96.html>.

[135] An important caveat to recourse to the Principles to fill gaps in the CISG is pointed out by Bonell: "So far it has been each judge's or arbitrator's task case by case both to determine those general principles and from the general principles to derive the solution for the specific question to be settled. This latter task could be facilitated by resorting to the UNIDROIT Principles. The only condition which needs to be satisfied is to show that the relevant provisions of the UNIDROIT Principles are the expression of a general principle underlying CISG." Bonell, *Alternative or Complementary Instruments, supra* note 130.

[136] When either the PECL or the UNIDROIT Principles are used in this Introduction to aid CISG research as "general principles," they illustrate a concept that can apply to either.

Ulrich Magnus provides the conceptual framework for resort to the UNIDROIT Principles as expressions of general principles underlying the CISG. He states

> Art. 7(2) CISG allows utilization of the general principles, on which the Convention is based and which merely haven't been expressed directly, for the purpose of filling gaps. In general, any general principles existing outside of the CISG are not to be considered. Is that also true for the "Principles"? As seen above, their authors, among other things, have designed the "Principles" for the purpose of providing a guideline for interpretation and for

would reduce, if not eliminate, the need for recourse to conflict of laws rules in that context.[137]

The wide recognition of the Principles as a clear expression of "general principles" of private law[138] adds legitimacy to the argument for their inclusion in the gap-filling

filling gaps in international Conventions regarding commercial contracts.... To be sure, this intention alone cannot suffice. However, in my opinion the "Principles" are nevertheless to be considered as additional general principles in the context of the CISG. The most important reason for this is that they vastly correspond both to the respective provisions of the CISG as well as to the general principles which have been derived from the CISG... In light of the fact that the CISG basically was the force behind the "Principles," this correspondence is not surprising.

Further, the approach in developing the "Principles" appears appropriate with respect to the current state of attempts to unify law. The CISG provides a basic set of rules which has resulted from an intensive comparison of legal systems and politically supported compromises between these legal systems. Therefore, the CISG can and should constitute the basis for the creation of a general law of contracts. Its provisions are to be generalized only to supplement new issues and solutions and align these issues and solutions with the needs of the industry. The UNIDROIT working group has proceeded with this concept in mind. Thus, its results, to the extent that they formulate general principles which cannot be derived directly from the CISG, can be utilized for filling gaps in the Convention...." Ulrich Magnus, "Die allgemeinen Grundsätze im UN-Kaufrecht," 59 *Rabels Zeitschrift* 492–493 (1995); English translation of the Magnus article available at <http://cisgw3.law.pace.edu/cisg/text/magnus.html>.

[137] *Cf.* U. Drobnig, "The Use of the UNIDROIT Principles by National and Supra-national courts," in *UNIDROIT Principles for International Commercial Contracts: A New Lex Mercatoria?*, ICC Publication No. 490/1 (1995) 223–232: "Article 7 para 2 refers for matters governed by the Convention to the general principles on which the Convention is based... And if there are no such principles, the provision refers to the law applicable by virtue of the rules of private international law... Thus there does not seem to be any room for recourse to the UNIDROIT Principles [in interpreting and supplementing CISG]."

It seems that Drobnig is treating the UNIDROIT Principles as a formal source of law that, because it is not listed in Article 7(2), may not be invoked. The Principles are actually more like a useful summary of what might be obtained via a comparative legal survey. The balance of academic opinion, however, seems to be that Article 7(2) legitimizes resorting to the UNIDROIT Principles as a means of interpreting and supplementing the CISG, as long as there is a gap on a matter governed by the CISG and the relevant provisions of the UNIDROIT Principles are the expression of a general principle underlying the CISG and not inconsistent with the CISG provision in question; *see, e.g.*, Bonell, *Alternatives or Complementary Instruments*, *supra* note 130, at 33. For evidence of favorable opinion on the possible use of the UNIDROIT Principles in interpreting and supplementing CISG, *see* also *id.* the references to: S.N. Martinez Cazon, "A Practitioner's View of the Applicability of the UNIDROIT Principles of International Commercial Contracts in Interpreting International Uniform Laws" 3 (paper presented at the 25th *IBA Biennial Conference*, Melbourne, Oct. 9–14, 1994); F. Enderlein, "The UNIDROIT Principles as a Means for Interpreting International Uniform Laws" 12 (paper presented at the 25th *IBA Biennial Conference*, Melbourne, Oct. 9–14, 1994). *See* also Ulrich Magnus, "Die allgemeinen Grundsätze im UN-Kaufrecht," 59 *Rabels Zeitschrift* 492–493 (1995); English translation of the Magnus article available at <http://cisgw3.law.pace.edu/cisg/text/magnus.html>.

[138] Evidence of the wide acknowledgment that the UNIDROIT Principles reflect general principles of private law is provided by

- a survey of arbitral awards rendered by the Court of Arbitration of Berlin in 1992, the Court of Arbitration of the International Chamber of Commerce in 1995 and 1996: *see* the references in Dietrich Maskow, "Hardship and *Force Majeure*," 40 *Am. J. Com. L.* 657, 665 (1992)
- and an *unpublished* decision of the Court of Appeal of Grenoble January 24, 1996. *Cf.* the summary published in *Uniform Law Review* (1997) 1.

In those instances, the UNIDROIT Principles were applied as a means of interpreting the applicable domestic law to demonstrate that a particular solution provided by the applicable domestic law corresponds to the general principles of law as reflected in the UNIDROIT Principles. Of course, for the UNIDROIT Principles to be of assistance in the proper interpretation of CISG, the relevant UNIDROIT provision must be linked (explicitly or implicitly) to a general principle underlying CISG and must not be inconsistent with the CISG provision in question.

There are also awards in which the UNIDROIT Principles were chosen as the law governing the contract, implicitly considering the UNIDROIT Principles as a source of the *lex mercatoria* and a reflection of wide international consensus:

- Three of these awards have been rendered by the Court of Arbitration of the International Chamber of Commerce. For extensive references, *see* P. Lalive, "*L'arbitrage international et les Principes UNIDROIT*" [*International arbitration and the UNIDROIT Principles*], *in* Contratti Commerciali Internazionali e Principi UNIDROIT 77–89 (Bonell ed. 1997). *See also* Katharina Boele-Woelki, "Principles and Private International Law – The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: How to Apply Them to International Contracts," *Uniform Law Review* (1996)

mechanism laid out in CISG Art. 7(2). From such a position, and assuming that they satisfy the formal requirements for their use in conjunction with the CISG, the Principles could offer considerable assistance in enabling the uniform interpretation and application of the Convention that the drafters of the CISG had intended.[139]

It is submitted that the CISG is, and must remain, a self-contained body of rules independent of, and distinct from, the different domestic laws. The nature of the effort that created the Convention indicates, indeed it demands, that the CISG should stand on its own feet, supported by the general principles that underlie it. Because of its unique nature and limitations, it is necessary that the CISG exist on top of a legal order that can provide doctrinal support and solutions to practical problems – such as gap-filling – in order to guarantee the CISG's functional continuity and development without offending its values of internationality and uniformity. The necessary legal backdrop for the CISG's existence and application can be provided by general principles of international commercial law consistent with the intent of the CISG legislators, such as those exemplified by many of the provisions of the UNIDROIT Principles and the PECL.

Against that background, the recourse to rules of private international law represents regression into doctrinal fragmentation and practical uncertainty. The relevant reference to such a method in Article 7(2) is unfortunate, as it does not assist the goal of uniformity. By producing divergent results in the application of the Convention, recourse to the rules of private international law impedes and frustrates the unification movement and can reverse the progress achieved by the worldwide adoption of the CISG as a uniform body of international sales law.

On the other hand, minimizing the need to invoke the rules of private international law in the context of Article 7(2) goes a long way toward strengthening the unification effort. This approach requires reliance upon and an aggressive search for general principles that underlie the Convention. Such principles can (often) be found in international Restatements, such as the UNIDROIT Principles and the PECL. These two instruments belong, together with the CISG, to a new international legal order that their respective drafters had envisaged. The interpretative and supplementary functions of these instruments concerning the proper application of the CISG best reflect the objectives of the United Nations, as these are were stated in CISG's Preamble – to remove "legal barriers in international trade and promote the development of international trade". Providing answers to unresolved matters governed by the CISG affects the uniformity of the Convention's application. It is arguable that in such cases international uniformity is promoted if the answer can be given by reference to any of the CISG's general principles that may be provided elsewhere (e.g., in the UNIDROIT Principles or the PECL answers to such unresolved matters). Conversely, recourse to the rules of private international law for the same purpose hinders and harms uniformity.

I have argued elsewhere,[140] as did many delegates present at the 1980 Vienna Diplomatic Conference, that recourse to rules of private international law should not have been made a part of Article 7(2). Nonetheless, the text is there for all to peruse. The various academic and theoretical objections to this inclusion have been recorded and

652, at 661, who points out that "[t]his significant award may be regarded as the official entrée of the Principles into international arbitration." *Id.*

- Another award of this kind was rendered by the National and International Court of Arbitration of Milan, Award No. 1795 of December 1, 1996.

[139] *See, e.g.*, Netherlands October 16, 2002 Appellate Court's-Hertogenbosch, case presentation, including English translation available at <http://cisgw3.law.pace.edu/cases/021016n1.html>; that court decision draws on the UNIDROIT Principles (see para. 2.7) and the PECL (see para 2.8) to help interpret the CISG.

[140] *See* generally Felemegas, *Uniform Interpretation*, *supra* note 24, at chapters 4 and 5.

have been themselves discussed further, but the main question remains essentially the same: ultimately, can the CISG unify the law of international sales?

The answer to that question is twofold. The CISG indeed has the potential to achieve the vision of its drafters and satisfy the needs of international buyers and sellers for certainty and uniformity. But its potential is endangered by the specific reference to conflict of laws for purposes of gap-filling in Article 7(2). The overwhelming preponderance of the evidence (i.e., the text and its legislative history) points to a strong, common desire in favor of uniformity, despite evidence of compromise in the final form of the CISG, as found in the relevant compromise in Art. 7(2). The traces of the political differences that remain in the text are, however, important ones in terms of the CISG's goal of achieving uniformity in the law of international sales. This is because they are arguably capable of turning the CISG into little more than an improved – but ultimately disappointing – revision of its predecessors, the 1964 Hague Conventions that failed to achieve the same goal.

The interpreter called upon to apply the CISG now (and in the future) has a clearly defined, albeit difficult task – to apply the provisions of the Convention according to the specific rules of interpretation contained in Article 7. The relevant textual reference in Article 7(2) to domestic law leaves the CISG prone to divergent gap-filling; that is, in the absence of general principles, the solution is to be provided in conformity with the relevant law applicable according to the rules of private international law – a development that endangers the uniformity of the Convention's interpretation and application. The Convention's fundamental general principle of "reasonableness" has a strong bearing on the proper interpretation of all provisions of the CISG, as per Article 7(2). Kritzer[141] argues in support of gap-filling in the CISG with reference to general principles in lieu of the recourse to the rules of private international law, wherever it is *reasonable* to do so:

> . . . regarding reasonableness as a fundamental principle of the CISG and reading reasonableness into every article of the CISG, whether specifically mentioned in the article or not, helps tilt the scales in favor of Part One rather than Part Two applications of Article 7(2) – a tilting of scales that . . . is required by virtue of the good-faith and uniform-law mandate recited in Article 7(1) of the CISG.[142]

Thus, it is submitted that the proper interpretation of the Convention must be based on general principles, rather than on the rules of private international law, where it is reasonable to do so. Because it is also reasonable to read into Article 7(2) the good faith and uniform law mandates recited in Article 7(1), it would also be reasonable to make such election (i.e., to rely on general principles, rather than on the rules of private international law) in the operation of Article 7(2) when these mandates (i.e., the promotion of uniformity in the Convention's application and the observance of good faith in international trade) are at stake.

From what has been written so far, one main conclusion can be drawn: ultimately, it is the interpreter's task to decide whether the CISG can really become a uniform law; that is, whether universalism prevails over nationalism and whether any progress has been made since the enactment of the national codes that overturned what could have been a basis for a new *ius commune*. Unlike the 1964 Hague Conventions, the 1980 Vienna Convention provides an ideal framework that should permit a positive answer to that question.

[141] *See* Kritzer's editorial remarks on "reasonableness," which include further citations and references, available online on the Pace Web site at <http://cisgw3.law.pace.edu/cisg/text/reason.html>.

[142] *Id.*

Article 7 provides that the CISG's provisions should be interpreted and any gaps *praeter legem* in the CISG be filled in accordance with the general principles that bind the individual member States into a community. As a result of either a political reality (see the debates in the legislative history of Article 7) or a legal reality (i.e., the acknowledgement that no provision of any law can purport to expressly settle all questions concerning matters governed by it) or both, however, the rules of private international law have been placed in the gap-filling mechanism of the Convention. It is made clear in the text of Article 7(2) that, in the absence of any relevant general principles, a court applying the CISG is obliged to turn to domestic law. Obviously, such a development would hinder the search for the CISG's elusive goal of uniformity.

In the proper construction and application of the CISG as uniform international sales law, the necessary legal backdrop could be provided by general principles of international commercial law, such as those exemplified by the UNIDROIT Principles and the PECL. The UNIDROIT Principles, the PECL, and the CISG belong to the new legal order that the United Nations has envisaged, and working in tandem, they best reflect the objectives of that body to remove "legal barriers in international trade and promote the development of international trade" in the spirit of equality and friendly cooperation among its member States. This substantive affinity among the three distinct instruments legitimizes resorting to the Principles as a means of interpreting and supplementing the CISG – so long as there is a gap *praeter legem* in the CISG and the relevant provisions of the Principles are the expression of a general principle underlying the CISG and are not inconsistent with the CISG provision in question.

As far as the reference to the rules of private international law in Article 7(2) is concerned, two things must be said. First, this reference is incorporated into the text of the CISG. Second, the strength of this textual reference is clearly undermined by an examination of its legislative history and an analysis of its effect on the overall scheme of the Convention. There is strong academic support for the view that in interpreting the CISG, in the absence of general principles of the Convention (i.e., as *ultima ratio*),[143] one not only is allowed to make recourse to the rules of private international law but one is also obliged to do so.[144] This conclusion is strictly valid, and it stems from the text of Article 7(2). Fulfilling this obligation, however, not only offers nothing to "the development of international trade on the basis of equality and mutual benefit" but it also fosters the creation of divergent interpretations of the CISG as well, thus endangering the CISG's long-term success and survival. Courts, especially in countries without an established tradition in extrapolating general principles from a codified instrument, can fatally injure the CISG's credibility as uniform transnational law by abusing the "last resort" option.

Any court applying the CISG should not miss the importance of the mandate in Article 7(1) that, in interpreting the provisions of the Convention (including Art. 7(2) itself), "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." Such an interpretative approach not only respects the mandate of the new law as expressed in Art. 7(1) but it also helps in many instances to render the reference to the rules of private international law superfluous. Thus, it is a positive step toward the realization of substantive legal uniformity.

On the other hand, the recourse to rules of private international law, in the context of the CISG's gap-filling, represents regression into doctrinal fragmentation and practical

[143] *See* M. J. Bonell, "Article 7," in *Convezione di Vienna sui Contratti di Vendita Internazionale di Beni Mobili* 25 (Cesare Massimo Bianca ed., 1991); Rolf Herber, "Article 7," in *Kommentar zum Einheitlichen UN-Kaufrecht* 91–100 (Ernst Caemmerer & Peter Schlechtriem eds., 2d ed. 1995), at 93.

[144] *See* Ferrari, *Uniform Interpretation*, *supra* note 54, at 228, stating that "recourse to domestic law for the purpose of filling gaps under certain circumstances is not only admissible, but even obligatory."

uncertainty. The relevant textual reference in Article 7(2) leaves the CISG prone to divergent gap-filling (i.e., in conformity with the relevant domestic law applicable according to the rules of private international law). In resolving gaps *praeter legem*, the proper interpretation of the Convention requires preference to be given to a comprehensive search for a solution provided by the general principles underlying the CISG, rather than the ready application of a domestic law applicable by virtue of the rules of private international law. Only such an approach pays proper regard to the international character of the CISG and can promote uniformity in the Convention's application.

VIII. CISG – UNIDROIT PRINCIPLES – PECL COMPARATIVE ANALYSIS

The following chapters examine in more detail the nature of this proposed role of the UNIDROIT Principles and the PECL. To assist in efforts to utilize the Principles to fill gaps in the CISG or otherwise help interpret the Convention, we present counterpart provisions of the CISG and the UNIDROIT Principles, as well as the PECL. The corresponding matchups of CISG provisions with counterpart provisions of the UNIDROIT Principles and the PECL are presented with our analyses of the individual articles of the CISG.

In some instances, the counterpart provisions are virtually identical. In such instances, the typical commentary to the Principles (UNIDROIT and PECL) acknowledges its CISG antecedents and provides helpful illustrations. In other instances, although the Principles are more expansive than their CISG counterparts, the intent of the counterpart provisions appears to be the same. In still other cases, the comparative matchups only partially track one another.

The team of scholars, thirty-nine in number, who participated in this comparative research project, comprises academics and practitioners who represent civil law and common law jurisdictions in twenty-one countries. The participating scholars who have authored the comparative editorials have done their best to enable the reader to draw his or her own conclusions as to the extent to which the matched Principles can properly be used to help interpret the CISG. It is hoped that the results of this truly international collaborative research effort will provide further stimulus for the CISG researcher to investigate and arrive at the proper interpretation of the Convention as uniform sales law.

Freedom of contract: Remarks on the manner in which the UNIDROIT Principles may be used to interpret or supplement Article 6 of the CISG

Bojidara Borisova

I. Introduction
II. CISG's Dispositive Character
III. Manner in Which Party Autonomy Might Be Exercised
IV. Scope of Party Autonomy
V. Party Autonomy Limitations

I. INTRODUCTION

The principle of party autonomy entrenched in CISG Article 6 represents an important guarantee for the effective functioning of international trade and accommodates the fulfillment of the principle of freedom of contract, which is a basic tenet of international commercial relations.[1] The inclusion of this principle in the provisions of the CISG reflects the strong conviction of the international community that specific warranties must be created for the establishment of a freely operating, market-oriented international economy within which the contracting parties have the freedom to act in conformity with their business interests. Similar provisions were also incorporated in other international uniform laws adopted before the CISG.[2]

The UNIDROIT Principles, which were promulgated almost fifteen years after the adoption of the CISG, contain two articles that correspond in substance with CISG Art. 6. UNIDROIT Principles Arts 1.1 and 1.5, though similar in essence to CISG Art. 6, better illustrate the concept of party autonomy and can be used for the interpretation and application of CISG Art. 6.[3] This concept was regulated in two other important conventions on international commercial relations – one adopted the same year as the CISG and the other a few years later.[4] The solid interest that the international community has shown in the importance of party autonomy once again underlines its significance. Although today it seems unthinkable to have a uniform act that regulates international commercial relations without explicitly emphasizing party autonomy, there was strong opposition to the inclusion of this concept during the draft process of the Convention.[5]

[1] *See* the Official Comments on Art. 1.1 of the UNIDROIT Principles, available online at <http://cisgw3.law.pace.edu/cisg/principles/uni6.html#official>.

[2] *See* the Uniform Law on the International Sale of Goods and the Uniform Law on the Formation of Contracts for the International Sale of Goods. For detailed historical analysis of the party autonomy concept *see* Murphy, "United Nations Convention for the International Sale of Goods: Creating Uniformity in International Sales Law," 12 *Fordham Int'l. L.J.* 727–750 (1998), also available online <http://cisgw3.law.pace.edu/cisg/biblio/murphy.html>.

[3] *See* "General Observations on Use of the UNIDROIT Principles to Help Interpret the CISG," available online at <http://cisgw3.law.pace.edu/cisg/text/matchup/general-observations.html>.

[4] *See* The Convention on the Law Applicable to Contractual Obligations (the so-called Rome Convention of 1980) and The 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (the so-called 1986 Choice of Law Convention).

[5] For the positions of the different CISG Contracting States, see Murphy, *supra* note 2.